

No. A10-419

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Eduardo Rios, Rodolfo Gutierrez, Evelia Mendoza, Jennifer Brickweg, Marsha Winter,  
Juan Guerra, Jr., Valeria Cabral, Margarita Ruiz, Todd E. Nord, Jeff Rudie, and John  
Patrick Kelly, 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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**RESPONDENTS/CROSS-APPELLANTS' PRINCIPAL AND RESPONSE BRIEF  
AND ADDENDUM**

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Lindquist & Vennum P.L.L.P.  
Thomas F. Pursell #012068x  
Daniel J. Sheran #100183  
Robert J. Hennessey #33118  
Marnie L. DeWall #0324188  
Kelly G. Laudon #0386854  
80 South Eighth Street, Suite 4200  
Minneapolis, MN 55402  
(612) 371-3211

Law Office of Tejada Guzman, PLLC  
Antonio Tejada #0325326  
214 4th St. SW  
Willmar, MN 56201  
(320) 262-3669

*Attorneys for Appellants/Cross-Respondents*

Dorsey & Whitney LLP  
Steven J. Wells #0163508  
Ryan E. Mick #0311960  
Glenn M. Salvo #0349008  
Charles K. LaPlante #0389005  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
(612) 340-2600

*Attorneys for Respondents/Cross-Appellants*

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE ISSUES ON THE CROSS-APPEAL.....	3
INTRODUCTION .....	5
STATEMENT OF THE CASE.....	9
STATEMENT OF THE FACTS .....	11
ARGUMENT.....	11
I. Standard of Review.....	11
II. Appellants’ contract claims were properly dismissed because there was no contract to pay for donning and doffing. ....	12
A. The absence of objective contractual intent is dispositive. ....	12
B. This Court should not impose a regulatory definition of “work” on the parties’ contracts. ....	14
C. Plaintiffs had no “vested rights” to compensation for donning and doffing.....	20
D. There are no fact issues for trial. ....	22
III. Appellants’ MFLSA meal break claim was properly dismissed. ....	22
A. The plain language of Minn. Stat. § 177.254 demonstrates the legislature’s intent to impose only a “sufficient time” standard. ....	23
B. The Minnesota legislature considered and intentionally rejected a bright-line minimum time requirement. ....	23
C. The Minnesota legislature did not impose a “stealth” 30-minute meal break time requirement in Minn. Stat. § 177.254.....	25
D. The plain language of the Minnesota Rules precludes Appellants’ interpretation.....	26
E. Appellants’ interpretation of Minn. Rule 5200.0120 conflicts with the history of the MNDOLI’s rulemaking.....	28
IV. The district court correctly dismissed Appellants’ overtime claim under Minnesota Rule 5200.0170’s “workweek rule.” .....	29
A. The workweek rule requires a comparison of total time worked in a week with total pay for the week to determine compliance with the MFLSA overtime statute. ....	30

B.	Appellants’ concession that Rule 5200.0170 should be interpreted in the manner adopted by the district court for minimum wage claims supports the same interpretation for overtime claims.....	31
C.	The full text of Minn. Rule 5200.0170 confirms the required application of the workweek rule. ....	32
D.	Appellants’ arguments ignoring the plain meaning of Rule 5200.0170 should be rejected. ....	33
V.	The district court correctly denied Appellants’ motion for partial summary judgment. ....	34
A.	Defining “work” is not a proper basis for summary judgment. ....	34
B.	Requirements of due process preclude judgment “as to liability.” ....	35
C.	Appellants’ motion would fail under the <i>de minimis</i> rule. ....	36
VI.	The district court properly disregarded Appellants’ unpled recordkeeping “claim.”	37
VII.	Jennie-O did not waive its attorney client privilege. ....	39
A.	Notwithstanding extensive efforts to protect the privilege, Jennie-O mistakenly produced two pages of privileged documents out of hundreds of thousands of non-privileged documents produced. ....	39
B.	Jennie-O’s inadvertent production did not waive the privilege. ....	41
	CROSS-APPEAL .....	42
I.	Standard of Review.....	42
II.	The district court abused its discretion by certifying, and then refusing to decertify, the overtime class. ....	43
A.	The district court did not apply the Whitaker standard. ....	44
B.	Appellants’ failure to produce the promised common evidence of unpaid donning and doffing precludes class certification. ....	46
1.	There were no uniform donning and doffing practices at Jennie-O, much less uniform nonpayment of donning and doffing time. ....	46
2.	The evidence demonstrates Jennie-O’s payment for donning and doffing.....	47
a.	Supervisors instituted various pay practices prior to June 2007.....	48
b.	Line employees have been paid for most donning and doffing under the company-wide “swipe to swipe” pay methodology implemented in June 2007. ....	50

3.	Appellants offered no evidence supporting their claim of widespread compensable, but unpaid, donning and doffing. ....	51
4.	Appellants cannot establish commonality. ....	53
5.	The named plaintiffs are not typical. ....	53
6.	Appellants cannot demonstrate predominance. ....	54
7.	A class trial would not be the superior method of resolving Appellants' claims. ....	55
III.	The district court erred in permitting Appellants to add a claim for punitive damages. ....	56
A.	Appellants failed to present clear and convincing evidence that Jennie-O violated the MFLSA overtime statute. ....	56
B.	Appellants did not offer any clear and convincing evidence that Jennie-O deliberately disregarded <i>any</i> MFLSA rights. ....	57
1.	Jennie-O's decision makers carefully considered the state of the law and determined that donning and doffing was not compensable. ....	58
2.	Appellants misrepresent Jennie-O's documents. ....	59
	CONCLUSION.....	61

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>Adams v. Claxton Poultry Farms,</u> No. 607-CV-017 (S.D. Ga. Feb. 23, 2009) (slip op.) (R.App. 1107) .....	50, 51
<u>Alford v. Perdue Farms, Inc.,</u> 2008 WL 879413 (M.D. Ga. Mar. 28, 2008) .....	19
<u>Alvarez v. IBP, Inc.,</u> 339 F.3d 894 (9th Cir. 2003).....	19, 50
<u>Anderson v. Mt. Clemens Pottery Co.,</u> 328 U.S. 680 (1946) .....	2, 36, 38
<u>Anderson v. Pilgrim’s Pride Corp.,</u> 147 F. Supp. 2d 556 (E.D. Tex. 2001) .....	19, 51, 61
<u>Audette v. Northeast St. Bank of Minneapolis,</u> 436 N.W.2d 125 (Minn. App. 1989).....	21
<u>Berglund v. Grangers, Inc.,</u> 1998 WL 328382 (Minn. App. June 23, 1998).....	21, 22
<u>Blain v. Gen. Elec. Co.,</u> 371 F. Supp. 857 (W.D. Ky. 1971) .....	28
<u>Bot v. Residential Servs., Inc.,</u> 1997 WL 328029 (Minn. App. June 17, 1997).....	33
<u>Briggs Transp. Co. v. Ranzenberger,</u> 217 N.W.2d 198 (Minn. 1974).....	12
<u>Brown v. Tonka Corp.,</u> 519 N.W.2d 474 (Minn. App. 1994).....	21, 22
<u>Burkhart-Deal v. Citifinancial, Inc.,</u> 2010 WL 457122 (W.D. Pa. Feb. 4, 2010) .....	56
<u>Can Mfrs. Inst., Inc. v. State,</u> 289 N.W.2d 416 (Minn. 1979).....	29
<u>Carlsen v. U.S.,</u> 521 F.3d 1371 (Fed. Cir. 2008).....	36

<u>Coon v. Ga. Pacific Corp.</u> , 829 F.2d 1563 (11th Cir. 1987).....	3, 38
<u>Duluth Fireman’s Relief Ass’n v. City of Duluth</u> , 361 N.W.2d 381 (Minn. 1985).....	27, 32
<u>E.I. du Pont De Nemours &amp; Co. v. Harrup</u> , 227 F.2d 133 (4th Cir. 1955).....	36
<u>Emme v. C.O.M.B., Inc.</u> , 418 N.W.2d 176 (Minn. 1988) .....	35
<u>Feges v. Perkins Rests., Inc.</u> , 483 N.W.2d 701 (Minn. 1992).....	21
<u>Frank v. Gold’n Plump</u> , 2007 WL 2780504 (D. Minn. Sept. 24, 2007) .....	24
<u>Gen. Refractories Co. v. Travelers Ins. Co.</u> , 1998 WL 961380 (E.D. Pa.1998) .....	2, 35
<u>Gen. Tel. Co. v. Falcon</u> , 457 U.S. 147 (1982).....	43
<u>Goeb v. Tharaldson</u> , 615 N.W.2d 800 (Minn. 2000).....	4, 43, 52
<u>Gorman v. Consol. Edison Corp.</u> , 488 F.3d 586 (2d Cir. 2007).....	19, 50
<u>Gray v. Bicknell</u> , 86 F.3d 1472 (8th Cir. 1996).....	41
<u>Hernandez-Tirado v. Artau</u> , 874 F.2d 866 (1st Cir. 1989).....	59
<u>Hunt v. IBM Mid Am. Employees Federal Credit Union</u> , 384 N.W.2d 853 (Minn. 1986).....	13
<u>IBP Inc. v. Alvarez</u> , 546 U.S. 21 (2005).....	19
<u>In re Copper Market Antitrust Litigation</u> , 200 F.R.D. 213 (S.D.N.Y. 2001).....	42

<u>In re First Alliance Mortgage Co.,</u> 2003 U.S. Dist. LEXIS 25925 (C.D. Cal. June 16, 2003).....	59
<u>Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.,</u> 128 N.W.2d 334 (Minn. 1964).....	17
<u>Interstate Power Co., Inc. v. Noble County Bd. of Comm’rs,</u> 617 N.W.2d 566 (Minn. 2000).....	44
<u>Jenkins v. Harrison Poultry, Inc.,</u> No. 2:07-CV-0058-WCO (N.D. Ga. July 29, 2008) (R.App. 1172).....	51
<u>Johnson v. L.B. Hartz Stores, Inc.,</u> 277 N.W.414 (Minn. 1938).....	17, 18
<u>Kroning v. State Farm Auto. Ins. Co.,</u> 567 N.W.2d 42 (Minn. 1997).....	11
<u>Larkin v. Glens Falls Ins. Co.,</u> 83 N.W. 409 (Minn. 1900).....	18
<u>LePage v. Blue Cross &amp; Blue Shield of Minn.,</u> 2008 WL 2570815 (D. Minn. June 25, 2008).....	3, 39
<u>Lewis v. Equitable Life Assur. Soc.,</u> 389 N.W.2d 876 (Minn. 1986).....	59
<u>Lewy 1990 Trust ex rel. Lewy v. Inv. Advisors, Inc.,</u> 650 N.W.2d 445 (Minn. App. 2002).....	43, 54
<u>Lindow v. United States,</u> 738 F.2d 1057 (9th Cir.1984).....	36
<u>Lindsey v. Normet,</u> 405 U.S. 56 (1972).....	35
<u>Lugo v. Farmers Pride, Inc.,</u> 967 A.2d 963 (Pa. Super. Ct. 2009).....	17
<u>Martinez-Hernandez v. Butterball, LLC,</u> 578 F. Supp. 2d 816 (E.D.N.C. 2008).....	16, 17
<u>Mattice v. Minn. Property Ins. Placement,</u> 655 N.W.2d 336 (Minn. App. 2002).....	15, 23

<u>Mattson v. Underwriters at Lloyds of London,</u> 414 N.W.2d 717 (Minn. 1987).....	20
<u>McMaster v. Benson,</u> 495 N.W.2d 613 (Minn. App. 1993).....	1, 24
<u>Mertens v. Hewitt Assocs.,</u> 508 U.S. 248 (1993).....	32
<u>Michaelson v. Minn. Mining &amp; Mfg. Co.,</u> 474 N.W.2d 174 (Minn. App. 1991).....	21
<u>Milner v. Farmers Ins. Exch.,</u> 748 N.W.2d 608 (Minn. 2008).....	3, 11, 38, 39
<u>Minneapolis Cablesystems v. City of Minneapolis,</u> 299 N.W.2d 121 (Minn. 1980).....	1, 12
<u>North Star Center, Inc. v. Sibley Bowl, Inc.,</u> 205 N.W.2d 331 (Minn. 1973).....	22
<u>Peters v. Mut. Ben. Life Ins. Co.,</u> 420 N.W.2d 908 (Minn. App. 1988).....	13
<u>Pine River State Bank v. Mettille,</u> 333 N.W.2d 622 (Minn. 1983).....	12, 21
<u>Pressley v. Sanderson Farms, Inc.,</u> 2001 WL 850017 (S.D. Tex. 2001), <i>aff'd</i> , 2002 WL 432986 (5th Cir. Mar. 7, 2002).....	19, 51, 61
<u>Ramirez v. NutraSweet Co.,</u> 1997 WL 684894 (N.D. Ill. Oct. 30, 1997).....	13
<u>Razink v. Krutzig,</u> 746 N.W.2d 644 (Minn. App. 2008).....	11
<u>Reich v. IBP, Inc.,</u> 38 F.3d 1123 (10th Cir. 1994).....	18, 50
<u>Riley Bros. Constr., Inc. v. Shuck,</u> 704 N.W.2d 197 (Minn. App. 2005).....	1, 12, 14
<u>Roberts v. Brunswick Corp.,</u> 783 N.W.2d 226 (Minn. App. 2010).....	1, 21

<u>Roeder v. Am. Postal Workers Union, AFL-CIO,</u> 180 F.3d 733 (6th Cir. 1999).....	38
<u>Rutstein v. Avis Rent-A-Car Systems, Inc.,</u> 211 F.3d 1228 (11th Cir. 2000).....	53
<u>Ruud v. Great Plains Supply, Inc.,</u> 526 N.W.2d 369 (Minn. 1995).....	13
<u>Safeco Ins. Co. of Am. v. Burr,</u> 551 U.S. 47 (2007).....	4, 57, 59
<u>Sec. Indus. Ass'n v. Bd. of Governors,</u> 468 U.S. 137 (1984).....	29
<u>Soderbeck v. Burnett County, Wis.,</u> 752 F.2d 285 (7th Cir. 1985).....	59
<u>Speckel v. Perkins,</u> 364 N.W.2d 890 (Minn. App. 1985).....	12, 14
<u>Sprague v. Gen. Motors Corp.,</u> 133 F.3d 388 (6th Cir. 1998).....	53
<u>Starway v. Indep. Sch. Dist. No. 625,</u> 187 F.R.D. 595 (D. Minn. 1999).....	3, 41
<u>State Farm v. Campbell,</u> 538 U.S. 408 (2003).....	56, 57
<u>Sw. Refining Corp. v. Bernal,</u> 22 S.W.3d 425 (Tex. 2000).....	54
<u>Swanlund v. Shimano Indus. Corp., Ltd.,</u> 459 N.W.2d 151 (Minn. App. 1990).....	42
<u>Thiele v. Stich,</u> 425 N.W.2d 580 (Minn. 1988).....	20
<u>Transit Team, Inc. v. Metro. Council,</u> 679 N.W.2d 390 (Minn. App. 2004).....	1, 23, 25, 27
<u>Tum v. Barber Foods, Inc.,</u> 360 F.3d 274 (1st Cir. 2004).....	19

<u>U.S. v. Klinghoffer Bros. Realty Corp.,</u> 285 F.2d 487 (2nd Cir. 1960).....	34
<u>Waits v. Frito-Lay, Inc.,</u> 978 F.2d 1093 (9th Cir. 1992).....	59
<u>Welch v. Eli Lilly &amp; Co.,</u> 2009 WL 700199 (S.D. Ind. Mar. 16, 2009) .....	52, 53
<u>Whitaker v. 3M Co.,</u> 764 N.W.2d 631 (Minn. App. 2009).....	3, 8, 42, 43, 44, 45, 52, 53
<u>Willie v. Independent School Dist. No. 709,</u> 231 N.W.2d 272 (Minn. 1975) .....	35
<u>White v. Tip Top Poultry, Inc.,</u> No. 4:07-CV-101-HLM (N.D. Ga. Sept. 16, 2008) (R.App. 1218), (R&R adopted Oct. 7, 2008) (R.App. 1277).....	51

**STATUTES**

Minn. Stat. § 177.22.....	2, 36
Minn. Stat. § 177.25.....	2, 30, 34, 56
Minn. Stat. § 177.254.....	1, 22, 23, 24, 25, 29
Minn. Stat. § 549.20.....	4, 56
Minn. Stat. § 645.16.....	23

**OTHER AUTHORITIES**

Minn. R. Civ. P. 23 .....	passim
Minn. R. 5200.0060 .....	24, 25, 27
Minn. R. 5200.0120 .....	passim
Minn. R. 5200.0170 .....	passim
Minn. R. Evid. 402.....	52

Minn. R. Evid. 403..... 52

29 C.F.R. 785.19..... 28

Restatement (Second) of Contracts § 201 (1979)..... 1, 14

11 Richard A. Lord, Williston on Contracts § 30:21 (4th ed. 1999)..... 15

## STATEMENT OF THE ISSUES

**1. Did the district court correctly dismiss Appellants' breach of contract claims because there was no evidence that the parties expressed objective contractual intent that donning and doffing would be compensable?**

The district court concluded that there was no meeting of the minds between the parties that donning and doffing activities would be compensable and rejected Appellants' request to unilaterally impose additional contract terms on the parties requiring payment for donning and doffing. (A. 12-30.)

Apposite authority: Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121 (Minn. 1980); Roberts v. Brunswick Corp., 783 N.W.2d 226 (Minn. App. 2010); Riley Bros. Constr., Inc. v. Shuck, 704 N.W.2d 197, 202 (Minn. App. 2005); Restatement (Second) of Contracts, § 201, cmt. c (1979).

**2. Did the district court correctly dismiss Appellants' MFLSA meal break claim based on undisputed evidence that all plaintiffs received "sufficient time to eat a meal," as required by Minn. Stat. § 177.254?**

The district court rejected Appellants' argument that the MFLSA imposes a 30-minute minimum time requirement for meal breaks, as contrary to the plain language of Minn. Stat. § 177.254 and the Minnesota Rules, as well as the legislative history of Minn. Stat. § 177.254. Because the plaintiffs testified that they had "sufficient time to eat a meal," as required by the statute, the district court granted summary judgment. (A. 32.)

Apposite authority: Minn. Stat. § 177.254; Transit Team, Inc. v. Metro. Council, 679 N.W.2d 390, 395 (Minn. App. 2004); McMaster v. Benson, 495 N.W.2d 613, 614 (Minn. App. 1993); Statement of Need and Reasonableness, Minn. Rule 5200.0120 (R.A. 22).

**3. Did the district court correctly dismiss Appellants' MFLSA overtime claim based on undisputed evidence that all plaintiffs received more overtime compensation than they were entitled to receive under the Minnesota overtime statute?**

The district court applied the "workweek rule" of Minn. Rule 5200.0170 and held that Appellants' evidence of alleged unpaid donning and doffing time was insufficient to establish that any plaintiff had not been paid proper overtime compensation under Minn. Stat. § 177.25. (A. 94.)

Apposite authority: Minn. Rule 5200.1070.

**4. Did the district court properly deny Appellants' motion for partial summary judgment "as to liability" with respect to Appellants' MFLSA overtime claim, in the absence of undisputed material facts establishing overtime liability?**

The district court twice denied Appellants' motion for partial summary judgment because Appellants could not establish overtime liability as a matter of law. (A. 69, 81.)

Apposite authority: Minn. Stat. § 177.22; Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Statement of Need and Reasonableness, Minn. Rule 5200.0120 (R.A. 22); Gen. Refractories Co. v. Travelers Ins. Co., 1998 WL 961380 (E.D. Pa.1998).

**5. Did the district court correctly enter final judgment, regardless of Appellants' assertion that they also had an unpled "recordkeeping" claim?**

The district court entered final judgment upon the dismissal of all claims set forth in Appellants' Sixth Amended Complaint. (R.A. 19.) Notwithstanding the district court's repeated orders, beginning on July 30, 2007, that made clear that only Appellants' MFLSA overtime claim remained for consideration (A. 101), and notwithstanding opportunities to amend their Complaint to add a recordkeeping claim, Appellants never did so.

Apposite authority: Milner v. Farmers Ins. Exch., 748 N.W.2d 608 (Minn. 2008); Coon v. Georgia Pacific Corp., 829 F.2d 1563 (11th Cir. 1987); LePage v. Blue Cross & Blue Shield of Minn., 2008 WL 2570815 (D. Minn. June 25, 2008).

**6. Did the district court correctly order Appellants to return inadvertently produced privileged documents to Jennie-O?**

The district court held that Jennie-O had not waived the attorney-client privilege by inadvertently producing two pages of privileged documents to Appellants, in light of Jennie-O's reasonable efforts to preserve the attorney client privilege. (A. 1.)

Apposite authority: Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999).

**STATEMENT OF THE ISSUES ON THE CROSS-APPEAL**

**1. Did the district court abuse its discretion by certifying a class, and by denying Jennie-O's motion for decertification, without resolving significant fact disputes concerning the elements of Minn. R. Civ. P. 23 or requiring Appellants to establish all elements of Rule 23 by a preponderance of the evidence?**

(1) Jennie-O opposed Appellants' motion for class certification by memorandum dated January 5, 2007, and moved for decertification on June 15, 2009. (R.App. 114, 233.)

(2) The district court granted Appellants' motion for class certification on July 30, 2007, and denied Jennie-O's motion for decertification on November 16, 2009, without a memorandum opinion. (A. 97; R.A. 17.)

(3) Jennie-O preserved its appeal of this issue in its Notice of Related Appeal and Statement of the Case, dated March 16, 2010. (R.App. 454, 457.)

(4) Apposite authority: Whitaker v. 3M Co., 764 N.W.2d 631 (Minn. App. 2009).

**2. Did the district court err by permitting Appellants to amend their complaint to add a claim for punitive damages based on their MFLSA overtime claim, in the absence of any evidence that Jennie-O violated the applicable statute or deliberately disregarded Appellants' statutory rights?**

(1) Jennie-O asserted Appellants' failure to satisfy the requirements to amend their complaint to add a claim for punitive damages in opposition to Appellants' motion to amend on March 24, 2009. (R.App. 142.)

(2) The district court granted Appellants' motion on May 22, 2009. (A. 71.)

(3) Jennie-O preserved its appeal of this issue in its Notice of Related Appeal and Statement of the Case, dated March 16, 2010. (R.App. 454, 457.)

(4) Apposite authority: Minn. Stat. § 549.20; Minn. Rule 5200.0170; Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007).

**3. Did the district court abuse its discretion by denying Jennie-O's motion to strike Appellants' expert testimony notwithstanding the experts' admissions that they had no evidentiary basis for their opinions regarding alleged unpaid donning and doffing, and their use of demonstrably unreliable methodologies?**

(1) Jennie-O moved to strike the opinions of putative experts Robert Radwin and Frank Martin on June 15, 2009. (R.App. 196.)

(2) The district court denied Jennie-O's motion to strike on November 16, 2009, without memorandum opinion.

(3) Jennie-O preserved its appeal of this issue in its Notice of Related Appeal and Statement of the Case, dated March 16, 2010. (R.App. 454, 457.)

(4) Apposite authority: Goeb v. Tharaldson, 615 N.W.2d 800, 814-15 (Minn. 2000).

## INTRODUCTION

Appellants, eleven current and former employees of Jennie-O Turkey Store, Inc., West Central Turkeys, Inc., and Heartland Foods Co. (collectively “Jennie-O”), brought suit against Jennie-O alleging breach of contract and equitable claims, as well as claims under the Minnesota Fair Labor Standards Act (“MFLSA”) for alleged unpaid overtime, minimum wage violations, and meal and rest break violations. Each Appellant worked as a line employee in one of six Jennie-O turkey processing plants in Minnesota.

Appellants allege that Jennie-O failed to pay them for time spent “donning and doffing,” that is, putting on and taking off lightweight protective and sanitary apparel; waiting for and picking up or putting away such apparel; washing their hands; and walking in Jennie-O’s plants. Appellants did not plead claims for alleged unpaid donning and doffing under the federal Fair Labor Standards Act (“FLSA”).

The district court properly concluded that the record contains no evidence creating a triable issue of fact on any of Appellants’ claims. Appellants do not contest dismissal of their minimum wage and equitable claims. There is no evidence of a contract to pay for donning and doffing activities. There is no evidence that Appellants were denied “sufficient time to eat a meal” during their meal break, which is what the statute requires. And the evidence showed that Jennie-O in fact paid *more* than required under the MFLSA overtime statute, because it paid overtime wages after 40 hours per week, rather than after 48 hours as required by the MFLSA.

Appellants’ contract claims failed because they did not adduce any evidence that the parties objectively intended “donning and doffing” to be compensable. Under

Minnesota law, objective contractual intent is the keystone of contract interpretation. Recognizing the absence of any such evidence, Appellants argue that their unprecedented interpretation of a regulation addressing the MFLSA minimum wage law (a law that Jennie-O indisputably complied with) should be incorporated into private contracts, even though the parties never intended to incorporate such a term. But Appellants make no argument that either the agency promulgating the regulation or the Minnesota legislature ever intended the regulation to apply outside the application of the minimum wage statute. A court cannot arbitrarily impose statutory provisions as terms of private commercial contracts without destroying both established precedent and certainty in contractual relations.

The plain meaning of the MFLSA meal break statute and its unambiguous legislative history show that the MFLSA only requires employers to provide “sufficient time to eat a meal.” There is no support for Appellants’ contrary interpretation that would require employers to provide 30-minute minimum meal periods and require employers to pay for 30 minutes of meal break time if meal breaks are less than 30 minutes. Given the plaintiffs’ own testimony that they always received sufficient, uninterrupted time to eat, summary judgment was properly granted.

Appellants’ overtime claim turns on the meaning of the “workweek rule” in Minnesota Rule 5200.0170, which states that “[t]he period of time used for determining compliance with the minimum wage rate and overtime compensation ... is the workweek.” Under that rule, the adequacy of overtime compensation is determined by comparing the total amount the employee should have been paid for a workweek under

Minnesota's overtime statute to the amount actually paid for that workweek. If the employee receives enough total compensation in a given workweek to ensure that he or she received the appropriate overtime rate for overtime worked, there can be no violation of the overtime statute. Appellants concede that the workweek rule applies to minimum wage claims, and they offer no logical reason why the same language, in the same rule, which expressly applies in both contexts, would mean one thing for the minimum wage and something entirely different for overtime compensation. When the workweek rule is applied to Appellants' own speculative estimates of alleged unpaid donning and doffing time, the record shows that Jennie-O actually *overpaid* overtime compensation to Appellants under Minnesota law because Jennie-O pays overtime after 40 hours in a workweek, rather than after 48 hours as the MFLSA requires.

Because Appellants' claims fail as a matter of law, this Court should affirm the district court's summary judgment orders. If it does so, it need not consider Jennie-O's related appeal. If this Court were to reverse summary judgment as to Appellants' MFLSA overtime claim, however, it should also reverse the district court's orders certifying a class, denying decertification and permitting Appellants to pursue a claim for punitive damages.<sup>1</sup> If this Court were to reverse summary judgment as to any of

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<sup>1</sup> The district court's class and punitive damages orders were limited to the context of the MFLSA overtime claim, because all other substantive claims had already been dismissed.

Appellants' claims, it should also reverse the district court's order denying Jennie-O's motion to strike Appellants' expert testimony.

Contrary to the requirements set forth in Whitaker v. 3M Co., 764 N.W.2d 631 (Minn. App. 2009), the district court never analyzed all of the class evidence, never resolved fact disputes directly relevant to class certification, and did not require Appellants to establish all of the elements of Minn. R. Civ. P. 23 by a preponderance of the evidence. When the evidence is properly weighed, Appellants cannot "bridge the gap" between their individual claims and class claims alleging uniform nonpayment for donning and doffing.

At the heart of the class issue was Appellants' promise to the district court that their expert witnesses would prove the fact and extent of unpaid donning and doffing for the putative class, identify class members, and demonstrate damages. But Appellants' experts later admitted that they made no effort to demonstrate *any* unpaid donning and doffing. Rather, the experts *assumed* that all donning and doffing was unpaid. This necessarily precluded proof of uniform nonpayment for donning and doffing, and further precluded identification of class members and proof of damages. This failure, combined with demonstrably fatal flaws in the experts' "scientific" methodologies required that their testimony be excluded, and the district court abused its discretion by not doing so.

As the district court itself later acknowledged, Appellants had *no* evidence of MFLSA overtime liability at all, much less that Jennie-O deliberately disregarded Appellants' MFLSA overtime rights. Thus, permitting Appellants to pursue a claim for punitive damages based on that claim was error. In any event, in light of extensive

authority holding that donning and doffing was not compensable and the district court's own analysis agreeing that Jennie-O properly paid its employees, there is no basis for an allegation that Jennie-O deliberately disregarded the MFLSA overtime statute, much less "clear and convincing evidence" that it did so.

### **STATEMENT OF THE CASE**

Appellants filed this action on December 31, 2003. (A. 470.) The first complaint recited eight causes of action: three breach of contract claims, three MFLSA claims, and two claims for equitable relief. (*Id.*) There was no count alleging that Jennie-O had violated any recordkeeping requirements. On September 26, 2006, the district court (Hon. Tony Leung) entered summary judgment dismissing Appellants' contract claims and MFLSA meal and rest break claims. (A. 6.) On September 7, 2007, the district court entered summary judgment dismissing Appellants' subsequently added minimum wage claim and their equitable claims. (A. 34.)

On July 30, 2007, the district court certified a Minn. R. Civ. P. 23 class with respect to Appellants' single remaining claim for alleged MFLSA overtime violations. (A. 97.) The district court stated unequivocally that only that claim remained in the case (A. 101), and, as to that claim, defined the class to include:

All current and former hourly-compensated production line employees of [Jennie-O] in the State of Minnesota who ... engaged in uncompensated-for donning and doffing activities and whose employment included any workweek in which the aggregate of compensated-for time and time spent donning and doffing exceeded 48 hours.

(A. 98.) Despite the district court's explicit determination that only Appellants' MFLSA overtime claim remained in the case (A. 101), Appellants never sought to amend their Complaint to add a claim for alleged recordkeeping violations.

On October 15, 2007, the district court allowed Appellants to seek reconsideration of its summary judgment order with respect to the MFLSA meal break claim, based on Appellants' argument that a federal district court had interpreted the meal break statute differently. (R.A. 13.) After reviewing legislative history not presented to or considered by the federal district court, the district court in this case denied the motion for reconsideration and reaffirmed its summary judgment order on February 13, 2008. (A. 59.)

The district court granted Appellants' motion for leave to amend their complaint to add a claim for punitive damages based on their MFLSA overtime claim, over Respondents' objections, on May 22, 2009. (A. 71.)

On June 25, 2009, the case was reassigned to the Honorable Tanya Bransford. Following reassignment, Appellants filed a motion for partial summary judgment as to liability on the remaining MFLSA overtime claim. (App. 381.) Jennie-O moved for summary judgment on the MFLSA overtime claim, for decertification of the overtime class, and to strike Appellants' expert testimony. (R.App. 170, 196, 233.) Judge Bransford initially denied all motions (A. 81-83; R.A. 17-18), but *sua sponte* reconsidered Jennie-O's summary judgment motion and granted that motion on December 24, 2009. (A. 84.) Final judgment was entered on January 25, 2010. (R.A. 19.)

Appellants appeal from dismissal of their breach of contract claims, MFLSA overtime claim, and MFLSA meal break claim. Appellants also allege that the Court should not have entered final judgment because of an unpled recordkeeping claim. Appellants have not appealed the district court's orders dismissing their minimum wage claim, their equitable claims, and their MFLSA rest break claim. Jennie-O cross-appeals from the district court's orders granting class certification and denying decertification of the overtime class, allowing Appellants to add a claim for punitive damages and denying Jennie-O's motion to strike Appellants' expert testimony.

### **STATEMENT OF THE FACTS**

Jennie-O will address the record facts pertinent to the issues before this Court in the context of each argument.

### **ARGUMENT**

#### **I. Standard of Review.**

This Court reviews the district court's summary judgment orders *de novo*. Razink v. Krutzig, 746 N.W.2d 644, 649 (Minn. App. 2008). This Court reviews the district court's decision upholding Jennie-O's attorney client privilege objection for an abuse of discretion. Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997). Since a district court has discretion whether to allow a claim that has not been pled to proceed to trial, the district court's decision to enter final judgment notwithstanding Appellants' allegations of an unpled recordkeeping claim also should be evaluated for abuse of discretion. See Milner v. Farmers Ins. Exchange, 748 N.W.2d 608, 618-19 (Minn. 2008).

**II. Appellants' contract claims were properly dismissed because there was no contract to pay for donning and doffing.**

Appellants reiterate their claim that Jennie-O breached contracts with its employees to pay for donning and doffing time at the beginning and end of the workday, at lunch breaks, and at rest breaks. To succeed on contract claims, plaintiffs bear the burden to prove (1) the formation of a contract; (2) performance of any conditions precedent; and (3) a breach of contract. Briggs Transp. Co. v. Ranzenberger, 217 N.W.2d 198, 200 (Minn. 1974). Here, the district court properly ruled that there was no contract to pay for donning and doffing because there was no evidence that the parties manifested objective contractual intent that donning and doffing activities would be compensable. (A. 12-30.)

**A. The absence of objective contractual intent is dispositive.**

Formation of a contract requires a definite offer, acceptance, and consideration. Pine River State Bank v. Mettill, 333 N.W.2d 622, 626-27 (Minn. 1983). A plaintiff must show that the parties had an objective "meeting of the minds" as to the terms of the alleged contract for those terms to be binding. Minneapolis Cablesystems v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980).

Minnesota follows the objective theory of contract formation, under which an outward manifestation of assent is determinative. Riley Bros. Constr., Inc. v. Shuck, 704 N.W.2d 197, 202 (Minn. App. 2005); Speckel v. Perkins, 364 N.W.2d 890, 893 (Minn. App. 1985). A contract does not exist unless the parties have agreed "with reasonable

certainty about the same thing and on the same terms.” Peters v. Mut. Ben. Life Ins. Co., 420 N.W.2d 908, 914 (Minn. App. 1988).

Appellants offered no evidence that the parties had a “meeting of the minds” that donning and doffing activities would be compensable. None of the documents cited by Appellants contained an objective promise by Jennie-O to pay for donning and doffing. See Hunt v. IBM Mid Am. Employees Federal Credit Union, 384 N.W.2d 853, 856 (Minn. 1986); Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 372 (Minn. 1995). In fact, none of the documents referred to donning and doffing at all. Nor did Appellants present evidence that they had an oral contract with Jennie-O to pay for donning and doffing. Each Appellant testified that Jennie-O never promised them compensation for donning and doffing, and most testified that they never discussed the issue with Jennie-O. (R.App. 468, 486-87, 497, 525-26, 562-63, 576-77, 683, 687, 701, 706-07, 735.) Indeed, until Appellants’ counsel solicited them as plaintiffs, the Appellants never complained about alleged unpaid donning and doffing, and many Appellants admitted that they had no expectation that they would be paid for donning and doffing. (R.App. 523, 681.)

Appellants did not dispute these facts in the district court, A. 15-16, and they do not dispute them on appeal. Appellants’ failure to provide evidence of objective formation of a contract to pay for donning and doffing and, indeed, their disclaimer of any representation that could possibly constitute a definite contract offer, required summary judgment. See, e.g., Ramirez v. NutraSweet Co., 1997 WL 684984, at \*3 (N.D. Ill. Oct. 30, 1997) (plaintiff’s admissions that employer never promised to pay for time

spent changing clothes precluded claim that clothes-changing time was compensable under the parties' at-will employment contract).

**B. This Court should not impose a regulatory definition of “work” on the parties’ contracts.**

Appellants urge this Court to forego an analysis of the parties’ contractual intent and foist upon them a contract term requiring payment for donning and doffing to which the parties never assented. Appellants argue that because they interpret Minnesota Rule 5200.0120’s definition of “hours worked” to include donning and doffing activities, this Court should impose that interpretation as an implied term in Jennie-O’s implied private employment contracts with its workers.

Appellants offer no evidence that the parties intended the definition of “hours worked” in Minn. Rule 5200.0120 to define compensable work for purposes of their implied employment contracts, much less that the parties understood Rule 5200.0120 in the manner advanced by Appellants. Because the objective manifestation of contractual intent is the inviolable keystone of contract formation and interpretation in Minnesota, that fact alone defeats Appellants’ argument. See Riley Bros., 704 N.W.2d at 202; Speckel, 364 N.W.2d at 893.

Absent evidence of the parties’ objective intent to incorporate a regulatory definition as a term of their contract, this Court would violate long-standing principles of contract interpretation were it to impose such a term. See, e.g., Restatement (Second) of Contracts, § 201, cmt. c:

[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law. . . . The objective

of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: “the courts do not make a contract for the parties.” Ordinarily, therefore, the mutual understanding of the parties prevails *even where the contractual term has been defined differently by statute or administrative regulation.*

(emphasis added); 11 Richard A. Lord, Williston on Contracts § 30:21 (4th ed. 1999)

(“To assume, first, that everybody knows the law, and, second, that everybody makes his contract with reference to the law and adopts its provisions as terms of the agreement, is to pile a fiction upon a fiction, and certainly without any necessity.”).

This Court also would violate the intent of the Minnesota Department of Labor & Industry (“MNDOLI”) in drafting Rule 5200.0120. The MNDOLI clearly intended to promulgate that Rule for the limited and specific purpose of implementing Minnesota’s minimum wage law. See Minn. Rule 5200.0120, subp. 1 (“**General.** The minimum wage must be paid for all hours worked.”). Jennie-O undisputedly complied with the minimum wage law. (A. 55-58.) There is nothing in the minimum wage statute or the regulations promulgated thereunder that would require Rule 5200.0120’s definition of “hours worked” to be imposed as a term – for all purposes – to every private employment contract. See, e.g., Mattice v. Minn. Property Ins. Placement, 655 N.W.2d 336, 341 (Minn. App. 2002) (court’s role “is simply to interpret the statutory language, not to look beyond the statute’s plain meaning in order to ‘in effect rewrite a statute’”) (citation omitted).

Indeed, Appellants’ argument – that a court should extract statutory or regulatory definitions or provisions to which the parties never agreed and impose them on private

contracts for purposes outside the scope of the legislation itself – would also expand legislative and regulatory power far beyond the boundaries of the legislation (and legislative intent), creating an unintended and wholly improper expansion of legislative authority into the area of private commercial contracts. Jennie-O is not aware that any Minnesota court has suggested that regulatory definitions enacted for the limited purpose of a specific regulation should be extended into every corner of private commercial activity, as Appellants argue. Rightly so. There would be no end to the uncertainty in contractual relations that would be caused if every term in a private contract could be subject to the court-ordered imposition of legislative or statutory definitions (much less highly debatable interpretations thereof), to which the parties never agreed and in contexts legislatures never intended to affect. Fundamentally, here, there is no indication on the face of Minn. Rule 5200.0120 or in enabling legislation that the MNDOLI had the intent, or even the power, to impose a definition of “hours worked” outside the context of minimum wage statute, with which JOTS indisputably complied. The court may look at the parties’ intent; the court may look at the text and intent of legislation. But if the parties did not intend a specific definition and if the legislature did not intend to impose a definition by statute for this express purpose in this express context, there is no basis for the court to impose such a definition.

Nonetheless, Appellants rely on two non-Minnesota cases to assert that this Court should impose their view of Rule 5200.0120’s definition of work. The first, Martinez-Hernandez v. Butterball, LLC, 578 F. Supp. 2d 816 (E.D.N.C. 2008), is inapposite. Martinez-Hernandez held that North Carolina’s statutory definition of “work” applied to

a claim under North Carolina's "payday" statute. It did not apply a statutory definition to a breach of contract claim. Id. at 821-22.

Appellants' reliance on Lugo v. Farmers Pride, Inc., 967 A.2d 963 (Pa. Super. Ct. 2009), is also misplaced. In Lugo, the Pennsylvania court held, on the equivalent of a Rule 12 motion, that the plaintiffs could pursue discovery on a theory that Pennsylvania's regulatory definition of "hours worked" applied to an employment contract. Id. at 965, 969. The unique procedural posture of that case alone distinguishes it from the district court's summary judgment order here, where that court held, after discovery had been completed, there was no basis to impose a term to which the parties had not agreed. Regardless, Lugo is not good law. It is fundamentally at odds with the Restatement and every case, in Minnesota and elsewhere, applying the objective theory of contract formation and would expand legislative and regulatory power far beyond the boundaries of specific legislation. Presumably for these reasons, Jennie-O has not located a single court, in any jurisdiction, that has cited Lugo for the proposition Appellants advance.

Appellants also argue more generally that parties are presumed to contract with reference to existing principles of law. Appellants misconstrue the cases upon which they rely, none of which suggests that this Court should (or could) affirmatively impose a term that was never objectively intended by the parties. Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc. involved the interpretation of a term the parties expressly incorporated into their contract, and the Supreme Court specifically reaffirmed the keystone principle that the parties' objective intent controls. 128 N.W.2d 334, 340-41 (Minn. 1964). Johnson v. L.B. Hartz Stores, Inc. affirmed the maxim that parties cannot

contract to do something prohibited by law. 277 N.W. 414, 416 (Minn. 1938). In Larkin v. Glens Falls Ins. Co. the Court merely recognized that the decision of a local fire inspector to prohibit repair of a damaged building affected the value of the building for insurance purposes. 83 N.W. 409, 410 (Minn. 1900).

Even if this Court were to consider imposing a contract term based on “existing principles of law” (and it should not), it should reject Appellants’ unprecedented interpretation of Minn. Rule 5200.0120. Appellants assertion that the compensability of donning and doffing has been an existing principle of law under Rule 5200.0120 is unsupported. Indeed, no Minnesota court has ever interpreted that Rule to require payment for any donning and doffing, much less all donning and doffing under any circumstances, as Appellants argue.

By contrast, numerous decisions under the federal FLSA held that the kind of donning and doffing undertaken by Appellants was *not* compensable. Some courts held that donning and doffing like that at Jennie-O was not properly considered work at all. See, e.g., Reich v. IBP, Inc., 38 F.3d 1123, 1126 n.1 (10th Cir. 1994) (“Requiring employees to show up at their workstations with such standard equipment [safety glasses, ear plugs, hard hats, and safety shoes] is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe.”). The Reich court distinguished such lightweight apparel, like that worn by Jennie-O employees, from cumbersome protective safety gear unique to processing employees in the red meat packing industry. See id. at 1124. Other courts have also held that donning and doffing is not compensable, clearly refuting Appellants’ assertion that the compensability of

donning and doffing is or ever has been a settled legal question under federal law. See, e.g., Gorman, 488 F.3d at 593-94 (“[T]he donning and doffing of . . . generic protective gear is not different in kind from changing clothes and showering under normal conditions, which . . . are not covered by the FLSA.”) (citation and internal quotation marks omitted); Alford v. Perdue Farms, Inc., 2008 WL 879413, at \*6 (M.D. Ga. Mar. 28, 2008).

Courts and juries also rejected similar donning and doffing claims under the *de minimis* rule. See, e.g., Anderson v. Pilgrim’s Pride Corp., 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001); Pressley, 2001 WL 850017, at \*3 (S.D. Tex. 2001), aff’d, 2002 WL 432986 (5th Cir. Mar. 7, 2002). The application of the *de minimis* rule in donning and doffing cases also has been reaffirmed. Alvarez v. IBP, Inc., 339 F.3d 894, 904 (9th Cir. 2003) (“The time it takes to perform these tasks vis-a-vis non-unique protective gear is *de minimis* as a matter of law.”), aff’d, IBP, Inc. v. Alvarez, 546 U.S. 21 (2005); Alford, 2008 WL 879413, at \*6 (finding donning and doffing of standard apparel to be *de minimis*); see also Tum v. Barber Foods, Inc., 360 F.3d 274, 280 (1st Cir. 2004), aff’d in part, Alvarez, 546 U.S. 21. If there was an existing principle of law at the time when Appellants’ employment with Jennie-O began, it was that donning and doffing is *not* compensable work under federal law, and no case interpreted Minnesota law to the contrary.

**C. Appellants had no “vested rights” to compensation for donning and doffing.**

Alternatively, Appellants assert that they had “vested rights” to compensation for donning and doffing, based on language in Jennie-O’s employee handbooks.

Appellants’ argument is not properly before this Court. They did not argue that Jennie-O “retroactively reduce[d] pay and benefits,” App. Br. at 30, in opposition to Jennie-O’s motion for summary judgment in 2005. Appellants’ attempt to present the argument on appeal, when it was not presented to the district court as a reason to deny summary judgment, should be rejected. See Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988); Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717, 721-22 (Minn. 1987).

Even if Appellants had preserved their “vested rights” argument, however, it would fail. Appellants base their argument on Jennie-O’s employee handbooks, which discussed company donning and doffing policies. While an employee handbook may modify an employment-at-will relationship, Jennie-O’s employee handbooks included unambiguous contract disclaimers:

**This handbook is presented as a matter of information only. . . . The language used in this handbook is not intended to create, nor is it to be construed to create a contract (expressed or implied) between Jennie-O and any one or all of its employees. These programs and policies do not affect, alter or modify the “employment at will” status of the employee or employees of the Company.**

(R.App. 1339.)

This handbook provides an overview of policies and general information that apply to hourly Team members. . . . This overview

and the policies of The Turkey Store Company are not contracts between the company and you. Rather they describe the company's philosophy that will be used as guidelines by supervisors. . . . This handbook does not create any contractual right, either expressed or implied, for employment with The Turkey Store Company.

(R.App. 1373.)

Minnesota law is clear that such disclaimers defeat a contract claim based on handbook provisions. See, e.g., Feges v. Perkins Rests., Inc., 483 N.W.2d 701, 708 (Minn. 1992); Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. App. 1991); Audette v. Northeast St. Bank of Minneapolis, 436 N.W.2d 125, 127 (Minn. App. 1989). This is particularly true where, as here, the disclaimer expressly states an intent to set forth "general policy" only. See Pine River, 333 N.W.2d at 626.

Appellants' argument that these cases are not controlling with respect to their claim because they have a vested right to "earned wages," including payment for donning and doffing activities performed in compliance with handbook policies, is misplaced. In Roberts v. Brunswick Corp., this Court rejected the same argument that Appellants raise here. 783 N.W.2d 226 (Minn. App. 2010). Roberts specifically rejected Appellants' interpretation of Brown v. Tonka Corp., 519 N.W.2d 474 (Minn. App. 1994), and Berglund v. Grangers, Inc., 1998 WL 328382 (Minn. App. June 23, 1998), and held that a valid disclaimer precludes the formation of any unilateral contract based on handbook terms, including alleged contracts for "compensation." Regardless, Appellants' argument would fail because they offered no evidence that Jennie-O specifically promised payment for donning and doffing (R.App. 468, 486-87, 497, 525-26, 562-63, 576-77, 683, 687, 701, 706-07, 735.), or that they received compensation for donning and doffing that was

taken away by Jennie-O. (R.App. 304.) See Brown, 519 N.W.2d at 477; Berglund, 1998 WL 328382 at \*1, \*3-\*4.

**D. There are no fact issues for trial.**

Appellants' remaining argument is little more than an assertion that this Court should remand this case so that jurors could speculate about Jennie-O's subjective intent or impose their personal perceptions of "justice." App. Br. at 27, 30. Minnesota's requirement that contracts be interpreted to effect objective manifestation of assent precludes Appellants' argument. North Star Center, Inc. v. Sibley Bowl, Inc., 205 N.W.2d 331, 332 (Minn. 1973). The district court's application of well-established principles of contract interpretation to ensure that parties' contractual obligations are based on evidence of objective intent is not a "blank check for abuse."

**III. Appellants' MFLSA meal break claim was properly dismissed.**

Minn. Stat. § 177.254 governs Appellants' MFLSA meal break claim and requires employers to "permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal." Notwithstanding the plain language of the statutory text, Appellants assert that the MFLSA requires strict 30-minute minimum meal breaks, rather than merely "sufficient" time, and also requires employers to pay employees for 30 minutes of meal break time if meal breaks are less than 30 minutes.<sup>2</sup> App. Br. at 36, 45.

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<sup>2</sup> Appellants have never sought to recover simply for alleged work time during meal breaks, but rather to recover 30 minutes of damages whenever an employee's meal break was allegedly 29 minutes and 59 seconds or less. (A. 347, 350; App. Br. at 36, 45.) In any event, neither the district court nor Jennie-O ignored the plaintiffs'

The district court properly rejected Appellants' unprecedented argument and granted summary judgment based on the plaintiffs' uniform admissions that they always had sufficient time to eat a meal, as the MFLSA requires. (A. 32.)

**A. The plain language of Minn. Stat. § 177.254 demonstrates the legislature's intent to impose only a "sufficient time" standard.**

In order to establish a violation of § 177.254, a plaintiff must prove that he or she did not have "sufficient time to eat a meal." *Id.* This unambiguous language makes clear that the Minnesota legislature did not intend to impose a strict 30-minute minimum time requirement, much less prohibit deduction of any meal break less than 30 minutes. Had that been the legislature's intent, it easily could have framed the statute accordingly. *See, e.g., Transit Team, Inc. v. Metro. Council*, 679 N.W.2d 390, 395 (Minn. App. 2004) ("In our view, if the legislature intended the statute to [achieve a more specific result], it would have clearly expressed such intention."). The legislature did not do so, and this Court should not read such requirements into the statute. *See Minn. Stat. § 645.16; Mattice*, 655 N.W.2d at 341.

**B. The Minnesota legislature considered and intentionally rejected a bright-line minimum time requirement.**

The legislature's intent to reject a bright-line minimum time requirement is apparent from the language of the statute itself. That conclusion is confirmed by the

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allegations of unpaid work during meal breaks. Jennie-O specifically addressed such allegations in the context of Appellants' overtime claim and demonstrated that Appellants received proper compensation even assuming that such allegations were true. *See infra.*

legislative history. As originally proposed, the Minnesota meal break statute would have imposed a 20-minute minimum time requirement for meal breaks. (R.App. 1052.) But both the Minnesota Senate and House subsequently amended the bill to eliminate the bright-line 20-minute minimum and insert instead the flexible requirement that employers provide “sufficient time to eat a meal.” (R.App. 1058-59.) The amended bill, imposing only the “sufficient time” standard, was enacted into law in 1989. See Minn. Stat. § 177.254. This history makes clear that the Minnesota legislature considered and purposefully rejected not only a bright-line minimum time requirement in general, but actually a shorter minimum time requirement (20 minutes) than that being read into the statute by Appellants (30 minutes).

Indeed, the legislature rejected a minimum time requirement in favor of the flexible “sufficient time” standard in 1989, years *after* Minnesota Rules 5200.0120 and 5200.0060, upon which Appellants rely, were promulgated. (R.App. 1061, 1065, 1067.) The subsequently-enacted statute clearly sets forth the controlling legal standard, regardless of the meaning of those Rules. See, e.g., McMaster v. Benson, 495 N.W.2d 613, 614 (Minn. App. 1993).<sup>3</sup>

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<sup>3</sup> Appellants rely heavily on Frank v. Gold’n Plump, 2007 WL 2780504 (D. Minn. Sept. 24, 2007) (Schiltz, J.). The district court in this case permitted Appellants to move for reconsideration of its original order granting summary judgment on the meal break claim in light of the decision in Frank. As Jennie-O set forth in its briefing on that motion, however, the relevant legislative history had never been presented to the Frank court. (R.App. 369.) Indeed, as the district court here pointed out, the opinion in Frank demonstrates that Judge Schiltz was unaware of this legislative history when he interpreted MFLSA meal break law.

**C. The Minnesota legislature did not impose a “stealth” 30-minute meal break time requirement in Minn. Stat. § 177.254.**

Notwithstanding the plain text of the governing statute and the unambiguous history, Appellants assert that Minnesota Rules 5200.0120 and 5200.0060 nonetheless require bright-line 30-minute meal breaks and payment of 30 minutes of meal break time for any meal break less than 30 minutes. Remarkably, Appellants hinge their argument on Minn. Stat. § 177.254, subd. 2, which states:

Nothing in this section requires the employer to pay the employee during the meal break.

Appellants insist that this text somehow incorporated their interpretation of Rules 5200.0120 and 5200.0060 under the cloak of the words “in this section.” There is no support for that argument.

First, Appellants’ argument directly contradicts the fundamental principle that the legislature does not secretly impose legal mandates. See Transit Team, 679 N.W.2d at 395. A statement that Minnesota does not require paid meal breaks does not mean there is an unstated obligation to pay for 30 minutes of meal break time for any meal break less than 30 minutes.

Further, Appellants’ argument rests on the unsupported assumption that the legislature believed that Rules 5200.0120 and 5200.0060 created a bright-line 30-minute meal break requirement and the “deductibility” framework Appellants allege. But Appellants fail to show that any court, legislature, or any other authoritative body had ever adopted Appellants’ interpretation of Rules 5200.0120 and 5200.0060 when Minn. Stat. § 177.254 was enacted. Thus, Appellants offered no evidence that the Minnesota

legislature intended to silently import a never-before considered interpretation of those rules into the meal break statute's "sufficient time" standard.

In fact, Appellants' "silent incorporation" argument directly contradicts the legislative history of § 177.254, which Appellants do not even try to explain. If the legislature thought that the law already imposed a mandatory 30-minute meal break, and that breaks of less than 30 minutes could not be deducted, there is no logical reason why it would have established a flexible "sufficient time" standard. Obviously, the legislature's rejection of a bright-line minimum time requirement in favor of a flexible standard is completely inconsistent with Appellants' argument. Appellants acknowledge as much by ignoring the legislative history of Minn. Stat. § 177.254.

**D. The plain language of the Minnesota Rules precludes Appellants' interpretation.**

Appellants' argument is not only inconsistent with the plain text of the governing statute and the legislative history, but it also assumes an interpretation of Rules 5200.0120 and 5200.0060 that is contradicted by the text of the Rules themselves.

First, the Rules, on their face, concern only the minimum wage. Rule 5200.0060 concerns when meal allowances may be credited toward the minimum wage. Rule 5200.0120 generally addresses the hours that must be paid at the minimum wage. The limited scope of these rules is confirmed by the fact that they could not have been promulgated to interpret Minnesota's meal break statute, which did not exist when they were promulgated. Thus, these Rules are irrelevant here. In any event, the district court

granted summary judgment dismissing Appellants' minimum wage claim, and Appellants have not appealed that decision.

Rule 5200.0060 provides that "Meal periods of less than *20 minutes* may not be deducted from hours worked."<sup>4</sup> (emphasis added). Appellants' interpretation of the Rule to prohibit an employer from deducting any break less than a "bona fide" *30 minutes* would render the Rule's actual text superfluous, contrary to the most basic tenets of logic and statutory interpretation. See, e.g., Duluth Fireman's Relief Ass'n v. City of Duluth, 361 N.W.2d 381, 385 (Minn. 1985).

Further, the language of Rule 5200.0120 stating that that 30 minutes is "ordinarily long enough" for a meal break demonstrates that Appellants' interpretation of that Rule is incorrect. (A. 66-67.) Like the Minnesota legislature, if the MNDOLI had intended Rule 5200.0120 to achieve the specific result of a mandatory 30-minute minimum time requirement and a prohibition against deducting any meal break less than 30 minutes, it would have expressed that intention clearly. It would not have used a non-mandatory phrase like "ordinarily long enough" in describing meal breaks. See, e.g., Transit Team, 679 N.W.2d at 395.

Rather, the focus of Rule 5200.0120 (and Rule 5200.0060, which uses nearly identical language) concerns the question of whether employees are relieved from duty during their meal periods – that is, that they are not interrupted by work demands while

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<sup>4</sup> Appellants uniformly testified that they received at least 20 minute uninterrupted meal breaks. (A. 32; see also App. Br. at 12-13.)

eating – not whether those meal periods are for a particular amount of time (in excess of 20 minutes). (A. 67.) As the district court noted, while Appellants argue that employees had to doff and don at the start and end of meal breaks, there is no dispute that employees were completely relieved of duty for at least 20 uninterrupted minutes for meal breaks, and this was sufficient time for them to eat their meals. (A. 32.)

**E. Appellants' interpretation of Minn. Rule 5200.0120 conflicts with the history of the MNDOLI's rulemaking.**

Appellants' interpretation of the Minnesota Rules also is not supported by the rulemaking history. When the MNDOLI proposed Rule 5200.0120, for example, it submitted a Statement of Need and Reasonableness (“SONAR”) explaining its purpose and intent. With respect to meal breaks, the SONAR stated:

Unpaid meal periods are defined to be consistent with federal regulations (29 C.F.R. 785.19). The proposed rule does not require an employer to provide a meal period, but does allow an employer to deduct meal periods provided.

(R.A. 29.) On its face, this statement of the MNDOLI's intent renders Appellants' contrived “deductibility” rule untenable.

Further, when Rule 5200.0120 was adopted in 1986, the federal authority interpreting 29 C.F.R. 785.19 with respect to the *length* of meal breaks held that a 30-minute minimum was not required. See, e.g., Blain v. Gen. Elec. Co., 371 F. Supp. 857, 861-62 (W.D. Ky. 1971). There is no reason to believe that the MNDOLI intended to enact a requirement more onerous than the federal regulation, when it carefully asserted that Rule 5200.0120 was modeled on the federal regulation. Even if the MNDOLI did intend a more onerous requirement, however, that requirement became invalid with the

passage of Minn. Stat. § 177.254 in 1989. See Can Mfrs. Inst., Inc. v. State, 289 N.W.2d 416, 425, 426 (Minn. 1979); Sec. Indus. Ass'n v. Bd. of Governors, 468 U.S. 137, 143 (1984).

**IV. The district court correctly dismissed Appellants' overtime claim under Minnesota Rule 5200.0170's "workweek rule."**

The issue before this Court with respect to Appellants' MFLSA overtime claim is strictly a matter of law concerning the proper application of the workweek rule in Minnesota Rule 5200.0170. There is no issue of fact before this Court. In demonstrating Appellants' failure to present a valid overtime claim for purposes of summary judgment, Jennie-O fully assumed the facts presented by Appellants and their experts (even though those "facts" are completely speculative and unsupported). (R.App. 192-95.) Indeed, Jennie-O assumed that the most generous set of facts available for *any* plaintiff applied to *all* plaintiffs, but proved that even then, every plaintiff had already received *more* than the compensation required under the Minnesota overtime statute, because Jennie-O pays overtime rates after 40 hours in a workweek, rather than only after 48 hours as the MFLSA requires. (R.App. 725, 1351.) Appellants did not dispute these facts before the district court.<sup>5</sup>

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<sup>5</sup> Similarly here, the only "fact" issue identified by Appellants is their legal argument that the MFLSA requires employers to provide bright-line 30-minute meal breaks and to pay employees for a full 30 minutes if the meal break is even one second less than 30 minutes. App. Br. at 44-45. Jennie-O did include the amount of unpaid work time alleged by the plaintiffs to have occurred during their meal breaks in demonstrating the absence of any overtime damages under Minn. R. 5200.0170's workweek rule. (R.App. 192-95.)

**A. The workweek rule requires a comparison of total time worked in a week with total pay for the week to determine compliance with the MFLSA overtime statute.**

Rule 5200.0170 conclusively establishes the workweek rule as the proper means for determining compliance with the MFLSA overtime statute:

**5200.0170 WORKWEEK.**

Subpart 1. **Definition.** 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 is true whether the employee is paid on an hourly, piecework, commission, or any other basis.

Under Rule 5200.0170, the Court compares the total amount the employee should have been paid for a workweek under Minnesota's 48-hour overtime statute to the amount actually paid for that workweek. If an employee receives a sufficient amount of total compensation in a given workweek to ensure that he or she received the appropriate overtime rate for any overtime worked, there can be no violation of the overtime statute.<sup>6</sup>

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<sup>6</sup> As an illustration, assume a claimant earned an hourly wage of \$10.43 per hour (the plaintiffs' average hourly wage, A. 36); could demonstrate that he had 2.158 hours of unpaid donning and doffing in a workweek (which was the highest estimate of alleged donning and doffing time identified by Appellants' experts for *any* named plaintiff, App. 26); and had already worked 48 hours in that workweek. Under this hypothetical, the employee undisputedly would have been paid at least \$542.36 for that workweek because Jennie-O pays overtime wage rates after 40 hours: ( $\$10.43$  regular rate of pay x 40 hours =  $\$417.20$ ) + ( $\$10.43$  x 1.5 x 8 overtime hours =  $\$125.16$ ) =  $\$542.36$ . Minn. Stat. § 177.25, however, only requires employers to pay overtime for compensable time over 48 hours in a workweek. Thus, even if this claimant could establish that 2.158 hours of unpaid donning and doffing was compensable, Jennie-O only would be required to pay this employee  $\$534.40$  under the MFLSA: ( $\$10.43$  regular rate of pay x 48 hours =  $\$500.64$ ) + ( $\$10.43$  x 1.5 x

Stated differently, to determine compliance with the minimum wage or overtime compensation requirements, the workweek rule does not require an examination of what was paid, if anything, for individual increments of time (or pieces; or sales) during a week; it is required total pay for the workweek that is the yardstick against which actual pay is measured.

**B. Appellants' concession that Rule 5200.0170 should be interpreted in the manner adopted by the district court for minimum wage claims supports the same interpretation for overtime claims.**

On its face, the workweek rule applies with equal force to both Appellants' minimum wage claim and their overtime claim: "The period of time used for determining compliance with the *minimum wage rate [and] overtime compensation ... is the workweek.*" Minn. R. 5200.0170 (emphasis added). Based on this language, the district court applied the same workweek rule under Rule 5200.0170 in precisely the same manner in dismissing both Appellants' minimum wage claim and their overtime claim. (A. 90-94.) Yet Appellants did not appeal the dismissal of their minimum wage claim, and they offer no reason why the same language, in the same rule, which expressly applies in both contexts, would mean one thing for the minimum wage and something

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2.158 overtime hours = \$33.76) = \$534.40. Under the workweek rule, because the total amount actually paid to the employee for the workweek (\$542.36) was greater than the amount required to be paid by the MFLSA (\$534.40), there is no overtime violation. When this calculation was applied to the facts as alleged by the plaintiffs – including total pre-shift and post-shift donning and doffing as calculated by Appellants' experts and the amount of donning and doffing time during meal breaks alleged by the plaintiffs during their depositions – none of the plaintiffs had any workweek in which they received less than the required amount of pay.

entirely different for overtime compensation. Cf. Mertens v. Hewitt Assocs., 508 U.S. 248, 260 (1993) (“language used in one portion of a statute should be deemed to have the same meaning as the same language used elsewhere in the statute”) (citation omitted).

**C. The full text of Minn. Rule 5200.0170 confirms the required application of the workweek rule.**

The applicability of the workweek rule is apparent on the face of the first sentence of Rule 5200.0170, but it also is confirmed by the entirety of the Rule’s language, which makes clear that the workweek rule applies “whether the employee is paid on an hourly, piecework, commission, or any other basis.” Minn. Rule 5200.0170, subp. 1.

Appellants’ argument also could be made in the context of a piecework or commission situation (as in, “I wasn’t paid anything at all for *that* piece ...”), but under Rule 5200.0170, such arguments would necessarily fail to raise an overtime claim as long as the employee received enough total compensation in the workweek to ensure adequate compensation for total hours worked, including any overtime hours. Indeed, an overtime analysis for piecework and commission employees inherently *requires* a workweek analysis. Because such employees are not paid an hourly wage, employers must use the workweek analysis to convert their per piece or per sale income into an hourly wage that can be used to ensure overtime compliance. And Minn. Rule 5200.0170 makes clear that the same workweek rule applies to employees paid on a piecework, sale, *and hourly* basis. Appellants’ interpretation of the overtime calculation cannot be squared with this regulatory language. Thus, it should be rejected. See Duluth Firemen’s Relief Ass’n, 361 N.W.2d at 385.

**D. Appellants' arguments ignoring the plain meaning of Rule 5200.0170 should be rejected.**

Notwithstanding the plain language of Rule 5200.0170, Appellants assert that application of the workweek rule would result in some work hours being "ignored." This argument begs the question of how overtime pay must be calculated under the MFLSA. Rule 5200.0170 provides the answer by requiring application of the workweek rule. When the workweek rule is applied, no work time is "ignored." Instead, Jennie-O actually *overpays* overtime compensation under the MFLSA because it pays overtime rates after 40 hours in a workweek, resulting in more total compensation than the statute requires.

Appellants also argue that application of the workweek rule is improper because it "ignores" Jennie-O's FLSA and (alleged) contractual obligations to pay overtime after 40 hours in a workweek. Appellants never pled a FLSA cause of action, and their contract claims fail as a matter of law. Regardless, Appellants' argument is a *non sequitur*. The question before this Court on Appellants' MFLSA overtime claim is what the MFLSA requires, not what the FLSA or alleged employment contracts require. The MFLSA requires application of the workweek rule in the context of Minnesota's 48 hour workweek. Appellants identify no authority to the contrary.<sup>7</sup>

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<sup>7</sup> Appellants' cursory argument that this Court rejected the workweek rule in Bot v. Residential Servs., Inc., 1997 WL 328029 (Minn. App. June 17, 1997), is without merit. The Bot court did not consider minimum wage or overtime issues under the MFLSA; it considered a *contract* claim for "sleep time." Id. at \*6. The Court did not analyze, much less reject, the workweek rule in Rule 5200.0170.

Finally, Appellants assert that U.S. v. Klinghoffer Bros. Realty Corp. precludes application of the workweek rule. 285 F.2d 487, 490-91 (2nd Cir. 1960). Klinghoffer did not address, much less reject, the workweek rule for overtime claims. Id. Klinghoffer involved an interpretation of the federal FLSA. The Klinghoffer court adopted the workweek rule to determine compliance with the minimum wage, and held there was no minimum wage violation. Id. The court held that there was an overtime violation, but not because it rejected application of the workweek rule in that context. Rather, the court observed that the employer did not pay *any* overtime compensation. Id. The court had no need to address the workweek rule in the overtime context, much less under Minnesota law, because there was no *overpayment* (as there is here) of overtime compensation.

**V. The district court correctly denied Appellants' motion for partial summary judgment.**

If this Court affirms summary judgment on Appellants' MFLSA overtime claim, it need not consider Appellants' partial summary judgment motion. If this Court considers Appellants' motion, however, it should affirm the district court's order denying it because Jennie-O is not liable for alleged MFLSA overtime violations as a matter of law.

**A. Defining "work" is not a proper basis for summary judgment.**

Appellants assert that the meaning of "work" is a question of law, making the question of MFLSA overtime liability ripe for summary judgment. But to prove liability under Minn. Stat. § 177.25 for any line employee, Appellants would have to prove, at a minimum, that: (1) all donning and doffing activities are compensable; (2) the employee

engaged in *unpaid* but compensable work; (3) the amount of unpaid work was more than *de minimis*; (4) the alleged unpaid work caused the employee to work more than 48 hours per workweek; and (5) the employee was inadequately paid under Minnesota's workweek rule.

Defining "hours worked" would resolve only the first of these elements; it would not establish liability. Thus, Appellants' motion sought an improper advisory opinion. See, e.g., Gen. Refractories Co. v. Travelers Ins. Co., 1998 WL 961380, at \*5-\*6 (E.D. Pa.1998); see also Emme v. C.O.M.B., Inc., 418 N.W.2d 176, 179 (Minn. 1988); Willie v. Independent School Dist. No. 709, 231 N.W.2d 272, 274 (Minn. 1975).

**B. Requirements of due process preclude judgment "as to liability."**

At trial, even if a putative claimant could set forth *prima facie* evidence of unpaid overtime, Jennie-O would be entitled to raise individual defenses. For example, Jennie-O would offer evidence that the claimant was paid for donning and doffing, or that the amount of time was *de minimis*, or that the claimant did not actually work more than 48 hours in particular workweeks. Granting Appellants' motion "as to liability" would deny Jennie-O its basic due process rights to raise such defenses. See, e.g., Lindsey v. Normet, 405 U.S. 56, 66 (1972) (due process requires opportunity to present defenses). As set forth in the Cross-Appeal section of this brief, Jennie-O presented extensive, compelling, and largely un rebutted evidence that, though not required, Jennie-O did in fact pay for most donning and doffing activities.

**C. Appellants' motion would fail under the *de minimis* rule.**

Even were this Court to consider the merits of Appellants' argument, as noted above, Appellants cite no authority holding that donning and doffing is necessarily compensable under the MFLSA. Indeed, the district court properly held that Appellants' motion failed under the *de minimis* rule. (A. 69-70.) Courts have long held that employers need not pay for work time that is difficult to capture and amounts to 10 minutes per day or less. See E.I. du Pont De Nemours & Co. v. Harrup, 227 F.2d 133, 135-36 (4th Cir. 1955); Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir.1984); Carlsen v. U.S., 521 F.3d 1371, 1377-78 (Fed. Cir. 2008). Indeed, many courts have held that similar donning and doffing is *de minimis*. See supra. Appellants bear the burden to demonstrate that their unpaid donning and doffing time, if any, is more than *de minimis*. See Mt. Clemens, 328 U.S. at 686-87 (plaintiff "has the burden of proving that he performed work for which he was not properly compensated").<sup>8</sup>

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<sup>8</sup> Early in the case, Appellants argued that there is no *de minimis* rule under Minnesota law, but they subsequently abandoned that argument in the district court and do not raise it on appeal. The *de minimis* rule has been an established part of wage and hour law since Mt. Clemens, 328 U.S. at 692. The rule did not arise from specific federal statutory language, but rather from the Supreme Court's recognition that "[t]he workweek contemplated by [the FLSA] must be computed in light of the realities of the industrial world." Id. Nothing in the MFLSA suggests that the Minnesota legislature intended to eliminate the well-established *de minimis* rule. Rather, the *de minimis* rule was an "existing" compensation standard "safeguarded" under the MFLSA. See Minn. Stat. § 177.22. The *de minimis* rule also was one of the "well-accepted concepts" that the MNDOLI incorporated into its MFLSA regulations. (R.A. 22.)

Appellants offered no evidence that they were not paid for donning and doffing prior to June 2007, much less that they had more than 10 minutes of unpaid time per day. (App. 2, 16; R.App. 473, 475, 564-65, 569, 575-76, 594, 681, 686-87, 699-701, 708, 733-34.) Similarly, Appellants' expert opined that after June 2007, Jennie-O employees spent an average of 8.7 minutes on start-of-shift and end-of-shift donning and doffing. (App. 11.) Although Plaintiffs have no evidence that all of that time was unpaid for any employee, even the total time is *de minimis*. Appellants also offered no evidence that it would be feasible for Jennie-O to specifically record donning and doffing time, given Jennie-O's practice to allow workers to enter and exit the plants at their discretion and don and doff apparel while eating breakfast or snacks, drinking coffee or soda, or relaxing and socializing with their coworkers. (R.App. 469, 488-89, 527-28, 566-67, 693-94, 709-10, 736.)

**VI. The district court properly disregarded Appellants' unpled recordkeeping "claim."**

Appellants never pled a cause of action alleging a violation of the MFLSA's recordkeeping statute. (App. 470-524; R.App. 1-99.) Thus, on July 30, 2007, the district court correctly informed Appellants that "*only* Count II [of the complaint] regarding Defendants' alleged overtime violation remains for trial." (A. 101 (emphasis added).) Despite the court's unambiguous statement that no other claim remained (which it later reiterated, A. 72), Appellants made no attempt to amend their complaint to add a recordkeeping claim, thereby waiving any right to seek amendment. Indeed, even when Appellants did seek amendment, they added only a claim for punitive damages, again

leaving out any recordkeeping claim. Appellants' unpled "claim" is not properly before this Court. See, e.g., Coon v. Ga. Pacific Corp., 829 F.2d 1563, 1571 (11th Cir. 1987); Roeder v. Am. Postal Workers Union, AFL-CIO, 180 F.3d 733, 737 n.4 (6th Cir. 1999).

Appellants' reliance on Milner is misplaced. In Milner, the district court permitted an unpled recordkeeping claim to proceed, and the Minnesota Supreme Court held that the district court was "within its authority" to do so. 748 N.W.2d at 619. The Court did not hold that allowing an unpled claim to proceed was required, id., and the district court in this case repeatedly made clear that it was not allowing an unpled claim. (A. 72, 101.) And here, unlike Milner, Appellants were expressly on notice that the district court (correctly) interpreted their Complaint *not* to include a recordkeeping claim; had ample opportunity to amend their Complaint to add such a claim; and failed (and thereby waived their right) to do so. Appellants identify no error in the district court exercising that discretion under these circumstances.<sup>9</sup>

Even if Appellants' unpled recordkeeping claim was before the district court, however, it was properly dismissed. Appellants do not dispute that Jennie-O accurately recorded employees' paid time, swipe times, and (if applicable) scheduled time. (R.App. 995, 1393.) Rather, Appellants argue that Jennie-O's records were deficient because they

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<sup>9</sup> Appellants' reference to Mt. Clemens is inapposite. Mt. Clemens did not involve a recordkeeping claim, much less hold that an employer was liable for not keeping accurate records. Mt. Clemens, 328 U.S. at 687-88. Mt. Clemens simply held that if a plaintiff can prove liability for unpaid work *and* demonstrate a reasonable estimate of unpaid time for a damages analysis, the burden shifts to the employer to rebut that estimate (for damages purposes only), in the absence of accurate records. Id.

were insufficiently detailed with respect to donning and doffing time.<sup>10</sup> App. Br. at 46. That argument merely attempts to “bootstrap” a recordkeeping claim to their substantive overtime claim. That is improper. See, e.g., LePage v. Blue Cross & Blue Shield of Minn., 2008 WL 2570815, at \*4-\*5 (D. Minn. June 25, 2008) (“Plaintiffs have alleged that Blue Cross failed to maintain records for certain time before and after their scheduled shift. . . . The Court fails to understand how this translates into a record-keeping violation. In the end, Plaintiffs are attempting to take their substantive claim that they were not paid overtime, and bootstrap a record-keeping violation into their Complaint.”).

**VII. Jennie-O did not waive its attorney client privilege.**

**A. Notwithstanding extensive efforts to protect the privilege, Jennie-O mistakenly produced two pages of privileged documents out of hundreds of thousands of non-privileged documents produced.**

In preparing to respond to plaintiffs’ document requests during discovery, Jennie-O’s outside counsel suspected that numerous documents had been incorrectly designated as “privileged” by Jennie-O personnel. (R.App. 1332-33.) Consequently, counsel undertook a careful review of hundreds of documents marked as privileged to identify any documents that should, in good faith, be produced. This process spanned weeks and involved dozens of interviews with Jennie-O personnel and an individualized review of documents to determine the validity of any privilege claim. (*Id.*) Counsel eventually determined that numerous documents marked as “privileged” had not been

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<sup>10</sup> This fact further distinguishes Milner, in which the employer kept *no* records of hours worked. See Milner, 748 N.W.2d at 612.

prepared for counsel for the purpose of seeking legal advice.<sup>11</sup> (Id.) Consequently, Jennie-O produced all such documents to Appellants, along with hundreds of thousands of other non-privileged documents. (Id.) Among the hundreds of pages of documents (many of which were duplicates) mistakenly labeled as “privileged,” Jennie-O produced two single-page documents that were, in fact, privileged. These documents reflected an internal analysis of donning and doffing issues that had been undertaken at the request of Jennie-O’s in-house counsel, and were prepared for the express purpose of facilitating communications with counsel. (R.App. 1333.) The documents were produced inadvertently, only because of their similarity in appearance to documents determined to be non-privileged through this review process. (Id.)

When Jennie-O discovered that the documents were privileged during the deposition of David Juhlke, who had prepared the documents at the request of in-house counsel, outside counsel immediately identified the documents as privileged and took steps to secure their return.

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<sup>11</sup> This mislabeling was the result of a simple mistake. Jennie-O’s vice-president of human resources, David Juhlke, instructed an industrial engineer, Randy Sather, that any written communications with counsel, as well as any documents prepared for counsel, should be designated as privileged. (R.App 1332.) Sather interpreted Juhlke’s instruction to mean that all documents – including pre-existing documents – should be marked as attorney-client privileged if a copy was sent to counsel. (R.App. 1332-33.) Numerous non-privileged documents were thus incorrectly marked as “privileged.”

**B. Jennie-O's inadvertent production did not waive the privilege.**

Appellants do not contend that the disputed documents in this case are not privileged. Rather, Appellants assert that Jennie-O waived its privilege by inadvertently producing them. But the attorney-client privilege is not automatically waived as a consequence of inadvertent disclosure. Under the so-called “lenient” approach, an inadvertent disclosure by itself never waives the privilege. See, e.g., Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996). As set forth above, the disputed documents were produced without knowledge of their privileged nature, which precludes a waiver.

Jennie-O also did not waive the privilege under the “middle of the road” test. See Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 596-97 (D. Minn. 1999). Under that test, a court “accounts for the errors that inevitably occur in modern, document-intensive litigation, but treats carelessness with privileged material as an indication of waiver.” Gray, 86 F.3d at 1484.

Far from being “careless,” Jennie-O took careful steps to properly produce documents under confusing circumstances fostered by an employee’s misunderstanding of the privilege. The two pages in question were produced only because of their similarity in appearance to documents determined to be non-privileged through Jennie-O’s extensive review process. Under these circumstances, the fact that two pages were inadvertently disclosed – out of hundreds of thousands of pages produced – is not evidence of carelessness.

Further, the extent of disclosure was limited by Jennie-O’s prompt remedial efforts. When considering an instance of inadvertent disclosure, “[t]he relevant

correction period begins when the party realizes that an error has been made.” In re Copper Market Antitrust Litigation, 200 F.R.D. 213, 222 (S.D.N.Y. 2001). Here, immediately upon learning that the documents had been incorrectly produced, during a deposition, Jennie-O took steps to secure their return, including two requests on the record during the deposition and a formal written request the following day. Mr. Juhlke, the author, refused to answer any questions about the documents. No other Jennie-O witness provided testimony about them.

Finally, the interests of justice would be served by preserving Jennie-O’s privilege. These documents were not only prepared at the request of counsel to facilitate legal advice, they were prepared after the litigation had commenced and reflect preparation of Jennie-O’s defense. Permitting Appellants to use these documents would not only violate Jennie-O’s confidential relationship with counsel, but also its reasonable expectation that its defense preparation will not be used against it. See Copper Market, 200 F.R.D. at 223.

## CROSS-APPEAL

### **I. Standard of Review.**

With respect to the issues raised by Jennie-O’s related appeal, this Court reviews class certification decisions for abuse of discretion, see Whitaker 764 N.W.2d at 635, and an error of law, such as failure to follow the correct certification standard, is an abuse of discretion, see id. at 635-36. This Court reviews *de novo* the district court’s order granting Appellants’ motion for leave to amend to add a claim for punitive damages. See Swanlund v. Shimano Indus. Corp., Ltd., 459 N.W.2d 151, 154 (Minn. App. 1990). This

Court reviews the district court's decision denying Jennie-O's motion to strike Appellants' expert testimony for an abuse of discretion. Goeb v. Tharaldson, 615 N.W.2d 800, 815 (Minn. 2000).

**II. The district court abused its discretion by certifying, and then refusing to decertify, the overtime class.**

If this Court were to reverse the district court's order granting summary judgment on Appellants' overtime claim (and it should not), this Court should then review and reverse the district court's orders granting certification, and later denying decertification, of the overtime class.

Under Minnesota law, class certification is a two-step analysis, with the plaintiff bearing the burden of proof for all elements. First, the class must satisfy the requirements of Minn. R. Civ. P. 23.01: numerosity, commonality, typicality, and adequacy of representation; then, the action must come within one of the three categories of Rule 23.02. See Lewy 1990 Trust ex rel. Lewy v. Inv. Advisors, Inc., 650 N.W.2d 445, 451-52, 455 (Minn. App. 2002). If a lawsuit has been certified as a class action, the plaintiffs must demonstrate continued compliance with the requirements of Rule 23 or decertification of the class is appropriate. *See* Minn. R. Civ. P. 23.03(a)(3); see also Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982).

To determine the propriety of class certification, a court must undertake a rigorous analysis of the plaintiffs' class evidence. A court cannot assume that the plaintiffs' class allegations are true, but must consider whatever evidence is necessary to determine whether the plaintiffs satisfy their burden of proof. See Whitaker, 764 N.W.2d at 637.

Plaintiffs bear the burden to establish each of the Rule 23 elements by a preponderance of the evidence, in order to “bridge the gap” between their individual claims and class claims. *Id.* at 639. The Court must resolve all factual disputes relevant to a Rule 23 analysis, including disputes over the plaintiffs’ expert evidence. *Id.* at 637 (“[A] district court may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided....”).

**A. The district court did not apply the Whitaker standard.**

The district court failed to require Appellants to establish all elements of Rule 23 by a preponderance of the evidence. The district court also did not resolve the factual disputes relevant to the Rule 23 elements, including the parties’ disputes regarding the Appellants’ expert evidence. Although this may be understandable with respect to the district court’s original class order, because the district court considered class certification in this case almost two years before Whitaker was decided, it was error. *See Interstate Power Co., Inc. v. Noble County Bd. of Comm’rs*, 617 N.W.2d 566, 575 (Minn. 2000) (“[A]ppellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled on the case.”). It also was error for the district court to deny Jennie-O’s motion for decertification. Indeed, because the district court did not issue a memorandum opinion explaining how it complied with Whitaker’s requirements, this Court should hold that the district court abused its discretion in denying Jennie-O’s motion as a matter of law.

The district court's initial failure to apply the proper burden of proof is evident on the face of its class certification memorandum. Nowhere did the district court identify all of the evidence Jennie-O submitted against class certification, much less analyze the evidence and explain how Appellants' class evidence was stronger. With respect to commonality, for example, rather than requiring Appellants to "bridge the gap" between individual and class claims by demonstrating a "common practice" of nonpayment of overtime wages by a preponderance of the evidence, see Whitaker, 764 N.W.2d at 639, the district court relied on its finding that there were "common questions." (A. 108.) Whitaker expressly rejected such an analysis as insufficient to establish commonality. 764 N.W.2d at 640 ("This is precisely the standard that has been rejected by the federal courts of appeal.").

The district court also declined to resolve fact disputes regarding the parties' experts as those disputes related to the Rule 23 elements. For example, notwithstanding Jennie-O's evidence that Frank Martin's methodology was fundamentally flawed (R.App. 219-24), the district court relied on the fact that Martin had *asserted* that unpaid donning and doffing time could be determined from Jennie-O's records as support for its finding of commonality. (A. 107 ("Plaintiffs' expert, Frank B. Martin, has indicated that [unpaid donning and doffing] may be established using data derived from Defendants' KRONOS system.")) This would ultimately prove to be false. (App. 16; R.App. 204.) Regardless, in doing so, the district court not only declined to resolve the fact disputes directly relevant to the Rule 23 analysis, but also demonstrably failed to hold Appellants to their burden to establish commonality by a preponderance of the evidence. Indeed, nowhere

did the district court purport to weigh the evidence in order to determine that Appellants' class evidence was stronger than Jennie-O's evidence that class treatment was improper.

**B. Appellants' failure to produce the promised common evidence of unpaid donning and doffing precludes class certification.**

The record is clear that Appellants did not "bridge the gap" between individual and class claims.

**1. There were no uniform donning and doffing practices at Jennie-O, much less uniform nonpayment of donning and doffing time.**

Jennie-O employees have worn a wide variety of safety and sanitary apparel, based on the requirements of their particular jobs. Many employees wear only basic sanitary apparel (*e.g.*, hairnets, boots, bump caps, ear protection, and smocks), and do not wear any unique protective or sanitary apparel at all. (R.App. 743, 751-52, 763-64, 771-72, 787-88, 795-96, 806-07, 815, 844-45, 853-54, 862-63, 870-71, 927-28, 936-37, 953-55, 983-84, 1026-27, 1033-34.) Some employees use knives and must wear mesh gloves, arm guards and/or chest protectors, depending on their particular job. (R.App. 752, 763-64, 777, 787-88, 807, 825-26, 834, 854, 863, 880, 894, 902-03, 919-20, 945, 954-55, 963, 973, 1034, 1044.) Some employees wear plastic gloves or aprons to keep themselves clean. (R.App. 751, 776-77, 786-87, 795-96, 807, 814-15, 825, 833-34, 844-45, 879-80, 894, 919, 936-37, 954, 963, 972-73.) All told, employees may wear one of as many as 20 or more different combinations of apparel in a single plant, and multiple combinations of apparel even in a single department.

Washing and walking requirements also varied between (and within) different plants and departments. (R.App. 241, at n.7.) Further, employees' donning, doffing, walking, and washing requirements also changed significantly over time. Time clocks were moved or added, and locations where employees pick up or dispose of safety and/or sanitary apparel changed. (R.App. 242.) The apparel requirements in some departments changed. (Id.)

Even Appellants' own experts acknowledged these extensive variations. (Id. (“[T]here are clearly differences in donning and doffing between different jobs, both in terms of specific requirements and times.”).)

**2. The evidence demonstrates Jennie-O's payment for donning and doffing.**

Unlike donning and doffing cases brought against beef and pork processors under the federal FLSA, Jennie-O employees generally were not paid “line time,” or from the first piece of meat to the last piece of meat. Some employees were paid based on their individual swipe in and out times in Jennie-O's electronic “Kronos” timekeeping system. (R.App. 1000.) Other employees were paid based on “master” swipes (by a supervisor or co-worker), or according to a schedule. (R.App. 995-96.) Other employees had paid time begin one way (*e.g.*, master swipe) and end another way (*e.g.*, individual swipe). (R.App. 1001.) Even within a single department, individual employees performing different functions often were paid differently. For example, many departments had set-up and tear-down employees who were paid based on their individual swipe times, regardless how other employees were paid. (R.App. 802-03, 907-08, 980-81.)

**a. Supervisors instituted various pay practices prior to June 2007.**

Jennie-O is a conglomeration of four previously independent businesses: Jennie-O Foods, Inc., Jerome Foods, Inc., West Central Turkeys, Inc., and Heartland Foods Co. Even after joining into a single corporate organization in the late 1990s and early 2000s, however, each business followed its own legacy pay practices. (R.App. 723-25.) Prior to June 2007, these legacy practices included individual supervisors establishing different pay practices for donning and doffing for their own departments and shifts. (R.App. 513-14, 518-19.)

Supervisors' practices frequently included paid time for donning and doffing. Many employees who were paid based on their individual swipe times donned their work apparel after swiping in (on paid time) and most doffed their apparel before swiping out (also on paid time). (R.App. 748-49, 759-60, 774, 784, 792, 803, 807, 811-12, 835-36, 841-42, 845-46, 851-52, 860, 876, 889-90, 915-16, 924, 933, 941, 945, 949-50, 960, 964-65, 969, 981, 991, 1027, 1030-31, 1039.) Many supervisors with employees who were paid based on "master" swipes or schedules started paid time before employees began working on turkeys to give them paid time for donning, and ended paid time after employees doffed their apparel. (R.App. 744, 754-55, 765, 772, 788-89, 854-55, 859-60, 867, 872, 882, 890, 911-912, 928, 933, 937-38, 955-56, 980, 986, 1027-28, 1036, 1046, 1050.) Some employees also had "dwell time" – paid time at the beginning or end of a shift when turkey products are moving on the line, but the employee has no work to do – during which they could don or doff. (R.App. 778-79, 797-98, 802, 816-17, 836, 872,

883-84, 920-21, 946, 974-75.) Employees in the Faribault, West Central and Heartland plants also had paid time automatically added to their time records to compensate for donning and doffing. (R.App. 808, 810, 836, 839, 907-08, 925, 946-47, 965, 967.) Many supervisors also added extra time to their employees' rest and meal breaks for donning and doffing. (R.App. 747, 758, 766-67, 773, 781-82, 791-92, 810, 821-22, 849, 857-859, 864-66, 874-75, 914-15, 931-32, 939-40, 958-59, 967-68, 977, 979, 988-89, 1029, 1037-39, 1047-49.)

The plaintiffs never disputed the testimony of their supervisors explaining the supervisors' individual donning and doffing pay practices.<sup>12</sup> To the contrary, the plaintiffs either agreed with their supervisors or admitted that they did not know whether they engaged in any unpaid donning or doffing. (See, e.g., R.App. 734 (Winters Dep. at 19:15-17 ("Q. How do you know you're not getting paid for these [donning and doffing] tasks that you've described? A. I don't know.")), 473 (Brickweg Dep. at 70:4-11 ("Q. Do you know from what point in the morning you start to get paid? A. No, I don't. Q. Do you know at what point at the end of the day you stop getting paid? A. No, I

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<sup>12</sup> Even the documents cited by Appellants actually confirm Jennie-O's argument that there was no uniform practice of nonpayment and, in fact, many supervisors *did* implement practices which resulted in pay for donning and doffing. For example, Appellants cite to portions of a 2001 Pay Practices Audit, but fail to note that that the audit revealed a variety of pay practices under which many employees were paid for donning and doffing. (A. 136-38.) Other documents also confirmed that supervisors made paid time available for donning and doffing. (See R.App. 451-52.) Regardless, none of the documents identified by Appellants, all of which concerned practices circa 1999-2001, contradicts the supervisors' description of their practices during the time period relevant to this case, much less demonstrates a common practice of unpaid donning and doffing by a preponderance of the evidence.

don't.”), 708 (Ruiz Dep. at 51:15-16 (“We didn't know if we were being paid . . . .”)), 681 (Rios Dep. at 7:20-23 (“Q. Prior to discussing the issue with your attorney, had you had concerns about whether you were being paid for time spent putting on equipment? A. No, because I didn't know anything.”)); see also R.App. 475, 564-65, 569, 575-76, 699-701.)

**b. Line employees have been paid for most donning and doffing under the company-wide “swipe to swipe” pay methodology implemented in June 2007.**

In June 2007, Jennie-O unified its pay practices for the first time under a “swipe to swipe” methodology under which all line employees are paid from the second they swipe in at the time clock to the second they swipe out at the time clock. (R.App. 248.)

Jennie-O also reconfigured its departments so that employees swipe in before picking up and putting on required safety apparel (i.e., mesh gloves and/or chest protectors) or plastic sanitary apparel (i.e., plastics aprons, gloves, and/or sleeves), washing their hands, and walking to their workstations. (Id.) Likewise, employees doff their safety and sanitary apparel and wash up (if at all) before swiping out. (Id.) Those activities are paid. (Id.)

The only donning and doffing that may occur on unpaid time is the donning and doffing of generic apparel, such as rubber boots, hair nets, bump caps, and smocks, which courts routinely hold is not compensable. See, e.g., Gorman, 488 F.3d at 594; Alvarez, 339 F.3d at 903-05; Reich, 38 F.3d at 1126; Adams v. Claxton Poultry Farms, No. 607-CV-017, at 10 (S.D. Ga. Feb. 23, 2009) (R.App. 1116); Jenkins v. Harrison Poultry, Inc., No. 2:07-CV-0058-WCO, at 10-12 (N.D. Ga. July 29, 2008) (R.App. 1181-83); White v.

Tip Top Poultry, Inc., No. 4:07-CV-101-HLM, at 46-52 (N.D. Ga. Sept. 16, 2008) (R.App. 1263-69) (R&R adopted Oct. 7, 2008); Anderson, 147 F. Supp. 2d at 563; Pressley, 2001 WL 850017, at \*3.

**3. Appellants offered no evidence supporting their claim of widespread compensable, but unpaid, donning and doffing.**

In the face of the extensive evidence that Jennie-O paid for arguably compensable donning and doffing, Appellants assured the district court that their experts would prove the alleged fact of widespread unpaid donning and doffing. (A. 107.) The district court expressly relied on these promises in certifying the overtime class. (Id. (“Plaintiffs’ expert testimony reveals that a relatively simple methodology for calculating each line workers’ damages may be used.”); A. 111 (“Plaintiffs’ expert, Frank B. Martin, has testified that an ‘accurate and simple calculation of amount due can be done for each employee who would be entitled to damages.’).) But Appellants never provided the promised evidence.

Appellants advised the district court that their “time study” expert, Robert Radwin, would “determine the number of uncompensated ‘hours worked’” on a daily basis. (R.App. 249.) But Radwin admitted that he made no effort whatsoever to identify, much less measure, unpaid donning and doffing time. (App. 2 (“My study was limited to ascertaining the time spent by employees in donning and doffing activities....”); see also R.App. 593 (“[I]f you’re asking me if my study as it sits in its entirety estimates the amount of uncompensated time, then I would say it doesn’t ....”), 594 (“[M]y study doesn’t consider time specifically that is paid or unpaid ....”), 595 (“I don’t specifically

calculate time as paid or unpaid.”.) Radwin *assumed* that all donning and doffing was unpaid because Appellants’ counsel told him to do so. (R.App. 580-82, 652, 655.)

Appellants also advised the district court that their statistician, Frank Martin, would be able to determine class membership and calculate damages for every class member. (A. 107.) But Martin also undertook no investigation to determine whether any donning or doffing time was unpaid. (App. 16 (“This Report is not directed at proving that Jennie-O failed to compensate employees for any given amount of time. Instead, it assumes that Plaintiffs are able to prove uncompensated time in the amounts shown in the Radwin Report . . . .”); see also R.App. 542-46, 556-57.) He disclaimed any methodology to determine what, if any, donning time was unpaid for any line employees, as would be necessary to determine which employees are class members, much less calculate damages for alleged unpaid donning and doffing for each such person. (R.App. 546-47.) He also followed Appellants’ counsel’s directive to assume that donning and doffing was unpaid. (R.App. 546-47, 551.)<sup>13</sup>

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<sup>13</sup> In addition to precluding proof of a “common practice” of unpaid donning and doffing under Whitaker, Appellants’ experts’ mere assumption that donning and doffing was unpaid was not a reliable foundation for their opinions purporting to calculate unpaid time (Radwin) or calculate damages (Martin). See Goeb, 615 N.W.2d at 814-15. Indeed, it makes their opinions irrelevant to the main fact issue in the case. Minn. R. Evid. 402. Permitting Appellants to hide their speculation about alleged unpaid donning and doffing under the “cloak of an expert” also would be extremely misleading and prejudicial to Jennie-O. See Minn. R. Evid. 403; Welch v. Eli Lilly & Co., 2009 WL 700199, at \*10 (S.D. Ind. Mar. 16, 2009). For these and other reasons presented to the district court (R.App. 196), the court abused its discretion by denying Jennie-O’s motion to strike.

**4. Appellants cannot establish commonality.**

Appellants' failure to provide the promised common evidence of unpaid donning and doffing precludes them from establishing commonality. They cannot demonstrate by a preponderance of the evidence that all Jennie-O employees shared a common experience of nonpayment for allegedly compensable donning and doffing, that is, they cannot establish liability on a class wide basis. Indeed, Appellants admit their deficiency when they concede that nearly a quarter of Jennie-O's line workers have no claims. App. Br. at 45. On this record, commonality is absent. See, e.g., Whitaker, 764 N.W.2d at 639, Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228, 1235-36 (11th Cir. 2000) (“[S]erious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts.”) (citation omitted).

**5. The named plaintiffs are not typical.**

“The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.” Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998). The named plaintiffs worked in only a tiny fraction of Jennie-O's dozens of departments. These individuals testified that they did not know whether they donned and doffed on unpaid time and, to the contrary, Jennie-O presented evidence of paid donning and doffing under each named plaintiff's supervisor. (See generally R.App. 741-991, 1025-1051.) There is no evidence that Appellants would be able to advance the overtime claims (if any) of other, completely dissimilar employees,

from different plants and departments, based on the individualized evidence regarding payment for donning and doffing and weekly hours worked applicable to each one.

**6. Appellants cannot demonstrate predominance.**

Rule 23.01(c) requires Plaintiffs to show that common issues predominate; that is, they must show that “the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member’s individual position.” Lewy, 650 N.W.2d at 455. “If, after common issues are resolved, presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury, then common issues do not predominate.” Sw. Refining Corp. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000).

Here, a jury would have to answer a host of individualized questions for every putative claimant, just to determine whether Jennie-O has any liability for alleged uncompensated overtime. First, a jury would have to determine how much time each individual employee spent on his or her required donning, doffing, washing, and waiting activities – at the start of shift, end of shift, and in connection with meal breaks – based on the parties’ competing evidence as to each person. Then the jury would have to determine how much, if any, time was unpaid, in light of individual supervisor’s pay practices prior to June 2007 and Jennie-O’s pay practices after June 2007. That determination itself depends on numerous individualized factors, including (1) the pay methodology used for the employee at various points in time; (2) the duration of any grace period provided by each supervisor, (3) any “dwell time” available to employees, and (4) whether the employee had extra paid time added for donning and doffing

activities. Then, for any employees who engaged in some donning or doffing on unpaid time, the jury would have to further determine whether that employee had the opportunity to don on paid time, but chose not to do so. The jury then would have to determine if the amount of alleged unpaid time was more than *de minimis*. Last, but not least, the jury would have to determine whether the amount of unpaid donning and doffing time (if not *de minimis*) caused that employee to work workweeks in excess of 48 hours (and if so, how many such workweeks and the amount of time in excess of 48 hours in each week); and whether the employee had already received sufficient overtime compensation for such time, in light of Jennie-O's practice of paying overtime after 40 hours in a workweek, rather than 48 hours under Minnesota law. Specific answers to each question, for each employee, for each pay period are necessary just to make the basic liability determinations in this case.

These are overwhelming, determinative questions, and answering them would require analysis of the testimony of each employee; his or her supervisor, plant manager and co-workers; and any documents reflecting the experience of employees working in that particular plant, department and position. Thus, the vast majority of a "class" trial would be spent resolving dozens of employee-specific questions necessary to determine liability for each of the thousands of putative claimants alleged by Appellants.

**7. A class trial would not be the superior method of resolving Appellants' claims.**

Appellants also must demonstrate that a class trial would be "superior to other available methods for the fair and efficient adjudication of the controversy." Minn. R.

Civ. P. 23.02(c). Because Appellants failed to produce common evidence of alleged unpaid donning and doffing, any trial in this matter would necessarily turn on highly individualized inquiries. Accordingly, they fail to satisfy the superiority requirement. See Burkhart-Deal v. Citifinancial, Inc., 2010 WL 457122, at \*4 (W.D. Pa. Feb. 4, 2010) (“Where common proof is not available, thus requiring individualized ‘mini-trials’ courts have found that the ‘staggering problems of logistics thus created’ make the case unmanageable as a class action.”) (citation omitted).

**III. The district court erred in permitting Appellants to add a claim for punitive damages.**

**A. Appellants failed to present clear and convincing evidence that Jennie-O violated the MFLSA overtime statute.**

The district court eventually recognized that Appellants had *no* evidence of unpaid overtime under Minn. Stat. § 177.25 and Minn. Rule 5200.0170. Before it came to that recognition, however, it permitted Appellants to add a claim for punitive damages based on their MFLSA overtime claim. That was necessarily error: Absent even *prima facie* evidence of an overtime violation, Appellants could not demonstrate clear and convincing evidence that Jennie-O deliberately disregarded their rights to MFLSA overtime pay, as required to be allowed to seek punitive damages. See Minn. Stat. § 549.20; State Farm v. Campbell, 538 U.S. 408, 422-23 (2003) (punitive damages can only be awarded “for the conduct that harmed the plaintiff”).

Even if the district court had erred in dismissing Appellants’ overtime claim (and it did not), there is no basis to hold that Jennie-O deliberately disregarded Appellants’ MFLSA overtime rights by paying overtime wages in compliance with the application of

the workweek rule adopted by the district court. See, e.g., Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 69-70 (2007) (“While we disagree with [the company’s] analysis, we recognize that its reading has a foundation in the statutory text, and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in [the company’s] favor.”). Short of this Court holding that the district court itself “deliberately disregarded” Appellants’ MFLSA overtime rights in dismissing Count II of their complaint, Jennie-O’s practice of paying overtime in reliance on Minn. Rule 5200.0170’s workweek rule, in precisely the manner the district court ruled was required by Minnesota law, cannot be considered a deliberate disregard of Appellants’ MFLSA rights.

**B. Appellants did not offer any clear and convincing evidence that Jennie-O deliberately disregarded *any* MFLSA rights.**

Appellants assert that their motion to amend was properly granted because they allege that Jennie-O had deliberately disregarded their rights to be paid for “work,” as they interpret that term. That argument is untenable – Appellants’ burden was to establish deliberate disregard of their MFLSA overtime rights. Even if the more abstract question regarding the meaning of “work” was properly before the district court, however, the district court abused its discretion because Appellants offered no clear and convincing evidence that Jennie-O deliberately disregarded any rights under the Minnesota FLA.

**1. Jennie-O's decision makers carefully considered the state of the law and determined that donning and doffing was not compensable.**

Far from willfully violating the law, Jennie-O's decision-makers testified that they carefully considered the case law and reasonably believed that the Company was in compliance with the prevailing law. Jennie-O's vice president of human resources personally read relevant donning and doffing cases and testified that, "[f]rom everything we've read based on court cases that have tried to define what is compensable under donning and doffing, it appeared to us that our practices were similar with other companies who had not been found guilty of any violation." (R.App. 521.) Likewise, Jennie-O's president testified "it was my clear understanding at the time that legally we were not required to pay [for donning and doffing]." (R.App. 484.) Appellants offered no evidence contradicting this testimony.

Jennie-O's carefully considered interpretation of the law as not requiring payment for donning and doffing was correct. But even if Jennie-O's executives had been wrong about the compensability of donning and doffing (and they were not), a misjudgment about legal requirements is not "deliberate disregard" of such requirements.<sup>14</sup> See, e.g., Burr, 551 U.S. at 70; Hernandez-Tirado v. Artau, 874 F.2d 866, 870 (1st Cir. 1989)

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<sup>14</sup> To the extent Appellants cite cases holding that donning and doffing is compensable in some circumstances, the cases relied upon by Appellants were federal FLSA cases, from other jurisdictions, decided after this lawsuit was commenced. Jennie-O cannot be said to have deliberately disregarded cases that had not even been decided when it was making its decisions concerning donning and doffing.

(holding that a court should not permit a defendant to be punished for conduct that was not “obviously wrongful” at the time it occurred).

Indeed, in cases where an alleged right is unsettled, courts reject the imposition of punitive damages as a matter of law. See, e.g., *Waits v. Frito-Lay, Inc.* 978 F.2d 1093, 1104 (9th Cir. 1992) (“[W]here an issue is one of first impression, or where a right has not been clearly established, punitive damages are generally unavailable”); *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285, 291 (7th Cir. 1985); *In re First Alliance Mortgage Co.*, 2003 U.S. Dist. LEXIS 25925, at \*36 (C.D. Cal. June 16, 2003); cf. *Lewis v. Equitable Life Assur. Soc.*, 389 N.W.2d 876, 891-92 (Minn. 1986). That rationale certainly applies here, where the weight of case law has held for years that donning and doffing activities like those at issue in this case are not compensable. See supra at 18-19. Given that case law, and the absence of any prior decision by a Minnesota court that the MFLSA required compensation for donning and doffing, there was no basis for the district court to hold that Jennie-O’s pay practices risked a high probability of injury, much less that Jennie-O deliberately disregarded such a risk.

## **2. Appellants misrepresent Jennie-O’s documents.**

Appellants cite several Jennie-O documents, claiming they are evidence of deliberate wrongdoing by Jennie-O. Appellants mischaracterize the nature and content of those documents.<sup>15</sup>

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<sup>15</sup> Many of the documents cited by Appellants are more than a decade old, prepared long before the time period at issue in this case and for just one of the companies that today

Significantly, most of the documents cited by Appellants reflect Jennie-O's efforts to comply with the requirements of the *federal* FLSA, not the *Minnesota* FLSA. On the whole, those documents reflect that Jennie-O was in compliance with the federal FLSA. (A. 139-141.) Regardless, *none* of the documents cited by Appellants even mention Jennie-O's obligations to pay overtime under the MFLSA. Appellants never brought a claim under the federal FLSA, and statements about that statutory scheme are not relevant evidence, much less clear and convincing evidence that Jennie-O deliberately disregarded any employees' rights under the separate *Minnesota* FLSA overtime statute.

In particular, Appellants place great emphasis on documents from 1999-2001 in which Pat Solheid, then a (non-lawyer) human resources employee for Jerome Foods, attempted to make recommendations regarding donning and doffing pay practices based on her understanding of the U.S. Department of Labor's ("DOL") position concerning the federal FLSA. (A. 139-41.) Solheid unfortunately never sought legal advice and simply misinterpreted the FLSA (R.App. 161), as demonstrated by numerous cases subsequently holding that donning and doffing was not compensable. See, e.g., Anderson, 147 F. Supp. 2d at 563; Pressley, 2001 WL 850017, at \* 3. Equally significant, the DOL itself changed its opinion after Solheid drafted those documents, reversing its 1997 opinion

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comprise Jennie-O. (See, e.g., A. 139-41.) The documents also include drafts, of uncertain origin, that Jennie-O personnel uniformly described as inaccurate with respect to the Company's actual donning and doffing practices. (R.App. 480-82, 716-18.) Appellants also reference documents regarding proposed policy changes from 2003, but nothing in those documents indicates that employees were not already being paid in one way or another for donning and doffing. (A. 130-32.) In fact, most were. See supra; see generally R.App. 741-991, 1025-1051.

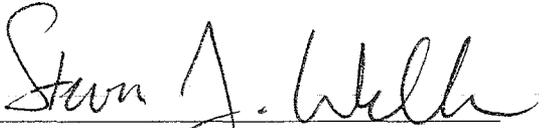
upon which Solheid had relied, and expressly holding that donning and doffing was *not* compensable under the FLSA. (R.App. 309.) In any event, Solheid's observations concerning the DOL's stance, in a then-uncertain legal landscape, do not establish a violation of the FLSA, much less the MFLSA, particularly where, as here, Jennie-O's decision makers did not rely on those opinions, but investigated the issue and drew their own conclusions that donning and doffing at Jennie-O was not compensable, based on the weight of judicial authority. (R.App. 484, 521.)

### CONCLUSION

For the reasons set forth above, the district court's orders granting summary judgment and its judgment dismissing Appellants' complaint with prejudice should be affirmed. If the district court's order dismissing Appellants' overtime claim is reversed, however, the district court's orders certifying an overtime class and permitting a claim for punitive damages should be reversed. If any of the district court's summary judgment orders are reversed, the district court's order denying Jennie-O's motion to strike the testimony of Appellants' experts should be reversed.

Dated: July 12, 2010

Dorsey & Whitney LLP

By 

Steven J. Wells #0163508

Ryan E. Mick #0311960

Glenn M. Salvo #0349008

Charles K. LaPlante #0389005

Suite 1500, 50 South Sixth Street

Minneapolis, MN 55402-1498

Telephone: (612) 340-2600

*Attorneys for Respondents/Cross-Appellants*

No. A10-419

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Eduardo Rios, Rodolfo Gutierrez, Evelia Mendoza, Jennifer Brickweg, Marsha Winter,  
Juan Guerra, Jr., Valeria Cabral, Margarita Ruiz, Todd E. Nord, Jeff Rudie, and John  
Patrick Kelly, 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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**CERTIFICATE OF COMPLIANCE WITH MINNESOTA RULE OF CIVIL  
APPELLATE PROCEDURE 131.01, SUBD. 5(D)(7)**

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The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 131.01, Subd. 5(d)(7), that this brief (exclusive of the table of contents, the table of authorities, any addendum, and any certificates of counsel), contains 16,371 words, as ascertained by using the word count feature of the Microsoft® Office Word 2003 word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the Rules by being in 13-point Times New Roman format.

Dated: July 12, 2010

Dorsey & Whitney LLP

By 

Steven J. Wells #0163508  
Ryan E. Mick #0311960  
Glenn M. Salvo #0349008  
Charles K. LaPlante #0389005  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
Telephone: (612) 340-2600

*Attorneys for Respondents/Cross-Appellants*