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

PEG BOUAPHAKEO, *et al.*,	*	
Plaintiffs,	*	CIVIL NO. 5:07-cv-04009-JAJ-TJS
vs.	*	
	*	
TYSON FOODS, INC.,	*	
Defendant.	*	

PLAINTIFFS' BRIEF OPPOSING DEFENDANT TYSON'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND TO DECERTIFY OR ALTERNATIVELY FOR A NEW TRIAL

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Pursuant to Federal Rules of Civil Procedure 50 and 59, Plaintiffs respectfully oppose Defendant Tyson Foods, Inc.'s (hereafter "Tyson") Renewed Motion for Judgment As A Matter of Law and Motion To Decertify Or In The Alternative For A New Trial On Damages (**Doc. 305**).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Having failed to prevent certification of Fair Labor Standards Act ("FLSA") and Rule 23 classes back in 2008, and having twice failed to decertify the Rule 23 class prior to trial and during trial; Tyson, undeterred, now makes yet another run at trying to convince this Court to decertify Plaintiffs' FLSA and Rule 23 classes. Tyson's fourth attempt at preventing class certification should also fail..[1]

Defendant Tyson's arguments are based on several faulty premises. Tyson's primary argument is that Tyson is permitted to "invade the jury deliberation room" and start dictating to this Court what the jury supposedly had found as fact and what credibility determinations it must

[1] Defendant Tyson concedes that that it is not challenging the jury's class-wide determination that "the actions [at issue] constitute work, are compensable under the Portal Act, and are de minimis on a class-wide basis. Defendant's Brief (**Doc. 304-1**) at page 7, footnote 3. Rather than challenging class certification on these three dispositive issues, Tyson limits its post-trial motion to the issue of whether there was sufficient class-wide proof "that all Plaintiffs and other members of the class have not already been fully compensated for any overtime hours worked for their compensable time." Id.

have made to reach its verdict.[2] Tyson has unilaterally determined (without any evidence whatsoever) that the jury entirely discredited Dr. Mericle's testimony, merely because it did not award Plaintiffs every penny they asked for. If Tyson wanted a jury to make a precise finding of how many minutes per day they awarded to Plaintiffs then Tyson should have demanded that this item be included on the Verdict Sheet at trial. This Court asked Tyson's counsel whether he had any objection to the jury instruction or verdict form and here was Mr. Mueller's unequivocal response:

The Court: Mr. Mueller?

Mr. Mueller: **Defendant does not have any objections to the instructions or the Verdict Form.** If you want comment on anything that Mr. Wiggins just argued, I am happy to answer your questions.

Trial Transcript at 1689 (emphasis added).

This Court cannot permit Tyson, after a two-week trial, to substitute its own heavily biased suppositions for what the jury rightfully determined in this case. Now that the trial is over and Tyson does not like the outcome, is not the time for Tyson to second guess the Court's verdict sheet and jury instructions when Tyson approved both at the trial itself.

Second, Tyson essentially (and erroneously) contends that juries are not allowed to make compromises on damages in rendering their verdicts. Here, Tyson argues that because the jury did not award Plaintiffs every penny they asked for then the parties have no way of knowing how they arrived at the damages number in their verdict and thus the damages verdict is invalid as a matter of law. This argument has no legal support and runs contrary to all established law on this subject.

[2] The only things we do know in terms of what the jury found are what is on the actual verdict sheet. See **Doc. 280**. Tyson's assertion that that the jury discredited Dr. Mericle's testimony is nowhere on the Verdict Sheet.

Lastly, Tyson also seeks to effectively overrule the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) by contending that Plaintiffs cannot use representative testimony to establish both liability and damages. As Plaintiffs will establish further into this Brief, Mt. Clemens Pottery is still the governing law on this issue and that law has not been modified by any of the arguments that Tyson tries to make here.

Contrary to Tyson's arguments, Plaintiffs have presented ample, uncontroverted trial evidence that establishes that there are several claims and defenses common and applicable to every single class member for some or all of the class period established in this case, and the jury's favorable verdict was based upon that evidence.

These common questions of fact and law which were determined at the trial (supported by ample trial evidence to support their claims and oppose Tyson's defenses) include, but are not limited to the following:

1. Whether Plaintiffs must be compensated for unpaid walking time that occurred from March 31, 2004 (for the FLSA class) or from February 7, 2005 (The Iowa state law class) until February 4, 2007 when Tyson admits (in Stipulation 34) that it first started paying for walking time. This claim applies to every single class member in this case.

2. Whether Plaintiffs must be compensated for all donning and doffing related activities which occurred during their 30-minute unpaid meal break for the entire class period through June 28, 2010. This claim applies to every single class member for the entire class period. The jury ruled against Plaintiffs on this issue and this question was addressed directly on the **Verdict Form** as Question 3 (See **Doc. 280**).

3. Whether Plaintiffs must be compensated for all donning, doffing and washing activities related to what Tyson refers to as "standard" or "non-unique" items such as the frock, white shirt and pants, gloves, aprons, boots, hair net, beard net, ear plugs and hard hat, where Tyson has admitted that it has not paid Plaintiffs for work performed pertaining to these items at any time during the relevant period in this case. This is yet another claim common to every class member for the entire class period. The jury ruled in favor of Plaintiffs on this issue and this question was addressed directly on the **Verdict Form** as Questions 1 and 2 (See **Doc. 280**).

4. Whether Tyson's de minimis defense is applicable to any of the class members for any of the work activities for which they make a claim in this case. This is a defense common to every class member for the entire class period. The jury ruled in favor of Plaintiffs on this issue and this question was addressed directly on the **Verdict Form** as Question 4 (See **Doc. 280**).

5. Whether Tyson paid sufficiently to "knife-using" employees for all time spent donning, doffing, maintaining and washing what Tyson refers to as "unique" or "knife-related" equipment where the evidence is uncontroverted that Tyson paid 4 minutes per day for such activities from the beginning of the class period until February 4, 2007, and a range of 4-8 minutes per day for these activities (but also now including walking time) from February 4, 2007 until the end of the class period. This claim is common to approximately 70% of the class who are knife-users for the entire class period.

These common claims and defenses warrant class treatment pursuant to both the FLSA and Rule 23. Accordingly, this Court should deny Tyson's motion for decertification or alternatively for a new trial in all respects.

II. STANDARD FOR JUDGMENT AS A MATTER OF LAW OR REQUEST FOR NEW TRIAL

Rule 50 of the Federal Rules of Civil Procedure provides that the standard for judgment as a matter of law is the same as under Rule 56, that there is no genuine issue of material fact that would allow a reasonable jury to return a verdict in favor of the opposing party. Reeves v. Sanderson Plumbing, 530 U.S. 133, 139 (2000). A renewed motion for judgment as a matter of law post-trial is evaluated under the same standard as the initial motion filed at the close of evidence; the motion will be denied if the evidence in the record could properly support the verdict, viewing the evidence, and all inferences, in the light most favorable to the non-moving party. Radavansky v. City of Olmstead Falls, 496 F.3d 609, 614 (6th Cir. 2007). See also, Miller v. Holzmann, 563 F.Supp.2d 54, 75-76 (D.D.C.)(courts do not lightly disturb a jury verdict). The standard for a Rule 59 motion for a new trial is the same; the motion will be granted only if the verdict is contrary to the clear weight of the evidence. Jennings v. Jones, 587 F.3d 430, 436 (1st Cir. 2009).

III. ARGUMENT

A. Plaintiffs Are Only Required To Prove Liability and Damages On A Collective Basis In A Fair Labor Standards Act Collective Action[3].

[3] A collective action is appropriate when there are common issues of fact and common issues of law. Thus, when there is agreement between the parties about what employees did, or there is a reliable showing that employees

Defendant Tyson states in its motion that "[t]he jury's verdict is unsustainable because Plaintiffs failed to prove the *sine qua non* of an overtime claim on a class 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. . . . This is not a simply a damages issue; rather it is an evidentiary problem that prohibits a finding of class-wide liability." See Defendant's Motion (**Doc. 304-1**)(emphasis in the original) at p. 1.

Tyson's entire motion rests on the mistaken premise that there was no evidence of uncompensated work covering *every* member of the class. It is undisputed that *every* class member was uncompensated for the following activities which the jury found to be compensable work

- Donning and doffing "sanitary" gear and equipment for the entire liability period. Tr. 195:15-192:4, 194:16-19, 195:3-6, 201:6-10, 1619:16-1620:4, 1621:2-5

- Walking-transporting time from the locker room to the production line at the start of the shift and from the wash station to the production line at the end of the shift for the 2004-2007 portion of the liability period. *See Stipulation* 34 (Doc. 160-1). Tyson stipulated that it did not pay for such post-donning walking time until February 4, 2007, which was three years after the liability period began February 6, 2004 (*Stipulation* no. 34 at Doc. 160-1).

Tyson's officials admitted at trial that ***nothing*** was paid to ***any*** class member for activities related to the Company's "sanitary" and "standard" gear and equipment because such activities were not covered by the K-code compensation or the time study that such K-code compensation was based upon. **Trial Tr.** 191:15-192:4, 194:16-19, 195:3-6, 201:6-10, 1619:16-

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performed "substantially similar work," a court may properly and easily try plaintiffs' claims collectively. Id. at 793. See also, McLaughlin v. Ho Fat Seto, 850 F.2d 586, 589 (9th Cir.1988) (holding that collective treatment on non-exempt employees' overtime claims was appropriate because plaintiffs made prima facie showing of overtime violations and inaccurate recordkeeping that employer did not negate); Donovan v. Williams Oil Co., 717 F.2d 503, 505 (10th Cir.1983) (describing representative witness testimony as consistent across witnesses in affirming judgment in favor of plaintiffs).

1620:4, 1621:2-5. Such non-payment for activities related to Tyson's "sanitary" and "standard" equipment applied to *all* class members, those in both knife-related jobs and non-knife related jobs. Tyson also stipulated that it paid ***nothing*** to *any* class member for their walking-transporting time. The parties stipulated that such time was uncompensated for the first three years of the liability period (February 6, 2004 to February 4, 2007). **Stipulation** 34. It is undisputed that Tyson had a centralized, across-the-board ***policy*** of non-payment for activities related to its "sanitary" and "standard" equipment and employees' walking-transporting activities to and from the locker room. *See* **Stipulations 25, 35 and 39**; **Trial Tr.** 178-182, 210-211, 1619:16-1620:4, 1621:2-5.

That is enough to establish class-wide liability to every class member. The amount of such uncompensated time is not relevant to liability, but only to the issue of damages. For purposes of class-wide liability, the plaintiff proved to the satisfaction of the jury that Tyson had a **policy** of not paying for the activities at issue. Once that policy was established, the question of the *amount* of time that went uncompensated pursuant to that policy was relevant only to the damage stage of the Court's instructions and the jury's deliberations. The Supreme Court held in *Wal-Mart* that every issue in a case need not be common: "We quite agree that for the purposes of Rule 23(a)(2) 'even a single common issue will do." Wal-Mart, 131 S. Ct. 2541 (2011), 2011 US LEXIS 4567, *36. For purposes of liability, the jury only had to determine that Tyson failed to pay for compensable work, not prove the *amount* of time spent performing that work or the resulting economic loss that should be paid as damages. The Supreme Court and the Eighth Circuit have held that the damage phase of the trial is governed by the burden-shifting rules of Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) (superseded by statute on other grounds, and Donovan v. Tony and Susan Alamo Foundation, 722 F.2d 397, 403-404 (8th Cir. 1984).

"[I]t is the employer who is charged with the duty of record-keeping so that the amount of work performed and compensation earned may be calculated with precision. An employer failing to comply with this duty cannot complain if the record is deficient and the court must resort to a reasonable "approximation" in computing the amount of damages awarded." Donovan, 722 F.2d at 397, 403-404. When the defendant fails to keep records of the amount of time spent performing the contested work, the plaintiff has only a limited burden of producing an estimate or "approximation" of the amount of such time by "just and reasonable inference." *Id.* The defendant then bears the burden of proving the "more precise" amount of time that went uncompensated. *Id.* No objection to the jury instruction on this point was made at trial. **Trial Tr.** 1689. The jury's award of $2,892,378.70 was a reasonable approximation of the Plaintiffs' loss once Tyson declined to come forward with the "more precise" calculation that it argued for at trial.

A time study average was permissible once Tyson itself adopted a uniform compensation system and did not keep the required records of the amount of time spent performing the work at issue.

There is no "all or none" requirement for class-wide proof like that currently argued by the defendant. The purpose of a class action is to resolve the claims of all class members, not to guarantee that each of them will be found to have an economic loss from the common policy or practice at issue. Plaintiffs' evidence covered the compensated and uncompensated time of all class members and showed which class members had not already been paid sufficient K-Code time for the activities at issue. That fact does not make plaintiffs' evidence less than "class-wide." Plaintiffs' evidence addressed every class member in terms of whether each of them have "already been fully compensated for any overtime hours worked." Def. Brief. at 1 (**Doc. 304-1).**

Dr. Fox testified that she used Tyson's payroll records for each class member and "subtracted off the amount of K-code time that had already been paid to the employee that was shown in the pay database and came up with a total amount of uncompensated time worked." Tr. 1267:7-10. Her testimony demonstrated that no "formula" was used like the type rejected in Wal-Mart:

Q. So essentially it sounds as if you built a database that would tell us which days people worked and how much they got paid for those days?
A. Correct.
Q. All right. Now, did you do that on a person-by-person basis?
A. Yes.
Q. Did you do it on a day-by-day basis?
A. Yes.
Q. If a person was absent on a particular day, did they get -- did that day get included in their backpay?
A. No.
Q. Did you do it on a week-by-week basis in terms of which weeks they worked over 40 and which weeks they worked under 40 hours?
A. Yes.
Q. Let's say they came in on Monday and were absent the rest of the week, they just had an eight or nine-hour day, did they get any backpay for that week?

A. No. * * *
Q. So the K-code was the actual amount of time -- of pay that was paid each week to a particular person.

A. In the pay data, yes.
Q. And that came directly from Tyson?
A. Yes.
Q. You didn't have to do anything to that element, did you?
A. No.
Q. And the days that they actually were at work or absent, did you have to do anything other than that other than take Tyson's records at face value?
A. No.

* * *

Q. From Tyson's own records were you able to tell how much to subtract as already having been paid?
A. Yes.

Trial Tr. 1267:11-1269:17.

Tyson's cross-examination of Dr. Fox established that she gave the Company full credit for the K-code time it had already paid to each individual member of the class. **Trial Tr.**

1320:18-1321:7. Tyson is mistaken in arguing that the amount already compensated for the activities at issue varied from individual to individual. Tyson paid a flat 4 minutes per day to every class member prior to February 4, 2007. **Trial Tr.** 1270:18-1271:17. Tyson also applied a flat, across-the-board K-code payment since February 4, 2007 that varied not by individual, but only by broad job codes in a tight range that varied by no more than 4 to 8 minutes. See **Stipulations 33-39 (Doc. 160-1)**; **Trial Tr.** 1310:1-17, 1311:17-1312:1, 1316:10-1318:16, 1321:18-1322:7, 1330:16-1331:3. Because Tyson applied such an across-the-board average number of minutes to every class member in the two departments covered by the class, there was no individualized issue of fact of the type argued in the current motion. **Trial Tr.** 1321:8-17.

This is clearly a case where Defendant Tyson did not keep accurate time records to record the time that Plaintiffs spent performing the work activities that are in dispute in this case: donning, doffing and cleaning safety and sanitary equipment and clothing both before and after the production shift, walking after donning and walking before doffing, and donning, doffing and cleaning safety and sanitary equipment and clothing during unpaid meal breaks. The Supreme Court in Mt. Clemens Pottery addressed this exact situation and described the employees' burden of proof under the FLSA in such situations:

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [Section] 11(c) of the Act. . . . Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any Story Parchment Co. v. Paterson Parchment Co. 282 U.S. 555. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of damages.

Mt. Clemens Pottery, 328 U.S. at 688.

Damages in a Fair Labor Standards Act collective action are not set according to proof by a preponderance of the evidence as to every individual plaintiff, but in accordance with the amount the representational proof establishes for the class members as a matter of just and reasonable inference. Monroe v. FTS USA, LLC, 2011 WL 442050 at *8 (W.D. Tenn. February 7, 2011). See also, Baden-Winterwood, 729 F.Supp.2d at 989 (stating same). One of the purposes of trying several overtime pay claims in a collective action is to avoid the inefficiencies of conducting multiple individual trials on the same factual and legal issues. See Hoffmann-La Roche, 493 U.S. at 173; Prickett v. DeKalb County, 349 F.3d 1294, 1297 (11th Cir.2003).

B. Plaintiffs Have Presented Numerous Fact Witnesses, Expert Witnesses and Stipulations To Prove That Plaintiffs Have FLSA And Rule 23 Class-Wide Liability And Damages Against Defendant.

Plaintiffs have several other sources of proof available to them that negate the need for substantial testimony from the workers themselves. First, Plaintiffs have elicited direct testimony from, inter alia, Mrylon Kizer, Tyson's Complex Manager at the Storm Lake plant, and William Sager, the Complex HR Manager at the Storm Lake plant and their testimony proves that all of the class Plaintiffs in Slaughter and Fabrication (Cut and Retrim) departments (who comprise all of the class members in this case) have not been paid during the entire class period for donning and doffing all of their sanitary equipment and clothing at their unpaid meal breaks as well as for all walking time which occurs after the first principal activity.

As the Complex Manager, Mrylon Kizer has knowledge that pertains to call class members since he is familiar with all of the job departments, how all employees are paid and generally what PPE they are required to wear for their job. The fact that Plaintiffs proved their case largely using testimony from management witnesses as opposed to their own plaintiffs is absolutely irrelevant to whether they sustained their burden of proof.

In addition to the factual stipulations agreed to by the parties, Tyson's management witnesses testified to the following facts which prove Plaintiffs' case on a collective basis:

1. Kill, Cut and Re-Trim are the three main production floors totaling approximately 1300 hourly employees at the present time. The Cut Floor has two production shifts totaling approximately 440-460 hourly team members. The Re-trim department has two production shifts totaling approximately 440-450 hourly team members. The Kill Floor has two production shifts totaling approximately 380-400 hourly team members. **Trial Transcript at 179 (September 13, 2011, Direct of William Sager, II), lines 1-11. Stipulation 14 (Doc. 160-1, page 3).**

2. Fabrication and slaughter employees are paid by "gang time." Gang time is the amount of time that production workers are performing line work. It starts when the first piece of product passes their work station and it ends when the last piece of product passes their work station. **Trial Transcript at 178 (September 13, 2011, Direct of William Sager, II), lines 2-6.**

3. All production Employees are required to do certain work activities before they start getting paid on gang time each day. Before they start getting paid on gang time, employees are required to put on the equipment that is required to do their job. That equipment is partially stored by the employee in their locker and the rest is laundered by the company and hung in their locker between shifts. **Trial Transcript at 57-58 (September 12, 2011, Direct of John Sebben[4]); Trial Transcript at 427-428 (September 12, 2011, Direct of Danny Hacker[5]).**

4. All production employees must have all of their required safety and sanitary items on before they start their work on gang time and they can be disciplined if they are not fully dressed when gang time begins. **Trial Transcript at 178 (September 13, 2011, Direct of William Sager, II), lines 7-18. Trial Transcript at 718 (September 14, 2011, Direct of Mrylon Kizer).**

5. All fabrication employees who handle exposed edible product must wear a frock to reduce cross-contamination. Trial Transcript at 725 (September 14, 2011, Direct of Mrylon Kizer). Tyson's written policy is that employees cannot wear frocks, gloves, aprons or other "outer garments" into the rest room, into the cafeteria or outside the plant. **Trial Transcript at 219 (September 13, 2011, Direct of William Sager, II), lines 5-25).**

6. Frocks are not permitted in rest rooms, the cafeteria, or outside the plant because of the risk of contaminating the product. **Trial Transcript at 219 (September 13, 2011, Direct of William Sager, II), lines 5-25; Trial Transcript at 763-764 (September 14, 2011, Direct of**

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[4] Sebben testified that he supervised approximately 200 positions on Kill Floor A shift. **Transcript at 43 (September 12, 2011, Direct of John Sebben).** Sebben also testified that the A shift and B shift "mirror each other", so this Court should consider Sebben's testimony as pertinent to all 400 positions on A and B kill floor. Id.

[5] Hacker testified that he was very knowledgeable of both the cut and retrim floors because he was at different times the General Supervisor in Retrim and the General Supervisor of the Cut Floor. **Transcript at 410. (September 12, 2011, Direct of Danny Hacker).** Accordingly, Hacker's testimony effectively covers nearly 900 of the 1300 hour production positions at the Storm Lake plant.

Mrylon Kizer). The frock is worn on top of mesh protective equipment items, like the mesh apron. **Trial Transcript at 193-94 (September 13, 2011, Direct of William Sager, II).**

7. All employees who work in areas with exposed edible product must wear a hairnet to protect food products from foreign object contamination. **Trial Transcript at 80-81 (September 12, 2011, Direct of John Sebben).**

8. All employees are not permitted to take frocks, hair nets, beard nets, gloves, aprons, sleeves out of the production area and into other areas of the plant including the rest room or cafeteria to prevent product contamination. **Trial Transcript at 212-213 (September 13, 2011, Direct of William Sager, II). Trial Transcript at 769-770 (September 14, 2011, Direct of Mrylon Kizer).**

9. Slaughter floor employees are required to wear company issued and laundered white shirt and pants. The laundered shirt and pants are placed in the employee's locker between shifts. **Trial Transcript at 64-65 (September 12, 2011, Direct of John Sebben).**

10. One purpose of the company supplying, laundering and issuing the white shirt and pants to the slaughter employees is to protect meat products from contamination. **Trial Transcript at 80-81 (September 12, 2011, Direct of John Sebben).**

11. At the Storm Lake plant, during the entirety of the class period in the case, Defendant Tyson did not compensate employees for donning, doffing or washing "outer garments" such as frocks, hair nets, plastic sleeves, gloves and aprons. **Trial Transcript at 191 (September 13, 2011, Direct of William Sager, II).**

12. The time spent on donning, doffing and washing "sanitary" and "standard" clothing and equipment was not included in the company's internal time study that was the basis for the K-Code payments and so those items were not compensated as part of the K-Code payments. **Trial Transcript at 191, 194-195, and 201 (Testimony of James Lemkuhl).**

13. Employees on the processing floor are required to wash, the arm guard, knives, scabbards, steel, mesh apron or belly guard at the end of shift. Other mesh items must be washed if they are they are not covered by a frock and do not get dirty. **Trial Transcript at 418-420 (September 14, 2011, Direct of Danny Hacker).**

14. Approximately 70% of the Tyson Storm Lake hourly workers in production jobs are considered "knife-related" employees. **Trial Transcript at 325 (September 13, 2011, Re-Direct of William Sager, II), lines 6-10.** Daniel Lindgren, who is the general supervisor for the cut floor, agreed with the 70% knife-user estimate as it pertained to the employees he supervises. **Trial Transcript at 553 (September 14, 2011, Direct of Daniel Lindgren), lines 3-7.**

Taken as a whole, the direct testimony of Tyson management employees provide ample evidence of all core aspects of both FLSA collective action certification (that the Plaintiffs are "similarly situated to each other") and Rule 23 class certification: numerosity, commonality and

typicality. William Sager's testimony alone provides more than sufficient evidence to withstand Defendant Tyson's renewed motion to decertify Plaintiffs FLSA and Rule 23 classes because his testimony establishes that: (1) Tyson has never paid any of the Plaintiffs at any time within the FLSA or Rule 23 class period to don, doff or wash their "non-unique" gear and equipment; and (2) Tyson has never paid any of the Plaintiffs during any time within the FLSA or Rule 23 class period to don, doff or wash any of their equipment during your breaks. These facts are undisputed by Tyson.[6]

Second, the parties have agreed to several fact stipulations which provide proof of several of the factual elements of Plaintiffs' Fair Labor Standards Act claims. These stipulations of fact are expansive and speak in broad terms to the common evidence of required safety and sanitary equipment worn by all of the employees involved in this lawsuit, as well as the donning, doffing, cleaning and walking work activities engaged in by all of the employees at issue in this lawsuit. These factual stipulations which are found in the Pre-Trial Order (**Doc. 160-1**)(pages 2-7) and Plaintiffs refer the Court to the following **Stipulations** specifically: **9, 11, 14, 16-25, 30-39 and 45**, which stipulations begin with the statement "[t]he parties agree that the following facts are true and undisputed."

Possibly the most important of these Stipulations is **Stipulation 34** which reads:

> 34. On February 4, 2007, the company added its calculation of the pre- and post-shift walking time at the Storm Lake facility to the amount of time employees in various job positions were determined in 1998 to spend performing the various pre- and post- shift activities.

Thus, **Stipulation 34** is a clear admission that Defendant Tyson did not pay anything for walking time from the beginning of the class period until February 4, 2007. In total, these factual

[6] Thus, in order for Tyson to be correct that Plaintiffs cannot establish as a matter of law that there is any class-wide liability are any class-wide damages common to call FLSA or Rule 23 class members (and for this Court in turn to determine that Plaintiffs' classes must be decertified), this Court would first have to determine as a matter of law both that: (1) non-unique gear and equipment is not compensable as a matter of law; and (2) all time Plaintiffs spend performing donning and doffing activities during their meal breaks are non-compensable as a matter of law. Defendant Tyson has not moved for Rule 50 relief on the former issue.

stipulations alone provide the same factual evidence that this Court had relied upon in granting Plaintiffs' class certification and denying Defendant's prior motion to decertify the class.

Third, Plaintiffs have presented the testimony of Dr. Kenneth Mericle[7], who testified that he and two assistants spent two days (and two shifts each day) inside Tyson's Storm Lake plant filming, taking stopwatch times, and analyzing the work activities that are at issue in this case. Further, Dr. Mericle testified that he reviewed numerous hours of the film of these work activities to arrive at reasonable estimates of time that it takes for the class members to perform the work activities in dispute in this matter. Dr. Mericle testified to the following:

1. That the total time for the donning, doffing, walking and cleaning activities he studied was 18.00 minutes (using hundredths of a minute calculations rather than seconds) for employees in processing. Trial Transcript at 916-17 (September 19, 2011, Direct of Ken Mericle), lines 1-4.

2. That the total time for the donning, doffing, walking and cleaning activities he studied was 21.25 minutes (using hundredths of a minute calculations rather than seconds) for slaughter. Trial Transcript at 917-918, (September 19, 2011, Direct of Ken Mericle).

3. That the total time for the donning, doffing, walking and cleaning activities he studied, if he eliminated 30 "outlier" samples was 20.83 minutes for slaughter and 16.73 minutes for fabrication. Trial Transcript at 1253-1254, (September 19, 2011, Re-Direct of Ken Mericle).

In Perez v. Mountaire Farms, Inc., 610 F.Supp. 2d 499 (D. Md. 2010), reversed in part on other grounds, 650 F.3d 350 (4th Cir. 2011), the court cited a videotaped time study, identical to Dr. Mericle's study here, as sufficient evidence to prove that the employer violated the Fair Labor Standards Act. The Perez court held that determining amount of time spent by poultry processing plant employees in donning and doffing personal protective equipment (PPE) during

[7] Defendant Tyson spends three pages pointing out various perceived flaws with the credibility of Dr. Mericle's time study. These perceived flaws have little if anything to do with the question of whether this matter should continue to be certified as a class action under the FLSA or Rule 23. Instead, these issues all have to due with the credibility of his time determinations, which is a question for the jury as the finder of fact. The stipulations of fact agreed to by the parties and the numerous admissions made by Tyson's management witnesses as to the common issues of fact and law pertinent to all class members far outweighs any minor flaws in Dr. Mericle's time study when evaluated for purposes of the issue that Tyson seeks judgment as a matter of law. Plaintiffs' position is that even if this Court struck Dr. Mericle's testimony in its entirety, there would still be absolutely no grounds for the Court to decertify either the FLSA or Rule 23 classes because of the overwhelming testimony of Tyson's management witnesses that supports class certification.

the work day, for purposes of compensation under FLSA, videotape study of random employees carrying out donning/doffing activities, including time spent on in-between activities of walking, sanitizing, and waiting in line, constituted sufficient evidence to prove an FLSA violation, (when adjusted downward to allow for loitering) because the study reflected continuous work day, used truly random sampling, and covered all shifts and all departments. See, Perez, 610 F.Supp.2d at 523-34. The court made a legal determination that the total time that all employees spent donning and doffing was 17 minutes based on the videotaped time study. Id. The court did not reference employee testimony at all in making this conclusion. Id.

Dr. Mericle's videotaped time study is either very similar or identical to the time-study described in the Perez case. Accordingly, as the district court did in Perez, this Court could determine that Plaintiffs have met their burden of proof on their Fair Labor Standards Act claims based on Dr. Mericle's time-study by itself.

Defendant Tyson's argument in Section III of their Brief, contending that Plaintiffs have presented no evidence of damages for the FLSA opt-in class, is simply false. Dr. Mericle's time study conclusions are estimates of damages from a lost compensable time standpoint. Pursuant to the Mt. Clemens Pottery line of cases, these time study conclusions provide a "reasonable inference" as to the damages suffered by the FLSA opt-in Plaintiffs in this matter. As explained below, it is clear that the jury used these damage estimates in reaching their verdict.

Fourth, Plaintiffs presented Rule 1006 summary evidence from Liesl Fox, who made monetary damages calculations based upon both the payroll data supplied by Defendant Tyson and the time estimates made by Dr. Mericle in his trial testimony. Dr Fox testified to the following:

1. She used the payroll detail data supplied by Defendant Tyson to add up the total number of hours that the data showed that they worked during the week, whether at a regular rate of pay or at the overtime rate of pay. Then she used that to determine numbers of estimated unpaid activity time and then subtracted from that the amount of compensated K code time in the

data. **Trial Transcript at 1265, lines 3-20; 1266, line 14, through 1267, line 10. (September 21, 2011, Direct of Liesl Fox).**

2. She made a calculation of $6,686,082.36 for the Iowa state law class based on her review of the payroll data and the use or the original time study numbers from Dr. Mericle's original report of 18.00 minutes per day in processing and 21.25 minutes in slaughter. **Trial Transcript at 1277, lines 21-25; and 1270, lines 4-8 (September 21, 2011, Direct of Liesl Fox).**

3. The $6.6 million calculation for the Iowa state law class was the result of individual by individual employee-by-employee calculations. **Trial Transcript at 1277, lines 21-25; and 1270, lines 4-8 (September 21, 2011, Direct of Liesl Fox).** She took the data for each person and looked at it for each person week by week, how many hours they worked, how much the unpaid activities would be. The $6.6 million calculation represented the amount of damages for the estimated unpaid activities after subtracting out what has already been paid in K code time for employees who have worked in either processing or slaughter during the period from . **Trial Transcript at 1267, lines 2-10 (September 21, 2011, Direct of Liesl Fox).**

4. Dr. Fox further testified on re-direct that she could make new damage calculations based on Dr. Mericle's revised time numbers of 16.73 minutes per day for processing and 20.83 minutes per day for slaughter that excluded 30 outliers, but it would take her computer 10 minutes to compute it. **Trial Transcript at 1369, line 19 through 1370, line 7 (September 21, 2011, Re-Direct of Liesl Fox).** Dr. Fox later testified that the new damage calculations using the 16.73 minutes per day for processing and 20.83 minutes per day for slaughter were $6,198,191.67 for the Iowa state class and $1,490,652.35 for the FLSA class. **Trial Transcript at 1373, lines 19-22 (September 21, 2011 Re-Direct of Liesl Fox).**

Thus, although a reasonable jury could make a calculation of approximate damages from Dr. Mericle's time estimates alone, the above summary testimony of Dr. Fox further assisted the jury in making damage calculations for the respective entire FLSA and Rule 23 classes.

Lastly, although Plaintiffs may have only presented testimony from four plaintiffs, Jesus Montes, Nicolas Lovan, Jesus Baldaras, and Donald Brown, those four plaintiffs, all of whom worked in kill or fabrication, testified in a manner which established that their claims were common to each other and the rest of the class members. The following testimony from Montes, Lovan, Baldaras and Brown established the following common points:

1. They each testified that they wear the same sanitary items: either a frock or white shirt and pants, hard hat, earplugs, hairnet and safety glasses. **Trial Transcript at 797 (September 14, 2011, Direct of Jesus Montes); (Trial Transcript at 633 (September 14, 2011, Direct of Jesus Baldaras); and Trial Transcript at 672 (September 14, 2011, Direct of Donald Brown);**

2. They each testified that they don some of their equipment at their locker pre-shift after removing their laundry bag and PPE from their locker. **Trial Transcript at 794-795 (September 14, 2011, Direct of Jesus Montes); (Trial Transcript at 638 (September 14, 2011, Direct of Jesus Baldaras); and Trial Transcript at 679-680 (September 14, 2011, Direct of Donald Brown);**

3. They each testified that they don some of their equipment at their workstation pre-shift after sanitizing it. **Trial Transcript at 798 (September 14, 2011, Direct of Jesus Montes); (Trial Transcript at 640-641 (September 14, 2011, Direct of Jesus Baldaras); and Trial Transcript at 683 (September 14, 2011, Direct of Donald Brown).;**

4. Montes, Lovan, and Baldaras all testified that they dip some of their equipment into a sanitizer pre-shift. **Trial Transcript at 798 (September 14, 2011, Direct of Jesus Montes); (Trial Transcript at 639-640 (September 14, 2011, Direct of Jesus Baldaras);**

5. Montes, Lovan, Baldaras and Brown all testified that they had to wash their metal, plastic and rubber items of equipment at the end of the shift. **Trial Transcript at 809 (September 15, 2011, Direct of Jesus Montes); Trial Transcript at 592 (September 14, 2011, Direct of Nicolas Lovan); Trial Transcript at 645-646 (September 14, 2011, Direct of Jesus Baldaras); and Trial Transcript at 694 (September 14, 2011, Direct of Donald Brown);**

6. Montes, Lovan, Baldaras and Brown all testified that they had to doff all of their protective equipment and sanitary equipment at the end of the shift. They also testified that they put their knives (if they use a knife), plastic and metal and items in their locker and they put their frocks, white shirts and pants and Polar gloves and sleeves into a laundry bag which they placed into a hamper. **Trial Transcript at 809 (September 15, 2011, Direct of Jesus Montes); Trial Transcript at 594 (September 14, 2011, Direct of Nicolas Lovan); Trial Transcript at 647 (September 14, 2011, Direct of Jesus Baldaras); and Trial Transcript at 698 (September 14, 2011, Direct of Donald Brown);**

Summarily, during the entire trial, Plaintiffs have presented several elements of evidence establishing well beyond a preponderance of evidence, that Defendant Tyson is liable to Plaintiffs for violations of federal and state law, as well as establishing the existence and specifics of damages which Defendant Tyson owes to the Plaintiffs under federal and state law. Those elements of evidence are: (1) Defendant's admissions made by their management personnel; (2) the comprehensive stipulations of fact that the parties agreed to and which are part of the Pre-Trial Order (**Doc. 160-1**) in this case; (3) the expert testimony of Dr. Kenneth Mericle; (4) the Rule 1006 summary testimony of Plaintiffs' witness, Liesl Fox; and (5) the testimony of four Plaintiffs, Jesus Montes, Nicolas Lovan, Jesus Baldaras and Donald Brown. Accordingly,

Plaintiffs have provided sufficient evidence that would amply support the jury's verdict in this case, both as an FLSA collective action and a Rule 23 class action.

C. The Case Law Cited By Tyson To Support Decertification Is Scant And Has No Applicability To This Case

The case law that Tyson cites in support of the proposition that this Court should decertify the Rule 23 and FLSA classes is not persuasive. Tyson's primary case is an opinion from a Pennsylvania district court that appears to be entirely antithetical to the collective action provisions of Section 216(b) of the FLSA itself, as well as 60 plus years of Supreme Court law stemming from the Mount Clemens Pottery case. This case, Lugo v. Farmers Pride Inc., 737 F.Supp.2d 291 (E.D. Pa. 2010)[8], attempts to effectively invalidate the collective action provisions of 29 U.S.C. § 216(b) which has for decades permitted employees to file and litigate FLSA violations on a collective basis. The quote that Tyson identifies from Lugo on page 14 of its Brief borders on ludicrous. The Lugo court actually attempted to justify its decision to decertify by stating at 737 F.Supp.2d at 703:

> 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.

The Lugo court has apparently overlooked the fact that Congress felt otherwise in legislating 29 U.S.C. § 216(b) of the FLSA which expressly permits collective actions and requires each employee to "opt-in" to the lawsuit so that employees are not corralled into a lawsuit that they do not want to be bound by. This Court should not follow this illogical decision and adopt Lugo as persuasive authority to decertify this action.

[8] It should also be noted that Lugo is not a case that decertified a class during or at the conclusion of a trial. The Lugo court merely held a two-day evidentiary hearing during the pre-trial discovery phase of the case on the defendant's motion to decertify. See Lugo, at pages 10-12.

Tyson now argues (at pages 15-16 of its Brief) that another court agreed with Lugo, specifically, Prise v. Alderwoods Group, Inc., 2011 WL 4101145 (W.D. Sept. 9, 2011). While Prise does cite Lugo, the Prise case has nothing to do with the legal issues the jury decided here. Prise involved funeral home employees who quarreled with the meal break policy (no longer an issues here since the jury ruled for Tyson on that issue) and with a purported policy of encouraging employees to perform off-site community work without compensating employees for that work. See, Prise, at *2. The court determined that since the question of whether the employees did these community service projects voluntarily or at the behest of the employer was individual by nature, the court could not certify a class because it involved an individual inquiry on that issue.

Here, there was nothing individual about whether Plaintiffs had to don, doff and clean their equipment pre-shift and post-shift. The testimony and stipulations established beyond doubt that these activities were required by Tyson, occurred on premises and were supervised by Tyson's supervisors and Quality Assurance people to make sure Plaintiffs had equipment on when they worked and that the equipment was clean. Thus, Prise, only a persuasive authority in any event, has no applicability whatsoever to this case.

D. As This Court Previously Decided The Walmart Stores Vs. Dukes Case Does Not Warrant Decertification Of The Current Action Because Plaintiffs Have Established A Common Means Of Proof That Does Not Require Individualized Damages Or "Trial By Formula"

Tyson also asserts that this Court should decertify Plaintiffs' Rule 23 class on the basis of Wal-Mart Stores, Inc., v. Dukes, 564 U.S. ____, 131 S.Ct. 2541 (June 20, 2011). Tyson claims (at pages 16-18 of their Brief) that the Dukes Court rejected a "trial by formula" approach and that Plaintiffs have taken a "trial by formula" approach to the evidence in this case. Plaintiffs emphatically disagree.

Contrary to Tyson's argument, the evidence before the jury did not involve a back pay "formula." Dr. Fox testified that she used the defendant's payroll records to determine the amount of K-code compensation paid to each class member on a day-by-day and individual-by-individual basis. **Trial Tr.** 1267-1271, 1310-1311, 1316-1318, 1321-1322, 1330-1331. Tyson itself grouped its employees into an across-the-board K-code payment based on a time study "average" rather than maintaining records of the actual time each employee has spent on the work at issue. See Stipulations 33-39 (**Doc. 160-1**) The Company stipulated that it has not kept records of plaintiffs' actual time and instead has only paid what it determined for itself to be the "average" time necessary to perform the contested activities. Doc. 160-1. Stipulation no. 29 established that "[a]lthough the time clocks record the time that hourly workers punch the clock to the minute, Tyson does not use such recorded time to determine an employee's compensable hours or pay. The time clocks are generally used to record attendance." Doc. 160-1. Tyson determined that such averages were a reasonable substitute for records of actual time required to be kept by the Department of Labor's regulations and the permanent injunction in Reich v. IBP, Inc. Having failed to keep the requisite records of the actual time spent by each class member, the plaintiffs were forced to use time study averages calculated pursuant to widely-accepted principles of industrial engineering.

Courts have held that back pay can reasonably be calculated pursuant to such time study averages whenever the employer fails to keep records of the actual time that employees spend performing the work at issue.. Helmert v. Butterball, LLC, 2011 U.S. Dist. LEXIS 82994, **26-30, 35 (E. D. Ark. July 27, 2011); Perez v. Mountaire Farms, 650 F.3d 350, 372 (4th Cir. 2011); Jordan v. IBP, Inc., 2004 U.S. Dist. LEXIS 30490, 2004 WL 5621927, (M.D. Tenn. Oct. 12, 2004). As recently held by another district court in the Eighth Circuit:

> In a case such as this one, it is impossible to determine the actual time that each plaintiff spent in compensable donning-and-doffing-related activities over a two

> or three year period when the employer failed to keep a record of that time. Cf. Alvarez, 339 F.3d at 914 (upholding the district court's compensation measure based on "reasonable" time, "thereby avoiding countless individual plaintiff-specific quagmires while directing the parties to individualize the damage measure to the extent possible nevertheless"). **More often than not, such awards may be based on a reasonable estimate of the time that employees were engaged in the compensable activities.**

Helmert, 2011 U.S. Dist. LEXIS 82994 at **26-30 (emphasis added).9

The Eighth Circuit has similarly held that approximations of the time at issue will carry the plaintiffs' burden of proof when the defendant has failed to maintain the requisite records of actual time spent on the work at issue.

> The solution to the problem presented "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes" is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying the compensation as contemplated by the Fair Labor Standards Act. In such a situation **we hold that an employee has carried out his burden** if he 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. The

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[9] Tyson is required to keep records of the actual time employees spent performing the same donning, doffing, walking and sanitizing activities at issue in this case. *Helmert v. Butterball, LLC*, 2011 U.S. Dist. LEXIS 82994, **28-30 (E. D. Ark. July 27, 2011); *Jordan v. IBP, Inc.*, 2004 U.S. Dist. LEXIS 30490, 2004 WL 5621927, at *13 (M.D. Tenn. Oct. 12, 2004); *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1248 (D. Kan. 2007). The FLSA requires that employees be compensated for "**all time** during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*,328 U.S. 680, 690-691 (1946) (emphasis added); *see also IBP v. Alvarez*, 546 U.S. at 25; 29 C.F.R. 785.7; 29 C.F.R. 790.6(a). This rule is based on the Congressional intent that employees should be paid for "all time" that they are subject to the direction or control of the employer. *See Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). The Supreme Court has recently held that the Portal Act did not change the holdings in these cases that compensable time includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" *IBP v. Alvarez* 546 U.S. at 25) (quoting *Mt. Clemens*, 328 U.S. at 690-691). Tyson has these same managerial powers. Although, actual recorded time rather than reasonable or average times is required for purposes of establishing compliance with the FLSA, back pay must necessarily be based on reconstructed, average-time calculations in circumstances where the employer has failed to maintain the requisite records of the actual time spent.

> burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Donovan v. Tony and Susan Alamo Foundation, 722 F.2d 397, 404 (8th Cir. 1984) (emphasis added).

Tyson bears the burden of proof on the issue of how much compensable time went uncompensated. Dole v. Tony and Susan Alamo Foundation, 915 F.2d 349, 351 (8th Cir. 1990) ("once the plaintiff has produced evidence of uncompensated labor '[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.'") (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946)); Donovan, 722 F.2d at 397, 403-404 ("[I]t is the employer who is charged with the duty of record-keeping so that the amount of work performed and compensation earned may be calculated with precision. An employer failing to comply with this duty cannot complain if the record is deficient and the court must resort to a reasonable approximation in computing the amount of damages awarded."); Herman v. Kramer, 1998 U.S. App. LEXIS 23329, *7 (1998), 163 F.3d 602 (8th Cir. 1998) ("When an employer has failed to keep proper records, courts should not hesitate to award damages based on the 'just and reasonable inference' from the evidence presented.") (quoting Mt. Clemens Pottery Co., 328 U.S. at 687); Reich v. Stewart, 121 F.3d 400, 406 (8th Cir. 1997) ("When an employer has failed to keep proper records, courts should not hesitate to award damages based on the 'just and reasonable inference' from the evidence presented", quoting Martin v. Tony & Susan Alamo Found., 952 F.2d 1050, 1052 (8th Cir.), cert. denied, 505 U.S. 1204 (1992) and citing Mt. Clemens Pottery Co., 328 U.S. at 687).

The Fourth Circuit has recently approved the use of time study averages as a basis for calculating backpay in a similar donning and doffing case. Perez, 650 F.3d at 370-372 ("Thus, a calculation based on the summation of mean times provides a more accurate representation of the amount of time that employees working at the plant actually spend donning and doffing. We therefore conclude that the district court did not err in relying on the mean times provided by Dr. Radwin, and we now proceed to calculate the compensable time based on the results of Dr. Radwin's study."). The Court also approved the type of subtraction of the average number of minutes spent on breaks that were determined to be non-compensable similar to that here.

> Based on the district court's rationale, after adjusting for "outliers," the total compensable time for donning and doffing was seventeen minutes. From this Period of seventeen minutes, we must exclude the amount of time required for mealtime donning and doffing that the employees are precluded from recovering by our decision in Sepulveda. According to Dr. Radwin's study, the mean time for mealtime donning and doffing is 6.796 minutes. Therefore, the total time spent donning and doffing at the beginning and end of the workday equals 10.204 minutes.

Perez, 650 F.3d at 372 (footnote omitted).

The jury obviously followed a similar methodology in this case by subtracting the number of minutes that Drs. Mericle and Fox attributed to the break periods that the jury found non-compensable — 3.36 minutes for Kill and 3.10 minutes for Cut and Retrim. **See Plaintiffs' Trial Exhibit 242 (Tables To Dr. Mericle's Expert Report).** The jury's verdict of $2,892,378 is a "just and reasonable inference" of the type permitted by the Supreme Court, and the Eighth Circuit when the defendant failed to keep its records and failed to come forward with the "more precise" evidence required by Mt. Clemons Pottery and the Court's decision in the Alaimo Foundation cases cited above.

The use of an "average" is not the type of trial-by-formula addressed in Wal-Mart which sought to prove whether each individual female class member had been denied a promotion because of her sex. Here, the use of an "average" amount of time comes from Tyson itself which

has used its time-study averages as the basis for its K-Code payments for the activities at issue. Plaintiffs' experts have merely shown that Tyson's "averages" were incorrectly calculated.10 The foregoing evidence and stipulations establish a "common injury" as that term is used in Wal-Mart. The common injury is not being paid overtime for the work activities at issue in this case. Wal-Mart does not require more than that. The Court held that plaintiffs must show more than just a common statute under which they are bringing their claims, but it did not create an "entitlement to individualized determinations of each class member's eligibility for backpay" as argued by Tyson. Wal-Mart considered only the proof necessary to establish that a given female class member was an individual victim of sex discrimination based on her supervisor's exercise of subjective discretion. No similar individualized determination is necessary in a wage-and-hour case. The calculation of backpay in such a case is much simpler and direct than proof of subjective sex discrimination against each individual class member. Plaintiffs adopt their prior briefs in opposition to decertification under Wal-Mart and the Court's prior Order denying such decertification.

Tyson also attempts to mislead this Court by claiming that the Eighth Circuit in a recent decision, Bennett v. Nucor Corp., 656 F.3d 802, (8th Cir. 2011), agreed with Tyson's ridiculous argument that miniscule differences in job classifications and job duties destroys commonality in a class action in a failure to pay overtime case. Tyson takes great pains to mention twice (at pages 1 and 7 of their Brief) that someone from Plaintiffs' trial team was also counsel in Bennett (as though that could possibly have any real relevance); but Tyson avoids mention what is truly

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[10] Defendant's expert, Dr. Adams, has used the same "averaging" methodology which showed that Tyson's in-house averages were *less* than the average amount of time that the activities at issue actually took to perform. Tyson is also mistaken in arguing that Dr. Fox's backpay was based solely on Dr. Mericle's time study. She calculated backpay on the basis of Tyson's own 20 to 23 minute average adopted in June 2010, as well as the defendant's expert's time study. Dr. Mericle's time study was only a third alternative and was actually less than the 20-23 minutes that Tyson began paying for the contested activities in June 2010.

relevant here, which is that the Bennett case is a Title VII race discrimination hiring and promotion case that has absolutely nothing to do with failure to pay overtime wages. See Bennett, 656 F.2d at 808. The Eighth Circuit concluded in Bennett that the district court was correct in determining that the class of employees did not share common issues because departments at Nucor utilized different hiring and promotion criteria from each other. Id. at 815-16.[11]

Here, in stark contrast to Bennett, there are no legal issues that are different from job classification to job classification or department to department. All class members share the same claims and same legal issues and are likewise subject to the exact same defenses interposed by Defendant Tyson. There are no "subjective" components to Plaintiffs' overtime claims that could possibly vary from job to job. The trial testimony and factual stipulations, as set forth above, establish that Plaintiffs' claims are legally the same regardless of job and department.

E. The Jury's Verdict Satisfies The Eighth Circuit's Standards For Determining Damages

The jury's verdict was based on the calculations that the plaintiffs' expert, Dr. Fox, introduced into evidence and the failure of Tyson to make any effort to come forward with the "more precise" calculation that was required by the Eighth Circuit's decisions quoted in the prior section. "[I]t is the employer who is charged with the duty of record-keeping so that the amount of work performed and compensation earned may be calculated with precision. An employer failing to comply with this duty cannot complain if the record is deficient and the court must

[11] Tyson also makes a similar very confusing argument related to the Supreme Court's recent one-paragraph opinion in Chinese Daily News, Inc. v. Wang, Lynn, et al., ____ U.S. ____, 2011 WL 4529967 (October 3, 2011) which reads in its entirety: "The petition for writ of certiorari is granted. The judgment is vacated, and the case is remanded back to the Ninth Circuit for further consideration in light of Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ____ (2011)." Nowhere in this one paragraph statement does the Supreme Court say what Tyson claims it says; that the Supreme Court has ruled that Dukes applies to wage and hour class action. The Ninth Circuit's decision in Wang v. Chinese Daily News, 623 F.3d 743 (9th Cir. 2010)[11] came out before the Supreme Court's Dukes decision. We will need to wait and see what the Ninth Circuit does on remand before either side can argue that Dukes has any applicability whatsoever in the wage and hour arena. The Ninth Circuit may find that it does or it may find that it does not, but Tyson cannot argue that the Supreme Court's remand means that it definitely does.

resort to a reasonable approximation in computing the amount of damages awarded." Donovan, 722 F.2d at 397, 403-404.

The jury's award of $2,892,378.70 was a reasonable approximation of the Plaintiffs' loss once Tyson declined to come forward with the "more precise" calculation that it argued for at trial. Tyson argued to the jury that the plaintiffs' back pay could not be "apportioned" on the basis of a lower number of minutes because that might "push" some class members below the 40 hour threshold for overtime pay. It failed, however, to offer any proof of its own about the amount of back pay that would result from such a lower number of minutes. It also failed to address the evidence from its own officials that class members averaged working 48 hours per week, which meant that a lower number of minutes would not, in fact, "push" class members below such 40 hour threshold. **Trial Tr.** 209:10-21, 734-735. Dr. Fox only testified that the damages she calculated could not be apportioned pro rata by a lower number of minutes if such lower minutes would push class members below the 40 hour threshold for overtime. The Defendant never came forward with any evidence that this would actually occur for any set number of lower minutes. Nor did it ever show what amount back pay would result from such a lower number of minutes as required by the Supreme Court in Mt. Clemons Pottery and the Eighth Circuit in Donovan and similar decisions. Faced with such a failure of proof by Tyson, the jury was entitled to use the 50% reduction to plaintiffs' calculations that it adopted to account for the points Tyson was arguing against such calculations. Indeed, the jury was more than generous in awarding Tyson a 50% reduction once it failed to come forward with the "more precise" back pay calculation required by the Eighth Circuit's case law. The jury could have easily awarded the full amount of plaintiffs' back pay calculation adjusted for outliers and merely subtracted the amount attributable to the meal period activities it found to be non-compensable. That would have been $5,784,757, rather than half that amount that is contained in the jury's

verdict. "A verdict may not be considered to be excessive unless there has been a 'plain injustice' or a 'monstrous' or 'shocking" result.'" School District No. 11 v. Sverdrup & Parcel and Associates, Inc., 797 F.2d 651, 654 (8th Cir. 1986).

Having failed to carry its burden of proving a "more precise" calculation than the $2,892,378.70 awarded by the jury, Tyson does not have standing to calculate the means which the jury chose to overcome that failure of proof. "An employer failing to comply with this duty cannot complain if the record is deficient and the court must resort to a reasonable approximation in computing the amount of damages awarded." Donovan, 722 F.2d at 397, 403-404. The jury's damage calculation was as follows:

$6,198.191	Fox Backpay adjusted for outliers
Minus $ 413,434	Amount attributable to meal period claim (Tr. 1739)
$5,784,757	after meal period eliminated
x .50	50% reduction for Tyson's arguments
$2,892,378	Amount awarded by jury

This was a legitimate and reasonable way for the jury to resolve Tyson's failure to carry its burden of producing a "more precise" amount of back pay based on its criticisms of plaintiffs' calculations at trial.

The jury is not required to return a verdict precisely equivalent to an expert's calculation. Children's Broadcasting Corp. v. The Walt Disney Company, 357 F.3d 860, 866 (8th Cir. 2004)("That the jury did not return a verdict precisely equivalent to the amounts provided by Dr. Putnam's testimony is immaterial.") (citing Sch. Dist. No. 11 v. Sverdrup & Parcel and Assoc., 797 F.2d 651, 654 (8th Cir. 1986)). A jury is "entitled to sort through the evidence presented at trial and to arrive at what it considered to be the damages caused by the conduct it found to be wrongful. In short, there was evidence from which the jury could approximate the amount of damages sustained." Children's Broadcasting Corp., 357 F.3d at 866 (citing Children's, 245 F.3d

at 1017); see also School District No. 11 v. Sverdrup & Parcel and Associates, Inc., 797 F.2d 651, 654 (8th Cir. 1986) ("The law does not require mathematical precision in proof of a loss; proof to a reasonable certainty is sufficient. The difficulty of proving a precise amount will not preclude recovery as long as there is a reasonable basis to approximate the amount.") (citing LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342, 349-351 (8th Cir. 1981), cert. denied, 455 U.S. 1019, 72 L. Ed. 2d 138, 102 S. Ct. 1716 and Pillsbury Co. v. Illinois Central Gulf R.R., 687 F.2d 241, 246 (8th Cir. 1982)).

The Court must " review a judgment as a matter of law with deference to the jury's verdict." White v. Pence, 961 F.2d 776, 779 (8th Cir. 1992).

> The party securing the jury verdict receives the benefit of all reasonable inferences to be drawn from the evidence. We will affirm a judgment as a matter of law only where all the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict.

Mears v. Nationwide Mutual Ins. Co., 91 F.3d 1118, 1121-1122 (8th Cir. 1996) (citing Singer Co. v. E.I. du Pont de Nemours & Co., 579 F.2d 433, 440-41 (8th Cir. 1978)); School District No. 11 v. Sverdrup & Parcel and Associates, Inc., 797 F.2d 651, 654 (8th Cir. 1986) ("A jury verdict may not be overturned for insufficient evidence unless it is clearly contrary to the evidence.").

IV. CONCLUSION

Based upon the foregoing reasons, Plaintiffs respectfully requests that this Court deny Defendant Tyson's Motion To Decertify Or Alternatively For A New Trial in all respects.

Respectfully submitted,

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Dated: November 14, 2011

CERTIFICATE OF SERVICE

I, Brian P. McCafferty, hereby certify that on November 14, 2011, I electronically filed the foregoing Plaintiffs' Brief In Opposition to Defendant Tyson's Motion To Decertify Class Or Alternatively For A New Trial with the Clerk of Court using the CM/ECF system which sent notification of such to the following counsel for Defendant Tyson Foods, Inc., pursuant to the ECF System:

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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/ Brian P. McCafferty

Brian P. McCafferty

Dated: November 14, 2011