No. 14-

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

PARTIES TO THE PROCEEDINGS

The petitioner is Tyson Foods, Inc. ("Tyson"), and respondents are Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, who filed suit on behalf of themselves and other similarly situated individuals at Tyson's pork-processing plant in Storm Lake, Iowa.

RULE 26.9 STATEMENT

Tyson has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Tyson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 765 F.3d 791 and reproduced at Pet. App. 1a–24a. The Eighth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 114a–131a. The district court's unpublished orders denying Tyson's motion to decertify the class and Tyson's post-trial motion are reproduced at Pet. App. 25a–30a and 31a–38a. The district court's opinion granting class certification and conditional certification of a collective action is reported at 564 F. Supp. 2d 870 and is reproduced at Pet. App. 41a–113a.

JURISDICTION

The court of appeals entered judgment on August 25, 2014, Pet. App. 1a, and denied rehearing on November 19, 2014, Pet. App. 114a. On January 29, 2015, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3) and the Fair Labor Standards Act ("FLSA") provisions that authorize a private cause of action for damages for unpaid overtime compensation, 29 U.S.C. §§ 207(a), 216(b), which are reproduced at Pet. App. 132a–136a.

INTRODUCTION

In this case, a deeply divided Eighth Circuit sanctioned the use of seriously flawed procedures that many district courts have used to permit certification and adjudication of class actions under Rule 23(b)(3) and collective actions under the FLSA. Plaintiffs are hourly workers at a pork-processing facility who alleged that they are entitled to overtime compensation and liquidated damages because Tyson failed to compensate them fully for time spent "donning" and "doffing" personal protective equipment and walking to and from their work stations. The district court certified the class based on the existence of common questions about whether these activities were compensable "work," even though there were differences in the amount of time individual employees actually spent on these activities and hundreds of employees worked no overtime at all. The court then allowed plaintiffs to ignore these individual differences and "prove" liability and damages to the class with "common" statistical evidence that erroneously presumed that *all* class members are identical to a fictional "average" employee. The end result of this "undifferentiated presentation[] of evidence" was a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Pet. App. 24a (Beam, J. dissenting).

The Eighth Circuit's affirmance of that unjust result warrants review because it exacerbates two circuit splits and conflicts with this Court's decisions in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), and *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013). *Wal-Mart* and *Comcast* should have put a stop to class certification premised on the notion that

classwide liability and damages can be established through a "Trial by Formula," *Wal-Mart*, 131 S. Ct. at 2561, and damages models that ignore the basis of the defendant's putative liability to each class member, *Comcast*, 133 S. Ct. at 1433. That lax approach to class certification effectively evades Rule 23's predominance requirement and alters substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2702.

The Second, Fourth, Fifth, Seventh, and Ninth Circuits have properly held that no class may be certified where plaintiffs seek to obtain an aggregate damages award for the class by extrapolating from a fictional "average" class member. Nevertheless, plaintiffs in other circuits continue to obtain class certification on the premise that they can "prove" the defendant's liability and damages for the class by extrapolating from an unrepresentative sample. In addition to the Eighth Circuit decision below, the Tenth Circuit recently affirmed class certification where plaintiffs obtained an aggregate damages award by extrapolating from a sample of class members who had varying degrees of injuries (and in many cases no injuries at all). This Court's review is thus warranted to clear up the confusion and put an end to this violation of the Rules Enabling Act and the Due Process Clause.

This Court's review is also needed to resolve the confusion among the lower courts on the question whether a class may be certified when it includes uninjured class members. The Second and Ninth Circuits have held that all class members must have standing to sue, and the D.C. Circuit recently held that to obtain class certification, plaintiffs must be able to show injury to all class members. The Third, Seventh, and Tenth Circuits, in contrast, have held

that the requirements of Article III are satisfied as long as a single class member was injured and has standing to sue. Like the Eighth Circuit here, those courts allow plaintiffs to use Rule 23(b)(3) to bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages.

Rule 23(b)(3) does not expand the jurisdiction of federal courts or authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were harmed. This Court should grant review to resolve the confusion and put an end to this unlawful practice.

STATEMENT OF THE CASE

1. Plaintiffs are current and former hourly employees at Tyson's Storm Lake, Iowa, pork-processing plant. Apdx.00684. These line employees worked in two areas: on the Slaughter (or "Kill") floor and on the Processing (or "Fabrication") floor. *Id*.

The Storm Lake facility employs approximately 1,300 employees, doing over 420 distinct jobs over two shifts. Apdx.00684; Appellees' Apdx.00149–172. Each position requires the job-holder to perform certain duties and to wear different sanitary items and personal protective equipment ("PPE"). Apdx.00684–85; Apdx.00827–00851.

All employees wear a hard hat, hairnet, and ear protection while on the production floor, Apdx.00685, but the similarities end there. Processing employees wear a frock, like a butcher's smock, while Slaughter employees wear a company-issued white shirt-and-pants uniform, *id.*, or their own comparable clothing, Tr. 263–64.

Additional items worn by employees depend on the employee's job, Apdx.00685, and personal preference, Tr. 156–57, 329, 498, 504, 511. Knife-wielding employees in both areas don and doff, in varying combination, plastic belly guards, mesh sleeves, plexiglass arm guards, Polar gloves, Polar sleeves, scabbards (or sheaths) for their knives, and steels with which to maintain them. Apdx.00684.[1] Some non-knife users, in contrast, choose to wear rubber gloves, cotton gloves, or plastic aprons. Apdx.00685, Tr. 156–57, 266–69, 444, 607, 651, 654. Further, employees in both departments regularly elect to wear other Tyson-provided items as a matter of personal preference. See Tr. 157, 244, 260, 607, 651, 654. Thus, even employees working the same job may be attired quite differently. Tr. 259–60, 266–68, 271, 747–48.

2. This case is brought by employees paid on Tyson's "gang-time" system, which compensates them from the time the first piece of product passes their work stations until the last piece of product does so. Tr. 178. Tyson also pays a fixed amount of extra time each day called "K-Code time" (because it is given to employees in departments using knives), Pet. App. 2a, that compensates employees for donning/doffing-related activities.

From the beginning of the limitations periods until February 2007, Tyson paid four minutes of K-Code time per day to each employee who worked in a department in which a knife was used.[2] Apdx.00686;

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[1] Approximately 70 percent of the class were knife-wielding employees. Tr. 325.

[2] The Slaughter and Processing floors were mainly comprised of such departments; thus, most class members who worked during this time period would have received four minutes per

Tr. 1358. From February 2007 to June 28, 2010, Tyson paid only knife-wielding employees K-Code time of four to eight minutes (depending on their specific job for the shift). Apdx.00686.

In addition, some class members were compensated for these donning/doffing and walking activities even apart from any K-Code payments they received. Specifically, employees who were assigned to come in early to setup or stay late to teardown after gang time were paid for the additional time, Tr. 547, and were able to don/doff and clean their gear and walk to/from the work station during that period of time, Tr. 1457; Apdx.00108; Apdx.00136; Apdx.00139; Apdx.00236.

3. Plaintiffs filed this action in 2007 for themselves and other "similarly situated individuals," alleging that Tyson failed to compensate its employees for overtime work, in violation of the FLSA, 29 U.S.C. § 207, and the Iowa Wage Payment Collection Law, Iowa Code § 91A.1, *et seq*., which provides a state-law basis to recover for FLSA claims. Apdx.00001–00002; Apdx.00013–00014. Plaintiffs did not challenge the gang-time system. They claimed, however, that the K-Code times were too low, and they were entitled to overtime compensation for unpaid time spent on donning/doffing, washing, and walking when those activities were undertaken by an employee who worked more than 40 hours in a workweek. Apdx.00009–00012.

Plaintiffs moved for the certification of a Rule 23(b)(3) class and an FLSA collective action. Apdx.00017; Apdx.00040. Tyson objected, arguing that liability and damages could be determined only

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day they were on the job, regardless of whether they actually worked a knife job. Apdx.00686; Tr. 390.

on an individual basis, Apdx.00065; Apdx.00461. The district court agreed that "there [we]re some very big factual differences among hourly employees at Tyson" given that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet. App. 87a. Nevertheless, because the court viewed "the gang time compensation system" as a "'tie that binds'" the class together under a single, common question of law, it certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members who are also members of the Rule 23 class. Pet. App 87a, 110–11a; Apdx.00684.

4. After this Court decided *Wal-Mart Stores, Inc.* v. *Dukes*, Tyson filed a motion to decertify the Rule 23 class. Dkt. 212. Tyson asserted that decertification was necessary because plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution ... in one stroke." Dkt. 212-1, at 5 (quoting *Wal-Mart*, 131 S. Ct at 2551).

Plaintiffs opposed decertification, asserting, first, that they could prove Tyson undercompensated the class members with a time study by Dr. Kenneth Mericle that purported to show the average amount of time Tyson employees spent on donning/doffing-related activities. Dkt. 223-1, at 22. Specifically, Mericle identified eight donning/doffing-related "activities" on the Processing side and six on the Slaughter side. Apdx.00802–00803; Apdx.1084–85. He then measured how much time a small sample of employees took for each of these activities in both areas. Tr. 1350. Finally, he computed the average time for the donning/doffing-related activities he identified, added an estimated walking time, and calculated an "all-in" average of 18 minutes on the

Processing floor and 21.25 minutes on the Slaughter floor. Apdx.0082–0083.

Second, plaintiffs said they would calculate entitlement to overtime compensation and damages with a report by Dr. Liesl Fox. Fox assumed that *all* class members spent Mericle's averaged amount of time donning/doffing their equipment—*i.e.*, that everyone on the Processing floor spent 18 minutes and everyone on the Slaughter floor spent 21.25 minutes on donning/doffing-related activities. Then, using a computer program and Tyson's pay records, she determined how much overtime compensation an employee would be due, if any, if he or she were credited for Mericle's averaged donning/doffing time each workday during the class period. Dkt. 226, Ex. 3, at 2. Finally, Fox totaled those numbers to arrive at an aggregate damages award for each class.

Tyson objected that this purported proof would result in a "trial by formula" expressly prohibited by a unanimous Court in *Wal-Mart*. Dkt. 212-1, at 10–12. Whether an employee was entitled to overtime pay, Tyson argued, could be determined only on an individualized basis because the employees donned/doffed different equipment in a different order over different amounts of time while working different jobs. Dkt. 237, at 11. To determine Tyson's liability and damages based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated the company's right to demonstrate that *individual* class members were not entitled to overtime. *Id*. at 5.

The district court denied Tyson's motion, finding that whether "donning and doffing and/or sanitizing of the PPE ... constitutes 'work'" was a common question susceptible to common proof. Pet. App. 37a. The court observed, without elaboration, that there

were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id*.

5. At trial, however, the few class members who testified admitted that Tyson required employees to wear different PPE, depending on their job, and that employees chose to wear different items, depending on their personal preferences. Tr. 611 (Lovan); Tr. 634 (Balderas); Tr. 705–06 (Brown). Additionally, these employees testified that they don and doff these pieces of equipment in a different order, in different places, and that each piece requires a distinct amount of time. Tr. 604, 628.

Nevertheless, plaintiffs purported to prove class members' entitlement to overtime compensation with Dr. Mericle's testimony regarding his averaged time study. Mericle conceded that his time measurements necessarily included employees who performed different jobs and donned and doffed different equipment. Tr. 897, 899, 1049, 1141. This resulted in "a lot of variation." Tr. 1158. For instance, when Mericle measured the pre-shift donning of equipment by Processing floor employees in the locker room, his observed times ranged from approximately half a minute to ten minutes. Pet. App. 137a. On the Slaughter side, he similarly observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift. *Id*. at 138a.

Mericle also conceded that this wide disparity—which repeated itself with each "activity" measured—was because "some of [the workers] put on more equipment than others." Tr. 1144. On the Processing floor, for example, Tyson required the employee in one position to wear one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one Plexiglass arm guard. Tr. 504–05. In contrast, the employee in another position (also on the same

Processing floor) had to wear only one mesh apron, one scabbard, one steel sharpener, one mesh glove, one Polar sleeve, and one mesh sleeve, Tr. 507, while a third employee in a different position on that floor needed to don none of these pieces, *id*.

Mericle's recorded measurements also showed that Tyson's employees did not don their equipment in the same place or in the same order. Tr. 897, 907. In fact, Mericle measured employees continuing to don equipment once they were on the disassembly line (and, thus, already on paid gang-time), yet he included them in his computations. Tr. 1003. Nor did Mericle account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or teardown responsibilities. Tr. 1457.

By his own admission, Mericle did not pre-select workers from a variety of jobs, Tr. 1105–08, or ensure that his sample had the same proportion of knife and non-knife wielding employees as Tyson's workforce, Tr. 1050. Instead, he and his team observed whichever employees were performing a certain activity at a given time, allowing the employees to self-select into his study. Tr. 912. As a result, he agreed that he did not study a "random sample." Tr. 913.

Dr. Fox testified that classwide damages were $6,686,082.36 for the Rule 23 class and $1,611,702.44 for the FLSA collective if one assumed that every class member worked Mericle's "average" times. Tr. 1277–78; Apdx.00869. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, sanitizing, and walking. Tr. 1307.

Fox also acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included over 212 members who suffered no injury at all; even adding the estimated time did not result in those employees working over 40 hours in a single week. She further explained that, as Mericle's average donning/doffing times are reduced, the number of uninjured workers would increase as more employees' work hours fell below 40 for a given week. Tr. 1351. This drop-off happens in a non-linear fashion, *id*., so her calculations were "all or nothing," meaning that "if the jury concludes the activities take [a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result" without re-running the program, Tr. 1352.

At the close of plaintiffs' case, Tyson asked the court to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. Tr. 1398–1401; Dkt. 270. The district court denied the motion, trial continued, and the case was submitted to the jury.

6. The jury found that the class members were "entitled to additional compensation for ... the donning and doffing activities at issue in this case," and awarded damages in the amount of $2,892,378.70, substantially less than Fox had calculated for the Rule 23 class. Tr. 1819.

After the verdict, Tyson requested judgment as a matter of law and renewed its motion for decertification of the class. The undisputed trial testimony showed that the class contained employees from numerous departments, "all of which were comprised of many different positions, all requiring different combinations of required and optional safety

or sanitary items." Dkt. 304-1, at 9. These individual differences and Mericle's failure to account for them in his study, Tyson contended, meant that Mericle's averaged times did not establish whether any given employee was actually undercompensated. *Id.* at 10. Moreover, Fox's testimony established that there are at least 212 class members who had zero uncompensated overtime, and the actual number of uninjured employees was much higher. Because the jury awarded a damages figure less than Fox calculated, it necessarily found that Mericle's average times were overstated and, as Fox conceded at trial, the number of uninjured class members rises if one assumes that the amount of time spent on donning/doffing, cleaning, and walking activities is less than Mericle calculated. *Id.* at 13 (citing Tr. 1302). Nonetheless, these uninjured plaintiffs were included in the aggregate damages award, now making it impossible to award damages accurately after the jury rejected Fox's "all or nothing" damages total. *Id.* at 13–14.

The district court denied Tyson's motion, saying that "there [was] not a complete absence of probative facts to support the [jury's] conclusion, nor did a miscarriage of justice occur." Pet. App. at 30a.

7. On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that "individual plaintiffs varied in their donning and doffing routines," Pet. App. 8a, and that plaintiffs "rel[ied] on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated "work" time, *id.* at 11a. The majority reasoned, however, that because "Tyson had a specific company policy" and the "class members worked at the same plant and used similar equipment," "this inference [was] allowable under *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680, 687 … (1946)." *Id*. at 8a. In the majority's view, plaintiffs' application of Mericle's averaged donning/doffing times to individual "employee time records to establish individual damages" meant that "[t]hey [had] prove[d] liability for the class as a whole." *Id*. at 10a.

The majority also rejected Tyson's argument that decertification was necessary "because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." Pet. App. 8a. The majority said "Tyson exaggerate[d] the [legal] authority for its contention," but provided no further analysis or explanation. *Id*. at 9a.

Judge Beam dissented. He emphasized the myriad differences between the class members, "differences in [their] donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation [and] other relevant factors." *Id*. at 23a (Beam, J., dissenting). "While ... all class members were subject to a common policy—gang-time payment," there could be "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because Tyson, by issuing K-Code time, had already paid for donning/doffing in many instances and because the amount of time individual employees spent donning and doffing varied. *Id.* Thus, the common evidence could not "resolve[] [the case] in 'one stroke,'" *id*. (quoting *Wal-Mart*, 131 S. Ct. at 2551), and the class "should have been decertified," *id*.

In addition, Judge Beam found that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees. Pet. App. 22a. As he noted, "the

jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* Consequently, by certifying a class with hundreds of uninjured employees the district court would force Tyson to pay employees whom it had fully compensated, a result that would be unfair to Tyson and any class members who actually were injured. *Id.*

8. Tyson's petition for rehearing or rehearing *en banc* was denied by a vote of 6 to 5. In an opinion respecting the denial of rehearing, Judge Benton stated his view that "*Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context" and that the plaintiffs implicitly satisfied this standard by proffering expert testimony of classwide average donning/doffing times. Pet. App. 127a–128a & n.5 (Benton, J., respecting the denial of rehr'g en banc). He also concluded that "Tyson has no interest in how the fund is allocated among class members," so it is not relevant to the appeal that hundreds of uninjured employees were included in the class. *Id.* at 131a.

Again, Judge Beam dissented, decrying the court's affirmance of "a professionally assembled class action lurching out of control." *Id.* at 115a (Beam, J., dissenting from rehr'g denial). First, Judge Beam faulted the majority for misreading *Mt. Clemens*, which allows the use of a "just and reasonable inference" in determining damages, but *only after* plaintiffs carry the "individual burden of [proving] by a preponderance of the evidence" that "each putative class member" "performed work for which he was not properly compensated." *Id.* at 120a (internal quotation marks omitted). Applying that inference at

the liability stage by using an average donning/doffing time, Judge Beam argued, relieved plaintiffs of their burden and resulted in awarding damages to hundreds of uninjured plaintiffs. *Id.* at 120a–121a.

Second, Judge Beam emphasized that the inclusion of these uninjured employees in the class—when paired with the jury's reduced aggregate damages award—underscored the inappropriateness of certifying the class in the first instance. By awarding a reduced damages award, the jury necessarily found Mericle's time estimations inflated. As a result, "well more than one-half the certified class of 3,344 persons have no damages whatsoever and the balance have markedly lower damages that are now virtually impossible to calculate." Pet. App. 125a. By upholding the district court's class certification, the entire class—including the hundreds of members with "no provable damages"—were made "joint beneficiaries" of the "lump sum district court judgment" but without a means to limit distributions for only proven damages. *Id.*

REASONS FOR GRANTING THE PETITION

I. WHETHER CLASS OR COLLECTIVE ACTIONS MAY BE CERTIFIED BASED ON STATISTICS THAT ERRONEOUSLY PRESUME ALL CLASS MEMBERS ARE IDENTICAL TO AN AVERAGE OBSERVED IN A SAMPLE IS AN IMPORTANT AND RECURRING QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS.

This case presents this Court with the opportunity to address the propriety of certifying a class under Rule 23(b)(3), or an FLSA collective action, where plaintiffs' common "proof" of liability and damages is

statistical evidence that erroneously presumes that all class members are identical to the average observed in a sample. Notwithstanding this Court's guidance in *Wal-Mart* and *Comcast*, this recurring issue has sharply divided the lower courts.

The undisputed evidence in this case showed that there was substantial variance in the amount of time individual employees spent in donning/doffing-related activities each day. The three production workers who testified at trial and gave time estimates, explained that each wore different items and spent different amounts of time on donning/doffing-related activities. See Tr. 708–09 (more than 2 minutes for Brown to don gear pre-shift); Tr. 598 (6–7 minutes for Lovan); Tr. 641 (10–12 minutes for Balderas); see also Tr. 1157 (Mericle conceding that in his time study, there were "different [times] for every single person [his] team measured").

Calling each of the remaining 3,341 members of the class to testify would have been impracticable. It also would have demonstrated that the district court was clearly wrong in thinking Tyson's liability for damages was "capable of classwide resolution" and could be resolved "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. So plaintiffs presented evidence that purportedly would permit the jury to determine liability and damages for all class members: Mericle's time study. In upholding class certification, the Eighth Circuit panel majority allowed plaintiffs to "prove" liability and damages based on Mericle's averaged times, and held that the variations among individual plaintiffs did not "prevent [a] 'one stroke' determination" of liability and damages. Pet. App. 8a.

That erroneous decision is in direct conflict with the Seventh Circuit's decision in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Plaintiffs in

Espenscheid were satellite dish technicians who claimed that they were required "to do work for which they were not compensated at all, and also to work more than 40 hours a week without being paid overtime for the additional hours" in violation of the FLSA and parallel provisions of state law. *Id.* at 773. The Seventh Circuit assumed, for purposes of appeal, that "plaintiffs could prove that [the employer's] policies violated the [law] in these ways." *Id.* But even so, the court held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776.

In so holding, the Seventh Circuit expressly rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class." *Id.* at 774. In that case (as here, see *supra* p. 10), there was "no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members." 705 F.3d at 774. But even if by "pure happenstance" the number of unpaid hours worked each week by the employees in the sample "was equal to the average number of hours of the entire class," the sampling "would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held,

> would require that all have done roughly the same amount of work.… No one thinks there was such uniformity. And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of

> overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) under-compensate him by half.

Id.

That reasoning is equally applicable here. Plaintiffs' time study confirmed that there was wide variation in the amount of time employees spent donning and doffing different combinations of PPE. For example, employees spent between 0.583 minutes and 13.283 minutes donning equipment in the locker room pre-shift, and between 1.783 minutes and 9.267 minutes doffing and storing equipment post-shift. See Pet. App. 137a–138a. But even this understates the individual variation among class members. The undisputed record evidence shows that some employees had time to don protective gear at their station after the production line had commenced operation—and thus were paid for that activity under Tyson's gang-time system. See *supra* p. 16. Some employees were paid to come in before or after gang time to set up or clean up the production line, and when they did so, they donned and doffed their PPE during the set up or clean up time for which they were paid. See *supra* pp. 6, 10. Thus, had this case been brought in the Seventh Circuit, class certification would have been denied because plaintiffs could prove entitlement to overtime and damages only by using a time study based on impermissible averaging.

The Eighth Circuit did not explain how its decision was consistent with *Espenscheid*. Although it acknowledged that the Seventh Circuit held that class certification was "improper" when there were variations in the class and "use of an average

conferred a 'windfall' on some class members," the panel majority dismissed the decision with a simple "cf." citation with no explanation. Pet. App. 9a. Instead, it said that to apply the time study to "individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 … (1946)." Pet. App. 8a. That is simply incorrect.

Mt. Clemens requires a plaintiff seeking unpaid overtime under the FLSA to prove "that *he* 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." 328 U.S. at 687 (emphasis added). As the Seventh Circuit recognized, nothing in that decision allows an employee who was fully compensated by the K-Code time he received to recover damages by showing that K-Code time was not sufficient to compensate another employee, much less a fictional composite employee. See *Espenscheid*, 705 F.3d at 775 ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

Class certification also would have been denied had this case been brought in the Fourth Circuit, which, like the Seventh Circuit, does not permit class certification where aggregate damages will be based "on abstract analysis of 'averages.'" *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). *Broussard* was brought by franchisees who sought lost profits allegedly caused by the franchisor's misuse of advertising funds. To prove damages, plaintiffs called an expert who computed "an average profit margin based on a sample of franchisees' financial data" and "an

estimate of 'on average how many additional cars would have come in per week in the typical Meineke dealer's shop had the additional advertising dollars been spent.'" *Id.* This focus on a "fictional" "'typical franchisee operation,'" the court held, was improper where the actual "profits lost by franchisees" differed "according to their individual business circumstances." *Id.* That this invalid "shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.*

The Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), similarly held that a class cannot be certified based "on an estimate of the average loss for each plaintiff." *Id.* at 231. "[S]uch an aggregate determination," the Second Circuit explained, would likely result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *Id.* It also poses the "danger of overcompensation" in that some members of the class may benefit from the recovery even though they were not injured. *Id.* at 232. "This kind of disconnect offends the Rules Enabling Act, which provides that the federal rules of procedure, such as Rule 23, cannot be used to 'abridge, enlarge, or modify any substantive right.'" *Id.* at 231 (quoting 28 U.S.C. § 2072(b)).

The Fifth Circuit, too, has recognized that class certification based on such procedures results in an impermissible "alteration of substantive" rights. See *In re Fibreboard*, 893 F.2d 706, 712 (5th Cir. 1990). Plaintiffs in *Fibreboard* were individuals suffering diseases allegedly caused by exposure to asbestos. The district court certified a class based on a trial

plan under which liability and damages would be determined for approximately 3,000 class members by "index[ing]" them to 41 test cases. *Id.* at 711. The Fifth Circuit reversed, holding the class "cannot be certified" on this basis because it "create[d] the requisite commonality for trial" by "submerge[ing]" the "discrete components of the class members' claims and the asbestos manufacturers' defenses." *Id.* at 712; see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311–29 (5th Cir. 1998) (finding plan to establish classwide liability on damages based on extrapolation violates defendants' Seventh Amendment right to a jury trial).

The Ninth Circuit in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), likewise realized that it would alter rights and violate due process to allow classwide damages to be determined through "sampling" when there is substantial variance among individual class members. *Id.* at 1168. *Jimenez* was a wage-and-hour class action brought by claims adjusters who alleged that Allstate had an unofficial policy requiring them to work unpaid off-the-clock overtime. The district court certified a class to decide whether such a policy existed, but bifurcated the proceedings and "rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase." *Id.* "This split," the Ninth Circuit held, preserved "Allstate's due process right to present individualized defenses to damages claims." *Id.*[3]

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[3] Allstate has filed a petition for writ of certiorari seeking review of this decision on the grounds that Rule 23 and the Due Process Clause do not allow plaintiffs to establish classwide *liability* through statistical "sampling" just as they do not allow plaintiffs to use sampling to prove classwide *damages*. *See Allstate Ins. Co.* v. *Jimenez*, 83 U.S.L.W. 3638 (Jan. 27, 2015)

In contrast, neither the district court nor the Eighth Circuit took any steps to preserve Tyson's right to present defenses to individual claims. They refused to decertify the class notwithstanding the existence of undisputed differences in donning and doffing times. And they allowed plaintiffs to "prove" damages with a formula that applied average donning/doffing times to all class members.

That the Eighth Circuit would allow such a procedure is particularly surprising because it is so at odds with this Court's recent decisions in *Wal-Mart* and *Comcast*. *Comcast* made clear that "courts must conduct a rigorous analysis" of expert models "purporting to serve as evidence of damages in [a] class action," and they must deny class certification where the models employ flawed methodologies or produce "arbitrary measurements." 133 S. Ct. at 1433 (quotations omitted). To ignore defects in the model and allow class certification as long as there is "*any*" damages model, "no matter how arbitrary," would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id*. (emphasis in original).

And *Wal-Mart* makes clear that a damages model based on averaging is a flawed approach that cannot be used to avoid individualized inquiries and permit liability and damages to be determined on a classwide basis. In *Wal-Mart*, this Court unanimously reversed class certification where liability and damages would be determined for a sample, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class,

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(No. 14-910). Here, the Eighth Circuit upheld the district court's class certification with regard to both liability *and* damages. Thus, if this Court were to grant certiorari and reverse in *Jimenez*, that would *a fortiori* require vacatur of the Eighth Circuit's decision here.

and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561. Such a "Trial by Formula," this Court held, would impermissibly abridge the defendant's rights under the Due Process Clause and the Rules Enabling Act. *Id.*

Here, as in *Wal-Mart*, allowing classwide liability and damages to be established on the basis of statistical sampling precluded Tyson from raising its "defenses to individual claims." *Id.*; see also *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."). In this class trial, Tyson lost the right to show the jury that individual class members had no unpaid overtime. In an individual trial, Tyson could have cross-examined the employee and sought to prove that the employee spent (or reasonably could have spent) less time engaged in donning/doffing-related activities than was claimed. Or Tyson could have shown that the employee was compensated for such activities by the K-Code payments or because he performed them at times in which he was compensated (*i.e.*, when that employee's "gang time" had started or when Tyson paid the employee to setup or clean up the production area). In a class trial, however, Tyson was reduced to attacking the methodology used by plaintiffs' experts to determine the "average" donning/doffing time.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a; see also *id.* at 13a. That plaintiffs' expert added the average donning/doffing times to the class members' actual time records does not change the fact that classwide liability was based purely on extrapolation and an assumption—*i.e.*, that each class member spent the same "average" amount of time donning, doffing and walking—rather than individualized proof as to how, if at all, each was injured.

Unfortunately, the Eighth Circuit is not alone in its refusal to follow *Wal-Mart*. The Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), affirmed class certification in an antitrust case where plaintiffs "proved" damages with an expert who applied average overcharges to disparate transactions, including transactions for which there were no overcharges. *Id.* at 1257. The Tenth Circuit thought that was an appropriate way to "approximate" damages in a large class action, saying "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate damages."[4] *Id.*

This Court should grant review to resolve the conflicts among the courts of appeals and put an end to the practice of using averaging and extrapolation from a sample to mask individual differences so that

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[4] The Dow Chemical Company filed a petition for writ of certiorari on March 9, 2014, seeking review of this issue. *Dow Chemical Co.* v. *Seegott Holdings, Inc.*, No. 14-1091. Thus, if this Court were to grant certiorari and reverse in *Dow*, that would require vacatur of the Eighth Circuit's decision here.

vast numbers of disparate individual liability and damages claims can be aggregated together in a large class action. Rule 23 is not a license for plaintiffs' counsel to engage in this type of "'claim fusion'" in "which claims in the aggregate merge to assume characteristics that no individual claim possesses." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1003 (2005). Nor does it permit district courts to engage in "'ad hoc lawmaking'" or "the manipulation of substantive rules to assist in resolving or preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law." *Id*. This Court's review is therefore needed to ensure that Rule 23 is "interpreted in keeping with" the Due Process Clause and the Rules Enabling Act, "which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

II. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER A CLASS MAY BE CERTIFIED WHERE THE CLASS INCLUDES MEMBERS WHO WERE NOT INJURED.

Plaintiffs who seek to invoke the jurisdiction of the federal courts have the burden of establishing that they have standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To meet that burden, plaintiffs must show, among other things, that they suffered an "'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Id*. at 560. "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the

resolutions of which have direct consequences on the parties involved." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013).

Although this Court has held that Rule 23 "'must be interpreted in keeping with Article III constraints'" on standing, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem*, 521 U.S. at 613), the lower courts are divided about what that entails. Specifically, the circuit courts disagree about whether plaintiffs must show that all class members were injured by the defendants' allegedly unlawful actions, or whether a class may be certified even though it includes members who were not injured and thus have no claim for damages.

The lead decision allowing certification of classes that include members with no plausible claim to damages is *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009). Although the Seventh Circuit recognized that "injury is a prerequisite to standing," it held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.* at 676.

A divided panel of the First Circuit recently agreed that the "'possibility or indeed inevitability'" that some class members were not injured "'does not preclude class certification.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (quoting *Kohen*, 571 F.3d at 677). The court thus affirmed class certification in an antitrust case in which 2.4% of the class likely had no injury, *id.* at 32, which, as the dissent noted, would be "at least 24,000 people," and

"nobody knows who the 24,000 are," *id.* at 32, n.29, 25 (Kayatta, J., dissenting).[5]

The Tenth Circuit also has cited *Kohen* in holding that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm." *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). And the Tenth Circuit recently affirmed class certification in an antitrust case in which it expressly acknowledged that some class members "avoid[ed] injury altogether." *In re Urethane*, 768 F.3d at 1254.

The Third Circuit reached a similar result in *Krell* v. *Prudential Insurance Company of America*, 148 F.3d 283 (3d Cir. 1998), a case involving allegedly fraudulent sales practices by an insurance company. The district court certified the class despite defendants' objections that it included "both injured and uninjured policyholders." *Id.* at 306. The Third Circuit affirmed, holding that if "the named plaintiffs satisfy Article III," the "absentee class members are not required to make a similar showing." *Id.* at 307.

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[5] To be sure, *Kohen* and its progeny have stated that a district court may decline to certify a class that "contains a great many persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677. But it reached that conclusion not because of the limitations imposed by Article III (or due process or any substantive law), or because the presence of uninjured class members is a warning sign that individualized inquiry is required, but "because of the *in terrorem* character of a class action," which, "by aggregating a large number of claims," can "impose a huge contingent liability upon a defendant." *Id.* at 678. *Nexium* demonstrates this *ad hoc* and standardless test imposes no meaningful constraint on class certification of classes with thousands of uninjured members, even when the district court has no plan for ensuring that they do not contribute to the defendant's liability or share in the judgment.

In contrast, the Second Circuit held in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that "no class may be certified that contains members lacking Article III standing." Rather, the class must "be defined in such a way that anyone within it would have standing." *Id.* at 264. The Ninth Circuit has agreed with this test. See *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney*, 443 F.3d at 264).[6]

More recently, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the D.C. Circuit vacated the district court's certification of a class where plaintiffs could not "prove, through common evidence, that all class members were in fact injured." *Id.* at 252. The district court in *Rail Freight* had not been troubled by the presence of uninjured class members, because it looked to cases like *Kohen* and held that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Id.* at 255 (alterations in original) (quotations omitted). The D.C. Circuit expressly disapproved of that approach, noting that *Kohen* was decided before this Court's decision in *Comcast* when "the case law was far more accommodating to class certification under Rule 23(b)(3)." *Id.* Instead, the court held that if plaintiffs cannot show with "common evidence" that "all class members suffered *some* injury," then class

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[6] As the Fifth Circuit noted in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), *cert. denied sub nom.* 135 S. Ct. 754 (2014), the Seventh, Eighth, and Ninth Circuits have not been entirely consistent on the question, with some decisions adopting the *Kohen* test and others citing *Denney*. *Id.* at 800–01 & nn.27–30. Considering all the decisions, there is a "roughly even split of circuit authority." *Id.* at 801.

certification must be denied because "individual trials" would be necessary "to establish whether a particular [class member] suffered harm." *Id.* at 252.

Thus, if Tyson's plant were located in the Second or D.C. Circuits, the district court could not have certified the class because plaintiffs could not prove, with common evidence, that all class members were injured. Quite the contrary, plaintiffs' damages expert admitted that the class contained at least 212 employees who were not injured because they did not work *any* unpaid overtime even under Mericle's assumed averages. See *supra* p. 11. The actual number of uninjured class members is even larger. As Judge Beam explained in dissent, the fact that the jury awarded plaintiffs less than half the damages they requested indicates that the jury disagreed with plaintiffs' "over-generous time study conclusions." Pet. App. 125a. And plaintiffs' expert admitted that if "'employee[s] worked less than [the time study] numbers … it is possible that Tyson's K-code payments already have fully paid them for that time.'" *Id.* at 123a (omission in original). Accordingly, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.* at 125a. Yet *all* class members are "included as beneficiaries of the single damages verdict" and, "damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 22a–24a.

To affirm that result, as the Eighth Circuit did, is to allow plaintiffs to use the procedural device of Rule 23(b)(3) to alter substantive law in violation of the Rules Enabling Act. The panel majority had no persuasive argument to the contrary. Its only justification for the inclusion of uninjured class members was to say that *Tyson* "invited" the error by

requesting that the jury be instructed that it could not award damages for "[a]ny employee who has already received full compensation for all activities you find to be compensable." Pet. App. 10a (quotations omitted). That reasoning is flawed and cannot insulate the district court's error from appellate review. As Judge Beam explained, Tyson did not invite the erroneous inclusion of uninjured class members; it "vigorously" opposed class certification "at every turn in this litigation." *Id.* at 20a. But when its objections to class certification were rejected by the district court, Tyson reasonably and properly requested "that the plaintiffs be held to their evidentiary burdens of proof." *Id.*

This Court should therefore grant review to resolve the circuit split and ensure that Rule 23(b)(3), which is a limited procedural device for aggregating liability and damages claims, is not used improperly to expand federal court jurisdiction and compensate individuals who suffered no injury, lack Article III standing, and are entitled to zero damages.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECUR IN BOTH CLASS ACTIONS UNDER RULE 23(B)(3) AND COLLECTIVE ACTIONS UNDER THE FLSA.

As is evident from the circuit court cases discussed above, the question whether a class can be certified where liability and damages will be determined with statistical sampling that erroneously presumes that all class members are identical to the average of a sample, and the question whether a class can be certified that includes members with no injury, are questions that arise in a variety of class actions. Indeed, this Court's own docket confirms that these questions commonly arise in wage-and-hour collective

actions under the FLSA and in Rule 23(b)(3) class actions brought under parallel provisions of state law like the Iowa Wage Payment Collection Law at issue here. See *supra* note 3 (discussing petition for writ of certiorari in *Allstate Ins. Co.* v. *Jimenez*, No. 14-910). They also arise in consumer fraud cases and antitrust actions and a variety of other actions for damages in federal courts. See *supra* note 4 (discussing petition for writ of certiorari in *Dow Chemical Company* v. *Seegott Holdings, Inc.*, No. 14-1091).

The division among the lower courts on these questions warrants this Court's review. Although the questions frequently arise when plaintiffs seek class certification in the district court, they typically escape appellate review. Interlocutory review of a certification decision is rare. See 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 7.2 (10th ed. 2013). And "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

In addition, "professionally assembled class action[s]," Pet. App. 115a (Beam, J., dissenting), are now a fact of life that impose significant costs on companies doing business in the United States. While Rule 23 was intended to "impose[] stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Color Rest.*, 133 S. Ct. 2304, 2310 (2013), certification continues to be the norm. A recent study of major companies found that 54% of them "are currently engaged in class action litigation." *The 2015 Carlton Fields Jorden Burt Class Action Survey* 6 (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-

survey.pdf. "[C]onsumer fraud and labor and employment remain the most prevalent class action matters," accounting for "more than 50 percent of all class actions." *Id.* at 3. Indeed, it is now estimated that "90% of all federal and state court employment law class actions filed in the United States are wage and hour class or collective actions." Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and Precautions Employers Should Take* 1 (2012) *available at* http://www.lb7.uscourts.gov/documents/12-19431.pdf.

Although the drafters of Rule 23 realized that a damages class action could "be convenient and desirable depending upon the particular facts," they emphasized that it should only be used when "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23, advisory committee's 1966 note. When it is necessary for plaintiffs to use sampling techniques to create a fictional plaintiff with "average" characteristics that are applied by extrapolation to class members with strikingly different individual circumstances in order to "prove" defendants' liability or damages to all class members with common evidence, procedural fairness and due process are sacrificed. See *supra* pp. 23–24. When a class includes uninjured members who would have no standing to litigate or obtain damages on their own, procedural fairness and due process are the victims. See *supra* pp. 29–30. This Court should grant review to put an end to these unlawful practices and return Rule 23 to the narrow exception to individual litigation as it was adopted in 1966.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 12–3753.
Submitted: Feb. 11, 2014
Filed: Aug. 25, 2014.

PEG BOUAPHAKEO; JAVIER FRAYRE; JOSE A. GARCIA; MARIO MARTINEZ; JESUS A. MONTES; HERIBENTO RENTERIA, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs–Appellees

v.

TYSON FOODS, INC.,

Defendant–Appellant.

Before SMITH, BEAM, and BENTON, Circuit Judges.

Opinion

BENTON, Circuit Judge.

Peg Bouaphakeo and other named plaintiffs are employees of Tyson Foods, Inc. They represent a class of employees at Tyson's meat-processing facility in Storm Lake, Iowa. They sued Tyson for not paying wages due under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq., and the Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 et seq. A jury returned a verdict for the class. Tyson appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

The employees are current and former "gang-time" employees at Tyson's facility. The background is similar to that in *Lopez v. Tyson Foods, Inc*., 690 F.3d 869, 873–75 (8th Cir.2012) (adapted to the facts of this case):

> To calculate the employees' compensable working time, Tyson measures "gang time"—when the employees are at their working stations and the production line is moving. The employees claim Tyson failed to provide FLSA overtime compensation for donning (putting on) personal protective equipment (PPE) and clothing before production and again after lunch, and for doffing (taking off) PPE and clothing before lunch and again after production. The PPE and clothing worn by individual employees vary depending on their role in the process. Tyson classifies items of PPE and clothing as either "unique" or "non-unique" to the meat-processing industry. . . . The employees also seek compensation for transporting the items from lockers to the production floor.
>
> In addition to "gang time," Tyson adds "K-code" time to each employee's paycheck. Before 2007, Tyson paid four minutes of K-code time per day to each [employee in a department where knives were used] in order to compensate for the donning and doffing of unique items. From [February] 2007 to [June] 2010, Tyson added [several minutes] per day for pre-and post-shift walking time required of the employee. . . . Tyson does not record the actual time that employees perform any of these tasks.

* * * *

The FLSA prohibits the employment of any person "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 [126 S.Ct. 514, 163 L.Ed.2d 288] (2005). An employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 686-87 [66 S.Ct. 1187, 90 L.Ed. 1515] (1946), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84; *Fast v. Applebee's Int'l, Inc*., 638 F.3d 872, 881 (8th Cir.2011). "Neither 'work' nor 'workweek' is defined in the statute." *Alvarez*, 546 U.S. at 25 [126 S.Ct. 514]. At one time, the Supreme Court defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 [64 S.Ct. 698, 88 L.Ed. 949] (1944), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, Pub.L. No. 80–49, 61 Stat. 84. The Court then "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA." *Alvarez*, 546 U.S. at 25 [126 S.Ct. 514], *citing Armour & Co. v. Wantock*, 323 U.S. 126, 133 [65 S.Ct. 165, 89 L.Ed. 118] (1944).

Whether an employee's activity is "work" does not end the compensability analysis. In the Portal–to–Portal Act, Congress excluded some activities that

might otherwise constitute work from the FLSA. The Act excepts two categories:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or post-liminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a); *Alvarez*, 546 U.S. at 26–28, 126 S.Ct. 514. "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are *an integral and indispensable part of the principal activities* for which covered workmen are employed and are not specifically excluded by [29 U.S.C. § 254(a)(1)]." *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (emphasis added). And, "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under [29 U.S.C. § 254(a)]." *Alvarez*, 546 U.S. at 37, 126 S.Ct. 514.

The Department of Labor has a "continuous workday rule," generally defining an employee's "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b); *Alvarez*, 546 U.S. at 29, 37 [126 S.Ct. 514] (describing and applying the continuous workday rule). During the continuous workday, the compensability of all activities that otherwise satisfy the requirements of

the FLSA is not affected by the Portal–to–Portal Act's exceptions. In *Alvarez*, the Supreme Court held that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [the Portal–to–Portal Act], and as a result is covered by the FLSA." *Alvarez*, 546 U.S. at 37 [126 S.Ct. 514].

The employees sued in 2007, claiming that Tyson's K-code time was insufficient to cover compensable pre- and post-production line activities, violating the FLSA and IWPCL. The district court[1] certified the FLSA claim as a collective action and the IWPCL claim as a Rule 23 class action.[2] During a nine-day trial, plaintiffs proved liability and damages by using individual timesheets, along with average donning, doffing, and walking times calculated from 744 employee observations. The jury returned a verdict

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[1] The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa. The case was later transferred to the Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

[2] *See Salazar v. Agriprocessors, Inc*., 527 F.Supp.2d 873, 884 (N.D.Iowa 2007) (finding, in a similar donning and doffing case, that "there is no novel issue of state law in the IWPCL Claim, nor is there a difference in the terms of proof required by the FLSA Claim and the IWPCL Claim. There are no issues of first impression in the IWPCL Claim that the Iowa courts would be better suited to answer. . . . [T]he substance and basis of the FLSA Claim and the IWPCL Claim is virtually indistinguishable, that is, the claims involve identical facts and highly similar legal theories.") (internal quotations removed). *See generally Lindsay v. Gov't Emps. Ins. Co*., 448 F.3d 416, 425 (D.C.Cir.2006) (finding "state law claims essentially replicate the FLSA claims" in an overtime case).

for the class of $2,892,378.70. With liquidated damages, the final judgment totaled $5,785,757.40.

II.

Tyson argues that the district court erred in certifying the FLSA collective action—under 29 U.S.C. § 216(b)—and the IWPCL class—under Rule 23.[3] Class certification is reviewed for abuse of discretion. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir.2010) (reviewing class certification under Rule 23 for abuse of discretion); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir.2001) ("The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court."). A district court may certify a class under Rule 23(b) if "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b). The FLSA allows named plaintiffs to sue "for and in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). Plaintiffs may be similarly situated when "they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien v. Ed*

[3] The district court conditionally certified the FLSA class, and many employees opted in. *See Genesis Healthcare Corp. v. Symczyk*, ——U.S. ——, 133 S.Ct. 1523, 1530, 185 L.Ed.2d 636 (2013) (finding that "employees . . . become parties to a collective action . . . by filing written consent with the court" after conditional certification). While the district court never revisited the conditional certification, the parties treat the FLSA certification as unconditional.

Donnelly Enters., Inc., 575 F.3d 567, 585 (6th Cir.2009). A court may consider "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir.2001).[4]

According to Tyson, factual differences between plaintiffs—differences in PPE and clothing between positions, the individual routines of employees, and variation in duties and management among departments—make class certification improper. These differences, Tyson says, do not allow the class action to "generate common *answers* apt to drive the resolution of the litigation." *Wal–Mart Stores, Inc. v. Dukes*, ——U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). *See Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 374–76 (8th Cir.2013) (applying *Dukes* and reversing certification when the interaction between individual customers and employees meant liability was "dominated by individual issues"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815 (8th Cir.2011) (denying certification when there were "stark inter-departmental variations in job titles,

[4] FLSA collective actions and Rule 23 class actions have separate procedures, such as the "opt in" requirement to an FLSA collective action and the "opt out" requirement for a Rule 23 class action. *See Symczyk*, 133 S.Ct. at 1529 (finding Rule 23 precedent inapposite when considering the mootness of an FLSA action with no "opt in" parties). Contrary to the dissent's statement, the Supreme Court in *Symczyk* did not find that these actions "may not be procedurally homogenized for trial" or "do not lend themselves to inextricably intertwined trials." Neither party complains of procedural error from "homogenizing" the claims at trial.

functions performed, and equipment used"). Unlike *Dukes,* Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike *Dukes*, class members worked at the same plant and used similar equipment. The time study showed that donning and doffing all equipment, plus walking, took an average of 18 minutes in the fabrication department and 21 minutes in the kill department. True, applying Tyson's K-code policy and expert testimony to "generate . . . answers" for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) (allowing liability based on "just and reasonable inference" when complete records do not exist). While individual plaintiffs varied in their donning and doffing routines, their complaint is not "dominated by individual issues" such that "the varied circumstances . . . prevent 'one stroke' determination." *Luiken*, 705 F.3d at 374, 376, *quoting Dukes*, 131 S.Ct. at 2551. The district court did not abuse its discretion in certifying the class.

Tyson also contends that the class should be decertified because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking. *See In re Zurn Pex Plumbing Prods. Liab. Litig*., 644 F.3d 604, 616 (8th Cir.2011) ("A district court may not certify a class . . . 'if it contains members who lack standing.' "), *quoting Avritt*, 615 F.3d at 1034; *Blades v. Monsanto Co*., 400 F.3d 562, 571 (8th Cir.2005) (when "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy . . . damages to all class

members must be shown to justify the class action"). *Cf. Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir.2013) (finding certification improper when piece-rate system varied pay from worker-to-worker, use of an average conferred a "windfall" on some class members, and employees had incentive to under-report time). Tyson exaggerates the authority for its contention. *See Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013) (allowing variation in damages unless "individual damage calculations . . . overwhelm questions common to the class"); *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, —— U.S. ——, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013) ("Rule 23(b)(3) requires a showing that *questions* common to the class predominate, *not that those questions will be answered, on the merits*, in favor of the class.") (second emphasis added); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir.1995) ("The fact that individuals . . . will have . . . claims of differing strengths does not impact on the commonality of the class as structured."); *Mejdrech v. Met–Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir.2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop.").[5]

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[5] The dissent says that the class fails because commonality under Rule 23 "requires . . . that all class members suffered the same injury," and that "the locution 'injury' includes the measure of a class member's individual damages." Individual damage calculations, however, are permissible if they do not "overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433. The district court found the differences between gang-time employees

At any rate, at Tyson's request, the jury was instructed, "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." Tyson's instruction directed the jury to treat plaintiffs with no damages as class members. It is "fundamental that where the defendant . . . 'invited error' there can be no reversible error." *United States v. Beason*, 220 F.3d 964, 968 (8th Cir.2000), *quoting United States v. Steele*, 610 F.2d 504, 505 (8th Cir.1979).

III.

Tyson believes that plaintiffs improperly relied on a formula to prove liability. In *Dukes*, the Supreme Court disapproved of "Trial by Formula."

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Dukes, 131 S.Ct. at 2561. Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages. Using statistics or samples in litigation is not necessarily

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"small" and allowed individual damage calculations based on undisputed employee timesheets. This was not an abuse of discretion.

trial by formula. *See Comcast*, 133 S.Ct. at 1434 (considering expert's multiple-regression model); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir.2011) (favoring "a calculation based on the summation of mean times" to represent "the amount of time that employees working at the plant actually spend donning and doffing"). *Cf. Martinez v. Ryan*, —— U.S. ——, 132 S.Ct. 1309, 1325 n. 5, 182 L.Ed.2d 272 (2012) (relying on "a sample of federal habeas cases").

Plaintiffs do rely on inference from average donning, doffing, and walking times, but they apply this analysis to each class member individually. Using this representative evidence is comparable to a jury applying testimony from named plaintiffs to find classwide liability. *See* Fed.R.Civ.P. 23 (allowing representative parties when their claims "are typical of the claims or defenses of the class" and they "fairly and adequately protect the interests of the class"). For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated workers. *Mt. Clemens*, 328 U.S. at 684, 66 S.Ct. 1187; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 462 (6th Cir.1945) (discussing testimony). To prove damages, the Court remanded for "the determination of the amount of walking time involved and the amount of preliminary activities performed" based on "whatever reasonable inferences can be drawn from the employees' evidence." *Mt. Clemens*, 328 U.S. at 693–94, 66 S.Ct. 1187.

Tyson claims that plaintiffs presented insufficient evidence to prove damages classwide. *See Murray v. Stuckey's, Inc.*, 939 F.2d 614, 621 (8th Cir.1991) ("[P]laintiffs' evidence failed to show, *for each individual plaintiff*, 'that he has in fact performed

work for which he was improperly compensated.' "), *quoting Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187; *Marshall v. Truman Arnold Distrib. Co., Inc.*, 640 F.2d 906, 911 (8th Cir.1981) (requiring further evidence from non-testifying employees before awarding damages when earnings projections were substantially rebutted by cross-examination). *Cf. Dukes*, 131 S.Ct. at 2560 (requiring "individualized determinations of each employee's eligibility for backpay" as a procedural prerequisite for certification under Title VII). This court "will not reverse a jury verdict for insufficient evidence unless 'after viewing the evidence in the light most favorable to the verdict, [it concludes] that no reasonable juror could have returned a verdict for the non-moving party.' " *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 497 (8th Cir.1998), *quoting Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.1997) (en banc). *See Sandifer v. United States Steel Corp.*, —— U.S. ——, 134 S.Ct. 870, 880, 187 L.Ed.2d 729 (2014) (agreeing "with the basic perception of the Courts of Appeals that it is most unlikely Congress meant [the FLSA] to convert federal judges into time-study professionals"). Tyson has no evidence of the specific time each class member spent donning, doffing, and walking. "[W]hen 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." *Reich v. Stewart*, 121 F.3d 400, 406 (8th Cir.1997), *quoting Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.1992) (allowing "pattern or practice" evidence when defendant provided "self-serving, unsubstantiated approximations" of employee hours), *citing Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187.

To prove damages, plaintiffs use individual timesheets, along with average times calculated from a sample of 744 observations of employee donning, doffing, and walking. Plaintiffs' expert testified that the sample was large for this type of study, representative, and approximately random. He testified that the study used "accepted procedure in industrial engineering." Tyson's Director of Human Resources testified that K-code time did not include the donning and doffing of much non-unique PPE. Pay data—which came directly from Tyson—showed the amount of K-code time each individual received. Sufficient evidence existed to support a "reasonable inference" of classwide liability. *Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187.

Tyson asserts that even if sufficient evidence supported damages, plaintiffs' claims still fail because it is uncertain if any uncompensated work was performed, citing *Carmody v. Kansas City Board of Police Commissioners*, 713 F.3d 401, 406 (8th Cir.2013) ("*Anderson* [*v. Mt. Clemens Pottery Co*.] only applies where the existence of damages is certain. . . . *Anderson* allows uncertainty only for the amount of damages."). In *Carmody*, the plaintiffs did not "produce[ ] evidence indicating any hours worked over forty hours per week . . . were never paid." *Id*. The plaintiffs "did not provide any evidence of actual damages because the testimony contained no reference to overtime hours that violated the FLSA." *Id*. at 407. Here, Tyson stipulates that "workers at the Storm Lake plant tend to work a significant amount of overtime on a weekly basis." Plaintiffs show uncompensated overtime work by applying average donning, doffing, and walking times to employee timesheets. The evidence is "susceptible to [the] reasonable inference" that the jury's verdict is correct.

Troknya v. Cleveland Chiropractic Clinic, 280 F.3d 1200, 1206 (8th Cir.2002).[6]

* * * *

The judgment is affirmed.

BEAM, Circuit Judge, dissenting.

For two independent but somewhat factually related reasons, this case should be reversed, remanded and dismissed. First, under the circumstances of this litigation, neither the putative Fair Labor Standards Act (FLSA) collective action (the so-called federal class) nor the purported Iowa Wage Payment Collection Law (IWPCL) Rule 23(b)(3) class (the so-called state class) were eligible for class certification, either as a matter of fact or a matter of law. *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 583–84 (6th Cir.2009); *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir.2001). Second, Rule 23 state-law-based class actions are fundamentally different than collective actions authorized under the FLSA and may not be procedurally homogenized for trial as done in this case.[7] *Genesis Healthcare Corp. v.*

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[6] Tyson also argues that the jury failed to follow the directions of plaintiffs' damages expert, who testified that the jury could choose only "all or nothing" of her model. A jury is not required to follow an expert's conclusion. *See Children's Broad. Corp. v. The Walt Disney Co.*, 357 F.3d 860, 866 (8th Cir.2004).

[7] In its footnote 2, the court takes issue with this observation. In support, the court cites *Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873 (N.D.Iowa 2007), and *Lindsay v. Government Employees Insurance Co.*, 448 F.3d 416 (D.C.Cir.2006). Although subject matter jurisdiction was not in dispute in this case, *Salazar* and *Lindsay* deal with whether a federal cause of action

Symczyk, —— U.S. ——, 133 S.Ct. 1523, 1529, 185 L.Ed.2d 636 (2013).

I. BACKGROUND

This litigation generally involves hourly production employees of Tyson Foods at its Storm Lake, Iowa, meat-processing facility. But, the dispute more basically involves six named (lead) plaintiff employees from the kill, cut and retrim departments of the Storm Lake operation who were paid their wages using, in part, Tyson's "gang-time" compensation system but who also claim to have been owed overtime pay resulting from disparate compensable work activities occurring at times other than while earning daily "gang time" kill, cut and retrim department production line compensation. The six attempt to assert two separate collective actions—a federal statutory action asserting violations of the FLSA, 29 U.S.C. §§ 201–219, and a state statutory action separately based upon the IWPCL, Iowa Code Chapter 91A.

This case was originally assigned to the Honorable Mark Bennett who *conditionally* "certified" a federal collective action class pursuant to 29 U.S.C. § 216(b) and a purported IWPCL state law class pursuant to

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(the FLSA) and a state cause of action (the IWPCL) "derive" sufficiently from the same "common nucleus of operative facts" that, when joined, they form part of a case and controversy under Article III of the United States Constitution. *Lindsay*, 448 F.3d at 424 (quotation omitted), *Salazar*, 527 F.Supp.2d at 880 (quotation omitted); *See* 28 U.S.C. § 1367(a). But, "case and controversy" standing is not the fundamental issue here. The question is whether the separate federal and state claims were sufficiently identical to be presented to the jury, as here, as one amalgamated cause of action. In my view, Supreme Court precedent indicates they were not.

Federal Rule of Civil Procedure 23(b)(3). Then, because the Honorable John Jarvey was already assigned to several comparable cases involving Tyson, including a case involving Tyson employees at Columbus Junction, Iowa, *Guyton v. Tyson*, No. 3:07–cv–00088–JAJTJS (S.D.Iowa) (a companion case on appeal), this matter was transferred to Judge Jarvey for further pretrial and post-trial proceedings and for trial. The case has now been litigated and is before this panel on appeal.

II. DISCUSSION

1. The Classes

A. The Federal FLSA Class

A collective action to recover damages permitted by the FLSA "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by anyone or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). However, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id*.

The six named lead plaintiff employees who sought to establish this collective action bore the "burden of showing that the opt-in [consenting] plaintiffs are similarly situated to the lead plaintiffs." *O'Brien*, 575 F.3d at 584. Judge Bennett, apparently recognizing the likely existence of numerous factors unrelated to the "gang-time" pay used to determine a given Tyson employee's regular wages—factors amply established by the evidence at trial—certified a "conditional" FLSA class consisting of employees from the kill, cut and retrim departments at the Tyson plant paid

through the so-called gang-time compensation system within a discrete time period set forth in the certification. Indeed, the conditional certification related only to the three departments and the gang-time pay earned in the production line in those departments. No other regular or overtime pay calculation factors discussed at the merits portion of the trial (such as: individual employment codes, specific duties, wage-rate variations, knife wielding protections, sanitary clothing and equipment, part-time work, illness, injury, shift differentials, and routine production line overtime) were in any way incorporated as limitations on the use of the FLSA conditional class. The record reveals that this "conditional" designation was never withdrawn or modified at any time during or after the trial. According to the joint stipulation of facts by the parties, there were 444 employees who consented to be a part of this FLSA collective action class *including the six named lead plaintiffs*.

B. The IWPCL State Class

" 'In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met.' " *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir.2013) (quoting *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir.1994)). Judge Bennett, at the request of the same six named plaintiffs who sought creation of and joined the FLSA collective class, ultimately certified what he termed a "modified" 3,344–person putative Rule 23 state law class consisting of all "current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2005, to the present, and who are or were paid under a 'gang-time'

compensation system in the Kill, Cut or Retrim departments." This certification also included no other limiting or enhancing overtime pay calculation elements. The record discloses that this certification was likewise never further embellished or modified during or after trial.

The "gang-time system of payment" as referred to by Judge Bennett and defined by the evidence is a system where employees are paid from the time their production line starts to the time their production line ends. There is no contention by the named plaintiffs that the Storm Lake Tyson employees did not receive all wages due and owing for time worked during the production line gang-time pay periods. So, standing by itself, as it does in the class certifications, the gang-time production line classification means little in the context of proving at trial through evidence common to the class the overtime pay claims of the 3,344 members of the allegedly underpaid overtime class. Supreme Court and Eighth Circuit precedent demands otherwise. *See Dukes*, 131 S.Ct. at 2549–50 (discussing the requirements of class certification); *see also Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 874 (8th Cir.2012) (an employee who sues for unpaid overtime has the burden of proving he performed work for which he was not properly compensated).

To be certified for purposes of Rule 23(a), the collective groupings, that is the putative classes, must have been such that Tyson was positioned to assert its legitimately held common-to-the-class defenses against all members of the group who claimed to have earned unpaid overtime wages. *See* Fed.R.Civ.P. 23(a)(3). In this same context, the class must have been limited to Tyson employees who could and did establish entitlement to overtime pay resulting from

overtime work performed during compensable time, that is, work performed at times other than production line gang-time pay periods-periods for which all class members were already routinely, regularly, and unquestionably paid by Tyson in accordance with the law.

"In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Luiken*, 705 F.3d at 372 (quotation omitted). While a Rule 23(b)(3) class was purportedly certified, any Rule 23 class may only be lawfully certified if the "trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 131 S.Ct. at 2551 (quotation omitted). Actual, not presumed, conformance with Rule 23(a) remains indispensable. *Id*. Frequently, as in this case, " 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id*. Rule 23(a)'s four bedrock requirements are numerosity, commonality, typicality and adequate representation (here, a named plaintiff with standing). Commonality requires the plaintiff to demonstrate at the time of the merits hearing on the underlying claim—that all class members suffered the same injury. *Dukes*, 131 S.Ct. at 2551. So, if the locution "injury" includes the measure of a class member's individual damages, as I believe it does, this class fails on that score alone.

The court majority apparently sees a pathway around plaintiffs' legal dilemma arising from the above-noted class formulation failures. Although acknowledging that class certification is improper when a "windfall" is conferred on some class members, *ante* at 797, the court makes the following observation:

> At any rate, at Tyson's request, the jury was instructed, "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." Tyson's instruction directed the jury to treat plaintiffs with no damages as class members. It is "fundamental that where the defendant . . . 'invited error' there can be no reversible error." *United States v. Beason*, 220 F.3d 964, 968 (8th Cir.2000) (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir.1979)).

Ante at 798.

Thus, says the court, Tyson "directed the jury to treat plaintiffs with no damages as class members." However, Tyson made no such class membership directive to the jury through its instructional request and *Beason* and *Steele* are wholly inapposite as case precedent for the court's faulty premise. The cases deal only with run-of-the-mill evidentiary matters, not waivers of legal principles. *Beason* simply opened the door to the making of a *Bruton* exception by permitting an admission from a non-testifying co-defendant, and *Steele* admitted otherwise inadmissible hearsay evidence to clarify and rebut an issue opened by the criminal defendant's cross-examination. Tyson, after vigorously resisting class action formulations at every turn in this litigation, and being denied, properly requested an instruction that the plaintiffs be held to their evidentiary burdens of proof.

C. The Merits

Fundamentally, as previously noted, this case emerges from two separate causes of action brought through a single federal court complaint—a federal

law cause of action alleging liability leading to damages arising from violation of the FLSA and a state law cause of action alleging liability and damages arising from violation of the IWPCL. The burden of proof on all issues of statutory liability, injury and measure of damages rests squarely upon the shoulders of the named plaintiffs. *Lopez*, 690 F.3d at 874. In this case, gang-time pay is not in dispute. The plaintiffs contend, as does the court majority, that the overtime pay dispute involves time spent by a class of Tyson employees in doffing and donning various sanitary and personal protection equipment before and after the gang-time production line work has been completed each day.

Tyson's Storm Lake employees are required to wear a different combination of sanitary and protective gear. Those employees wearing knives to use in conjunction with their particular duties on a particular day are required to wear a combination of a plastic belly guard, mesh apron, mesh sleeve, plexiglass arm guard, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining the knives and knife scabbards ("knife related gear"). Other workers are required to wear a hard hat, hairnet, beard net, earplugs, ear muffs, rubber or cotton gloves, and rubber or plastic aprons ("sanitary gear").

From 1998 until February 4, 2007, Tyson paid four extra minutes beyond production line time for all production employees, referred to as "K–Code" time. From February 4, 2007, to June 28, 2010, Tyson ceased paying non-knife-wielding employees for the time donning and doffing sanitary gear. From February 4, 2007, to June 28, 2010, Tyson paid knife-wielding employees between 4 to 8 minutes of K–Code

time, depending on the job, and employees who did not have a knife did not receive K–Code time payments.

Plaintiffs offered evidence at trial concerning a sample of putative class employees from Dr. Kenneth Mericle and Dr. Liesl Fox. Fox's calculation testimony fed off of Mericle's evidence concerning Rule 23 class damages for overtime pay. Fox testified, assuming Mericle's evidence was true, that at least 212 members of the purported class did not suffer any damages because the doffing and donning time, less the K–Code time "would not have been enough to kick them into overtime." Further, while the plaintiffs' evidence generally indicated some individual overtime damages ranging from a few cents to several thousand dollars, there were at least 509 workers whose injuries ranged from $0.27 to less than $100. And, the record discloses that the jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury measured in cents rather than dollars. In spite of having the burden of proof, there was no evidence adduced by plaintiffs that established the number of purported class member employees fully compensated or not fully compensated by the K–Code payments already paid by Tyson. It is evident, however, that many class employees fit within each category and all were apparently included as beneficiaries of the single damages verdict returned by the jury.

Rule 23(a)(2) contemplates that "there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of

the same provision of law." *Dukes*, 131 S.Ct. at 2551 (quotation and citation omitted). Rather, "[t]heir claims must depend upon a common contention. . . . . That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. "What matters to class certification . . . is not the raising of common 'questions' . . . but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. (first alteration and italics in original) (quotation omitted). That was not the case here. While it is true that all class members were subject to a common policy—gang-time payment—there is no "common answer," arising from the evidence concerning the individual overtime pay questions at issue in this case. Thus, this case with these classes cannot be resolved in "one stroke," given the differences in donning and doffing times, K–Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation and a myriad of other relevant factors. The "rigorous" analysis of class certification in this case, which overlaps with the merits as required by *Dukes*, 131 S.Ct. at 2551, clearly discloses that the Rule 23 class claim does not comply with either rule or precedent and should have been decertified

Finally, the wisdom of the Supreme Court's statement in *Symczyk*, 133 S.Ct. at 1530, that Rule 23 class actions and collective actions under the FLSA are fundamentally different and thus do not lend themselves to inextricably intertwined trials, as here,

is well dramatized by this case.[8] Here we have undifferentiated presentations of evidence, including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages, ultimately resulting in a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict. Assuming that the district court could now re-open the proceedings in an effort to deal with an individual plaintiff's damages using the Mericle/Fox evidence, the exercise would be laborious, virtually unguided, and well outside of the limiting parameters the Supreme Court has, as a matter of law, placed upon use of the Rule 23 class action machinery.

III. CONCLUSION

From this result, I dissent.

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[8] In footnotes 3 and 4, the court again takes issue with this contention. Interestingly, in doing so, the court cites *Symczyk*, a case that clearly holds to the contrary. In *Symczyk*, the Supreme Court, in discussing an FLSA mootness issue and the applicability, or not, of Rule 23 class action cases to that particular question, stated: "Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S.Ct. at 1529. And then more to the point here, the Supreme Court held that although a putative class acquires "independent legal status once it is certified under Rule 23[, u]nder the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved notification to employees." *Id*. at 1530. Thus, the FLSA class in this case never progressed beyond "conditional" status and could not, as a matter of law, have been joined with the supposed Rule 23 class in an actionable claim of any kind, however the parties may have chosen to treat this conditional effort, which treatment is unclear from the record.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. 5:07–cv–04009
Sept. 26, 2012.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER

JOHN A. JARVEY, District Judge.

This matter comes before the Court on Defendant's motion for a judgment as a matter of law and motion to decertify or, in the alternative, for a new trial on damages, filed on October 24, 2011. [Dkt. No. 305]. Plaintiffs filed their resistance to Defendant's motion on November 15, 2011. [Dkt. No. 310]. Defendant replied to Plaintiffs' resistance on December 1, 2011. [Dkt. No. 313]. For reasons more fully explained below, the Court denies Defendant's motion.

I. FACTUAL BACKGROUND

These motions stem from a five-year dispute between the parties that culminated in a two-week trial in Sioux City, Iowa in September of 2011. The

Plaintiffs are all current or former employees of Defendant at their Storm Lake, Iowa facility. All Tyson production workers at the Storm Lake plant wear at least some items of personal protective equipment ("PPE"), which includes hard hats, ear plugs, boots, frocks, hair nets, hard plastic arm guards, mesh aprons, mesh sleeves or Kevlar sleeves, scabbards, cotton gloves, rubber gloves, cut-resistant (Kevlar) gloves, and mesh gloves.

Tyson Storm Lake hourly production workers must have all required and cleaned PPE on before the first piece of meat product reaches their work station on the assembly line. Employees are not permitted to perform work on the production line without wearing all required PPE, and they are disciplined if they are not wearing their required PPE. Tyson pays its Storm Lake hourly production workers, in part, on a "gang time" basis. "Gang time" is the time that the processing lines are moving and during which production workers are physically at the assembly line while the lines are moving and producing product. In and of itself, "gang time" does not record time that production workers spend donning, doffing, and cleaning themselves and their PPE before and after "gang time" and at unpaid meal breaks. In addition to "gang time" Tyson pays its hourly production workers "extra" minutes per day to compensate them for donning, doffing, and washing their PPE. The payment of "extra" minutes beyond the "gang time" for donning and doffing activities is referred to as "K–Code" time.

The parties have long disputed whether or not this K–Code time adequately compensates employees for the time they spend donning and doffing their PPE. In February 2007 Plaintiffs filed suit against Defendant

alleging violations of the Fair Labor Standards Act and the Iowa Wage Payment Collection law. Both a collective action under the Fair Labor Standards Act and a Rule 23 class were certified in this matter, and the case proceeded as a collective and class action. In September of 2011 a jury trial was held among the parties to resolve these issues. After the parties presented evidence to the jury for nine days, the case was submitted to the jury on September 23, 2011. The jury returned with a verdict on September 26, 2011. The jury found that the plaintiffs proved that the time spent donning and doffing their PPE was "work" within the meaning of the Fair Labor Standards Act; that this "work" was "integral and indispensable" to the employees' gang-time work; that the meal break was a bona fide meal period; that the donning and doffing activities at issue in the case were not "de minimis," and that the plaintiffs proved that they were entitled to additional compensation for their donning and doffing activities. The jury awarded $2,892,378.70 in damages to the Plaintiffs.

II. LEGAL STANDARD

a. Judgment as a Matter of Law

"Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party." *S. Wine and Spirits of Nev. v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 534 (8th Cir.2011) (citing *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 860 (8th Cir.2002)). In the Court's analysis, "we may not weigh the credibility of evidence, and conflicts in the evidence must be resolved in favor of the verdict." *Id*. (citing *Schooley v. Orkin Extermination, Co., Inc*., 502 F.3d 759, 764 (8th Cir.2007)). If no evidence supports the nonmoving party—that is, if all the evidence points in favor of the

moving party—then the Court may grant a motion for judgment as a matter of law. *Johnson v. Texarkana Ark. Sch. Dist. No. 7*, Slip Copy, 2012 WL 527907, at *1 (W.D.Ark. February 16, 2012).

"Where conflicting inferences reasonably can be drawn from the evidence, it is the role of the jury, not the court, to determine which inferences shall be drawn." *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir.2002). Therefore, it is inappropriate for this Court to overturn a jury verdict "unless, after giving the nonmoving party the benefit of all reasonable inferences and resolving all conflicts in the evidence in the nonmoving party's favor, there still exists a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party." *Id.* (internal quotation omitted).

b. New Trial

This Court may order a new trial only under the circumstances where a "miscarriage of justice" would occur without one. *White v. Pence*, 961 F.2d 776, 780 (8th Cir.1992) ("When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not." *Id.*) "A new trial may not be granted on the grounds that a jury's verdict is excessive unless the court concludes that the jury's verdict is a plain injustice or a monstrous or shocking result." *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 475 (8th Cir.1987) (internal quotations omitted).

III. DISCUSSION

In this case it cannot be said that no reasonable juror could have found for the Plaintiffs, or that the jury's verdict was a monstrous or shocking result.

Defendant argues that the evidence at trial was not sufficient to support liability because Plaintiffs failed to show that each individual employee had not already been fully compensated for any overtime hours they worked. However, Plaintiffs called two experts to help determine both liability and damages. Dr. Kenneth Mericle conducted a time study at Defendant's facility and determined how much time Plaintiffs spent donning and doffing their PPE. Dr. Leisle Fox used these numbers to calculate the amount of money owed to each Plaintiff for these activities. Dr. Fox did this by creating a database that included all Plaintiffs. [Tr. Ex. 349]. In this database, she made calculations for each Plaintiff individually by subtracting what was already paid to the employee in K-code time or determining if the employee was not owed extra payment for the week because their work did not exceed 40 hours and calculated what was owed to them on a week-by-week basis.

Additionally, Plaintiffs provided evidence from several opt-in plaintiffs, as well as Tyson employees, who testified to the general practices of employees regarding the donning and doffing of PPE. This included which PPE items were used by different groups of employees—including knife-wielders and non-knife-wielders—how often people donned and doffed these items, how these items were stored, cleaned, and sanitized, and how long it generally took for people to don and doff the items. Also included in the evidence was testimony regarding Defendant's practice of paying on the "gang time" system and adding K-code time to individual employees' paychecks in order to compensate them for the time the company believed it should take the employees to don and doff their PPE. Witnesses also testified that

Plaintiffs spent more time donning and doffing their PPE than Defendant paid them in K-code time.

The Court finds this evidence was sufficient for the jury to conclude that Defendant was liable for violating the Fair Labor Standards Act and the Iowa Wage Payment Collection Law, and that it was also sufficient for their damages calculations. It is not the role of the Court to attempt to divine the motivations of the jury or to determine the precise calculations of the damages they awarded. *See LeSueur Creamery, Inc. v. Haskon, Inc*., 660 F.2d 342, 354 (8th Cir.1981) ("The trial judge is not free to speculate as to the reasons for the jury's verdict." *Id*.) Instead, the Court must only look to see if there was sufficient evidence in the record from which the jury could make the determinations they did. Plaintiffs provided sufficient evidence in the form of witness testimony and the expert calculations of Dr. Mericle and Dr. Fox. In this case, there is not a complete absence of probative facts to support the conclusion, nor did a miscarriage of justice occur. The Court concludes that the Defendant failed to meet the heavy burden the law requires to overturn a jury's verdict and award of damages.

IV. CONCLUSION

Upon the foregoing,

IT IS ORDERED that Defendant's Motion for a Judgment as a Matter of Law and Motion to Decertify or, in the alternative, for a New Trial on Damages [Dkt. No. 305] is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. 5:07–cv–04009–JAJ
Aug. 25, 2011.

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER

JOHN A. JARVEY, District Judge.

This matter comes before the court pursuant to defendant's July 27, 2011 motion for decertification of Rule 23 class [dkt. 212]. Plaintiffs filed their opposition to defendant's motion to decertify Rule 23 class on August 19, 2011 [dkt. 227]. Defendant filed its reply brief on August 24, 2011 [dkt. 226–1].

Defendant argues that the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (June 20, 2011) mandates decertification of the plaintiffs' Rule 23 class. Defendant argues that

decertification is warranted because the court's[1] order granting class certification found that defendant's gang time compensation system was the "tie that binds" the class together under a single purported common question of law, and the Supreme Court in *Dukes* held that common questions of law are not sufficient to certify a class. Further, defendant claims that plaintiffs' use of a "representative sample" of hourly employee witness to prove class claims is prohibited by *Dukes*, which makes clear an employer's entitlement to individualized determinations of each class member's eligibility for back pay and expressly rejects certification of back pay claims proven through a "sample set" of class members whose damages are extrapolated to the entire class.

Plaintiffs argue in their resistance to defendant's motion to decertify should be denied because, unlike *Dukes*, this case involves no individual-by-individual determinations, and defendant's de minimus defense likewise must be answered across-the-board "in one stroke" for the class as a whole. Plaintiffs claim that this case satisfies the *Dukes* standard for commonality because a "common answer" is required for the following dispositive question: whether the subject activities are "work" and "integral and indispensable" to a principal activity because they are necessary to job performance and primarily benefit the defendant.

The court has studied the *Dukes* decision and finds its holdings and analysis largely inapplicable to and/or

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[1] *See* Judge Bennett's July 3, 2008 Memorandum Order and Opinion Regarding Plaintiffs' Motions for Conditional Certification as a Collective Action under the FLSA and Certification as a Class Action under Rule of Civil Procedure 23 [dkt. 62].

distinguishable from the instant case. In *Dukes* the District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs nationwide, current and former female employees of Wal-Mart who alleged that the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women. *Dukes*, 131 S.Ct. at 2547. In additional to injunctive and declaratory relief, the plaintiffs in *Dukes* also sought an award of backpay. *Id*. It was undisputed in *Dukes* that pay and promotion decisions were generally committed to "local managers' broad discretion, which is exercised 'in a largely subjective manner' " with only limited corporate oversight. *Id*. The plaintiffs in *Dukes* never alleged that Wal-Mart had an express corporate policy against the advancement of women, but rather claimed that their local managers' discretion over pay and promotions was exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. *Id*. at 2548. As described by the Court:

> Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice.

Id.

As evidence in support of the "commonality" requirement of Rule 23(a)(2), the plaintiffs in *Dukes* relied primarily on three forms of proof. *Id*. at 2549. First, plaintiffs provided statistical evidence about pay and promotion disparities between men and women at Wal-Mart. *Id*. Second, plaintiffs produced anecdotal reports of discrimination from about 120 of Wal-Mart's female employees. *Id*. Third, plaintiffs relied on the testimony of a sociologist who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. *Id*.

Noting that the "crux of this case is commonality," the court noted:

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon*, *supra*, at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of

> classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at 2551.

As *Dukes* was a Title VII case, the focus of the inquiry in resolving each individual's claim was "the reason for [the] particular employment decision." *Id.* at 2552 (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984)). As such, *Dukes* involved "literally millions of employment decisions" and "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it [would] be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*" *Id*.

Similar to *Dukes*, the Supreme Court in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) rejected a class comprising all employees wrongfully denied promotions and all applicants wrongly denied jobs for lack of commonality and typicality. Specifically, the Court held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." *Id*. at 158. The Court in *Falcon* suggested two ways in which commonality and typicality may have been shown. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id*. at 159, n. 15. Second, "[s]ignificant proof that an employer operated under a

general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id*.

Noting the absence of "significant proof" that Wal-Mart was operating under a "general policy of discrimination," and further noting that Wal-Mart's announced policy actually forbids sex discrimination, the Court in *Dukes* found that the only policy established by plaintiffs' evidence was Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters which is "just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Dukes*, 131 S.Ct. at 2554.

> [D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.
>
> [Plaintiffs] have not identified a common mode of exercising discretion that pervaded the entire company . . . In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. [Plaintiffs] attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

Id. at 2554-55.

With respect to the Rule 23 class at issue, this court disagrees with the defendant's contention that Judge Bennett certified a Rule 23 class based on what he found to be a single common question of law: "whether Tyson's gang time compensation system violates the law." In addition to the common legal question identified by Judge Bennett, which this court has interpreted *not* to be a challenge to the legality of the "gang time" system per se, but rather whether the defendant has paid its production workers for all "work" performed prior and subsequent to "gang time," particularly the time spent donning, doffing, and cleaning PPE, Judge Bennett also noted numerous factual similarities among the employees paid on a "gang time" basis. Unlike *Dukes*, there is a common answer available to this question because, unlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility. If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs. The instant matter is not like *Dukes* where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process. Moreover, the court does not see the same evidentiary defects in the instant case as those addressed in *Dukes*, as the instant case is supportable by class-wide proof.

Finally, the court finds inapplicable and/or distinguishable the analysis/holding of *Dukes* as it pertains to plaintiffs' claims for backpay. The class in *Dukes* was certified pursuant to Rule 23(b)(2), which "allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.' " *Dukes*, 131 S.Ct. at 2257 (quoting Rule 23(b)(2)). Rather, Judge Bennett found that the class was properly certified under Rule 23(b)(3). As noted by the Court in *Dukes*, "We think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id*. at 2558.

Upon the foregoing,

IT IS ORDERED that defendant's motion for decertification of Rule 23 class [dkt. 212] is DENIED.

APPENDIX D

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

No. C07-4009-MWB

PEG BOUAPHAKEO, ET AL.,

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

ORDER UNSEALING
MEMORANDUM OPINION AND
ORDER ON PLAINTIFFS' MOTIONS
FOR COLLECTIVE ACTION AND
CLASS ACTION CERTIFICATION

On July 3, 2008, the court filed its memorandum opinion and order on Plaintiffs' motions for collective action certification under the Fair Labor Standards Act, and class action certification under Federal Rule of Civil Procedure 23. Dkt. # 62. The parties previously entered into a protective order to keep certain information confidential throughout the litigation of this case. Dkt. # 29. The parties also sealed their briefs when arguing their positions relative to the collective action and class action certification of Plaintiffs' claims. As a result, the court filed its memorandum

opinion and order on collective action and class action certification under seal. Dkt. # 62.

After considering the confidentiality concerns espoused by the parties in their protective order, the court does not believe its memorandum opinion and order needs to be sealed. Therefore, the court orders its memorandum opinion and order, Dkt. # 62, to be *unsealed*.

IT IS SO ORDERED.

DATED this 14th day of July, 2008.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

APPENDIX E

UNITED STATES DISTRICT COURT,
N.D. IOWA,
WESTERN DIVISION.

No. C 07–4009–MWB.
July 3, 2008.

PEG BOUAPHAKEO, JAVIER FRAYRE, JOSE A. GARCIA, MARIO MARTINEZ, JESUS A. MONTES, AND HERIBENTO RENTERIA,[1]

Plaintiffs,

v.

TYSON FOODS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFFS' MOTIONS FOR CONDITIONAL CERTIFICATION AS A COLLECTIVE ACTION UNDER THE FSLA AND

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[1] Previously, this case was captioned as "Dale Sharp, et al. v. Tyson Foods, Inc." to account for ten named plaintiffs. Six of these plaintiffs (those named in the present caption) worked at Tyson's Storm Lake, Iowa, facility. The remaining four plaintiffs (Sharp, Brian Fryar, Courtney Knutson, and Mike Sturtevant) worked at Tyson's Denison, Iowa, facility. The Denison, Iowa, plaintiffs are no longer involved in this lawsuit as a result of the parties voluntarily dismissing the claims against Tyson's Denison facility. Therefore, the court has restyled the caption to include only those named plaintiffs from Tyson's Storm Lake facility.

CERTIFICATION AS A CLASS ACTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

[TO BE FILED UNDER SEAL]

MARK W. BENNETT, District Judge.

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Plaintiff employees request the court to allow them to proceed as representatives of a group of employees against Defendant for its allegedly illegal wage payment practices. Several issues must be addressed in considering Plaintiffs' request, but one question stands out: Does Defendant's "gang time" compensation system allow Plaintiff employees to gang up on Defendants?

I. INTRODUCTION

Plaintiffs Dale Sharp, et al., filed a "Class Action and Representative Action Complaint" against Defendant Tyson Foods, Inc., on February 6, 2007. Dkt. # 2. Plaintiffs bring two claims against Tyson: (1) a class action under Federal Rule of Civil Procedure 23 for Tyson's alleged violations of the Iowa Wage

Payment Collection Law (IWPCL), and (2) a collective action under 29 U.S.C. § 216(b) for Tyson's alleged violations under the Fair Labor Standards Act (FLSA). Plaintiffs state the court has subject matter jurisdiction over their IWPCL claim under 28 U.S.C. § 1332(d) (diversity jurisdiction for class actions), and subject matter jurisdiction over their FLSA claim under 28 U.S.C. § 1331 (federal question jurisdiction). Tyson filed its answer, raising many affirmative defenses, on March 28, 2007. Dkt. # 15.

On July 6, 2007, the court approved a scheduling order and discovery plan. Dkt. # 23. The court limited discovery to class certification issues, and set deadlines for the parties' briefs related to class action and collective action certification. On November 27, 2007, the court approved the parties' protective order to keep certain information confidential during the parties' discovery and litigation of this lawsuit. Dkt. # 29. On February 4, 2008, Plaintiffs filed a renewed sealed motion for the court to conditionally certify its FLSA claim as a collective action under the FLSA. Dkt. # 34. On the same date, Plaintiffs also filed a renewed sealed motion for the court to certify its IWPCL claim as a class action under Rule 23. Dkt. # 35. Tyson responded with its resistance to Plaintiffs' motion for class certification on March 4, 2008, Dkt. # 45, and with its resistance to Plaintiffs' motion for conditional certification on March 5, 2008, Dkt. # 49. Plaintiffs then filed their replies on March 26, 2008. Dkt. # 59. No party has requested oral arguments on the class certification and conditional collective action certification issues. As a result, the matter is fully submitted. The trial date has not yet been set, but a telephonic status conference is set for July 9, 2008, before Chief Magistrate Judge Paul A. Zoss. Dkt. # 61.

II. FACTUAL BACKGROUND

There were originally ten named plaintiffs in this action, but only six remain due to the dismissal of all claims involving Tyson's Denison, Iowa, facility. Dkt. # 40. The six remaining plaintiffs are current or former production employees who work or who have worked for Tyson's Storm Lake, Iowa, pork processing facility. Tyson's facility in Storm Lake receives, slaughters, and processes hogs into various cuts of pork that are then packaged and shipped to other Tyson facilities or directly to customers. The Storm Lake facility has approximately 1,600 hourly production and support employees that work on three shifts. These employees work in six main departments: the Kill, Cut, Retrim, Materials Handling/Load Out, Rendering, and Maintenance departments. Most of the hourly employees work in the Kill, Cut, and Retrim departments. None of the six remaining named plaintiffs have worked in the Rendering, Load Out, or Maintenance departments at Tyson.

All hourly production employees are required to clock in and out before and after their shift. Clocking in and out is generally only for attendance purposes. Clocking in and out only affects an employee's paid time if the employee clocks in late (in which case the employee's pay is reduced) or comes in early or stays late to perform set up and clean up work (in which case the employee's pay is increased). The employees in the Kill, Cut, and Retrim departments are paid by "gang time,"[2] or the length of production in their department,

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[2] Gang time is also sometimes called "line time," "shift time," or "mastercard time." *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1302 (11th Cir.2008) (mastercard time); *Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 879 (N.D.Iowa 2007) (line time);

which is generally the time it takes for hogs to travel on mechanized belts through the department. More specifically, gang time begins when the first hog or piece of pork "hits the floor" of the specific department, and gang time ends when the last hog or piece of pork "hits the floor" in that department. As a result, gang time represents the amount of work each employee performs while on the production line, and those employees at the beginning of the production line start and end a few minutes earlier than those employees at the end of the production line. The employees in the Rendering, Materials Handling/Load Out, and Maintenance departments are not paid by gang time. Instead, these employees are paid based on a pre-set start time until a pre-set end time.

In addition, most hourly employees at Tyson are given a "K code" value to compensate them for the work they perform donning and doffing their Personal Protective Equipment (PPE) before and after their shift begins. PPE is the clothing Tyson provides their employees and requires them to wear to perform their jobs. Prior to 2007, Tyson paid every employee within certain departments an extra four minutes to compensate them for the extra time they needed to don and doff their PPE. In 2007, and as a result of the United States Supreme Court decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), Tyson changed its K code policy. Now, all Tyson employees are given a K code value specific to their positions to represent the extra time they need to be compensated for donning and doffing their PPE. Some are not given any K code value, but those that

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Saunders v. John Morrell & Co., No. C88–4143, 1991 WL 529542, at *7 n. 2 (N.D.Iowa Dec. 24, 1991) (shift time).

don and doff PPE are given a K code value somewhere between four and seven minutes.

All hourly production employees are required to wear certain PPE, but not all wear the same PPE. Employees often wear PPE such as hard hats, hairnets, beard nets (if applicable), rubber soled or steel-toed boots, hearing protection, rubber or cotton or kevlar or mesh gloves, company issued shirts and pants ("whites"), frocks, belly guards, aprons, and arm guards. In addition, most employees throughout the plant use knives, and these employees are required to wear additional clothing as added protection. Most employees who use knives are required to dip their knife and related equipment[3] in a sanitizing solution before beginning production work. Likewise, when leaving the department, the employee must perform the same sanitation procedure. In addition, at the end of their shift, these employees are required to rinse their knives and related equipment at one of several wash nozzles either in the production area or immediately outside the production area at the wash station. Employees who are required to wear a frock, "whites," hard hat, hairnet, beardnet, steel-toed boots, and earplugs must have these items on before entering the production area. All hourly employees are assigned a locker in the main locker rooms off the production hallway, which the employees use to store their required and optional clothing items and equipment. Hourly production employees receive one fifteen minute paid break and one thirty minute unpaid meal period per shift. Employees do not have

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[3] Employees that use knives have scabbards to contain their knives and steels to sharpen their knives. As of April 2007, Tyson's Storm Lake facility uses no-maintenance steels that do not require sanding. [D. ex. 22].

to perform any washing or sanitizing during their meal period.

III. COMPATIBILITY OF FLSA AND IWPCL CLAIMS

The specific circumstances of this case must be made absolutely clear. Plaintiffs have two claims against Tyson: a federal law FLSA claim, and a state law IWPCL claim. The court has subject matter jurisdiction over the federal law claim because it is based on federal law. *See* 28 U.S.C. § 1331. The court has subject matter jurisdiction over the state law claim because the parties meet the requirements for diversity jurisdiction under the Class Action Fairness Act of 2005 (CAFA).[4] Plaintiffs ask the court to certify their federal law claim as a "collective action" under § 216(b) of the FLSA. Plaintiffs also ask the court to certify their state law claim as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

Tyson argues Plaintiffs cannot bring both the FLSA claim and the IWPCL claim in the same action because the Plaintiffs' FLSA claim preempts Plaintiffs' IWPCL claim in this case. Tyson additionally argues that Plaintiffs' IWPCL claim and request for class certification under Rule 23 should be either denied, dismissed, or limited because the class certification procedure under Rule 23 is fundamentally opposed to the collective action certification procedure under

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[4] CAFA gives the district court original jurisdiction over civil class actions where there are more than 100 class members, more than $5,000,000 is in controversy, any member of the class is diverse from any defendant, and the primary defendants are not governmental entities. Class Action Fairness Act of 2005 (CAFA), Pub.L. No. 109–2, § 4, 119 Stat. 4, 9 (2005) (codified at 28 U.S.C. § 1332(d)(2), (5)).

§ 216(b). Tyson's arguments address the compatibility of FLSA and state law claims, and they have been the subject of many district court dockets recently. *See*, *e.g.*, *Ellis v. Edward D. Jones & Co., L.P.*, 527 F.Supp.2d 439, 459 n. 19 (W.D.Pa.2007) (noting the "recent phenomenon" of the " 'explosion' of hybrid lawsuits involving both state and FLSA claims"). Unfortunately, however, circuit court opinions are rare on the issues confronted in these circumstances, and there is an overall paucity of decisions on the subject in the Eighth Circuit. The court is, therefore, navigating some relatively uncharted, or at least rough, waters in addressing these arguments.[5] The court will first address the issue of preemption, followed by Tyson's arguments against dual certification.

A. Preemption

The Supremacy Clause "states that the laws of the United States made pursuant to the Constitution are the 'supreme Law of the Land.' " *Wuebker v. Wilbur–Ellis Co.*, 418 F.3d 883, 886 (8th Cir.2005) (quoting U.S. Const., Art. VI, cl. 2). Whether federal law preempts state law is a question of congressional intent. *Id*. ("Congressional intent is the touchstone for determining the preemptive effect of a statute." (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990))). The United States Supreme Court has identified a three-part "categorical framework" to discern whether Congress meant to

[5] The waters are made rougher because the cases that address the issues in this case are often unpublished. The court regrets analyzing the issues with the help of authority not recommended for publication. The court feels compelled, however, to address all the decisions in this area, whether published or not, because not many decisions exist at all.

preempt state law. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151–52 (9th Cir.2000). According to this framework,

> [c]ourts discern an intent to preempt state law when Congress expressly forbids state regulation (express preemption), when it creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption), and when a law enacted by it directly conflicts with state law (conflict preemption).

Wuebker, 418 F.3d at 886 (citing *English*, 496 U.S. at 78–79, 110 S.Ct. 2270). Notably, the three categories of preemption—express, field, and conflict—are not "rigidly distinct." *English*, 496 U.S. at 79 n. 5, 110 S.Ct. 2270.

In this case, and keeping in mind that the three categories of preemption are somewhat related, the only question is whether Plaintiffs' IWPCL claim is barred under a conflict preemption analysis. Express and field preemption do not apply because Congress did not specifically prohibit state regulation in this area. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 n. 10 (4th Cir.2007) (addressing the similar question of whether plaintiff's state law contract, negligence, and fraud claims were preempted by the FLSA, and finding "there is no question that express preemption and field preemption are inapposite to this dispute"); *Williamson*, 208 F.3d at 1151–52 (addressing the similar question of whether plaintiff's common law fraud claim was preempted by the FLSA, and focusing on whether conflict preemption

applied).[6] In fact, the FLSA contains a savings clause that allows states to enact their own laws in this area. 29 U.S.C. § 218(a). Moreover, Tyson does not specifically argue express or field preemption applies. Instead, Tyson relies almost exclusively on the recent Fourth Circuit Court of Appeals's decision in *Anderson*—which used a conflict preemption analysis—for its argument that Plaintiffs' IWPCL claim is preempted by the FLSA.

Conflict preemption, also called implied preemption, can occur in two ways: "when it is impossible for a private party to comply with both state and federal law, and when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wuebker*, 418 F.3d at 887 (quoting *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000)); *see Williamson*, 208 F.3d at 1152 (noting the two types of conflict preemption). Tyson does not argue that it is impossible for Tyson to comply with both the FLSA and the IWPCL, and the court is unaware of any reason why dual compliance would not be possible. Therefore, the relevant question in this case, as it was in *Anderson* and *Williamson*, is whether the state law claim "stands as an obstacle" to Congress's objectives in the FLSA. "In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Forest Park II v. Hadley*, 336 F.3d 724, 733 (8th Cir.2003) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494,

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[6] The Fourth Circuit Court of Appeals's decision in *Anderson* in 2007, and the Ninth Circuit Court of Appeals's decision in *Williamson* in 2000, appear to be the only two recent federal appellate decisions that substantively address FLSA preemption.

107 S.Ct. 805, 93 L.Ed.2d 883 (1987)). State law is "preempted if it interferes with the methods by which the federal statute was designed to reach that goal." *Id*. "Thus, '[w]here a state statute conflicts with, or frustrates, federal law, the former must give way.' " *Id*. (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)).

In *Anderson*, the Fourth Circuit Court of Appeals held that "Congress prescribed exclusive remedies in the FLSA for violations of its mandates" and, therefore, the "Class Members' FLSA-based contract, negligence, and fraud claims are precluded under a theory of obstacle preemption." 508 F.3d at 194. Most important to the court's holding was the "[c]rucial[ ]" fact that "the Class Members' state claims all depended on establishing that [the defendant] violated the FLSA," and that "[w]ithout doubt, these state claims essentially require the same proof as claims asserted under the FLSA itself." *Id*. at 193. The court further stated:

> The Class Members do not contend, however, that any North Carolina law entitles them to unpaid wages. Rather, as discussed above, they rely on the FLSA for their rights, and they invoke state law only as the source of remedies for the alleged FLSA violations. Importantly, the FLSA does not explicitly authorize states to create alternative remedies for FLSA violations.

Id. The court also noted that its holding was "consistent with the rulings of several district courts deeming state claims to be preempted by the FLSA where those claims have merely duplicated FLSA claims." *Id*. at 194 (citing *Choimbol v. Fairfield Resorts, Inc*., No. 2:05cv463, 2006 WL 2631791, at *4–6 (E.D.Va. Sept. 11, 2006); *Moeck v. Gray Supply*

Corp., No. 03–1950, 2006 WL 42368, at *2 (D.N.J. Jan. 6, 2006); *Chen v. St. Beat Sportswear, Inc*., 364 F.Supp.2d 269, 292–93 (E.D.N.Y.2005); *Morrow v. Green Tree Servicing, L.L.C*., 360 F.Supp.2d 1246, 1252–53 (M.D.Ala.2005); *Sorenson v. CHT Corp*., No. 03 C 1609(L), 2004 WL 442638, at *5–7 (N.D.Ill. Mar. 9, 2004); *Johnston v. Davis Sec., Inc*., 217 F.Supp.2d 1224, 1227–28 (D.Utah 2002); *Alexander v. Vesta Ins. Group, Inc*., 147 F.Supp.2d 1223, 1240–41 (N.D.Ala.2001)).

The Ninth Circuit Court of Appeals came to a different conclusion in *Williamson*. In *Williamson*, the court addressed whether plaintiffs' common law fraud claims were preempted by the FLSA. 208 F.3d at 1152–54. The court stated conflict (obstacle) preemption would apply if two conditions were met: "(1) the anti-retaliation provision [in the FLSA] covers [plaintiffs' common law fraud claims] and (2) the FLSA is the exclusive remedy for claims duplicated by or equivalent of rights covered by the FLSA." *Id*. at 1152. Regarding the first condition, the court held that the FLSA anti-retaliation provision did not apply to defendant's allegedly fraudulent conduct. *Id*. In other words, plaintiffs' common law fraud claim provided the sole right and remedy for defendants' alleged bad acts. *Id*. Regarding the second condition, the court found the FLSA did not provide exclusive remedies for violating its provisions. The court initially noted that the FLSA's savings clause at 29 U.S.C. § 218(a), which allows states to enact stricter wage, hour, and child labor provisions, "indicates that [the FLSA] does not provide an exclusive remedy." *Williamson*, 208 F.3d at 1151. Then the court distinguished a pair of cases, *Kendall v. City of Chesapeake*, 174 F.3d 437 (4th Cir.1999), and *Lerwill v. Inflight Motion Pictures*, 343 F.Supp. 1027 (N.D.Cal.1972), to at least raise doubt

that the FLSA provides the exclusive remedy for violating its provisions.[7] Both of these cases suggested or stated that the FLSA contained the exclusive remedies for its own violations. *Kendall*, 174 F.3d at 443 ("[I]n the FLSA Congress manifested a desire to exclusively define the private remedies available to redress violations of statute's terms."); *Lerwill*, 343 F.Supp. at 1029 ("The only conclusion possible, then, is that the statutory remedy is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA."). Regarding *Kendall*, the *Williamson* court noted that *Kendall* was not a case about preemption, but about "whether another federal statute (Section 1983) can support a claim that clearly falls under the FLSA." *Williamson*, 208 F.3d at 1153. Regarding *Lerwill*, the Ninth Circuit Court of Appeals noted it was also "dubious authority" because it did not discuss preemption at all, and because "[i]t was about a plaintiff's effort to get a more favorable remedy." *Id*. Thus, in the end, the court found neither of its obstacle preemption conditions satisfied, and therefore held that the FLSA did not preempt plaintiffs' common law fraud claim. *Id*.

Whether this court should ultimately follow the persuasive authority in *Anderson* or *Williamson*—there is no mandatory authority on point—requires the court to review the applicable state law in this case, the IWPCL, in light of the arguments made for and against preemption. The IWPCL is a "remedial

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[7] Interestingly, the *Anderson* court relied on *Kendall* for its holding that the FLSA provided the exclusive remedy for FLSA violations. *Anderson*, 508 F.3d at 194 ("Whether the FLSA provides exclusive remedies for the enforcement of its own provisions is a question that need not occupy us for long, because we already answered it [affirmatively] in *Kendall*.").

statute," and "meant to facilitate the public policy of allowing employees to collect wages owed to them by their employers." *Hornby v. State*, 559 N.W.2d 23, 26 (Iowa 1997). Section 91A.3 gives employees the right to receive their wages. It states, "An employer shall pay all wages due its employees. . . ." Iowa Code § 91A.3. The IWPCL also gives employees the right to receive their "wages due" in "at least monthly, semimonthly, or biweekly installments on regular paydays," *id*., and provides suspended or terminated employees with the right to receive their "wages earned" by "the next regular payday," *id*. § 91A.4. The FLSA, of course, provides similar rights, like the rights to a minimum wage and overtime pay. 29 U.S.C. §§ 206, 207. A big difference between the FLSA and IWPCL is that the IWPCL is more concerned with when or how wages are paid. See *Runyon v. Kubota Tractor Corp*., 653 N.W.2d 582, 585 (Iowa 2002) ("We have observed that the purpose of chapter 91A is to 'facilitate collection of wages by employees.' " (quoting *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999))). Nevertheless, both statutes require employers to pay certain wages to their employees. *See Stahl v. Big Lots Stores, Inc*., No. 06–CV–1026–LRR, 2007 WL 3376707, at *5 (N.D.Iowa Nov. 7, 2007) ("The purpose of the FLSA and the IWPCL is to 'facilitate the collection of wages owed to employees.' " (quoting *Phipps v. IASD Health Servs. Corp*., 558 N.W.2d 198, 201 (Iowa 1997))). While the FLSA prescribes exactly what kind of wages must be paid, *see* 29 U.S.C. §§ 206, 207, the IWPCL simply requires that an employer "pay all wages due its employees," Iowa Code § 91A.3. Thus, the FLSA may be used to establish an employee's right to a certain amount of wages under the IWPCL and an employer's

violation of the IWPCL for not paying "all wages due its employees." *Id*.

And that appears to be exactly the case here. Plaintiffs complaint alleges that Tyson is obligated to pay all wages to its employees under the IWPCL, but Plaintiffs never state what law or right—other than those rights conferred by the FLSA—they rely on that establishes they are entitled to the wages they seek. In addition, despite Tyson's argument that Plaintiffs' IWPCL claim is based on a violation of the FLSA,[8] Plaintiffs do not assert their right to wages due under the IWPCL is conferred by anything other than the FLSA. In such a case, it is perhaps obvious that Plaintiffs rely on the FLSA to establish a violation under the IWPCL for Tyson's failure to "pay all wages due its employees." *Id*. This is not surprising, as this court has recognized this situation before: The "violation of the FLSA is precisely the basis for the wages purportedly owed under the IWPCL in this case. Thus, the IWPCL claim is essentially 'duplicative' of the FLSA claim in this action." *Bartleson v. Winnebago Indust., Inc*., 219 F.R.D. 629, 634 (N.D.Iowa 2003) (citations omitted).[9]

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[8] Tyson specifically argues that "the IWPCL does not provide Plaintiffs with any substantive rights, but simply provides a mechanism for plaintiffs to recover wages owed but unpaid," and that "Plaintiffs' claims under the IWPCL must rely on the FLSA to establish the underlying right to compensation allegedly owed by defendant within the meaning of the IWPCL." Dkt. # 45.

[9] A violation of the IWPCL, however, is not always dependent upon establishing a violation of the FLSA. The specific amount of "wages due" to employees under the IWPCL must be provided by something other than the IWPCL. And as a general matter, that amount does not have to be provided by the FLSA. The wages due under the IWPCL could be based on any number of legal bases, such as an employment agreement or Iowa's minimum wage law.

As a result, this case appears similar to the case in *Anderson*. Plaintiff's state law claims in *Anderson* depended on violations of the FLSA, as they do here. 508 F.3d at 193–94. In *Williamson*, however, the plaintiff's common law fraud claim did not depend on any violation of the FLSA—the FLSA did not even provide a basis for recovery for the claim asserted by the plaintiff. 208 F.3d at 1152–53. Nevertheless, the court does not believe such "duplication" means Plaintiffs' IWPCL claim is preempted by their FLSA claim because the court, like the court in *Williamson*, does not believe the FLSA provides the exclusive remedy for its violations. Thus, the court disagrees with the Fourth Circuit Court of Appeals's determination that the FLSA provides otherwise. *Anderson*, 508 F.3d at 194; *see Roman v. Maietta Const., Inc*., 147 F.3d 71, 76 (1st Cir.1998) ("As the trial court noted, 'the FLSA is the exclusive remedy for enforcement of rights created under the FLSA.' "). As the court in *Williamson* determined, "the 'savings clause' indicates that [the

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See Iowa Code § 91D.1 (requiring a minimum wage of "$7.25 as of January 1, 2008"). Because the IWPCL may rely on a legal basis for wages that is stricter or different than the FLSA, the IWPCL is not generally duplicative of the FLSA. *Cf. Avery v. City of Talladega*, 24 F.3d 1337, 1348 (11th Cir.1994) ("[T]he district court erred in holding that the FLSA pre-empts a state law contractual claim that seeks to recover wages for time that is compensable under the contract though not under the FLSA."). Moreover, the IWPCL could apply in different circumstances than the FLSA, because the FLSA covers employers and employees who are not necessarily covered under the IWPCL. *See Dietrich v. Liberty Square, L.L.C*., No. C 05–2037–EJM, 2006 WL 1876989, at *1–2 (N.D.Iowa July 6, 2006) (finding that the definitions of employer and employee are different under the FLSA and IWPCL).

FLSA] does not provide an exclusive remedy." 208 F.3d at 1151. The savings clause provides:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week established under this chapter. . . .

29 U.S.C. § 218(a). Under the savings clause, a state may clearly provide greater benefits, or rights, than the FLSA. While the savings clause does not specifically reference remedies, the court believes the savings clause indicates that Congress did not foreclose states from providing alternative remedies. In addition, while the *Anderson* court focused on the fact that the FLSA does not "explicitly authorize states to create alternative remedies for FLSA violations," 508 F.3d at 193, neither does the FLSA explicitly forbid states from doing so. In light of the savings clause, the court thinks the better conclusion is that the FLSA does not provide the exclusive remedy for violations of its mandates.[10]

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[10] In this case, the remedies available under the IWPCL are almost identical to the remedies available under the FLSA. *See Stahl v. Big Lots Stores, Inc.*, No. 06–CV–1026–LRR, 2007 WL 3376707 (N.D.Iowa Nov. 7, 2007) (comparing the remedies available under the IWPCL and the FLSA). Under the IWPCL, successful plaintiffs may recover "unpaid wages or expenses, court costs and usual and necessary attorney's fees incurred in recovering the unpaid wages or expenses." Iowa Code § 91A.8. In addition, the successful plaintiff under the IWPCL may recover liquidated damages, generally limited to "the amount of unpaid wages," *id.* § 91A.2(6), "[w]hen it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section 91A.3," *id.* § 91A.8.

Moreover, because the FLSA does not provide the exclusive remedy for its violations, the court does not believe Plaintiffs' duplicative IWPCL claim "interferes," "frustrates," "conflicts," or "stands as an obstacle" to the goals of the FLSA. *Forest Park II*, 336 F.3d at 733 (quotations omitted). It may be true that Plaintiffs' IWPCL claim depends on proving an FLSA violation to succeed. But the court does not see how this dependency or duplication means, under an implied/conflict/obstacle preemption analysis, that Plaintiffs' IWPCL claim is preempted by the FLSA. The goal of the FLSA—"to eliminate 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,' " *Anderson*, 508 F.3d at 192 (quoting 29 U.S.C. § 202(a))—is not frustrated by enforcing the IWPCL, *see Forest Park II*, 336 F.3d at 733 (noting a state statute must give way when it frustrates federal law). And the court does not see how enforcement of the IWPCL "interferes with the methods by which the federal statute was designed to reach that goal." *Id*. (quotation omitted). Tyson certainly argues the "method" of FLSA collective action certification is interfered with by the Rule 23 class action procedure for Plaintiffs' IWPCL claim, but the IWPCL itself does not interfere with the

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Under the FLSA, successful plaintiffs may recover "their unpaid minimum wages, or their unpaid overtime compensation . . . and . . . an additional equal amount as liquidated damages." 29 U.S.C. § 216(b); *see id*. (noting also that violations of section 215(a)(3) entitle the employee to equitable relief, including "employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."). In addition, the successful plaintiff under the FLSA may recover a "reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id*.

methods by which the FLSA is implemented.[11] The IWPCL does not interfere with or stand as an obstacle to the FLSA, despite the fact that Plaintiffs' IWPCL claim is duplicative of their FLSA claim. *See Takacs v. A.G. Edwards & Sons, Inc.*, 444 F.Supp.2d 1100, 1117 (S.D.Cal.2006) ("Here, as in *Williamson*, Plaintiffs' fraud claims under [California's Unfair Competition Law] would not contradict any purpose or application of the FLSA, and therefore should stand.").

Of course, the court is aware of the plethora of cases holding that the FLSA preempts duplicative state law claims. *See Anderson*, 508 F.3d at 194 (citing cases); *Woodard v. FedEx Freight East, Inc.*, 250 F.R.D. 178, 189, 2008 WL 471552, at *11 (M.D.Pa.2008) ("[A] conflict exists where, as here, the state wage law claim parallels the FLSA action."); *Lopez v. Flight Servs. & Sys., Inc.*, No. 07–CV–6186 CJS, 2008 WL 203028, at *5, 7 (W.D.N.Y. Jan. 23, 2008) (holding that "Plaintiffs' state common-law claims for fraud, breach of contract, breach of implied covenants of good faith, tortious interference with contract, and unjust enrichment are preempted by the FLSA" because they are duplicative of the FLSA); *Nimmons v. RBC Ins. Holdings (USA), Inc.*, No. 6:07–cv–2637, 2007 WL 4571179, at *2 (D.S.C. Dec. 27, 2007) ("The foregoing authorities compel the conclusion that Plaintiff's state law claims are not viable and should be dismissed as duplicative of the rights and remedies available under the FLSA."); *see also Ellis*, 527 F.Supp.2d at 449 (using a preemption analysis to "assess[ ] the opt-in/opt-out conflict," and although not deciding whether the FLSA preempted plaintiff's state law claims, suggesting it

[11] This argument, in fact, is not advanced by Tyson as a reason for preemption, but as a reason for denying, dismissing, or limiting Plaintiffs' request for Rule 23 class certification.

would reach such a conclusion). In fact, nearly every court to consider the issue recognizes that state law claims that merely duplicate or depend on the FLSA are preempted by federal law. *See Lopez*, 2008 WL 203028, at *5 ("Moreover, almost without exception, the District Courts that have considered the question [of whether a duplicative state law claim is preempted by the FLSA] have reached the same result [as the Fourth Circuit Court of Appeals in *Anderson*]." (citing *Choimbol*, 2006 WL 2631791, at *5, and *Petras v. Johnson*, No. 92 CIV. 8298(CSH), 1993 WL 228014, at *2, 3 (S.D.N.Y. June 22, 1993))). But there are also plenty of cases holding the FLSA does not *generally* preempt state law claims in a given case. *See Guzman v. VLM, Inc.*, No. 07–CV–1126 (JG)(RER), 2008 WL 597186, at *10 (E.D.N.Y. March 2, 2008) ("[I]t is settled in the Second Circuit that FLSA does not preempt state wage and hour laws."); *Thorpe v. Abbott Labs., Inc.*, 534 F.Supp.2d 1120, 1124 (N.D.Cal.2008) ("[T]he FLSA clearly indicates that it does not preempt stricter state law claims." (citing 29 U.S.C. § 218(a))); *Sjoblom v. Charter Commc'ns, L.L.C.*, No. 3:07–cv–0451–bbc, 2007 WL 4560541, at *5 (W.D.Wis. Dec. 19, 2007) ("[T]he [FLSA] does not preempt Wisconsin wage and hour laws."); *Neary v. Metro. Prop. & Cas. Ins. Co.*, 472 F.Supp.2d 247, 251 (D.Conn.2007) ("[T]he FLSA does not preempt state wage and hour statutes."); *Takacs*, 444 F.Supp.2d at 1116-18 ("The Ninth Circuit has held that the FLSA does not preempt state law overtime wage laws. . . ."); *Dancer I–VII v. Golden Coin, Ltd.*, 176 P.3d 271, 273 (Nev.2008) (per curiam) ("Given that the FLSA expressly provides that higher state minimum wage legislation may control minimum wage claims, and because Nevada's minimum wage law provides greater employee wage protection than that provided

under the FLSA, we conclude that the FLSA does not preempt the NWHL."). Although this case may be a first in holding that the FLSA does not preempt a *duplicative* state law claim, the court believes the better conclusion in this case—where there is no controlling authority on the subject and the court believes the FLSA does not provide the exclusive remedy for its violations—is that the FLSA does not preempt Plaintiffs' duplicative IWPCL claim.[12]

B. Dual Certification

Tyson's second argument against Plaintiffs' IWPCL claim is that the procedural aspects of class certification under Federal Rule of Civil Procedure 23 are so completely at odds with the procedural aspects of collective action certification under 29 U.S.C. § 216(b), that Plaintiffs' IWPCL claim must be denied, dismissed, or limited. Tyson's argument focuses on the differences between the "opt-out" procedure under Rule 23 and the "opt-in" procedure under § 216(b).

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[12] *Osby v. Citigroup, Inc.*, No. 07–cv–06085–NKL, 2008 WL 2074102 (W.D.Mo. May 14, 2008), is the only authority the court can find from the Eighth Circuit that directly tackles the preemption issue. In *Osby*, the district court determined plaintiff's state law claim of unjust enrichment was not preempted by the FLSA because the state law claim did "not depend on establishing that Citigroup violated the FLSA." 2008 WL 2074102, at *2. While the court's holding here is inconsistent with *Osby*—because the state law claim in this case depends on establishing that Tyson violated the FLSA—the court's holding regarding preemption in this case is, as Plaintiffs point out, at least consistent with the *results* of two prior cases in this district that allowed IWPCL and FLSA claims to proceed together, although the question of preemption never arose. *See Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 884–85 (N.D.Iowa 2007) (exercising supplemental jurisdiction over plaintiff's IWPCL claim); *Bartleson*, 219 F.R.D. at 634 (same).

This argument, like Tyson's preemption argument, is particularly popular among district court dockets right now. *See, e.g., Woodard*, at 183–90, 2008 WL 471552, at *6–12. No clear or consistent resolution appears imminent, however,[13] and like the question of preemption, there is no controlling authority for the court to rely on.

Despite their confusing semantic similarities, the differences between class actions and collective actions are great. *See Lugo v. Farmer's Pride Inc.*, 2008 WL 638237, at *2 (E.D.Pa. March 7, 2008) ("Class actions and collective actions can often be confused with each other."); *Salazar*, 527 F.Supp.2d at 877 ("At the outset, it is crucial to note the distinction between a FLSA *collective* action and a Rule 23 *class* action. The distinction is sometimes blurred."). *See generally* Wright, Miller, & Kane, *Federal Practice and Procedure* § 1807 at 468-77 (2005 & Supp.2007) [hereinafter Wright] (stating the differences between Rule 23 class actions and FLSA collective actions). Plaintiffs in class actions certified under Rule 23 are generally a member of the class unless they opt-out.[14]

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[13] The different results obtained in these cases are evident from two recent decisions that were announced on the same day, but with opposite results. *Compare Ellis*, 527 F.Supp.2d at 449–52 (holding the opt-in and opt-out procedures created a conflict that required "Plaintiffs parallel state claims [to] be dismissed"), *with Freeman v. Hoffmann–LaRoche, Inc.*, No. 07–1503(JLL), 2007 WL 4440875, at *2 (D.N.J. Dec. 18, 2007) (denying Defendants' motion "to dismiss or strike Plaintiffs' state law class action allegations solely on the basis of their 'inherent incompatibility' with the asserted FLSA collective action").

[14] Not all class actions under Rule 23 are the same:

> Rule 23(b) authorizes three types of class actions and makes participation in the first two types mandatory for individuals falling within the definition of the class. The

See In re Piper Funds, Inc., 71 F.3d 298, 303–04 (8th Cir.1995) (recognizing plaintiffs have a right to opt out of a Rule 23 class action). Under § 216(b), plaintiffs must opt-in to become a member of the collective action. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

There is no doubt that the opt-in/opt-out distinction represents "a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [the] FLSA." *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir.1975); *see Woodard*, at 187, 2008 WL 471552, at *9 ("Rule 23 is the antithesis of § 216(b)."). Because of this difference many courts have held that Rule 23 class actions may not be maintained in the same action as a FLSA collective action. *See Burkhart-Deal v. Citifinancial, Inc.*, 2008 WL 2357735, at *1–2 (W.D.Pa. June 5, 2008) (concluding "the inherent incompatibility Plaintiff's FLSA claims and state law class claims, in this particular case, require dismissal of the state law class claims"); *Woodard*, at 188, 2008 WL 471552, at *12 (dismissing Plaintiffs' Rule 23 class allegations because "the Court finds that simultaneous prosecution of Mr. Woodard's FLSA collective action and [Pennsylvania Minimum Wage Act claim] class action will frustrate the congressional intent and

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> third type of class action under Rule 23(b)(3) requires individuals falling within the definition of the class to opt out of the litigation if they do not wish to be bound by any judgment that is reached.

Wright, § 1807 at 474. In this case, Plaintiffs request class certification under Rule 23(b)(1) and (3).

circumvent § 216(b)'s opt-in requirement"); *Ellis*, 527 F.Supp.2d at 452 (dismissing plaintiffs' parallel state law claims because "the policies that underlie the FLSA" would be "total[ly] negat[ed] . . . if the Court were to allow Plaintiffs to pursue state law overtime remedies under Rule 23 and FLSA opt-in remedies in the same action"). Still many other courts, however, have allowed both class and collective actions to proceed. *See Osby*, 2008 WL 2074102, at *3 ("District court cases permitting FLSA collective actions to proceed simultaneously with Rule 23 state actions are legion."); *Jackson v. Alpharma Inc.*, 2008 WL 508664, at *4–5 (D.N.J. Feb. 21, 2008) (addressing the incompatibility argument, and concluding "that it is premature to dismiss Plaintiff's state law claims, given that Plaintiff has alleged this Court has independent CAFA jurisdiction over the claims"). In fact, in this district, the court has recognized that "[o]ther district courts have proceeded well beyond the stage of exercising supplemental jurisdiction and have certified both FLSA collective actions and Rule 23 classes involving claims of violations of state wage payment collection laws." *Salazar*, 527 F.Supp.2d at 884–86 (choosing to exercise, at the time, its supplemental jurisdiction to entertain plaintiffs' IWPCL claim and FLSA claim together). Of course, in this case, there is no question of supplemental jurisdiction: Plaintiffs' state law claim under the IWPCL has an independent jurisdictional basis under 28 U.S.C. § 1332(d), or CAFA. The only question now is whether the differences between Rule 23 class action certification and collective action certification under the FLSA require the court to deny, dismiss, or limit Plaintiffs' IWPCL claim and request for class certification.

Although the court is cognizant of the procedural differences between a Rule 23 class action and FLSA collective action, as well as the unique challenges created when such actions are maintained in the same suit, the court does not feel these differences and challenges are a reason to deny, dismiss, or limit Plaintiffs' class action claim, especially when such a claim has an independent jurisdictional basis. Plaintiffs, of course, must still meet the requirements for collective action and class action certification. If they do, the court will then take up the challenges inherent in maintaining both actions in one suit. The inherent challenges, however, are not a basis to deny, dismiss, or limit Plaintiffs' state law claim. *See Salazar*, 527 F.Supp.2d at 886 ("The court is well-equipped to manage a case involving a FLSA collective action and a state-law class action."); *Guzman*, 2008 WL 597186, at *9 ("It is true that there would be some possibility of confusion, but this can be allayed through careful wording of the class notice."). After all, Plaintiffs would still be under the same opt-in/opt-out predicament even if Plaintiffs brought their IWPCL suit in another court or action.[15] Addressing this situation, another district court opined:

> Plaintiff's state law class action claims could proceed separately from the federal action in this court pursuant to the Class Action Fairness Act.

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[15] It should be noted, however, that Plaintiffs have asked for class action certification under both subdivision (b)(1) and (b)(3) of Rule 23. If the court were to certify Plaintiffs' class action under (b)(1), Plaintiffs would not be able to opt-out of the class action because membership is mandatory under either (b)(1) or (b)(2). *See generally* Wright, § 1784.1 at 343–344. Only if the court were to certify Plaintiffs' class action under subdivision (b)(3) would there truly be an opt-in/opt-out situation.

> Although including the federal and state law claims in the same lawsuit will pose challenges, I am not persuaded that separate adjudication of these claims will reduce confusion among potential class members who would still receive two notices concerning almost identical facts: one requiring them to opt in to a federal collective action and another including them in a state law class action unless they opt out. Clearly drafted collective and class action notices should help alleviate confusion in this case.

Sjoblom, 2007 WL 4560541, at *5 (citation omitted).

Tyson also argues the court should not allow both actions to proceed because doing so would have serious legal ramifications for potential plaintiffs who did not opt-in to the FLSA action. In other words, if class members under Rule 23 failed to opt-in to the FLSA collective action, they might subsequently be precluded by principles of res judicata from asserting their federal rights under the FLSA. The court knows of no case that has so held, and the court does not believe this is a serious or valid concern, *see Guzman*, 2008 WL 597186, at *10 n. 11 (rejecting this argument), or that Tyson genuinely shares this concern. Finally, Tyson argues that the court should exercise its discretion and limit the number of class members under Rule 23 to only those that opt-in under the FLSA. This court has done so when addressing concerns of supplemental jurisdiction, *see Bartleson*, 219 F.R.D. at 634–38 (holding that the court's supplemental jurisdiction over plaintiffs' state law claims extended only to those state law class members who also opted in to the FLSA claim), *but see Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 420–425 (holding the opt-in provision of the FLSA did not

expressly prohibit the exercise of supplemental jurisdiction over those state law claimants that did not opt-in), but Plaintiffs IWPCL claims have an independent jurisdictional basis in this case under CAFA. Furthermore, because the court does not find the differences between a class action and a collective action preclude the maintenance of both actions, the court does not believe it is necessary to limit the class action in the manner suggested.

C. Rules Enabling Act

Some of the decisions confronting the issues in this case address an argument against dual certification based on the Rules Enabling Act (REA), 28 U.S.C. § 2072(a). *E.g., Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164, 2008 WL 2201469, at *12 (S.D.N.Y.2008). Such an argument has not been advanced in this case. Thus, the court expresses no opinion on the subject other than to note that there is no controlling authority, and that courts have come to differing conclusions. *Compare Ellis*, 527 F.Supp.2d at 454 (finding, in the alternative under the REA, that plaintiffs duplicative state law claims should be dismissed), *with Osby*, 2008 WL 2074102, at *3-4 (rejecting defendant's argument under the REA); *Sjoblom*, 2007 WL 4560541, at *5 (same); *Freeman*, 2007 WL 4440875, at *3 (same).[16]

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[16] *Ellis* and *Freeman* were announced on December 18, 2007, and *Sjoblom* was announced on December 19, 2007. In *Sjoblom*, the court stated that "the only courts that have addressed the argument that the Rules Enabling Act prevents simultaneous litigation of state and federal class labor claims have squarely rejected it." 2007 WL 4560541, at *5. Since the *Sjoblom* decision was announced a day after *Ellis*, it is not surprising that *Sjoblom* failed to discuss the contrary authority in *Ellis*. However, it appears the court in *Osby* made the same mistake much later,

IV. FLSA COLLECTIVE ACTION

Plaintiffs seek *conditional* certification of their FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b). Plaintiffs request the court to authorize notice to all potential collective action class members. Tyson resists the Plaintiffs' request.

A. Legal Standards

"An employee may bring an FLSA action on behalf of himself and any other 'similarly situated' employees." *Salazar v. Agriprocessors, Inc*. (*Salazar II*), No. 07–CV–1006–LRR, 2008 WL 782803, at *3 (N.D.Iowa March 17, 2008) (quoting 29 U.S.C. § 216(b)). Specifically, the FLSA provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent

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when it was announced on May 14, 2008. *See Osby*, 2008 WL 2074102, at *4 (noting all courts that have addressed the REA argument have rejected it). Contrary to the indications in *Osby* and *Sjoblom*, there is at least one case—*Ellis*—that has found favorably for the defendants on the basis of an REA argument. *See also Damassia*, 250 F.R.D. 164, 2008 WL 2201469, at *12 (addressing and disagreeing with the *Ellis* decision, and noting "[Defendant] relies on a single district court decision from another circuit for the proposition that the Rules Enabling Act prevents the certification of a class for state wage claims related to FLSA wage claims.").

> is filed in the court in which such action is brought.

29 U.S.C. § 216(b). Thus, the FLSA "allows as class members only those who 'opt in.' " *Schmidt v. Fuller Brush Co*., 527 F.2d 532, 536 (8th Cir.1975). The FLSA provides the district court with "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). The court has a "responsibility to avoid the 'stirring up' of litigation through unwarranted solicitation" of potential opt-in plaintiffs, *Severtson v. Phillips Beverage Co*., 137 F.R.D. 264, 267 (D.Minn.1991), but the district court should, "in appropriate cases," exercise its discretion to facilitate notice to potential plaintiffs, *Hoffmann-La Roche Inc*., 493 U.S. at 169.

Section 216(b) does not define when "other employees [are] similarly situated" so that collective action certification, and the authorization of notice, is appropriate. 29 U.S.C. § 216(b). Similarly, the Eighth Circuit Court of Appeals has not defined what "similarly situated" means, or elaborated on when it is an "appropriate case[ ]" to facilitate notice. *Salazar II*, 2008 WL 782803, at *3. Courts across the country, however, have discussed various approaches to determine whether plaintiffs are similarly situated.[17]

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[17] The Tenth Circuit Court of Appeals explained three different approaches to collective action certification under § 216(b): (1) a two-step, or "*ad hoc* case-by-case" approach, (2) an approach incorporating the analysis used for class certification under Federal Rule of Civil Procedure 23, and (3) an approach incorporating the analysis used for "spurious" class actions under

The great majority of these courts—including most or all of the district courts within the Eighth Circuit—have championed a two-step approach to determine collective action certification under § 216(b). *See Comer v. Wal-Mart Stores, Inc*., 454 F.3d 544, 546 (6th Cir.2006) (recognizing that the two step approach is "typically used by courts in suits filed under 29 U.S.C. § 216(b)"); *Hipp v. Liberty Nat. Life Ins. Co*., 252 F.3d 1208, 1219 (11th Cir.2001) ("The two-tiered approach to certification of § 216(b) opt-in classes . . . appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it in future cases."); *Resendiz-Ramirez v. P & H Forestry, L.L.C*., 515 F.Supp.2d 937, 940 (W.D.Ark.2007) ("The Eighth Circuit has not yet declared which approach it favors in deciding whether plaintiffs are similarly situated under 29 U.S.C. § 216(b), but the district courts in this circuit use the two-stage analysis.")

Because the Northern District of Iowa has artfully danced the "two-step" before, *see, e.g., Salazar II*, 2008 WL 782803 at * 3–4, and other circuit courts approve the use of this approach, *see, e.g., Thiessen*, 267 F.3d at 1105 (noting "there is little difference in the various approaches," but that the two-step approach is "[a]rguably . . . the best of the three"), and because neither party in this case has advanced an argument to apply a different approach,[18] the court will follow the two-step approach to determine whether other employees are similarly situated for collective action

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pre–1966 Rule 23. *Thiessen v. General Electric Capital Corp*., 267 F.3d 1095, 1102–03 (10th Cir.2001).

[18] However, the parties dispute whether the court should employ a first step or second step analysis at this point in the parties' litigation.

certification under § 216(b), *see Resendiz–Ramirez*, 515 F.Supp.2d at 941 ("The Court is convinced that the more prudent approach is to use the two-stage certification analysis that is used by a majority of courts, including a majority of district courts in the Eighth Circuit."). Nevertheless, the court believes the admonition by the Eleventh Circuit Court of Appeals is important: "Nothing in our circuit precedent, however, requires district courts to utilize this approach. The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court." *Hipp*, 252 F.3d at 1219.

The two-step approach to collective action certification " 'distinguishes between conditional class certification, generally made at the "notice stage," and a final class certification determination made after discovery is largely completed.' " *Dietrich*, 230 F.R.D. at 577 (quoting *Campbell*, 2001 WL 34152094, at *2).

> Applying the two-part test, the Court first uses a lenient standard to determine whether similarly situated persons exist, and if appropriate, the class is conditionally certified. The second step occurs after notice, time for opting-in, and discovery have taken place. Applying a stricter standard, the Court makes a factual determination on the similarly situated question. The second inquiry is usually conducted upon a defendant's motion for decertification.

Freeman v. Wal-Mart Stores, Inc., 256 F.Supp.2d 941, 944 (W.D.Ark.2003) (citation omitted); *see Resendiz–Ramirez*, 515 F.Supp.2d at 940-41 (explaining the two-step approach). Whether during the first step/notice stage or second step/final stage, the burden remains on the plaintiffs to show that "other

employees [are] similarly situated." 29 U.S.C. § 216(b); *see Frank v. Gold'n Plump Poultry, Inc.*, No. 04–CV–1018 (PJS/RLE), 2007 WL 2780504, at *2–3 (D.Minn. Sept. 24, 2007) (recognizing the plaintiffs' burdens at the first and second steps).

At the first step, or notice stage, "[t]o show conditional certification is warranted, the plaintiffs 'need merely provide some factual basis from which the court can determine if similarly situated potential plaintiffs exist.' " *Salazar II*, 2008 WL 782803 at *5 (quoting *Dietrich v. Liberty Square, L.L.C.*, 230 F.R.D. 574, 577 (N.D.Iowa 2005)). Although the burden at the first step is "more lenient," and does not require existing plaintiffs to "show that members of the conditionally certified class are actually similarly situated," *Fast v. Applebee's Int'l, Inc.*, 243 F.R.D. 360, 363 (W.D.Mo.2007), "plaintiffs must present more than mere allegations; i.e., some evidence to support the allegations is required," *Young v. Cerner Corp.*, 503 F.Supp.2d 1226, 1229 (W.D.Mo.2007). The supporting evidence should include "evidence that other similarly situated individuals desire to opt in to the litigation" because " '[o]thers' interest in joining the litigation is relevant to whether or not to put a defendant employer to the expense and effort of notice to a conditionally certified class of claimants.' " *Parker v. Rowland Express, Inc.*, 492 F.Supp.2d 1159, 1164-65 (D.Minn.2007) (quoting *Simmons v. T–Mobile USA, Inc.*, No. H–06–1820, 2007 WL 210008, at *9 (S.D.Tex. Jan. 24, 2007)). In addition to "whether potential plaintiffs have been identified," district courts outside of the Eighth Circuit have evaluated several other factors at this stage to determine the propriety of conditional certification, including "whether affidavits of potential plaintiffs have been submitted, whether there is evidence of a widespread discriminatory plan,

and whether, as a matter of sound management, a manageable class exists." *Jimenez v. Lakeside Pic–N–Pac, L.L.C.*, 2007 WL 4454295, at *2 (W.D.Mich. Dec. 14, 2007) (citing *Olivo v. GMAC Mortg. Corp.*, 374 F.Supp.2d 545, 548 (E.D.Mich.2004)). In sum, "[c]onditional certification in the first step 'requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan.' " *Young*, 503 F.Supp.2d at 1229 (quoting *Davis v. NovaStar Mortg., Inc.*, 408 F.Supp.2d 811, 815 (W.D.Mo.2005)).

At the second step, or final stage, "[p]laintiffs seeking to maintain an opt-in class action bear the burden to show that they are similarly situated with respect to their job requirements and pay provisions." *Kautsch v. Premier Communications*, No. 06–cv–04035–NKL, 2008 WL 294271, at *2 (W.D.Mo. Jan. 31, 2008) (citing *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir.1996)). This showing is usually required after a collective action has been conditionally certified and upon the defendant's motion to decertify, *Freeman*, 256 F.Supp.2d at 944, or "after the close of discovery, or at least where 'discovery is largely complete and the matter is ready for trial,' " *Huang v. Gateway Hotel Holdings*, 248 F.R.D. 225, 227 (E.D.Mo.2008) (quoting *Hipp*, 252 F.3d at 1218). Although the plaintiff's burden at this final stage is more strict than at the notice stage, the plaintiff need not show that opt in plaintiffs are "identically situated." *Fast*, 243 F.R.D. at 363. The court considers three factors to determine whether plaintiffs remain similarly situated at the final stage. *Smith*, 404 F.Supp.2d 1144, 1150 (D.Minn.2005) (citing *Thiessen*, 267 F.3d at 1103). These factors include: the employment and factual settings of plaintiffs; (2) the various defenses available to

defendants; and (3) considerations of fairness, procedure, and manageability. *Id.*; *Kautsch*, 2008 WL 294271, at *2. The district court must assess these factors in light of "the fundamental purpose of 29 U.S.C. § 216(b): (1) to lower costs to the plaintiffs through the pooling of resources; and (2) to limit the controversy to one proceeding which efficiently resolves 'common issues of law and fact that arose from the same alleged activity.' " *Kautsch*, 2008 WL 294271, at *2 (quoting *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D.Pa.2000)).

Thus, in sum, the level of proof required at each stage in the FLSA collective action certification process is largely dependent upon the amount of information before the court. At the first step, when less information is before the court, plaintiffs simply need to come forward with a "factual basis," *Dietrich*, 230 F.R.D. at 577, a "colorable basis," *Smith*, 404 F.Supp.2d at 1149, or "substantial allegations," that the existing plaintiffs and putative plaintiffs "were together the victims of a single decision, policy or plan," *Davis*, 408 F.Supp.2d at 815. At the second step, the court has much more information and is in a position to "make a factual determination on the similarly situated question," *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir.1995), and therefore "plaintiffs must clear a higher hurdle to continue," *Frank*, 2007 WL 2780504, at *3. The "stricter post-discovery standard" requires plaintiffs to convince the court that the factual record reveals putative plaintiffs are still similarly situated to existing plaintiffs. *Smith*, 404 F.Supp.2d at 1149. Finally, and importantly, whether at the first or second step in the § 216(b) collective action certification process, plaintiffs need not prove the merits of their claim. That is, plaintiffs do not have to show that the employer actually

violated the FLSA.[19] *See Smith v. Heartland Automotive Servs., Inc.*, 404 F.Supp.2d 1144, 1148

[19] Plaintiffs specifically argue this point in their brief, although they fail to cite to any case law to support their argument:

> In order to prevail in requesting this Court to conditionally certify this matter as a collective action, Plaintiffs do not have to prove on the merits that Tyson's 'gang time' is *per se* illegal (though they could easily do so even at this early stage of the litigation). Plaintiffs only have to prove that they are 'similarly situated' because they are each affected by a common Tyson policy which they are challenging. Thus, while Tyson may dispute the Plaintiffs' claims that Tyson's 'gang time' system is illegal under the [FLSA], Tyson cannot dispute that its uniform 'gang time' pay practices which affect almost all of its hourly employees render this matter suitable for collective action treatment pursuant to the [FLSA].

Dkt. # 59, Pt. 2. Defendant's counter-argument suggests Plaintiffs must prove the merits of their claim at the certification stage: Tyson argues Plaintiffs cannot show that they are similarly situated to potential plaintiffs because plaintiffs "fail to present any evidence of an *unlawful* policy or practice that is common to *all* Storm Lake employees." Dkt. # 49 (emphasis in original). However, Tyson also argues that "[P]laintiffs must demonstrate . . . some similarity binding the named plaintiffs and putative class members as the victims of a particular *alleged* unlawful policy or practice." Dkt. # 49 (emphasis added). Although some district courts in the Eighth Circuit appear to require proof on the merits at the certification stage, *see, e.g.*, *Dietrich*, 230 F.R.D. at 577 (" 'Courts have held that plaintiffs *can meet this burden by* making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan *that violated the law*.' " (emphasis added) (quoting *Hoffman v. Sbarro, Inc.*, 1997 WL 736703 (S.D.N.Y.1997))), the court does not believe plaintiffs have to make such a showing. Instead, the court believes the better policy at the certification stage is simply to determine whether "a class of similarly situated plaintiffs exists." *Smith*, 404 F.Supp.2d at 1149. Of course, it would be unreasonable to proceed with certification if a plaintiff's claim was meritless or

(D.Minn.2005) ("[T]he Court does not consider the merits of Plaintiffs' claims on a decertification motion. . . ."); *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 680 (D.Colo.1997) ("[W]hether plaintiffs can meet their burden in the liability phase . . . is irrelevant to the question of § 216(b) certification.").

B. Legal Analysis

1. First or second step?

Both parties urge the application of the two-step approach to determine collective action certification, but the parties dispute which step should be undertaken at this time. Plaintiffs argue the court should base its analysis under standards of the first step, or the "notice stage," because Plaintiffs seek conditional certification at this point and, although some discovery has taken place, the record is "woefully inadequate" to make a final decision. Dkt. # 59. Tyson argues the court should skip the first step and base its analysis under the standards of the second step, or "final stage," "because considerable discovery has occurred and an ample factual record has been established." Dkt. # 49.

The parties have completed class discovery. Tyson deposed the six named remaining plaintiffs and twelve potential opt-in plaintiffs, and Plaintiffs deposed four Rule 30(b)(6) witnesses provided by Tyson. Tyson has

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completely deficient, and the court would exercise its discretion to prohibit the § 216(b) certification of plaintiffs in such a case. But it is similarly unreasonable to require actual proof on the merits of plaintiffs' claims at the certification stage, as that is what trial is for. The question at the certification stage, whether during the first step or second step, is whether plaintiffs are similarly situated—not whether plaintiffs can succeed on their claim.

also responded to twelve interrogatories, produced almost 3,000 pages of responsive documents, and provided payroll data from February 2004 through March 2007. In addition, over thirty employees submitted "declarations" on behalf of Tyson. Because of this limited, but substantial discovery, it is clear to the court that this case is not at a typical "notice stage." *See Parker*, 492 F.Supp.2d at 1163 ("At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members."). Thus, the court finds support for Tyson's argument that a more demanding standard should be required of Plaintiffs at this point. *See Campbell*, 2001 WL 34152094, at *2 (finding merit in defendant's contention "that the record in this case is beyond that which would warrant the leniency generally given to cases at the notice stage" because the action was "filed nearly a year and a half ago" and "[d]epositions of nearly all named plaintiffs have been taken, Defendants have responded to two sets of interrogatories, and affidavits in support and opposition to the current motion have been filed"); *Smith v. T-Mobile USA, Inc.*, No. CV 05–5274 ABC (SSx), 2007 WL 2385131, at *4 (C.D.Cal. Aug. 15, 2007) ("Where substantial discovery has been completed, some Courts have skipped the first-step analysis and proceeded directly to the second step.").

However, it is also clear that not all information is before the court, and that Plaintiffs are merely requesting *conditional* certification at this time, for the first time. *See Parker*, 492 F.Supp.2d at 1164 ("Here, Plaintiffs seek an Order conditionally certifying this case as a collective action, in order to notify all potential plaintiffs of the pendency of

this lawsuit and to provide them with the opportunity to opt in. Hence, the Court is at the first stage of the two-stage process."). The court is persuaded by the sentiments of other district courts that

> "beginning with tier one of the analysis is the most equitable means of proceeding. . . . [S]hould the court bypass tier one entirely, some potential plaintiffs might not become aware of the lawsuit and would not have an opportunity to join the suit. . . . The potential prejudice to plaintiffs of bypassing tier one thus is significant."

Gieseke v. First Horizon Home Loan Corp., 408 F.Supp.2d 1164, 1167 (D.Kan.2006) (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 468 (N.D.Cal.2004)). Therefore, the court does not believe a second stage—i.e., final stage—analysis is prudent at this point in the proceedings. Instead, the court believes the two step process should begin with the first step in this case.

This conclusion, however, is procedural. The two step approach to collective action certification under § 216(b) has both procedural and substantive aspects. Procedurally, the two step approach allows a district court to *conditionally* certify a collective action among similarly situated plaintiffs, and then revise the certified collective action class later if necessary. Substantively, the two step approach allows a district court to first rely on "substantive allegations" when conditionally certifying a collective action, and then later make a factual determination about the propriety of the certified collective action class. While the court finds the procedural aspect of the two-step approach necessary in this case, it cannot overlook the almost six months of substantial class discovery that the parties have conducted and the valuable

information before the court that is relevant to the certification of Plaintiffs' collective action under the FLSA. *See* Dkt. # 23. As a result, the court will apply what it believes is a common sense application of the two step approach in this case: The court will determine whether *conditional* certification of a collective action is appropriate by evaluating all the facts that have thus far been placed before it. Thus, procedurally, the court is not making any final decisions, and Tyson will have an opportunity to later decertify the class if the court approves conditional certification and authorizes notice. Furthermore, substantively, the court will ultimately use the more onerous second stage analysis to account for all the important facts learned through discovery that inform what putative plaintiffs, if any, are similarly situated to existing plaintiffs. Many other courts have done likewise, although not specifically recognizing the procedural/substantive difference. *See Villanueva–Bazaldua v. TruGreen Ltd. Partners*, 479 F.Supp.2d 411, 415 (D.Del.2007) ("District courts in other circuits have adopted an intermediate approach to the 'similarly situated' inquiry when the parties voluntarily engage in discovery prior to a decision on conditional certification."); *Jimenez*, 2007 WL 4454295, at *3 (stating, because the parties had engaged in six months of pre-certification discovery, that "the Court will review Plaintiffs' allegations and affidavits in conjunction with the evidence gleaned through discovery"); *Thiessen v. General Electric Capital Corp*., 996 F.Supp. 1071, 1080 (D.Kan.1998) ("Thus, the court adopts an 'intermediate approach' in analyzing the 'similarly situated' issue.").

2. Conditional certification

Plaintiffs request the court to conditionally certify and to approve notice to all potential collective action class members, which Plaintiffs define as:

> All current and former hourly production and support employees of Tyson Foods, Inc., or Tyson Fresh Meats, Inc.'s Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004 to the present.

Dkt. # 34, Exhibit A. Plaintiffs indicate February 7, 2004, because the complaint was filed on February 6, 2007, and the FLSA provides a maximum three year statute of limitations. *See* 29 U.S.C. § 255 (providing a three year statute of limitations for willful violations). Plaintiffs also indicate Tyson's Storm Lake facility because the parties voluntarily agreed to dismiss Plaintiffs' claims against Tyson's Denison facility. Dkt. # 40. In their reply brief, Plaintiffs refine their proposed collective action class: "To be clear, Plaintiffs would define the certified collective action 'class' as including all hourly employees who: (1) don, doff, wash or sanitize *any* sanitary and protective clothing, equipment, and gear; and/or (2) maintain knives, steels and any other tools or equipment that are used in the production process." Dkt. # 59.

Of course, Plaintiffs' defined collective action class must also be considered in light of Plaintiffs' allegations in their FLSA claim. Plaintiffs allege that Tyson violated the FLSA by failing to pay its hourly employees in full. Specifically, Plaintiffs state that Tyson uses an "unlawful compensation system," known as "gang time" or "line time," that fails to compensate

> employees for all required pre-production line and post-production line activities that are necessary and integral to their overall employment responsibilities, such as: donning and doffing clothing and protective equipment, cleaning and sanitizing that equipment, walking to their lockers and/or production line after already performing compensable activities, and at the end of the work day, walking to the wash stations and then to their lockers and/or supply rooms before the end of compensable time, working on knife maintenance equipment known as "steels" or "mousetraps," and waiting in line to receive required knives, supplies, tools and equipment needed for production line activities.

Dkt. # 2. Plaintiffs recognize that their complaint "alleges that this 'gang time' system violates federal law," but Plaintiffs argue all hourly employees—even those not paid by gang time—"are still similarly situated to all other class members because they are likewise not paid in full." Dkt. # 34. The question for the court now is whether these allegations and the factual record support the conditional certification of Plaintiffs' defined collective action class.

a. Substantive analysis under the first step

Although the court believes a more demanding analysis is required in this case due to the amount of discovery conducted, the court begins its discussion with a brief analysis of the relevant considerations under the first step. The court believes these considerations support Plaintiffs' request for conditional certification.

Over 300 employees have filed "consents" to opt in to this lawsuit. Therefore, the court easily finds

"evidence that other similarly situated individuals desire to opt in to the litigation." *Parker*, 492 F.Supp.2d at 1164. This supports Plaintiffs' claim for conditional certification. *Id*. The "consents" are also similar to "affidavits" in support of Plaintiffs' claim, and many potential plaintiffs have been deposed. This also supports Plaintiffs' claim for conditional certification. *Olivo*, 374 F.Supp.2d at 548. Furthermore, there is ample evidence of a "single decision, policy or plan" inasmuch as most production employees are paid on a gang time basis. *Davis*, 408 F.Supp.2d at 815. This is another factor that supports conditional certification. Finally, the court finds support for a manageable collective action class because all potential plaintiffs worked or currently work at the same place—Tyson's pork processing plant in Storm Lake, Iowa. The parties acknowledge that the potential collective action class is over 3,000 members, and while this potential class is not insignificant in number, the potential class is not too large or geographically displaced to be considered unmanageable. *See Owens v. Southern Hens, Inc*., 2008 WL 723923, at *3 (S.D.Miss.2008) (noting all potential plaintiffs "are all employees at a single facility"); *Freeman*, 256 F.Supp.2d at 945 (refusing to permit notice to employees at every Wal-Mart store in the country); *Sheffield v. Orius Corp*., 211 F.R.D. 411, 413 (D.Or.2002) (noting "dissimilarities among the putative class members extend to geography, work sites, and payment systems"). Altogether, the court believes these considerations indicate a "factual basis" that similarly situated plaintiffs exist. *See Dietrich v. Liberty Square, L.L.C*., 230 F.R.D. 574, 577 (N.D.Iowa 2005).

b. Substantive analysis under the second step

Although the first step analysis generally informs the court that conditional certification is appropriate, the court will not conditionally certify Plaintiffs' collective action class without meeting the more demanding standards under the second step. Thus, the court proceeds by analyzing the relevant factors under the second step.

i. Employment and factual settings of plaintiffs. The six named plaintiffs in this case are all employed, or were employed, in the Kill, Cut, and Retrim Departments at Tyson's Storm Lake, Iowa, facility. Like most employed in the Kill, Cut, and Retrim departments, and like most production employees at Tyson's Storm Lake, Iowa, facility, the named plaintiffs are or were paid on a gang time basis. In fact, of the 1,596 hourly employees currently working at Tyson's Storm Lake, Iowa, facility, only 172 employees work in departments that are specifically not paid on a gang time basis. These 172 employees represent the 50 employees in the Load Out department, the 22 employees in the Rendering department, and the 100 employees in the Maintenance department. The remaining hourly employees work in the Kill, Cut, and Retrim departments, and these departments are mostly paid on a gang time basis. Tyson has put forth evidence to show that "some" employees in the Kill, Cut, and Retrim departments are, in fact, paid on a non-gang time basis due to special circumstances such as when the employee regularly performs set up and tear down duties before and after gang time. For example, Curtis Muckey, the Processing Supervisor in the Kill department for the A shift, declared that out of the more than one-hundred employees he supervises, about ten team members arrive early and

stay late to perform set up and clean up activities. [D. ex. 24]. These employees, even though members of the Kill department, are not paid via gang time but based on the time they clock in and out. There is no doubt, however, that most hourly employees at Tyson, like the named plaintiffs, are paid on a gang time basis.[20]

There is also no doubt that nearly all production employees at Tyson's Storm Lake, Iowa, facility wear some kind of PPE. In fact, out of all the evidence presented to the court, the court can only find one instance in which an employee—a "Stunner" in the Kill Department—is not required to wear some kind of PPE. [D. ex. 11]. But the evidence shows that even Stunners usually choose to wear cotton gloves. [D. ex. 11]. The evidence also shows that all other employees are required to wear multiple kinds of PPE, usually consisting of a hard hat, hairnet, hearing protection, a frock, and some kind of boots.[21] It is also evident,

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[20] Plaintiffs allege Tyson employs almost ninety percent of its employees on a gang time basis. This percentage, however, is derived from the approximate 1600 hourly employees and the 172 employees that work in the departments that are specifically not paid via gang time ((1600–172) / 1600 = 89.25%). Thus, it does not account for "some" employees in the Kill, Cut, and Retrim departments that are not paid via gang time. It is obvious, however, that the number of employees paid via gang time is certainly above 75%.

[21] For example, the declarations of supervisory personnel at Tyson's Storm Lake, Iowa, facility show that Tyson employees are generally required to wear some kind of PPE. Bill Haukap, Processing Supervisor in the Cut Department for the A shift, declared that all his team members were required to wear a hard hat, hairnet, beard net (if necessary), hearing protection, and a frock. [D. ex. 3]. Rich Devilbiss, General Supervisor in the Materials Handling/Load Out Department for the B shift, declared that his team members are required to wear a hardhat, hearing protection, and steel-toed boots. [D. ex. 4]. Lonnie Woock,

however, that despite the general need for employees to wear PPE for their work, exactly what kind of PPE is required differs greatly among employees. In fact, the declarations of supervisory personnel indicate that "[t]he clothing and equipment that team members wear differs from department to department and

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General Supervisor in the Rendering Department for the A shift, declared that rendering employees are required to wear a hardhat, hearing protection, and steel-toed boots. [D. ex. 6]. Paul Davis, Maintenance Superintendent for the B shift, declared that maintenance team members are required to wear a hardhat, hearing protection, eye protection, and steel-toed boots. [D. ex. 7]. Moises Gracia, Supervisor in the Retrim Department for the A shift, declared that everyone in the departments he supervises must wear a hard hat, ear protection, hairnet, beardnet (if necessary), frock and rubber boots. [D. ex. 8]. Dan Lindgren, Processing Supervisor in the Cut Department for the B shift, declared that his team members must all wear a hard hat, hairnet, beardnet (if necessary), and hearing protection. [D. ex. 9]. Lori Molan, Supervisor in the Retrim Floor for the B shift, declared that all her employees have to at least wear a hard hat, frock, and hearing protection. [D. ex. 10]. Ron Peters, Supervisor in the Kill Floor for the A shift, declared that everyone must wear the company issued white shirt and pants. [D. ex. 11]. Curt Anderson, Plant Superintendent in the Cut and Retrim Departments for the A shift, declared that all team members must wear frocks. [D. ex. 12]. Randy Story, Supervisor in the Kill Floor for the B shift, declared Kill Floor employees must all wear at least a hard hat, whites (pants and shirt), hairnet, hearing protection, and steel-toed boots. [D. ex. 14]. Curtis Muckey, Processing Supervisor in the Kill department for the A shift, declared that all of his one-hundred or so employees must wear a hard hat, hairnet, beardnet (if necessary), whites, and hearing protection. [D. ex. 24]. Matt Meyer, Supervisor in the Cut Department for the B shift, declared that all of his employees are required to wear some kind of PPE, usually at least a frock. [D. ex. 39]. Finally, Rick Petersen and Kris Jimenes, General Supervisors in the Cut Department, generally declared that all employees are required to wear some sort of PPE, as they frequently see employees don and doff their PPE. [D. ex. 46, 51].

position to position." [D. ex. 3–4, 6–14, 24]. Finally, most employees use knives in their work. William Sager, Tyson's Human Resources Manager in Storm Lake, estimated about seventy percent of Tyson's employees use knives, and that knife use is mostly confined to the Kill, Cut, and Retrim departments. [D. ex. 5]. Those employees with knives typically have additional PPE that must be worn, and additional procedures to follow to clean or sharpen their knives.

This summary of the factual circumstances concerning the putative collective action class makes it clear that there are some very big factual differences among hourly employees at Tyson. The putative collective action class may be all employed at the same facility, but they are spread across six different departments that have their own specific duties and supervisors. Moreover, the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different. Thus, at least with respect to Plaintiffs' defined collective action class, the court does not believe the factual settings of potential plaintiffs support a finding that they are similarly situated.

However, there is a "tie that binds" most all putative plaintiffs together: the gang time compensation system. The putative plaintiffs that are paid via a gang time system are generally similarly situated. They all work in the same location and they are paid by the same general compensation system. Moreover, all of these employees are employed in the Kill, Cut, and Retrim departments, and most all use some kind of knife and wear multiple kinds of PPE. Thus, the court believes the employment and factual settings of plaintiffs support collective action certification if the collective action class is limited to those paid under a

gang time compensation system. *Rawls v. Augustine Home Health Care, Inc*., 244 F.R.D. 298, (D.Md.2007) (stating a court should inquire, under the first factor, into "whether Plaintiffs have provided evidence of a company-wide policy which may violate the FLSA, as well as an assessment of Plaintiffs' job duties, geographic location, supervision, and salary." (citing *Thiessen*, 996 F.Supp. at 1081–82)).

ii. Defenses available to Tyson. Tyson also argues that the disparate facts among employees give rise to individualized defenses that render collective action treatment improper. Specifically, Tyson argues an individualized inquiry is necessary because the court will have to (1) determine which pre-shift and post-shift activities, if any, constitute "work" within the meaning of the FLSA, (2) determine whether individual supervisors knew that employees were performing off-the-clock "work" activities, (3) determine whether any "work" activities are excluded by the Portal to Portal Act because they are not "integral and dispensable," (4) determine whether any compensable work activities are *de minimus,* and (5) determine whether the statute of limitations applies to a particular collective action class member's claim. Dkt. # 49. Plaintiffs respond by arguing that these alleged defenses do not require individualized treatment and are not applicable in this case.

The court does not agree with Plaintiffs that these questions are inapplicable in this case. It is very likely that these questions will be addressed. For example, whether the donning and doffing of PPE is considered work under the FLSA, whether such work is integral and dispensable, and whether any compensable work is *de minimus* are questions often raised in similar cases. *See, e.g., Alvarez v. IBP*, 339 F.3d 894, 902-04

(9th Cir.2003) ("Accordingly, donning and doffing of all protective gear is integral and indispensable to 'the principal activities for which [the plaintiffs] are employed,' and generally compensable [as work under the FLSA]. However, the specific tasks of donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimus*." (citation omitted)). The court agrees with Plaintiffs, however, that these questions highlighting Tyson's possible defenses do not disfavor conditional certification because these possible defenses are not as individualized as Tyson wants the court to believe. Tyson's argument that there are individualized defenses is premised on its belief that there are numerous factual disparities among putative plaintiffs. Tyson is correct if the putative collective action class is defined as all hourly employees. But as the court found above, when the putative plaintiffs are limited to those that are paid via a gang time system, there are far more factual similarities than dissimilarities. Moreover, the courts that often address these supposed individualized defenses often do so after collective action certification is granted, such as on summary judgment or on appeal. *See De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 364–65 (3d Cir.2007) (determining these questions on appeal from a denial of summary judgment and after collective action certification was approved). Thus, the court is not persuaded that this factor supports Tyson's argument for individual, rather than collective, treatment in this case, so long as the collective action class is limited to those that are paid via a gang time system.

iii. Fairness, manageability, and procedural considerations. Tyson argues it is unfair to certify Plaintiffs' proposed collective action class because

Tyson would be forced to defend against *un* common evidence. Tyson points to the fact that none of the six named plaintiffs work in the Rendering, Materials Handling, or Maintenance departments, and that all six named plaintiffs admitted they could not testify as to the PPE worn by other departmental employees, the methods used to compensate other departmental employees, or how long others in their production areas spend donning and doffing their PPE. Without common evidence to defend against, Tyson argues it is an unfair burden to certify the collective action against it. Plaintiffs do not specifically rebut this argument.

The court again agrees with Tyson that, concerning all hourly employees that don and doff PPE or maintain knives and steels and other tools in the production process, it would be unfair to Tyson to have to defend against all the dissimilarities among these hourly employees. But again, if the collective action class is limited to those paid via a gang time system, the similarities outweigh the dissimilarities, and a fair playing field is created. The collective action class is also manageable for the court, and the court sees no procedural considerations that weigh against the certification of a collective action class that is limited to hourly employees paid via a gang time system.

C. Conditionally Certified Collective Action Class

The court finds the potential plaintiffs are not similarly situated regarding Plaintiffs' originally defined collective action class. Plaintiffs' attempt to persuade the court that all hourly employees are similarly situated fails because a blatant and significant difference exists between the named plaintiffs and some of those they wish to include in the collective action class. That difference is that not all hourly employees are paid via a gang time system. *See*

Kautsch, 2008 WL 294271, at *2 ("Plaintiffs seeking to maintain an opt-in class action bear the burden to show that they are similarly situated with respect to their job requirements and pay provisions.").

The court does believe, however, that potential plaintiffs are similarly situated if the collective action class is limited to only those production employees that are paid via gang time. Gang time, after all, is the company-wide policy that Plaintiffs claim violates the FLSA. Moreover, Plaintiffs acknowledged in their brief a significant amount of employees are not paid via gang time, and that the court could limit the collective action class to only those that are paid via gang time. The court also believes this resolution properly takes into account the "fundamental purpose" of the FLSA by lowering the costs to plaintiffs and efficiently resolving the issues in one proceeding. *Id*. Furthermore, it is well within the court's discretion to refine Plaintiffs' proposed collective action class in this manner. *See Baldridge v. Sbc Comm'ns, Inc*., 404 F.3d 930, 931–32 (5th Cir.2005) ("[T]he class certification order here is subject to revision before the district court addresses the merits. As we have noted, the court has already used its discretion to modify the original certification order to limit the scope of the class and has scheduled a date to consider decertification before trial begins." (footnote omitted)). Finally, due to the fact that the court is proceeding *procedurally* under the first step of collective action certification, this court's decision simply *conditionally* certifies the redefined collective action class. Thus, Tyson has every opportunity to move to decertify or further limit the class in the future. *See Rawls*, 244 F.R.D. at 299 (addressing defendant's motion to decertify conditionally certified class).

In coming to this conclusion, the court distinguishes the facts in the unpublished decision, *Fox v. Tyson Foods, Inc*., No. 4:99–CV–1612–VEH (N.D.Ala. Nov. 15, 2006), submitted to the court as Defense exhibit 1. Dkt. # s 45, 49. In *Fox*, the district court denied FLSA class certification to plaintiffs from eight different Tyson chicken processing facilities located in seven different states. [D. ex. 1, p. 1]. In denying FLSA collective action certification, the court noted the "inter-plant and intra-plant inconsistencies" between the plaintiffs, and that the evidence showed "Tyson does not have a single plan to not compensate employees for donning and doffing time." [D. ex. 1, p. 13–14]. In this case, there is only one Tyson facility involved, and all named plaintiffs are paid via gang time. Gang time, of course, is a uniform compensation plan. In addition, to the extent that *Fox* suggests the court needs to determine the merits of Plaintiffs claim in the instant case, the court strongly disagrees with any such proposition.

In the end, the court grants Plaintiffs' motion for the conditional certification of the following collective action class:

> All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004, to the present, and who are or were paid under a "gang time" compensation system in the Kill, Cut, or Retrim departments.

The court does not believe it is necessary to include anything in the collective action class definition about donning and doffing, PPE, or knives and other equipment, because the evidence reveals that those employed in the Kill, Cut, and Retrim departments all don and doff some sort of PPE and/or use some kind of

knife or tool. The court is satisfied this redefined collective action class is similarly situated under the FLSA. The notice and specific orders regarding the conditional certification of Plaintiffs' collective action under the FLSA are set forth in the conclusion and order of this opinion.

V. IWPCL CLASS ACTION

Plaintiffs also seek class certification of their IWPCL claim pursuant to Federal Rule of Civil Procedure 23. Plaintiffs specifically seek certification of a class defined as follows:

> All current and former hourly production and support workers of Defendant Tyson's Storm Lake, Iowa, meat processing facility who have been employed by Tyson at any time from February 7, 2005, to the present.

Dkt. # 35. The date is the only material difference between the Plaintiffs' requested Rule 23 class and their requested FLSA collective action class. Plaintiffs chose February 7, *2005*, as the pertinent date for their Rule 23 class action because the IWPCL provides for a two-year statute of limitations. *See Waterman v. Nashua–Plainfield Cmty. School Dist.*, 446 F.Supp.2d 1018, 1027 (N.D.Iowa 2006) ("The statute of limitations for an IWPCL action is two years from the time the action accrues." (citing Iowa Code § 614.1(8))).

The requirements for certification under Rule 23 are set forth by the rule, which was recently amended[22] to read as follows:

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[22] Rule 23 was amended last year, but only to reflect a general restyling of the rules. Thus, although the parties briefed these

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally

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issues under the old language of the rule, it does not change the import of their arguments.

> to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

FED.R.CIV.P. 23. "To be certified as a class, plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b)." *In re St. Jude Medical, Inc*., 425 F.3d 1116, 1119 (8th Cir.2005). "[T]he court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 are satisfied." *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir.2006) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). "Though class certification is not the time to address the merits of the parties' claims and defenses, the 'rigorous

analysis' under Rule 23 must involve consideration of what the parties must prove." *Elizabeth M.*, 458 F.3d at 786.

A. Rule 23(a) Legal Standards And Analysis

There are four "threshold requirements" under Rule 23(a) that plaintiffs must meet to be certified as a class. *Owner–Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1011 (8th Cir.2003). These requirements include:

> (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. (citing FED.R.CIV.P. 23(a)). The United States Supreme Court has summarized these four requirements as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Tyson concedes Plaintiffs meet the numerosity requirement, but Tyson argues Plaintiffs fail to meet the remaining three elements. The Supreme Court has recognized that these three remaining requirements all "tend to merge," but this court will first address each of them separately. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

1. Commonality

Commonality, as a threshold element for Rule 23 class certification, "requires that there be common

questions of law or fact among the members of the class," but it "does not require that every question of law or fact be common to every member of the class." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir.1982). Instead, commonality may be satisfied "when the legal question linking the class members is substantially related to the resolution of the litigation." *DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1174 (8th Cir.1995) (quotations omitted). "Thus, factual differences are not fatal to maintenance of the class action if common questions of law exist." *Robinson v. Sears, Roebuck & Co*., 111 F.Supp.2d 1101, 1120 (E.D.Ark.2000).

Plaintiffs claim they meet this commonality requirement because they all share the common question of "whether Defendant Tyson has violated [the IWPCL] by not paying production workers at its Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time,' particularly the time spent donning, doffing, and cleaning personal protective equipment." Dkt. # 35. Tyson argues there "is no single question of law or fact that is common to every member of the putative class" because "there is nothing 'uniform' about the pay practices at the Storm Lake facility." Dkt. # 45.

Tyson's argument is largely correct regarding the entire class Plaintiffs defined—all hourly production and support workers. There is no uniform pay practice regarding all hourly production and support workers. However, and as the court found when analyzing the propriety of FLSA collective action certification, there undoubtedly is a uniform pay practice among *most* employees at Tyson's Storm Lake facility. Tyson admits that "it has utilized the same compensation system at all times relevant to the Complaint," and

"that most of the hourly production workers" at its Storm Lake facility "are paid on 'gang time,' plus four minutes a day for pre- and post-shift activities." Dkt. # 15. In fact, as the court found in its FLSA collective action analysis, over 75% of Tyson's nearly 1,600 employees are paid via gang time.

Because Plaintiffs have alleged violations of the IWPCL based on Tyson's alleged "unlawful compensation system," which Plaintiffs define as the use of "gang time," Dkt. # 2, the commonality element cannot be met with regard to those employees who are not paid via gang time. The factual difference between the payment system for employees paid on gang time and the employees not paid on gang time is significant and cannot be ignored. After all, Plaintiffs plainly note the gang time payment system as the basis for their lawsuit, Dkt. # 2, and Plaintiffs assert they meet the commonality requirement for class certification by stating all plaintiffs share the common question of "whether Defendant Tyson has violated [the IWPCL] by not paying production workers at its Storm Lake, Iowa, facility for all work performed prior and subsequent to 'gang time,' " Dkt. # 35. Certain employees in the requested class, however, are not paid under gang time. Therefore, there is not commonality between the class representatives, who are all workers in the departments paid via gang time, and the requested class members who are not paid via gang time.

But the commonality element is satisfied with respect to most of the class members, i.e., those class members that are paid on a gang time basis. Plaintiffs, of course, allege that such a practice violates the IWPCL, and, thus, there is a common question of law specific to all of the employees paid on a gang time

basis. Tyson points to numerous factual differences regarding the clothing and equipment employees wear, even among those paid on a gang time basis, but the court is not convinced these factual differences defeat commonality among all employees paid on a gang time basis. All employees paid on a gang time basis wear some sort of PPE, and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE. In addition, most all use some kind of knife, and also a scabbard or steel. The small factual differences between those employees that are paid on a gang time basis "are not fatal to maintenance of the class action [because a] common question[ ] of law exist[s]." *Robinson*, 111 F.Supp.2d at 1120. That question is whether Tyson's gang time compensation system violates the law. Because "[a]ll current and former hourly production and support workers" are not all paid via gang time, Plaintiffs' requested class does not meet the commonality requirement under Rule 23(a)(2). But the court is satisfied that the proposed class, if redefined and confined to hourly employees paid under Tyson's gang time compensation system, meets the commonality requirement. *See Felix De Asencio v. Tyson Foods, Inc.*, No. CIV.A 00–CV–4294, 2002 WL 1585580, at *2 (E.D.Pa. July 17, 2002) ("Here, the common questions of law and fact revolve around the allegations that Tyson has violated the WPCL by not paying the New Holland facility production workers for all work performed prior and subsequent to 'line time,' particularly the time spent donning, doffing, and cleaning protective equipment and garments."), *rev'd on other grounds*, *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir.2003).

2. Typicality

"The burden of showing typicality is not an onerous one." *Paxton*, 688 F.2d at 561. In fact, the analysis of typicality tends to merge with the analysis of commonality, *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), although the Eighth Circuit Court of Appeals has "given typicality 'an independent meaning' by holding that Rule 23(a)(3) 'requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff.' " *Paxton*, 688 F.2d at 561 (quoting *Donaldson v. Pillsbury Co*., 554 F.2d 825, 830 (8th Cir.1977)). Typicality "is generally considered to be satisfied 'if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.' " *Id*. at 561–62 (quoting Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1764 at n. 21.1 (Supp.1982)). However, "[t]he presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M*., 458 F.3d at 787.

Tyson again argues there are "wide factual variations" between the named plaintiffs and putative plaintiffs that preclude a finding of typicality. The court agrees with respect to Plaintiffs' proposed class definition. All hourly employees are not typical of each other because some are not paid via a gang time compensation system. However, if the class is confined to employees paid via gang time, the typicality requirement is met because their claims are based on the same legal theory—that Tyson's gang time compensation system is unlawful. In addition, among gang time paid employees, the evidence only shows

factual differences regarding the specific PPE these employees wear and the tools they carry. The court does not feel these differences necessitate individualized inquiry to prove a violation because most all gang time employees wear at least the same basic PPE and use some kind of knife or tool. Moreover, there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited. Again, as with the court's finding concerning commonality, those employees that are not paid via gang time do not have the "same or similar" grievance as the class representatives because the class representatives are or were paid on a gang time basis. *Donaldson*, 554 F.2d at 830. Thus, the court only finds the typicality requirement met with respect to a class defined as those employees that are paid via gang time.

3. Adequacy of representation

"The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562–63. The Supreme Court has advised that the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231.

Tyson does not dispute that Plaintiffs' counsel is qualified to vigorously prosecute the interests of the class, but Tyson does dispute whether the class representatives have common interests with the members of the class. Tyson specifically points to the fact that the named plaintiffs do not represent all the

different job positions or even departments in the putative class. The six remaining named plaintiffs—Mario Martinez, Peg Bouaphakeo, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia—have never worked in the Rendering, Material Handling/Load Out, or Maintenance departments.

Of course, if all six departments were relatively similar, particularly in regard to how the employees were paid, the named plaintiffs' inexperience in the Rendering, Load Out, and Maintenance departments would not matter much. The possibilities for conflicts of interest between class representatives and class members are obviously minimal when all plaintiffs in an IWPCL class action perform similar work and receive compensation under a similar pay system. But in this case the chances for conflicts of interest are greater because there is a significant difference, at least with respect to how they are paid, between most of the hourly employees in the Kill, Cut, and Retrim departments, and the hourly employees in the Rendering, Material Handling/Load Out, and Maintenance departments. That difference, of course, is that the Rendering, Material Handling/Load Out, and Maintenance departments are not paid via gang time.

The significance of this difference is highlighted by the Supreme Court's admonition that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Broadly defined, the interest and injury in this case is the desire to recover payment for

work performed that allegedly was not paid. Plaintiffs' complaint, however, belies such a broad definition. Plaintiffs' complaint is littered with allegations of Tyson's "unlawful compensation system," which Plaintiffs unequivocally assert as Tyson's use of "a system known as 'gang time' or 'line time.' " Dkt. # 2. While all named plaintiffs work in departments paid under this gang time system, the same cannot be said for all requested class members. In such a case, the court finds the named plaintiffs do not adequately represent all of the requested class. However, if the class is limited to those employees paid by gang time, the court sees no conflicts between the class representatives and those they represent.

4. Merged result

The commonality, typicality, and adequacy of representation requirements of Rule 23(a) "tend to merge" because they "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tele. Co. of Southwest*, 457 U.S. at 158 n. 13, 102 S.Ct. 2364. Whether looked at individually, or when the elements of Rule 23(a) are merged together, it is obvious to the court that the three disputed Rule 23(a) elements are not satisfied when the class is defined as all hourly production and support employees. Not all hourly employees are paid via gang time, which is the compensation system Plaintiffs allege is unlawful. However, it is also clear that if the class is redefined or confined to only those hourly employees paid via gang time, the requirements of Rule 23(a) are met,

including the numerosity requirement. Tyson did not dispute numerosity, and even under what is redefined as a smaller class, it is clear that numerosity is easily satisfied, when most of Tyson's 1600 employees are paid via a gang time system.

It is well within the court's authority to redefine Plaintiffs' proposed class. *See, e.g.*, *Robinson*, 111 F.Supp.2d 1101 (E.D.Ark.2000) (granting "plaintiffs' motion for class certification as modified"); Wright, § 1759 at 130–131 & n. 28 ("[I]f plaintiff's definition of the class is found to be unacceptable, the court may construe the complaint or redefine the class to bring it within the scope of Rule 23."). The court finds it appropriate to do so at this point. Therefore, the court will next analyze whether a class defined as those hourly employees paid on a gang time basis at Tyson's Storm Lake, Iowa, facility meet one of the subsections of Rule 23(b).

B. Rule 23(b) Legal Standards And Analysis

Parties seeking class certification must also show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem*, 521 U.S. at 614, 117 S.Ct. 2231. Plaintiffs do not claim they meet the requirements under Rule 23(b)(2), as that rule "permits class actions for declaratory or injunctive relief." *Id*. Plaintiffs claim they meet the requirements under either Rule 23(b)(1) or (3).

1. Rule 23(b)(1)

The Supreme Court summed up the purposes and requirements of Rule 23(b)(1) in *Amchem*:

> Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards

> of conduct for the party opposing the class," or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests." Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims.

521 U.S. at 614, 117 S.Ct. 2231 (citations omitted); *see Reynolds v. Nat'l Football League*, 584 F.2d 280, 283 (8th Cir.1978) (explaining certification under Rule 23(b)(1)(A) and (B)).

Subdivision (A) is intended to allow class certification when individual actions could have an adverse effect on the defendant. Wright, § 1773 at 10. Thus, the provision attempts to protect the party opposing the class. Under subdivision (A), "there obviously must be a risk that separate actions will in fact be brought if a class action is not permitted. Otherwise there is no danger that incompatible standards of conduct will be formulated by the courts." Wright, § 1773 at 11. In this case, there certainly is a risk that separate actions will in fact be brought—many potential plaintiffs are aware of the suit, as several hundred have filed consents at least with respect to the FLSA claim. However, the court does not see how individual lawsuits achieving different results would impair Tyson's ability to pursue a uniform

continuing course of conduct. Tyson would not be put in a conflicted position simply because Tyson might have "to pay damages to some class members but not to others or to pay them different amounts." Wright, § 1773 at 13; *see Smith v. Brown & Williamson Tobacco Corp*., 174 F.R.D. 90, 99 (W.D.Mo.1997) ("Although individual lawsuits might end with different results, this does not justify certification of the class [under Rule 23(b)(1)]."). Thus, the court agrees with Tyson that Plaintiffs have not met their burden of proving class certification is appropriate under subdivision (A).

Subdivision (B) is intended to allow class certification when individual actions could have an adverse effect upon the putative plaintiffs. Wright, § 1774 at 24 ("Rule 23(b)(1)(B) allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members, rather than on the opposing party."). Under subdivision (B), and unlike subdivision (A), "it is not necessary to demonstrate that separate actions are likely or feasible in order to invoke Rule 23(b)(1)(B)." Wright, § 1774 at 25. It simply needs to be shown that individual actions would, "as a practical matter," be dispositive, impair, or impede the interests of other members not parties to the individual lawsuit. Plaintiffs argue that "[m]ost, if not all, of these workers lack the financial resources to litigate alone against a corporate giant like Tyson Foods." Dkt. # 35. Subdivision (B), however, is not really concerned with the financial resources of individual plaintiffs, but rather the financial resources of the defendant. *See In re Fed. Skywalk Cases*, 680 F.2d 1175, 1187 (8th Cir.1982) ("A class action may be certified under Rule 23(b)(1)(B) when a number of individuals claim rights to a share of a fund that is too small to satisfy in full

every individual's claim."). That is why Rule 23(b)(1)(B) is invoked in "limited fund" circumstances, whereby individual actions may deplete the limited amount of monetary recompense available and leave some individuals without a remedy. That is not the case here, and thus the court does not find Subdivision (B) applies to Plaintiffs' situation. Wright, § 1773 at 25 (noting the purpose of Subdivision (B) is "to protect the interests of all class members against any determination that would have an adverse effect on them").

2. Rule 23(b)(3)

"In general . . . a Rule 23(b)(3) action is appropriate whenever the actual interests of the parties can be served best by settling their differences in a single action." Wright, § 1777 at 114. To be certified under Rule 23(b)(3), Plaintiffs must satisfy the "predominance" and "superiority" components of the rule. *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231. These requirements were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " *Id*. (quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697). Rule 23(b)(3) specifically lists four factors pertinent to the court's determinations regarding predominance and superiority:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

FED.R.CIV.P. 23(b)(3).

Under the first factor, the court does not foresee a great interest among individual plaintiffs in proceeding individually. Such individualized adjudications would be financially burdensome, and some individual plaintiffs may not stand to gain a significant remedy. On the other hand, the advantages of determining the common issues by means of a class action are apparent, as all employees in the class could finalize their claims in one proceeding. Under the second factor, the class representatives have already conducted a substantial part of discovery, and thus individual adjudications would duplicate work already performed. Under the third factor, Tyson's Storm Lake, Iowa, facility is located within the Northern District of Iowa, and there is no reason why this District Court would not be a desirable forum for the litigation. All the evidence is very close. Under the fourth factor, the court does not foresee problems of manageability. No indication of counter-claims are present, and the size of the class is not too large or dispersed among several Tyson plants.

Regarding the predominance inquiry, the "court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Blades*, 400 F.3d at 566. In other words, the court must look at the nature of the evidence plaintiffs would have to come

forward with to establish a prima facie case, and if "the members of the proposed class will need to present evidence that varies from member to member, then it is an individual question." *Id*. In this case, class members need to prove that they are not paid for all the work they perform under Tyson's gang time compensation system. To do so, the class members would need to show that they perform work which goes unpaid, which Plaintiffs claim is the time they spend donning and doffing their PPE or cleaning their equipment. Clearly, not all employees paid on gang time wear the same PPE or use the same equipment. However, common evidence that Tyson's compensation system cannot account for even the basic or standard PPE employees need to don, doff, and clean would establish a prima facie case for the class. Individual questions may exist, but the court does not believe they predominate.

Regarding the superiority inquiry, the court is to compare the possible alternatives to a class action and determine if any is superior to the proposed class action. The alternatives to class action litigation in this case are individual lawsuits by class members. There is no doubt this would be more burdensome on the class members, and it would likely be less efficient use of judicial resources. *See Valentino v. Carter–Wallace*, 97 F.3d 1227, 1234–35 (9th Cir.1996) ("Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation."). Under such circumstances, the court finds the superiority requirement met.

C. Certified Class Action

Based on the above analysis, the court finds that Plaintiffs' motion for class action certification under

Rule 23 should be granted as modified. That is, the court hereby certifies in accordance with Rule 23(c)(1)(B) the following class under Rule 23(b)(3):

> All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2005, to the present, and who are or were paid under a "gang time" compensation system in the Kill, Cut, or Retrim departments.

The notice and specific orders regarding the certification of Plaintiffs' class action under Rule 23 are set forth in the following conclusion and order.

VI. CONCLUSION AND ORDER

The court finds Plaintiffs can maintain their FLSA and IWPCL actions together. The FLSA does not preempt Plaintiffs' IWPCL claim, and the differences between the collective action and class action procedures do not require the court to dismiss, deny, or limit Plaintiffs' IWPCL claim.

The court also *grants, as modified* by the court's revised definitions, *see infra* Parts IV.C, V.C, Plaintiffs' motion for conditional certification of their FLSA claim as a collective action under § 216(b), *see* Dkt. # 34, and Plaintiffs' motion for certification of their IWPCL claim as a class action under Rule 23, *see* Dkt. # 35.

The class members of both the FLSA collective action and the Rule 23 class action deserve notice of the Plaintiffs' claims and their opportunity to "opt-in" or "opt-out" as the case may be. *See* FED.R.CIV.P. 23(c)(2)(B) ("For any class that is certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort."); Wright, § 1807 at 485 ("The FLSA requires that notice be given to allow plaintiffs to opt in. . . ."). Because the classes are identical (except for a temporal difference)[23] and there is likely confusion to arise among members receiving two notices, the court believes the best course of action is to authorize and craft one notice that informs all opt-in members and all opt-out members of their rights. The court orders *Plaintiffs to submit a draft proposed notice* that meets

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[23] Regarding the temporal difference, the court believes it is important to note that the statute of limitations operates differently in class actions and collective actions. *See* Wright, § 1807 at 476 ("Another difference flowing from the opt-in requirement is the treatment of the statute of limitations."). The filing of Plaintiffs' complaint tolls the statute of limitations for the Rule 23 class action members "until the class certification decision has been made, or until an individual class member opts out." *Id.* Under the FLSA,

> [a]n action is considered to be commenced, for statute of limitations purposes, either (1) when the complaint is filed, if the plaintiff is named in the complaint and filed a written consent to become a party at the time the complaint was filed; or (2) on the date a consent to become a party was filed, if the plaintiff was either unnamed in the complaint or failed to file a consent at the time the complaint was filed.

Frye v. Baptist Memorial Hosp., Inc., No. 07–2708 Ma/P, 2008 WL 2117264, at *3 (W.D.Tenn. May 20, 2008) (citing 29 U.S.C. § 256(a) and *Piper v. RGIS Inventory Specialists, Inc*., No. C–07–00032 (JCS), 2007 WL 1690887, at *6 (N.D.Cal. June 11, 2007)). The court does not believe this difference necessitates specifying a different date in the FLSA collective action class definition, although this principle will be important when addressing Tyson's statute of limitations affirmative defense. Dkt. # 15.

the requirements of the FLSA[24] and Rule 23(c)(2)(B)[25] *within ten days*. Tyson shall have *five days to respond* to Plaintiffs' draft, and thereafter the court will finalize the proposed notice.

The six named plaintiffs—*Peg Bouaphakeo, Javier Frayre, Jose A. Garcia, Mario Martinez, Jesus A. Montes,* and *Heribento Renteria*—are *designated as class representatives for the collective and class actions,* and the court *appoints the lead counsel of record* for Plaintiffs, under the standards in Rule 23(g), as class counsel for Plaintiffs' IWPCL class action and FLSA collective action. The court also orders *Tyson to provide within twenty days* to Plaintiffs' counsel a listing of the names and addresses of all Tyson employees that meet the court's definition of the FLSA collective action class and IWPCL class

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[24] The FLSA does not specifically state what kind of notice must be given, but other sources provide insight. *See generally* Wright, § 1807 at 485–487, 493 n. 57.

[25] Rule 23(c)(2)(B) states:

> For any class that is certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

FED.R.CIV.P. 23(c)(2)(B).

action class in this case. Further orders shall accompany the court's finalization of notice.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 12-3753

PEG BOUAPHAKEO, *et al*.,

Appellees,

v.

TYSON FOODS, INC.,

Appellant,

Nov. 19, 2014

Appeal from U.S. District Court for the Northern District of Iowa—Sioux City (5:07-cv-04009-JAJ).

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Chief Judge RILEY, *Judge* WOLLMAN, *Judge* LOKEN, *Judge* GRUENDER, and *Judge* SHEPHERD would grant the petition for rehearing en banc.

Judge BEAM would grant panel rehearing.

BEAM, Circuit Judge, dissenting to the denial of rehearing by the panel and rehearing by the court en banc in this matter.

As aided and abetted by this court, this dispute becomes yet another manifestation of a professionally assembled class action lurching out of control. *See generally* Review and Outlook, *Tort Blowout Preventer,* Wall St. J., Oct. 24, 2014, at A12. From the decisions of the panel and the court en banc denying rehearing, I dissent.

I. BACKGROUND

At the outset, I include by reference my panel dissent. *Bouaphakeo v. Tyson Foods, Inc.* 765 F.3d 791, 800 (8th Cir.2014) (Beam, J., dissenting). And, at the risk of a small measure of repetition, I review and restate a portion of the procedural and evidentiary record from the district court.

The trial court conditionally and preliminarily, but erroneously, certified a 444-person Fair Labor Standards Act (federal) class (FLSA), including the named plaintiffs, and a 3,344 Iowa (state) class, also including the named plaintiffs, all of whom are either present or former employees of Tyson's Storm Lake, Iowa, facility. The backbone of these supposed classes is Tyson's "gang time" production line. The jury was instructed that the plaintiffs make no claim for the time that they were actually on the production line, known as "gang time."

However, these gang time production line employees are required to wear an array of safety and sanitary equipment depending upon the job function they are performing at the time and the department to which they are assigned on a given day. Use of this equipment requires pre- and post-production line working time to put on, take off and rinse, and some additional walking. Tyson agrees that actual time spent for this doffing, donning, rinsing and walking is compensable. Thus, the only issue in dispute is the

temporal extent of these pre- and post-production line activities and the individual pay generated through them for each member of the putative classes.

Of course, this time/pay issue has existed well prior to commencement of this particular case, a circumstance that is fully relevant to the reasoning of the panel majority.

The parties have jointly stipulated that as early as 1998, Tyson had studied the relationship, application and compensability of the knife-connected and sanitary item use in connection with the gang time work. This study included the temporal duration of these doffing, donning, rinsing and walking activities. Without my detailing all such factors involved and applied, these time studies resulted in extra overtime pay—the so-called Tyson K-code payments. These calculations and payments were used by the classes' expert witnesses at trial, as I will later discuss in more detail. The K-code wage payments were based on one or more four- to eight-minute daily segment calculations, depending upon the department worked and the equipment used. And they were, as indicated, intended to compensate employees for the doffing, donning, rinsing and walking activities involving the protective and sanitary item equipment. These wage payments in some measure or another were paid from 1998 until at least June 28, 2010, well within the time frame of this action.

Accordingly, contrary to the panel opinion's statements and inferences, there is no issue of "liability"[1] for overtime pay, if earned—the sole issue

[1] Liability is defined as "legal responsibility to another . . . enforceable by civil remedy." *Black's Law Dictionary* 1053 (10th ed.2014).

before the court at this point is a jury's determination, upon proper instructions on the law, of individual compensatory damages,[2] if any, for each member of the putative classes and the entry of a final judgment that, upon execution,[3] results in individual wage payments to all lawfully certified members of a lawfully assembled class. In short, under binding precedent of the Supreme Court and this court, if an employee suffers no damages by way of unpaid wages, he or she is not a proper member of an alleged federal or state class and the employer has no liability for such a class claim asserted by an employee or his or her named plaintiff representatives. *Blades v. Monsanto Co.,* 400 F.3d 562, 571 (8th Cir.2005) ("[D]amages to all class members must be shown to justify the class action."). Here, because the class representative's evidence clearly shows that numerous members of the certified putative classes suffer no damages, there is neither a legally certified class nor a final judgment that can lead to individual wage loss payments to any class member. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613 & n. 15, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints. . . ."). Thus, the supposed classes must be decertified and dismissed or, at least, remanded to the district court for proper recertification of a lawfully assembled class and entry of a final judgment identifying damages specific to

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[2] "'Damages are the sum of money which a person wronged is entitled to receive from a wrongdoer as compensation for the wrong.'" *Black's Law Dictionary* 471 (10th ed.2014) (quoting Frank Gahan, *The Law of Damages* 1 (1936)).

[3] An execution is "[t]he act of carrying out or putting into effect" a court order or judgment. *Black's Law Dictionary* 689 (10th ed.2014).

each individual member of a legitimate class. *Genesis Healthcare Corp. v. Symczyk,* —— U.S. ——, ——, 133 S.Ct. 1523, 1528, 185 L.Ed.2d 636 (2013) (holding that for purposes of Article III, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed") (quotations omitted).

II. DISCUSSION

A.

The panel majority substantially depends upon *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) in rendering judgment in this appeal. But, respectfully, *Mt. Clemens* bears no weight whatever in support of the majority's attempted validation of its counter-factual legal conclusions.

The panel states, "[A]pplying Tyson's K-code policy and expert testimony to 'generate . . . answers' for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) (allowing liability based on 'just and reasonable inference' when complete records do not exist.)." *Bouaphakeo,* 765 F.3d at 797 (second alteration in original). But, the Supreme Court in *Mt. Clemens* does not explicate, generally or specifically, language supportive of the panel majority's above statements. And, standing alone, the panel's statements are irrelevant to this case because individual "*damages,*" not group liability, are the fighting issue.

The panel further states, "[f]or the donning, doffing, and walking in *Mt. Clemens,* testimony from eight employees established liability for 300 similarly situated workers. *Mt. Clemens,* 328 U.S. at 684; *Mt.*

Clemens Pottery Co. v. Anderson, 149 F.2d 461, 462 (6th Cir.1945) (discussing testimony)." *Id.* at 799. With this "eight employees established *liability*" statement, the panel erroneously seeks to validate and affirm in this case the lump sum *damages* verdict returned by the trial jury as instructed by the trial court, which verdict was used, in turn, by the trial court to enter an erroneous lump sum compensatory damages judgment.

While there is reference to eight employees' testimony in the *Mt. Clemens* Sixth Circuit opinion, 149 F.2d at 462, and while such testimony may have been relevant to the Mt. Clemens' group *liability* for overtime pay under the FLSA given the circumstances of that litigation and that particular appeal, the panel majority's reference to the Sixth Circuit's discussion of trial testimony has no relevance whatever to the *damages* at issue in either the Supreme Court's *Mt. Clemens* opinion or in this case. Indeed, in *Mt. Clemens,* the Supreme Court, referring to individual class damages, stated, "we remand [this] case for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the de minimis doctrine and calculating the resulting damages under the [FLSA]." 328 U.S. at 694.

Also, questions of liability in a FLSA case or in a Federal Rule 23(b) case guided by the FLSA present matters of law for the court. *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *Jarrett v. ERC Props., Inc.,* 211 F.3d 1078, 1081 (8th Cir.2000). Damages, on the other hand, are matters for jury determination under properly drawn instructions on the law from the trial court. *Alvarez Perez v. Sanford–Orlando Kennel Club, Inc.,* 515 F.3d 1150, 1163 (11th Cir.2008) (discussing

the jury's role in assessing compensatory damages and the court's role in the award of liquidated damages under the FLSA); *Borough v. Duluth, Missabe & Iron Range Ry. Co.,* 762 F.2d 66, 69 (8th Cir.1985) ("[C]alculation of damages are questions of fact and peculiarly within the province of the jury.").

Mt. Clemens does say, as noted by the panel opinion, an employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 687, *see also Holaway v. Stratasys, Inc.,* No. 14-1146, 2014 WL 5755987 (8th Cir. Nov.6, 2014). And, notwithstanding the panel's inference to the contrary, that individual burden of proof is by a preponderance of the evidence and the burden runs to each putative class member, although presumably with the benefit of admissible circumstantial evidence adduced by the class member or by the classes' named plaintiffs.

In *Mt. Clemens,* the Supreme Court, noting an employer's responsibility to keep adequate payroll records under 29 U.S.C. § 211(c) of the FLSA, and further noting that Mt. Clemens had not done so, unremarkably held, "[i]n 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." 328 U.S. at 687. The long established "reasonable inference rule" by definition, simply identifies the enduring evidentiary principle "that a jury, in deciding a case, may properly consider any reasonable inference drawn from the evidence presented at trial." *Black's Law Dictionary* 1457 (10th ed.2014). It is, at bottom, the simple recognition of the availability of circumstantial

evidence. In this vein, there is precedent for the proposition that if an employer has failed to keep payroll records, employees are to be awarded compensation based upon the most accurate basis possible. *Holaway,* 2014 WL 5755987, at *3. And, "once the employee has shown work performed for which the employee was not compensated, and sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference." *Id.* at *2 (quotation and internal quotation omitted).

Such burden-shifting rationale is not applicable in this case for at least two reasons. First, well over half of the putative class employees in this case have not "shown work performed for which [they were] not compensated." *Id.* Indeed, they have affirmatively shown through their own evidence that they have performed no work for which they have not been compensated.

Second, in this case, there is clearly no dearth of adequate attendance, assignment, equipment, work time and payroll records as contemplated by *Mt. Clemens* and *Holaway.* Complete time and work records exist and were available to each Tyson employee and their expert witnesses—including entitlement to and payment of K-code wages resulting from donning, doffing, rinsing and walking specific to each employee and department. The individual members of the alleged classes simply disagree with Tyson's K-code time calculations and, thus, assume the burden of proof of a different result by adducing a preponderance of admissible evidence to the contrary. However, what the class representatives actually

succeed in proving with their expert testimony in this case is that a large number of the members of their assembled classes actually suffered no damages at all and, under Supreme Court precedent, and that of this circuit, cannot, in the final analysis, be part of a lawfully created class. *Genesis Healthcare,* 133 S.Ct. at 1528; *Amchem Prods.,* 521 U.S. 591, 613 & n. 15, 117 S.Ct. 2231, 138 L.Ed.2d 689. Neither does any established precedent extend employer overtime pay liability to any member of a purported class who has been fully reimbursed for his or her working time by the Tyson K-code payments. *Blades,* 400 F.3d at 571.

B.

As noted in my panel dissent, plaintiffs, as required by *Mt. Clemens,* offered individual member damage evidence at trial. Dr. Liesl Fox made and presented to the jury individual damages calculations that incorporated time study information created by Dr. Kenneth Mericle. Dr. Fox, without objection by Tyson, also adopted Tyson's several employment records including Tyson's individual K-code payment register. The only identifiable variable fact that Dr. Fox used in her damages calculations was the substitution of Dr. Mericle's department-by-department time studies of 21.25 minutes and 18 minutes per employee per day in lieu of Tyson's 4-minute and 8-minute K-code determinations. Dr. Fox, using Dr. Mericle's more generous time measurements, testified that at least 212 members of the certified class had no pay claim because wages due for time spent doffing, donning, rinsing and walking—less the already proffered individual K-code payments—"would not have been enough to kick them into overtime." Further, plaintiffs' evidence indicated that even using Dr. Fox's

damage calculations, there were at least 509 additional workers whose damages ranged from $0.27 to less than $100, thus falling into the de minimis[4] range mentioned in *Mt. Clemens.* In this regard, Dr. Fox's complete range of individual damages ran from $0.00 to $9,903.25—that when finally totaled tallied up to the $6,686,082.36 jury demand by the plaintiffs that I next discuss.

Dr. Fox's total damages calculation, using, as earlier noted, Dr. Mericle's time observations of 21.25 minutes in the kill department and 18 minutes in the fabrication department, presented to the jury, through plaintiffs' trial exhibit 345, class damages of $8,297,784.80–$1,611,702.44 for the FLSA class and $6,686,082.36 for the Iowa class. On cross-examination concerning her calculations, Dr. Fox was asked "if an employee worked less than Dr. Mericle's [time study] numbers . . . it is possible that Tyson's K-code payments already could have fully paid them for that time, right?" Dr. Fox responded, "[p]otentially."

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[4] The "de minimis doctrine" is actually unique to the FLSA and first appeared in *Mt. Clemens. Perez v. Mountaire Farms, Inc.,* 650 F.3d 350, 377 (4th Cir.2011) (Wilkerson, J., concurring). Very generally, it stands for the proposition that de minimis periods of work are noncompensable. "In *[Mt. Clemens],* the Court acknowledged that a de minimis rule is necessary because '[t]he workweek contemplated by [the FLSA] must be computed in light of the realities of the industrial world,' and those 'realities of the industrial world' must include the commonsense observation that the computations of ever smaller increments of time may eventually become so onerous that they should not be the subject of endless litigation." *Id.* at 378 (quoting *Mt. Clemens,* 328 U.S. at 692).

Dr. Fox was then asked and answered the following questions:

Q. And do you remember telling me you can't just take a fraction or a portion of that because as you go down in numbers, people—I think you told Mr. Wiggins this this morning—you start finding that people start dropping out of overtime, right?

A. That's correct.

Q. So if somebody was at 41 hours, let's say 40 and a half hours, and you took out an hour because let's say the jury concludes that work didn't take as long as Dr. Mericle said, a lot of those people would fall into non-overtime, correct?

A. That's correct. I don't know how many, but yes, some would.

Q. So you can't just take your original $6.6 million number and say well, we are going to cut it in half if we find Mericle's numbers are overstated by twice or let me put this a better way.

If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?

A. No, you cannot.

Q. Right. And the lower and lower the number of minutes goes, the more and more people start falling out of overtime, right?

A. That's correct.

Q. So at some point if you drop the number low enough, you would expect that people would be at zero on your chart, right?

A. Some people would, yes.

> Q. Okay. Well, anybody whose K-code time covers the amount of time the jury thinks should be paid would be a zero, right?
>
> A. That's correct.

So, notwithstanding exhibit 345 with its damages calculation of $8,297,784.80, class counsel conceded that the FLSA class, in part, duplicated the Iowa Class, and then asked the jury to return a verdict for the above-stated $6,686,082.36 for both of the classes. The jury, obviously rejecting Dr. Mericle's over-generous time study conclusions, returned a verdict of $2,892,378.70. This figure amounts to 43.25 percent of the above-stated jury demand, which demand was, as above noted, based upon the sum total of the Dr. Fox class-member itemization received in evidence as trial exhibit D-2274, which exhibit already included 212 members with no damages and an additional 509 members with de minimis damages.

Thus, giving the best gloss available to the plaintiffs under the evidence they themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages whatever and the balance have markedly lower individual damages that are now virtually impossible to accurately calculate.

C.

The status of this case can be summarized as follows:

> 1. A certified class of 3,344 persons, more than one-half of which have no provable damages, are the joint beneficiaries of a lump sum jury verdict and lump sum district court judgment in the amount of $2,892,378.70 in compensatory damages.

2. The lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due the limited number of members of the certified class with provable damages.

3. Neither the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom.

If the case must be returned to the district court for further action concerning distribution of damages, the existing judgment is clearly not a final appealable order. Very simply, a final order is one which "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I.M. & S. Ry. Co. v. S. Express Co.,* 108 U.S. 24, 28–29, 2 S.Ct. 6, 27 L.Ed. 638 (1883). Judgments that leave the "assessment of damages or awarding of other relief" unresolved, "have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291." *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 744, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976).

III. CONCLUSION

There was a motion to decertify the class after judgment. At that point, binding precedent indicates that the district court should have either decertified the classes entirely or recertified them in accordance with only those putative members with provable damages, if such damages were reasonably discernible from the evidence available at that time.

Accordingly, I dissent from the panel's denial of the requested rehearing and, to the extent I am by law authorized to do so, the denial of rehearing by a majority of the court en banc. The important issues

and extraordinary circumstances presented by this case should be properly considered—especially noting that several other somewhat similar cases are presently at issue in the district courts of this circuit and this court on appeal.

BENTON, *Circuit Judge*, respecting the denial of rehearing en banc.

This court held that the district court did not abuse its discretion in certifying a class of Tyson Foods, Inc. employees, who presented sufficient evidence to support the jury's award of overtime pay.

The dissent to the denial of panel rehearing claims that the class lacks commonality and focuses exclusively on damages issues. But all parties asked the jury to resolve Tyson's liability: Did Tyson's K–Code policy fully compensate its Storm Lake, Iowa, "gang-time" employees for their donning and doffing activities? *See Verdict Form, Question No. 5* ("Did the plaintiffs prove that they are entitled to additional compensation for any of the donning and doffing activities at issue in this case?"). *See also Jury Instruction No. 3* ("Summary of Claims"). This was a common contention of the class. *See Wal-Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (noting that a class's "claims must depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

Contrary to the dissent, *Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context. *See Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687–88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) ("It is enough under these

circumstances if there is a basis for a reasonable inference as to the extent of the damages."). Tyson kept no records of donning and doffing time.[5] A "reasonable inference" demonstrates compensable time. *See id. See also Fast v. Applebee's Int'l, Inc.,* 638 F.3d 872, 881–82 (8th Cir.2011) (holding, based on *Mt. Clemens,* that if Applebee's did not track time employees spent on tipped verus nontipped duties, they could demonstrate their nontipped work through reasonable inference). The dissent asserts that if some employees are entitled to no overtime, then no "reasonable inference" may show the overtime worked by other employees. This stands *Mt. Clemens* on its head: The dissent makes "the burden of proving that [the employee] performed work for which he was not properly compensated" into "an impossible hurdle for the employee." *Mt. Clemens,* 328 U.S. at 687.

The dissent implies that there is no Article III standing because some employees are entitled to no overtime. But the "federal courts do not require that each member of a class submit evidence of personal standing," so long as each member may allege injury. *Halvorson v. Auto–Owners Ins. Co.,* 718 F.3d 773, 779 (8th Cir.2013), *quoting Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1034 (8th Cir.2010) (internal quotation marks omitted). Here, all members of the class were

[5] Tyson kept attendance, assignment, equipment, work time, and payroll records. These records permitted the plaintiffs' experts to calculate individualized damages. These records, however, do not reflect the amount of time employees spent donning and doffing. *See Mt. Clemens,* 328 U.S. at 688 ("[E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.").

Tyson "gang time" employees that necessarily spent time donning and doffing, and therefore each could allege he was undercompensated by Tyson's K-Code policy. The failure of some employees to demonstrate damages goes to the merits, not jurisdiction. *See Suchanek v. Sturm Foods, Inc.,* 764 F.3d 750, 757-78 (7th Cir.2014) (explaining that a class definition is too broad if it includes those "who *could not* have been harmed," but is acceptable if it includes those "who *were not* harmed"). *See also Kohen v. Pac. Inv. Mgmt. Co.,* 571 F.3d 672, 677 (7th Cir.2009) ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case . . . if [class members] are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification."). It also does not overwhelm commonality, particularly post-verdict. *See Comcast Corp. v. Behrend,* —— U.S. ——, ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013) (allowing damages variations unless "individual damage calculations . . . overwhelm questions common to the class"). *See also Gortat v. Capala Bros.,* 949 F.Supp.2d 374, 383 (E.D.N.Y.2013) ("Research has failed to reveal a single decided case or a single sentence in the legal literature to which a similar post-verdict [decertification] motion has been addressed."), *aff'd* 568 Fed.Appx. 78, 79 (2d Cir.2014); *In re Urethane Antitrust Litig.,* 768 F.3d 1245, 1256 (10th Cir.2014) (affirming denial of decertification motion due to lateness and prejudice when motion was filed one week before trial).

The dissent's claim that more than half the class has no damages is speculative. True, the jury lowered the experts' donning and doffing estimates. But it does not follow that, because the jury awarded the plaintiffs

43.25 percent of their original jury demand, more than half the class has no damages. The record shows that many employees regularly worked overtime, so that all of their donning and doffing time is fully compensable. Likewise, nothing in the record or case law supports the dissent's conclusion that damages under $100 are de minimis. *See Verdict Form, Question No. 4*, *citing Jury Instruction No. 6* ("Employers must compensate employees for even small amounts of time, unless the time is so minuscule that it cannot as a practical administrative matter be recorded for payroll purposes. . . . There is no precise amount of time that may be denied compensation as 'de minimis.' "). *See also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation marks omitted)).

The court, without objection, instructed the jury only as to aggregate damages. *See Verdict Form* (giving one line for the jury to "indicate how much you award for" pre- and post-shift donning and doffing). *See also In re Urethane Antitrust Litig.,* 768 F.3d at 1269 ("Dow cannot complain about the uncertainties inherent in an aggregate damages award because Dow never requested individualized findings on damages."). The court then entered a final judgment awarding the class aggregate damages. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 479 n. 5, 481 n. 7, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (rejecting Boeing's argument that the judgment is not final until class members have presented individual claims because Boeing's liability was not contingent upon individual claims and the "judgment terminated the

litigation between Boeing and the class concerning the extent of Boeing's liability"). In this case, employees without damages are not entitled to allocation of the award. *Jury Instruction No. 8* ("Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages."). Beyond that, Tyson has no interest in how the fund is allocated among the class members. *See Boeing,* 444 U.S. at 481 & n. 7 ("The judgment on the merits stripped Boeing of any present interest in the fund. Thus, Boeing had no cognizable interest in further litigation between the class and its lawyers over the amount of fees ultimately awarded from money belonging to the class."). *See also In re Urethane Antitrust Litig.,* 768 F.3d at 1269 (holding Dow "has no interest in the method of distributing the aggregate damages award among the class members" and rejecting Dow's argument that a jury must determine which class members suffered less or no injury), *citing Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248, 1258 (11th Cir.2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves.").

APPENDIX G

FEDERAL STATUTES

29 U.S.C. § 207. Maximum Hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

29 U.S.C § 216. Penalties

* * * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the

defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * * *

APPENDIX H

FEDERAL RULE

Federal Rules of Civil Procedure Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Dr. Mericle's Observed Times Vary Widely

Fabrication (Cut and Retrim)

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	88	.583	10.333
Pre-shift: dip scabbard, wash hands	120	.010	.580
Pre-shift: don equipment in department	23	1.017	5.133
Pre-lunch: doff equipment	Less than one minute	.033	3.917
Post-lunch: don equipment		.450	5.650
Post-shift: doff, clean equipment in department	28	.300	3.567
Post-shift: inspect, disinfect at door	18	.033	.383
Post-shift: doff, store equipment at locker	21	1.783	9.267

1

Dr. Mericle's Observed Times Vary Widely

Kill

Activity	Sample Size	Shortest observed time (minutes)	Longest observed time (minutes)
Pre-shift: don equipment at locker	51	2.100	13.283
Pre-shift: don equipment in department	11	.917	4.550
Pre-lunch: doff equipment	Less than one minute	.417	2.683
Post-lunch: don equipment		.500	6.350
Post-shift: doff, clean equipment in department	52	.200	5.750
Post-shift: doff at locker	15	1.967	5.517

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