EXHIBIT E

SUMMARY OF KEY TESTIMONY OF PLAINTIFFS' EXPERT DR. FOX ON ISSUES PERTINENT TO DEFENDANT'S MOTION TO DECERTIFY[*]

● Dr. Fox explained that she wrote software code (SAS programs), which constitute *formulas* that were applied to the payroll data that Tyson produced in discovery. "Q. So are the SAS programs the formulas that you applied against the data we just talked about? A. They contain the formula and all of the codes that I used in order to get all those various databases into a format that can be analyzed." Fox dep. 23:8-14.

● Dr. Fox similarly explained that she used these SAS *formulas* to determine if Tyson owes money to any particular individual under her assumptions as to the amount of time they spent donning and doffing: "Q. Okay. Exhibit 46 was called 'Detailed Data Set.' What is that? A. That's the SAS data set that I created that has all the pay records in it. Q. Okay. And is that just the data set against which you applied your *formula* for calculating damages? A. Yes." Fox dep. 64:12-19 (emphasis added).

● Dr. Fox explained the portion of her report in which she discusses how Tyson always had a *policy* to pay some K-code time to the class members, and then made revisions to that *policy* in February 2007 that *varied* the number of K-code minutes according to the particular job each class member worked: "A. … This program [Dr. Fox's SAS software code marked as deposition exhibit 21] actually is the section called impact of February 4th, 2007 policy change that starts on page 12 [of Dr. Fox's expert report]. Q. Okay. I got it. And then you were able to corroborate, correct, that Tyson did pay the four minutes to all the employees in the Production Departments before February of 2007? A. Correct. Q. Right. And then you were also able to corroborate that Tyson did pay K-code minutes to employees in the Production Departments between February of '07 and June 26 of 2010, correct? A. Yes. K-code time was paid. Q. Right. But what you found, and I think you say this on pages 6 and 8 of your report, is that those K-code minutes from February '07 to June of 2010 were *variable*[], correct? A. Yes. Q. Meaning they were different, depending on what job people held, correct? A. Well, that -- that's correct." Fox dep. 35:19-36:15 (emphasis added).

● Dr. Fox further explained the above point as follows: "Q. From the information that was provided to you, you determined that Tyson had a *policy* of paying for at least certain amounts of money for donning and doffing activities, correct? A. Correct. Q. And that's essentially what your report says at the bottom of page 6 under the heading '[K-Code Time] Compensation,' correct? A. Yes. Q. And as you corroborated this before February 4 of '07, everybody in a Production Department got four minutes of K-code, right? A. Correct. Q. And you corroborated that from February 4 '07 to June 27th, 2010, employees associated with knife using positions got paid four to eight minutes, correct? A. Well, I mean, I don't know the knife using positions, but specific job codes, yes." Fox dep. 113:20-114:13 (emphasis added).

● Dr. Fox admitted that the time-study "averages" from Plaintiffs' expert Dr. Mericle came from a mere *sample* of employees, and then Plaintiffs' counsel told her to plug those

[*] Dr. Fox's deposition occurred on August 23, 2011. Pages cited above are attached hereto.

numbers into her *formula* even though she has no basis to corroborate those numbers for any particular individual: "Q. When you looked at Dr. Mericle's report, did you understand that he was using a *sampling* approach to videotape and develop numbers that you *plugged into your formula*? A. Yes. Q. Okay. So you understand that he did not measure everybody in the class? A. That is correct. Q. And did you talk to Dr. Mericle? A. No. Q. Did you evaluate the validity of his numbers? A. No. Q. Were you asked to do that? A. No. Q. Were you asked to assume that his estimates were correct? A. Well, I mean I wasn't asked to assume they were correct, I was just asked to use those numbers. Q. Okay. Fair enough. Who told you to do that? A. [Plaintiffs' counsel] Mr. Wiggins. Q. Am I correct that you have no independent information as to whether or not Dr. Mericle's time estimates are accurate? A. That is correct." Fox dep. 103:1-104:2 (emphasis added).

● Dr. Fox confirmed that the actual amount of time spent by each employee on donning and doffing cannot be determined from Tyson's payroll or punch records. Thus, she plugged in an "average" amount of time from another source (whether it be Plaintiffs' expert Dr. Mericle, Tyson's expert Dr. Adams, or simply the amount of K-code that Tyson now pays on average). The particular number of minutes assumed as the "average" makes a difference to whether Tyson owes anything to employees under Dr. Fox's model. She admits that if employees spent less time than any of these assumed "average" times, more employees would not be entitled to anything; the lower the number of assumed minutes, the greater the number of employees who would not recover anything: "Q. I understand that you can't know how much they spent [donning/doffing]. I'm just saying if a jury concludes people spent less time than the numbers you plugged in, you know for a fact some people are going to fall into zero in your calculations, right? A. So your question is, if a jury comes back with less minutes than what I'm using to plug in? Q. (MR. MUELLER:) Right. A. Then that's correct. Q. Right. And the lower that number goes, the higher the number of people go that would be entitled to zero, right? A. That's correct." Fox dep. 131:15-135:18 (objections deleted).

● Dr. Fox admitted that many employees punched in for the start of shift in *less* time than Dr. Mericle estimated they spend, on average, performing pre-shift donning activities in the plant. In other words, the punch records prove that Dr. Mericle's "averages" literally cannot be applied to large numbers of employees (22% of employees in Fabrication, and 26% in Kill). *See* Fox dep. 120:13-124:12. But Dr. Fox has no way of determining *which* employees were associated with those short punch-in times. *Id.* at 50:24-52:13.

● Dr. Fox admitted that "two different individuals may work the same job but still have different donning and doffing times …." Fox dep. 141:19-21. She also admitted that there is no way to determine the actual figures for each job without reviewing all of the millions of punch records: "So I'm getting it about as individual as I can not knowing any averages per job. So it really can't get a whole lot more individual unless we go through the punch detail data record by record." Fox dep. 142:21-25.

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

CASE NUMBER: 5:07-CV-04009 JAJ
PEG BOUAPHAKEO, et al., individually and on behalf of a class of others similarly situated,
PLAINTIFF,

VS

TYSON FOODS, INC.
DEFENDANT.

DEPOSITION OF LIESL FOX:

It is hereby stipulated and agreed by and between counsel representing the parties that the deposition of LIESL FOX, at the offices of WIGGINS, CHILDS, QUINN & PANTAZIS at 301 19th Street North, Birmingham, Alabama, on the 23rd day of August, 2011, is taken pursuant to the Federal Rules of Civil Procedure and that said deposition may be taken before Janet Arledge, RPR, CRR, Court Reporter and Commissioner for

opened directly by SAS, so if you click on it it wants to open in that SAS Program. But in order to look at the file, you could open it in Word or Notepad, or whatever you want. Any editing program can look at it, but the dot SAS just means that when you click on it, it wants to open in that SAS program.

Q. So are the SAS programs the formulas that you applied against the data we just talked about?

A. They contain the formula and all of the codes that I used in order to get all those various databases into a format that can be analyzed.

Q. Okay. And let's just go through Exhibit 14 to 37, and please tell me what each of these are.

A. Okay. Well, these are all alphabetically and not necessarily the order in which they were done in the analysis. Class definition would have been the program that I ran to identify who would have been a class member, based on liability period that, you know, their opt-in date, or whether they worked in a production department, or something like

and so in Exhibits 20 and 21, I looked at individuals who were in the Production Departments after February of 2007, but were not working any jobs that were associated with K-code time, and so basically this was the amount of time that, had those four minutes not been taken away that they would have been compensated.

Q. Okay. And does this relate to the section of your report which I marked as Exhibit 1, does that take -- I'm just going to pull up Exhibit 1. It's called -- starting on page 6, this relates to the section of your report called K-code time compensation. Am I right about that?

A. Well, that talks about -- that particular section talks about how I'm trying to determine your methodology, or Tyson's methodology in paying K-code time. This program actually is the section called impact of February 4th, 2007 policy change that starts on page 12.

Q. Okay. I got it. And then you were able to corroborate, correct, that Tyson did pay the four minutes to all the employees in the

Production Departments before February of 2007?

A. Correct.

Q. Right. And then you were also able to corroborate that Tyson did pay K-code minutes to employees in the Production Departments between February of '07 and June 26 of 2010, correct?

A. Yes. K-code time was paid.

Q. Right. But what you found, and I think you say this on pages 6 and 8 of your report, is that those K-code minutes from February '07 to June of 2010 were variables, correct?

A. Yes.

Q. Meaning they were different, depending on what job people held, correct?

A. Well, that -- that's correct. I have, I had information that detailed different minutes for the jobs. And based on that, I was able to, I guess, figure -- figure that out for the bulk of the people that worked in there. Now, I couldn't do it for everybody. And again, there is nothing in the data that shows K-code minutes per day or per shift. So all I could do was add it up over the week and then see how close it was. And so for the bulk of them, I got it right. There were some that weren't,

MS. McGOWAN: Object to the form.

A. Based on my determination of department and shift, yes. There were 100 instances that I could find that had 23 minutes, which is .18 percent of the records, but again that's just based on what I could guess as a Production Department, as a shift. So really, I can't prove or disprove either way.

Q. (MR. MUELLER:) Okay. Go to Exhibits 28 and 29. What are those? They're called punch data set billed.

A. That reads in all of the different punch detail databases and then creates one data set from it.

Q. And when you say reads them all, does that mean that you were given different punch databases over time, you just merged them?

A. Correct.

Q. Okay. Does it do anything more than that?

A. No, it just builds a -- it just builds -- it just combines them all together into one database.

Q. Let's go to Exhibits 30 and 31, which say "Punch Detail Compare." What did that

program do?

A. That -- in that one, I tried to compare, look at the relationship between the punch detail data and then the pay data, just to try to figure out -- well, first of all, you know, looked at there was a time period, a period of time where I had punch data but no pay detail or no payroll data. But I tried to determine if the punch data could be used in order to determine punch-in and punch-out times and how much time they may have worked prior to or after a shift ended, but there was -- I believe that there were enough problems in the two that I could not use the punch detail data.

Q. You couldn't use the punch detail data to do what?

A. To determine really when they punched in or out. There was -- in some of the examples I noted in my report that there were differences in how a date was recorded so that if someone started working at midnight, the day may have been recorded, you know, either that day or it may have been recorded the day before, so if I worked at midnight on the 21st, the punch detail data may have shown the 20th or it may have

shown the 21st. The departments didn't match, so if a punch data may have showed them working in one department, the pay detail may have had them working in another. The punch detail data did not have job code, so it wouldn't have been useful there to determine which jobs were getting K-code time.

I'm trying to think what else there were. But there were just -- I think that there were just enough discrepancies in there that without more information on how those, the punch data and the pay data related, I just could not use the punch data.

Q. But you didn't ask us those questions, did you?

MS. McGOWAN: Object to the form.

A. No.

Q. (MR. MUELLER:) Okay. And you have a frequency table for the punches in your report, correct? If you go to page 426 of the tables to your report?

A. Correct.

Q. What does that frequency table tell us?

A. That tells us the number of hours between the first clock punched on a day that

correct?

MS. McGOWAN: Object to the form.

A. Correct. I mean, I'm assuming that's under discussion, but yes.

Q. Well, you currently are using different numbers than in Exhibit 45, correct?

A. That is correct.

Q. Is this the class definition for both the Iowa class and the opt-in class?

A. Yes, I believe an indicator variable is in there showing both classes.

Q. Okay. Exhibit 46 was called "Detailed Data Set." What is that?

A. That's the SAS data set that I created that has all the pay records in it.

Q. Okay. And is that just the data set against which you applied your formula for calculating damages?

A. Yes.

Q. Okay. And then Exhibit 47 says "Individual Damages." What is that?

A. That's just an Excel spreadsheet that lists for each person in the class the damages that I computed for them.

Q. And that was your original estimation

Q. When you looked at Dr. Mericle's report, did you understand that he was using a sampling approach to videotape and develop numbers that you plugged into your formula?
A. Yes.
Q. Okay. So you understand that he did not measure everybody in the class?
A. That is correct.
Q. And did you talk to Dr. Mericle?
A. No.
Q. Did you evaluate the validity of his numbers?
A. No.
Q. Were you asked to do that?
A. No.
Q. Were you asked to assume that his estimates were correct?
A. Well, I mean I wasn't asked to assume they were correct, I was just asked to use those numbers.
Q. Okay. Fair enough. Who told you to do that?
A. Mr. Wiggins.
Q. Am I correct that you have no independent information as to whether or not Dr.

Mericle's time estimates are accurate?

A. That is correct.

MS. McGOWAN: Object to the form.

Q. Have you reviewed any of Dr. Mericle's videotapes?

A. No.

Q. Now, when you use Dr. Adams's numbers, am I correct that you do not know yourself whether or not Dr. Adams would add them up in the way that you have added them up?

MS. McGOWAN: Object to the form.

A. Let me look at his. I thought I just used a number, but let me check. Let me look at his report. I thought -- I thought I just used the bottom line number, but maybe I added things up. Let me just check. I think that's what I used. Let me go back. Um, oops.

What I used from Adams report was on page -- well, it's on page 27. No, hold on, wrong page, wrong way. On page 25 of his report -- back up.

He's got a summary box that says "Daily Times", and he's got a total number, and then he's got nine minutes and one second. And then on page 26, he's got a box and it has a

A. As far as I know.
Q. And was that sufficient information for you to calculate back-wages if a jury determines Tyson owes anything?
A. Using the methodology that I used, yes.
Q. And Dr. Nickerson identified that the data was not produced for the day, January 29th of 2005. Did you see that when you read his report?
A. Yes.
Q. And is that explanation for why you found a week where you can't figure out how much K-code was paid that week?
A. That could be since that would have been the Saturday and K-codes are always paid on Saturday, so that could be why.
Q. Well, do you have any reason to dispute that, that statement?
A. No.
Q. From the information that was provided to you, you determined that Tyson had a policy of paying for at least certain amounts of money for donning and doffing activities, correct?
A. Correct.
Q. And that's essentially what your report

says at the bottom of page 6 under the heading "K-Code Assigned Compensation", correct?

A. Yes.

Q. And as you corroborated this, before February 4 of '07, everybody in a Production Department got four minutes of K-code, right?

A. Correct.

Q. And you corroborated that from February 4, '07 to June 27th, 2010, employees associated with knife using positions got paid four to eight minutes, correct?

A. Well, I mean, I don't know the knife using positions, but specific job codes, yes.

Q. So you don't know whether they used a knife, but you know that in that time period various job codes got paid four to eight minutes of K-code?

A. That's correct.

Q. Okay. And what you found was that the number of minutes of K-code figured over time, correct, that's one of the things you said in pages six to eight?

A. Yes.

Q. And you also found that the job codes that received the K-code changed over time as

that just eliminates a lot of possibility, that adds complexity to the calculations.

Q. Well, let me put it this way: 94 percent is something close to the whole population of punch-ins, right, it's only 6 percent off?

A. Of that particular subset of the punch-ins.

Q. Where there was only one task performed during the day?

A. Correct. Only one shift and one task during that shift.

Q. Now, did you take into account at all for those 94 percent of the punch-in records, did you take into account instances where the punch-in times suggested they're in the plant less than your assumed donning and doffing times?

MS. McGOWAN: Object to the form.

A. I did not use any punch times in my damages, so I guess the answer is no.

Q. (MR. MUELLER:) Are there any reasons other than what you've already told me why you did not try to do that?

A. No, I can't think of any. I think it

just -- I think it just did not lend itself to ease of calculation in the time that I had. I think it would have taken more work than just a computer algorithm, so I think that's the basic reason.

Q. Did you see from Dr. Mericle's report that he has -- he reports separately on the pre-shift activities?

A. Yes.

Q. And would you agree with me that you have at least had some evidence from the punch records that people have shorter times between punch-in and the start of work than Dr. Mericle's average time for the pre-shift activity?

MS. McGOWAN: Object to the form.

A. You mean looking at -- you mean the punch data, is that what you asked? I guess I lost the question.

Q. Yes. Well, I'll break it down. Pull up Mericle's report, which is exhibit -- it's in the info folder.

A. Right.

Q. It's Exhibit 7. And you pointed me earlier to the totals. Well, let's just go to

them. Go to table five, design page 4 of Exhibit 7.

A. Okay.

Q. And if you look at his first three lines, let's just add them up. He's got 4.56 for donning equipment, pre-shift, at the locker. He's got point one seven for dipping the scabbard and washing of hands. And he's got 2.38 minutes for donning equipment, pre-shift in the department. This is all in the Fabrication side. Those add up to a little over seven minutes, 7.11 minutes; do you see that?

A. Correct. Yes.

Q. But you can see with me that the punch differences you received have instances where people punch-in less than seven minutes before their pay event starts?

MS. McGOWAN: Object to the form.

A. Yes, they do.

Q. (MR. MUELLER:) And we can tell the frequency of that from your own table showing the frequency of punch times before the pay event, right?

A. Right. The seven -- the 7.11 minutes is -- would be approximately point one two

hours, which is the twenty -- 26 minus three, about, between 22 and 23 percent of those specific subset of records.

Q. Right. Meaning the paid detail -- I'm sorry, the punch detail suggests that for about 22 percent of the people, they punched in less -- in less time before the pay started than the number Dr. Mericle used in which you plugged into your formula, right?

A. Yeah. For that particular subset, yes.

Q. Now, that's on the Fabrication side. Let's do the same thing on Kill. If you look at table six in Exhibit 7, page -- the same activities. Well, they don't do the scabbard there, so let's take the first line, which is 6.4 minutes, and the second line, which is 2.06 minutes; would you agree Dr. Mericle said the average pre-shift donning activities on the Kill side are 8.46 minutes?

MS. McGOWAN: Object to the form.

A. Yes.

Q. (MR. MUELLER:) So around eight-and-a-half minutes, right?

A. Right.

Q. And if you look at your frequency

table, would you agree with me that there are instances where people punch-in less than 8.46 minutes before the start of their pay?

A. Yes, there are.

Q. And what's the frequency of that?

A. That's about -- that's point one four minutes. Now, I mean -- now again, this particular chart in my punch example is everybody combined. So -- but there are 30 minus twenty-two -- about 26, a little over 26 percent of that particular subset of records punch-in less than point one four hours.

Q. Okay.

A. Now again this -- I think that this data -- let me check. This -- again, this data is not limited to just the Production Departments. This punch chart is not limited to just the Production Departments either. So -- but there are people that clock in less than point one four hours, wherever they are, that's true.

Q. What percent of the punch detail you have -- just estimate for me how much it correlates with the Production Departments. Isn't the vast majority of the details you have

either their K-code minutes could be sufficient to cover their activities, or they're just not being pushed into overtime, correct?

A. That's correct.

Q. Do you have any personal knowledge of whether any of the employees performed off-the-clock work for which they were not already paid?

A. No, I do not.

Q. So for purposes of your backpay calculations, you assume that only by plugging in the averages that you plug into your formula, correct?

A. That's correct.

Q. I'm sorry if I've already asked this, but I want to make sure it's clear. So in your calculations, you used actual Tyson payroll data and wage rates including K-codes that have already been paid, correct?

A. Correct.

Q. But you don't know the actual amount of donning and doffing any particular person did, correct?

A. That's correct.

Q. You plugged in an average from another

source, whether it's Mericle, Adams, or Mr. Wiggins telling you to use the current average K-code time, correct?

MS. McGOWAN: Object to the form.

A. That's correct.

Q. (MR. MUELLER:) And that assumed number, as we saw a minute ago, makes a difference as to whether you find that Tyson owes a particular person any money?

A. Yes.

Q. That is if an individual employee spent less time on donning and doffing than the numbers you used, it might result in a finding of zero money owed to that person, right?

MS. McGOWAN: Object to the form.

A. I'm sorry, could you repeat that?

Q. (MR. MUELLER:) If a particular individual actually spent less time on donning and doffing than the numbers you used, it might result in the determination, even under your own model, of zero money owed to that person?

MS. McGOWAN: Object to the form.

A. Well, no. Let me say that the data does not have actual donning and doffing time in it. It has -- it has an amount of K-code time

that was paid as a lump sum at the end of the week based on prior to February, 2007, four minutes a day in their Production Department, after February of 2007, a specific number of minutes per shift if they happen -- for the specific job that they work in, if they -- I think the document said that if they worked more than one job, it was -- it was the first job that would have been awarded K-code time. So the -- let me get back to your question.

It has nothing to do if an individual spent less time donning and doffing, it's was, did an individual receive an amount of K-code time greater than what I would have estimated for them per shift or per day based on these values.

Q. I understand that. So here's my question: If the employee spent less time than you assumed, they might not be entitled to recover, correct?

MS. McGOWAN: Object to the form.

A. Are you assuming that I actually determined how much time they spent donning and doffing?

Q. (MR. MUELLER:) No. You used an

average number that came from one of three sources. Either Dr. Mericle, Dr. Adams, or what Tyson pays people for K-code now, correct?

A. That's correct.

Q. Let me start with the easiest hypothetical. Let's just assume there's an employee who only spent four minutes a day on donning and doffing, and he's in a knife using job, for which Tyson paid at least four minutes of K-code. That person would be entitled to recover zero, right?

A. Well, I mean --

MS. McGOWAN: Object to the form.

A. Assuming I could determine they spent four minutes. All I would know is that they would have been already compensated for four minutes a day. I don't know how much time they actually spent donning and doffing. So assuming that they had been compensated for four minutes a day, and Mericle's number is -- or an average should have been four minutes, whatever the final number is, then they would not get anything because they had already been compensated for four minutes a day, that does not relate to how much time they actually spent

donning and doffing.

Q. I understand that you can't know how much they spent. I'm just saying if a jury concludes people spent less time than the numbers you plugged in, you know for a fact some people are going to fall into zero in your calculations, right?

MS. McGOWAN: Object to the form.

A. So your question is, if a jury comes back with less minutes than what I'm using to plug in?

Q. (MR. MUELLER:) Right.

A. Then that's correct.

Q. Right. And the lower that number goes, the higher the number of people go that would be entitled to zero, right?

MS. McGOWAN: Object to the form.

A. That's correct.

Q. (MR. MUELLER:) And we -- because we see that going from Mericle's numbers just down to Adams's numbers, I think you just said a minute ago, it went from 2,850 people to 2,428 people under the Iowa class, right?

A. That's correct.

Q. So let me just do the math. If you

that I can't do individual back wages because I'm using averages. But let me just say that the K-code time has always been paid just, I guess, as an average. However Tyson determined the four minutes or the four to eight minutes that was used after February of 2007, I mean that's some kind of an average.

And so Tyson is already not awarding K-code time based on an individual donning and doffing number, and so I'm computing backpay basically on the same methodology that Tyson has been using. So unless we actually analyze all of the pay -- all of the punch data, it's about as individual as it can get.

Q. But you know that from February of '07 to June of 2010, the K-codes were job specific, right?

A. That's correct. But just because an individual -- I mean, two different individuals may work the same job but still have different donning and doffing times, but they both get the same amount of time. So, you know, we could -- you know, if a jury comes back with a different amount of K-code time for each individual job code, that could certainly be done, too. All

I'm saying is that currently K-code time is not awarded according to actual performance. And so I'm using an overall average instead of a job code average, but it's basically the same methodology that's already being used to pay K-code time.

Q. When you say "basically", you make no attempt to do it by job, correct?

MS. McGOWAN: Object to the form.

A. No, because I wasn't given information using -- I mean neither Adams or Mericle did anything on a job-by-job basis, they did it on an area, I guess, basis.

If information were to come back and say, you know, these job codes get five minutes, these job codes get seven minutes, or whatever, that could -- you know, that could be done. But all I'm saying is that the averages that I'm using are what I was asked to use and Tyson is not currently doing it based on actual performance. So I'm getting it about as individual as I can not knowing any averages per job. So it really can't get a whole lot more individual unless we go through the punch detail data record by record.