

**IN THE CIRCUIT COURT
FOR COLE COUNTY, STATE OF MISSOURI
19TH JUDICIAL CIRCUIT**

THOMAS HOOTSELLE, JR., et al., and)
MISSOURI CORRECTIONS OFFICERS)
ASSOCIATION,)

Plaintiffs, Individually and on)
behalf of all others similarly situated,)

v.)

MISSOURI DEPARTMENT OF)
CORRECTIONS,)

Defendant.)

Cause No. 12AC-CC00518-01

Div. 3

**UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND SUGGESTIONS IN SUPPORT**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs, Thomas Hootselle, Jr., Oliver Huff and Daniel Dicus and the Missouri Corrections Officers Association, by counsel, under Missouri Rule of Civil Procedure 52.08(e), hereby move the Court for entry of an Order:

1. Preliminarily approving the Class Action Settlement Agreement and Release with Missouri Department of Corrections (“MDOC”) executed by the parties, which is attached hereto as Exhibit 1 (hereafter referred to as the “Settlement” or “Settlement Agreement”). The Settlement Agreement provides, in part, that in exchange for a release of all claims by the entire Class, the MDOC will pay \$49.5 million into a Settlement Fund and will compensate Class Members additional wages (15 minutes per each shift) to Corrections Officers I and II for a minimum of eight years;
2. Certifying the Settlement Class and appointing Class Counsel and the Class Representatives for purposes of settlement;
3. Approving the proposed notice plan and deadlines for Settlement Class

Members to object to, or opt-out of, the proposed Settlement as set forth in this table of proposal deadlines:

PROPOSED APPROVAL TIMELINE

Event	Time for Compliance
Deadline for Settlement Administrator to Mail Notice to Settlement Class Members	Within 30 days from entry of the Preliminary Approval Order
Deadline for Class Member Objections	60 days after notice is sent
Deadline for Opt-Outs	60 days after notice is sent
Deadline for motion for attorneys' fees and costs	10 days prior to deadline for Class Member Objections
Deadline for motion for final approval	10 days prior to Final Approval Hearing
Final Approval Hearing	Approximately 120 days from entry of the Preliminary Approval Order

4. Scheduling a hearing in approximately 120 days to consider final approval of the proposed Settlement.

This motion is made on the grounds that the Settlement is the product of arm's-length negotiations by informed counsel and is a fair, reasonable, and adequate compromise of the claims brought in this case. Class Counsel met and conferred with counsel for Defendant about this motion, and Defendant does not oppose the motion.

INTRODUCTION

After almost a decade of intense and extensive litigation that included the production of hundreds of thousands of documents, dozens of depositions, and the briefing of multiple motions to compel, motions to dismiss and motions for summary judgment; full briefing of class certification, leading the Court to certify a class in 2015, which was thereafter subject to multiple motions to decertify; a trial in August of 2018 leading to a judgment in favor of Plaintiffs, which was followed by appeals to the Missouri Court of Appeals and the Missouri Supreme Court, a remand to this Court for further proceedings and extensive preparations for a second trial in June of 2022, including preparations of expert reports and the filing of motions for summary judgment by both sides; extensive expert analysis (by both sides) of the potential class-wide damages in this case; and multiple intense, arm's-length mediation sessions overseen by former Missouri Supreme Court Judge and neutral mediator Ray Price, Esq. of Armstrong Teasdale, the Parties reached the proposed Class Action Settlement Agreement and Release (attached hereto as Exhibit 1) that is now before the Court for preliminary approval under Missouri Rule of Civil Procedure 52.08. The Settlement, which was the result of hard-fought, arm's-length negotiations, provides a cash Settlement Fund of \$49,500,000. Settlement ¶ 2.26; Affidavit of Gary K. Burger attached hereto as Exhibit 2 ("Burger Aff."), ¶ 31. The Settlement Fund represents a recovery of nearly 33% of the damages projected by Plaintiffs' expert as the best possible day in court for the Settlement Class, and 95% of the damages projected by Defendant's expert. Burger Aff. ¶ 35. The Settlement monies will be distributed to the members of the Settlement Class without requiring them to complete a claim form or take any additional steps. Burger Aff. ¶ 35. The Settlement also pays all Class Members an extra 15 minutes of time per shift to pay for pre and post shift activity in the future guaranteed for 8 years at least, which has a value of about \$54 Million to the Settlement Class and will cost MDOC about \$65 Million to pay with

employer benefits. Burger Aff. ¶ 36.

The Settlement represents an excellent result for the Settlement Class in this litigation, is fair, reasonable and adequate and the Court should grant preliminary approval of it. Burger Aff. ¶¶ 34, 37. Granting preliminary approval will allow notice of the Settlement to be distributed to the Settlement Class so that members can opt out of, object to, or choose to participate in the Settlement, and for the Court to schedule a hearing in approximately 120 days to consider whether to grant final approval of the Settlement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 14, 2012, this class action was brought against the MDOC by Plaintiffs Thomas Hootselle, Jr., Daniel Dicus and Oliver Huff¹, individually and as representatives of all persons who have been employed as Corrections Officers I or Corrections Officers II at any time from August 14, 2007 to present for claims involving unpaid straight-time compensation and anytime from August 14, 2010 to present for claims involving unpaid overtime compensation. Plaintiffs' Petition alleges that the MDOC does not pay straight-time or overtime wages for pre- and post-shift activities Plaintiffs claim that CO I and CO II employees are required to perform before and after every shift. Plaintiffs' lawsuit sought to require the Department of Corrections pay all class members for those pre- and post-shift activities.

Plaintiffs' Petition contains multiple counts. In Count III, Plaintiffs seek damages for the Department's alleged breach of contract in not paying wages for work performed. In Count IV, Plaintiffs seek damages for the Department's alleged unjust enrichment for pre- and post-shift activities completed by CO I and CO II employees that Plaintiffs allege was not paid. In Count V, Plaintiffs seek relief in quantum meruit for pre- and post-shift

¹ The Missouri Corrections Officers Association was added as a party Plaintiff later in the case.

activities completed by CO I and CO II employees. Counts I and II have been previously dismissed by the Court.

This Court certified a class of correctional officers in February 2015 and amended the class definition in September 2015 to comply with the statute of limitations. (Burger Aff. ¶8.) The Missouri Supreme Court affirmed the order refusing to decertify the class, *Hootselle*, 624 S.W.3d at 133-34, and the class consists of approximately 13,000 Officers. (*Id.* ¶2, 27.) MDOC employs these Officers “for the purpose of supervising, guarding, escorting and disciplining the offenders incarcerated in our state prisons.” (*Id.* ¶27.)

As described in more detail in Plaintiffs’ Petition, before each shift, Officers must perform the following tasks: picking up equipment such as keys and radios; logging their arrival either electronically or manually; passing through security gates and entry-egress points, including a metal detector and an airlock (a set of doors where one is always closed that accommodates less than ten Officers at a time); reporting to a supervisor to obtain their post; walking to their posts; and receiving a “pass down” of pertinent information. (*Id.* ¶ 6.) At the end of each shift, they perform these same tasks in reverse. (*Id.*) These tasks are universally known as pre- and post-shift activities at MDOC. (*Id.*) As the Missouri Supreme Court ultimately concluded:

This is the same work expected of the corrections officers during their shifts. The only difference is where within the facility they do the work, at or away from their posts. Because the corrections officers are supervising, guarding, and disciplining offenders during this time, once they are in the presence of inmates and “on duty and expected to respond” to emergent incidents, they are performing the work they are employed to do.

Hootselle, 624 S.W.3d at 142.

The Department of Corrections denies that the pre- and post-shift activities identified by Plaintiffs are compensable and that it must compensate employees for time spent performing those activities. It raises several affirmative defenses, including that the time spent on such activities is small, or de minimis, and that the activities are pre- or post-

work activities that are not compensable under applicable law. Burger Aff. ¶ 7.

Extensive litigation between the parties occurred from the inception of the case, through certification of the class in 2015, leading up to a trial that occurred in August 2018. See Burger Aff. ¶¶ 3 – 5 for a description of discovery and 10 – 16 for major litigation events. In the course of the litigation, the parties briefed and argued multiple motions to compel, motions to dismiss and motions for summary judgment. (*Id.*) . A trial that was held in August of 2018 that resulted in a verdict for Plaintiffs, which was then appealed by the MDOC all the way to the Missouri Supreme Court. See Burger Aff. ¶¶20 – 22 for a trial description and 23 – 28 for the appeal description. After the Missouri Supreme Court’s decision in June of 2021 remanding the case to this Court for further proceedings, the parties reengaged in intense pretrial litigation efforts, including another round of expert reports, as well as the filing of summary judgment motions by both sides, in advance of a second trial that was set to begin in June of 2022. Burger Aff. ¶¶ –29 - 32. The parties also engaged in multiple, intense and arms’-length mediation sessions conducted by former Missouri Supreme Court Judge and neutral mediatory Ray Price, Jr. of Armstrong Teasdale. Burger Aff. ¶ 33. Those mediation sessions eventually lead to the parties reaching the Settlement Agreement that is presented to the Court through this motion. (*Id.*).

I. Settlement Terms

A. The Settlement Class

The Settlement provides for certification of the following Settlement Class, defined as:

All Persons Employed In Positions As Corrections Officer I Or Corrections Officer II By The Department Of Corrections Of The State Of Missouri At Any Time From August 14, 2007 To The Present Date for Claims Relating to Unpaid Straight-Time Compensation and From August 14, 2010 To The Present Date for Unpaid Overtime Compensation.

Settlement ¶ I.B, II.5.

B. Value of the Settlement to the Settlement Class Members

In exchange for the release in the Settlement, MDOC has agreed to: (1) pay \$49.5 million to be used for direct payments to the members of the Settlement Class (the “Settlement Fund”), after deductions of Court-approved fees and expenses. Settlement ¶¶ III.A, B; (2) pay current and future Correction Officer I and II’s an additional 15 minutes per shift (not to exceed 15 minutes in any 24-hour period) beginning July 1, 2022 for 8 years through June 30, 2030 for pre- and post-shift activity. Settlement ¶¶ III.G. This time will be applied on the employees next regular pay cycle and if that payment constitutes overtime under MDOC’s compensation policy for that officer, the payment will be at time and a half. (*Id.*). This payment will constitute a full and complete payment for pre- and post-shift activity during this time and completely release Defendant MDOC for any claim therefor for these 8 years. (*Id.*). This is monetary consideration for the Settlement. It is the intent of the Parties that these 15 minutes will not apply to Defendant MDOC employees in secondary employment status. (*Id.*).

C. Distribution to Settlement Class Members

The Settlement does not require Settlement Class Members to submit a claim or take any action to claim the monies they are entitled to under the Settlement. Settlement ¶ V.G. Rather, payments will be made to Settlement Class Members by mailing a check to their last known address. Settlement ¶ V.G. Each Settlement Class Member will receive their pro rata share of the Settlement Fund, based on the time period the Settlement Class Member worked for Defendant at MDOC’s facilities during the Class Period. Settlement ¶ V.G. This will be calculated by the Claims Administrator with consultation of Plaintiffs’ expert economist. The method to determine a Settlement Class Member’s pro rata share of the Settlement Fund should use the following steps:

- a. First, collect all Settlement Class Members' earnings history from MDOC and match the names and time of employment to the list of Settlement Class Members provided by MDOC.
- b. Second, determine the amount of time each Settlement Class Member worked for MDOC as a Correctional Officer or Correctional Sergeant during the Class Period regardless of the work location (and at what wage rate if available).
- c. Third, determine the sum of all of time that all of the Settlement Class Members worked for MDOC as a Correctional Officer or Correctional Sergeant during the Class Period regardless of the work location (and at the various wage rates if available and if possible).
- d. Fourth, divide each individual Settlement Class Member's time worked for MDOC as a Correctional Officer or Correctional Sergeant during the Class Period (and wage rate if available) by the sum of all of the time all the Settlement Class Members worked for MDOC as a Correctional Officer or Correctional Sergeant during the Class Period regardless of the work location (and at the various wage rates if available and if possible). The result is a share of the Settlement Fund for each Settlement Class Member. Note that this share is determined after Court-approved attorneys' fees and expenses are deducted and subject to the 20% retention from the first payment. Each Settlement Class Member's share will vary in proportion to their wages, hours worked, and time of employment during the Class Period. The Settlement Class Member's share as determined will also be used for the second distribution from the Settlement Fund. If there are some Settlement Class Members whose wage data or time working for MDOC cannot be determined due to a lack of sufficient data, the mean time and wages of all Settlement Class members may be used if

appropriate. If wage rates cannot be used in this distribution because of a lack of data or problems in methodology, the distribution may occur without factoring in wage rates.

e. Fifth, the distribution value to an individual Settlement Class Member is found by multiplying each Settlement Class Member's share by the amount in the Settlement Fund after Court-approved attorneys' fees and expenses are deducted. This distribution value will be applied to any payments from the Settlement Fund.

Settlement Class Members will have the opportunity to challenge their allocation from the Settlement Fund, and those challenges will be resolved by the Claims Administrator. Settlement ¶¶ V.G–K. After the first payment, the Claims Administrator will resolve disputes on allocation amount, account for unclaimed payments, and make a second payment to eligible Settlement Class Members until the Settlement Fund is depleted. Settlement ¶¶ V.L.

D. Notice to Class Members

The Settlement includes proposed email and post-card notice to the Settlement Class Members (as well as the availability of long-form notice on the settlement website) that informs them of the terms of the Settlement and their rights to object to, or opt-out of, the Settlement, or to do nothing and receive the benefits of the Settlement and be bound by it. Attached as Exhibit 3 is the long-form notice. Settlement section V and Exs. B, C. Notice will be emailed or mailed to Settlement Class Members and a website and telephone number will be established to provide additional information about the Settlement. (*Id.*). The Settlement Administrator will provide the notice and the costs will be paid from the Settlement Fund. Settlement ¶ III.F

E. Attorneys' Fees and Expenses, and Class Representative Service Award

Before the deadline for class members to object, Class Counsel will file a motion with the Court requesting to be paid one-third of the Settlement Fund as attorneys' fees, and will seek reimbursement of reasonable expenses. *See* Settlement ¶ III.D. Class Counsel will also seek Court approval of an award of attorneys' fees in the annual amount of \$1,732,650 for eight years, for their work in obtaining the going-forward MDOC wage increase to Corrections Officers I and II, with payments to be made by MDOC by June 30, for each of the years 2023 through 2030 (after the first year, Defendant MDOC will seek to maintain this appropriation as part of its ongoing core budget). *See* Settlement ¶ III.G. This is to be paid by MDOC in addition to the 15 minute a shift payment and the Settlement Fund. *See* Settlement ¶ III.H. Class Counsel will also request payment of the litigation expenses they have advanced on behalf of the Class. *See* Settlement ¶ III.D.

Class counsel will also request that the Court approve a payment of the Settlement Administrator's costs and a service award of \$25,000 to the individual Class Representatives, in recognition of their efforts in this case that have resulted in substantial benefit to thousands of their fellow Corrections Officers. Burger Aff. ¶ 42, 43; Settlement ¶III.C. The requests for attorneys' fees and expenses, the Settlement Administrator's costs, and for the service awards will be posted to the settlement website.

SUGGESTIONS IN SUPPORT OF GRANTING THE MOTION

Missouri Rule of Civil Procedure 52.08(e) provides that class actions "shall not be dismissed or compromised without the approval of the court." Preliminary approval of a class settlement under Rule 52.08(e) requires the court to "review the record before it, and determine whether, based on that record, it appears that the settlement is fair and that certification may ultimately be approved." *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 383 (Mo. Ct. App. 1997). As the court in *Chadwick* emphasized, this preliminary review is "at most a determination that there is what might be termed 'probable cause' to submit the

proposal to class members and hold a full-scale hearing as to its fairness.” *Id.* (quoting *In Re Traffic Executive Ass’n–Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980)).

I. Courts evaluate class settlement under several factors to determine if it is fair under Rule 52.08(e).

When evaluating whether a settlement is fair, Missouri courts are required to look at: “(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff’s success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.” *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 266 (Mo. Ct. App. 2011) (quoting *Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. E.D. 2000)). See also *State ex rel. Byrd*, 956 S.W.2d at 378 n. 6 (same). However, the “most important” factors in this determination are “the strength of the plaintiff’s case on the merits balanced against the offered settlement.” *Bachman*, 344 S.W.3d at 266.

II. The Class is evaluated under Missouri Rule of Civil Procedure 52.08(a) and (b) to determine whether it can be certified as a class for judgment on the Settlement.

In deciding whether the court will likely be able to certify a class for purposes of settlement, the Court evaluates whether the proposed class meets the four requirements of Rule 52.08(a) and any one of the requirements of the subsections of Rule 52.08(b), which in this case is subsection 52.08(b)(3). *Elsea v. U.S. Eng’g Co.*, 463 S.W.3d 409, 417-18 (Mo. Ct. App. 2015). See also *State ex rel. Byrd*, 956 S.W.2d at 377-79 (citing *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 2247-48 (1997)).² These “requirements for certification may

² Missouri courts “may use federal precedent” on Federal Rule 23 when making determinations under Missouri Rule 52.08. *Ralph v. Am. Fam. Mut. Ins. Co.*, 809 S.W.2d 173, 174 (Mo. Ct. App. 1991); *Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 161 (Mo. Ct. App. 2006) (“[I]t is well settled that federal interpretations of Rule 23 are relevant in interpreting Rule 52.08.”); *State ex rel. Byrd*, 956 S.W.2d at 378-19 (same).

be easier to meet in the settlement context.” *Id.* at 377. The Rule 52.09(a) prerequisites to certification require that, “(1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact that are common to the class (commonality); (3) the claims of the representative parties are typical of the class claims (typicality); and (4) the representative parties will fairly and adequately protect the class interests (adequacy).” *Elsea*, 463 S.W.3d at 417.

Numerosity does not require “an exact number of class members” but rather looks at whether “joinder is impracticable through some evidence or reasonable, good faith estimate of the number of purported class members.” *Frank v. Enviro-Tech Servs.*, 577 S.W.3d 163, 167 (Mo. Ct. App. 2019) (citing *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249–50 (3d Cir. 2016) for the proposition that “generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40 the numerosity requirement has been met”); *see also Ark. Educ. Ass’n v. Bd. of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (twenty or more members is sufficient). As to commonality the “fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance.” *Elsea*, 463 S.W.3d at 419 (quoting *Dale*, 204 S.W.3d at 175). Indeed, “[a] single common issue may be the overriding one in the litigation, *despite the fact that the suit also entails numerous remaining individual questions.*” *Id.* (quoting *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo.banc 2007)) (emphasis in original). Typicality just “means that there are other members of the class who have the same or similar grievances as the plaintiff.” *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). It is “fairly easily met” if the claims of the named plaintiff and class members are similar—and especially where “the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.” *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 223 (Mo.

Ct. App. 2007) (citing, *e.g.*, *Alpern*, 84 F.3d at 1540). The adequacy prerequisite “applies both to the named class representatives and to class counsel.” *Elsea*, 463 S.W.3d at 420–21. It turns on whether: “1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative’s interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge.” *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004)). *See also Elsea*, 463 S.W.3d at 421 (as to the class representative, courts look for “any conflicts of interest that will adversely affect the interests of the class”).

Finally, the requirements of Rule 52.08(b)(3) are satisfied if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Analysis of predominance is “relaxed in the settlement context.” *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2019 WL 7160380, at *4 (W.D. Mo. Nov. 18, 2019) (citing *Amchem*, 117 S.Ct. at 2248). The predominance requirement looks at whether “substantial common issues [] ‘predominate’ over the individual issues.” *Elsea*, 463 S.W.3d at 422 (quoting *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. 2012) (en banc) (internal quotations omitted)). It “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. To satisfy this requirement, not every single issue must be common to all class members. In fact, the predominance requirement can be satisfied if there is one single common issue that is the overriding issue in the litigation.” *Id.* (quoting *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 688 (Mo. App. W.D. 2009) (internal quotations omitted)).

Once the Court has thus, “determine[ed] whether . . . it appears that the settlement is fair and that certification may ultimately be approved,” *State ex rel. Byrd*, 956 S.W.2d at

383, it may grant preliminary approval.

III. Once a court grants “preliminary approval,” it must approve and direct notice to the class, set deadlines for class members to opt-out or object, and set a date for a final approval hearing.

Upon the granting of preliminary approval, the court “shall direct to the members of the class the best notice practicable under the circumstances” to inform them of the proposed settlement and the right to object or opt out. Mo. R. Civ. P. 52.08(c), (e). Notice to class members “shall advise each member that: (A) the court will exclude the member from the class if requested by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if desired, enter an appearance through counsel.” Mo. R. Civ. P. 52.08(c)(2). After the time for objections and opt-out requests has passed, the Court then holds a hearing to consider whether to grant final approval, taking into account any objections raised by class members and all other relevant factors. *See Bachman*, 344 S.W.3d at 265 n. 3 (citing *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002)).

DISCUSSION

The Court should enter an order granting preliminary approval to the Settlement, certifying the Settlement Class and appointing Class Counsel, approving the notice and notice plan, and scheduling a final approval hearing for October 2022 because: (1) the settlement is fair, reasonable and adequate; (2) the class has already been shown to meet the requirements for certification under Missouri Rules of Civil Procedure 52.08(a) and 52.08(b)(3) in the course of litigation, which certification was upheld by the Missouri Supreme Court and therefore, certification of the Settlement class is clearly warranted; and (3) the form and method of notice meets the requirements of Due Process.

I. The Court should grant preliminary approval because it the settlement is fair, reasonable and adequate and the class is certifiable under Rules 52.08(a) and (b).

A. The class settlement is fair, reasonable and adequate.

Here, the “most important” factors to evaluating the fairness of the settlement terms—the merits of Plaintiffs’ case “balanced against the offered settlement”—strongly supports approval. *Bachman*, 344 S.W.3d at 266. First, the substantial settlement relief accounts for nearly 33% of the recovery that the class could have hoped to achieve in their best day in court and 95 % of MDOC’s estimate. *See, e.g., Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) (settlement at 27-percent of maximum recovery “well within the fair and reasonable range”). In addition, the substantial settlement fund is bolstered by the MDOC’s payment of wages going forward for eight years, which has a value, based on conservative estimates, of \$54 - \$65 Million or higher if more officers are hired by MDOC. Burger Aff. ¶ 36. The Settlement takes the strength of Plaintiffs’ case and MDOC’s defenses into consideration. The settlement is balanced almost equally between payment for past damages and payment of future wages. The Settlement Fund of \$49.5 Million enables Class Members to receive a very large share of their damages – a 1/3 to 95% depending on the expert’s view. The payment of the 15 minutes in the future represents essentially all future damages to the class as their time is rounded to the nearest 15-minute increment and the attorneys’ fees for that recovery are being paid apart and in addition to the wage payment. With the past and future damages and the additional attorneys’ fees payment, the value of the settlement is between \$117.5 and 128.5 million Dollars.

And while Plaintiffs believe in the merits of their case, class action litigation is “inherently risky and involves numerous procedural hurdles.” Burger Aff. ¶ 38. Here, for example, the Plaintiffs had already litigated their case through a successful verdict at trial, an effort that took over six years to accomplish, only to have that verdict vacated on appeal

three years later, with the case sent back to this Court for further proceedings. Burger Aff. ¶¶ 25 – 32, 38. Although the Missouri Supreme Court affirmed certain parts of Plaintiffs’ case in chief, concluding that some of the activities at issue were compensable and that the class had been properly certified, other key issues were undecided in advance of the second trial, set for June of 2022, including whether five of the seven activities were compensable under applicable law. Burger Aff. ¶ 38. In addition, unlike the first trial, which was only about damages, the second trial would have been about both liability and damages, with the additional risk that Plaintiffs would not prevail on the compensability of all the activities for which they sought compensation. Burger Aff. ¶ 38. In addition, unlike the first trial, MDOC would be allowed to put on expert testimony, which it had been precluded from doing at the trial in 2018, meaning that Plaintiffs faced the risk that the jury would believe the MDOC’s expert, whose damages figure (\$52 million) was much lower than that of Plaintiffs’ expert. (*Id.*). And there can be no doubt that simply trying a case of this complexity in front of an entirely different jury meant that Plaintiffs could not be certain of prevailing again. (*Id.*).

Even if the Plaintiffs prevailed at the second trial, Plaintiff faced the potential hurdle of immediate appeal, and the uncertainty (and lengthy delay) that they had already experienced after the verdict in the first trial. (*Id.*). And though the Missouri Supreme Court had affirmed the earlier class certification decision, MDOC was free to seek decertification again. (*Id.*). Moreover, MDOC could assert immunity to the equitable claims (and did in their summary judgment Motion) and could assert immunity from execution on the judgment as they did before the Western District Court of Appeals. (*Id.*).³ The threat of

³ The parties litigated MDOC’s Motion and Renewed Motion to Stay the Amended Judgement in the Court of Appeals and Motion to Quash the Garnishment in the Trial Court in April of 2019. For its immunity argument, MDOC relied on *Nacy v. LePage*, 111 S.W.2d 25 (Mo. 1937) (Holding that the State Treasurer cannot be garnished, the State enjoys immunity from garnishment) and *Otte v. Mo. State Treasurer*, 141 S.W.3d 74, 74 (Mo. App. E.D. 2004) (holding that sovereign immunity prevented an employee from “bringing a Chapter 513 action in execution against the Treasurer.”). MDOC made a

potential decertification, along with summary judgment, trial, and appeal present significant risks in any case. *Id.*; see also *Bachman*, 344 S.W.3d at 266 (considering procedural and substantive complexities including “expense on appeal”). Thus, the significant recovery for the class achieved here reflects a fair balance between the potential maximum recovery, the Plaintiffs’ meritorious claims, as well as the “complexity, expense, and likely duration of the litigation.” Burger Aff. ¶ 34, 37 and 38.

The other factors likewise favor approving the settlement. First, there is plainly no fraud or collusion here. This case was vigorously contested over years, many motions, trial, appeal and remand. Burger Aff. ¶ 3 – 31. Settlement negotiations were negotiated at arm’s length by experienced counsel, over several sessions involving intense advocacy on both sides. Burger Aff. ¶ 33. Second, the settlement is balanced between potential recovery maximums and minimums, as well as balanced between compensation for past and future damages. Third, the method of distributing the relief to the Class is highly efficient because it requires class members to do nothing—they will automatically receive a payment of what Plaintiffs calculate with their expert to be their share of the settlement fund based on their time of service. Class members will receive a check and thereafter be able to submit a claim if they believe the amount is incorrect in any way. If need be, there will be a second distribution for all unclaimed settlement funds and resolving class member claims where an individual submitted a valid claim adjustment – payments to class members continue until the Settlement Fund is depleted. Settlement ¶¶ III.A; V.L; Burger Aff. ¶ 35. Furthermore, the Settlement treats class members equitably relative to each other by awarding them a pro

similar argument with Missouri Constitution Article IV, § 28 as well, asserting the State never has to pay a judgment unless the legislature explicitly so directs. The MDOC also asserted it never would have to post a bond and any judgement would be stayed under *State ex rel. Dir. of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996). The Court of Appeals found for MDOC on these issues and stayed execution of the 2018 judgment.

rata share of the Settlement Fund that is based on the amount of time that they worked at one or more of the MDOC institutions, and subject to a plan of distribution developed by Plaintiffs' expert. Settlement ¶ III.A; V.G. Fourth, the substantial recovery compares favorably given the myriad risks and extensive costs of prolonged litigation. Finally, Class Counsel views the settlement as an excellent result for the class, one that is likely to be viewed favorably by the class members who will appreciate receiving compensation from this lawsuit without having to expend any resources of their own. Burger Aff. ¶¶ 34, 37.

B. The Court will be able to certify the class for judgment.

The Settlement is not only fair, reasonable, and adequate, but certifying the class for judgment on the Settlement is appropriate under Missouri Rules of Civil Procedure 52.08(a) and 52.08(b)(3).

First, it is important to note that the class at issue here was subject to full litigation and briefing, and was found to meet the requirements of Missouri Rules of Civil Procedure 52.08(a) and 52.08(b)(3) earlier in this case, a decision that was affirmed through multiple MDOC motions to decertify and ultimately affirmed by the Missouri Supreme Court. Burger Aff. ¶¶ 8, 9, 27; *Hootselle v. Missouri Dept. Corr.*, 624 S.W.3d 123, 134, 135 (Mo. 2021). The proposed class satisfy the Rule 52.08(a) prerequisites: “numerosity, commonality, typicality, and fair and adequate representation.” *Elsea*, 463 S.W.3d at 417.

Numerosity is satisfied here because the Settlement Class consists of thousands of current and former Corrections Officers. *Frank*, 577 S.W.3d at 167 (class that exceeds 40 members is numerous). Commonality is likewise met. Common issues include whether MDOC required all Corrections Officers I and II to perform pre- and post-shift activities and refused to pay for it; thus, the claims all depend upon “a common legal grievance” that turns on MDOC’s uniform course of conduct. *Elsea*, 463 S.W.3d at 419. Typicality is satisfied because Plaintiffs’ claims arise from MDOC’s uniform “course of conduct” that exists as to

the class claims and “gives rise to the same legal or remedial theory.” *Hale*, 231 S.W.3d at 223. Finally, adequacy is satisfied because the Class Representatives and Class Counsel have vigorously prosecuted this action and their interests are aligned with those of the Settlement Class—to obtain the largest recovery possible. *Carpe*, 224 F.R.D. at 458.

Additionally, Rule 52.08(b)(3) predominance is satisfied because the “single common issue. . . is the overriding issue in the litigation.” *Elsea*, 463 S.W.3d at 422. Here, the central issue of whether MDOC required all Corrections Officers I and II to perform pre- and post-shift activities and refused to pay for it is the overriding issue and driving force of the litigation and predominates over any individual issues. Superiority is satisfied because an agreed resolution with a large payout made directly to class members is superior to the costs, risks, and delays of other options for continuing this case through a second trial (and potential appeals) and guarantees that class members receive a recovery. Thus, all of the requirements to certify the Settlement class, after notice and a final approval hearing, are met, and the Court should grant preliminary approval, and appoint the individual Plaintiffs as Class Representatives and Gary K. Burger of Burger Law, LLC and Michael J. Flannery of Cuneo Gilbert & LaDuca, LLP as Class Counsel.

II. The Court should approve the proposed notice plan, set deadlines for opt-outs and objections, and set a final approval hearing date in October, 2022.

As part of the preliminary approval order, the Court should also approve the proposed forms and manner of notice. The notice constitutes the “best practicable notice” under the circumstances and is direct notice to each class member individually. The email and post-card notices (as well as a long-form notice available on the settlement website) are consistent with the types of plain-English forms recommended by the Federal Judicial Center and inform the class members of all the required information, including (i) the nature of the action; (ii) the class definition; (iii) the class claims; (iv) that a class member

may object and enter an appearance through an attorney if the member so desires; (v) that the Court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members. The Settlement Administrator will provide the notice and report to Class Counsel who will in turn report to the Court on the effectiveness of the notice plan. The notice also provides for the Court to schedule a final approval hearing after class members have had a chance to opt-out of, object to, or remain part of the Settlement.

WHEREFORE, the Plaintiff Class requests this Court Grant this Motion, and enter an Order:

1. Preliminarily approving the Class Action Settlement Agreement with Missouri Department of Corrections (“MDOC”), attached as Exhibit 1 (the “Settlement”), which provides, in exchange for a release, the establishment of a \$49.5 million settlement fund and payment of eight years of additional wages (15 minutes per shift) to Corrections Officers I and II (now called Correctional Officer and Correctional Sergeants by MDOC);
2. Certifying the Settlement Class and appointing Class Counsel and the Class Representatives for purposes of settlement;
3. Approving the proposed notice plan and deadlines for Settlement Class Members to object to, or opt-out of, the proposed Settlement as set forth in this table of proposal deadlines:

PROPOSED APPROVAL TIMELINE

Event	Time for Compliance
Deadline for Settlement Administrator to Mail Notice to Settlement Class Members	Within 30 days from entry of the Preliminary Approval Order
Deadline for Class Member Objections	60 days after notice is sent
Deadline for Opt-Outs	60 days after notice is sent
Deadline for motion for attorneys' fees and costs	10 days prior to deadline for Class Member Objections
Deadline for motion for final approval	10 days prior to Final Approval Hearing
Final Approval Hearing	Approximately 120 days from entry of the Preliminary Approval Order

4. Scheduling a hearing for October, 2022 to consider final approval of the proposed Settlement.
5. Enter the proposed Order Preliminary Approving Class Action Settlement, Directing Notice, and Setting Date for Final Approval Hearing on a date selected by the Court in October of 2022; and
6. for any further just and proper relief.

Dated: June 1, 2022

Respectfully submitted,

/s/Gary K. Burger
 BURGER LAW FIRM, LLC
 Gary K. Burger, #43478
 500 N. Broadway, Suite 1860
 St. Louis, MO 63102
 (314) 542-2222
 (314) 542-2229 Facsimile
gary@burgerlaw.com

Michael J. Flannery, #52714
 CUNEO GILBERT & LADUCA, LLP
 500 N. Broadway, Suite 1450
 St. Louis, MO 63102
 (314) 226-1015
 (202) 789-1813 Facsimile
mflannery@cuneolaw.com

***Attorneys for Plaintiffs
 and the Certified Class***

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing served by the courts electronic E-Filing system, on this 1st day of June, 2022, to all counsel for record for Defendant Missouri Department of Corrections.

/s/Gary K. Burger