IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

PEG BOUAPHAKEO, et al. individually and on behalf of a class of others similarly situated,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

Docket No. 5:07-CV-04009 JAJ

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION TO DECERTIFY OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON DAMAGES

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I. INTRODUCTION

Based on the trial record, the jury's class-wide verdict cannot withstand appellate scrutiny and must be set aside based upon the Rule 23 standard determined in *Wal-Mart Stores, Inc. v. Dukes*. The United States Supreme Court has now made clear that *Dukes'* Rule 23 standard also applies to wage-hour cases post-trial. *See Chinese Daily News, Inc. v. Wang*, No. 10-1202, 2011 WL 4529967 (Oct. 3, 2011). In addition, the Eighth Circuit recently reiterated in *Bennett v. Nucor Corp.,* __ F.3d __, 2011 WL 4389194 (8th Cir. Sept. 22, 2011) ─ a case involving the same Plaintiffs' counsel as here ─ its view that evidence of differing job classifications and job duties, standing alone, can preclude a finding of commonality and defeat class certification. For these reasons, the jury's verdict must be set aside.

More specifically, the jury's verdict is unsustainable because Plaintiffs failed to prove the *sine qua non* of an overtime claim on a class-wide basis: that ***all*** Plaintiffs and other members of the class have not already been fully compensated for any overtime hours worked for their compensable time. On this trial record, no reasonable jury could have found that it took all class members a common amount of time to don and doff their varying combinations of standard and/or unique items, nor could they have conjured up a common number that was remotely supported by the evidence once they rejected (as they did) Dr. Mericle's numbers. Even if the evidence could have supported a common number of minutes, whether those extra minutes were more than the K Code already paid to that class member, or pushed any class member into overtime, would be individualized for every class member. In fact, Dr. Fox's testimony unequivocally establishes that the jury's verdict ─ which rejected the much higher daily minutes that she assumed ─ necessarily compensated hundreds of unidentified employees to whom Defendant has no liability. This is not simply a damages issue; rather, it is an evidentiary problem that prohibits a finding of class-wide liability.

The evidence at trial unequivocally demonstrated that the time it takes class members to don and doff varies widely by individual. In fact, Dr. Mericle testified that the activities of each person he measured were different from one another and that every individual measured took a different amount of time to perform each of the donning and doffing activities for reasons that are individualized and unknowable. Likewise, it was undisputed that the amount of extra minutes paid to class members varied by job code. After February 2007, employees within the *same* department were paid *different* amounts of extra minutes and, before February 2007, non-knife wielding employees were paid four extra minutes even though it might only take them seconds to don standard items. Given these significant differences, the fact that the jury found the standard items to be compensable and the time to don and doff the standard and unique items not to be *de minimis* says nothing about whether the additional minutes determined by the jury were more than the K Code already paid and/or pushed any particular class member into overtime. The jury could only reach a verdict against Tyson if it found that *each* class member did not already receive enough K Code to cover their daily donning and doffing time, and by adding the minutes determined by the jury, it pushed all of those class members into overtime. Yet, on the trial record before it, the jury had no basis to do so. In addition, as Dr. Fox herself explained to Plaintiff's counsel, there was no way to apply a lesser number of minutes because the jury had no way of apportioning those minutes between the Kill class members and the "Fabrication" class members. Accordingly, Defendant respectfully renews its Motion for Judgment As A Matter of Law Or To Decertify pursuant to Fed. R. Civ. P. 50. (Docket No. 270.)

In the alternative, and at a minimum, this Court should order a new trial on damages pursuant to Fed. R. Civ. P. 59 because the jury's damages verdict lacks any basis in the record. It is impossible to discern how the jury arrived at its verdict amount from anything contained in the evidentiary record. The jury clearly rejected the Plaintiffs' damages number based on Dr.

Mericle's study, as well as the alternative 15-minute number that Plaintiffs admitted was "plucked out of the air." (Trial Tr. at 1363:24-1364:9.) Instead, the jury did precisely what Dr. Fox said could not be done: it awarded some proportion of the damages number sought by Plaintiffs. In doing so, the jury arbitrarily awarded damages, and therefore imposed liability on Defendant, as to hundreds of employees who were fully paid or did not go into overtime. This is a truism based on Dr. Fox's own explanation of how her damages model worked. Thus, the damages verdict cannot stand.

II. JUDGMENT AS A MATTER OF LAW SHOULD BE ENTERED FOR TYSON BECAUSE PLAINTIFFS FAILED TO PROVE OVERTIME LIABILITY ON A CLASS-WIDE BASIS.

A. Legal Standard For Judgment As A Matter Of Law.

Federal Rule of Civil Procedure 50(b) permits a party to file a renewed motion for judgment as a matter of law after a verdict is rendered that includes an alternative or joint request for a new trial under Rule 59. Judgment as a matter of law is appropriate "only when all the evidence points in one direction and there are no reasonable interpretations that would support the jury's verdict." *Dominium Mgmt. Servs., Inc. v. Nationwide Housing Group,* 195 F.3d 358, 363 (8th Cir. 1999) (citing *Mears v. Nationwide Mut. Ins. Co.,* 91 F.3d 1118, 1122 (8th Cir. 1996)). The court, however, is not "entitled to give [the non-moving] party the benefit of unreasonable inferences, or those at war with the undisputed facts." *Askew v. Millerd,* 191 F.3d 953, 957 (8th Cir. 1999). For a jury to find for a party, the party must present more than a scintilla of evidence supporting its claim. *Id.; see also Larson by Larson v. Miller,* 76 F.3d 1446, 1452 (8th Cir. 1996) (en banc) (internal citations and quotation marks omitted).

B. Plaintiffs Failed To Prove That Each Member Of The Class Was Not Adequately Paid For Overtime Spent In Donning, Doffing, And Walking Activities.

1. Plaintiffs Have The Burden Under Rule 23 To Present Evidence At Trial That Establishes Liability On A Class-wide Basis. [1]

Under Rule 23 Plaintiffs must present enough evidence to determine liability at trial on a class-wide basis, *i.e.*, on behalf of every single plaintiff. *See Blyden v. Mancusi,* 186 F.3d 252, 266-267 (2d Cir. 1999) (recognizing that the verdict sheet in a Rule 23 class action must require findings sufficient to support class-wide liability, and "the verdict sheet's failure to establish class-wide causation would not have been harmless."); *Cimino v. Raymark Indus.,* 151 F.3d 297, 312 (5th Cir. 1998) (finding that a Rule 23 class action does not "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law."); *Marlo v. United Parcel Serv., Inc.,* 251 F.R.D. 476, 482 (C.D. Cal. May 19, 2008) ("A plaintiff bringing a class action normally has the ultimate burden of proving class-wide liability at trial. … This burden may be met with common proof …." (citing *Teamsters v. United States,* 431 U.S. 324 (1977)). Plaintiffs have acknowledged this standard, noting in their opposition to Defendant's Motion for Directed Verdict made during trial that they

[1] Since the jury's verdict was significantly higher than either of Dr. Fox's damages calculations for the FLSA class, but lower than Dr. Fox's damages calculations for the Rule 23 class (*see* P-345, P-348), it seems likely that the jury awarded damages to the full Rule 23 class. Thus, Defendant focuses its brief on the Rule 23 standard. However, even if the jury intended to make a separate award to the FLSA class, the standard for representative evidence is similar enough for present purposes. *See Murray v. Stuckey's Inc.,* 939 F.2d 614, 621 (8th Cir. 1991); *Grochowski v. Phoenix Constr.,* 318 F.3d 80, 87-89 (2d Cir. 2003); *Reich v. Southern Md. Hosp., Inc.,* 43 F.3d 949, 951-952 (4th Cir. 1995); *Sec'y of Labor v. DeSisto,* 929 F.2d 789, 793 (1st Cir. 1991); *Beliz v. W.H. McLeod & Sons Packing Co.,* 765 F.2d 1317, 1331 (5th Cir. 1985); *Donovan v. Simmons Petroleum Corp.,* 725 F.2d 83, 85-86 (10th Cir. 1983); *see also In re Food Lion Effective Scheduling Litig.,* 861 F. Supp. 1263, 1272-74 (E.D.N.C. 1994); *Johnson v. Big Lots Stores, Inc.,* 561 F. Supp. 2d 567, 570-571, 578-79 (E.D. La. 2008).

must prove *class-wide* liability to prevail at trial. (*See* Docket No. 272 at p. 5 ("class plaintiffs must prove class-wide liability at trial …").)

Moreover, the United States Supreme Court recently made clear that its decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 US __, 131 S. Ct. 2541 (2011) is not limited to Title VII discrimination cases or large, multi-facility classes. In *Chinese Daily News, Inc. v. Wang*, No. 10-1202, 2011 WL 4529967 (Oct. 3, 2011), the Supreme Court granted *certiorari*, vacated the lower court judgment, and remanded a combined FLSA/state law wage-hour case to the Ninth Circuit Court of Appeals "for further consideration in light of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (2011)." In *Chinese Daily News*, the district court granted conditional certification under the FLSA pursuant to § 216(b) and class certification under state law pursuant to Fed. R. Civ. P. 23(b)(2) and, alternatively, under Rule 23(b)(3), of a small class of employees at only one facility. After a jury trial on the merits and judgment for the employees, defendant appealed the class certification order. The certification order was upheld and *Chinese Daily News* sought a writ of *certiorari* to the Supreme Court. By remanding the case for reconsideration in light of *Dukes*, the Supreme Court made clear that its decision in *Dukes* is not limited to large, multi-facility Title VII discrimination cases, as Plaintiffs previously argued to this Court. Instead, the Supreme Court's remand of the *Chinese Daily News* wage-hour case clarifies that *Dukes* applies with equal force to all class actions, including wage-hour class actions like this one, and that it applies post-trial.[2] Thus, the heightened standard articulated by the Supreme Court in *Dukes* governs this action.

[2] Plaintiffs might argue that the Supreme Court remanded the *Chinese Daily News* case solely for reconsideration of the lower court's grant of class certification under Rule 23(b)(2). First, the remand order says no such thing. If the Supreme Court had intended for the Ninth Circuit to reconsider only the grant of class certification under Rule 23(b)(2), it could have said so. Second, there would have been no reason for the Supreme Court to remand the case if it believed its decision in *Dukes* did not have broader implications beyond Rule 23(b)(2), given that the

In *Dukes*, the Supreme Court held that the commonality requirement of Rule 23(a)(2) requires a plaintiff to offer "significant proof" of "a common contention" that "is capable of class-wide resolution ─ which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551 (acknowledging that the case before it presented common questions like "[d]o all of us plaintiffs indeed work for Wal-Mart?" and "[d]o our managers have discretion over pay?" but holding that "[r]eciting these questions is not sufficient to obtain class certification."). The Court held that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'" and made clear that "commonality" does not exist merely because a purported class all allegedly suffered a violation of the same provision of law. *See id.* ("What matters to class certification ... is not the raising of common 'questions' ─ even in droves ─ but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.") (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009) (emphasis in original)). The Court also emphasized that the class action proponent must actually prove each element of Rule 23, and embraced the *Falcon* "rigorous analysis" standard that courts must use to evaluate that proof. *Dukes*, 131 S. Ct. at 2551-52 (holding that a common contention must be "affirmatively demonstrate[d]" because "Rule 23 does not set forth a mere pleading standard.").

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district court alternatively granted certification under Rule 23(b)(3). If the Ninth Circuit overturns the district court's certification under Rule 23(b)(2), the Ninth Circuit will necessarily be required to analyze the alternative Rule 23(b)(3) certification. There is simply no basis to find that the Supreme Court's *Dukes* opinion regarding Rule 23(b)(2) applies broadly to all class actions, while the other portions of the Court's *Dukes* opinion involving Rule 23(a) are narrowly limited to Title VII cases involving discriminatory intent, particularly since a class action must always meet the requirements of Rule 23(a) in addition to one of the subsections of Rule 23(b). It would make no sense for *Duke's* discussion of Rule 23(b)(2) to apply broadly, but for its discussion regarding Rule 23(a) to apply narrowly.

Likewise, in *Bennett v. NuCor Corp*., __ F.3d __, 2011 WL 4389194 (8th Cir. Sept. 22, 2011), the Eighth Circuit Court of Appeals recently reiterated that a proponent of a class-wide judgment must show that all class members' claims depend upon a common contention capable of class-wide resolution. *Id.* at *7. In *Bennett*, the Court of Appeals found that the common "crucial" question that needed to be capable of common resolution was "why was I disfavored." *Id.* The Eighth Circuit rejected the arguments of plaintiffs' counsel (the same counsel representing Plaintiffs here) and affirmed the denial of class certification because the varying employment practices within and between departments and the "stark inter-departmental variations in job titles, functions performed, and equipment used" precluded a common answer to that crucial question for all class members. *Id.* at *8. Here, the common crucial question is "was I denied overtime to which I was entitled?" As in *Bennett*, the undisputed evidence at trial revealed differences in PPE and standard items worn, myriad individual practices of each employee, varying times in which it took each employee to don and doff their required items, and varying K Codes, all of which preclude a class-wide answer to this crucial question.[3]

2. Plaintiffs Failed To Prove Each Class Member Has Uncompensated Overtime For Donning And Doffing And Walking Time.

a. Record Evidence Does Not Support A Common Number Of Minutes For Donning/Doffing Activities On A Class-wide Basis.

To recover on behalf of the class, Plaintiffs must have proven that each member of the class was not adequately compensated for their pre- and post-shift compensable activities

[3] Plaintiffs may contend that the jury could and did resolve the questions of whether the activities constitute work, are compensable under the Portal Act, and are *de minimis* on a class-wide basis. This argument misses the point. Defendant is not challenging the ability of the jury to decide those issues on a class-wide basis. Defendant's point is that even deciding those issues on a class-wide basis does not answer the crucial question of whether all putative class members were underpaid and denied overtime to which they were entitled.

performed *during overtime hours*. In other words, the central issue the jury had to decide was whether Plaintiffs proved that each class member actually suffered the same injury ─ that each class member was denied overtime to which they were entitled for performing compensable activities. *See Dukes,* 131 S. Ct. at 2551 ("What matters … is not the raising of common 'questions' ─ even in droves ─ but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation") (emphasis in original; internal citations omitted). This is not a damages issue; it is the *sine qua non* of liability in an overtime case.

Here, the jury's verdict as to Question No. 5 is not sustainable because of the utter failure of class-wide proof as to whether all members of the class who will participate in the recovery were entitled to "additional" overtime pay. At trial, Plaintiffs did not, through the use of representative or common evidence, carry their burden of proving that each participating class member is owed this additional compensation. To the contrary, *Plaintiffs* highlighted, and it is undisputed, that all of the Plaintiff class members wear different combinations of required and optional clothing and equipment, that the time it takes class members to don and doff varies by department and individual, and that different K Codes are paid to each of them. These variations preclude a class-wide finding of liability because there was simply no way for the jury to conclude that a common number of minutes could be awarded to the class as a whole and that that common number of minutes pushed every class member into liability for unpaid overtime.

For example, during direct examination of General Supervisor John Sebben, Mr. Wiggins asked leading questions to elicit testimony that the "length of time it takes people to put things on and take them off varies from person to person;" it varied by the age or physical condition of the employees; it varied by the tenure of the employees; and "the time it takes is not a flat four minutes for every person." (*See* Trial Tr. at 174:5-174:22 (Sebben).) Similarly, Mr. Wiggins

highlighted, through questioning of plant Human Resources Manager Will Sager and General Supervisor Danny Hacker, that employees do not perform the same job every day, employees often rotate jobs, and employees can begin working one job and change mid-shift to another job that may not require a knife (and the requisite knife-related equipment). (*See* Trial Tr. at 325:15-326:7 (Sager); 413:16-413:23; 422:17-422:19; 423:1-423:3; 446:8-446:21; 447:12-447:18 (Hacker).) Dr. Mericle admitted that employees were free to and did change their "unique" items and sanitary clothing elsewhere than the locker room, undercutting Plaintiffs' assertion about whether the full walking time claimed by Plaintiffs was compensable for every class member.[4] (*See* Trial Tr. at 1159:19-1161:13.)

The few Plaintiffs who testified readily conceded that the Storm Lake plant contained numerous departments in the Kill, Cut, and Retrim areas, all of which were comprised of many different positions, all requiring different combinations of required and optional safety or sanitary items. (*See* Trial Tr. at 607:18-607:24, 611:9-611:18 (Lovan); 662:25-663:11 (Balderas); 703:7-703:8, 703:11 (Brown); 812:20-812:23 (Montes); P-301.) In fact, Jesus Balderas admitted that because he was the only one that performed the shoulder chop job, he is most likely the only one who chose his specific combination of protective equipment and sanitary clothing. (Trial Tr. at 663:12-663:15.) The Plaintiffs also admitted that they could *not* testify about the PPE worn by other employees outside their department. (*See, e.g.,* Trial Tr. at 663:16-663:22 (Balderas).) They similarly admitted that the speed in which employees put on and take off items varies and they had no knowledge of the amount of time spent on the pre- and post-shift activities by other employees. (*See id.* at 613:20-613:24 (Lovan); 663:16-663:22

[4] While Plaintiffs may claim that all employees must *touch* their standard items and PPE in the locker room, this argument is irrelevant. No basis exists to believe the jury found that merely touching an item is compensable or starts the continuous workday; there was no jury instruction or special verdict form interrogatory to that effect.

(Balderas).) This evidence, coupled with the unpredictable variety in the pre- and post-shift activities performed by employees, makes their testimony both unrepresentative and inapplicable to the experiences of other class members. *See Grochowski,* 318 F.3d at 88-89 (affirming judgment against non-testifying plaintiffs because testimony regarding hours worked was speculative); *Murray*, 939 F.2d at 621 (holding that, where differing work situations exist, plaintiffs' burden "must be met individually by each plaintiff").

There simply is no evidence in the record to support class-wide donning and doffing times. Plaintiffs' failure of proof on a class-wide basis is exemplified by the admissions of their own time-study expert, who was the *only* evidence offered on class-wide times.[5] Dr. Mericle did not measure all hourly production employees (*see* Trial Tr. at 961:8-961:9), nor did he take a random sample of employees (*see id.* at 1106:5-1106:7). Neither did he study each job, or even each department within the two very large areas of Fabrication and Slaughter, or even distinguish between knife and non-knife users. (*See id.* at 908:2-908:7; 976:12-977:13; 1050:11-1050:15.) He obtained 744 measurements, but even that does not represent 744 different employees because it could include the same employees doing different things on different days. (*See id.* at 907:11-907:20; 1038:4-1038:12; 1039:1-1039:8; 1039:20-1039:23.)

Dr. Mericle also admitted that the activities he measured are neither repetitive nor standardized. (Trial Tr. at 1074:18-1075:7; 1157:22-1157:24.) *In fact, he admitted that all 744 measurements were different from one another and every single individual measured took a different amount of time to perform each of the activities.* (*Id.* at 1157:16-1157:21.) Dr. Mericle admitted that employees listed in his study under the same "activity" were actually changing

[5] Although four Plaintiffs also testified, they were not offered as class-wide evidence. In his closing argument, Mr. Wiggins admitted that those witnesses were merely offered as "anecdotal" evidence. (Trial Tr. at 1794:14.)

different equipment and doing many *different* things. (*Id.* at 885:5-885:12; 1141:20-1141:23; 1143:2-1143:5 ("the content of the activity between the two subjects is different because of the different equipment that they're wearing."); 1158:8-1158:16 (different combinations of clothing).)

As Dr. Mericle also admitted, he studied how long these employees "did take" and did not otherwise study how long it "should take" to perform the donning and doffing at issue. (Trial Tr. 1076:1-1079:6.) On this trial record, it is evident why he could not, and did not, study the reasonable times. For example, Dr. Mericle admitted that the time it takes each individual to don or doff his or her equipment can vary based on a variety of factors, including what equipment the individual puts on where, the experience of the individual, the efficiency of the individual, potential physical limitations, or the individual's own choosing. (*See id.* at 896:8-896:19; 899:5-899:12 ("they might do it in a slightly different way, they might do the activities in a different way, they might have different levels of skill, they might have different physical health, they might have some restrictions, work pace comes into play, a lot of different factors come into play"); 1158:14-1160:2.)

Dr. Mericle further confirmed that employees take different amounts of time to don and doff the same equipment (see id. at 1159:2-1159:4); employees take different amounts of time to wash the same equipment (see id. at 1159:5-1159:14); employees have different routines for donning and doffing their equipment both before and after shift (see id. at 1159:15-1159:18); employees don and doff different items of equipment in different locations (see id. at 1159:19-1161:17); and everyone has different times for pre- and post-shift donning and doffing due to different equipment, difference in physical abilities, differences in choices, and differences in personal activities (see id. at 1161:18-1161:21; 1162:4-1162:12).

Further, Dr. Mericle acknowledged that the employees he studied have different routines, including donning equipment as they walk to their work stations, carrying various equipment to don at their work stations, donning equipment after the line already has started (i.e., after "gang time" has started), and doing different amounts of washing at different times throughout their shift. (Trial Tr. at 994:19-994:23; 996:23-997:3; 1003:14-1003:19; 1008:10-1008:15; 990:1-990:13 ("you saw some people at the Storm Lake plant who washed before they went on lunch when other employees went straight to their hooks, hung their equipment, and went to the cafeteria without doing any washing? …. Yes, I did see that, yes. … And you saw that some people washed at the end of the day and some people did not, correct? That's also correct.").)

Moreover, the undisputed record evidence reveals virtually all class members were paid four minutes of additional time until February 2007, including some employees who wore only the standard items. Nonetheless, neither Dr. Mericle nor the four testifying Plaintiffs offered any class-wide evidence as to the reasonable amount of time that it would take employees to don and doff only the standard items. Dr. Mericle's class-wide time estimates were for employees who wore a mixture of items, with most wearing some unique items, and even most of the four testifying Plaintiffs wore at least some unique items. Thus, there is no record evidence at all as to the class-wide donning and doffing times of just the standard items; if the jury sought to compensate the Plaintiffs only for the standard items, there is simply no basis in the record to support such a number.

In short, there is no evidence, let alone substantial evidence, to support a finding that all employees took the same amount of time to don and doff their various combinations of items. There is also no evidence of a class-wide "reasonable" time, because Dr. Mericle did not attempt to study how long it should take to don and doff. Moreover, the jury's verdict shows that they rejected Dr. Mericle's times for Kill and Fabrication but, when the jury did so, it had no basis to

know how to apply even an approximation of an alternative time because the Plaintiffs provided no evidence of which class members worked in Kill and which ones worked in Fabrication. Indeed, Dr. Fox rejected Mr. Wiggins' own leading attempt to justify a fractional amount of her original calculation, explaining that "it depends on how many people work fabrication, how many work kill …." (Trial Tr. 1386:6-13.) In short, on this trial record, there simply is no common number, and no way to apply any alternative common number.

b. The Jury's Verdict Necessarily Found In Favor Of Hundreds of Unidentified Employees To Whom Tyson Has No Liability.

Dr. Fox admitted that, even using Dr. Mericle's original average numbers, not all putative class members were underpaid. (Trial Tr. at 1299:2-1299:11.) Further demonstrating the lack of class-wide proof, Dr. Fox admitted that if the jury rejected Dr. Mericle's numbers (as the jury obviously did), and in turn rejected her damages calculations, the jury could not simply award lesser damages. There were two reasons for this. First, if an employee spent less time on donning/doffing than Dr. Mericle's average number, Dr. Fox admitted that it would be possible that Tyson's K Code payments could already have fully paid that employee. (*Id.* at 1333:13-17; 1351:20-1352:6.) Second, as the amount of additional minutes went down, more and more class members would fall out of liability because they "start falling out of overtime." (*Id.* at 1276:21-1277:3, 1299:2-1302:18; 1350:13-1351:19.) But the Plaintiffs gave the jury no way to make such determinations if the jury rejected Mericle's and Fox's testimony.

For example, Dr. Fox's calculation based on an assumed 15-minute number increased the number of "zeroed-out" Plaintiffs to 604 (from 212 under Dr. Mericle's original assumed numbers) because they did not enter overtime in any week. (Trial Tr. at 1302:12-18; P-348 (3,344 minus 2,470 = 604); D-2272.) This fact proves that even slight changes in the number of daily minutes result in *hundreds* of additional Plaintiffs not establishing liability. Here, the

jury's verdict reflects a determination of times that are *substantially* below any of Dr. Mericle's or Dr. Fox's numbers ─ even the 15-minute calculation ─ but there was no concomitant evidence of which class members received less K Code payments than the jury's lower times, or which class members still went into overtime when applying the jury's lower times.

Faced with a similar situation, the court in *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291 (E.D. Pa. 2010), granted defendant's motion to decertify the FLSA collective class in a donning and doffing case, after taking two days of evidence similar to the evidence developed here. As in this case, some *Lugo* plaintiffs arrived significantly before their shift to don their PPE, but the evidence was that the employer did not require them to arrive at these times, or that all workers required this amount of time to prepare. *Id*. *at* 304. The evidence was that the precise amount of time for donning and doffing varied by department and position, and that the employer paid different amounts of extra time for donning and doffing depending on the department and shift. *Id*. at 303-304, 315-316. The court reasoned that:

> The evidence indicates that there may be some hourly production workers who have legitimate claims for undercompensation for time spent donning and doffing, and some who may not; the evidence does not demonstrate, however, that the question of undercompensation can be answered in a manner common to all plaintiffs. If the present case were tried collectively and a verdict were reached for defendant, this result would be unfair to those plaintiffs who may have been denied pay owed them for donning and doffing; similarly, if a verdict were reached for plaintiffs, this would be unfair to defendant, who would be deemed liable as to the entire collective-action class when it may not have undercompensated all individual members of that class.

Id. at 303. The court concluded that the employer's liability for under-compensation could not be collectively addressed for all employees in the plant because of the myriad differences between the employees. *Id.* at 317.

The *Lugo* decision has been followed by other courts. Recently, in *Prise v. Alderwoods Group, Inc.*, the court granted the defendant's decertification motion after "conducting a fact-

specific review of each class member" and finding that plaintiffs did not satisfy their burden that they were similarly situated, as required under the FLSA. *See Prise v. Alderwoods Group, Inc.,* __ F. Supp. 2d __, 2011 WL 4101145, at *1, 17 (W.D. Pa. Sept. 9, 2011). In *Prise,* plaintiffs brought suit alleging nonpayment of overtime and claimed defendant required them to perform community work for defendant's benefit without compensating them when it occurred outside of their regular work hours. The court recognized that "allegations of an 'overarching' policy are insufficient"; "an individual opt-in plaintiff is required to demonstrate his own basis for a reward." *Id.* at *17-18. Citing *Lugo,* the court recognized that because some plaintiffs had been paid for certain work, it "would be necessary to conduct an individualized inquiry for each plaintiff to determine whether … they received compensation for that work. *Id.* at *23. The court further cited *Lugo* for "adeptly address[ing] this fairness issue," stating:

> If the present case were tried collectively and a verdict reached for defendant, this result would be unfair to those plaintiffs who may have been denied pay owed to them for [the activities at issue]; similarly, if a verdict were reached for plaintiffs, this would be unfair to defendant, who would be deemed liable as to the entire collective class when it may not have undercompensated all individual members of that class.

Id. at 23.

As the *Prise* case demonstrates, this reasoning in *Lugo* is not "illogical" and does not "border on ludicrous," nor does it invalidate the collective action provisions of 29 U.S.C. § 216(b), as Plaintiffs have claimed. (Dkt. No. 272 at 18.) Instead, it shows that courts are beginning to realize the fallacy of trying these cases as class actions where individualized work practices and individualized compensation render it impossible to determine that employees were undercompensated on a class-wide basis. *See also Pacheco v. Boar's Head Provisions Co.,* 671 F. Supp. 2d 957, 966 (W.D. Mich. 2009) (in denying plaintiffs' motion for class certification under the FLSA in a donning and doffing case, the court highlighted that the company already

had a practice of paying employees for their donning and doffing activities, "any failure to follow that policy w[ould] be unique to [the] specific departments and supervisors," and employees "put on different items, at different times, in different places, all depending on their job duties and their own personal practices and preferences.") (citation omitted).

This case highlights the very concerns raised by the courts in *Lugo* and *Prise* that led those courts to decertify. Dr. Fox's and Dr. Mericle's unrebutted and unequivocal testimony is that Plaintiffs *cannot prove* unpaid time, let alone unpaid *overtime,* by each class member. This problem is substantially exacerbated by the fact that the jury obviously rejected both Dr. Mericle's and Dr. Fox's numbers, but there was no evidence to support individualized determinations of under-compensation, or who fell into overtime, when applying the jury's lower daily times. Thus, this Court should grant judgment as a matter of law to Tyson. *See Murray*, 939 F.2d at 621 (holding that to satisfy the directive of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), in a case with differing work situations, plaintiffs must show the amount and extent of uncompensated work "*for each individual plaintiff*[.]") (emphasis in original).

C. Plaintiffs' Trial-By-Formula Approach To Damages Is Impermissible.

In *Dukes*, the Supreme Court reaffirmed that an employer is entitled to individualized determinations of each class member's eligibility for back pay. 131 S. Ct. at 2561. The Court squarely rejected the "Trial-by-Formula" approach Plaintiffs took in this case, where a "sample set" of class members is selected, validated, and extrapolated to the entire class.

As noted above, Plaintiffs sought to establish "class-wide" proof of unpaid overtime through the testimony of Dr. Mericle, who took sample videotape at the Storm Lake plant over two days and calculated an "average" time for donning/doffing in the Kill area and in the "Fabrication" (Cut/Retrim) area. (Trial Tr. at 820:16-820:21.) Dr. Mericle admitted that he did not study the time each member of the class actually spent on donning and doffing, even though

he conceded that there is significant variation in the time required to perform these activities. (*Id.* at 961:8-961:9; 1157:16-1157:21.)

Dr. Fox then calculated damages by taking a fixed number supposedly spent on donning/doffing by everyone in the Kill area, and a fixed number supposedly spent on donning/doffing by everyone in the Fabrication area.[6] (Trial Tr. at 1305:19-1306:12; 1329:25-1330:15.) Dr. Fox admitted that she did not know how much time was spent on donning and doffing and related activities by the putative class members each day and that these calculations were based solely on Dr. Mericle's time-study "averages." (*Id.* at 1304:20-1305:11; 1307:7-11.) She admitted that she did not know if anyone performed off-the-clock work. (*Id.* at 1267:5-1267:6; 1269:24-1269:25; 1270:1-3; 1304:24-1305:11.) In other words, she assumed that each member of the class took the same amount of time to perform the activities at issue (even though the evidence established otherwise) and then used that same number to determine whether each class member *individually* was under- or over-compensated. (*Id.* at 1329:25-1330:15.)

Contrary to Plaintiffs' contention that Dr. Fox's approach was not formulaic because she arrived at individual damages calculations for each class member, all Dr. Fox did to arrive at these individual numbers was to plug the data for each individual person into a computer-program formula she wrote, and then run that data against Dr. Mericle's average time estimates or the assumed 15-minute average number that was plucked out of the air. (Trial Tr. at 1305:19-1306:4.) This is the epitome of a formulaic calculation, with the key variable being the assumed

[6] Dr. Fox also calculated damages based on an assumed 15 minutes of donning and doffing time, but admits this number was simply "plucked out of the air." (Trial Tr. at 1363:24-1364:9.) Importantly, in his closing argument, Mr. Wiggins did not argue that this 15 minutes was grounded in the evidence. He argued that it was a "hypothetical" that was intended *solely* to prove "how easy it is" to perform the calculation. (*Id.* at 1804:22-1805:7.)

average time estimates. In fact, Dr. Fox herself described her approach as a "formula" no fewer than 15 times throughout her testimony. (*See id.* at 1280:18-1374:3.)

This use of sampling, estimates, and extrapolation is precisely the "rough justice" approach that the Supreme Court rejected in *Dukes*. *See Dukes,* 131 S. Ct. at 2561 (disapproving of "Trial-by-Formula" where sample set of class members testify and percentage of valid claims determines the award to entire class). Plaintiffs' Trial-by-Formula approach avoids establishing liability and damages on an individual basis and deprives Tyson of its right to "litigate its statutory defenses to individual claims."[7] *See id.* ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims"). For this additional reason, the class should be decertified and judgment should be entered for Tyson.

[7] The cross-examinations of Nicholas Lovan and Jesus Balderas illustrate why this formulaic approach is prohibited by *Dukes* in principle and prejudiced Defendant in practice. Although Mr. Lovan testified that it took him 8-9 minutes to perform his donning activities in the morning, he admitted on cross-examination that he can really perform these activities in less time, and does so at the break; he just chooses to take his time in the morning because no one requires him to do it in a set time or order. (*See* Trial Tr. at 597:13-597:17, 599:7-599:16, 602:6-604:4.) Mr. Balderas said it took 30 seconds to don his hard hat, but on cross-examination admitted it really only took 2-3 seconds and acknowledged that when a person estimates times in the abstract, the estimate can be higher than the actual time. (*See id.* at 655:21-655:25; 656:7-656:11; 660:20-660:25.) Thus, it is evident that Plaintiff's Trial-by-Formula approach deprived Defendant of its right to assert individualized defenses to each putative class member's claim. Cross-examination almost inevitably results in individual plaintiffs making concessions, such as on the amount of time it takes them, which would require mini-trials to resolve each individual claim. *See Pacheco,* 671 F. Supp. 2d at 965 (discussing the court's concern "'about the contradictions between [p]laintiffs' affidavits and their deposition testimony, because they show 'the importance of cross-examination of each plaintiff' and suggest[ing] 'the need for separate mini-trials to resolve each individuals claim….'" The court found that "'[s]uch a result is the antithesis of collective action treatment and would overwhelm the judicial system and eliminate any judicial efficiency that might be gained through a collective approach.'") (citing *Hinojos v. Home Depot, Inc.,* Case No. 2:06-CV-00108, 2006 WL 3712944, at *3 (D. Nev. Dec. 1, 2006) (denying collective action certification because determination of whether employees were denied overtime pay was individualized inquiry and defendant must be permitted to cross-examine each plaintiff and establish individualized defenses). In a case such as this where individual times for donning and doffing are crucial to the question of liability, Trial-by-Formula is especially improper.

III. IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES SHOULD BE ORDERED UNDER FED. R. CIV. P. 59.

A. Standard For A New Trial Under Rule 59.

Federal Rule of Civil Procedure 59 permits this Court to order a new trial when the trial, through a verdict against the weight of the evidence or legal errors at trial, resulted in a miscarriage of justice. *See White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992); *Douglas County Bank & Trust Co. v. United Fin. Inc.*, 207 F.3d 473, 478 (8th Cir. 2000) (a miscarriage of justice occurs "when there is insufficient evidence to support the verdict."). Consistent with the plain language of Rule 59(a), the court may grant a partial new trial solely on the issue of damages. Fed. R. Civ. P. 59(a)(1)(A); *see, e.g., Powell v. TPI Petro., Inc.*, 510 F.3d 818, 824-25 (8th Cir. 2007) (remanding for partial new trial on damages); *Frumkin v. Mayo Clinic*, 965 F.2d 620, 624-625 (8th Cir. 1992) (the court's finding that the evidence did not support the award and that the award was speculative justified a grant of a new trial on damages). In this case, the jury's damages verdict is wholly unsupported by the record evidence and a new trial on damages must be ordered to avoid a miscarriage of justice.

B. Plaintiffs' Damages Evidence And The Jury's Verdict.

As discussed above, Plaintiffs provided evidence at trial of the putative class's alleged damages through the testimony of Dr. Mericle and Dr. Fox. Dr. Mericle testified that he performed a time study at the Storm Lake plant and arrived at an average number of minutes that all employees in Slaughter and "Fabrication," respectively, supposedly spent on donning and doffing activities. Dr. Fox then took Dr. Mericle's average number for each side of the plant and plugged them into a formula that, combined with putative class member pay and punch data, allowed her to determine whether each class member individually had worked overtime hours for which they had been under-compensated and, if so, by how much. (Trial Tr. at 1266:25-1268:5,

1268:13-1268:20; 1270:1-1270:8.) Based upon this methodology, Dr. Fox testified that Plaintiffs' class-wide damages were $6,686,082.36 for the state law class and $1,611,702.44 for the FLSA class. (*Id.* at 1277:21-1278:2, 1278:15-1278:21; P-345.) Dr. Fox also provided the jury with two alternative calculations conjured up in the middle of trial. The first one was based on Dr. Mericle's revised averages calculated on Friday, September 16, to take into account the standard test for excluding "outliers"; this previously undisclosed calculation first came out on Mr. Wiggin's re-direct examination of Dr. Mericle on September 20. (*Id.* at 1176:12-1183:9 and 1245:24-1254:11). Dr. Fox's second alternative calculation was based on a 15-minute number that Plaintiffs' counsel "plucked out of the air."[8] (*Id.* at 1364:2-1364:9.) The jury returned a verdict for Plaintiffs, but not in any of the amounts, or combination of amounts, offered by Dr. Fox. Instead, the jury awarded $2,892,378.70.

C. No Record Evidence Exists To Support The Jury's Class-wide Damages Number.

It is impossible to discern from the record how the jury arrived at its damages number, but one thing is clear: the jury rejected Dr. Mericle's numbers and determined that the donning and doffing activities took some unknown, lesser amount of time.[9] While the weight of the

[8] Plaintiffs' failure to disclose Dr. Fox's 15-minute calculation until the night before it was offered to the jury was not substantially justified and harmless, and therefore the Court should have granted Defendant's oral motion to exclude her new calculations pursuant to Fed. R. Civ. P. 37(c)(1). First, Dr. Fox and Mr. Wiggins admitted that a variety of new calculations were submitted to Plaintiffs' counsel by email on September 7, but Plaintiffs' counsel did not serve the 15-minute calculation until the evening of September 20. (Transcript of Sept. 20 motion hearing at 1-18; Trial Tr. at 1230:3-1232:21, 1354:6-14, 1451:3-16.) Plaintiffs' counsel offered *no* justification for withholding the calculation. Second, the late disclosure prejudiced Defendant. Unlike Dr. Fox's late-disclosed walking time calculation served on September 19, Defendant was not given any opportunity to depose Dr. Fox on her 15-minute calculation.

[9] Defendant has spent considerable time attempting to deconstruct the jury's damages verdict to shed light on how the jury arrived at the precise number it awarded. Although the jury's award of a specific number of dollars and cents indicates the jury performed some proportional calculation, the components of that calculation are a mystery.

evidence supports the jury's finding that Dr. Mericle's times were unreliable, once the jury rejected Dr. Mericle's average numbers, it was left with nothing in the evidence from which to discern an alternative donning and doffing time that could be applied class-wide. Rather, the overwhelming evidence demonstrated that donning and doffing times varied by area, by department, by job, and by person.

Specifically, the four testifying Plaintiffs each attested to taking substantially different amounts of time to don and doff. (*Compare* Trial Tr. at 598:9-598:18 (Lovan took 6-7 minutes to don before shift) *with* Trial Tr. at 708:23-709:18 (Brown took over 2 minutes to don before shift) *with* Trial Tr. at 641:17-641:22 (Balderas took 10-12 minutes to complete pre-shift activities.) They also admitted they could only testify to their own unique circumstances and could not competently testify about how long it took others to engage in donning, doffing, and related activities because those times would vary by job and by person. (*See, e.g.,* Trial Tr. at 613:20-613:24.) Likewise, Plaintiffs' video clips showed widely varying times for donning and doffing. Even Dr. Mericle testified that every person he studied took a different amount of time to perform donning, doffing, and related activities and that the reasons for these differences were varied and unknowable. (*See* Trial Tr. at 896:8-896:19, 899:5-899:12, 961:8-961:9; 1157:16-1157:21, 1158:14-1160:2, 1161:18-1161:21, 1162:4-1162:12.)

Having rejected Dr. Mericle's average numbers, the jury was left with a record replete with evidence conclusively establishing that all class members took varying amounts of time for donning and doffing activities, leaving no way for the jury to determine a supportable class-wide donning and doffing number on an average basis, let alone on an individualized basis.[10] *See*

[10] The written question crossed out on the notepaper submitted to the Court with the jury's questions during deliberations (Docket No. 296) suggests that they were struggling with differentiating between knife users and non-knife users. But there simply was no basis to separate non-knife users from knife-users in the damages assessment, nor was there any evidence

Murray, 939 F.2d at 621 (holding that to satisfy the directive of *Anderson v. Mt. Clemens Pottery* in a case such as this with differing work situations, the plaintiffs must show the amount and extent of uncompensated work "*for each individual plaintiff*[.]") (emphasis in original).[11]

Even if the jury could have divined a class-wide number of donning and doffing time from the evidentiary record, Dr. Fox's testimony at trial made clear that the jury had no basis in the record before them to calculate a valid monetary award based on that time.

Dr. Fox acknowledged that class members only suffered damages if the times for donning and doffing were more than what Tyson already paid an individual in K Code *and* "would put them into overtime." In other words, if extra minutes were added but those extra minutes were less than a particular employee's K Code and/or did not result in the employee accruing over 40 hours worked for the week, the individual "would not get damages for that week." (Trial Tr. at 1276:21-1277:3, 1299:2-1302:18; 1333:13-17; 1350:13-1352:6.) Based on these principles, Dr. Fox admitted that, if the jury rejected Dr. Mericle's average numbers, the jury could not simply reduce Dr. Mericle's numbers and take a corresponding fraction or proportion of her damages number to arrive at its verdict. (*Id.* at 1350:22-1352:8.)

For example, Dr. Fox admitted that if the jury wanted to award only half as many minutes as Dr. Mericle found to be applicable for donning and doffing time, it could not simply take half of Dr. Fox's roughly $6.6 million damages number because "the lower and lower the number of minutes goes, the more and more people start falling out of overtime" and admitting that "at

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in the record on which the jury could have determined which employees were knife users versus non-knife users. Plaintiffs utterly failed to present evidence on which the jury could have calculated damages to compensate only non-knife users if they believed the employees who wore knife-related equipment were fully paid. (Trial Tr. at 1350:5-1350:12.)

[11] In contrast to this case, in *Murray* the plaintiffs did in fact present evidence as to the amount of overtime purportedly owed to each individual plaintiff and the damages award was based on that individualized evidence. *Id*.

some point if you drop the number low enough, you would expect that people would be at zero" on Dr. Fox's damages chart. (Trial Tr. at 1351:12-1351:23.) In fact, when Mr. Wiggins tried to lead Dr. Fox into agreeing that a proportional calculation could be done, she disagreed with him, stating "I don't think that you can just apply — apply it that way." (*Id.* at 1386:12-1386:13.)

This problem is exemplified by Dr. Fox's original calculations. Even under Dr. Fox's original calculations using Dr. Mericle's original numbers, 212 putative class members had ***no*** damages at all because even when Dr. Mericle's extra minutes were added, "[i]t would not have been enough to kick them into overtime." (Trial Tr. at 1302:12-1302:18.) Likewise, there were hundreds of people who, even using Dr. Mericle's original numbers, were close to non-liability and had minimal amounts of unpaid overtime. For example, one employee was "kicked into overtime" for a total of only 27 cents in damages and another for only $1.35 in damages; 487 class members had less than $50 in damages. (*Id.* at 1301:11-1302:23; D-2272.) Given these numbers and the fact that the jury's verdict was significantly less than the number calculated by Dr. Fox, it necessarily means that at least the 487 class members who had $50 or less in damages under Dr. Mericle's original numbers would fall completely out of liability under the jury's reduced verdict, and the reality is that significantly more class members were awarded damages who fell out of liability as well.

In fact, at 15 minutes a day, Dr. Fox calculated $4,903,621.51 in damages to 2,740 members of the Iowa class (P-348), meaning that 604 members *never* entered overtime even under her 15-minute assumption. Given that the jury awarded much less than that (i.e., $2,892,378.70), it necessarily means that the jury believed either that the daily average was much less than 15 minutes, or else that only non-knife users were entitled to any further compensation, or some combination of the two possibilities. Either way, it necessarily means that *hundreds* of

individuals would not have fallen into overtime, but there was simply no way for the jury to determine *who* those people were so that their individualized damages could be subtracted.

There simply is no way to reconcile the jury's verdict with Dr. Fox's testimony and the record evidence. The jury's verdict appears to be some fraction of Dr. Mericle's and Dr. Fox's numbers, which Dr. Fox unequivocally testified the jury could not do because it necessarily would award damages to individuals to whom Tyson has no liability. As Dr. Fox admitted, the way her model was set up, her damages number was "all or nothing." (Trial Tr. at 1352:9-1353:7 (once the jury rejected Dr. Mericle's numbers, whole damages model would need to be recomputed using Dr. Fox's formula to arrive at a useable damages number); *Id.* at 1352:3-1352:8 (if the jury believed the donning activities took five minutes, there was no evidence in the record to tell the jury how much that would equate to in damages).) Here, when the jury rejected all, it was left only with the choice of awarding nothing. By conjuring up its own proportional damages number, the jury reached a verdict against the weight of the evidence that cannot be upheld. Thus, a new trial on damages must be ordered.

D. The Jury Verdict Must Be Reversed Even Under The Burden-Shifting Framework Set Forth In *Anderson v. Mt. Clemens Pottery*.

In opposition to Defendant's Motion, Plaintiffs may argue that *Anderson v. Mt. Clemens Pottery* permits them to prove damages through approximation and therefore the jury's verdict must be upheld. This is a red herring. While *Anderson* does provide shifting burdens of proof in a case in which the plaintiff establishes that the defendant failed to keep records as required by the FLSA, nowhere in *Anderson* does the Court hold that a jury may simply make up class-wide damages numbers that are unsupported by the evidence, particularly where, as here, that number results in overpaying people to whom the defendant has no liability at all. Plaintiffs simply

cannot point to *Anderson* and claim that it allows them to approximate damages when their own expert testified that such an approximation cannot be done.

Moreover, under *Anderson*, the burden only shifts to the defendant if the plaintiff proves that "he has in fact performed work for which he was improperly compensated *and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference*." *Anderson*, 328 U.S. at 687-88 (emphasis added). As the Eighth Circuit Court of Appeals has emphasized, to satisfy their burden of proof under *Anderson* in a case such as this with differing work situations, the plaintiffs must show "the amount and extent" of uncompensated work "*for each individual plaintiff*[.]" *Murray*, 939 F.2d at 621 (emphasis in original). As discussed above, Plaintiffs have failed to establish the amount and extent of uncompensated donning and doffing activities for each individual in the class and, therefore, Plaintiffs cannot rely on *Anderson* to salvage the jury's unsupportable award.

In *Marshall v. Truman Arnold Distributing Co.*, 640 F.2d 906 (8th Cir. 1981), a similar case to this one, the Secretary of Labor claimed workers had not been paid minimum wage and overtime as required by law. After a bench trial, the court found that the workers were employees under the FLSA and were entitled to minimum wage and overtime payments. The court awarded damages to those employees who testified at trial and were able to demonstrate that they were underpaid, but denied damages to non-testifying employees because "the Secretary had presented no proof upon which the Court could make a finding of fact that any of the eight * * * [non-testifying employees] performed any work upon which claims for back wages could be based." *Id.* at 910-11 (asterisks in original, internal citation and quotation marks omitted).

On appeal, the Secretary of Labor argued that the court misapplied the burden of proof under *Anderson* and that he had presented sufficient evidence to meet the initial burden of

proving that the non-testifying employees had performed work for which they were not properly compensated. The Eighth Circuit rejected the Secretary's argument, however, finding that while the Secretary had presented sufficient evidence to establish that the non-testifying employees were entitled to overtime compensation, he did not produce sufficient evidence of the "amount and extent of that work" to support a damages award. *Id.* Rather, the Court held that the company had substantially rebutted the wage projections of the employees who did testify through cross-examination, and because of that the trial court awarded less than 50 percent of the amount claimed. In light of this, the Court held that the "validity of the Secretary's wage projections as applied to the other eight [employees] who did not testify was thereby undermined" and they had not met their burden of proving the "amount and extent of the [uncompensated] work as required by *Anderson*." *Id.*

Here, as in *Marshall*, it is evident that Tyson substantially rebutted Plaintiffs' evidence of the amount and extent of the uncompensated work because the jury resoundingly rejected Dr. Mericle's average minutes by awarding damages in an amount substantially lower than Plaintiffs sought. It is also clear that the jury rejected the 15 minute alternate number that Plaintiffs' counsel suggested that Dr. Fox "pluck[] out of the air" because the damages award was substantially less than that number as well. Accordingly, under the Eighth Circuit's precedent in *Marshall*, the jury's verdict cannot be upheld because Defendant successfully undermined the validity of Plaintiffs' supposedly representative evidence as applied to the class as a whole and the jury was left with no evidence in the record to reach an alternate number.

The Eleventh Circuit Court of Appeals' decision in *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259 (11th Cir. 2008), further demonstrates that the shifting burden standard under *Anderson* does not permit the jury to reach a verdict unsupported by the evidence. In *Rodriguez*, the plaintiffs sought unpaid overtime. Because the defendant had not kept records of

the amount of hours worked by the plaintiffs, each of the 28 plaintiffs testified to the number of hours they worked each week and their regular rate of pay. At trial, the jury awarded damages in excess of the amount sought by the employees. The court of appeals reversed the district court order affirming the jury's damages award, holding that the jury verdict was not supported by the evidence. In doing so, the court recognized that it was not possible to discern the jury's reasoning for its damages award and that the jury was permitted to make "approximations and estimates" to arrive at a damages verdict because the defendant did not keep records of the actual hours worked by the plaintiffs. Nonetheless, the "jury was required, however, to operate within the bounds of the evidence presented at trial[.]" *Rodriguez*, 518 F.3d at 1267-68 ("Whether the error resulted from disregarding the evidence, a mathematical mistake, confusion, or some other reason, it is still error. … The damages award must be set aside.").

As these cases illustrate, even under the standard articulated in *Anderson*, the jury's verdict must find support in the record. Here, for all the reasons discussed above, it does not. Accordingly, Defendant respectfully requests that, if the Court does not enter directed verdict for Defendant because of the utter failure of class-wide proof of liability, the Court vacate the damages award and order a new trial solely on the issue of damages.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for judgment as a matter of law and motion to decertify should be granted. In the alternative, Defendant requests a new trial on damages. Defendant also requests oral argument on its Motion, which would aid the Court in resolving the issues due to the voluminous record and the complex legal issues presented.

Respectfully submitted,

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October 24, 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that this 24th day of October 2011, I electronically filed the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION TO DECERTIFY OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON DAMAGES with the Clerk of the Court using the Court's CM/ECF filing system, which will serve notice of electronic filing upon the following:

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and I hereby certify that I have mailed by United States Postal Service, postage prepaid, this document to the following non CM/ECF participants:

None.

/s/ Michael J. Mueller
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