

A10-419

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*State of Minnesota*  
*In Court of Appeals*

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Marsha Winter, Juan Guerra, Jr., Valeria Cabral, Margarita  
Ruiz, Todd E. Nord, Jeff Rudie and John Patrick Kelley, Jr.,

*Appellants-Cross Respondents,*

v.

Jennie-O Turkey Store, Inc., a Minnesota corporation, West Central  
Turkeys, Inc. (a/k/a Pelican Turkeys, Inc.) and Heartland Foods Co.,

*Respondents-Cross Appellants.*

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**REPLY AND RESPONSE BRIEF OF APPELLANTS-CROSS RESPONDENTS**

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## STATEMENT OF ISSUES ON CROSS APPEAL

1. The trial court certified a class of line workers who would be entitled to overtime compensation when uncompensated Donning and Doffing hours are added to the hours JOTS actually paid. In certifying the class, the court had before it over three years of discovery and briefing on numerous motions, and in its order certifying the class the court weighed the evidence, rejected JOTS' arguments and made findings of fact on each Rule 23 element. The issue on cross appeal is whether, notwithstanding the above, the court abused its discretion under Whitaker, which requires a district court to address and resolve factual disputes relevant to class-certification requirements. Whitaker v. 3M Co., 764 N.W.2d 631, 640 (Minn. Ct. App. 2009).

The trial court certified a class.

Most apposite authorities: Whitaker v. 3M Co., 764 N.W.2d 631, 640 (Minn. Ct. App. 2009); Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010); Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018, 2007 WL 2780504 (D. Minn. Sept. 24, 2007).

2. The court found Plaintiffs made a *prima facie* case, by clear and convincing evidence, that JOTS knowingly disregarded their rights by not paying them MFLSA overtime for Donning and Doffing hours. Compelling evidence included JOTS' own documents and testimony showing non-payment for such time, evidence of inadequate meal and rest breaks, feared liability for not paying for Donning and Doffing, and JOTS' proposals to compensate employees for some such time, abandoned because they would

cost too much. Considering this and other evidence cited in the Order, did the court abuse its discretion in granting Plaintiffs' motion to add a punitive damages claim?

The trial court found that Plaintiffs had produced clear and convincing evidence of JOTS' knowing disregard for their MFLSA rights and granted Plaintiffs' motion to add a punitive damages claim.

Most apposite authorities: Utecht v. Shopko Dept. Store, 324 N.W.2d 652 (Minn. 1982); Anderson v. Fogelson, No. A09-493, 2009 WL 4910489 (Minn. Ct. App. Dec. 22, 2009).

3. JOTS identified the trial court's denial of its motion to exclude Plaintiffs' expert reports as an issue on appeal. However, JOTS did not argue the issue, except to mention it in a footnote referring to its briefing below. This issue is therefore whether JOTS has waived that issue for appeal.

The trial court did not rule.

Most apposite authorities: Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982); State v. Modern Recycling Inc., 558 N.W.2d 770, 772 (Minn. Ct. App. 1997).

## INTRODUCTION AND STATEMENT OF THE CASE

JOTS' Principal and Response Brief shows the two pillars of its defense—avoiding inconvenient facts and spinning elaborate post-litigation justifications for not paying employees for all their work. Even while granting summary judgment for JOTS on the contract and MFLSA claims, the trial court observed that “Plaintiffs may very well have a remarkably strong claim under the [federal] FLSA.” (A.22) The court further observed that the MFLSA might give advantages in class composition and remedies, such as the ability to take advantage of Rule 23 class certification rather than the FLSA “opt-in” class. Id. On the unique facts of this case, Plaintiff-Appellants (“Plaintiffs”) have remarkably strong MFLSA and contract claims, too. Plaintiffs therefore ask this Court to correct the lower court’s erroneous rulings on the many state law issues of first impression raised herein and remand the case, including the punitive damages claim, for trial as a class action.

## ARGUMENT

### **I. THE MFLSA REQUIRES JOTS TO PAY OVERTIME FOR ALL HOURS WORKED OVER 48 PER WEEK.**

JOTS defends summary judgment on the overtime claim by arguing (1) the MFLSA definition of “hours worked” applies only to minimum wage claims; (2) a rule defining the “workweek” for purposes of minimum wage and overtime calculations compliance allows JOTS to offset federal law overtime against an employer’s MFLSA obligations; and (3) as a matter of fact, all named Plaintiffs (but not all class members) have no right to unpaid hours worked under their FLSA-offset theory. Plaintiffs

previously explained why there are unresolved fact issues underlying JOTS' workweek averaging argument (A.Br.44) and now respond to JOTS' legal arguments.

**A. The MFLSA Has Only One Definition of "Work."**

Central to JOTS' defense is its argument that the MFLSA definition of "hours worked" applies only to minimum wage claims. (Br.6, 15) But this term is used throughout the MFLSA—so JOTS can only be right if law makers intended "hours worked" to have different meanings in different laws, but provided only one definition. The language, history and purpose of the MFLSA show that JOTS' argument is as wrong as it sounds.

The Legislature intended the MFLSA to establish and safeguard "minimum wage and overtime compensation standards" and gave the Department of Labor and Industry ("MNDOLI") power to adopt rules to effectuate the statutes. Minn. Stat. §§177.22; 177.28, subd. 1. The operative rule, Minn. R. 5200.0120, subpt. 1, provides:

The minimum wage must be paid for all hours worked. Hours worked include training time, call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment or must remain on the premises until work is prepared or available. Rest periods of less than 20 minutes may not be deducted from total hours worked.

The rule on its face does not limit the concept of hours worked to minimum wage; indeed, as promulgated in 1973 (the year the MFLSA was enacted), the rule did not contain the first sentence referencing minimum wage claims. See LS 12, first codified at 8 MCAR §1.4012 (1978) (S.App.21-25) This sentence was added in 1984 as one of

several amendments to the “Hours Worked” rule which MNDOLI intended to “clarify the distinction between working hours versus non working hours,” by setting out “more specific guidelines for determining actual hours of work.” (R.Add.28) MNDOLI explained it added the sentence not to limit the existing provision but to “emphasiz[e] the requirement of minimum wages for all hours worked.” Id.

This history completely negates JOTS’ argument—and a common-sense interpretation confirms. The MFLSA uses “hours worked” throughout its provisions. The minimum wage and overtime statutes do not use the precise phrase, but both incorporate the concept. The overtime statute requires payment at a time-and-a-half rate “for employment<sup>1</sup> in excess of 48 hours in a workweek.” Minn. Stat. §177.25, subd. 1. The overtime rate is based on the “regular rate” of pay, which, in turn, is explicitly calculated with reference to “total hours worked.” Minn. R. 5200.0130 (8 MCAR §1.4013 (1978)). Employers must make records of, among other things, “the hours worked each day and each workweek by the employee.” Minn. Stat. §177.30. See also Minn. Stat. §177.27, subds. 1–3 and Minn. R. 5200.0100, .0121, .0130. Judge Leung held that the plain language of the “hours worked” rule applied to Plaintiffs’ statutory overtime claim. (A.79)

It is absurd to think, as JOTS’ argument necessarily implies, that “hours worked” would be recorded one way for minimum wage and another for overtime purposes. The law does not require employers to keep two sets of book for state law compliance, and

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<sup>1</sup> To “employ” under the MFLSA is to “permit to work.” Minn. Stat. §177.23, subd. 5.

JOTS does not keep its own books that way. JOTS calls Plaintiffs' interpretation of the rule "unprecedented." (Br.6) But it offers no coherent competing interpretation, no argument that the rule's plain language does not include Donning and Doffing, and no evidence that it followed the rule for minimum wage purposes (as its own argument would require it to do) but calculated "hours worked" a different way for overtime. "Hours worked" has only one meaning under the MFLSA, and when Plaintiffs are in JOTS' plants, engaged in work-related activities, that time must be paid.

**B. The MFLSA Does Not Implicitly Offset FLSA Overtime Payments.**

JOTS argues that the rule defining "workweek" implies a complicated "averaging" formula relieving employers from paying MFLSA overtime for weekly hours in excess of 48 hours to the extent that the employee received federal law overtime premiums for hours worked between 40 and 48. (Br.29-34) Neither the statute nor the rules hint at such an exemption.<sup>2</sup> The overtime statute is simple and straightforward—Minn. Stat. §177.25 forbids "employ[ing] an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1½ times the regular rate. . . ." To "employ" is "to permit

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<sup>2</sup> JOTS argues that Plaintiffs conceded "workweek averaging" applies to the calculation of minimum wages. (Br.31) Plaintiffs did not—and cited a decision of this Court, Bot v. Residential Services, No. C8-96-2545, 1997 WL 328029 (Minn. Ct. App. June 17, 1997) (App.233-238), holding that workweek averaging does not apply even to minimum wage liability in a civil case. (Br.3, 44)

to work.” Minn. Stat. §177.23, subd. 5.<sup>3</sup> Under Minn. R. 5200.0170, the workweek rule, “The period of time used for determining compliance with the minimum wage rate, overtime compensation, and designation as a part-time employee is the workweek, which is defined as a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods.”

This language hides no “federal offset exemption.” The Legislature and MNDOLI created numerous express exceptions to the overtime requirement. Section 177.23, subd. 7(2) codifies a formula that factors in hours worked under 48; §177.23, subd. 7(17) exempts certain individuals subject to federal overtime standards; and subd. 11 based an overtime calculation on a federal law definition. The workweek rule itself apportions different types of pay for purposes of overtime compensation. Minn. R. 5200.0170, subpt. 1. Where Minnesota labor lawmakers intended exceptions, they are plainly stated. Under Minn. Stat. §645.19, these exceptions “shall be construed to exclude all others.” JOTS’ workweek averaging formula is not there—there is no language allowing employers to make people work an extra two to three hours per week completely without pay. (Br.30-31) To the contrary, according to MNDOLI, “The [MFLSA] requires employers to pay overtime for all hours worked in excess of 48 per week.” (S.App.24)

The Ninth Circuit rejected a similar “employer credit” in Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 913 (9th Cir. 2004). In Ballaris, the employer argued that

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<sup>3</sup> An employer obligates itself to pay for work under the FLSA when it suffers or permits an employee to work. Brennan v. Qwest Commc’ns Int’l, Inc., Case 07-CV-02024, 2010 WL 2901002 (D. Minn. July 20, 2010).

it was entitled to credit a paid lunch toward unpaid overtime. The Court held that even if the FLSA did not control:

To hold that an employer may validly compensate his employees for only a fraction of time consumed in actual labor would be inconsistent with the very purpose and structure” of the Act . . . crediting money already due an employee for some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute. It is, instead, false and deceptive “creative” bookkeeping that, if tolerated, would frustrate the goals and purposes of the FLSA.

370 F.3d at 914 (citations omitted).

JOTS’ supposed rule would allow it to benefit from a calculated decision not to record compensable activities as “hours worked.” The MFLSA, a remedial statute, should be interpreted broadly to protect workers—not to sanction JOTS’ “creative bookkeeping.” See Urban v. Cont’l Convention & Show Mgmt., 68 N.W.2d 633 (Minn. 1955)

## **II. JOTS’ AGREEMENT WITH LINE WORKERS REQUIRES PAY FOR ALL THE WORK IT HIRED THEM TO DO.**

The court found a contract whereunder line workers would be paid for their “work” and get 15-minute rest breaks and a 30-minute meal break each day. (A.4, 26) The court further found that federal law and JOTS policies require line workers to Don and Doff at the beginning and end of their shifts and during breaks, and that they could be fired for not following those policies; but, the court ruled, payment for Donning and Doffing was not required because the parties did not discuss Donning and Doffing and

explicitly agree that those activities would be paid as “work.” (A.25) It was error to hold that an employer could require Plaintiffs to Don and Doff without pay.

JOTS cites Ramirez v. NutraSweet Co., No. 95 C 0130, 1997 WL 684984 (N.D. Ill., Oct. 30, 1997), and the Restatement (Second) of Contracts §201 (“Whose Meaning Prevails”) as supporting its theory of “objective contractual intent.” (Br.12-13) NutraSweet, a pre-Alvarez Donning and Doffing case, was decided under Illinois law—which regards oral employment contracts with great skepticism and puts a heavy burden on employees to establish their terms. Id. at 2. Minnesota law is the opposite—by statute, the employer bears the burden of proving the terms of an oral contract. Minn. Stat. §181.56. It was not up to Plaintiffs to clarify that all their work would be paid—it was up to JOTS, which knew it should pay for Donning and Doffing, but did not. (See A.80) Further, the NutraSweet plaintiffs apparently did not argue that their agreement should be read in light of the state labor law definition of “work.” Restatement §201 does not apply because it assumes both parties attached a particular meaning to “work.” The facts before this Court are that the parties did not discuss and agree on Donning and Doffing or any other any activities as work. (A.15) The Restatement rule for these facts is §204:

When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Restatement (Second) of Contracts §204. Recognizing that parties for whatever reason do not always objectively manifest their intent, the Restatement also suggests how courts go about identifying terms that are “reasonable in the circumstances.”

A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.

Id. at §5(2). Comment b (“Contract terms supplied by law”) explains that terms may be implied and “often rest . . . on considerations of public policy rather than on manifestation of the intention of the parties.” Thus, looking to applicable law (in this case, the MFLSA) to give meaning to an unspoken contract term is mainstream contract law, followed by Minnesota Courts in numerous cases. (A.Br.24) See also Propp v. Johnson, 300 N.W. 615 (Minn. 1941); Career Res., Inc. v. Pearson Candy Co., 435 N.W.2d 114 (Minn. Ct. App. 1989); Winter v. Liles, 354 N.W.2d 70 (Minn. Ct. App. 1984).

This Court should apply the simple, longstanding rule that if an employer hires a worker to do something, the employer must pay for it. This is the common sense rule of Jacobson v. Edman, 47 N.W.2d 103, 105 (Minn. 1951) (“In the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him thereby bargains to pay for the services rendered.”) JOTS does not distinguish Jacobson, or dispute that line workers must Don and Doff. In FLSA terminology, Donning and Doffing activities are “integral and indispensable” to the duties of a meatpacking line worker. Spoerle v. Kraft Foods Global, Inc., No. 09-2691, 2010 WL

2990830 (7th Cir. Aug. 02, 2010).<sup>4</sup> JOTS stood by and accepted this integral and indispensable work, thereby manifesting assent under §19 of the Restatement. Where JOTS, because of its superior knowledge, should have raised this issue, but instead stood by with its fingers crossed, silence can supply the terms of a contract. Cf. Breyer Concrete, Inc. v. Beutel, No. A09-1547, 2010 WL 2732384 (Minn. Ct. App. Apr. 13, 2010) (S.App.31-35)

JOTS has not meaningfully distinguished two recent Donning and Doffing cases where courts supplied meaning to the term “work.” Both share common facts with the case before this Court. Lugo v. Farmers Pride, Inc. shows an appellate court looking to a state FLSA to determine the meaning of “work” for purposes of a contract claim—and affirming that a class of line workers can maintain an action for breach of contract for

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<sup>4</sup> Spoerle held Donning and Doffing compensable, including the Donning and Doffing of such gear as smocks, boots, hard hats, and hair nets which JOTS still does not pay for. (Br.50) The 7th Circuit cited IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) for this proposition, as did the 3rd Circuit in De Asencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007) and the United States Department of Labor (USDOL) in a May 2006 Field Bulletin. (S.App.51-54) USDOL interprets Alvarez to mean that “the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer’s premises is compensable ‘work’ under the FLSA.” Other federal courts have reached the same result, pre-and post-Alvarez. JOTS mis-cites Alvarez and the Ninth Circuit’s decision in that case as supporting the proposition that Donning and Doffing “generic” apparel is not compensable, or is *de minimis* as a matter of law. (Br.19, 50) See Ballaris, 370 F.3d at 910-11 (where 9th Circuit explains that its decision in Alvarez “held that donning and doffing of all protective gear was compensable worktime”). JOTS also cites pre-Alvarez cases which are inconsistent with Alvarez and are no longer good law. Tyson Foods recently agreed with the USDOL that all Donning and Doffing shall be paid. (S.App.12-20) (Consent Judgment)

unpaid Donning and Doffing time. 967 A.2d 963 (Pa. Super. 2009), cert. denied 980 A.2d 609.

Martinez-Hernandez v. Butterball, LLC, 578 F. Supp. 2d 816 (E.D.N.C. 2008) is even more instructive because it suggests why JOTS did not define “work” in its hiring and handbook materials. Contrary to JOTS’ assertion (Br.16-17), Butterball looked to state wage and hour law for a definition of work. 578 F. Supp. 2d at 821. Upholding line workers’ class contract claim, the court noted:

The Company does not discuss what constitutes ‘hours worked’ or specifically, whether the Company pays for [donning and doffing] time. Payment for [donning and doffing] time is not addressed in oral or written instructions or statements to employees at any point after they are hired. Supervisors and managers are not given instructions to talk to their departments or new employees about what the company considers to be ‘hours worked.’

The lack of definition of “work” or “hours worked” in JOTS’ materials suggests the same unspoken policy. (App.254-275) Certainly JOTS took great care not to allow line workers, or even line supervisors, to know about its internal Donning and Doffing/labor standards compliance studies. (A.129; App.290) Now, like its fellow turkey processor, JOTS seeks to cash in on this ambiguity by arguing that a contractual obligation to pay for Donning and Doffing can only arise if the parties expressly agree to it. Under this rule “an employer would be able to avoid payment of *any* wages . . . by simply claiming that the services rendered, although for the benefit of the employer, were something other than “work.” Butterball, 578 F. Supp. 2d at 822.

JOTS also argues that the disclaimer prevents the handbook from being considered an employment contract, citing Roberts v. Brunswick Corp., 783 N.W.2d 226 (Minn. Ct. App. 2010). (Br.21) Plaintiffs do not claim the handbook was a contract. Rather, handbooks are evidence of JOTS' policies requiring workers to Don and Doff at pain of discipline (an undisputed fact); and they support the court's finding of an agreement workers would get 30-minute unpaid meal and 15-minute paid rest breaks.<sup>5</sup> JOTS does not challenge these findings—it merely repeats that there was no “objective agreement” to pay for Donning and Doffing.

In summary, JOTS required line workers to Don and Doff, thereby obligating itself to pay for that time, but artfully sought to avoid payment for Donning and Doffing by avoiding discussion or definition of “work.” JOTS' insistence on objective contract terms sidesteps the facts and, under the Restatement, leaves the court to supply a reasonable meaning for “work,” based on the legal context of the relationship, which is governed by the MFLSA. Adopting JOTS' view of contract law would allow employers to trick employees into working without pay.

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<sup>5</sup> JOTS also argues that Plaintiffs cannot now argue that JOTS “retroactively reduce[d] pay and benefits,” because it did not do so in 2005. (Br.20) This misstates Plaintiffs' argument, which is that a disclaimer does not give an employer the right to “retroactively reduce pay and benefits after the employee has performed work explicitly required and directed by the employer.” (A.Br.30) Plaintiffs made this same argument at summary judgment. (App.319, 333, 340, 341)

**III. JOTS' MEAL BREAK ARGUMENT FAILS TO ADDRESS THE CENTRAL ISSUE OF DEDUCTIBILITY OF MEAL BREAKS AND MAKES NO ATTEMPT TO GIVE EFFECT TO BOTH THE STATUTE AND THE DEPARTMENT OF LABOR AND INDUSTRY'S BINDING RULES.**

JOTS completely misses the central issue of Plaintiffs' appeal with respect to Minnesota meal break law—deductibility. Specifically, JOTS ignores its own practice of automatically deducting 30 minutes daily from “hours worked” while not giving employees 30 minutes completely relieved from work duties; and it improperly frames the issue as whether the MFLSA has a “bright-line” 30-minute meal break rule. The proper question for this Court is “When can JOTS lawfully deduct meal break time from ‘hours worked’ under the MFLSA?” The answer: when an employee is completely relieved from duty for a bona fide meal break of 30 minutes or more (absent special conditions). JOTS' practice of deducting 30 minutes from “hours worked” without giving employees bona fide meal breaks violates MFLSA meal break regulations.

**A. The MFLSA Statute and Rules Form a Consistent Body of Law Regarding Deductibility of Meal Breaks.**

JOTS makes the extraordinary argument that Minn. Stat. §177.254 implicitly repealed Minnesota Rules 5200.0120 and 5200.0060—rules republished for 21 years following the passage of Minn. Stat §177.254.<sup>6</sup> (Br.24) Courts will not infer a repeal by

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<sup>6</sup> JOTS' characterization of Plaintiffs' deductibility framework as “unprecedented” is meritless. JOTS' Director of Employee Relations advised JOTS of this issue (App.303, 139-141), and Turkey Store and JOTS compliance audits recognized the need to provide time outside of the 30 minute meal period for Donning and Doffing activities. (A.134) Further, the references following Minn. Stat. Ann. §177.254 cite §21:98 of the

implication unless such a repeal was the manifest intention of the legislature or a later statute fully covers the subject of the prior one and manifestly conflicts therewith. State v. Nw. Linseed Co., 297 N.W. 635, 636 (Minn. 1941).<sup>7 8</sup> JOTS' argument wholly ignores two critical principles of statutory construction. First, it is the longstanding principle that the Legislature acts with knowledge of existing law. Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237, 244 (Minn. 2005); 2B Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction §51:2 (7th ed. 2008).

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Employment Coordinator, which adopts Plaintiffs' interpretation of the rules. (S.App.55) JOTS knew of the deductibility framework set forth by the meal break statute and rules—there is nothing “unprecedented” about it.

<sup>7</sup> Unlike the federal regulations, Minnesota's deductibility rules have the full force and effect of law. Minn. Stat. §14.38; Gold'n Plump, 2007 WL 2780504 at \*8. JOTS' brief (App.247) ignores this critical distinction. It cites only one case regarding the FLSA meal break deductibility rule, 29 C.F.R. 785.19. (Br.28). Blain v. Gen. Elec. Co., 371 F. Supp. 857 (W.D. Ky. 1971) acknowledged the advisory nature of the federal regulation and treated it as not binding. The court allowed a shorter-than-30-minute meal period to be deducted—but this period had been agreed upon by plaintiffs, their union and the employer. 371 F. Supp. at 862.

<sup>8</sup> The Minnesota Chamber of Commerce's (“Chamber”) Amicus Brief at 9-11 argues that the introduction of a 2010 proposed bill relating to meal breaks—a bill that was not enacted into law—somehow supports its notion that there is no 30-minute bright line meal break rule under Minnesota law. The Chamber—like JOTS—misses the point. Plaintiffs do not argue that Minnesota law requires a bright-line 30-minute meal break—only that if JOTS wishes to deduct a 30-minute meal break from “hours worked,” its employees must be completely relieved from duty for that 30-minute period. The Court should attach no significance to a bill introduced—but not enacted—by the legislature. See Order of Ry. Conductors of Am., et al. v. Swan, 329 U.S. 520, 529 (1947). The rest of the Chamber's brief essentially repeats JOTS' arguments which are addressed elsewhere herein.

Second, the Legislature always intends laws to be read together in harmony, to give effect to all provisions. Minn. Stat. §645.17(2). JOTS makes no attempt whatsoever to do this—a fundamental error in its analysis of MFLSA meal break law. Plaintiffs previously explained how the statute and rules form a consistent whole.<sup>9</sup> The only thing that changed with the enactment of Minn. Stat. §177.254 is that employers must now allow a meal break, with no set length, as long as the employee has sufficient time to eat a meal. But, under 5200.0120 and 5200.0060, if the meal break is less than 30 minutes (absent special conditions) or the employee is not completely relieved from duty, the employer must pay for it. JOTS claims that 5200.0060, which provides in part that “[m]eal breaks of less than 20 minutes may not be deducted from hours works” undercuts Plaintiffs’ interpretation of the statute and rules. This is not the case. If an employer can establish “special conditions” under 5200.0120, it may deduct meal breaks of less than 30 minutes. However, under 5200.0060 a meal period less than 20 minutes may never be deducted, even with special conditions.

In Bolin v. Japs-Olson Co., (which JOTS does not address) the Minnesota federal district court had no problem reading the statute and rules the same as Plaintiffs, holding that employees deprived of *bona fide* meal breaks were entitled to recover the full 30 minutes deducted from hours worked. No. 06-3574, 2008 WL 1699531 at \*3 (D. Minn.

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<sup>9</sup> JOTS claims that the Statement of Need and Reasonableness (“SONAR”) issued by MNDOLI in conjunction with Minn. Rule 5200.0120 “on its face” negates the deductibility framework articulated by Plaintiffs. (Br.28) But the SONAR language JOTS quotes is consistent with Plaintiffs’ interpretation—it specifically indicates that 5200.0120 permits deduction of meal breaks.

Apr. 9, 2008) (S.App.38) (noting that both the federal and state FLSA “draw a distinction between meal breaks and bona fide meal breaks to clarify when an employer must compensate employees while they eat”). Bolin was correctly decided because §177.254 and Minn. R. 5200.0060 and .0120 are entirely consistent when considered within the framework of deductibility. The statute mandates a meal break, and the rules tell the employer when it must pay for a break. JOTS’ interpretation fails to take into account cardinal principles of statutory construction and the binding effect of the rules.

**B. JOTS Impermissibly Deducts 30 Minutes Per Day from “Hours Worked.”**

Nowhere in its brief does JOTS address the disconnect between its practice of deducting 30 minutes *each day* from Plaintiffs’ “hours worked” and the evidence that Plaintiffs actually get shorter breaks when Donning and Doffing is considered “work.”<sup>10</sup> (See A.Br. at 12-14) JOTS knew this was wrong. Its HR Director wrote: “[I]f giving a meal break must be ½ hour. If shorter, must be paid. Must not require any work or work activities during unpaid lunch (putting on or taking off safety equipment . . . , etc.)”

(A.134)

— This undisputed practice of deducting 30 minutes when people actually get less violates Minn. R. 5200.0120 and Minn. R. 5200.0060—a rule which JOTS cites

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<sup>10</sup> JOTS asserts that Plaintiffs have not sought to recover for actual work time during a meal break, but instead seek only to recover for a full 30 minute meal break deducted from “hours worked.” (Br. 22, fn. 2) As set forth above, the length of meal breaks improperly deducted from Plaintiffs’ “hours worked” is a fact issue not currently before this Court. Numerous Plaintiffs testified that they were completely relieved from duty during meal breaks for as little as 20 minutes. (See A.Br.12)

incompletely in its brief. The relevant portion of 5200.0060 provides: “Meal periods of less than 20 minutes may not be deducted from hours worked, nor may meal periods be deducted where the employee is not entirely free from work responsibility” (emphasis added.) JOTS omits the emphasized language (Br.27), which prohibits exactly what JOTS does—deducting 30 minutes when the employee is not entirely free from work responsibility.

There is a clear factual dispute about whether—and to what extent—Plaintiffs are completely relieved from duty during the 30-minute meal break. Accordingly, Plaintiffs respectfully request this Court reverse the trial court and remand the meal break claim for trial.

**IV. SUMMARY JUDGMENT AS TO LIABILITY IS PROPER BECAUSE EVERY MEMBER OF THE CLASS CONTINUES TO PERFORM UNCOMPENSATED DONNING AND DOFFING AND JOTS CANNOT INVOKE A DE MINIMIS DEFENSE.**

JOTS argues that Appellants’ motion for summary judgment on liability is an improper request for an advisory opinion on the definition of “work,” would deny it a due process right to put on individual defenses, and fails under the *de minimis* rule. (Br.34-35) In fact, Minn. R. Civ. P. 56.01 allows a party to move for summary judgment “upon all or any part” of a claim. (Emphasis added) Plaintiffs’ motion is a routine exercise in summary judgment, which no more deprives the non-moving party of due process than any dispositive motion. Plaintiffs have elsewhere recited the undisputed facts showing unpaid Donning and Doffing time. JOTS’ *de minimis* defense fails for two reasons, even apart from its being an obvious fact question. First, no language in the MFLSA suggests

that some work is too insignificant to be paid. Instead, the “hours worked” rule covers all Appellants’ Donning and Doffing activities, and even if federal law were otherwise, the Minnesota rule would prevail. Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008)

Second, JOTS’ brief implies a uniform federal rule allowing employers to disregard uncompensated time of less than ten minutes daily. (Br.36-37) That is not the law. The *de minimis* rule

applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes’ duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee’s fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

Tyson Foods, Inc., 500 F.3d at 374 (emphasis added), cited with approval in Gold’n Plump, 2007 WL 2780504 at \*4, n.2. (App.244) If an employer can deny compensation for a task merely because it can be performed quickly, the employer could divide the workday into arguably *de minimis* segments that could “swallow up an entire shift.” Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 869 (W.D. Wisc. 2007). JOTS’ industrial engineers quantified selected Donning and Doffing tasks to the hundredth of a second. (E.g. App.129) JOTS knew there was no *de minimis* rule—it planned to add five minutes, and in a later iteration of its “solution,” one to two minutes of time for Donning and Doffing. (A130-32) Thus, even if there is a *de minimis* defense, JOTS, as a matter of law, is not eligible for it. The *de minimis* doctrine was not intended to allow

employers to organize the work day to short workers ten minutes here and ten minutes there, or in JOTS' case, some two weeks per year. (A.Br.15)

JOTS must pay for regularly recurring Donning and Doffing time as a matter of law. Because it does not, Plaintiffs are entitled to summary judgment on liability and a remand for trial on damages.

**V. PLAINTIFFS' RECORDKEEPING CLAIM FOR CIVIL PENALTIES, PAYABLE TO THE STATE, IS FAIRLY RAISED FOR TRIAL.**

Milner stands for the proposition that an alleged recordkeeping violation is properly before the court even if was not pleaded as a separate "count" in the complaint. 748 N.W.2d 608. JOTS responds that Milner permits, but does not require, a recordkeeping claim. Milner is specifically on point as an MFLSA recordkeeping claim, but it is one of a long line of cases stating that an issue is fairly raised for trial if the other party had adequate notice—which JOTS obviously does. See, e.g., T.W. Sommer Co. v. Modern Door & Lumber Co., 198 N.W.2d 278 (Minn. 1972).

JOTS further responds that it has accurate, Kronos-generated records of "employees' paid time." (Br.37-39) Plaintiffs do not challenge the accuracy of JOTS' Kronos time entries—but JOTS recorded the wrong thing. JOTS' records are not just "insufficiently detailed," they omit Donning and Doffing as "hours worked" as the MFLSA requires. This evidence must be assessed after a full trial to determine the extent to which JOTS should be penalized under the rule of Milner and the express policy of the MFLSA. See Minn. Stat. §177.27. The recordkeeping claim, for unexplained reasons,

was lost in the shuffle of Judge Bransford's *sua sponte* grant of summary judgment motion on the remaining class damages claim. Entry of judgment without addressing the recordkeeping claim at all was an abuse of discretion.

#### **VI. JOTS WAIVED THE PRIVILEGE FOR TWO DOCUMENTS.**

The district court did not apply the proper test to determine whether the privilege was waived and therefore abused its discretion. (A.1-5) See Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999). While JOTS argues it met the Starway test, (Br.41-42), courts have found waiver of privilege and, in the interests of justice, allowed Plaintiffs to keep similar inadvertently produced material. See Cycle Source Group, LLC. v. Spiegel Creditor Trust, Order, No. 02-3752 PJS/RLE (D. Minn. Sept. 27, 2006); Cole Sales Solution, Inc. v. Eddie Bauer, Inc., Order on Motion to Compel Discovery and Determine Waiver of Privilege, No. 02-661, 2002 WL 31505626 (D. Minn. Dec. 2, 2002).

JOTS produced the documents, confirmed that they were properly produced, then let them be used for months before asserting privilege. The documents contain information from JOTS' non-privileged Donning and Doffing studies and show an apportionment of potential damages to JOTS employees in different plants and units— information squarely contradicting JOTS' argument that predominant-individual damage issues prevent class certification. In the interests of justice, and because JOTS waived the privilege, this Court should order the documents returned to Plaintiffs.

## RESPONSE TO CROSS-APPEAL

### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS AND ITS ORDER SHOULD NOT BE OVERTURNED ON APPEAL.**

JOTS attacks class certification on two grounds. It first argues that the trial court did not comply with the class certification standard clarified in Whitaker v. 3M Co., 764 N.W.2d 631, 635 (Minn. Ct. App. 2009) (cert. denied). But the order shows that the court looked beyond Plaintiffs' allegations, weighed evidence, and resolved fact issues, as Whitaker requires. JOTS' second argument—there is no class-wide evidence it failed to pay for Donning and Doffing—ignores undisputed evidence and was considered and rejected by the district court.

#### **A. Standard of Review and Requirements for Class Certification.**

A grant of class certification may only be overturned for an abuse of discretion. Whitaker, 764 N.W.2d at 635. In reviewing class certification, Minnesota courts are guided by federal precedent. Id. When a class has been certified, appellate courts “accord the district court noticeably more deference than when [they] review a denial of class certification.” Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 579 (9th Cir. 2010) (en banc).

A class must satisfy all Rule 23.01 criteria, referred to as numerosity, commonality, typicality, and adequacy of representation. Whitaker, 764 N.W.2d at 635. Next, the court must find that the class satisfies one of the criteria of Rule 23.02. Lewy 1990 Trust v. Inv. Advisors, Inc., 650 N.W.2d 445, 451-452 (Minn. Ct. App. 2002).

A party moving for class certification must establish each Rule 23 element by a preponderance of the evidence, which means that “district courts must address and resolve factual disputes relevant to class certification requirements.” Whitaker, 764 N.W.2d at 640. While a court is permitted to look beyond plaintiff’s allegations, it is not allowed to decide fact issues not relevant to the class certification criteria. Id. at 637. “The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.” Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005) (cited with favor in Whitaker).

Significantly, Whitaker did not change Rule 23 requirements; it clarified the standard for decision, following a number of federal appellate courts. See Id. at 638; Dukes, 603 F.3d at 590 (“[T]he explanation we provide today is not a new standard at all.”). In a recent *en banc* opinion, the Ninth Circuit exhaustively discussed and explained the developing federal standard. Dukes, 603 F.3d at 579-598 (discussing each circuit’s approach, including the opinions relied upon in Whitaker). As Dukes notes, recent cases clarify that district courts must look beyond a plaintiff’s complaint to certify a class and may not refuse to consider factual issues just because those facts overlap with the merits. Id. at 598.

**B. The District Court Considered the Evidence Relevant to the Rule 23 Inquiry and Applied the Correct Standard.**

Although the district court did not use the words “preponderance of the evidence,” its order and the record demonstrates that it looked beyond the unsupported allegations to

find necessary facts regarding each Rule 23 element. Indeed, at the hearing on class certification, the trial court recognized it needed to make factual determinations, and requested additional factual submissions concerning Rule 23 requirements. (S.App.1-5) Far from refusing to consider facts outside the Complaint, the Court examined evidence developed over a discovery period of three-plus years, certifying the class only after weighing evidence presented in two summary judgment motions, a motion to exclude expert reports, and the motion for class certification. (A.101) The factual evidence JOTS claims the district court refused to consider was in fact considered; the court simply rejected JOTS' view of the facts. (See A.107-109) By examining the evidence and considering JOTS' factual arguments, the district court applied the Whitaker standard.

**C. The Trial Court Did Not Abuse Its Discretion and Correctly Found Plaintiffs' Evidence Satisfies the Rule 23.01 Factors.**

JOTS disputes two Rule 23.01 factors. On the disputed issues of commonality and typicality, the trial court made specific findings of fact, taking into account evidence from both sides, and rejected JOTS' interpretation of the facts and their significance to class certification.

**1. Commonality is Satisfied by the Common Question of Whether JOTS Violated Minnesota's Overtime Statute By Failing to Fully Compensate Plaintiffs for Donning and Doffing.**

Commonality requires that resolution of common questions will affect all or a substantial number of class members. "The threshold for commonality is not high and requires only that the resolution of the common questions will affect all or a substantial number of class members." Streich v. Am. Family Mut. Ins. Co., 399 N.W.2d 210, 214

(Minn. Ct. App. 1987). Not every question of law or fact must be common to every class member; commonality exists where questions linking class members are “substantially related to the resolution of the litigation even though the individuals are not identically situated.” Paxton v. Union Nat’l Bank, 688 F.2d 552, 561 (8th Cir. 1982). Indeed, “there need be only a single issue common to all members of the class.” Lockwood Motors, Inc. v. Gen. Motors Corp., 162 F.R.D. 569, 575 (D. Minn. 1995) (citations omitted).

This case raises numerous legal and factual questions common to the class.

Among them:

- Is Donning and Doffing “work” under Minn. R. 5200.0120, subpt. 1?
- Does JOTS’ centrally administered, computerized timekeeping system record and pay for all Donning and Doffing?
- Did line workers get the 30-minute meal breaks which JOTS subtracted from their pay? If not, what is the measure of damages for JOTS’ failure?
- Did class members work more than 48 hours in a workweek, when uncompensated Donning and Doffing time is added?
- What was the nature of JOTS’ undertaking to pay its employees for hourly work?
- By “just and reasonable inference,” how much Donning and Doffing time was unrecorded and unpaid under JOTS’ pre-June 2007 timekeeping system?
- By “just and reasonable inference,” how much Donning and Doffing time is unrecorded and unpaid under JOTS’ current timekeeping system?
- Was JOTS’ conduct willful, triggering a three-year statute of limitations under Minn. Stat. §541.07?
- Did JOTS act with deliberate regard to its employees’ rights under the MFLSA? If so, what amount of punitive damages should the class receive?

- Did JOTS violate Minn. Stat. §177.30 by failing to properly record hours worked? If so, what amount of civil penalties should be awarded?

The court found commonality in:

The central and uniform inquiry in this case is whether Defendants have violated Minn. Stat. §177.25 by failing to pay overtime compensation to its Minnesota production line employees whose workweeks are greater than 48 hours when their time spent donning and doffing is included. . . .

(App.108) The Court expressly considered and rejected JOTS' arguments that its pre-June 2007 compensation practices were too diverse to warrant common treatment, concluding simply that it was "not, however, persuaded by Defendants' argument."

(A.107) It follows *a fortiori* that commonality is satisfied with respect to JOTS' post-June 2007 pay practice, which pays employees on a uniform basis but omits time spent performing certain Donning and Doffing activities.

JOTS' primary argument as to why the trial court's commonality finding was incorrect—that Plaintiffs' evidence does not bridge the gap between individual and class claims by demonstrating a 'common practice' of nonpayment of overtime wages"—is both misplaced and factually incorrect. In Whitaker, the putative class alleged 3M had intentionally engaged in a pattern-and-practice of age discrimination, or, alternatively, that 3M had a neutral policy which disparately impacted older employees adversely. 764 N.W.2d at 638-39. Both theories require proof of a "common practice" of discrimination; to satisfy this element, plaintiffs must present statistical evidence to "bridge the gap" between individuals' anecdotal evidence of discriminatory conduct and class claims. Id. at 639. Because the district court failed to consider 3M's evidence

rebutting the validity of plaintiff's expert statistical proof, the Court of Appeals remanded for further review. Id. at 639-40. But Whitaker only required resolution of expert disputes "to the extent that they are relevant to, and for the limited purpose of, determining whether class certification requirements are met." Id. at 639.

JOTS conflates "commonality" with the substantive element of "common practice," which is not part of Plaintiffs' claims. The court correctly found here that commonality is satisfied based on the central issue—whether JOTS violated the MFLSA by failing to pay overtime. (A.108)<sup>11</sup>

**2. Typicality is Satisfied Because Class Representatives' Claims Stem from the Company-Wide Policy of Non-Payment for Donning and Doffing.**

Rule 23.01(c)'s requirement that representative parties' claims be "typical . . . of the class" is met "when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members." In re Workers' Compensation, 130 F.R.D. 99, 105 (D. Minn. 1990) (citations omitted). The claims need not be identical, and factual differences are permissible. Id. at 106. Named plaintiffs' claims are not typical if they are significantly different from, or likely to

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<sup>11</sup> To the extent Whitaker requires a district court to decide which expert is right on the merits, Dukes suggests that it went too far in applying the standard. Both cases involved discrimination claims against large employers and expert disputes to be drawn from statistical data. Compare Whitaker, 764 N.W.2d at 639-40 with Dukes, 603 F.3d at 591-98, 601-610. This should be a non-issue in this case, where liability does not depend on expert testimony.

conflict with the majority of class members. See Thomas v. Clarke, 54 F.R.D. 245, 251 (D. Minn. 1971).

All class members' claims arise from JOTS' failure to treat Donning and Doffing as "work." It is enough for typicality that Plaintiffs' and the class claims "stem from . . . the same legal or remedial theory." Paxton, 688 F.2d at 561-62. Plaintiffs, like all line workers, begin work before JOTS starts to pay them and continue working after the end of paid time, even under the new pay system.

Again, the Court considered and rejected JOTS' arguments and factual allegations:

Plaintiffs' claims clearly arise from the same series of events – Defendants' alleged repeated failure to include time spent donning and doffing in the calculation of their line workers' workweek hours and subsequent denial of overtime compensation for workweeks over 48 hours. The factual differences that Defendants allude to in their argument on this point – namely the alleged differences in dress and time recording practices between different departments, shifts, and lines within the organization – do not overcome the substantially universal core of operative facts that comprise the issues of this case. As such, Plaintiffs have satisfied the typicality requirement of Rule 23.01.

(A.108-09)

**D. The Trial Court Did Not Abuse Its Discretion in Finding Predominance and Superiority.**

The court next determines whether Plaintiffs satisfy at least one Rule 23.02 criterion. The trial court certified Plaintiffs' class under Rule 23.02(c), which requires that common questions of law predominate and that a class action be a superior method of adjudicating the dispute.

**1. The Trial Court Weighed the Evidence and Correctly Found Common Issues Predominate Over Individualized Issues.**

The court correctly recognized that predominance is a “far more demanding requirement than commonality.” (App.110) (citing In re Hartford Sales Practices Litig., 192 F.R.D. 592, 604 (D. Minn. 1999)). Predominance is met where “generalized evidence” could prove or disprove elements of the claims on a class-wide basis. Lewy, 650 N.W.2d at 455. The basic question is whether the putative class seeks to remedy a common legal grievance. Lockwood, 162 F.R.D. at 580.

All line workers in this case have a common legal grievance: they are systematically underpaid by JOTS’ policy of not fully compensating them for “hours worked.” Each of the common issues identified above is the same for all class members, and may be proved by nearly all the same general evidence. For pre-2007 Donning and Doffing—the period of time addressed by the Order—the generalized evidence includes JOTS’ own documents, admissions and policies showing line workers in every plant were denied full payment for Donning and Doffing. The trial court’s findings are detailed in the Order at A.100-103, and evaluated in the context of predominance at A.109-112. Based on these factual findings, the court found that the class’ “principal and unifying legal grievance” could be proved by the kinds of generalized evidence referred to throughout the trial court’s orders and Plaintiffs’ briefs. (A.111)

JOTS’ alleged individualized defenses that some employees were compensated for some Donning and Doffing—relates only to “how much” time Plaintiffs spent

performing uncompensated work, which Plaintiffs must then prove by “just and reasonable inference.” Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). It will be for a jury to decide whether Plaintiffs’ reasonable inferences are rebutted by JOTS’ contention that it delegated its legal responsibility to pay for Donning and Doffing to its lowest-level managers.

Federal Donning and Doffing cases have found class treatment appropriate and certified classes of meatpacking workers despite alleged variations in pay practices, equipment, and company policies. See, e.g., Abadeer v. Tyson Foods, Inc., No. 3:09-00125, 2009 WL 4110295 (M.D. Tenn. Nov. 25, 2009) (unpublished); Perez v. Mountaire Farms, Inc., 601 F. Supp. 2d 670 (D. Md. 2009); Lopez v. Sam Kane Beef Processors, Inc., Civ. No. CC-07-335, 2008 WL 565115 (S.D. Tex. Feb. 29, 2008) (unpublished); Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 813-14 (M.D. Tenn. 2008); Gold’n Plump, 2007 WL 2780504 at \*1; Spoerle v. Kraft Foods Global, Inc., 253 F.R.D. 434 (W.D. Wis. 2008); De Asencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003).

JOTS greatly overstates the district court’s alleged reliance on a supposed “promise” that Plaintiffs’ experts “would prove the alleged fact of widespread unpaid donning and doffing.” (Br.51) The trial court recognized that generalized non-expert evidence—including Plaintiffs’ testimony, JOTS’ admissions and documents, and the practical effects of JOTS’ pay practices—would be used to prove unpaid Donning and Doffing. (A.107, 111) The court relied only tangentially on the testimony of Plaintiffs’ experts. Dr. Martin testified that it was possible to perform a simple and accurate

calculation of damages—something he subsequently did, using, among other things, JOTS’ Kronos records and which JOTS’ expert statistician agreed was merely arithmetic. (S.App.6-8) Dr. Kválseth, an industrial engineer, testified it would be possible to reasonably measure Donning and Doffing times—something JOTS itself did in its own internal Donning and Doffing studies. (A.111; see, e.g., A.129) Indeed, when asked to describe the process the company used to assign Donning and Doffing times, he replied:

A: We were trying—seeking out groups of employees that had something in common. What we were trying to do was try a way to administratively—a way to simply administer the time that we were looking to add to employees’ paid time.

(S.App.7-9) Such evidence allowed the court to resolve disputed issues and conclude that “[t]he common issues in this case predominate over the individualized facts involved in damages calculations.” (A.111)

JOTS argues—but only with respect to its pre-June 2007 pay practices—that it had no uniform Donning and Doffing practices, that its supervisors had individual policies resulting in payment for some Donning and Doffing, and that Plaintiffs “offered no evidence supporting their claim of widespread compensable, but unpaid donning and doffing.” (Br.46-52, 51) (emphasis added). The court considered and rejected this argument. (A.108-09) JOTS’ factual argument borders on the unreal, given the evidence cited in Plaintiffs’ briefs and the punitive damages order. (See, e.g., A.130-32, 136, 143)

Ignoring this evidence, JOTS asserts the testimony from line supervisors creates predominant individualized issues. (Br.48)<sup>12</sup>

Even assuming JOTS' assertion is true that its lowest-level management, on a case-by-case basis, partly satisfied the company's requirement to pay for Donning and Doffing, this evidence shows that, as a matter of company policy, JOTS did not require pay for Donning and Doffing. This is the classic poultry industry defense—which Judge Schiltz saw through in Gold'n Plump:

Gold'n Plump argues that it simply leaves the question of whether to pay for donning and doffing time to the individual supervisors. Gold'n Plump's assertion is difficult to take seriously, given the competitiveness of the poultry industry, the attention that the donning-and-doffing issue has received within the industry, and the fact that not a single Gold'n Plump supervisor keeps track of donning and doffing time. Putting that aside, though, even if Gold'n Plump is correct, it does have a policy—a policy not to have a policy. . . . The bottom line is that Gold'n Plump has, at a minimum, decided not to require that its employees be paid for donning and doffing. That no-policy policy has allegedly injured all members of the putative class and is properly challenged through a class action.

Gold'n Plump, 2007 WL 2780504 at \*3 (cited with approval and followed in Wren v. RGIS Inventory Specialists, 256 F.R.D. 180, 206 (N.D. Cal. 2009)). Likewise, JOTS' assertion that it left wage and hour compliance in the hands of individual supervisors reflects a class-wide policy properly subject to class litigation. It is long established that

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<sup>12</sup> This testimony is not, as JOTS asserts, uncontested. (Br.4-9) Among other things, all named Plaintiffs testified that they had to be fully Donned and on the line at the start of scheduled time, meaning that they Donned before the start of paid time.

an employer may not benefit from its own noncompliance with labor laws, including its failure to keep accurate records of all hours worked. See, e.g., Mumbower v. Callicott, 526 F.2d 1183, 1187 (8th Cir. 1975).

JOTS relies on Anderson v. Cagle's, Inc., 488 F.3d 945 (11th Cir. 2007) and Fox v. Tyson Foods, Inc., No. 4:99-CV-1612, 2006 WL 6012784 (N.D. Ala. Nov. 15, 2006) (S.App.43-50), both of which are distinguishable. In Anderson, all named plaintiffs belonged to a union while many opt-in plaintiffs didn't, a critical distinction because a key defense in that case involved a collective bargaining agreement which would not apply to many opt-in plaintiffs. 488 F.3d at 954 n.8. No similar distinction exists in this case. In Tyson, the district court found, based on uncontroverted evidence, that employees in some plants were compensated for Donning and Doffing, that employees were not subject to the same corporate policy and therefore not similarly situated. 2006 WL 6012784 at \*6. JOTS' contention that it paid for some Donning and Doffing pre-June 2007 is highly contested, and the company's own documents show that employees in every plant were denied payment by the same policy. (A.143) JOTS admits its post-June 2007 pay practice uniformly denies payment for some Donning and Doffing.

In summary, generalized evidence supports the district court's conclusion that class-wide issues predominate over individualized issues. To the extent individual issues do arise, the Court has broad discretion to resolve those issues after, subsequent to, or apart from its overall adjudication of the class-wide issues. Indeed, Minnesota courts

recognize that individual issues will “usually remain after the common issues are adjudicated.” Lewy, 650 N.W.2d at 456.

**a. The Trial Court Did Not Abuse Its Discretion in Finding A Class Action is the Superior—“and Realistically the Only Method”—To Adjudicate Plaintiffs’ Claims.**

The Rule 23.02(c) superiority requirement focuses “not on the convenience or burden of a class action per se, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.” Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004). A class action must be deemed the only practical method of litigating when the complex nature of the litigation and the comparatively small individual financial interests are considered. Lewy, 650 N.W.2d at 457. Where individual recovery is too small to justify individual litigation, a class action is superior. Peterson v. BASF Corp., 618 N.W.2d 821 (Minn. Ct. App. 2001); Forcier v. State Farm Mut. Auto Ins. Co., 310 N.W.2d 124, 130 (Minn. 1981).

The thousands of affected JOTS line workers (many of them immigrants who speak little or no English) have no realistic individual remedy, given the nature and extent of proof in this case and the size of their individual claims. If these people are to have a chance at justice, they must have it as a class or not at all. As Judge Leung stated, “[i]n this case, a class action is clearly the superior—and realistically the only—method of adjudicating the production line workers’ claims.” (App.112)

**II. THE TRIAL COURT'S PUNITIVE DAMAGES ORDER IS SUPPORTED BY EXTENSIVE EVIDENCE OF JOTS' INTENTIONAL DISREGARD FOR WORKERS' RIGHTS TO BE PAID.**

**A. JOTS Misstates the Standard of Review and Ignores Explicit Evidence That It Disregarded Plaintiffs' MFLSA Rights.**

Arguing for reversal of the lower court's order allowing Plaintiffs to plead punitive damages, JOTS states a truism: there can be no punitive damages without a substantive law violation. True—and Plaintiffs' substantive claims should be reinstated for the reasons explained in their opening brief and herein. JOTS' next point is wrong, however—it cites Swanlund v. Shimano Indus. Corp., Ltd., 459 N.W.2d 151, 155 (Minn. Ct. App. 1990) for the proposition that appellate courts review *de novo* a trial court's order allowing a punitive damages claim. (Br.42) While this is Swanlund's holding, that case is an aberration. Fogelsong, 2009 WL 4910489. The Minnesota Supreme Court has long held that “[w]hether to allow an amendment is committed to the trial court's discretion.” Utecht, 324 N.W.2d at 654. This Court has followed that rule. See e.g. J.W. ex rel B.R.W. v. 287 Intermediate Dist., 761 N.W.2d 896, 903-04 (Minn. Ct. App. 2009).

Therefore, the proper question is whether the district court abused its discretion in evaluating the evidence. But whether the standard is abuse of discretion or *de novo* review, the evidence is clear and convincing. Much of the supporting evidence is cited in Plaintiffs' opening brief and in the court's Punitive Damages Order, and will not be repeated.

JOTS responds that some of the documents the court relied on are ten years old (not a persuasive criticism in a seven-year-old case) and are mischaracterized. (Br.60) But the standard at this stage is whether they could be viewed as clear and convincing. One wonders how JOTS will explain to the jury that a document such as an internal compliance study reporting “No Payment” for Donning and Doffing activities does not mean what it says (A.143), but it will have its chance to do so.

JOTS also claims it reasonably believed it did not have to pay for Donning and Doffing. But the court found that the plain language of the Minnesota rule—in effect since 1973—required payment for Donning and Doffing, and that Donning and Doffing has been considered compensable “for decades” under the FLSA. (A.79) JOTS also argues that FLSA opinions are not relevant to the MFLSA issue—an untenable legal position considering the overlap and similarity of the two laws. See Milner, 748 N.W.2d 608.

The court examined all the evidence before it and concluded that Plaintiffs had provided evidence that JOTS knew it should pay for Donning and Doffing but chose not to. “In sacrificing the rights of Plaintiffs for JOTS’ bottom line, the evidence would support clearly and convincingly that JOTS deliberately regarded Plaintiffs rights.” (A.80) This was not an abuse of discretion—it was a plain reading of overwhelming evidence of JOTS’ violations.

### **III. JOTS WAIVED ITS APPEAL ON EXPERT TESTIMONY BY FAILING TO BRIEF THE ISSUE.**

JOTS identified the denial of its motion to strike Plaintiffs' expert testimony as an issue, but did not actually brief the issue except in a footnote and by reference to arguments presented to the district court. (R.Br.52 n.13) JOTS has therefore waived this issue for appeal. Melina, 327 N.W.2d at 20; Modern Recycling Inc., 558 N.W.2d at 772; In re Biegenowski, 520 N.W.2d 525, 529 (Minn. Ct. App. 1994). Even if not waived, the trial court did not abuse its discretion in denying JOTS' motion to exclude Plaintiffs' experts. Plaintiffs' evidence of JOTS' policies and practice provides reliable foundation for the experts to reasonably estimate the issue of "how much" Donning and Doffing time was uncompensated. Jacobson v. \$55,900 in U.S. Currency, 728 N.W.2d 510, 528 (Minn. 2007). The experts' testimony will be helpful to the trier of fact, and is therefore admissible under Minn. R. Evid. 702.

### **CONCLUSION**

Plaintiff-Appellants respectfully request that this Court grant summary judgment on liability on their MFLSA overtime claim, and remand all remaining issues for trial on damages and liability, as appropriate. Plaintiffs further request that the trial court's order certifying an overtime class should be affirmed, with instructions that the court hear motions for class certification on the contract and MFLSA meal break claims; motions to include the MFLSA meal break claim in the punitive damages claim; and instructing the

court to make findings as to JOTS' recordkeeping and the appropriateness of civil penalties.

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