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## COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

Plaintiffs-Appellees Michelle Braun, Dolores Hummel and the certified Class (“Employees”) challenge the scope and “standard of review” set forth in the Brief of Appellant Wal-Mart Stores, Inc. and Sam’s Club (“Wal-Mart”). *See* WMBr. at 2-3. Substantial deference is given to the trial court’s class certification decision, which must be reviewed under the abuse of discretion standard. *See Bell v. Beneficial Consumer Disc. Co.*, 465 Pa. 225, 235, 348 A.2d 734, 739 (1975). “[T]he lower court’s order granting or denying class certification will not be disturbed on appeal unless the court neglected to consider the requirements of the rules or abused its discretion in applying them.” *D’Amelio v. Blue Cross of Lehigh Valley*, 347 Pa. Super. 441, 448-49, 500 A.2d 1137, 1141 (1985) (citations omitted).

With respect to entry of judgment on the jury’s verdict, an abuse of discretion may be found only where the appellant proves that a judgment is manifestly unreasonable, arbitrary or capricious; that it fails to apply the law; that it was motivated by partiality, prejudice, bias or ill-will; or that it lacks such support as to be clearly erroneous. *See Hoy v. Angelone*, 554 Pa. 134, 148, 720 A.2d 745, 752 (1998). This same standard applies to review of a trial court’s award of attorney fees. *Lucchino v. Commonwealth*, 570 Pa. 277, 285, 809 A.2d 264, 269 (2002) (“appellate review of [a trial court’s] order...awarding counsel fees to a litigant is limited solely to determining whether the [trial court] palpably abused its discretion in making the fee award.”). With respect to a jury charge, the appellate court “must examine the charge in its entirety against the background of the evidence to determine whether [reversible] error was committed.” *Ottavio v. Fibreboard Corp.*, 421 Pa. Super. 284, 294-95, 617 A.2d 1296, 1301-02 (1992). Even if the charge was erroneous, a new trial will be granted only if the charge might have prejudiced the appellant or the omission from the charge “amounts to fundamental error.” *Id.*

## **COUNTER-STATEMENT OF QUESTIONS INVOLVED**

1. Did the lower court abuse its class certification discretion where Wal-Mart's business records established that corporate payroll pressure caused Employee class members to miss earned rest breaks and be denied wages for all hours worked, so that liability and damages could be and were determined based upon common, class-wide evidence?

*Suggested Answer:* No. Wal-Mart's business records proved through common evidence that the Employee class members were not paid all wages owed. Whether these business records were reliable proof was a common, predominating issue that was decided by the jury. Because Wal-Mart relied on these same records to deduct wages from class members and to report wages and benefits to governmental authorities, the jury properly found them to be reliable, common proof of class wide liability and damages.

2. Did the lower court abuse its discretion with respect to due process where (i) Wal-Mart had a full and fair opportunity to challenge the reliability of its own business records; (ii) Wal-Mart failed to properly move for decertification prior to a decision on the merits; (iii) Wal-Mart relied on its business records to pay each class member; and (iv) Wal-Mart expressly withdrew its affirmative defense that class members voluntarily waived earned rest break wages and benefits?

*Suggested Answer:* No. This action was tried and defended as a class action. The credibility of Wal-Mart's after-the-fact anecdotal evidence about missing swipes or missing data offered to refute its business records was a common, predominating defense presented to and rejected by the jury. Wal-Mart failed to properly move for decertification before trial commenced, and failed to move for decertification after the close of Employees' evidence or thereafter, and, therefore, waived this and other issues.

3. Did the lower court abuse its discretion in entering a class judgment where overwhelming evidence of Wal-Mart's business practices, policies and payroll records established a common, uniform promise to each of Wal-Mart's employees, a uniform breach of that promise, a uniform failure to pay all wages owed, and a common benefit to Wal-Mart?

*Suggested Answer:* No. The lower court correctly entered judgment for the Class.

4. Did the lower court abuse its discretion in instructing the jury as to an employer's obligation to pay promised wages, wage supplements, or fringe benefits where Wal-Mart admitted in uniform corporate policies that earned rest breaks were taxable wage benefits – "take a break and get paid for it" – and the jury found Wal-Mart had not proved a good faith dispute?

*Suggested Answer:* No. The lower court properly instructed the jury, and the jury properly found that Wal-Mart did not meet its burden of proof.

5. Did the trial court err in awarding attorney fees to the prevailing Class?

*Suggested Answer:* No. The lower court properly followed controlling precedent.

## COUNTER-STATEMENT OF THE CASE

### FORM OF ACTION

This is one of dozens of employee class actions filed throughout the country against Wal-Mart for wage payment violations. The cases have taken the form of class actions because, as other courts have found, “[t]he operations of individual Wal-Mart stores, including payroll controls, are directed by corporate-wide policies established, disseminated, and carefully controlled by the home office.” *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 339, 893 N.E.2d 1187, 1192 (2008). *See also Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 97-98, 922 A.2d 710, 714-15 (2007).

Among the centralized policies, business practices and records these and other courts have found significant to the existence of predominating, common questions are:

- From its home office, Wal-Mart dictated procedures used by all of its employees to clock in and out at the start and end of each day and for breaks. R.7090a-95a, 7309a-11a.
- Wal-Mart communicated uniform time keeping procedures to all employees at the start of their employ and regularly thereafter in policies and postings drafted at home office and available online and in the stores. R.7008a, 6974a-92a, 7020a-33a, 2019a.
- Corporate written directives from home office governed rest breaks and off the clock work. These policies were known internally as Corporate Policy PD-07 and PD-43. R.6974a-92a, 7020a-33a.
- Until February 9, 2001, all hourly employees were required to clock out for breaks; after that date, a home office directive eliminated clocking out for breaks. R.7612a-20a; R.7547a. Wal-Mart ceased its long standing practice of making its employees clock in and out for paid rest breaks to reduce its acknowledged exposure in lawsuits such as this one. R.1696a-99a, Supp.R.8145a-50a, Supp.R.7954a, Supp.R.8086a.
- In widely disseminated statements, Wal-Mart senior management described policies PD-07 and PD-43 as “the LAW” and as “non-negotiable.” R.1552a, 1557a-58a.
- No Wal-Mart corporate policy permitted an hourly employee to waive rest breaks. R.6974a-92a, 7020a-33a.

- Wal-Mart’s policies PD-07 and PD-43 warned that if employees violated the policies, they would be disciplined (“coached”) up to and including termination. R.6984a, 7023a.
- Hourly employees who clocked in from rest breaks even one minute late were automatically docked for that minute of pay. R.1482a-85a, 7264a.
- Wal-Mart store managers received “labor guidelines” from Wal-Mart home office setting the number of shifts that could be scheduled in each store which number was dictated by sales rather than by tasks to be performed. R.7697a-7700, 7205a-15a, 1475a-81a.
- Home office exerted pressure on store managers to boost profits by minimizing labor costs. Labor costs in all stores represented 65-70% of “controllable” expenses, *i.e.*, expenses within a store manager’s control. R.7704a, 7637a-45a, 7684a-90a, Supp.R.8114a-17a; R.1585a-86a, Supp.R.8129a.
- Home office monitored labor costs daily and weekly, giving threatening “guidance” to store managers to lower labor costs and cut overtime to meet weekly budgets. R.7743a-44a, 7695a-96a, 7646a-83a, 7691a-94a.
- Wal-Mart conducted weekly Saturday meetings at home office attended by hundreds of senior corporate managers at which the past week’s expenses for each division, region and district within Wal-Mart were reviewed. Managers who exceeded labor budgets were chastised publicly by home office. Supp. R. 8159.
- Under compensation plans created at home office, store managers were paid base salaries and earned large bonuses if they adhered to corporate directives on labor costs. R.7901a-46a, 1563a-73a, 7745a-75a.
- Wal-Mart coached (disciplined) store managers who failed to keep labor costs “in line” with home office budgets derived from Wal-Mart’s “preferred scheduling” computer program. R.7627a-36a, 7701a-42a, 908a-912a, 920a-921 (Thompson Video).
- Wal-Mart’s store business records were all computerized and accessible on a “real time” basis at home office. R.932a-33a, 941a-42a (Campbell Video), 908a (Thompson Video).
- Store time clocks were programmed through computer systems at home office. R.1755a-61a.
- Wal-Mart’s Payroll/Scheduling Guide (“PSG”), distributed by home office, dictated how Wal-Mart’s computerized time records were created and maintained, including how payroll records were kept, how they were edited to ensure accuracy and reliability, how missing punches were handled, and how payroll was closed at the end of the day, week and pay period. R.7367a-96a, 1654a-55a.
- Wal-Mart’s payroll data was used to generate standardized reports used in every store throughout the company including:

- The TimeClock Punch Exception Report (“TPER”), a report generated daily throughout the class period, listing every employee whose punches (swipes) showed too few (*i.e.*, missing) breaks, short breaks or missing punches. R.6970a-73a, 7367a-68a, 7399a-402a, 7443a-91a.
- The Time Clock Archive Report (“TCAR”), a store report generated weekly and every two weeks, showed every punch for every employee in the store and all management edits to the punches for every single shift worked during the two week pay period. The TCAR also showed total hours worked and “total break” time. Until February 2001, the TCAR showed rest breaks taken and missed. After the TCAR was finalized in the store, it was electronically sent to the home office and used to generate pay checks for employees. The TCARs were maintained for 5 years to satisfy Wal-Mart’s state and federal timekeeping requirements. *See* R.7282a, 7395a-96a, 7086a, 7428a, 7514a-15a, 1667a-68a. Once paychecks were generated, they were sent to the stores and verified against the TCARs.R.7395a.
- Wal-Mart home office also kept computerized point of sale data, *i.e.*, data reflecting which employees were operating cash registers and at what times during their shifts they were logged onto and actively operating the registers. R.1753a-64a.
- Wal-Mart’s computerized business records were made and kept in the ordinary course of its business at or near the time of the events reported in the records. R.336a-37a, 342a-45a.
- Wal-Mart’s internal audit department used Wal-Mart’s business records, the TCARs and the TPERs, to conduct internal audits of compliance with the rest break policy. R.7493a-501a. Such audits were performed before and during the Class Period in individual stores, in districts (7-8 stores) and nationwide in 127 stores (the “Shipleigh Audit”) R.7441a-42a, 7887a-88a, 7518a-40a, 7503a-05a, 7492a. Several Pennsylvania stores were included in the Shipleigh Audit. R.7887a-88a. The internal audits were distributed to Wal-Mart’s senior managers and revealed tens of thousands of violations. R.7492a.

Because all the labor policies and practices were dictated by Wal-Mart’s home office and were used by Wal-Mart to monitor and manage its operations in a centralized manner, these actions have been and are properly pursued as class actions. *Salvas*, 452 Mass. at 339-42, 345-46, 893 N.E.2d at 1192-95, 1196-97; *Iliadis*, 191 N.J. at 97-98, 922 A.2d at 714-15.<sup>1</sup>

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<sup>1</sup> In describing these claims, the New Jersey Supreme Court said they presented a “quintessential example of facts and circumstances” supporting class-wide relief, because “the specifics of the manner in which [Wal-Mart] was alleged to have accomplished its goal of diminishing the compensation otherwise due the class members, the small amount that any one

Apart from these decisions, Wal-Mart also has conceded that class certification of the claims was appropriate. Though Wal-Mart purports to distinguish *Iliadis*, *Hale* and *Armijo* on the grounds it has settled those three certified class actions (WMBR. at 37, n.22), Wal-Mart neglects to mention it has also settled 63 wage and hour class actions asserting similar if not identical claims. S.R.7955a-56a. Because the United States Supreme Court has held that a settlement class may not be certified unless it can be certified for litigation purposes, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997), Wal-Mart was (and is) judicially estopped from arguing here (or in any court) that class certification of these wage and hour claims was improper.<sup>2</sup> Notably, Wal-Mart has not requested in this appeal to reverse certification of the class wide jury verdict in its favor on the meal period claim.<sup>3</sup> Because Wal-Mart cynically seeks the benefit of class wide *res judicata* while it simultaneously denounces the same class certification decision, its attacks on the trial court should be viewed with utmost skepticism.

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class member would be due, and the large number of class members for whom relief would otherwise not be practically available, all militated in favor of a conclusion that the common issues predominated and the class action mechanism was superior to any other form for relief.” *Int’l Union of Operating Eng’rs. Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 394, 929 A.2d 1076, 1089 (2007) (discussing *Iliadis*).

<sup>2</sup> See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 664 (7th Cir. 2004) (where the defendant has stipulated to class certification for settlement purposes but the settlement is disapproved, that defendant is nonetheless judicially estopped from challenging certification on the merits).

<sup>3</sup> The jury’s verdict and the judgment on the meal period claim were in part adverse to Wal-Mart, as both concluded that Wal-Mart had made a binding contract with Employees to provide meal break periods. This conclusion is beneficial to and enforceable by class members in the future despite the finding that Wal-Mart had not breached the contract in the past. Indeed, this un-appealed conclusion is directly contrary to Wal-Mart’s arguments here that it did not have an intent to contract with any class member and that no class member reasonably relied on Wal-Mart’s uniform wage and hour postings, policies and commitments. The meal period and rest break commitments were and are reflected in the same Wal-Mart policies and records.

## PROCEDURAL HISTORY OF THE CASE

As in the other certified wage and hour cases, all of the claims filed by Employees here (Braun in March 2002 and Hummel in August 2004) arose out of the identical factual predicate. Employees asserted Wal-Mart broke its promises to hourly employees – contained in its uniform corporate policies – to provide paid rest breaks and to pay for all time worked.

After initial motion practice, the parties engaged in wide-ranging class certification discovery. WMBr. App. E, Tr. FofF at ¶16. In the fall of 2003, Wal-Mart deposed 60 current and former hourly employees. *Id.* at ¶21. Employees deposed several members of Wal-Mart management. *Id.* at ¶23. The parties exchanged expert reports, and Wal-Mart moved to exclude Employees' experts. *Id.* at ¶¶24-25.

Wal-Mart then moved for summary judgment based on the statute of limitations as to Employee Braun's statutory claims. The trial court granted the motion in part and dismissed Braun's statutory claims as time-barred. Because of this ruling, Employee Hummel commenced her own class action based on the same factual predicate as Employee Braun but reasserting timely statutory claims, including a statutory cause of action under the Wage Payment and Collection Law, 43 Pa. C.S. § 260.1 *et seq.* ("WPCL").

The trial court conducted a two-day evidentiary hearing on class certification in *Braun* on September 9-10, 2004. At the hearing, the trial court denied Wal-Mart's motion to bar the testimony of Employees' statistical experts, Drs. Baggett and Shapiro. *See* WMBr. App. B, Tr. Op. 12/27/05 at 10 n.3. The trial court admitted into evidence hundreds of exhibits reflecting Wal-Mart's common policies, practices and record keeping, including expert reports of Drs. Baggett and Shapiro summarizing a statistical sampling of Wal-Mart's massive computerized payroll and cash register records. The trial court also received deposition testimony from Wal-

Mart salaried managers and Wal-Mart hourly employees. The trial court conducted a painstaking examination of Employees' common law claims, Wal-Mart's alleged defenses, and the method and nature of the common proof embodied in Wal-Mart's uniform business policies, practices and records, and applied such in its rigorous analysis of the elements necessary for class certification.

In October 2004, the trial court scheduled class certification briefing in *Hummel*. As the two cases asserted identical facts and overlapping legal claims, the trial court permitted discovery in *Braun* to be used in *Hummel*. A two day evidentiary hearing in *Hummel* was held on October 18-19, 2005. The parties again presented the extensive documentary and deposition evidence, expert analyses and summaries of Wal-Mart's own business records. At the conclusion of the hearing, and after a rigorous evaluation of the evidence and the elements necessary for class certification, the trial court requested that Employees file a trial plan. R.696a-98a. Employees filed their trial plan on November 16, 2005, outlining the common, generalized proof supporting each claim.

By opinion dated December 27, 2005, the trial court granted class certification. It set forth the basis for its rigorous analysis and concluded that Employees had sustained their burden of proof in establishing the elements necessary for class certification. In finding commonality and predominance, the trial court emphasized that the credibility of Wal-Mart's business records was a predominating common question for the jury's determination at trial. WMBr. App. B, Tr. Op. 12/27/05 at 12.

By order dated February 17, 2006, the trial court directed notice by first class mail to each of the approximately 190,000 class members identified in Wal-Mart's payroll records. The parties agreed that Wal-Mart's payroll records were reliable enough to identify each of the

190,000 Class members. Additionally, notice of pendency was posted on an internet web site. The mailed notice stated that any Class member could opt-out no later than May 1, 2006. The Class, after the opt-outs, numbered 186,979. The class period thus covered March 19, 1998 to May 1, 2006 (the “Class Period”). The trial court subsequently ordered publication of notice in seven Pennsylvania newspapers as well as posting of the notice at every Wal-Mart store for three weeks prior to trial.

On July 17, 2006, Wal-Mart moved *in limine* to exclude the testimony of *two* of Employees’ *three* expert witnesses (Drs. Baggett and Shapiro).<sup>4</sup> Wal-Mart failed to attach an expert report to this motion as required by Pa. R. Civ. P. 207.1. Citing Wal-Mart’s failure to comply with Pa. R. Civ. P. 207.1, the trial court denied the motion. R.1452a-53a. Although given the opportunity to do so, Wal-Mart never remedied this procedural defect. At trial, Wal-Mart’s counsel admitted that the pre-trial motion was not a decertification motion. R.1745a-47a (“Wal-Mart’s motion “wasn’t [a]ctually styled as a decertification motion.... It was a motion to exclude Dr. Shapiro from testifying.”)

Trial started on September 8, 2006. Employees called 18 fact witnesses and 3 expert witnesses. Employees’ industry expert, Dr. Frank Landy, testified as to Wal-Mart’s corporate-wide policies, practices, payroll scheduling, internal auditing, and store manager bonus plans, among other things. Former Wal-Mart Regional Vice President for the region including Pennsylvania, Castural Thompson, testified about similar subjects, including the extensive payroll pressure to reduce store costs and the fact that Wal-Mart’s internal audits showed extensive violations of its paid rest break commitment. R.908a-914a, 916a-918a, 921a

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<sup>4</sup> Wal-Mart never moved to exclude the testimony of Employees’ liability expert, Dr. Frank Landy, an industrial organizational psychologist. Dr. Landy testified about common issues pertaining to Wal-Mart’s class-wide liability for three full days. *See* NT 9/11/06 a.m. & p.m.; 9/12/06 a.m. & p.m.; and 9/13/06 a.m. & p.m.

(Thompson Video). Employees also presented the testimony of Greg Campbell, Wal-Mart's corporate designee for Information Systems, headquartered in Bentonville, Arkansas, who testified about the reliability and accuracy of Wal-Mart's computerized business records and systems. R.932a-43a (Campbell Video). Much of this testimony was confirmed by other testimony from senior corporate officers presented in Employees' case, including Canetta Ivy Reid (Wal-Mart's corporate designee for the policies and compliance initiatives and Director of Corporate Employment Compliance), Cheryl Lippert (Director of Human Resources), Michael Huffaker (Divisional Vice President), Charles Holley (Senior Vice President of Finance), Don Swann (Executive Vice President for People Division), Don Harris (Chief Operating Officer), and Thomas Coughlin (Chief Executive Officer).

Wal-Mart did not move to decertify the Class at the close of Employees' case or anytime thereafter. Wal-Mart started its case on September 26, 2006. Although it had listed over 133 witnesses on its witness list, Wal-Mart called only 12 fact witnesses and two expert witnesses (out of eight retained expert witnesses). WMBr. App. E, Tr. FofF at 160. The trial court did not impose any restrictions on the number of witnesses any party could call or any time constraint on the length of trial. WMBr. App. H., Tr. Op. 9/3/08 at 4, n.4. At the close of the evidence, Employees moved to dismiss Wal-Mart's affirmative defense of voluntary waiver. In response, Wal-Mart's counsel withdrew the waiver defense. R.2100a-2102a.

The jury returned its liability verdict on October 11, 2006, finding that Wal-Mart had an agreement with Employees to provide earned, paid rest and unpaid meal breaks;<sup>5</sup> that Wal-Mart breached its agreement by failing to provide earned, paid rest breaks to Employees; that it failed

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<sup>5</sup> Although the jury found there was an agreement by Wal-Mart to provide meal breaks to Class members, it also found that Wal-Mart did not breach the meal period agreement. R.2184 at Q.8-9. Wal-Mart has not appealed from class certification of this claim and, therefore, apparently agrees the trial court properly certified the Class for this claim.

to pay Employees for all time worked; and that it knowingly received an unfair benefit by not providing earned, paid rest breaks and pay for all time worked. The jury also found that Wal-Mart did not prove a good faith contest or dispute when it failed to pay class members for all hours worked or for missed and shorted rest break wages. R.2182a at Q.3, 2183a at Q.7. The jury returned its damages verdict on October 13, 2006. The verdict awarded \$29,178,874.35 for Employees' common law claims (\$1,462,910.35 for off the clock work and \$27,715,964 for breach of contract and unjust enrichment) and \$49,289,541 for Employees' statutory claims (\$1,031,430 for off the clock work and \$48,258,111 for breach of contract and unjust enrichment). R.2186a-87a.

All post-trial proceedings were accurately described by the trial court in its post-trial opinions. WMBr. App. E & H, Tr. Foff and Tr. Op. 9/3/08.

#### **COUNTER-STATEMENT OF THE FACTS**

Wal-Mart's centralized business practices, policies and business records were and remain the focal point of this case. The testimonial and documentary evidence of both parties concentrated on Wal-Mart's corporate records and business methods. The evidence included the following:

- *Uniform Corporate Policies Were Promises to Employees.* Dr. Landy testified that Wal-Mart, by means of its uniform written corporate policies, promised employees paid rest breaks during which they were to perform no work and pay for all hours worked. R.1540a-41a, 7034a-47a, 7048a-59a, 7060a-80a, 6974a-92a, 6993a, 6994a-97a, 6998a-7003a, 7004a-07a. Employees earned paid rest breaks based solely on the number of hours worked each shift. The promises were repeatedly and consistently conveyed to class members and were established at and disseminated from Wal-Mart's corporate headquarters in Arkansas. R.1557a-60a.
- Canetta Reid, Director of Corporate Employment Compliance, R.2047a-48a, testified that PD-07 and PD-43, policies in place since at least 1996, were disseminated to Employees "from day one" of their employment, at orientation, in the Handbook, on posters, through computer-based learning and through written

“talking points” distributed from corporate headquarters. R.1963a, 2019a. Wal-Mart’s former CEO and Vice Chairman, Thomas Coughlin, admitted the binding and non-discretionary nature of Wal-Mart’s promises to its Employees. During a company-wide meeting in August 2001, Coughlin presented the Company’s managers with five “non-negotiables,” which included strict adherence to Wal-Mart’s policies on breaks and off-the-clock work. The policies on breaks and off the clock work were, according to Coughlin, “NOT optional” and “NOT subject to negotiation” and were “the LAW!” Supp.R.8135a-37a, Supp.R.7965a-67a.

- *Breaks Are Wage Benefits.* Dr. Landy testified that paid rest breaks were a benefit of employment and a component of wages paid to Employees. R.1525a, 1556a-57a. Ms. Reid admitted that paid rest breaks promised by PD-07 were a benefit of employment. R.2020a-21a; *see also* R.899a (Swann Video). Wal-Mart written policies and benefits manual confirmed that employees were promised paid rest breaks as a part of their wages and as a benefit of their employment. *See* R.6902a-03a, the Associate Benefit Book at WMGE 116-17 (under the heading “My Money,” Wal-Mart identifies a series of “Pay Programs” that “supplement your income” including “Paid Break Periods” and states “Take a break and get paid for it!...”); R.7897a (Wal-MartBenefits.com website identifying paid rest breaks as an employee benefit under the heading “MY MONEY”).
- *“At Will” Employment Disclaimer Is No Defense.* Dr. Landy opined that a reasonable employee would understand the uniform disclaimer in the Wal-Mart handbook to disclaim only the intent to form something other than “at will” employment. Employees would not understand the disclaimer to contradict the corporate enforced and uniform corporate policies promising paid rest break benefits and pay for all hours worked, especially since these written policies included no such disclaimer. R.1561a-64a. A reasonable employee would understand from Wal-Mart’s numerous mandatory statements, notices, postings and labor guidelines that Wal-Mart intended to offer and indeed promised those benefits, and that employees should expect those wages and benefits upon working the specified number of hours. R.1545a-46a.
- *Preferred Scheduling System Caused Understaffing.* Dr. Landy testified Wal-Mart used its computer systems and the “preferred scheduling” program (which dictated the number of hours to be worked in each store based on sales rather than on tasks) to drive down wage expenses and increase profits. According to Dr. Landy, the preferred scheduling system dictated by home office was the “root cause” of understaffing in the stores. R.1496a-98a. (“Operations’ goal is to have payroll below last year’s percentages (R.7438a) by two tenths of a percent...The Preferred Scheduling sets up the ideal number of hours based on sales volume of the store.”); *see also*, R.7743a-44a (“We must have a .2% saving in payroll weeks 49-52...”). Dr. Landy testified to the correlation between understaffing and Employees’ ability to get breaks: The more understaffed the stores, the greater the pressure on managers not to provide breaks and on employees not to be able to take them. R.1537a.

- *Payroll Pressure Caused Understaffing, Missed Breaks And Off The Clock Work.* Dr. Landy explained the home office’s pervasive understaffing of the stores and its relentless pressure to reduce payroll costs. Supp.R.8113a, R.1505a-20a, 1595a-601a, 7627a-36a, 7637a-40a. Wal-Mart admitted that payroll pressure was the root cause of its wage and hour violations. R.1497a-98a. (2003 video in which Wal-Mart’s Vice President, People Division, Don Swann, acknowledged that payroll pressure (*i.e.*, pressure on store managers to achieve their projected sales and expenses where labor was the largest expense that store managers could control) was a “root cause” of violations of PD-07 and PD-43).
- *Bonus System Caused Rest Break And Off-The-Clock Violations.* Dr. Landy opined that the Wal-Mart store manager bonus system had a negative effect on compliance with Wal-Mart’s uniform policies on breaks and pay. R.1590a-91a, 7901a-46a and 7745a-75a. Under these incentive programs, each Wal-Mart store manager received a modest annual base salary of \$42,000 or \$50,000, depending on store size, and had the opportunity to receive an additional bonus based strictly on store profits. R.1562a-75a, 1576a-91a. Store managers earned as much as \$390,000 based strictly on the ability to control store profitability, *i.e.*, to lower wage expenses. Payroll was the largest “controllable expense” for store managers. Supp.R.8129a, 7637a-40a, 7641a-45a, 7684a-90a, 7701a-42a. Wal-Mart kept close tabs on associate hours and consistently pressured its store managers to reduce payroll even when it did not make business sense to do so.<sup>6</sup> R.7743a-44a, 7627a-36a, 7694a. Dr. Landy opined that by stealing just one hour’s time from each Employee every week for one year, a store manager with 300 employees could earn an incentive bonus of \$82,000. R.1585a-91a; 1539a (“They were saying no because they don’t want any more information about these potential violations. I mean, it’s a smoking gun.”); R.7879a-86a.
- *Payroll Records Were Proof Of Violations.* Wal-Mart admitted it was required to keep accurate records as a matter of law and company policy. R.1500a, 7625a-26a, 7502a, 1525a-27a, 7081a-85a. Wal-Mart used the data in the TCARs to determine employee pay *and to dock pay on an automatic basis*. An employee who took a break longer than 15 minutes was docked automatically for every minute his paid rest break exceeded 15 minutes. R.7264a. *See also* R.1482a-85a. Testimony from Charles Holley, the Wal-Mart senior corporate executive with authority and responsibility for Wal-Mart’s business records, and the person who signed Wal-Mart’s tax returns under penalty of perjury, confirmed the accuracy of the payroll records. R.1266a-68a (Holley Video). Canetta Reid, Director of Corporate Employment Compliance, testified that investigations and corrections made to rest break punching records was done prior to finalization of Wal-Mart’s

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<sup>6</sup> The bonuses of Wal-Mart store managers on average exceeded their base salaries, and could be as large as 100% of their base pay. R.1581a-82a, 7901a-46a, 7859a, 750a-54a (Bailey Video).

payroll records with minimal exceptions, in compliance with the Payroll Scheduling Guide. R.875a-76a (Reid Video), 7369a-96a.

- *Internal Audits Confirmed Policy Violations.* Wal-Mart's most senior managers received at least seven internal audit reports showing persistent and pervasive violations of the rest break policy. R.1501a-05a, 7518a-40a, 7503a-13a, 7493a-501a. Among many exhibits showing top level knowledge of violations were: R.6969a, (8/3/98 memo from a Divisional V.P. to Tom Coughlin acknowledging employees were not receiving scheduled breaks); R.7889a: "Dallas Meeting Highlights" dated 9/25/99 summarizing Coughlin's comments that among the "Top Five Reasons Cashiers Quit" was that they "Can't get breaks." A February 14, 2000 e-mail about a meeting between Wal-Mart's COO and nine hourly managers describes missed breaks as a primary reason for rampant cashier turnover (then running at over 120%). R.7516a-17a ("The highest percentage of Cashiers leave our company because they cannot receive a 'potty break.'").
- *Pennsylvania Impacts from Centralized Policies and Practices.* Regional Vice President Castural Thompson, a 26-year Wal-Mart veteran with supervisory responsibility for Pennsylvania, testified about wage pressure imposed by management to meet corporate financial goals by cutting labor costs, and confirmed that PD-07 violations were discussed by senior management at weekly meetings at home office. R.908-914a, 916a-918a, 921a-923a (Thompson Video).
- *Employee Complaints.* The pervasive violations of corporate policy were also reflected in written employee complaints, "ethics" hot line calls and in "grass roots" surveys conducted by Wal-Mart in its stores. R.1532a-36a, 7397a ("[employee] works in the snack bar and they are working 7 ½ hour without lunches and breaks..."), R.7398a-427a.
- *Spoilation of Evidence And Adverse Inferences.* From the beginning of the Class Period until February 2001, rest break punching was required and the TCARs showed whether an employee took any breaks, and the length of such breaks. In June 2000, with eight similar lawsuits already pending against it, Wal-Mart performed the Shipley Audit. The Audit showed pervasive non-compliance with corporate policy. R.7887a-88a, 7441a-42a. On July 21, 2000, the Shipley Audit was sent to 54 of Wal-Mart's senior managers including Tom Coughlin, Wal-Mart's then Vice Chairman, and Coleman Peterson, Executive Vice President of the People Division (Human Resources). R.7492a. Coughlin testified that no one at Wal-Mart took any action in response to the Shipley Audit. R.711a-20a; 289a-310a (Coughlin Video). At trial, Wal-Mart stipulated before the jury that: "As of January 4, 2001, lawsuits alleging violations of Wal-Mart's rest break policy had been filed against Wal-Mart on behalf of employees in eight states: Colorado, Indiana, Louisiana, New Mexico, North Carolina, Ohio, Texas and Nevada." R.1696a-99a; R.1905a-06a. They knew more lawsuits were coming. Supp.R.7954a.

- Dr. Landy testified that, following the Shipley Audit, Wal-Mart eliminated rest break punching to eliminate the “smoking gun” evidence of its policy violations and to limit its liability. R.1527a-40a. Dr. Landy’s opinion was subsequently confirmed when Wal-Mart belatedly disclosed post trial the 9/29/00 Meeting Notice of late Friday afternoon “Special Meeting of the Policy Committee,” listing two Wal-Mart senior executives, along with other members of the Policy Committee<sup>7</sup> as “required attendees” and stating: “There is a law suit in Colorado that involves our Break and Meal Period Policy, PD-07. *We need to meet for a short time to discuss proposed changes in this policy to assist our efforts in the suit and minimizing potential litigation.*” (emphasis added). Supp.R.7954a, 8086a (notes of corporate meeting on October 2, 2000 “\$550M lawsuit on Wal-Mart b/c of 1400 exceptions. Wal-Mart will be eliminating clocking in/out for breaks.”); R.7541a-46a (10/9/00 cost benefit study reported to Wal-Mart’s then COO identifying break exceptions as a “chronic problem”). The elimination of rest break punching became effective in February 2001. R.7612a-16a, 7551a.
- *Lack of Good Faith Contention Or Dispute.* Wal-Mart knew there were systemic and chronic rest break violations. Instead of addressing them, Wal-Mart stopped auditing rest break compliance, R.2023a-26a, and eliminated the only tool to ensure promised rest break compensation. R.1529a-30a, 7617a-20a.
- Following the elimination of rest break punching, repeated orders from Wal-Mart’s home office directed that no one create any documentation demonstrating whether employees were in fact receiving their rest breaks. R.1539a and 1540. R.7879a-86a, 7612a-20a. In response to managers’ requests to keep records of missed breaks, Wal-Mart issued directives from headquarters that no records of rest breaks be kept. R.7876a-78a.

### SUMMARY OF ARGUMENT

The General Assembly in the Wage Payment and Collection Law, 43 PS § 260.9a, this Court in *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293-94 (Pa. Super. 2005), and sister state supreme courts in parallel cases involving Wal-Mart have all recognized that employee class actions are not just appropriate but also essential forms for the litigation of hourly wage payment violation claims. These authorities have emphasized consistently that corporate employers must keep and maintain accurate records of employee hours and wages, and that employees may use these records to prove common law and statutory wage payment claims. The trial court followed

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<sup>7</sup> The “Policy Committee” was the committee at Wal-Mart’s home office responsible for changes to and implementation of corporate policies, including PD-07.

this law. In certifying the Class below after two multi-day evidentiary hearings, painstaking analysis of computerized payroll data and hundreds of business records, and scrutiny of detailed trial plans, the trial court properly found that the reliability of Wal-Mart's business records was one of many common and predominating questions of fact or law suitable for resolution on the merits in a class trial. The trial court then conducted a model class action trial of wage payment claims for nearly 186,000 hourly employees who would not otherwise have any realistic opportunity to gain access to the courts to assert their individual claims.

Wal-Mart has not and cannot satisfy its burden of proof on appeal. Because at least two sister state supreme courts have approved of the same class certification, evidentiary and substantive legal decisions issued by the trial court below, Wal-Mart cannot show any abuse of discretion.

The class certification and trial proceedings accorded all parties due process. Wal-Mart's claim that it was unable to assert a defense of voluntary waiver by individual class members is specious. Wal-Mart's trial counsel expressly withdrew that defense, a defense that was precluded as a matter of law by the specific provisions of the WPCL. Besides, at least one other class action precedent from an appellate case in which Wal-Mart was the representative *plaintiff* demonstrates that all of Wal-Mart's alleged defenses actually presented common and predominating questions. Therefore, Wal-Mart received all the notice and opportunity to defend that due process required.

The jury and the trial court also properly concluded that Wal-Mart had a unilateral wage and hour contract with Employees. The terms of that contract were offered in written uniform and consistent policies, labor guidelines, time-clock postings and commitments that all employees reasonably accepted by performing work for Wal-Mart. Employees agreed below

that Wal-Mart preserved the “at-will” presumption with its handbook disclaimer. But the jury and the trial court also properly found that the disclaimer did not negate Wal-Mart’s commitment to pay Employees for all time worked and to provide earned paid rest breaks in accordance with the uniform policies and labor guidelines.

The trial court also properly instructed the jury on all issues. The court directly quoted the applicable statutory provisions in its jury charge. It also calculated liquidated damages based on the specific statutory provisions at issue in this case. Wal-Mart’s own expert agreed with the calculation.

In awarding attorney fees, the trial court issued over 200 specific findings of fact and conclusions of law. It followed this Court’s decision in *Signora v. Liberty Travel*, and properly calculated a lodestar multiplier based on all of the factors set forth in Pa. R. Civ. P. 1716. Therefore, the trial court committed no abuse of discretion and its judgment should be affirmed.

## **LEGAL ARGUMENT**

### **I. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS.**

Consistent with all controlling precedent, in certifying the Employee Class the trial court emphasized that class actions are often the only realistic means for small-value claimants to gain access to the courts. WMBR. App. B, Tr. Op. 12/27/05 at 2 (*citing DiLucido v. Terminix Int’l, Inc.*, 450 Pa. Super. 393, 397, 676 A2d 1237, 1239 (1996), *alloc. denied*, 546 Pa. 655, 684 A.2d 557 (1997), overruled on other grounds by *Weinburg v. SunCo.*, 565 Pa. 612, 777 A.2d 442 (2001)); *see also Iliadis*, 191 N.J. at 116-17 (collecting cases). Wal-Mart did not dispute this principle below and does not dispute its application on appeal. Although Wal-Mart insinuates (WMBR. at 23) that a different pre-trial burden of proof might be considered in a future case, it does not and cannot dispute that the trial court properly applied the controlling pre-trial standard

for class certification below. Indeed, Wal-Mart expressly conceded at the class certification hearing that “[t]he proponent need only present evidence sufficient to make out a *prima facie* case ‘from which the court can conclude that the five class certification requirements are met.’” *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153-54 (2002) (quoting *Janicik v. Prudential Ins. Co.*, 305 Pa. Super. 120, 130, 451 A.2d 451, 455 (1982) (emphasis added)). At the hearing, Wal-Mart’s counsel responded to the court as follows:

Mr. Shea: I would assume plaintiffs have [the burden of proof] with respect to Rule 1702.

The Court: Right. By what standard?

Mr. Shea: By prima facia [sic] standard which this Court has equated with substantial evidence. They've got to come forward with substantial evidence.

The Court: Do you agree with me that's Pennsylvania standard?

Mr. Shea: I do, Your Honor.

R.339a.

Despite the foregoing concession, Wal-Mart argues on appeal that the trial court should have applied a different, unarticulated pre-trial standard. WMBr. at 23. But this argument is unpreserved for appeal and has been waived. *See Straub v. Cherne Industries, Inc.*, 583 Pa. 608, 880 A.2d 561 (2005). Whatever theoretical differences may or may not exist for an advisory opinion on the *pre*-trial standard, they are completely irrelevant in the context of this case. The record shows the trial court applied the proper standard and then confirmed and maintained class certification through trial and post-trial proceedings based on the preponderance of the evidence which is the same standard used to instruct the jury. Wal-Mart did not object to the burden of proof at any time, and failed to file a proper motion to decertify. Therefore, the issue here is not what pre-trial burden may be applied. The question is whether Wal-Mart has preserved for

appeal and proved an abuse of discretion where it failed to file a proper motion to decertify and the trial court entered a Class judgment based on the common and overwhelming evidence of systemic and centralized wage payment violations, as found by the jury.

Wal-Mart has not met and cannot carry its appellate burden for at least three (3) reasons: (i) its centralized business practices, promises, policies and payroll records all presented common and predominating questions of law or fact; (ii) its defenses to the claims also presented common and predominating questions; and (iii) it failed to properly move for decertification.

**A. THE TRIAL COURT CORRECTLY FOUND COMMONALITY AND PREDOMINANCE.**

It is well-settled that common questions exist where class members' legal grievances arise out of the "same practice or course of conduct" by the defendant. *Janicik*, 305 Pa. Super. at 133, 451 A.2d at 457; *Ablin, Inc. v. Bell Tel. Co. of Pa.*, 291 Pa. Super. 40, 50, 435 A.2d 208, 213 (1981). "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." *Weismer v. Beech-Nut Nutrition Corp.*, 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (1992).<sup>8</sup>

The trial court's decisions and the trial record all establish that commonality and predominance were easily met in this case. Wal-Mart conceded below that it told all employees that paid breaks would be provided as a work benefit, Supp.R.8104a-06a and R.590a-92a. A common, predominating question for trial, therefore, was whether these uniform policies and commitments constituted an agreement or unilateral contract between Wal-Mart and Employees. Employees' theory of liability was centered on a common grievance: that Wal-Mart's centralized business methods and practices caused it systematically to violate the uniform written

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<sup>8</sup> See *Salvas*, 452 Mass. at 357, 893 N.E.2d at 1205 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977), for the proposition that evidence of "each person" harmed by a general policy is not required in order to prove that the over-all policy existed).

“commitments” and wage payment policies it agreed were applicable to all employees. Of necessity, every one of the 186,000 class members would have to present and confront the same issues, evidence, defenses and arguments if individual litigation was required.

Wal-Mart says class certification was manifestly unreasonable because its intent to be bound by its corporate policy statements, commitments and labor notices was an inherently individualized issue. *See* WMBR. at 24-30. Wal-Mart relies on *Morosetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (1989), to argue its intention cannot be proved by “bits and pieces of [its] policy given individual employees at different times under varying circumstances.” *Id.* at 25 (*quoting Morosetti*, 522 Pa. at 495, 564 A.2d at 152-53). But the record here is completely different. Wal-Mart’s uniform policies applicable to all employees did not vary during the Class Period. Moreover, the policy in *Morosetti* was one that allegedly contradicted the legal presumption of “at will” employment, a presumption Employees conceded was not at issue in this case. The issue in the present case was not whether Wal-Mart intended to override the presumption of “at will” employment, but whether it committed to pay wages for all time worked and to provide paid rest breaks once an hourly employee worked the specified number of hours. This issue presented a classic common question of fact.

Unlike the public policy presumption that both employer and employee can ordinarily terminate employment at any time, *i.e.* “at will,” the intention to provide specified wages, benefits, terms, hours and other conditions is ascertained based on objective facts. For large hourly employers like Wal-Mart, these objective facts are typically reflected in widely disseminated corporate policy statements, time-clock postings, labor guidelines and employee handbooks. While neither employer nor employee can reasonably expect an assurance of continued employment upon performance of one or even one hundred hours of work due to the

“at-will” presumption, there is no rational argument that Wal-Mart is not obligated to pay the wages and benefits it agreed to pay and the employee agreed to accept for the hours of work already performed by the employee in accordance with uniform corporate policies.

Because Wal-Mart’s intention to contract was measured by an objective, reasonable person standard below, the issue necessarily presented a common, predominating question for both Wal-Mart and Employees. In fact, only two alternatives existed: *either* Wal-Mart did not intend to pay Employees wages for all time worked and for earned rest breaks; *or*, Wal-Mart did intend that these uniform corporate policies were in effect throughout the Class Period. As a result, Wal-Mart’s intent to promise, commit or – in legalese – “contract” presented a paradigmatic common and predominating question suitable for resolution by the jury on a class wide basis.<sup>9</sup>

The objective common evidence Employees presented included the following: (a) Wal-Mart’s home office communicated uniform labor and break policies to all employees; (b) the corporation admitted that the policies were “non-negotiable” commitments made by Wal-Mart to Employees; and (c) managers and employees would be subject to discipline up to and including termination for violations of these uniform, “non-negotiable” policies.

Tellingly, Wal-Mart proffered *common* proof of its lack of intent. It pointed to its uniform handbook disclaimer, from which it argued that the “at will” disclaimer meant that Wal-Mart was not bound to pay promised wages or wage benefits to any employee for work performed. It stated to the trial court that even after a hired employee worked eight (8) hours, the disclaimer meant that Wal-Mart had no contractual commitment to pay the employee anything

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<sup>9</sup> Indeed, the jury specifically found that Wal-Mart had agreed uniformly to provide meal break periods to each employee based on the number of hours worked, which is a common class-wide finding adverse to Wal-Mart and benefiting all employees that Wal-Mart has not appealed.

after the work had been performed. R.1461a-66a. Wal-Mart's counsel also argued to the jury that the disclaimer overrode all of the company's labor policies and commitments, so there was no corporate intention to agree to those uniform corporate statements. R.2132a-33a. Wal-Mart never contended and never presented any evidence that it had one wage payment policy for one group or category of employees and another for a different group, nor did it identify any basis for discriminating among the groups or among individuals.

The trial court correctly left resolution of the ultimate, common issue of corporate intent to the jury. Without doubt, in the absence of a certified class action, this same issue of objective corporate intent would be replayed over 186,000 times in 186,000 trials with 186,000 identical employee handbook disclaimers and 186,000 identical corporate policy statements and 186,000 displays of the "non-negotiable" power point from Wal-Mart's CEO.<sup>10</sup>

The same is true for the issue of Employee reliance. Employees' burden was to proffer common proof of a *reasonable employee's* understanding of Wal-Mart's affirmative promises. *Diel v. Elec. Data Sys. Corp.*, No. 07-CV-1213 (M.D. Pa. July 10, 2008); *McCloud v. United Parcel Serv., Inc.*, 543 F. Supp. 2d 391, 403 (E.D. Pa. 2008). The same documents and corporate

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<sup>10</sup> Tom Mars, Wal-Mart's General Counsel, confirmed Wal-Mart's uniform corporate intent on December 23, 2008: "Our policy is to pay associates for every hour worked and to provide rest and meal breaks. This is a commitment we make to the more than 1.4 million associates who choose to work for Wal-Mart ... ." The Court may take judicial notice of this statement found in a press release on Wal-Mart's website: Wal-Mart and Plaintiffs' Counsel Announce Settlement of Most Wage and Hour Class Action Lawsuits Against the Company, <http://walmartstores.com/FactsNews/NewsRoom/8867.aspx>. Supp.R.7955a-56a. See Pa. R. Evid. 201 (providing that courts shall take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned", "at any stage of the proceeding", "if requested by a party and supplied with the necessary information"); see also *Figueroa v. Pa. Bd. of Prob. & Parole*, 900 A.2d 949, 950 n.1 (Pa. Commw. Ct. 2006) (taking judicial notice of description of correctional facility provided Pennsylvania Department of Corrections website); *Horizon Healthcare Servs., Inc. v. Allied Nat'l, Inc.*, No. 03-4098, 2006 U.S. Dist. LEXIS 5440 (D.N.J. Feb. 10, 2006) (court took judicial notice of defendant's website).

admissions evidencing Wal-Mart's *objective* intent necessarily informed the objective understanding of the "reasonable employee." For example, Employees pointed to Tom Coughlin's statements about PD-07 ("Non negotiable" – "The LAW," the "We Commit To You" poster), and to the many written policies stating that employees would be disciplined for violating PD-07 and PD-43. Wal-Mart's liberal use of PD-07 to further its own ends – disciplining workers, hiring a huge labor force and avoiding labor unions – were sufficient proof that Employees justifiably relied on Corporate Policy PD-07 and PD-43 as contractual offers. R.1551a-52a, 1557a-58a, 1540-42a, 1473a-74a, 1525a, 1531a-32a, 1538a-39a, 1540a-46a. Indeed, to date, in its most recent statements, Wal-Mart continues to use language pregnant with promise. Supp.R.7955a-56a.<sup>11</sup>

**B. THE TRIAL COURT PROPERLY FOUND PREDOMINANCE AND COMMONALITY ON WAL-MART'S BREACH OF CONTRACT, UNJUST ENRICHMENT AND STATUTORY VIOLATIONS.**

The trial court rigorously examined the elements of Employees' claims and concluded they could be proved through common proof. WMBR. App. B, Tr. Op. 12/7/05 at 8-12. Wal-Mart's assertion of manifest error boils down to two assertions: that the trial court "cavalierly dismissed" testimony of current Wal-Mart employees who described why they had missed breaks many years earlier (WMBR. at 20), and that Employees lacked a common method of proving the elements of their claims. Neither argument can withstand scrutiny.

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<sup>11</sup> As the trial court and jury found, individual class member testimony about varied reactions to or recollections of Wal-Mart's policies, was and is completely irrelevant to the issue of whether a reasonable employee would understand that Wal-Mart was committing to be bound by wage payment policies uniformly disseminated, promulgated and enforced throughout the company.

**1. The Trial Court Properly Found Credibility To Be A Common, Predominating Question**

The trial court rigorously examined the parties' proffers of proof at the two separate class certification hearings, and, in compliance with Pennsylvania law, correctly and consistently refused to make merits findings or to accept one version of the facts over a competing version. *See e.g.* R.344a. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Cavanaugh v. Allegheny Ludlum Steel Corp.*, 364 Pa. Super. 437, 528 A.2d 236 (1987) (vacating denial of class certification and holding that the trial court improperly examined the merits of the litigation itself instead of focusing on factors relevant to class certification). After determining that each of the class certification requirements had been met, the trial court left the resolution of factual issues for the ultimate trier of fact, the jury, contemplating the completion of merits discovery. *See* WMBr. App. B, Tr. Op. 12/27/05 at 8, n.1 (noting, as to Wal-Mart's assertion that its records were inaccurate, that the defense might "be persuasive at trial"); 16 (Wal-Mart's contentions regarding its records were questions of fact for jury determination); 10-11 (noting conflicting testimony by Employees' and Wal-Mart's witnesses the resolution of which discrepancies "will undoubtedly be an issue for jury determination at trial."). As the trial conclusively proved, all of the alleged conflicts in the evidence involved common, predominating issues of fact, as Wal-Mart's assertions about its centralized payroll records and employee policies applied equally to every class member.

Wal-Mart's assertion (WMBr. at 20, n.11) that the trial court "rejected, as coerced," testimony favorable to Wal-Mart, misinterprets the trial court's Opinion. The trial court correctly noted that, as a general matter, credibility issues are not before a court on a class certification motion. WMBr. App. B, Tr. Op. 12/27/05 at 10-11. To emphasize this point, the trial court observed that a few snippets of video-taped deposition testimony would be an

improper basis for deciding credibility as to the underlying merits of this case, a determination left to the jury as the ultimate trier of fact. *Id.* at 11. The trial court’s reference to the USS Pueblo incident simply illustrated the importance of a jury’s evaluation of a witness’ credibility based on how each witness acts, speaks and looks while testifying and the need for the jury to observe *all* the testimony of a witness. *Id.* Reserving credibility determinations for a jury trial does not and cannot constitute an abuse of discretion.

**2. The Trial Court Properly Found Predominance Based on Employees’ Common Method of Proof.**

In its final challenge to class certification, Wal-Mart purports to attack the sufficiency of Employees’ common proof of liability and damages. This argument fails for at least two reasons. First, Wal-Mart ignores Employees’ common proof of *liability* based on corporate documents *other than* the payroll records, all of which was confirmed by testimony from Wal-Mart senior management about the systemic violations and the understaffing caused by the computerized “preferred scheduling” program. As in *Salvas*, this common proof included (a) Wal-Mart’s internal communications admitting that payroll pressure and understaffing caused widespread break policy and wage payment violations; (b) business record complaints from Pennsylvania employees showing ongoing pressure to miss breaks; (c) the Shipley Audit, which included stores in Pennsylvania, evidencing tens of thousands of earned but missed breaks; and (d) internal audit programs that instructed Wal-Mart’s auditors to count policy violations reflected in the payroll records exactly as Employees’ statistical experts counted them. *Salvas*, 452 Mass. at 365-66, 893 N.E.2d at 1210-11.

Second, Wal-Mart ignores the basis for the trial court’s findings. The predominance finding rested firmly on Wal-Mart’s business and payroll records. Plaintiffs’ experts did not interpret those records – they summarized them. Using computers to handle Wal-Mart’s massive

data, Drs. Baggett and Shapiro demonstrated their methodology for tabulating missed breaks and missed pay from a reliable audit sampling of the payroll and related business records. Drs. Baggett and Shapiro established it was possible to manageably present massive data to the trial court, and ultimately to the jury.

Thus, the trial court found commonality and predominance based on Wal-Mart's business records, concluding that "the systemic loss of contractual breaks and meal time in Pennsylvania stores has been *prima facie* demonstrated." WMBR. App. B, Tr. Op. 12/27/05 at 10. The trial court relied on the Business Records Act, 42 Pa. C.S. § 6108, to accept Wal-Mart's business records, mandated by law and used to pay and tax employees, as *prima facie* accurate. *Id.* at 11-12. The trial court properly left for resolution by the jury the meaning and credibility of Wal-Mart's computerized business records, the "factual determination as to why these statistically significant demonstrated discrepancies between the time records and unalterable policy exist," and Wal-Mart's culpability for the policy violations. *Id.* at 10. The trial court expressly found that, if a jury accepted Wal-Mart's defenses (either that its business records were inaccurate or that individualized explanations were needed as to every break), then Employees would fail in their burden of proof at trial. *Id.* at 16. The trial court rejected Wal-Mart's argument that thousands of employees would have to testify to the inaccuracy of their individual time records. *Id.* ("the inaccuracy of mandated records on which [Wal-Mart] relied for years, can surely be more convincingly demonstrated than through employee rote testimonials of company loyalty").<sup>12</sup>

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<sup>12</sup> At both class certification hearings, Wal-Mart failed to present testimony from any corporate official or manager responsible for the business records that the records – maintained for payroll and tax reporting purposes – were inaccurate, despite being expressly invited by the trial court to do so. R.346a-47a. The trial record is equally devoid of any proof from a Wal-Mart officer or designee that the business records were or are unreliable or inaccurate.

Decisions from appellate courts in other states bear out the wisdom of the trial court's predominance determination. In virtually identical cases, the highest courts of New Jersey and Massachusetts each reversed a trial court's denial of class certification, finding, as here, predominance based on mandated and centralized business records and uniform corporate admissions. In *Salvas*, the trial court decertified a class of 67,500 Wal-Mart employees. *See Salvas*, 452 Mass. at 356-358, 893 N.E.2d at 1204-06. The Massachusetts Supreme Judicial Court reversed, explaining that Wal-Mart's business records were inherently probative and provided a common method of proving class-wide *liability*:

[T]he plaintiffs are not using [their expert] to "imbue" Wal-Mart's business records with evidentiary value the records do not already possess. The motion judge's decision to exclude [plaintiffs' expert's] testimony as unreliable turns fundamentally on his conclusion that "[t]he time records of Wal-Mart are not adequate of themselves to establish entitlement to compensation in a case like this..." This formulation misstates the test. The question is not whether Wal-Mart's records are dispositive evidence, conclusively establishing liability and damages "of themselves." *Rather, the test is whether the business records are admissible evidence, probative of Wal-Mart's liability. If so, then [plaintiffs' expert's] efforts to count and summarize them...are similarly admissible...* In excluding even the portion of [plaintiffs' expert's] report and testimony that consisted of counting data found in Wal-Mart's own business records, *the motion judge acted not on the basis of any challenge to [the expert's] methodology, but essentially on his view that the records themselves were insufficiently reliable. This was error.* Business records have a special place in our law of evidence.

*Id.* at 357-58, 893 N.E.2d at 1205-06 (emphasis added); *see also id.* at 359-60, 893 N.E.2d at 1206-07. The *Salvas* court further held that any criticism of the expert's well-recognized statistical methodology went to the weight of the opinion not to its admissibility. *Id.* at 360, 893 N.E.2d at 1207. Here, the trial court properly applied the same analysis. WM Br. App. B, Tr. Op. 12/7/05 at 8-12. Employees' experts used the same mathematical and statistical

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Supp.R.8125a-28a, R.847a-51a, 59a (Lippert Video), 1484a-85a, 1500a, 7625a-26a, 1525a-27a, 7081a-85a, 932a-943a (Campbell Video), 875a-876a (Reid Video), 914a-915a, 921a, 925a (Thompson Video), 1266a-86a (Holley Video).

methodologies as used in *Salvas*. In fact, Wal-Mart's expert agreed at trial that the methodologies were well-established, and that she too used the same methods to analyze Wal-Mart's business records. R.2083a-84a. Therefore, as in *Salvas*, Wal-Mart's evidentiary arguments below went to weight, not to admissibility, and the trial court correctly found that this presented a common predominating issue for class wide resolution at trial.

The New Jersey Supreme Court's decision in *Iliadis* is to the same effect. In that case, the court identified a dozen predominant common issues including, *inter alia*, whether Wal-Mart's centralized scheduling policies caused it to violate its contractual and statutory commitments to employees; whether Wal-Mart's practices created a work environment in which wage payment promises were ignored to reduce labor expenses; whether Wal-Mart exercised central control over scheduling, payroll, staffing, training, and compensation; and whether its payroll and other business records were sufficiently credible to prove missed and shorted breaks for members of the employee class. *See Iliadis*, 191 N.J. at 111-12, 922 A.2d at 723-24; *see also Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 225-229 (Mo. Ct. App. 2007); *Armijo v. Wal-Mart Stores, Inc.*, 168 P.3d 129, 140-42 (N.M. Ct. App. 2007).

Without distinguishing or addressing the foregoing cases, Wal-Mart urges this Court to follow other appellate courts in parallel class actions against Wal-Mart that purportedly rejected the class-wide testimony from Drs. Baggett and Shapiro. WMBr. at 35-36. Contrary to Wal-Mart's assertion, neither Dr. Baggett nor Dr. Shapiro provided reports or testimony in *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, 351-52, 353, 773 N.E.2d 576, 578, 580 (2002), and the trial and appellate courts made no mention of these experts in *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002), and *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 602-03 (E.D. La. 2002). Additionally, in those cases, the plaintiffs sought to certify claims based

upon *oral contracts*, involving individual issues as to contract formation and terms that predominated over common issues. *See Petty*, 148 Ohio App.3d at 351-52, 354, 773 N.E. 2d at 578, 580; *Lopez*, 93 S.W.3d at 557; *Basco*, 216 F. Supp. 2d. at 602-03; and *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550-52, 613 S.E.2d 322, 327-28 (2005) (certification also denied based on class definition and potential “waiver” issues).

In contrast, here, Employees alleged and proved a unilateral contract under Pennsylvania law based upon uniform written corporate policies. *See Bauer v. Pottsville Area Emergency Medical Servs., Inc.*, 758 A.2d 1265 (Pa. Super. 2000) (holding that a written company policy is enforceable against an employer if a reasonable person in the employee’s position would interpret its provisions as evidencing the employer’s intent to be bound by the representations).<sup>13</sup>

Though it waived any appellate challenge to manageability, Wal-Mart unsuccessfully attempts to distinguish other certified and tried class actions on those grounds. WMBR. at 37. Neither *Savaglio v. Wal-Mart Stores, Inc.*, No. C-835687 (Cal. Super. Ct. Nov. 6, 2003), nor *Braun v. Wal-Mart, Inc.*, No 19-CO-01-9790 (Minn. Dist. Ct. June 30, 2008), supports Wal-Mart, as the trial of each of these class cases demonstrates manageability. *See also Iliadis*, 191 N.J. at 118-19, 922 A.2d at 727 (reversing denial of class certification on manageability grounds and noting the “resourcefulness, creativity, and administrative abilities of trial courts” to

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<sup>13</sup> The statistical methodologies employed by plaintiffs’ experts in parallel litigation against Wal-Mart are not employed here. *See, e.g., Jackson (Scott) v. Wal-Mart Stores, Inc.*, No. 258498, 2005 Mich. App. LEXIS 2975, \*12 (Mich. App. Nov. 29, 2005) (rejecting methodology of determining the break patterns of more than 96,000 employees over a six-year period through the use of random polling and extrapolation of electronic data collected over a period of only five weeks); *Kulmann (Hermanson) v. Wal-Mart Stores, Inc.*, 711 N.W. 2d 694 (Wisc. App. 2006) (rejecting methodology of using questionnaires submitted to employees to obtain their recollections of such unpaid work for extrapolation purposes where data did not exist). *Wal-Mart Stores Inc. v. Bailey*, 808 N.E.2d 1198 (Ind. App. 2004), *trans. den.*, 831 N.E.2d 742 (Ind. 2005) which upheld denial of class certification, does not discuss the methodologies of the plaintiffs’ experts.

overcome potential manageability obstacles) (internal citations omitted). Besides, the trial of this case below establishes beyond any doubt that the class trial was manageable.

**C. THE TRIAL COURT PROPERLY DEFINED THE CLASS.**

Wal-Mart challenges the class definition – March 19, 1998 “to the present” – as vague. This argument is without merit and, in any event, was waived by Wal-Mart. The Class was precisely defined as: “all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania during the period March 19, 1998 to the present.” Prior to trial, the Class Period was set using the notice opt-out deadline of May 1, 2006 as the end date. Wal-Mart consented to this end date, thus failing to preserve this issue for appeal. R.2140a (Wal-Mart agreement with end date and trial court instruction on same); Supp.R.8144a (*quoting* special verdict interrogatory No. 4).

Wal-Mart also challenges the class definition as impermissibly broad because it is not limited to Wal-Mart employees who missed rest breaks or worked off the clock, thus purportedly including individuals without cognizable claims. WMBr. at 39-40. Wal-Mart simply ignores well-settled law. “[C]lass members can assert a single common complaint even if they have not all suffered an actual injury; demonstrating that all class members are subject to the same harm will suffice.” *Baldassari v. Suburban Cable TV Co., Inc.*, 808 A.2d 184, 191 n.6 (Pa. Super. 2002). Besides, Class damages were calculated only for the actual missed and shorted rest breaks and the actual off-the-clock work reasonably reflected in Wal-Mart’s business records. *See* R.7947a-50a. These calculations did not and cannot prejudice Wal-Mart, as they reflect the most conservative totals for Employee damages. The trial court therefore acted well within the scope of its broad discretion in defining the Class. *See Janicik*, 305 Pa. Super. at 127, 451 A.2d at 454.

## II. WAL-MART'S DUE PROCESS ARGUMENT IS BASELESS.

Despite presenting a vigorous, extensive and unimpeded defense to all of Employees' claims, Wal-Mart says it was deprived of due process. But Wal-Mart was given notice and every opportunity to present all witnesses, defenses, evidence and argument it deemed necessary to protect its due process rights. In fact, Wal-Mart pursued the same trial plan that was followed in the court below when Wal-Mart was a representative *plaintiff* in a similar class action. See *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001), overruled on other grounds by *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

In *Visa Check*, as here, the defendants argued they would be prevented from presenting individual affirmative defenses – and therefore deprived of due process – if the mammoth nationwide claims were tried as a class action. Class *plaintiff* Wal-Mart argued, and the Second Circuit agreed, that if “the mitigation defense is in-fact viable, the majority of the issues relating to this defense are common to the class.” *Id.* at 139 (footnote omitted). As a result, the Court of Appeals affirmed certification of the *Visa Check* merchant class, and Wal-Mart later settled the class action for over \$3 billion plus extensive equitable relief. *In re Visa Check*, 396 F.3d 96, 103 (2d Cir. 2005) (approving settlement and award of attorneys' fees).

In the present case, like the defendants in *Visa Check*, Wal-Mart says the class trial prevented it from presenting the affirmative defense of voluntary waiver of rest break benefits. WMBr. at 41 (raising the waived issue of whether class members voluntarily missed breaks). Wal-Mart fails to advise this Court that it offered no proof of this affirmative defense and, on Employees' motion at the close of Wal-Mart's case, *withdrew the affirmative defense*. R.2100a-02a.

Apart from its failure to preserve the issue on appeal, Wal-Mart conceded at trial that this alleged defense was baseless for at least two reasons. First, the WPCL expressly precluded Wal-Mart's individual defense of voluntary waiver. 43 P.S. § 260.7 (provisions of law may not be waived by agreement). Second, as with *Visa Check*, virtually all issues relating to waiver and Wal-Mart's other purported defenses were and are common to the Class.

To the extent Wal-Mart wanted to disprove, discredit or otherwise undermine the accuracy of its TCAR reports and other payroll records, it was free to call countless executives, information systems managers and computer technology personnel to testify, if they could, that the payroll records were not reliable concerning rest break wages and wages paid. Similarly, to the extent Wal-Mart wanted to challenge a centerpiece of Employees' case – the Shipley Audit and the nine other internal audits – it was free to present evidence refuting that common proof. It failed to do so.

Contrary to Wal-Mart's brief (WMBr. at 40-41), Employees at trial did not rely on Dr. Baggett or Dr. Shapiro to establish whether and why an employee missed a break or a meal. Employees directly relied on Wal-Mart's TCARs and related business records, all of which specifically reported short and missed breaks. Drs. Baggett and Shapiro simply took these records as they found them, using them as Wal-Mart used them and for the same purposes. Drs. Baggett and Shapiro tabulated or correlated them to other internal and electronic records – extrapolating where certain records were missing or spoliated<sup>14</sup> – to present a comprehensible and aggregate damage amount based on Wal-Mart's own data. Therefore, like the mitigation defense in *Visa Check*, the issue whether the payroll records accurately reflected the hours worked, breaks missed, and wages paid – as Wal-Mart had represented previously to government

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<sup>14</sup> R.2079a-83a, 1765a-66, 1843a-45a, 2085a-86a.

authorities, employees and shareholders – was a common, predominating question for all of the Employees and for the jury to resolve on a class wide basis. Indeed, the exact same process involving the exact same data and the exact same testimony would have to be repeated over 186,000 times if the claims had to be tried on an individual basis.

The reasons Employees missed their breaks and worked off-the-clock were presented through extensive common evidence of Wal-Mart’s centralized “Preferred Scheduling System,” the immense payroll pressure it imposed, the bonus structure for store and district managers (which rewarded those who reduced payroll), and the systemic understaffing of stores reflected in Wal-Mart’s own internal documents. Wal-Mart was free to and did dispute this evidence of systemic payroll pressure. It also was free to dispute the roles played by its scheduling system and bonus structure in store understaffing. No testimony from individual class members could have or would have had any bearing on this issue, as Employees had no role in the scheduling system, paying bonuses to managers or staffing the stores. Again, as in *Visa Check*, the central issue was (and remained) a common predominating issue of fact that could be and was tried properly to the jury.

Relying on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008), Wal-Mart argues the class trial presented only “half of the equation.” WMBR. at 40. But this quotation is taken out-of-context, and *McLaughlin* is completely off-point and substantially in doubt due to a subsequent Supreme Court ruling. See *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 82 (E.D.N.Y. 2008) (noting that *McLaughlin* is “placed in doubt” by *Bridge v. Phoenix Bond & Indemnity Co.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2131, 2142 (2008)).

In *McLaughlin*, current and former smokers alleged that cigarette companies violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”) by portraying “light” cigarettes

as more healthful than “full-flavored” cigarettes. *See McLaughlin*, 522 F.3d at 220. In reversing class certification, the Court of Appeals said, “But proof of misrepresentation – even widespread and uniform misrepresentation – only satisfies half the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof.” *Id.* at 223. This statement has absolutely nothing to do with the class claims in the present case, as Employees did not sue Wal-Mart for misrepresentations, RICO violations, mail fraud or advertising fraud. More significantly, the Supreme Court subsequently contradicted *McLaughlin*’s reliance analysis in *Bridge*, 128 S. Ct. at 2142 (holding that reliance is not an element of a RICO claim). Wal-Mart’s other quotation from *McLaughlin* about conforming ““the law to the proof”” (*see* WMBR. at 40) is also taken out-of-context, as none of the Employees’ claims here is time-barred, which is the context in which the *McLaughlin* court used the quoted phrase. *See McLaughlin*, 522 F.3d at 220. In sum, none of Wal-Mart’s out-of-context snippets from this dubious precedent has any bearing on this appeal.

The insinuation by Wal-Mart that Employees created a “fictional” “composite ‘class’” for trial is fulsome at best. The trial here was entirely different from that in *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), cited by Wal-Mart. *See* WMBR. at 42. In that case, there were three (3) fundamental problems with the certified class. First, there were multiple different versions of the franchise agreement covered by the class action. *See id.* at 340. Here, by contrast, the break and pay promises were identical for every Class member. Second, *Broussard* was a non-opt-out class action in which certain class members had released their claims and were in conflict with other class members. *See id.* at 339. The Class certified here was an opt-out Class, and there was and is no evidence of any release or any conflict among or between Class members. Third, some of the class member claims were time-barred in

*Broussard*. *Id.* at 342. Here, no Class member claims were time-barred, as Ms. Hummel asserted timely statutory claims and the verdict properly separated the common law and statutory claims. As a result, *Broussard* has nothing in common with the Class claims tried in this case.

The trial below focused on Wal-Mart's own policies and promises, its own business records, its own uniform scheduling plans, its own centralized staffing dictates, its own bonus practices and its own corporate admissions. Without dispute, all of this corporate evidence applied equally to every member of the Employee Class, and would have to be duplicated and reintroduced 186,000 times if individual litigation were required.

To be sure, Wal-Mart attempted to contradict this common corporate evidence with the testimony of one Class member, Semerian Brown, a very soft-spoken 75 year old daytime maintenance employee who had worked at Wal-Mart since 1992, and who testified that he liked his job and enjoyed working at Wal-Mart. *See* R.2054a. Mr. Brown appeared to agree with the leading question of Wal-Mart's trial counsel that "no manager or supervisor ever prevented you from taking your meal or rest breaks, did they, sir?; No." R.2053a. Employees' counsel, the court and the jury all were able to observe this testimony, consider Mr. Brown's demeanor, his recollection and his unarticulated testimony.<sup>15</sup> For this reason, Employees' counsel did not cross-examine Mr. Brown. The jury, however, was well within its role to reject Wal-Mart's reliance on this very devoted longtime maintenance employee as the sole proof that Wal-Mart's payroll records could not be relied upon for the calculation of Class member damages. If anything, Mr. Brown's testimony proved conclusively that it was not just proper to try the case as a class action but also absolutely essential, as very few Wal-Mart employees would have the temerity or wherewithal to individually confront Wal-Mart.

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<sup>15</sup> For example, Mr. Brown shuffled to the witness stand and appeared to be very nervous.

Employees agree that the Constitution guarantees each litigant “an opportunity to be heard at a meaningful time and in a meaningful manner.” *See* WMBR. at 50 (citation omitted). The Supreme Court has emphasized that due process applies to both parties, and often requires a balancing test to ensure that both sides have a fair chance to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 343-48 (1976). “‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 786 (9th Cir. 1996). In this respect, “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (class actions are most appropriate where class members’ claims would be “uneconomical to litigate individually”); *Salvas*, 452 Mass. at 369, 893 N.E.2d at 1213 (same); *Iliadis*, 191 N.J. at 103, 922 A.2d at 718 (same).<sup>16</sup>

The court below scrupulously guarded and balanced the due process rights of all parties. Wal-Mart defended this class action as a class action, steadfastly contending that it uniformly disclaimed to all Employees any promise about breaks or pay. Employees presented common class-wide evidence that Wal-Mart indeed made those uniform promises and documented them

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<sup>16</sup> *See also Eisen*, 417 U.S. at 186, n.8 (“The class action is one of the few legal remedies the small claimant has against those who command the status quo.... The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all of our citizens...or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods. . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy – or at least to deter – that conduct.”) (internal citation and quotation marks omitted).

in common, written corporate policies that it distributed and enforced throughout the company. Employees also proved that Wal-Mart's centralized business policies, practices and programs necessarily resulted in intense payroll pressure, understaffing, missed and shorted breaks and off-the-clock work. Employees also proved class wide damages based on Wal-Mart's own records. R.7949a-52a. Wal-Mart did not argue below and has not argued on appeal that an improper methodology or statistical process was used to calculate these losses.

In this regard, it is fundamental that business records are presumed to be reliable, that the use of business records negates the need for cross-examination, and that reliance on such records in litigation does not offend the Constitution. *See Salvas*, 452 Mass. at 358-59, 893 N.E.2d at 1205-06 ("Business records have a special place in our law of evidence . . . Wal-Mart's business records at issue in this case satisfy all of the requirements to be afforded the usual presumption of reliability."); *Valentine v. Alameida*, 143 Fed. Appx. 782, 784 (9th Cir. 2005), *cert. denied*, *Valentine v. Woodford*, 547 U.S. 1127 (2006) ("business records are generally considered sufficiently reliable to survive a Confrontation Clause challenge"); *accord Commonwealth v. Scatena*, 332 Pa. Super. 415, 438-39, 481 A.2d 855, 867 (Pa. Super. 1984) (reliance on business records does not violate due process), *rev'd on other grounds*, 508 Pa. 512, 498 A.2d 1314 (1985); *McLean v. State*, 482 A.2d 101, 105 (Del. 1984) (under the business records exception, defendants have no due process right of confrontation due to their presumed reliability). Of necessity, the reasonable calculation of class member damages based on a class defendant's own business records is permissible in class cases. *See Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003). Thus, Employees' reliance on Wal-Mart's own business records to prove the Class's claims and losses in no way offended due process.

### **III. THE TRIAL COURT PROPERLY ENTERED JUDGMENT BASED ON THE JURY VERDICT.**

During a 29 day trial, and as the trial court found (WMBR. App. H, Tr. Op. 9/3/08 at 20), the jury heard “dramatic” factual testimony “more than sufficient to prove the class claims presented” by Employees. Wal-Mart now purports to challenge the sufficiency of that evidence by blatantly ignoring the trial record and the applicable law governing Employees’ claims. As set forth below, the evidence in support of the jury verdict was more than sufficient.

#### **A. THE EVIDENCE PROVED AND THE JURY FOUND THE EXISTENCE OF A UNIFORM CONTRACT.**

At trial, Employees founded their case on Corporate Policies PD-07 and PD-43. R.6974a-92a, 7020a-33a. Wal-Mart, in ostrich-like fashion, ignores the overwhelming evidence in the record: the Corporate Policies, the “We Commit To You” posters in every store repeating the promise of breaks and pay, the Home Office “Talking Points” reiterating the promises to every employee, the corporate admissions that the policies were “the LAW” and “non-negotiable” and the testimony of Wal-Mart’s corporate designee, Ms. Reid, that the uniform corporate policies remained the same during the class period and were communicated from the home office to every hourly employee. R.1963a, 2019a, Supp.R.8135a-37a. Wal-Mart’s determination to address only the terms of its Handbook (WMBR. at 24-25; 28-29; 44-47) and its refusal to address the corporate policies themselves does not alter the record evidence and the sufficiency of Employees’ common proof.

Contrary to Wal-Mart’s assertion (WMBR. at 24-26), in *Morosetti v. Louisiana Land Exploration Co.*, 45 Pa. D. & C.3d 545 (Pa. C.P. 1986), *vacated by* 564 A.2d 151 (Pa. 1989), the Supreme Court found that a contract with employees could arise out of a company policy widely

communicated to employees.<sup>17</sup> See also *Andrews v. Comp USA, Inc.*, No.3: 00-CV-1368-D, 2002 U.S. Dist. LEXIS 2953 at \*23-24 (N.D. Tex. Feb. 21, 2002) *aff'd without opinion*, 2002 U.S. App. LEXIS 24790 (5th Cir. Nov. 7, 2002) (citing *Morosetti's* holding that the distribution of a policy statement may constitute offer and acceptance of a contract). In *Bauer v. Pottsville Area Emergency Medical Services, Inc.*, 758 A.2d 1265 (Pa. Super. 2000), this Court found that company policies communicated in an employment context could constitute a “unilateral offer of employment which the employee accepts by the continuing performance of his or her duties.” *Id.* at 1269. Citing to Judge Beck’s concurring opinion in *Darlington v. General Electric*, 350 Pa. Super. 183, 212, 504 A.2d 306, 320 (1986), this Court described a unilateral contract:

In the employment context, the communication to employees of certain rights, policies and procedures may constitute an offer of an employment contract with those terms. The employee signifies acceptance of the terms and conditions by continuing to perform the duties of his or her job; no additional or special consideration is required.

*Id.* at 212, 504 A.2d at 320, *overruled on other grounds*, *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (1989). See also *First Home Sav. Bank, FSB v. Nernberg*, 436 Pa. Super. 377, 387, 648 A.2d 9, 14 (1994). *Pilkington v. CGU Ins. Co., Inc.*, No. 00-2495, 2001 U.S. Dist. LEXIS 3668, at \*21-22 (E.D. Pa. Feb. 9, 2001) (citing *Bauer*); *Caucci*

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<sup>17</sup> On appeal, the *Morosetti* trial court’s directed verdict on behalf of a certified class of employees asserting a contract claim for a fringe benefit (severance pay), *Morosetti*, 45 Pa. D. & C. 3d 545 (Allegheny Cty. 1986), was vacated *only* because plaintiffs’ evidence was insufficient to sustain their contract claim: “The only evidence was that in a company manual, which unlike other policies that were communicated to employees by flyers, there were *procedures for severance the company followed from time to time*....The learned trial judge fell into error when he equated an *uncommunicated* personnel manual with a ‘handbook.’” *Morosetti*, 522 Pa. at 495, 564 A.2d at 152-53 (emphasis added).

*v. Prison Health Servs., Inc.*, 153 F. Supp. 2d 605, 611 (E.D. Pa. 2001) (finding that “provisions in a [company] handbook or manual can constitute a unilateral offer”).<sup>18</sup>

Wal-Mart’s attack on the sufficiency of Employees’ proof of corporate intent to contract is without merit. WMBr. at 25-26, 43-44. As noted, on a contract claim intent is discerned objectively, not subjectively. *Ingrassia Constr. Co., Inc. v. Walsh*, 337 Pa. Super. 58, 66, 486 A.2d 478, 482-483 (1984) (intent to contract determined by “outward and objective manifestations of assent”).

Unfortunately for Wal-Mart, the jury was persuaded that the preponderance of the evidence demonstrated Wal-Mart’s intent to contract. The jury heard Employees’ common evidence of intent to contract in the widely disseminated Corporate Policies PD-07 and PD-43, *which policies were devoid of disclaimer language*, and which were repeatedly and continuously communicated to Employees. R.1906a-07a, 1963a-64a, 2019a-21a. Employees were informed repeatedly that the terms of their employment and their wages expressly included a definitive number of earned paid rest breaks of specific duration. R.6974a-92a, R.865a (Lippert Video), 1561a-63a. The jury heard Tom Coughlin, former CEO of Wal-Mart, who attested that these policies were “non-negotiable” and that anyone who violated them would be disciplined. R.1551a-52a; 1557a.

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<sup>18</sup> Wal-Mart’s reliance (WMBr. at 44-45) upon cases involving wrongful termination is misplaced. Unlike *Donahue v. Federal Express Corp.*, 2000 Pa. Super. 146, 753 A.2d 238 (2000), and *Luteran v. Loral Fairchild Corp.*, 455 Pa. Super. 364, 688 A.2d 211 (1997), no improper termination or discharge claims were asserted here. Employees conceded their “at will” status and pursued their contractual right to earned compensation benefits during the term of their employment as promised in Corporate Policies PD-07 and PD-43. R.1560a-62a. These policies were presented as inviolate rights of Employees. Under these circumstances, a reasonable employee would understand that Wal-Mart intended to be bound and the jury so found.

The jury saw Wal-Mart's "We Commit To You" poster. R.7008a. In language pregnant with promise<sup>19</sup> and *devoid of any disclaimer*, Wal-Mart posted the following statements in every store's break rooms: "*We commit to you . . . All associates will receive their breaks and lunches on time . . . YOU CAN COUNT ON US AT WAL-MART!!*" R.7008a (emphasis added). In still another indicium of Wal-Mart's intent to be bound and to persuade its employees of the binding nature of the commitment, the "We Commit to You" posters were *signed* by Wal-Mart management, including the Executive Vice President/Chief Operating Officer of Wal-Mart, the Regional and Divisional Vice Presidents, and the District Manager.

The jury also heard testimony about the disclaimer language in the Wal-Mart handbook, and the fact that the policies could be – but never were – altered.<sup>20</sup> Employees offered proof – evaluated and accepted by the jury – that the disclaimer language and the manner in which a reasonable employee would understand such language did not negate the pay and break promises. R.1561a-62a.

Contrary to Wal-Mart's argument (WMBR. at 44), the handbook disclaimers did not preclude a contract as a matter of law. *Andrews*, U.S. Dist. LEXIS 2953, at \*25 n.12 (applying Pennsylvania law) ("employment-status-related disclaimers are not relevant to the question whether the commission plan at issue here constitutes a compensation contract"); *McGough v.*

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<sup>19</sup> "Commit" is defined as "obligate or bind" and "commitment" as "an agreement or pledge to do something in the future." Webster's New Collegiate Dictionary (1977 ed.).

<sup>20</sup> Wal-Mart's handbook disclaimer was limited to the Handbook itself: "*This handbook is not a contract; the information contained in this handbook are guidelines only, and are in no way to be interpreted as a contract; the policies and benefits presented in this handbook are for your information and do not constitute terms or conditions of employment.*" (Emphasis added). Nothing in this disclaimer language, or in any other document presented to Employees, barred Wal-Mart from making other specific communications to Employees creating unilateral contractual obligations. That Wal-Mart made such other specific communications in the form of the policies, the posters, and the benefits book to name only a few cannot be refuted by Wal-Mart.

*Broadwing Comm'ns Inc.*, 177 F. Supp. 2d 289 (D.N.J. 2001) (interpreting Pennsylvania law and denying motion to dismiss employees' breach of contract and WPCL claims despite express disclaimer disavowing intent to contract).<sup>21</sup>

Similarly, the fact that the policies could be altered prospectively did not alter their binding nature for wages due on work already performed. *Kemmerer v. ICI Ams. Inc.*, 70 F.3d 281, 287 (3d Cir. 1995) ("Under unilateral contract principles, once the employee performs, the offer becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain."), *cert. denied*, 517 U.S. 1209 (1996); *McGough*, 177 F. Supp. 2d at 296 n.5 (interpreting Pennsylvania law) (same). See, e.g., *Abbott v. Schnader, Harrison, Segal & Lewis, LLP*, 805 A.2d 547, 559 (Pa. Super. 2002) (an "unfettered right to terminate [retroactively] in the face of specific grants of benefits 'ha[d] no basis in contract law' and was more than minimally unfair.")<sup>22</sup> The disclaimers and the ability to alter the policies were simply factors for the jury to consider. Based on the totality of the evidence, the jury concluded

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<sup>21</sup> The *McGough* disclaimer, in pertinent part, provided:

This Plan is a statement of the Company's current policy on incentive compensation. It is not a contract and does not give the [employee] any legal rights to receive compensation thereunder nor does it serve to alter the [employee's] employment relationship with the Company . . . as an at will employee. No legal rights accrue under the Plan with respect to compensation until such time as compensation is actually paid. The Company may modify or terminate the Plan at any time or without notice. . . .

*Id.* at 295. In *McGough*, the plaintiffs' claim was not dependent solely on the Compensation Plan, as they also alleged a separate oral agreement. *Id.*

<sup>22</sup> In *Schnader*, a unilateral contract case, the Superior Court recounted a hypothetical similar to the hypothetical the trial court described both before and during the trial of this case: If an employee is promised \$10 per hour effective Monday, and told that her wage can be reduced at any time, and on Wednesday her wage is cut to \$5 effective Thursday, her employer cannot refuse on pay day to give her \$10 per hour for her work on Monday through Wednesday. See *Schnader*, 805 A.2d at 559 (quotations and citations omitted).

that Wal-Mart intended its employees to understand its promises to be binding commitments and contractual obligations to provide breaks and pay. Jury Verdict – Liability.

Wal-Mart relies on *Richardson v. Charles Cole Memorial Hospital*, 320 Pa. Super. 106, 466 A.2d 1084 (1983) (WMBR. at 47), for the proposition that its ability to alter the policies negated any intent to contract. But in *DiBonaventura v. Consolidated Rail Corp.*, 372 Pa. Super. 420, 539 A.2d 865 (1988), this Court rejected *Richardson*'s application to unilateral contracts, noting that "mutuality of obligation" was a "thoroughly discredited notion." *Id.* at 425, 539 A.2d at 868. As *DiBonaventura* explains:

Because the issue of whether or not handbooks are bargained for appears to us to be one based upon the mutuality of obligation, and therefore ripe for interment, we see no need to consider the fact that the policies were unilaterally implemented here. Our inquiry will consider the issue of whether or not a reasonable employee in DiBonaventura's position would have expected the Agreement, policies, and manual that he cites in his amended complaint to provide him with a specific term of employment.

*Id.* at 426, 539 A.2d at 868.

In sum, at trial (as at class certification), the question of whether Wal-Mart intended to be bound by its widely disseminated policies applicable to all employees was the subject of extensive common proof that more than sufficed to support the jury's finding of a contract. As discussed *supra* at 22, n.10, Wal-Mart persists in making the same contractual promises to this day.

#### **B. THE JURY HEARD OVERWHELMING LIABILITY AND DAMAGES EVIDENCE.**

As discussed above at 9-11, the jury verdict was founded on: (i) Dr. Landy, an expert witness on liability, who testified for three days about Wal-Mart's corporate-wide policies, practices, payroll scheduling, and store manager bonus plans, all of which centralized business practices caused widespread policy violations; (ii) former Wal-Mart Regional Vice President for

the region including Pennsylvania, Castural Thompson, who testified about payroll pressure at Wal-Mart imposed by senior management to reduce labor costs, the internal audits evidencing extensive violations of Wal-Mart's break policies and promises and the knowledge of all of Wal-Mart's senior managers of the pervasive policy violations; (iii) Charles Holley, Wal-Mart's Corporate Controller, who attested to the accuracy of the payroll records; (iv) Greg Campbell, Wal-Mart's corporate designee for Information Systems, headquartered in home office, who testified about the reliability and accuracy of Wal-Mart's computerized business records and systems used by Wal-Mart to comply with its state and federal recordkeeping obligations; and (v) at least five other senior Wal-Mart executives who testified about the widespread rest break violations and systemic off-the-clock work issues at the company.

Ignoring all this evidence, Wal-Mart quarrels only with the trial court's determination to admit the testimony of plaintiffs' damages experts, Drs. Baggett and Shapiro (WMBr. at 48-49). This argument fails for manifold reasons. First, Wal-Mart waived its challenge to Dr. Baggett's testimony and the assumption contained in his opinion that the rate of rest break violations post February 9, 2001 was identical to the rate of such violations pre-February 9, 2001. Though expressly directed by the trial court to assert any objections to Dr. Baggett's testimony at the time objectionable testimony was presented, R.1652a, Wal-Mart failed to object to the symmetrical rate of violations assumption for the period post February 9, 2001 (when Wal-Mart eliminated rest break punching to limit its liability exposure). Wal-Mart also failed to object to Dr. Baggett's use of extrapolation techniques to supply the data missing as a result of Wal-Mart's elimination of rest break punching. R.1670a-71a, 1672a-74a, 1675a-76a. Throughout this extensive testimony, and despite the trial court's express admonition earlier that day, Wal-Mart registered not a single objection to Dr. Baggett's testimony. *Id.*

Even if Wal-Mart had not waived its objection, its challenge to Dr. Baggett's assumption that the rate of violations remained unchanged goes to the weight of the opinion and not to its admissibility. The standard of review of a trial court's evidentiary ruling, including a ruling as to the admissibility of expert evidence, is limited to whether the trial court abused its discretion. *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038, 1046 (2003) (when seeking to exclude admitted expert testimony, the moving party is required to show "manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous"). Moreover, in reviewing the sufficiency of the evidence, it must be viewed in the light most favorable to the verdict winners. *Simonetti v. School District of Philadelphia*, 308 Pa. Super. 555, 454 A.2d 1038, 1041 (Pa. Super. 1982).

Wal-Mart also ignores established law permitting the use of statistical sampling and extrapolation for the calculation of aggregate damages so long as there was "an adequate basis" and such extrapolation was "determined in a manner consistent with accepted standards of reliability." See, e.g., *United States v. McCutchen*, 992 F.2d 22, 25-26 (3d Cir. 1993); *Trach v. Fellin*, 817 A.2d 1102, 1114, 1118 (Pa. Super. 2003).<sup>23</sup>

Drs. Baggett and Shapiro each extrapolated from Wal-Mart's existing data to supply missing data because Wal-Mart eliminated rest break records to hide damning evidence of policy violations and purged certain data from its cash register records. R.2079a-83a, 1765a-66a, 1843a-45a, 2085a-86a. Wal-Mart's determination to spoliage evidence of its violations in this case permits an adverse inference, one on which the trial court properly instructed the jury and on which the jury properly relied. R.2141a-42a. Notably, Wal-Mart has not argued on appeal that the adverse inference instruction was improper.

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<sup>23</sup> Wal-Mart's own expert used extrapolation techniques. R.2083a-84a.

Apart from the adverse inference generally available, a special inference pertains in employment cases. In such cases, an employee must show initially that she performed work for which she was not properly compensated. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).<sup>24</sup> The Supreme Court has held that evidence of the amount and extent of that work may be a matter of just and reasonable inference. *Id.* The burden of proof then shifts to the employer to come forward with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Mt. Clemens*, 328 U.S. at 687-88. If the employer fails to produce such evidence, the court may then award damages to the employee, "even though the result be only approximate." *Id.* An employer, like Wal-Mart, that has failed to keep records – and, as here, eliminated the record keeping to "minimize potential litigation" exposure and avoid creating damning evidence of the precise amount of wages it has failed to pay employees – cannot be heard to complain that damages assessed against it lack the precision of measurement that would be possible had it kept such records. *Id.*

*Mt. Clemens* is controlling law.<sup>25</sup> Pennsylvania courts have specifically adopted *Mt. Clemens* and its progeny. *Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 359-60 (9th Cir. 1966); *see Walker v. Washbasket Wash & Dry*, C.A. No. 99-4878, 2001 U.S. Dist. LEXIS 9309, at \*39 (E.D. Pa. July 5, 2001) (in case involving FLSA and WPCL claims, court approximated damages absent employer records); *Martin v. Selker Bros.*, 949 F.2d 1286, 1297 (3d Cir. 1991) (FLSA case citing *Anderson*).

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<sup>24</sup> "[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. *The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of the uncompensated work.*" *Mt. Clemens*, 328 U.S. at 687 (emphasis added).

<sup>25</sup> The issue of extrapolation and damages in individual cases also applies to extrapolation and damages in class actions. *See, e.g., McReynolds v. Sodhexo Marriott Servs., Inc.*, 208 F.R.D. 428, 443 (D.D.C. 2002).

The propriety of Dr. Baggett's extrapolation and proof that Employees met their burden under *Mt. Clemens* is apparent from the wealth of evidence of record demonstrating that hourly associates were not receiving their rest breaks after (and before) February 9, 2001. First, Dr. Baggett's rest break extrapolations for 2000-2001 and 2001-2002 increased at the same ratio as the meal break violations for those same years (derived from meal data based on Wal-Mart's actual payroll records). From 2000-2001, Wal-Mart's records reflected a 1.05 increase in meal break violations over the previous year's violations. Dr. Baggett's extrapolation of rest break violations for the same period similarly applied a 1.05 ratio to calculate the year to year increase. From 2001-2002, Wal-Mart's data reflected a 1.08 increase in meal break violations over the previous year. Again, Dr. Baggett's extrapolation of rest break violations for 2002 applied the same 1.08 increase as compared to the previous year. *See* R.7948a, 7950a.

Other evidence of record confirming the validity and conservatism of the extrapolation includes (i) Dr. Shapiro's uncontroverted testimony that the off-the-clock data he analyzed demonstrated that the rate of rest break violations increased after February 9, 2001, R.1772a-73a, (ii) Regional Vice President Castural Thompson's testimony that rest break violations were still widespread at Wal-Mart when he left the company in April, R.924a (Thompson Video); and (iii) the admissions of Cheryl Lippert and Coleman Peterson that understaffing remained in the top five least favorable categories for hourly employees indicated in the grass roots surveys every year. R.855a-56a, 867a-68a (Lippert Video), Supp.R.8153a-58a. In addition, Wal-Mart's business records, including Wal-Mart employee surveys referred to internally as STAR reports and CORT reviews, evidenced that hourly employees continued to not receive their rest breaks post February 9, 2001. R.7552a-611a at Q.6.c., Supp.R.8087a-102a. In fact, the complaints of missed breaks were so prevalent in the CORT reviews conducted in 2005 that Wal-Mart elected

to omit the question beginning in August 2005 rather than continue to record evidence that employees were still missing rest breaks. R.2022a-36a. Dr. Landy also testified that Wal-Mart stores were understaffed *throughout the class period*, that employees would not take breaks, and remained reluctant to tell management about those missed breaks for fear of getting coached or suffering retaliation. According to Dr. Landy, elimination of rest break swiping was a “worst practice” that Wal-Mart adopted in order to avoid creating “smoking gun” evidence that could be used against it at trial. Wal-Mart took this action knowing full well that missed breaks were “a big problem.” R.1529a-30a.

The evidence further demonstrated that after the elimination of rest break swiping, hourly employees continued to complain about missed rest breaks. *See* R.7414a; 7424a. (January 2005 complaint from 60 employees: “While having their hours cut due to low sales, associates are still expected to get the same amount of work done. Some associates skip breaks because they have to get their work done.”). Similarly, class member testimony evidenced continuing missed rest breaks after February 9, 2001. *See* Supp.R.8119a-22a (Jacquie Copeland); Supp.R.8132a-33a (Dolores Hummel); R.1886a-87a, 1888a-89a, 1890a-91a and 1892a-93a (Patricia Holley); R.1899a-1902a (Dolores Killingsworth-Barber). Post February 9, 2001, Wal-Mart repeatedly issued directives to ensure that no records of its pervasive violations would be kept. R.7876a-86a. Because rest break violations continued unabated after swiping was eliminated, Wal-Mart should not be rewarded for eliminating the smoking gun evidence of its widespread rest break violations simply because it wanted to limit its exposure in these lawsuits. *McReynolds*, 208 F.R.D. at 444 n.25; *see also Mt. Clemens*, 328 U.S. at 688.

Wal-Mart’s attack on Dr. Shapiro’s testimony is no different (WMBr. at 49). Wal-Mart portrays the challenge as one of fact, not of methodology. Like Dr. Baggett, Dr. Shapiro simply

analyzed data provided by Wal-Mart and presumed its accuracy, a predominant question of credibility. It was clearly within the province and duty of the jury to resolve these factual issues. At trial, the jury saw and heard: 1) the direct testimony of Dr. Shapiro about the information upon which he relied (R.1749a-52a, 1754a, 1762a); 2) Dr. Shapiro's cross-examination during which these factual challenges were raised (R.1783a-84a, 1788a-89a, 1794a-98a); 3) the testimony of Rosemary Aquilino, a Wal-Mart employee, about whether employees sometimes work under each other's ID numbers (R.2071a); and 4) the testimony of Britt Roberts-Faulk, a Wal-Mart store manager, about whether time clocks and cash registers were always synchronized (R.1921a-22a). Wal-Mart actually supports the very contention it attempts to challenge by conceding that the jury heard extensive evidence on this common, predominating question and then made a factual finding applicable to all Class members. R.2181a at Q.1, 2186a at Q.1. Hence, the jury again was presented with and decided a common, predominating factual question, which reaffirms the propriety of the trial court's class certification decision.<sup>26</sup>

Wal-Mart purports to challenge the jury verdict on unjust enrichment but fails to address the issue. Unjust enrichment is essentially an equitable doctrine. *Schenck v. K.E. David, Ltd.*, 446 Pa. Super. 94, 97, 666 A.2d 327, 328 (1995). The elements are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such [in] circumstances that it would be inequitable for defendant to retain the benefit without payment of value." *Id.* (internal quotations and citation omitted).

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<sup>26</sup> Wal-Mart purports to claim error in Dr. Shapiro's methodology (WMBr. at 47-48) but fails to cite any expert testimony questioning that methodology, as required by Pa. R. Civ. P. 207.1 and Pa. R. Evid. 703. The omission is telling, because the comparison of two data bases of business information is not novel or even scientific, within the meaning of the law. In fact, such comparisons are made practically every minute of every day by government agencies, credit card companies, medical providers, pharmacies, retailers (including Wal-Mart), courts and litigants. In short, the propriety of such a comparison is a purely factual question perfectly suited for decision by a jury.

There was ample evidence from which the jury could have found that Wal-Mart was unjustly benefited by the off-the-clock work and the missed and short rest breaks. Numerous witnesses observed that Wal-Mart avoided overtime costs and the hiring of additional staff by having class members work through their breaks and off-the-clock. Dr. Landy described in detail how Wal-Mart benefited from the “payroll pressure” it imposed systematically throughout its stores. Wal-Mart’s own witnesses confirmed the “out-of-hours” phenomenon, and multiple class members testified they worked off-the-clock or through their breaks to get the work done without going into overtime. Even Wal-Mart’s own meeting videos (cheers and applause) showed the benefits to the company of the “payroll pressure” practices. S.R. 8159 (video). Based on the record and Wal-Mart’s business practices of calculating sales per man hour, Wal-Mart received approximately \$8,242,500,000 in revenues by stealing \$78.5 million from its hourly employees. *See* R.1486a-95a, 7646a-83a, 832a-38a (Huffaker Video).

#### **IV. THE TRIAL COURT PROPERLY AWARDED LIQUIDATED DAMAGES.**

Wal-Mart argued below, as on appeal, that paid rest breaks are not wages, “fringe benefits or wage supplements” within the meaning of the WPCL. The trial court and the jury rejected this two-faced argument in light of the plethora of evidence to the contrary. Wal-Mart reported monies paid for rest breaks as wages and taxed them as wages.<sup>27</sup> R.1553a-55a, 7086a, 7428a-33a, 7514a-15a, Supp.R.7968a-8085a. Additionally, numerous documents throughout the class period entitled “Your Benefits at Wal-Mart!” described the “comprehensive benefit package” offered to associates including rest break periods paid for by Wal-Mart:

Wal-Mart is a great place to work! . . . *Many people think the word “benefits” only refers to medical insurance. Not so at Wal-Mart. We are proud to offer you*

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<sup>27</sup> Thus, when an employee did get a paid rest break, that time spent on break was converted to taxable wages by Wal-Mart’s computer and the employee was accordingly taxed on the wages earned while on a rest break.

*a comprehensive benefits package* ranging from profit sharing to medical insurance to child care discounts . . . even an Associate Discount Card! Below you will find many more benefits and opportunities for which you may be eligible:

<b>BENEFIT</b>	<b>WHO PAYS?</b>	<b>WHAT DO YOU RECEIVE?</b>
BREAK PERIODS	<i>Wal-Mart</i>	Associates are paid up to two (2) break periods per work shift

R.7034a (emphasis added). See also R.7048a-59a, an e-mail transmitting a “Benefits Analysis” dated January 17, 2000 comparing Wal-Mart’s total benefits package to union plans and listing rest break periods as benefits. See also R.7060a-80a.

The “2006 Associates *Benefits Book*” expressly described all of the benefits available to Wal-Mart associates. R.6787a-6968a. Under the heading “My Money,” it stated:

***Pay Programs***

***In addition to the pay you receive for a regular day’s work, there are other programs and benefits that can supplement your income.”***

\* \* \*

***Paid Break Periods***

***Take a break and get paid for it! . . .***

*Id.* at R.6901a-6903a (emphasis added). See also, R.7897a (WalMartbenefits.com website under the heading “My Money” shows “links for all the benefits” including “Paid Break Periods”); R.1556a-57a.

In light of this overwhelming proof, the trial court properly found that *paid* rest breaks, earned solely by the duration of the employee’s work shift, promised by Wal-Mart to the Employees pursuant to a contractual agreement, Wal-Mart’s corporate policy PD-07, constituted

“fringe benefits or wage supplements” under the WPCL’s statutory definition of “wages.” The WPCL, 43 P.S. § 260.2a, defines “wages” as:

*All earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation. The term “wages” also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employees’ pay by the employer.*

The term “Fringe benefits” is also defined, to include:

*...separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employees’ pay by the employer; and any other amount to be paid pursuant to an agreement to the employee, a third party or fund for the benefit of employees.*

43 P.S. § 260.2a (emphasis added).

Though Wal-Mart urges to the contrary, courts have observed that the “WPCL should be broadly construed to protect all forms of compensation due to employees.” *Regier v. Rhone-Poulenc Rorer, Inc.*, No. 93-4821, 1995 U.S. Dist. LEXIS 9384, at \*13-14 (E.D. Pa. June 30, 1995); *Hartman v. Baker*, 766 A.2d 347, 352 (Pa. Super. 2000).<sup>28</sup> A broad construction is consistent with the underlying purpose of the WPCL, namely, to provide a statutory vehicle to remove some of the obstacles employees face in litigation to recover earned unpaid wages promised by an employer pursuant to contract. *Hartman*, 766 A.2d at 352 (quoting *Oberneder v. Link Computer Corp.* (“*Oberneder I*”), 449 Pa. Super. 528, 530, 674 A.2d 720, 721 (1996), *aff’d*, 548 Pa. 201, 696 A.2d 148 (1997)).

Wal-Mart’s assertion that whether rest breaks fall within the ambit of the WPCL is a legal question that should have been answered by the trial court in a vacuum – without regard to the facts – should be rejected. WMBr. at 49. First, Wal-Mart waived this argument when it

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<sup>28</sup> *Hartman* expressly noted the shortage of Pennsylvania cases applying the WPCL definitions and looked to federal cases for guidance. *Id.*

proposed Special Jury Instructions Nos. 17 and 22, requiring Employees to prove, as an element of their WPCL claims, that “rest breaks are ‘fringe benefits’ within the meaning of the WPCL.” *See* R.2177a-78a. Second, Wal-Mart’s own articulation of the “standard of review” for WPCL violations concedes that “*questions of fact and law*” are involved. WMBr. at 2 (emphasis added). Applicable case law confirms this principle. In *Hartman*, this Court found that an equity interest constituted WPCL wages by examining the facts, concluding the “equity interest was offered to...an employee, not for some reason unrelated to his employment.” *Hartman*, 766 A.2d at 353 (citing *Bowers v. NETI Techs., Inc.*, 690 F. Supp. 349 (E.D. Pa. 1988)). *See also* *Bowers*, 690 F. Supp. at 353 (repurchase payments offered by defendant to its employees “were certainly ‘wages’ within the broad definition of the WPCL in that they were payments *pursuant to an agreement*, and they were offered to plaintiffs as employees, and *not for some reason entirely unrelated to their employment*”); *Raykhman v. Digital Elevator Co.*, No. 93-1347, 1993 U.S. Dist. LEXIS 13112, at \*18-19 (E.D. Pa. Aug. 30, 1993) (that individual is an “employee” under the WPCL is a question of fact for the jury).

Wal-Mart argues that the provision of paid rest breaks is not the type of benefit contemplated by the WPCL. WMBr. at 50-51. The trial court properly rejected Wal-Mart’s unsupported argument noting that “[o]nly in defense of litigation does Wal-Mart claim that their employees’ hourly earnings during guaranteed paid rest breaks are not compensation.” WMBr. App. C, Tr. Op. 10/3/07 at 3. The trial court’s finding that paid rest breaks fit squarely within “wages” under the WPCL is supported by decisional law, which the trial court summed up succinctly:

In cases brought by highly paid executives, the Federal District Court, the Supreme Court of Pennsylvania and [this Court] have all held that ‘esoteric’ fringe benefits are subject to the protection of the WPCL.

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The law in its majesty applies equally to highly paid executives and minimum wage clerks. Just as highly paid executives' promised equity interests, or put options or percentage of sale proceeds are protected fringe benefits and wage supplements, so too the monetary equivalents of "paid break" time cashiers and other employees were prohibited from taking are protected fringe benefits and wage supplements.

WMBR. App. C, Tr. Op. 10/3/07 at 3, 6. As the trial court properly noted, this Court and other courts have rejected specious defense arguments that various forms of non-monetary compensation are not true "wages" under the meaning of the WPCL. WMBR. App. C, Tr. Op. 10/3/07 at 3-6 (*citing Regier*, 1995 U.S. Dist. Lexis 9384) (stock options constitute wages under the WPCL); *Bowers*, 690 F. Supp. 349 (payments in the form of "put options" were wages under the WPCL); *Hartman*, 766 A.2d 347 (2000) (an "equity interest" was included in the definition of wages under the WPCL and therefore subject to liquidated damages penalties); *Oberneder v. Link Computer Corp.* ("*Oberneder II*"), 548 Pa. 201, 696 A.2d 148 (1997) (claim by the company president for a percentage of the sale of a division of his corporation was subject to the WPCL such that attorneys fees should be awarded to the prevailing party). Given the expansive judicial reading of fringe benefits and wage supplements to include *non-monetary* payments, surely *monetary* payments for mandatory rest breaks promised by Wal-Mart here should likewise be protected under the WPCL. *See Regier*, 1995 U.S. Dist. LEXIS 9384, at \*17-18 (concluding that the "object of the WPCL is to provide employees with statutory remedies to recover *compensation of all types . . .*") (emphasis added).

Wal-Mart's argument is also belied by its own characterization of its benefits in corporate documents and admissions. On appeal, Wal-Mart misrepresents that "employees are paid whether or not they take their breaks." WMBR. at 51. This concept is entirely at odds with Wal-Mart's uniform policies - Wal-Mart promised to pay for all hours *worked* (under PD-43) *in*

*addition to* paying for *non-working* time on rest breaks (under PD-07). An employer who promises paid vacations to its employees similarly may not argue that a failure to provide vacation pay causes no harm because it is paying employees for working through their vacation.<sup>29</sup> *Dept. of Transp. v. Pennsylvania Indus. for Blind & Handicapped*, 886 A.2d 706, 714 (Pa. Commw. Ct. 2005) (WMBR. at 51) (where the court observed that bonuses under an employment contract and payment of accrued but unused vacation time fall within the WPCL’s definition of “wages”) illustrates this point.

#### **V. THE TRIAL COURT PROPERLY AWARDED MANDATORY LIQUIDATED DAMAGES.**

The trial court properly awarded *mandatory* liquidated damages of \$62,253,000 to Employees based on the jury’s findings that Wal-Mart breached its agreement to provide paid rest breaks and pay for all time worked and that Wal-Mart did not have a good faith contest or dispute when it failed to provide rest breaks and pay for all time worked. *See Oberneder II*, 548 Pa. at 206, 696 A.2d at 151 n.3 (an award of liquidated damages is mandatory once a fact finder determines that a party did not have a good faith contest or dispute).

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<sup>29</sup> The facts of this case bear no resemblance to those of *Harding v. Duquesne Light Co.*, 882 F. Supp. 422, 427-28 (W.D. Pa 1995) and *Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990) (WMBR. at 51).

In *Harding*, the plaintiffs claimed accrued but unpaid vacation time and stock appreciation rights under the WPCL but failed to present *any* evidence of a contractual entitlement to such payments. *Harding*, 882 F. Supp. at 428. The employer’s policy was silent on the issue of a discharged employee’s right to vacation pay, the company consistently denied such pay and the plaintiff never received any indication from the company to the contrary. *Id.*

Likewise, in *Weldon*, the court found that there was no evidence to indicate that the defendant employer had an express contractual obligation to pay wages to salaried employees during a suspension that ultimately resulted in termination. *Weldon*, 896 F.2d at 801. The employer contended that its company policy was to *not* pay wages during suspension and that only employees who were reinstated became eligible for back pay. *Id.*

**A. EMPLOYEES PROVED THEIR ENTITLEMENT TO LIQUIDATED DAMAGES.**

The liquidated damages provision of the WPCL, 43 P.S. § 260.10, specifies three alternative circumstances entitling an employee to liquidated damages: wages unpaid for 30 days following payday, *or* wages unpaid for 60 days where there is no regular payday, *or* where there are wage shortages exceeding 5% in any two paychecks in the same calendar quarter.

Here, the liquidated damages award was based on earned wages unpaid for 30 days after regularly scheduled paydays. This is the very circumstance contemplated by the statute. Wal-Mart cites no authority in support of its argument that because plaintiffs are seeking only *portions* of their pay, they must meet the “shortages” requirement of the statute. In fact, the three statutory alternatives focus on the *timing* of the employer’s failure to pay. Thus, the third alternative – which Wal-Mart contends is the only one that applies here – applies where a shortage in total earned wages occurs on *two regularly scheduled paydays in the same quarter* (thus presumably establishing a sufficient pattern demonstrating that the employer is failing in its contractual obligation). Under those circumstances, no 30 or 60 day waiting period is required. Employees here did not need to demonstrate 5% shortages as they demonstrated that they satisfied the thirty day waiting period. *See also* R.1288a at 31-32 (Wal-Mart counsel waiving 5% argument under WPCL).

Moreover, Wal-Mart’s construction of the WPCL makes no sense. Under Wal-Mart’s reading of the statute, an employer could “nickel and dime” its employees by underpaying 4% week after week and thereby circumvent the WPCL entirely. Since the statutory purpose is to “provide employees with statutory remedies to recover compensation of *all types*,” *Regier*, 1995 U.S. Dist. LEXIS 9384, at \*18, construing the statute to permit employees to recover liquidated damages for large shortages only would defeat the purpose of the WPCL. The trial court’s

rejection of Wal-Mart's ill-founded interpretation of the WPCL conforms with the rules of statutory construction. A court should read these statutory avenues of relief holistically and "presume[s] that the legislature did not intend an absurd or unreasonable result," and the court is "...permitted to examine the practical consequences of a particular interpretation." *See In re Adoption of J.A.S.*, 939 A.2d 403, 406 (Pa. Super. 2007) (WMBR. at 53).

**B. WAL-MART FAILED TO SATISFY ITS BURDEN OF PROVING GOOD-FAITH.**

Wal-Mart's brief incorrectly reverses the burden of proof. It states that Employees "had to show that Wal-Mart did not have a good faith contest or dispute of the wage claim in order to be entitled to liquidated damages" (WMBR. at 54). This Court has held, however, that the *employer* bears the burden of establishing its good faith conduct in withholding wages by *clear and convincing evidence*. *Thomas Jefferson Univ. v. Wapner*, 903 A.2d 565, 575 (Pa. Super. 2006) ("It is both logical and appropriate to allocate to the employer the burden of proving good faith. Certainly, the information tending to establish good faith in a WPCL matter is in the possession of the employer") (*citing Hartman*, 766 A.2d at 353-54). Though Wal-Mart bore the burden, it failed to offer any evidence that it was unaware of the rest break violations, took steps to calculate and pay for missed breaks, or even investigated the systemic violations reflected in the Shipley Audit and other internal audits.

The jury weighed the competing testimony of Castural Thompson, a 26-year Wal-Mart veteran who candidly admitted the existence of widespread policy violations and the fact that those violations were discussed regularly at weekly Friday meetings of Wal-Mart's senior management, against the testimony of the corporate "two, three and four star generals" from Tom Coughlin on down who repeatedly denied seeing the Shipley Audit or having knowledge of the policy violations. *Compare* R.916a-917a, 921a (Thompson Video) with R.829a-31a, 840a-

45a (Huffaker Video). The jury was also able to assess the credibility of Wal-Mart's "enforcement" efforts, including the corporate determination (about which no Wal-Mart witness could testify) to eliminate rest break punching, the only recordkeeping that shed light on whether employees received earned breaks, the cessation of internal audits to test PD-07 compliance and the absence of internal audits of PD-43 compliance.

The jury finding that Wal-Mart did not have a good faith dispute is further supported by Wal-Mart's elimination of questions about PD-07 compliance in employee surveys (the "CORT surveys") and the inability of the Director of Corporate Employment Compliance, Ms. Reid, to explain why, if it were intent on policy compliance, Wal-Mart eliminated those questions. R.2034a-36a. In the face of pending litigation all around the country, Wal-Mart's pattern of eliminating recordkeeping, ceasing to do internal audits, eliminating CORT survey questions and directing its employees under no circumstances to create any documentation from which PD-07 compliance could be monitored (R.7876a-78 and 7879a-86a) is itself sufficient for the jury to have found that Wal-Mart failed to carry its burden on good faith. Adding to that pattern the conclusion drawn by Employees' expert, that the Audit Committee of Wal-Mart's Board of Directors knew about the rest break problem and consciously and willfully disregarded it (R.1593a-96a), illustrates the absurdity of Wal-Mart's argument that it operated in good faith, and that the jury verdict and judgment are against the weight of the evidence.

Based on the foregoing, the jury found that Wal-Mart failed to meet its burden of proving good faith by clear and convincing evidence. R.218a at Q.3, 2183 at Q.7. Because these special factual findings are supported by ample evidence, this Court should not substitute its judgment for that of the jury. *See Koch v. Franklin*, 315 Pa. 145, 172 A. 672 (1934). The determination of issues of fact is peculiarly within the province of the jury, and its findings will not be disturbed

unless they are plainly and manifestly against the weight of the evidence. *Id.*

Wal-Mart asserts, *without citation to any authority*, that good faith must be “interpreted in the context of claims made in the litigation because litigation is the only possible forum for assertion of set-off or counterclaim rights.” WMBr. at 54. First, Wal-Mart misreads the WPCL which awards liquidated damages where “...no good faith contest or dispute of any wage claim *including* the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment.” 43 P.S. § 260.10. The statute does not, as Wal-Mart erroneously suggests, define or limit good faith to the litigation context,<sup>30</sup> nor does the case law support Wal-Mart’s unfounded theory. In determining whether the employer has satisfied its burden of proving good faith, courts often look at the circumstances surrounding the parties’ dealings while the operative contract was in effect – a time period which typically precedes litigation. *See Riseman v. Advanta Corp.*, No. 98-CV-6671, 2001 U.S. Dist. LEXIS 15760 at \*15-17 (E.D. Pa. Sept. 7, 2001), *aff’d in part and vacated in part on other grounds*, 39 Fed. Appx. 761 (3d Cir. 2002) (trial court found the jury was equipped to conclude defendant employer lacked good faith); *Hartman*, 766 A.2d at 354 n.3 (definition of good faith). Further, assuming Wal-Mart is correct that litigation starts the time table for a good faith dispute under the WPCL, Wal-Mart has failed to explain why it has not paid the \$78,500,000 in wages owed in the three years since the jury’s verdict.<sup>31</sup>

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<sup>30</sup> Even under Wal-Mart’s faulty interpretation of good faith, Wal-Mart has not met its burden. Wal-Mart never asserted any right to set-off or counter claim in the context of this litigation.

<sup>31</sup> *Thomas Jefferson University*, 903 A.2d 565 (WMBr. at 55, n.31), further illustrates that the good faith inquiry is made with respect to the employer’s conduct before suit was commenced. In *Jefferson*, this Court held the employer did not meet its good faith burden, where it withheld wages it had no reason to doubt were owed several months *before* it became aware of facts that might otherwise entitle it to withhold the wages. *Thomas Jefferson Univ.*, 903 A.2d at 575.

Here, Wal-Mart breached its wage payment commitments by requiring its employees to work without pay, and failing to provide Employees earned, paid rest breaks Wal-Mart had promised. WMBr. App. C, Tr. Op. 10/3/07 at 2. Wal-Mart saved tens of millions of dollars by denying rest breaks in Pennsylvania alone. *See id.*

Wal-Mart's reliance on *Hartman v. Baker*, 766 A.2d 347 (Pa. Super. 2000), is misplaced. WMBr. at 54-55. In *Hartman*, the record before the court demonstrated that the parties had varying plausible interpretations of the terms and the binding nature of the revised memorandum that allegedly entitled the employee to an equity interest. *Hartman*, 766 A.2d. at 354-55.<sup>32</sup> Here, by contrast, there is no similar evidence in the record to support Wal-Mart's unreasonable and unfounded assertion that it was not bound by PD-07 and PD-43, R.1461a-68a, and that the rest breaks were not wages and/or fringe benefits. Indeed, the record supports the opposite conclusion.

That Wal-Mart prevailed on certain claims and that Employees did not recover all of the damages initially sought does not alter the fact that Wal-Mart failed to carry its burden of proof (by clear and convincing evidence) to show it acted in good faith in contesting the wage claims. Besides, the liquidated damages under the WPCL are based upon statutory claims and damages upon which the Employees did prevail.

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<sup>32</sup> *Collins v. Allstate Indemnity Co.*, 426 Pa. Super. 197, 626 A.2d 1162 (1993) (WMBr. at 55) is distinguishable. In *Collins*, the employer made an incorrect legal conclusion in good faith that was based upon supporting authority and a thorough examination of the parties' conduct. *Collins*, 426 Pa. Super. at 216, 626 A.2d at 1171. Here, Wal-Mart's actions go well beyond "bad judgment," as the evidence conclusively proved that it wanted to increase profits by denying Employees promised benefits and wages and then sought to eliminate evidence of the violations.

**C. THE TRIAL COURT PROPERLY CHARGED THE JURY WITH RESPECT TO THE WPCL.**

Wal-Mart says the trial court incorrectly instructed the jury concerning the WPCL. Wal-Mart is wrong, because the court quoted the statute to the jury and correctly stated that it did not apply if Wal-Mart proved a good faith contest or dispute concerning the unpaid wages. R.2144a-46a, 2155a-57a. In addition, the appellate court “must examine the charge in its entirety against the background of the evidence to determine whether error was committed.” *Ottavio*, 421 Pa. Super. at 294-95, 617 A.2d at 1301-02. Even if the charge was erroneous, a new trial will be granted only if the charge might have prejudiced the appellant or the omission from the charge “amounts to fundamental error.” *Id.* Wal-Mart has not shown that the trial court committed reversible error when it quoted the WPCL in its instructions to the jury.

Wal-Mart’s claims of error with respect to the court’s failure to charge the jury on shortages under the liquidated damages provision of the WPCL have been waived by virtue of Wal-Mart’s pre-trial motion *in limine*, granted by the trial court, to preclude Employees from presenting any evidence concerning their statutory liquidated damages claim to the jury. WMBR. App. C, Tr. Op. 10/3/07 at 6-7; R.1292a at 74-75.

In any event, the trial court properly exercised its discretion when it rejected Wal-Mart’s request to instruct the jury on shortages under the liquidated damages provision of the WPCL. For the reasons discussed above, the shortages provision does not apply to this case. *See supra*, at 56. In addition, the jury charge and the interrogatories on good faith accurately reflected the applicable law. R.2144a-46a; 2155a-57a. As discussed more fully above, the interrogatories did not need to state a specific time frame for evaluating the good faith contest. Under the statute, the relevant time frame for measuring good faith begins once 30 days elapses following a

scheduled payday on which wages due were not paid. *See supra* at 59-60; *see also* R.2135a-36a, 2156a.<sup>33</sup>

**D. EMPLOYEES WERE NOT REQUIRED TO IDENTIFY SPECIFIC CLASS MEMBERS ENTITLED TO LIQUIDATED DAMAGES.**

Wal-Mart waived this argument by moving *in limine* to preclude Employees from making any argument before the jury regarding liquidated damages. R.1289a, 1292a at 74. Moreover, contrary to Wal-Mart’s misreading of the WPCL (WMBr. at 59), nowhere does the statute expressly require a trial court to identify which class member is entitled to a liquidated damages award. In fact, the WPCL specifically contemplates class actions on behalf of aggrieved employees. *See* 43 PS § 260.9a (providing that an action under the WPCL for *wages and liquidated damages* may be maintained by “any one or more employees for and on behalf of himself, themselves and other employees similarly situated...”). As a result, the statute does not require specific identification of class members who are to receive specific portions of aggregate liquidated damages awards. *See* 43 PS § 260.10 (providing for method of calculating liquidated damages).

In awarding the required aggregate statutory damages, the trial court was not required to identify specific class members. The purpose of liquidated damages is not to compensate the victim, but to deter the defendant, from violating the law. Aggregate liquidated damages focus not on the facts unique to each class member, but on the defendants’ conduct directed toward the class as a whole. *See Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 133 (3d Cir. 1991) (liquidated damages provision of WPCL is essentially a penalty provision aimed at deterring employers who, in bad faith, withhold legitimate payments to its employees).

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<sup>33</sup> Though Wal-Mart’s brief suggests otherwise, a good faith dispute in “failing to provide rest breaks” is the equivalent of a good faith dispute in failing to pay for those rest breaks, because the breaks were paid breaks.

Dr. Baggett determined that 98.81% of class members experienced *at least one* rest break violation during the relevant time period. *See* R.2478a. He concluded that class members experienced an average of 25 rest break violations per associate. *See Id.* Though the WPCL requires a \$500 penalty *for each violation*, Employees sought only a \$500 penalty *per class member*, which amounted to a total of \$62,253,000.<sup>34</sup> The trial court appropriately awarded that figure.

The analysis conducted by Wal-Mart's expert, Dr. Denise Martin, who calculated maximum awardable statutory damages of \$62,652,000 if every member of the class were entitled to liquidated damages, confirms the reasonableness of the trial court's award. WMBR. App. C, Tr. Op. 10/3/07 at 10-11 (Dr. Martin attested: "However, even if we assume that every single one of the 125,304 class members who worked after January 1, 2002 should be entitled to receive \$500.00 in liquidated damages - which is itself a likely overstatement - total damages would only be about \$ 63,000,000.00").

Wal-Mart erroneously states that a claims administrator should determine Wal-Mart's liability for liquidated damages under the WPCL. WMBR. at 59. Wal-Mart forgets or intentionally ignores that it successfully moved *in limine* to have the trial court determine liquidated damages. R.1289a; 1292a at 74.

## **V. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES.**

Wal-Mart argues the trial court abused its attorney fee discretion in just one respect – it awarded a positive lodestar adjustment pursuant to *Signora v. Liberty Travel Inc.*, 886 A.2d 284,

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<sup>34</sup> This is a conservative number given the WPCL's provision for liquidated damages of "an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars (\$500), *whichever is greater.*" 43 P.S. § 260.10 (emphasis added). As the trial court noted, "[E]ven the lesser calculation of 25 percent of the jury award (which requires no calculation of the number of class members or the number of specific violations) would be \$12,392,135.25." WMBR. App. C, Tr. Op. 10/3/07, n.15.

293-94 (Pa. Super. 2005); *Logan v. Marks*, 704 A.2d 671, 673 (Pa. Super. 1997); and Pa. R. Civ. P. 1716. Wal-Mart concedes, as it must, that this Court expressly held in *Signora* – another WPCL class action – that “a court has discretion to adjust the lodestar fee in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement.” *Signora*, 886 A.2d at 293 citing *Logan*, 704 A.2d at 674. Wal-Mart contends that while the trial court had adequate discretion to adjust the lodestar in light of these factors and others, it nevertheless abused that discretion because the multiplier allegedly “would double-count factors already subsumed in the lodestar.” WMBr. at 61.

This argument is mistaken, if not completely waived, for at least three (3) reasons. One, Wal-Mart’s fee experts below agreed, and all the evidence shows, that the hourly rates of Employees’ counsel were appropriate and consistent with prevailing market rates for experienced complex litigation trial lawyers. Two, Wal-Mart’s experts did not opine, and could not opine, that these hourly rates – which had been approved by many other courts that also awarded lodestar multipliers – already took into account the degree of success, the potential public benefit, or the contingent nature of the representation. And three, the lodestar adjustment was essential to assure employees with small claims adequate access to complex class action counsel who were and would continue to be able and willing to take these important cases to trial.

With respect to hourly rates, Wal-Mart and its fee experts did not dispute and expressly agreed that the billing rates of Employees’ counsel “were acceptable for lawyers at that high caliber and even in this type of complex litigation.” R.2701a; *see also id.* at R.2699a at 99 (stating that there was “no dispute” with \$625 per hour billing rate); *id.* at 2702a at 112 (redirect of Wal-Mart expert Ralph Wellington: “Q. You had no criticism of the rate he [Mr. Bridgers]

sought, which was \$625 an hour? A. Correct.”). In fact, as the trial court noted in its Findings of Fact and Conclusions of Law, these hourly rates were supported by “affidavits from six (6) prominent Philadelphia attorneys attesting to the reasonableness of the hourly rates charged by plaintiffs counsel in this case” (WMBR. App.E, Tr. FofF 11/14/07 at ¶100), and approved by other courts, including one case in which Wal-Mart’s own fee expert was among plaintiffs’ counsel who submitted a joint fee petition, *In re Adelpia Communications Corp. Securities Litigation*, Master File No. 1:03-md-01529 (E.D. Pa. 2005). See R.2701a (acknowledging that Schnader Harrison filed a joint fee petition as plaintiffs’ counsel in *In re Adelpia*); see also WMBR. App. E, Tr. FofF 11/14/07 at 14 ¶137 (finding rates for associates and paralegals comparable to those approved in other cases).

Based on the overwhelming evidence submitted, the trial court specifically found that “the hourly rates of Class Counsel have been approved by a number of state and federal courts in similar class action cases.” WMBR. App. E., Tr. FofF 11/14/07 at 20 ¶176.<sup>35</sup>

In *Township of South Whitehall v. Karoly*, 891 A.2d 780 (Pa. Commw. Ct. 2006), the court held that the failure of a fee objector to present affidavit or other evidence challenging hourly rates or the reasonableness of the fees requested constitutes a waiver of the issue. *Id.* at 785. Here, Wal-Mart and its fee experts presented absolutely no evidence that the hourly rates or the hours claimed “double count[ed] contingency,” as Wal-Mart argues after-the-fact on appeal to this Court. Indeed, the trial court expressly found that the aggregate fees and expenses

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<sup>35</sup> Moreover, the object in awarding a reasonable fee is to “simulate the market.” See *Milkman v. Am. Travellers Life Ins. Co.*, 61 Pa. D. & C.4th 502, 558, (Phila. Com. Pl. 2002) (quoting *In re Cont’l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)). Here, the market in 2006 fully justified the hourly rates charged by Employees’ counsel, as confirmed by precedent and the 2006 Survey of Hourly Rates published by the *National Law Journal*, Firm-by-firm sampling of billing rates nationwide, available at <http://www.nlj.com> (last visited Mar. 12, 2009). See *Farbotko v. Clinton County*, 433 F.3d 204, 210-11 (2d Cir. 2005) (court may take judicial notice of prior fee awards and of published surveys in specific area of practice).

incurred by Employees' counsel were less than the "aggregate expenditure of over \$17 million" by Wal-Mart and its counsel. Of course Wal-Mart's counsel, unlike Employees' counsel, charged and collected these fees and expenses monthly and without any risk of loss, demonstrating that a lodestar adjustment was, in fact, necessary for Employees to have access to similar complex litigation counsel able and willing to risk non-payment and out-of-pocket loss.<sup>36</sup>

Relying on *Birth Center v. St. Paul Cos.*, 727 A.2d 1144, 1160-61 (Pa. Super. 1999), Wal-Mart argues that a contingent risk enhancement is inappropriate where the factors creating the risk have been mitigated or already taken into account in the lodestar calculation. WMBR. at 61. In that case, unlike here, the trial court had not yet had an opportunity to rule on the fee petition. This Court noted, however, that "the existence of a fee contract or an agreement for payment of a portion of the reasonable hourly rate regardless of result may significantly mitigate contingent risk." *Birth Center*, 727A.2d at 1161, n.12 (citation and quotation marks omitted). In the present case, unlike the hospital in *Birth Center*, Wal-Mart has not offered and cannot offer any evidence of a fee contract for the payment of Employees' attorney fees regardless of result that would mitigate any of the astronomical contingent risk. Therefore, *Birth Center* is off-point.

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<sup>36</sup> Wal-Mart's primary trial counsel were members of the law firm of Susman Godfrey. Included in the extensive market evidence the trial court received and considered at the fee hearing was the decision in *In re Vitamins Antitrust Litigation.*, 398 F. Supp. 2d 209 (D.D.C. 2005), a complex class action that was settled before trial. In that case, Susman Godfrey and two other lead firms were awarded a lodestar multiplier of 10.7, and contributing firms were allocated lodestar multipliers of 5.4. *Id.* at 228-29. These and many other cases established that the market for the complex litigation services provided by Employees' trial counsel here required a multiplier well in excess of three (3) so Employees would have a fair chance of access to complex class action counsel willing and able to try their case to verdict on the merits. Tr. Foff at 22 ¶189 (citing *Milkman*, 61 Pa. D. & C. 4th at 566-67 (settled class action finding "a multiplier of three or higher to be reasonable in a class action setting"); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (settled class action approving multiplier "in the range of 4.5 to 8.5")). Wal-Mart did not produce any evidence below, and has not pointed to any evidence on appeal to this Court, that undermines or contradicts this market proof.

In *Conner v. DaimlerChrysler Corp.*, 820 A.2d 1266 (Pa. Super. 2003), this Court emphasized “that it is not the function of an appellate court to make factual determinations.” *Id.* at 1273. Wal-Mart in effect urges the Court to make an impermissible factual determination that the hourly rates of Employees’ lead counsel “already built in a risk enhancement for contingent fee litigation” based solely on counsels’ reporting of their “regular current rates.” WMBR. at 61-62. As noted above, however, Wal-Mart did not introduce any evidence of this alleged fact at the fee hearing below, and its experts even conceded that the rates were consistent with those for “high caliber” counsel in “complex litigation.” *See* R.2701a. Besides, the federal courts have rejected the idea that there is any difference between a non-contingent and a contingent hourly rate. *See Polsell v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524, 537 (3d Cir. 1997) (“there is no such thing as a prevailing market rate in contingent litigation” (citation omitted)). Therefore, there is no basis for Wal-Mart to contend that counsels’ hourly rates in any way mitigated the mammoth risks posed by the litigation and trial of this case. Because Wal-Mart presented no evidence below to support such an inference, it cannot be said the trial court palpably abused its attorney fee discretion. *See Lucchino*, 809 A.2d 264.

In *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990 (Pa. Super. 2007), the Court emphasized Pennsylvania’s strong public policy to justly compensate parties who incur attorney fees in instances in which statutory law provides for fee-shifting to the defendant. *See id.* at 1004. The Court explained that while federal decisions concerning similar areas may be relevant to attorney fee decisions in the state courts, “federal standards that have not been incorporated into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy.” *Id.* This observation necessarily applies to Wal-Mart’s citation of *City of Burlington v. Dague*, 505 U.S. 557 (1992), and to its dubious

reliance on the New Jersey Supreme Court case of *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995) (WMBR. at 62), which expressly criticized *Dague*, holding:

We understand and carefully have evaluated the various objections advanced to contingency enhancements, including the often-repeated admonition that “[t]hese statutes were not designed as a form of economic relief to improve the financial lot of [attorneys].” ... Both as a matter of economic reality and simple fairness, we have concluded that a counsel fee awarded under a fee-shifting statute cannot be “reasonable” unless the lodestar, calculated as if the attorney’s compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed.

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We are unpersuaded by Justice Scalia’s suggestion in *Dague, supra*, that awarding contingency enhancement under a fee-shifting statute “would in effect pay for the attorney’s time (or anticipated time) in cases where his client does *not* prevail.” ... In our view the case for contingency enhancement has nothing to do with the amount of time lawyers invest in losing cases. It rests on the desire to enable parties to compete for legal services in the private market. In that market, parties who can offer only fee awards contend with parties who can offer certain hourly payments and with parties who can offer contingent percentage fees from damage awards. To bid for services effectively, parties with only fee awards to offer must be able to pay market rates. They cannot do that when they are denied contingency enhancements because they cannot cover the nonpayment risk. A lawyer given a choice between an unenhanced hourly rate in a fee award case and an equal rate in a case where payment is certain will have a strong incentive to decline the fee award case.

661 A.2d at 1228.

Although Wal-Mart concedes that this Court in *Signora*, like the *Rendine* court, has doubted the reasoning of *Dague*, it contends nonetheless that the multiplier awarded here was not “necessary to attract competent counsel.” WMBR. at 62. The overwhelming majority of state and federal courts, like the trial court here, have rejected this argument, especially in the context of small value employee and consumer class actions. These and many other courts have emphasized that the object is to simulate the market where a direct market determination is infeasible. *See Milkman*, 61 Pa. D. & C. 4th at 558, (quoting *In re Continental Illinois Sec.*

*Litig.*, 962 F.2d 566, 572); *Wirtz v. Kansas Farm Bureau Servs., Inc.*, 355 F. Supp. 2d 1190, 1201-02, 1202 n.34 (D. Kan. 2005) (same).

Here, the trial court recognized – and Wal-Mart does not dispute – that this was and is a classic “negative value” wage payment class action in which class members’ claims would be “uneconomical to litigate individually.” *Phillips Petroleum*, 472 U.S. at 809; *see also Krack v. Action Motors Corp.*, 867 A.2d 86, 92-93 (Conn. App. Ct. 2005) (“Another factor that supports the court’s high award of attorney’s fees, relative to the plaintiff’s recovery, is the undesirability to Connecticut attorneys of relatively small dollar amount consumer cases such as the plaintiff’s case.”). In this regard, it is important to note that low multipliers or inadequate fee awards are, in reality, counter-productive and counter-deterrent, as they discourage resolutions on the merits through trial and fail to reward a more thorough crusade.<sup>37</sup> *See O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 310 (E.D. Pa. 2003). This Court has emphasized that lodestar adjustments

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<sup>37</sup> *See generally* Myriam Gilles and Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 139-151 (2006). As the trial court correctly noted (Tr. FofF at 22 ¶191), federal precedent recommends a common fund cross-check, where “a larger percentage [is awarded] in more developed cases, [so] the court can ensure that class counsel is rewarded for a more thorough crusade and punished for only a cursory inquiry before settlement.” *O’Keefe*, 214 F.R.D. at 309 (discussing lodestar cross-check under *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000)). Where, as here, the case is actually tried on liability and damages, a much higher percentage of the aggregate recovery for the class should apply in order to fulfill the purposes of the fee-shifting statute. *See Krebs v. United Mining Co.*, 893 A.2d 776, 793 (Pa. Super. 2006) (the fee-shifting purposes of the statute must be considered). Most courts have determined that 20% to 50% is an appropriate range for attorney’s fees. *See, e.g., In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985) (surveying fee awards and concluding that fees ranged between 20% and 50% in percentage of the fund); *In re Combustion, Inc.*, C.A. No. 94MDL4000, 1997 U.S. Dist. LEXIS 15041 (W.D. La. Sept. 18, 1997), *cert. denied*, *Tessier v. Combustion, Inc.*, 526 U.S. 1087 (1999) (36% awarded); *In re NCO Fin. Sys., Inc., Debt. Collection Litig.*, No. MDL 1353, 2002 U.S. Dist. LEXIS 17602 (E.D. Pa. Mar. 19, 2002) (43% of recovery in consumer case); *Tenuto v. Transworld Sys.*, 2002 WL 188569 (E.D. Pa. Jan. 31, 2002) (35% in consumer case); *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 300 (1st Cir. 1995) (approving district court’s award of “roughly \$68,000,000” of the approximately \$220,000,000 settlement fund, or 30.9%).

should be used to “promote the purposes of the specific statute involved.” *Krebs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006) (quotation marks and citation omitted).

Here, the trial court examined the relevant market and properly concluded that a 3.7 multiplier was required to promote the purposes of the WPCL, to simulate the market, to account for the outstanding success achieved by Employees’ counsel, to give effect to the non-monetary public benefits achieved (WMBR. App. E, Tr. FofF at 21 ¶184), to reward and encourage counsel for a “more thorough crusade” through trial as opposed to settlement, and to account for the tremendous financial and contingent risk Employees and their counsel incurred when they invested over \$12 million in attorney time and expenses over five (5) years without any payment in the interim and without any assurance they would recover all or even some of that investment in the future. That ***this award corresponds to only 31% of the cash benefits obtained for the Employee Class*** proves that the award was both consistent with the market for attorney services in complex class actions and with the make-whole purposes of attorney fee-shifting under the WPCL. *See Signora*, 886 A.2d at 293. Therefore, Wal-Mart has not met its heavy burden to prove that the lower court palpably abused its discretion.

