IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION – COUNCIL BLUFFS

AMERICA MAXWELL, on behalf of herself and all other similarly situated individuals,

Plaintiffs,

Case No. 1:08-cv-00017-JAJ-TJS

v.

TYSON FOODS, INC. d/b/a Tyson Fresh Meats, Inc.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF THE PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Plaintiff American Maxwell ("Plaintiff"), individually and on behalf of all FLSA Opt-In Plaintiffs and all Rule 23 Class Members who have not opted out of this litigation, and Defendant Tyson Foods, Inc. d/b/a Tyson Fresh Meats, Inc. ("Tyson"), file this joint motion respectfully seeking the Court's preliminary approval of the parties' Settlement Agreement to resolve this action. Through this Settlement Agreement, the parties resolve numerous claims, and in so doing, provide a substantial benefit to Plaintiff, the FLSA Opt-In Plaintiffs, and the Rule 23 Class Members.

In this action, Plaintiff alleged that Tyson violated the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA") and the Iowa Wage Payment Collection Law ("IWPCL"), by failing to pay its non-exempt, hourly production employees at its Council Bluffs, Iowa, case-ready meat-processing facility all of the wages and overtime compensation owed to them. *See* First Amended Complaint (Dkt. No. 63). The alleged uncompensated time included time that

employees spent preparing, donning, doffing, obtaining and sanitizing sanitary and safety equipment and gear; obtaining tools, equipment and supplies necessary for the performance of their work; and walking between work sites after the first compensable work activity and before the last compensable work activity. These unpaid work activities took place before and after paid time, and during the unpaid meal period. Tyson denies all liability in this action.

Following extensive arm's-length negotiations between counsel for the parties, Plaintiffs and Tyson have reached a proposed Settlement of this dispute which, pending Court approval, settles and resolves all claims in this action. The basic terms of the proposed Settlement, which are set forth in the Settlement Agreement attached hereto as Exhibit 1, are as follows:

1) There are two settlement classes: a) the 175 FLSA Opt-In Plaintiffs (the "Opt-In Plaintiffs" or "FLSA Class") who opted into the conditionally certified FLSA collective action; and b) all members of the 1,201-person certified Rule 23 class who did not opt out by the Court-ordered October 22, 2012 deadline (the parties are aware of only two opt-outs, Janet Cancino Lemus and Jesus M. Gonzales Marquez, who therefore are not included or affected by the Settlement Agreement, meaning that there are 1,199 Rule 23 Class Members (the "Rule 23 Class");
2) The Gross Settlement Amount is $950,000.00, plus the employer's share of FICA and FUTA on the wage portions of amounts distributed, which Tyson will pay in addition to the Gross Settlement Amount;
3) From the Gross Settlement Amount, a Net Settlement Amount of $262,500 will be distributed on a *pro rata* basis among all members of the Rule 23 Class who timely submit a Claim Form within 60 days of its mailing to them, with the amount being

determined through application of the damages model of Plaintiff's expert, Mr. Brian Hoffman, to the number of days that such class members worked in knife-using positions during the Rule 23 limitations period;[1]

4) From the Gross Settlement Amount another $8,477.12 will be distributed on a *pro rata* basis among the 76 members of the conditionally certified FLSA class who are not members of the Rule 23 Class (either because they never held knife-using positions or because they worked before the class limitations period). This amounts to 75 percent of the average recovery by knife users if they had worked the same number of days.

5) One-half of the individual settlement amount to be distributed to each Class Member and Opt-In Plaintiff will be defined as wages, and one-half of said individual net settlement amount will be defined as liquidated damages;

6) From the Gross Settlement Amount, Plaintiffs request that a service award of $5,000.00 be awarded to the Named Plaintiff, America Maxwell, for her participation in discovery and otherwise assisting Plaintiff's counsel, and Tyson does not oppose that request;

7) From the Gross Settlement Amount, up to $25,000 will be set aside for the cost of notice to the class and administration of the settlement by a Settlement Administrator appointed by the Court, and Plaintiff proposes Heffler, Radetich & Saitta, LLP ("Heffler" or the "Settlement Administrator"), an experienced settlement claims administrator, and Tyson does not oppose this appointment;

[1] Specifically, the parties agreed to apply "Assumption #4" of Mr. Hoffman's damages model set forth in his confidential Expert Report, limited to weeks in which Plaintiffs reached 40 hours or more.

8) The Settlement Administrator will then mail checks for the individual net settlement amounts to the Class Members, bearing agreed release language on the back of each check;

9) On the same date that Class Members are mailed their settlement checks, Plaintiff's counsel will be reimbursed from the Gross Settlement Amount for their actual out-of-pocket costs in this action, which as of the time of this filing exceed $340,000.00; and

10) Any residual monies from the Gross Settlement Amount will be paid to Plaintiff's counsel as a compromise amount for their fees in this action.

The parties respectfully submit that this joint motion for preliminary approval should be granted because the proposed Settlement falls well within the range of reasonableness and there are no grounds to doubt its fairness. The Settlement was negotiated by experienced class counsel after appropriate investigation of the claims and defenses. In addition, public policy favors the settlement of complex class and collective actions. Accordingly, the parties request that the Court: (1) issue an order granting preliminary approval of the proposed Settlement Agreement, in a form substantially similar to Exhibit D to the Settlement Agreement, which would give the Court's tentative approval to the settlement's substantive terms as well as approve the procedure for execution and administration of the settlement, and permit notice of the Settlement to be issued to the Class members;[2] (2) approve Heffler as the Settlement Administrator; (3) approve the mailing of the Notice of Settlement and Claim Form attached as Exhibits B and C to the Settlement Agreement; and (4) set a tentative date for a final fairness hearing so that the date may be included in the Notice of Settlement should any members

[2] The parties agree that if the Court is inclined to decide this motion on the papers, a preliminary approval hearing is not necessary.

of the Rule 23 Class or FLSA Class desire to appear and object.

I. PROCEDURAL HISTORY

A. Plaintiff's Claims And Tyson's Opposition To Them

Plaintiff filed this FLSA collective action and Rule 23 class action lawsuit against Tyson alleging that it required its production line workers at its Council Bluffs, Iowa, case-ready meat-processing facility to perform work while "off-the-clock." Plaintiff alleged that class members were required to spend time before their paid shifts began and after their paid shifts ended performing required work activities. This pre- and post-shift work included donning and doffing personal protective equipment ("PPE"), washing and sanitizing workers' PPE, tools, and persons, sharpening knives, and any walking and waiting time that was required and necessary to perform these and other work activities (collectively "PPE-related work" or "PPE-related activities"). *See* First Amended Complaint (Dkt. No. 63) at ¶¶ 11-13 and 15. Plaintiff alleged that Tyson also required Class members to perform PPE-related work during their unpaid meal periods, which resulted in those meal periods effectively being denied to class members. *See id*. at ¶ 14. Plaintiff alleged that as a result of failing to compensate them for this work time (in addition to the four minutes that Tyson already paid for pre- and post-shift activities), Tyson violated the FLSA, 29 U.S.C. §§ 201, *et seq*. *See id*. at ¶¶ 33-36. Plaintiff also alleged a violation of the Iowa Wage Payment Collection Law, Iowa Code § 91.A.1 *et seq*. *See id.* at ¶¶ 37-43. In addition, Plaintiff asserted claims, which were never certified, for breach of contract, *see id.* at ¶¶ 44-51, and unjust enrichment, *see id.* at ¶¶ 52-58.

Tyson denies all liability. Tyson contends that it is not liable for reasons that include, without limitation: (1) the activities on which Plaintiff based her claims are not "work" under the FLSA; (2) the non-meal period activities are "preliminary or postliminary" and the Portal-

to-Portal Act therefore precludes Plaintiff's claims based on those activities; (3) the activities are *de minimis*; (4) Plaintiff's claims related to incidental donning and doffing at their meal period are invalid because the class members obtain the predominant benefit of the meal period; (5) Tyson is entitled to the "good faith" defense to liability pursuant to 29 U.S.C. § 259 because it relied upon an interpretation or enforcement practice of the U.S. Department of Labor under which that regulatory agency had previously sued this same plant (along with others) when it was owned by IBP, Inc., and the DOL subsequently reached a negotiated settlement under which the plant was allowed to pay only 4 minutes a day for the challenged pre- and post-shift activities; and (6) Plaintiff cannot prove the existence of a contract to pay for any additional time, and she cannot pursue an unjust enrichment claim because she has adequate alternative remedies available to her (*e.g.*, her FLSA claim). Tyson contends, *inter alia*, that even if and to the extent that Plaintiff could show that any pre-shift or post-shift (or pre- and post-break) activities are potentially compensable under the FLSA or Iowa law, her claims are insufficient or precluded for reasons that include, without limitation: (1) Tyson has satisfied its obligations as to such activities by paying 4 minutes a day for the challenged pre- and post-shift activities, which Tyson contends is sufficient; and (2) Tyson did not act "willfully" (which would extend the limitations period for the FLSA Plaintiffs from two years to three years) and it acted in "good faith" as that term is used in 29 U.S.C. § 260, such as Tyson would not owe any liquidated damages. Tyson also denies that Plaintiff could present representative evidence sufficient for treatment of her claims collectively under 29 U.S.C. § 216(b) or Fed. R. Civ. P. 23. Tyson has vigorously defended its policies and practices, and absent settlement would continue to do so through trial and through appeal of any adverse judgment.

The parties have made their own independent assessments of their respective positions, with the advice of their counsel, and are fully aware of the legal and financial risks of further litigation.

B. Certification Of Plaintiff's Claims

On November 6, 2009, the Court conditionally certified Plaintiff's FLSA claims to proceed as a collective action pursuant to 29 U.S.C. § 216(b). *See* Dkt. No. 108. The Court certified the following FLSA class:

> All current and former hourly employees of Tyson's Council Bluffs facility who have been employed at any time from April 29, 2005 to the present, and who: (1) don, doff, wash, or sanitize any sanitary and protective clothing, equipment, and gear; and (2) maintain knives, steels and any other tools or equipment used in the production process.

A Court-approved notice was mailed to potential members of this class. Ultimately, 175 current or and former employees filed consent-to-join forms with the Court and therefore became FLSA Opt-In Plaintiffs.

On July 19, 2012, the Court certified Plaintiff's IWPCL claims to proceed as a class action pursuant to Fed. R. Civ. P. 23(b)(3). *See* Dkt. No. 287. The Court certified the following class:

> All current and former hourly production employees of Tyson's Council Bluffs facility who have been employed at any time from April 29, 2006 to the present and who (1) don, doff, wash, or sanitize any sanitary and protective clothing, equipment and/or gear; and (2) used or maintained knives or steels in the production process.

A Court-approved notice was mailed on or about August 23, 2012. The 60-day class notice period closed on October 22, 2012, and any Rule 23 Class member who did not return an "opt out" form by that date is conclusively a member of the Iowa state-law class. The parties are aware of only two opt-outs, Janet Cancino Lemus and Jesus M. Gonzales Marquez, who therefore are not included or affected by the proposed Settlement Agreement. Therefore, the

parties agree that there are 1,199 members of the Rule 23 Class, based on Tyson's payroll records showing who was assigned to knife-using jobs after April 29, 2006.

C. Discovery

The proposed Settlement is the result of protracted, arm's-length negotiations between counsel for the parties and is based on a comprehensive investigation of the facts and law, including the exchange of significant amounts of information. In the four-plus years that this lawsuit has been pending, the parties have conducted extensive discovery and engaged in extensive motion practice. Specifically, Plaintiff served over 89 document requests in her first set of requests dated March 24, 2010, and propounded 25 extensive interrogatories on the same date, which Tyson answered. Tyson produced over 392,000 pages of documents in response to the document requests, in addition to voluminous payroll and punch-clock data from April 29, 2006 until July 7, 2012 for *all* Rule 23 Class members, and similar data going back to July 17, 2005 for the FLSA Opt-In Plaintiffs. *See id.* Plaintiff and many Opt-In Plaintiffs also responded to Tyson's extensive document requests and interrogatories. *See id.* In addition, the parties have taken or defended 51 depositions of Plaintiffs, supervisors, corporate personnel, and expert witnesses, and additional depositions were scheduled to occur when the parties reached their settlement in principle. *See id.* The parties also conducted plant inspections and prepared expert time-study reports. *See id.* Furthermore, Plaintiff retained an expert witness to analyze volumes of payroll data to calculate alleged damages under various scenarios relating to the time estimates of Plaintiff's time-study expert. *See id.*

At the time the parties reached their settlement in principle on October 2, 2012, they had also made significant preparations for the trial scheduled to commence on November 7, 2012. This included the exchange of trial witness lists and trial exhibits lists.

As a result of this substantial discovery and trial-preparation efforts, the parties are fully aware of the legal risks associated with continuing to pursue litigation. *See id.*

D. Damages Analysis

Class Counsel based their damages analysis on: (a) the interviews they conducted with Plaintiff, Opt-In Plaintiffs and Class members throughout this litigation and testimony from other witnesses; (b) the information provided by Tyson regarding the FLSA Class and Rule 23 Class Members, including their pay records; and (c) the time-study report of Plaintiffs' expert, Dr. Robert G. Radwin. Using the time study of Dr. Radwin, and data produced by Tyson, Plaintiff's damages expert, Mr. Brian J. Hoffman, CPA, was able to generate a back-pay analysis. Specifically, Mr. Hoffman's estimate of unpaid wages for all of the alleged pre-shift and post-shift activities, excluding "waiting" time, which Plaintiff's Counsel told the Court during the class certification hearing would not be included as a component of damages at trial based upon the unique circumstances of this case, and excluding meal period donning and doffing, based upon this Court's recent summary judgment decision excluding such time in *Guyton v. Tyson Foods Inc.*, No. No. 3:07-cv-00088-JAJ (S.D. Iowa) (granting summary judgment to Tyson on meal period claim), resulted in an assumption of 13.768 unpaid minutes per day, and resulted in a calculation by Mr. Hoffman of back wages owed to the Rule 23 Class of $463,000 for weeks in which Rule 23 Class members worked over 40 hours when the assumed minutes were added to each day worked. This analysis provided a starting point for negotiations, and there were substantial further negotiations that took into account multiple factors.[3] The final settlement amount takes into account the substantial risks inherent in any collective or class action wage and hour case, as well as the specific defenses asserted by Tyson.

[3] The parties negotiated damages for the FLSA Class and Rule 23 Class members independently of their negotiation concerning Class Counsel's costs and attorneys' fees.

II. SUMMARY OF SETTLEMENT TERMS

The Settlement Agreement provides for a Gross Settlement Amount of $950,000.00 and defines how it will be apportioned among the Rule 23 Class Members, the FLSA Class Members who are not members of the Rule 23 Class, a Service Award to the Named Plaintiff, settlement administration costs, reimbursement of Class Counsel's out-of-pocket costs, and a compromise payment for Class Counsel's attorneys' fees.

Eligible class members will have 60 days from the time of first mailing by the Settlement Administrator to review the Notice of Settlement and return a Claim Form, which is a requisite for them to obtain money from the settlement. Once the total number of Claim Forms is known, the allocated Net Settlement Amounts will be re-apportioned among the class members who returned their Claim Forms. The Settlement Administrator will mail checks (one-half for back wages, and one half for liquidated damages) to each class member who returned a Claim Form, and Tyson separately will pay the employer's share of payroll taxes for the back-wage portion of the checks mailed to class members. In exchange for these payments under the Settlement Agreement, all class members will release any claims that were asserted or could have been asserted based on the factual allegations in the operative Complaint (except that only class members who return Claim Forms and affirmatively "opt-in" to this litigation will be deemed to release their claims under the FLSA).

A. The Settlement Classes

The Settlement Agreement defines the relevant classes in the same manner as the Court defined them. That is, the Rule 23 Class is defined as stated in the Court's Order dated July 19, 2012, as quoted above in section I.B. The parties agree that, based on Tyson's payroll data, there are 1,201 current and former employees who met this class definition, and that after the two opt-outs discussed above, there are a total remaining 1,199 Rule 23 Class Members. All of these

1,199 members of the Rule 23 Class will be sent a Notice of Settlement and are entitled to participate in the monetary proceeds of the settlement if they exceeded 40 hours in any particular work week.[4]

The FLSA Class is defined as stated in the Court's Order dated November 6, 2009, as quoted above in section I.B. There were a total of 175 current and former employees who filed consent-to-join forms with the Court to become "opt-ins" under the FLSA Class definition. These employees mainly used knives, although some of them did not. All of them are entitled to participate in the settlement if they exceeded 40 hours in any particular work week. Most of the FLSA Class Members will participate in the settlement through their status as Rule 23 Class Members. The 76 FLSA Opt-In Plaintiffs who are not part of the Rule 23 Class (either because they did not use knives, or they worked before the Rule 23 class period) will participate in the settlement at a compromise figure of 75 percent of what an average knife-user would have received for working the same number of days.[5]

B. Notice Of Settlement And Claim Form

Under the Settlement Agreement, the parties have agreed that Heffler will serve as the Settlement Administrator. After the Court enters its Preliminary Approval Order, the parties will provide the Settlement Administrator with information about each class member in the two classes (*e.g.*, name, Social Security number, address, and initial *pro rata* share of the settlement amount), so that the Settlement Administrator can prepare the mailing of the required documentation (the Notice of Settlement and the Claim Form, which are Exhibits B and C, respectively, to the Settlement Agreement). Ten business days after the Court issues its Order

[4] There are 145 members of the Rule 23 Class who are not eligible to recover a payment under this settlement because they never exceeded 40 hours in a work week.

[5] In actuality, all 76 of these FLSA opt-ins are eligible to recover a payment under the settlement.

preliminarily approving the proposed Settlement, the Settlement Administrator must mail those documents along with a postage pre-paid envelope back to the Settlement Administrator, to all FLSA and Rule 23 Class Members. In order to provide the best notice practicable, before mailing the Notice of Settlement, the Settlement Administrator will obtain the best known mailing addresses for all class members from the parties, and shall also run the list through the National Change of Address ("NCOA") database of the United States Post Office. In addition, the Settlement Administrator will conduct a trace on: (i) all class members whose notice is returned undeliverable and (ii) all inactive (*i.e.*, formerly employed) class members who do not respond to the notice within 30 days of mailing.

Separately, Tyson will provide all of the appropriate settlement documents to the United States Department of Labor, and any state labor agencies where class members reside (*e.g.*, the Iowa Division of Labor), which is required by the Class Action Fairness Act for a Rule 23 settlement. *See* 28 U.S.C. § 1715. As required by the statute, those agencies will have 90 days to determine whether to take action.

Class members will have 60 days from the date of the initial mailing of the Notice and Claim Form in which to submit to the Settlement Administrator a valid claim for their allocated portion of the Net Settlement Amount for their respective class. Within that same period of time, any class member can object to the settlement, whereupon the Court can take into account such objections at the final fairness hearing.

C. Calculating Individual Settlement Amounts

The Net Settlement to the Rule 23 Class is $262,500. This was a compromise amount that represents approximately 57% of the dollar amount sought by Plaintiff in settlement when measured against Plaintiff's expert, Mr. Brian Hoffman's damages calculations as

described above. The parties then agreed that FLSA Class Members who are *not* part of the Rule 23 Class (mainly because they never used a knife) would receive a compromise amount of 75 percent of what the Rule 23 class members are to receive for an equivalent job tenure, on the premise that non-knife users wear less protective clothing. There are 76 persons who fall within this group. By application of this formula to their payroll data, this group of 76 persons is eligible to receive $8,477.12 in total.

Using the above principles, the parties already have agreed on how much money each class member would receive under the settlement if *all* of them timely return a Claim Form within 60 days of the first mailing. Assuming (as is likely) that some class members will not return a claim form, the Settlement Agreement provides that the Net Settlement Amount for each class will be re-allocated so that it is shared *pro rata* by those class members who *do* timely return a Claim Form. In other words, it is highly likely that everyone who returns a Claim Form will receive a higher amount than the initial allocations. Under this approach, there will be no monies left over to distribute at the end of the process, and Tyson will not see a diminution in the amount that it owes as a result of the settlement.

On top of the above amounts paid to participating class members, the Settlement Agreement also obligates Tyson to pay the employer's share of FICA, FUTA and SUTA (*i.e.*, Social Security taxes, and federal and state unemployment taxes).

D. Funding And Distribution Of Individual Settlement Awards

Within 5 business days after the Effective Date of the settlement,[6] Tyson will fund the settlement by paying the Gross Settlement Amount into a Qualified Settlement Fund ("QSF") that will be created to administer the funds in accordance with IRS regulations under Code

[6] The Effective Date is when the time for any appeal of the Court's Final Approval Order expires.

section 468B. Within 30 days after the Effective Date, the Settlement Administrator will mail the checks for back wages and liquidated damages, and pay the Service Award to Plaintiff America Maxwell.

At the same time as the Settlement Administrator makes the above payments to the class members who returned Claim Forms, it will also draw on the Gross Settlement Amount to reimburse Class Counsel for their out-of-pocket costs, and pay a compromise amount to Class Counsel for their fees by drawing down on the remainder of the Gross Settlement Fund (assuming that it will leave sufficient funds for settlement administration).

After 180 days, if there are still any unclaimed checks, the back wage checks will escheat to the respective States in which the class members reside according to the laws of those States,[7] and any unclaimed liquidated damages checks will be converted into an additional compromise payment to Class Counsel as further reimbursement of their attorneys' fees. In total, however, Class Counsel will recover far less than their actual attorneys' fees expended in this litigation. Class Counsel were willing to compromise their attorneys' fees in order to reach a settlement with Tyson on the terms set forth in the proposed Settlement Agreement.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLMENT

A. The Payouts To The Plaintiffs Should Be Approved As A "Fair And Reasonable Resolution Of A Bona Fide Dispute"

It is well-settled that courts should review FLSA collective action settlements to ensure "a fair and reasonable resolution of a bona fide dispute." *Moore v. Ackerman Investment Co*., 2009 WL 2848858 (N.D. Iowa Sept. 1, 2009) (Bennett, J.) (citing *Lynn's Food Stores, Inc. v. United States Dept. of Labor*, 679 F.2d 1350, 1354-55 (11th Cir. 1982) and *Collins v. Sanderson*

[7] Some State laws require a longer period (*e.g*., one year) before wage checks must be remitted to the State. In such instances, the Administrator will wait longer than 180 days to do so.

Farms, Inc., 568 F. Supp. 2d 714, 719 (E.D. La. 2008)); *see also, e.g., Brask v. Heartland Automotive Services, Inc.*, 2006 WL 2524212 at *1-2 (D. Minn. Aug. 15, 2006); *Baker v. D.A.R.A. II, Inc.*, 2008 WL 4368913 at *2 (D. Ariz. Sept. 24, 2008); *Carey v. Space Coast Quality Lawn Maintenance and Landscaping, Inc*., 2006 WL 1883443 at *1-2 (M.D. Fla. July 7, 2006); *Sines v. Service Corp., Int'l*, 2006 WL1148725 at *1 (S.D.N.Y. May 1, 2006); *Cooks v. Osmose, Inc.*, 2004 WL 3728567 at *1 (M.D. Tenn. Feb. 13, 2004). "The primary focus of the Court's inquiry in determining whether to approve the settlement of a FLSA collective action is not, as it would be for a Rule 23 class action, on due process concerns, but rather on ensuring that an employer does not take advantage of its employees in settling their claim for wages." *Collins*, 568 F. Supp. 2d at 719.

On its face, Fed. R. Civ. P. 23(e) requires Court approval before the claims, issues or defenses of a certified Rule 23 class can be settled, voluntarily dismissed, or compromised. *Accord Wineland v. Casey's Gen. Stores, Inc*., 267 F.R.D. 669, 675-76 (S.D. Iowa 2009) (Pratt, J.). Rule 23(e)(1) to (5) require, *inter alia*, "reasonable notice" to all persons who would be bound by the proposal; a hearing after which there is a finding that the proposed settlement is "fair, reasonable, and adequate"; and an opportunity for class members to object to the proposed settlement. In general, the purpose of court approval in a Rule 23 class action is "to assure that the interests of absent class members, as well as those of the named plaintiffs, are protected." *Wineland*, 267 F.R.D. at 676 (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). "Under Rule 23(e) the district court acts as a fiduciary who must serve as guardian of the rights of absent class members." *BankAmerica Corp. Sec. Litig.*, 350 F.3d at 751-52 (quoting *Grunin, id.*). Because the district court is heavily involved in the management of the class action, and was exposed to the litigants and their strategies, positions, and proofs, the

Eighth Circuit will reverse a district court's approval of a Rule 23 settlement only for an abuse of discretion. *See BankAmerica Corp. Sec. Litig.*, 350 F.3d at 752 (quoting *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (per curiam)).

As a practical matter, courts examining FLSA settlements and Rule 23 settlements have applied similar factors. As Judge Bennett recently wrote in approving the FLSA settlement in *Moore*:

> Courts have also regularly applied the same "fairness" factors applied to a proposed settlement of a Rule 23 class action by analogy to a proposed settlement of a § 216(b) collective action to determine whether the proposed settlement is fair and reasonable. *See, e.g., Houston v. URS Corp*., 2009 WL 2474055, * 6 (E.D.Va. Aug. 7, 2009) (slip op.) (citing cases); *Collins*, 568 F. Supp. 2d at 722; *Dail v. George A. Arab, Inc.*, 391 F. Supp. 2d 1142, 1145 (M.D. Fla. 2005). Those factors are the following: (1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense, and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiffs; (5) the opinions of class counsel and class members after receiving notice of the settlement whether expressed directly or through failure to object; and (6) the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery. *Houston*, 2009 WL 2474055 at *6; *Collins*, 568 F. Supp. 2d at 722 (identifying the factors as "'(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.'" (quoting *Camp v. Progressive Corp*., 2004 WL 2149079 (E.D. La. Sept. 23, 2004), in turn citing *Reed v. General Motors Corp*., 703 F.2d 170, 172 (5th Cir. 1983)).

Similarly, as Judge Pratt wrote in approving the Rule 23 settlement in *Wineland*:

> "The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) (citing Grunin, 513 F.2d at 124 (citations omitted)). "Although in approving a settlement the district court need not undertake the type of detailed investigation that trying the case would involve, it must nevertheless provide the appellate court with a basis for determining that its decision rests on 'well-

> reasoned conclusions' and not 'mere boilerplate.' " *Id*. (quoting *In re Flight Transp*. [*Corp. Sec. Litg.*], 730 F.2d [1128,] at 1136 [(8th Cir. 1984)] (internal and additional citations omitted)). "The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Id*. (citing *Grunin*, 513 F.2d at 124; *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314-15 (7th Cir.1980)).

267 F.R.D. at 676.

Here, the proposed Settlement is fair and reasonable for at least four separate and independent reasons. First, the proposed Settlement provides the eligible class members ─ 1,199 Rule 23 Class members and an additional 76 employees who opted into the FLSA claims but did not qualify for the Rule 23 Class ─ with a net settlement amount of $270,977.12. This amount will be paid no matter how many class members return their Claim Form. The Rule 23 Class recovery of $262,500 was carefully negotiated based on, *inter alia*: the extensive discovery taken to date, including over 50 depositions and nearly 400,000 pages of documents exchanged; the time-study of Plaintiff's expert, Dr. Radwin; and the damages calculations of Plaintiffs' expert, accountant Mr. Hoffman based on Tyson's actual payroll data for the affected class members. In the view of the undersigned Class Counsel, this is an excellent result for the Rule 23 Class and FLSA Class considering the substantial risks of the upcoming scheduled trial and potential appeals. Specifically, if Plaintiff did not prevail on her meal-period claim on summary judgment or at trial (as have plaintiffs in *all* other recent cases brought by employees at Tyson's red-meat processing facilities), the Rule 23 Class will still recover through settlement 57% of all claimed back wages.

Similarly, the estimated 76 non-knife users who are in the FLSA Class but not in the Rule 23 Class will also do relatively well in the settlement. The Court's Rule 23 class certification order precludes them from recovering under state law, and thus only FLSA Opt-In Plaintiffs could pursue claims if they were non-knife users. The claims of the non-knife users

are more tenuous than those of the knife-users because it is undisputed that they used less equipment, and their recovery at trial would depend upon anecdotal testimony as to the amount of time they spent on the challenged activities. Despite the foregoing, the parties have agreed to give each non-knife user a recovery that would equate with 75% of what a knife-user would have recovered assuming the equivalent tenure, on the premise that they wear less protective clothing and perform less associated activities than knife-users. Although the total amount paid to the 76 FLSA Class Members may seem small, it is purely a product of the agreed-upon formula applied to the number of weeks in which they worked (which, for many of them, was very little time within the statute of limitations period).

Second, the Settlement Agreement enables the Rule 23 Class and FLSA Class to avoid significant litigation risks. Most notable of these risks is the possibility that Plaintiff would not prevail at trial or on appeal in light of Tyson's staunch position that it adhered at all relevant times to its obligations under the FLSA. Class Counsel were cognizant that Tyson prevailed *completely* in two recent trials in which plaintiffs asserted the same claims under Eighth Circuit federal law and Nebraska and Iowa state law, respectively. *See Lopez, et al. v. Tyson Foods, Inc.*, 690 F.3d 869 (8th Cir. Sept. 4, 2012); *Guyton et al. v. Tyson Foods, Inc.*, No. 3:07-cv-00088-JAJ-TJS (S.D. Iowa Apr. 26, 2012) (jury verdict at Dkt. No. 330) (Jarvey, J., presiding). In another action in which the plaintiffs asserted similar claims under Iowa law, the plaintiffs did prevail at trial, but those plaintiffs have admitted that the jury first excluded "outliers" (akin to the "waiting" time at issue here), then excluded the meal-period claims, and then awarded 50 percent of the remaining damages sought for pre- and post-shift activities. *See Bouaphakeo et al. v. Tyson Foods, Inc.*, No. 5:07-cv-040009-JAJ (Dkt. No. 308-1 at page 27)

(N.D. Iowa Nov. 14, 2011). Setting aside liquidated damages,[8] which were heavily contested here, the result in *Bouaphakeo* is similar to what the Plaintiff and the Classes here will recover under the instant settlement without having to go through trial and appeals. Indeed, Plaintiff and the Classes here will do slightly better, receiving *57 percent* of their non-meal period claims without waiting time.

Third, the Settlement Agreement enables participants to obtain a recovery without delay and without incurring additional individual litigation costs and additional attorneys' fees and costs. Absent the proposed Settlement, it is unlikely that individual Plaintiffs would commence individual lawsuits. By participating in the proposed Settlement, Settlement Class Members can tap into the efficiencies and economies of the FLSA collective action/Rule 23 class action device, which enables workers with low-dollar individual claims (as exist here) to pursue their FLSA and IWPCL rights by pooling resources with similarly situated workers. *See Evans v. Lowe's Home Centers, Inc*., 2006 WL 1371073 at *5 (M.D. Pa. May 18, 2006) (FLSA collective action device serves objectives of "lowering cost and limiting the controversy to one proceeding to efficiently resolve the common issues of law and fact").

Fourth, the Settlement Agreement is the product of extensive arm's-length bargaining conducted by experienced legal counsel on both sides. This factor weighs heavily in favor of the Court's approval. *See, e.g., Wineland,* 267 F.R.D. at 677 ("[T]he Settlement is the product of arm's length negotiations and, thus, is presumed to be fair and reasonable"); *In re Linerboard Antitrust Litig*., 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms'-length negotiations between

[8] In *Bouaphakeo*, Tyson had withdrawn before trial its opposition to liquidated damages if it were to lose at trial. Tyson has not done so here, and intends to assert at trial the same "good faith" defense upon which it prevailed at the recent *Guyton* trial in this Court.

experienced, capable counsel after meaningful discovery").

Finally, the proposed Settlement provides the ability of Class members to object after receiving notice of the Settlement,[9] and for the Court to consider those objections when considering whether to grant final approval of the Settlement. Based on their respective experience in other wage and hour cases, counsel for both sides do not anticipate many, if any, objections. To the extent that any objections materialize after the issuance of notice, the Court can consider whether they have merit when it determines whether to gives its final approval to the settlement.

Based on the above-stated reasons, the proposed Settlement is a fair and reasonable resolution of a bona fide dispute, and the parties jointly request that the Court preliminarily approve the Settlement Agreement submitted herewith so that the parties can proceed with providing notice of the proposed Settlement to the Rule 23 Class and the FLSA Class.

B. The Proposed Service Award To Plaintiff America Maxwell Should Be Preliminarily Approved In Light Of her Service To The Class

Pursuant to the Settlement Agreement, Tyson has agreed not to oppose the request of a $5,000 service award to Plaintiff America Maxwell, paid from the Gross Settlement Amount. If approved by the Court, this Service Award will be awarded to Ms. Maxwell (in addition to her individual settlement checks) for her efforts in bringing and prosecuting this collective and class action.

"Courts routinely recognize and approve incentive awards for class representatives and deponents." *Jones v. Casey's Gen. Stores, Inc*. 266 F.R.D. 222, 231 (S.D. Iowa 2009)

[9] Although there is a right to object, there is no right to "opt out" of the settlement under Fed. R. Civ. P. 23(e)(4). The Rule's provision is optional, not mandatory. In this case, where the Rule 23 notice period just closed on October 22, 2012, the parties agree that it would not be productive to afford yet another opportunity to opt out so close in time to the recent period.

(Pratt, J.); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000). It is particularly appropriate to compensate representative plaintiffs with incentive awards where they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of a class. *Jones*, 266 F.R.D. at 231; *see also In re Linerboard*, 2004 WL 1221350, at *18 (E.D. Pa. Jun. 2, 2004) ("Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly").

Here, the proposed Service Award to Ms. Maxwell is justified because she lent her name to the lawsuit, she gave a deposition, and she answered Tyson's written discovery. She worked with Class Counsel, providing background information about the employment circumstances of the class, about Tyson's policies and practices, and about the allegations in this lawsuit. Her Service Award was specifically negotiated, and will not come out of the Net Settlement Amounts owed to either the FLSA Class or the Rule 23 Class. *See Jones*, 266 F.R.D. at 231 ("These amounts were specifically negotiated as part of the Settlement package and will not diminish the recovery contemplated for each individual class member.").

Moreover, the relatively small Service Award is in line with those approved in class actions in this Circuit. *See, e.g., Cortez, et al. v. Nebraska Beef*, No. 8:08CV90, Dkt. No. 500 (D. Neb. Feb. 9, 2012) (preliminarily approving a $5,000 service payment to each named plaintiff deponent and a $2,500 service payment to each class member deponent); *Jones*, 266 F.R.D. at 231 (approving incentive awards of $10,000 to each of nine named plaintiffs and $1,000 to each class member deponent); *Wineland*, 267 F.R.D. at 677-678 (approving $10,000 payment to each of the named plaintiffs for the time and effort they devoted in pursuing litigation); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009) (awarding two lead plaintiffs $15,000 incentive awards); *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding

$100,000 collectively to a group of eight lead plaintiffs).

For these reasons, Plaintiffs assert that a Service Award of $5,000.00 to Ms. Maxwell is reasonable in light of the efforts she made to assist in this litigation. As previously stated, Tyson does not oppose the requests for this payment out of the Gross Settlement Amount.

C. The Court Should Preliminarily Approve The Reimbursement Of Class Counsel's Out-of-Pocket Costs And Recovery Of A Compromised Fee

The parties request that the Court approve of the Settlement Agreement's provisions for reimbursement of Class Counsel's actual out-of-pocket expenses, and a compromise payment for their attorneys' fees. The Settlement Agreement provides that Class Counsel will be reimbursed for their actual out-of-pocket expenses, which currently exceed $340,000.

The Settlement Agreement also provides that any residual amounts from the Gross Settlement Fund be paid to Plaintiffs' counsel as a compromised amount in lieu of their actual attorneys' fees expended in this litigation. These amounts were separately negotiated and will not diminish the Net Settlement Amounts to be distributed to the Rule 23 Class and FLSA Class. In addition, the anticipated amount to be awarded as attorneys' fees is a small fraction of the actual attorneys' fees expended by Class Counsel, which Class Counsel would seek to obtain as a prevailing party under the applicable fee-shifting provisions of the FLSA and Iowa wage statutes, if the parties had not agreed to this compromise. *See* 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); Iowa Code § 91A.8. Courts may determine the extent of a reasonable attorney's fee under such fee-shifting statutes based on Class Counsel's lodestar in the case. *See Perdue v. Kenny A. ex rel. Winn.*, 130 S.Ct. 1662, 1672 (2010) (holding that the lodestar figure has "become the guidling light of our fee-shifting jurisprudence").

In connection with the parties' motion for final approval of the proposed Settlement, Class Counsel will file a separate motion under Federal Rule of Civil Procedure 23(h) for approval of the proposed reimbursement of costs and attorneys' fees.

V. CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court grant this Joint Motion for Preliminary Approval of Settlement Agreement.

Date: October 31, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I served a true and correct copy of the foregoing Memorandum of Law in Support of Joint Motion for Preliminary Approval of Settlement Agreement, via the Court's ECF filing system, upon all counsel of record:

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