

**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,

Docket No. 5:07-CV-04009 JAJ

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

**DEFENDANT’S RENEWED MOTION
FOR JUDGMENT AS A MATTER OF
LAW AND MOTION TO DECERTIFY
OR, IN THE ALTERNATIVE, FOR A
NEW TRIAL ON DAMAGES**

ORAL ARGUMENT REQUESTED

**DEFENDANT’S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW
AND MOTION TO DECERTIFY OR, IN THE ALTERNATIVE,
FOR A NEW TRIAL ON DAMAGES**

Defendant Tyson Foods, Inc. hereby moves, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgment as a matter of law or, in the alternative, for a new trial on damages under Rule 59, and states as follows:

1. Plaintiffs failed to prove on a class-wide basis that all class members suffered a common injury, *i.e.*, that all members of the class have not already been fully compensated for any overtime hours worked for their compensable time. *See Chinese Daily News, Inc. v. Wang*, No. 10-1202, 2011 WL 4529967 (Oct. 3, 2011) (signaling that *Wal-Mart Stores, Inc. v. Dukes*, 564 US ___, 131 S. Ct. 2541 (2011) applies to wage-hour cases). *See* Defendants’ simultaneously filed Memorandum In Support Of Renewed Motion For Judgment As A Matter Of Law And Motion To Decertify Or, In The Alternative, For A New Trial On Damages (“Defendant’s Brief”) at § II.B.1.

2. At trial, Plaintiffs improperly tried to prove their case through a formula by presenting the jury with an average number of donning and doffing minutes determined by their time-study expert, Dr. Mericle, and then having their damages expert, Dr. Fox, plug those minutes into a formula. However, it is evident that the jury rejected Dr. Mericle's and Dr. Fox's proffered numbers and then did exactly what Dr. Fox admitted could not be done: the jury determined that the donning and doffing activities took some unknown, lesser amount of time and awarded some lesser, proportional amount of damages, thereby rendering a verdict for class members who suffered no injury and to whom Tyson had no liability. Plaintiffs have not proven that all class members were not fully compensated by K Code time for their compensable time spent donning and doffing and walking to and from their work stations, nor have Plaintiffs proven that each member of the class was pushed into overtime by the addition of some number of minutes less than those presented by Dr. Mericle. Because of this lack of class-wide proof, the jury had no legally sufficient evidentiary basis to find for Plaintiffs, and Tyson is entitled to judgment as a matter of law. *See* Defendants' Brief at §§ II.B.2 and II.C.

3. In the alternative, Defendant moves pursuant to Federal Rule of Civil Procedure 59 for a new trial on damages because the jury's verdict amount lacks any evidentiary basis in the record. As Plaintiffs' own expert, Dr. Liesl Fox, admitted, once the jury rejected Dr. Mericle's numbers (which it clearly did), it could not award some proportional amount of damages because as the number of donning and doffing minutes awarded went down, hundreds of class members already received sufficient K Code time and/or fell out of overtime. But the jury had no way of knowing who those individuals were, and thus could not subtract Dr. Fox's damages calculations for them. Thus, the damages verdict cannot stand. *See* Defendant's Brief at § III.

WHEREFORE, 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.

A full recitation of the factual and legal bases for this Motion are further set forth in 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, which accompanies this Motion.

Respectfully submitted,

/s/ Michael J. Mueller

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October 24, 2011

Attorneys for Defendant, TYSON FOODS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that this 24th day of October 2011, I electronically filed the foregoing DEFENDANT’S 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:

Brian P. McCafferty, Esq.
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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

Counsel for Defendant