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 REPLY 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

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs' Opposition (Dkt. 308) is replete with arguments that are irrelevant to Defendants' post-trial motion. Tyson is not challenging the Court's jury instructions or the verdict sheet, nor does Tyson attack any credibility determinations made by the jury. Likewise, Tyson does not challenge the jury's verdict on Plaintiffs' meal period claim, on which Tyson prevailed. Tyson also has not argued the absence of a record basis for the jury's decision on the work and Portal Act issues, or Tyson's *de minimis* defense.

Tyson's Rule 50 Motion focuses only on one crucial evidentiary problem that Plaintiffs' Opposition cannot fix: Plaintiffs' failure to prove that *all* members of the class who will participate in a recovery have not already been fully compensated for overtime hours worked for their compensable time. Plaintiffs oppose by arguing that this evidence is merely a damages issue; however, their argument is foreclosed by Jury Instruction No. 4, which the Court adopted almost verbatim from Plaintiffs' proposed instruction No. 16, titled "FLSA Elements" (Dkt. 163), and which makes clear that *to prove liability* Plaintiffs must show Tyson "failed to pay plaintiffs overtime for all hours worked in excess of 40 hours in one or more workweeks." (Dkt. 277) Plaintiffs' Opposition fails to identify any class-wide proof of liability under this standard.

Moreover, it is clear from Plaintiffs' explanation of how the jury arrived at its verdict that the jury did, in fact, award damages to hundreds of employees for whom Plaintiffs never proved unpaid overtime and to whom Tyson therefore has no liability. Based on binding Eighth Circuit precedent, the jury's verdict cannot stand in the face of the record developed at trial, including Dr. Fox's unrebutted expert testimony regarding the pay records and her damages model.

As set forth below, judgment should be entered for Tyson. In the alternative, and at a minimum, the Court must order a new trial on damages.

II. PLAINTIFFS FAILED TO ESTABLISH LIABILITY FOR UNPAID OVERTIME ON A CLASS-WIDE BASIS.

The verdict cannot stand because Plaintiffs have failed to identify evidence in the record to support a class-wide finding of liability. Plaintiffs had to prove that Tyson failed to pay them overtime for all hours worked in excess of 40 in one or more workweeks. Jury Instruction No. 4, which the Court adopted almost verbatim from Plaintiffs' proposed instruction No. 16, titled "FLSA Elements" (Dkt. #163), established this essential element of liability. (Dkt. 277) Thus, the Court must reject Plaintiffs' contention that the amount of uncompensated time is "not relevant to liability" and is merely an "issue of damages". (Opp. at 6) *See* Fed. R. Civ. P. 51(c); *De Horstmyer v. Black & Decker,* 151 F.3d 765, 771 (8th Cir. 1998).

Plaintiffs further argue that the jury's determination that the standard items were compensable, coupled with Tyson's "policy of not paying for" those items, showed that each class member engaged in "uncompensated work," therefore establishing class-wide liability. (Opp. at 5-6) Even taking as true these two points or the claim that Tyson did not pay for walking time for a portion of the limitations period, they do not support a finding that Plaintiffs proved liability under Instruction No. 4 on a class-wide basis *for failure to pay overtime*. These points say nothing about the jury's determination of the amount of time for those activities, or which class members it pushed into overtime. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2551 (2011) (requiring common answers to questions that would "drive the resolution of the litigation.");[1] *Bennett v. NuCor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011)

[1] In their Opposition, Plaintiffs now seemingly accept that the Supreme Court's decision in *Dukes* applies to this case and argue that they have met the *Dukes* standard for class-wide proof. (Opp. at 24) Only in footnote 11 do Plaintiffs faintly argue a "wait and see" approach to whether *Dukes* applies to wage-hour cases. Contrary to Plaintiffs' assertion, however, whatever the Ninth Circuit does on remand of *Chinese Daily News, Inc. v. Wang*, No. 10-1202, 2011 WL 4529967 (Oct. 3, 2011), is irrelevant.

(proponent of class-wide judgment must show all class members' claims depend on a common contention capable of class-wide resolution).

Likewise, Plaintiffs fail in their attempt to find support in the record for class-wide liability through (1) the testimony of Tyson managers, (2) the testimony of the four Plaintiffs, and (3) Dr. Mericle's time study. (Opp. at part III.B.) The testimony of Tyson's managers and the four Plaintiffs that is cited in Plaintiffs' Opposition is limited to the issues of work, Portal Act, the meal period, and *de minimis*, none of which are at issue in Defendant's Motion. Neither Tyson's managers nor the four testifying Plaintiffs offered any evidence of class-wide donning and doffing times. Indeed, Plaintiffs do not deny Mr. Wiggins' concession that the testimony of the four Plaintiffs was merely "anecdotal," and no fact witness provided any testimony whatsoever establishing that all members of the class were denied overtime to which they were entitled. In fact, all of the witnesses consistently testified that 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. (Def's Mot. at 8-12) Accordingly, there was no evidence, including from the testimony of the four plaintiffs or Tyson managers, from which the jury could conclude that a common number of minutes could be awarded to the class as a whole or, even if so, which class members were pushed into unpaid overtime.

Finally, Plaintiffs devoted considerable argument attempting to explain that Dr. Mericle's time study supported the jury's class-wide verdict.[2] Dr. Mericle's study cannot form the basis for class-wide liability. Even Plaintiffs eventually acknowledge that the jury rejected Dr.

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[2] Plaintiffs ignore the numerous concessions by Dr. Mericle that his findings could not be applied class-wide. While Plaintiffs try to portray these concessions as attacks on Dr. Mericle's credibility (Opp. at 14 n.7), none of Defendant's points go to Dr. Mericle's credibility at all.

Mericle's time-study averages while elucidating their theory of the jury's damages calculation, which explicitly rejects Dr. Mericle's numbers. (Opp. at 27) In an attempt to salvage Dr. Mericle's time study as a source of class-wide proof, Plaintiffs rely on *Perez v. Mountaire Farms, Inc.*, 610 F. Supp. 2d 499 (D. Md. 2010), *rev'd in part on other grounds*, 650 F.3d 350 (4th Cir. 2011). *Perez*, however, is inapposite. There was no challenge in *Perez* to the plaintiffs' class-wide proof of liability. *See id.* at 516 (listing 7 issues for decision, none of which related to whether the plaintiffs had shown liability class-wide). Also, unlike this case, the fact finder credited the time-study performed by the plaintiffs' expert after removing outliers. *See id.* at 524.

III. THE JURY'S VERDICT NECESSARILY HELD TYSON LIABLE TO HUNDREDS OF INDIVIDUALS WHO NEVER FELL INTO OVERTIME.

The jury's verdict also must be overturned since it is apparent that the jury awarded damages to individuals to whom Tyson had no liability. In their Opposition, Plaintiffs explain how the jury arrived at its damages award (Opp. at 27), and this explanation appears to be the only plausible explanation for how the jury calculated damages (albeit erroneously). In short, the jury awarded a fraction (*i.e.*, 0.5) of Dr. Mericle's and Dr. Fox's numbers ─ precisely what Dr. Fox testified they could not do. Consequently, the jury determined liability as to hundreds of individuals who never worked more than 40 hours in a workweek.

Plaintiffs further contend that Tyson's concern that the jury's verdict improperly awarded damages to individuals to whom Tyson had no liability is merely theoretical because Tyson "never came forward with any evidence that [class members would drop below 40 hours] for any set number of lower minutes." (Opp. at 26) This argument ignores the record evidence.[3] Dr.

[3] Plaintiffs cite anecdotal testimony to argue that employees worked 48 hours per week and, therefore, would not have fallen out of overtime. This strained interpretation of the testimony is irrelevant. Record testimony from Mr. Sebben was that, although it was possible employees had averaged 48 hours a week at one time, he believed that changed and employees began averaging only about 40 hours per week. (Trial Tr. 209:18-210:8) Mr. Kizer testified that, in his estimate,

Fox's own 15-minute calculation conclusively proves that hundreds of additional putative class members fell out of overtime by reducing the number of minutes. (*Compare* P-345 *with* P-348; *see also* Def's Mot. at 23) To accept Plaintiffs' argument that there is no evidence that class members would have fallen out of liability at an even lower amount (*i.e*., "half" of Dr. Mericle's and Fox's numbers, *see* Opp. at 27) would require the Court to reject the obvious, something neither the law nor justice permits the Court to do. *Askew v. Millerd,* 191 F.3d 953, 957 (8th Cir. 1999) (court is not "entitled to give [the non-moving] party the benefit of unreasonable inferences, or those at war with the undisputed facts.").

In addition, Plaintiffs disingenuously claim that Dr. Fox did not use a "formula," because Plaintiffs "showed which class members had not already been paid sufficient K-Code time for the activities at issue" and "addressed every class member in terms of whether each of them have 'already been fully compensated for any overtime hours worked.'" (Opp. at 7-8, 15-16, 20) Although Dr. Fox did so for Dr. Mericle's assumed average numbers and for the 15-minute number that was "plucked out of the air" (Trial Tr. at 1363:24-1364:9), Plaintiffs gave the jury *no basis* on which to make these determinations at any other number of minutes to be plugged into her computer formula, including the concept of "half" that appears to have been in the mind of the jury. As discussed at length in Defendant's opening brief, Dr. Fox unequivocally testified that if the jury rejected Dr. Mericle's numbers (as the jury obviously did), and in turn rejected

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employees worked 48-hour weeks only 60% of the time. (Trial Tr. 734:7-15) This anecdotal testimony cannot refute Dr. Fox's calculations from payroll data *proving* that hundreds fell out of overtime as the assumed "donning and doffing" minutes were reduced. (*Compare* P-345 *with* P-348; *see also* Def's Mot. at 23.)

her damages calculations, the jury could not simply award lesser damages.[4] (Def's Mot. at 13, 22-24) Because this is precisely what the jury did, the verdict must be set aside.

IV. PLAINTIFFS MISCONSTRUE THE *ANDERSON* BURDEN-SHIFTING FRAMEWORK, AND A NEW TRIAL ON DAMAGES MUST BE ORDERED.

Throughout their Opposition, Plaintiffs conflate the burden-shifting framework for an award of damages set forth in *Anderson v. Mt. Clemens Pottery* with the Plaintiffs' burden to establish liability for unpaid overtime as to each class member. (*E.g.*, Opp. at parts III.A. and III.E.) Plaintiffs repeatedly claim that they only need prove damages by approximation and, therefore, were relieved of their obligation to prove that every member of the class was deprived of overtime pay that was owed. This is simply not correct. As *Anderson* and *Murray v. Stuckey's Inc.* make clear, the burden-shifting framework comes into play *only if* Plaintiffs have established liability on a class-wide basis. *Anderson*, 328 U.S. at 687-88 (holding the burden shifts to the defendant only if the plaintiff proves that "he has in fact performed work for which he was improperly compensated …."); *Murray*, 939 F.2d 614, 621 (8th Cir. 1991) (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*") (emphasis in original). Indeed, Plaintiffs conceded this was the proper liability standard when they failed to object to Jury Instruction No. 2, which specifically instructed that for non-testifying class members "*to recover*" the evidence must show they suffered the same

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[4] The cases cited by Plaintiffs on pages 20-21 and 23 are inapposite. *Jordan v. Tyson* and *Helmert v. Butterball* involved summary judgment, not trial, and did not address time-study experts in those cases. Admittedly, *Perez* relied upon a plaintiffs' time study at trial to establish the reasonable time spent on the activities for purposes of damages. Such an approach could have been appropriate in this case as well, except that once the jury rejected Dr. Mericle's time study there remained no basis in the record to arrive at a reasonable estimate of a class-wide donning and doffing time, nor was there a way in the record for the jury to arrive at a dollar value for such an estimate as Dr. Fox admitted.

harm. (Dkt. 277, Instr. No. 2 (emphasis added)) Because, as discussed above, Plaintiffs failed to prove class-wide liability for unpaid overtime, the burden-shifting framework of *Anderson* never came into play.

But, even if it did, Plaintiffs are simply wrong that "once Tyson declined to come forward with the 'more precise' calculation that it argued for at trial" any approximate damages award by the jury would be proper. (Opp. at 7, 26) On the contrary, the Jury Instructions, *Anderson*, and *Marshall v. Truman Arnold Distributing Co.*, 640 F.2d 906 (8th Cir. 1981), all make clear that plaintiffs cannot carry their burden of showing the "amount and extent of the [uncompensated] work" through approximated damages if the defendant comes forward "with evidence of the precise amount of uncompensated work performed" *or* <u>presents "evidence to negate the reasonableness of the inference to be drawn from plaintiffs' evidence</u>." *Anderson*, 328 U.S. at 687-88; *Marshall*, 640 F.2d at 910-11; Dkt. 277, Instr. No. 8 (emphasis added).

It cannot be disputed that Tyson came forward with ample evidence to negate the reasonableness of the inference to be drawn from Plaintiffs' evidence because Plaintiffs admit the jury *rejected* Dr. Mericle's average donning and doffing numbers. Accordingly, under the Eighth Circuit's precedent in *Marshall*, the jury's verdict cannot be upheld because Defendant successfully undermined Plaintiffs' supposedly representative evidence and the jury was left with no evidence in the record to reach an alternate number. Plaintiffs completely ignore *Marshall* and offer no way to distinguish it, further confirming that *Marshall* is directly on point and commands a new trial on damages.[5]

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[5] While they ignore *Marshall*, Plaintiffs cite a number of inapposite Eighth Circuit decisions that only recite the *Anderson* burden-shifting framework. (Opp. at 21-22) Plaintiffs' reliance on the Fourth Circuit's decision in *Perez* also does nothing to advance their argument. Tyson agrees that, generally speaking, time studies may be used by plaintiffs to satisfy their burden to prove damages under *Anderson*. Where, however, the time-study is rejected by the fact finder, as here, it cannot be offered as class-wide proof of the "amount and extent of the [uncompensated] work"

As Dr. Fox admitted, her damages calculation was "all or nothing" (Trial Tr. 1352:9-1353:7), meaning that once the jury rejected Dr. Mericle's numbers and the alternative 15-minute calculation, it had to award nothing because the evidentiary record was devoid of any evidence on which to compute an alternate damages number. (*Id.* at 1353:5-7 ("If what you are getting at is can you come up with a number based on different estimates, then no, it has to be what is on that chart. It would have to be recomputed."); *id.* at 1352:3-8 (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).) While Plaintiffs argue now, just as they argued in closing, that the jury could give Dr. Fox "any amount of time and she could produce an answer in 10 minutes" (*id.* at 1744:6-7), the jury could not run those calculations in the jury room. The jury did not have Plaintiffs' Exhibit 349 containing Dr. Fox's database and computer program to run such alternative calculations. Nor would the jury have been permitted to give Dr. Fox a number during deliberations and ask her to run new calculations. The test for upholding the verdict is not whether someone outside of the record could perform new calculations. The test is whether the jury's verdict was supported by substantial evidence *in the record*. No such evidence exists in this record.[6]

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of the non-testifying class members. Rather, there must be some alternative evidence in the record to support the damages verdict. Where there is not, the plaintiffs fail to carry their burden of proof and no damages may be awarded. Nowhere is this made more clear than in the Eighth Circuit's decision in *Marshall*.

[6] The cases cited by Plaintiffs at pages 27-28 are inapposite and do nothing to support Plaintiffs' argument that the jury's verdict should be upheld. For example, in *Children's Broadcasting Corp. v. The Walt Disney Company*, 357 F.3d 860 (8th Cir. 2004), the record contained evidence to support a jury award lower than what the plaintiffs had requested. The other cases cited by Plaintiffs suffer from similar infirmities.

V. CONCLUSION

For the foregoing reasons, Defendant's motion for judgment as a matter of law and motion to decertify should be granted. Alternatively, Defendant requests a new trial on damages.

Respectfully submitted,

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November 30, 2011

Attorneys for Defendant, TYSON FOODS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that this 30th day of November 2011, I electronically filed the foregoing DEFENDANT'S REPLY 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
Counsel for Defendant