IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MICHELLE BRAUN, on behalf of herself and all others similarly situated,	:	
Appellee,	:	**No. 32 EAP 2012**
	:	**Super. Dkt. Nos. 3373 EDA 2007**
v.	:	**3376 EDA 2007**
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an Operating segment of Wal-Mart Stores, Inc.,	:	
Appellants.	:	
DOLORES HUMMEL, on behalf of herself and all others similarly situated,	:	
Appellee,	:	**No. 33 EAP 2012**
	:	**Super. Dkt. Nos. 3376 EDA 2007**
v.	:	**3373 EDA 2007**
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an Operating segment of Wal-Mart Stores, Inc.,	:	
Appellants.	:	

ADVANCED TEXT OF BRIEF OF APPELLEES

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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. The scope of review here is limited to the manner in which the trial of this certified class action was conducted. *See Morrison v. Commonwealth*, 538 Pa. 122, 131-133, 646 A.2d 565, 570 (1994) (explaining scope of review). Employees do not understand the issue, as rephrased by the Court upon the grant of allocatur, to embrace any of the lower courts' decisions as to pre-trial matters, the elements of contract law, the requirements or standards governing pre-trial class certification, or the meaning or elements of statutory provisions or of the Pennsylvania Rules of Civil Procedure. To the extent the lower courts' class certification decisions remain at issue, Employees note that substantial deference is given to the trial court's decision. *See Samuel-Bassett v. Kia Motors America, Inc.*, 34 A.3d 1, 15 (Pa. 2011). "An abuse of discretion will be found if the certifying court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact; [such that] the trial court must have exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice." *Id.*

With respect to the trial, the appellate court's inquiry is confined to whether the trial court's stated rulings and factual bases find support in the record. *See Morrison*, 538 Pa. at 134, 646 A.2d at 571 (citations omitted). "'Where the record adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion.'" *Id.* (quoting *Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 453, 625 A.2d 1181, 1187 (1993)). In reviewing the record, "the appellate court is to defer to the judgment of the trial court, for the trial court is uniquely qualified to determine factual matters." *Id.* Only where an error of judgment is "manifestly unreasonable" will an abuse of discretion be found. *Id.*

COUNTER-STATEMENT OF THE QUESTION INVOLVED

Whether, in a purported class action tried to verdict, it violates Pennsylvania law (including the Pennsylvania Rules of Civil Procedure) to subject Wal-Mart to a "Trial by Formula" that relieves Plaintiffs of their burden to produce class-wide "common" evidence on key elements of their claims.

SUGGESTED ANSWER

This question, as stated by Wal-Mart, mischaracterizes the nature of this class action and how it was tried and reviewed below. The Class judgment was based on class-wide "common" evidence that established all of the elements of Employees' claims. During the Class Period (1998-2006), Wal-Mart used a centralized "payroll scheduling system" that staffed its stores not by the man-hours required to do the job but instead by the total wage expense necessary to improve store profits year-to-year. Reducing wage expense was the primary if not only way for Wal-Mart to improve store profitability year-to-year. These centralized systems, incentives and practices imposed such payroll pressure and understaffing that hourly employees had to work through their promised breaks and off-the-clock. Wal-Mart's senior corporate officers admitted these common facts, including the payroll pressure.

Wal-Mart's corporate time records and internal audits – scrupulously reviewed and verified by the home office – evidenced the rest-break violations. The corporation's own electronic systems established that Employees were operating cash registers while they were off-the-clock and not being paid. Wal-Mart stopped keeping rest-break records after it was sued, but it did not change its payroll scheduling system or the manager bonus scheme. As a result, the exact same payroll pressures existed throughout the Class Period and continued to cause the exact same rest-break and off-the-clock work violations as admitted by the officers and documented by the corporate time clock reports and internal audits. The jury and the lower courts correctly found that all of this common evidence proved that Wal-Mart violated the law. This was a trial by corporate record and corporate admission, not a "Trial by Formula."

COUNTER-STATEMENT OF THE CASE

FORM OF THE ACTION

This is a wage and hour class action brought on behalf of nearly 187,000 current and former Pennsylvania hourly workers of Wal-Mart during 1998-2006. During that period, Wal-Mart had a centralized "payroll scheduling system" that staffed the stores not by man hours required to perform the various jobs but instead by the aggregate wage expense necessary to improve store margins and profitability year over year. Super. Ct. Slip Op. ("Slip Op.") at 10-11, 178. The case took the form of a class action 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). After a nearly six (6) week jury trial, Employees established that this centralized payroll scheduling system created such payroll pressure and understaffing that Wal-Mart systematically failed to pay Employees wages for hundreds of thousands of hours of off-the-clock work and millions of promised paid rest breaks.

Wal-Mart's top executives and corporate designees provided live and videotaped evidence that Wal-Mart had uniform, non-negotiable policies that Employees were to receive paid rest breaks and full compensation for all hours worked. Slip Op. at 35-40, 42, 120-121. These promises and policies were communicated daily to all Employees, through break-room postings, employee benefit books and communications, computer-based training and employee orientations. *Id.* Despite these uniform promises and policies, Wal-Mart's own time-clock records and internal audit reports established that Wal-Mart systematically failed to pay Employees for the off-the-clock work and the missed breaks and that Wal-Mart senior

management knew of these systematic violations. Slip Op. at 47-51. The jury returned a unanimous verdict finding Wal-Mart liable for breaching its wage and benefit promises to Employees and for violating the Pennsylvania Wage Payment and Collection Law ("WPCL"). R. _____(verdict forms).

The jury unanimously awarded Employees $2,494,340 for unpaid off-the-clock work and $75,974,075 for missed and shorted rest break wages. *Id.* The trial court applied the statutory liquidated damages provision of the WPCL, 43 P.S. § 260.10, and awarded $500 for each of the 124,506 Employees covered by the WPCL claim period, for a total of $62,253,000 in compensation for the multiple years in which these Employees had not received their proper pay and benefits. The trial court also awarded statutory and common fund attorney fees, and denied Wal-Mart's post-trial motions. Slip Op. at 17-18. In a 211-page decision issued on June 10, 2011, the Superior Court affirmed the class judgment but vacated and remanded the fee award. *Id*.

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. In response, Wal-Mart asserted the affirmative defense of "voluntary waiver." R._____ (Answers).

After initial motion practice, the parties engaged in wide-ranging class certification discovery. WMBr. App. F, 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 that reasserted timely statutory claims, including a statutory cause of action under the WPCL, 43 Pa. C.S. § 260.1 *et seq.*

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. C, Tr. Op. 12/27/05 at 10. 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. *See id.*

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 and proposed verdict

interrogatories. R.686a; 696a-98a. Employees filed their trial plan on November 16, 2005, outlining the common, generalized proof supporting each claim. R.____ (trial plan) and R.___ (verdict interrogatories).

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. C, Tr. Op. 12/27/05 at 12. The Superior Court denied Wal-Mart's petition for review of the class certification decision on April 26, 2006. 37 EDM 2006 (Pa. Super. Apr. 26, 2006).

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).[1] Wal-Mart failed to attach an

[1] Wal-Mart never moved to exclude the testimony of Employees' liability expert, Dr. Frank Landy, an industrial-organization 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.

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 (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. F, 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. I, 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;[2] that Wal-Mart breached its agreement by failing to provide earned, paid rest breaks to Employees; that it failed 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.

[2] 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. 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.

All post-trial proceedings were accurately described by the trial court in its post-trial opinions. WMBr. App. F & I, 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. Class-wide common evidence at trial proved that Wal-Mart's corporate policies PD-07 and PD-43[3] were uniform unilateral offers to contract that a reasonable employee in the position of class members would view as a binding and unequivocal promise to pay for all time worked and to provide paid rest breaks, that the policies were breached, and that Employees were damaged.

Wal-Mart's Uniform Promises

- 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.
- PD-07 promised Employees paid rest breaks which were earned solely on the basis of the number of hours worked each shift. Per PD-07, Employees who worked over three hours received one 15 minute paid rest break and Employees who worked over six hours received two 15 minute paid rest breaks. R.6974a-92a.
- *Wal-Mart Agreed to Pay Extra Wages For Rest Breaks.* The Associate Benefit Book, disseminated on line to all hourly employees (D. Exh. 146), promised employees that: "*In addition to the pay you receive for a regular day's work,* there are other programs and benefits that can supplement your income." Included among those programs and benefits that supplemented the "pay [employees] receive for a regular day's work" were paid rest breaks: "Take a break and get paid for it." R.6902a-6903a.
- PD-07 promised that rest breaks would be paid at employees' regular rate of pay R.6974a-92a.
- Wal-Mart's policies PD-07 and PD-43 expressly warned that employees who violated the policies by skipping breaks or taking long or short breaks or working off-the-clock would be disciplined ("coached") up to and including termination. R.6984a, 7023a.
- No Wal-Mart corporate policy permitted an hourly employee to waive rest breaks. R.6974a-92a, 7020a-33a.

[3] "PD" refers to Wal-Mart's "People Division," the company's human resources function.

- Wal-Mart's former CEO and Vice Chairman, Thomas Coughlin, admitted the binding and non-discretionary nature of Wal-Mart's promises. 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. According to Coughlin, the policies were "NOT optional" and "NOT subject to negotiation" and were "the LAW!" Supp.R.8135a-37a, Supp.R.7965a-67a. *See also* P. Exh. 451h (Coughlin video).
- *Uniform Corporate Policies Were Promises to Employees.* Based on the foregoing and other documents, 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, 1541a, 7034a-47a, 7048a-59a, 7060a-80a, 6974a-92a, 6993a, 6994a-97a, 6998a-7003a, 7004a-07a.

The Dissemination of the Promises

- The uniform promises repeatedly and consistently conveyed to Employees were established at and disseminated from Wal-Mart's home office. R.1557a-60a.
- Canetta Reid, Director of Corporate Employment Compliance, R.2049a-51a, 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 Associate Benefit Book, on posters in the stores, through computer-based learning and through written "talking points" distributed from corporate headquarters to local managers dictating the very words to be used to disseminate the promise to Employees. R.1963a, 2019a. R.7897a (Wal-MartBenefits.com website identifying paid rest breaks as an employee benefit under the heading "MY MONEY").

Reasonable Employee's Understanding Of Wal-Mart's Promises

- *"At Will" Employment Disclaimer Is No Defense.* In addition to the widely disseminated corporate policies and the Associate Benefit Book, Employees were provided with an Associate Handbook at the commencement of their employment. That Handbook and the employment application signed by Employees disclaimed Wal-Mart's intent to form a relationship other than "at will" with Employees. This provision permitted Wal-Mart to terminate Employees at any time and permitted Employees to quit at any time. Dr. Landy opined that a reasonable employee would understand the uniform disclaimer to disclaim only the intent to form something other than "at will" employment. *See* R.1545a-1564a.
- A reasonable employee in the position of Employees would not understand the Handbook disclaimer to contradict the corporate-enforced policies promising paid rest break benefits and pay for all hours worked, especially since PD-07 and PD-43 included no such disclaimer. R.1560a-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. *See* R.1545a-46a.

Breach Of The Promises

- *Wal-Mart's Senior Management Testified To Wal-Mart's Breach.* Among many exhibits showing top level knowledge of PD-07 violations were: R.6969a (8/3/98 memo from a Divisional V.P. to Coughlin acknowledging employees were not receiving scheduled breaks); R.7889a-900a: "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;" R.7516a-17a (2/14/00 e-mail re: meeting between Wal-Mart's COO and nine hourly managers describing missed breaks as a primary reason for rampant cashier turnover (then running at over 120%): "The highest percentage of Cashiers leave our company because they cannot receive a 'potty break.'").
- *Internal Audits Evidenced How Wal-Mart Used Its Own Records To Measure Policy Violations and Wal-Mart's Knowledge Of Such Violations.* Wal-Mart's executives 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, 7887a-88a. In June 2000, Wal-Mart performed the Shipley Audit of 127 stores, including 5 Pennsylvania stores (R.7441a-53a, 7887a-88a). The audit showed pervasive violations of PD-07. It reflected over 60,000 rest-break violations for just a one week period. The audit was delivered to Wal-Mart's most senior executives including Coughlin, Don Harris and many others. NT 9/12/06 at 65-72. The audits all used Wal-Mart's payroll records, TCARs and TPERs, the same way Employees' expert, Dr. Baggett, used those records at trial.
- *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. Wal-Mart failed to investigate these complaints. NT 9/28/06 at 110-114; 9/29/06 at 11-14; P. Exh. 77.
- Regional Vice President Castural Thompson, a 26-year Wal-Mart veteran, testified about the overwhelming 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).

Wal-Mart's Business Records Evidenced Breach On a Class-Wide Basis

- Wal-Mart's 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.
- 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, until February 2001, for rest 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.
- Wal-Mart's Payroll/Scheduling Guide, a 278 page tome distributed by the home office, dictated in detail how Wal-Mart's computerized time records were created and maintained, including how payroll records were edited to ensure accuracy and reliability, how missing swipes were handled on a daily basis, and how payroll was closed at the end of the day, week and pay period. R.7367a-96a, 1654a-55a.
- As dictated by the Payroll/Scheduling Guide, 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, listing every employee whose swipes showed "TOO FEW BREAKS" and "SHORT BREAK." 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 swipe for every employee in the store and all management edits to the swipes for every single shift worked. 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 Wal-Mart's 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 time-keeping requirements. *See* R.7282a, 7396a, 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 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.
- Testimony from Charles Holley, the senior executive with responsibility for Wal-Mart's business records, who signed Wal-Mart's tax returns, confirmed the accuracy of the payroll records. R.1266a-68a (Holley Video).
- Canetta Reid testified that investigations and corrections made to rest break records were done prior to finalization of Wal-Mart's payroll records with minimal exceptions, in compliance with the Payroll/Scheduling Guide. R.875a-876a (Reid Video), 7369a-96a.
- 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.3369a-37a, 342a-45a, Supp.R.7965a-67a.

Wal-Mart Used Its Business Records To Pay Employees, To Dock Employee Pay And To Audit For Policy Violations

- Wal-Mart used the data in the TCARs to determine employee pay. P. Exh. 54.
- 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's automatic

payroll system docked employee pay without inquiring whether the long break was "volitional" or "forced" or why or whether it "actually" occurred; Wal-Mart's computer system simply took the swipes at face value and docked pay. *See id*.

- 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 during the Class Period in individual stores, in districts (7-8 stores) and nationwide in 127 stores (the "Shipley Audit"). R.7441a-42a, 7887a-88a, 7518a-40a, 7503a-05a, 7492a. Several Pennsylvania stores were included in the Shipley Audit. R.7887a-88a, 7441a-42a. The internal audits were distributed to Wal-Mart's senior executives and revealed tens of thousands of violations. *Id*.

- *Wal-Mart Eliminated Rest Break Punching To Avoid Creating Evidence of its Violations.* From the beginning of the Class Period until February 2001, rest-break swiping was required and the TCARs showed whether an employee took "TOO FEW BREAKS" and "SHORT BREAK." In June 2000, with eight similar class action 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 executives* including Coughlin and Coleman Peterson, Executive Vice President of the People Division. R.7492a. Coughlin testified that no one at Wal-Mart took any action in response to the Shipley Audit to remedy pervasive rest-break violations. 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. Wal-Mart knew more lawsuits were coming. Supp.R.7954a.

- Dr. Landy testified that, following the Shipley Audit, Wal-Mart eliminated rest break swiping to eliminate the "smoking gun" evidence of its policy violations and to limit its liability in pending class wage and hour cases. R.1532a-36a; *see also* R.1585a-91a ("They were saying no because they don't want any more information about these potential violations. I mean, it's a smoking gun"); Supp.R.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. (A document considered but sealed by the trial court at trial, NT 9/14/06 p.m. at 50-52, also reflected that litigation-risk was a material factor in the elimination of rest-break swiping).

- Dr. Landy's opinion was subsequently confirmed when Wal-Mart belatedly disclosed post-trial the 9/29/00 "Special Meeting of the Policy Committee" 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." R. ____ (Exh. C to Pltfs' Op. Br. Post-trial 2/22/07 (emphasis added)). [4]

- 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 swiping, 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-1540a; 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. Questions that had formerly appeared in hourly employee "satisfaction" surveys regarding whether rest breaks were provided simply disappeared from the surveys. Wal-Mart's designee, Ms. Reid, could not explain why. NT 9/28/06 p.m. at 76/7-78/12.

Benefit and Appreciation of Benefit

- 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, 7205a-15a, 1475a-80a, 1481a.
- 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 management's control. R.7704a, 7637a-40a, 7641a-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 were reviewed. Managers who exceeded labor budgets were chastised publicly by home office. P. Exh. 451a-g; 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).

[4] In related litigation against Wal-Mart, an email chain was produced in which Wal-Mart executives admitted that "legal exposure" in "class actions" was the reason for eliminating rest-break swiping. R._____ (11/30/00 WMHOC-00082-008-00002699).

- *Preferred Scheduling System Caused Understaffing.* Dr. Landy testified Wal-Mart used its computer systems and the "preferred scheduling" program to drive down wage expenses and increase profits. According to Dr. Landy, the preferred scheduling system was the "root cause" of understaffing in the stores. R.1497a-98a; *see* R.7438a. ("Operations' goal is to have payroll below last year's percentages 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 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; P. Exh. 451i (2003 video in which Wal-Mart's Vice President, People Division, Don Swann, acknowledged that payroll pressure was the "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-75a237-247. 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.1562a75a, R.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." Supp.R.8129a, 7637a-40a, 7641a-45a, 7684a-90a, 7701a-42a. Wal-Mart kept close tabs on associate hours and consistently pressured its managers to reduce payroll even when it did not make business sense to do so. 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. NT 9/13/06 at 78-80.
- Wal-Mart's own meeting videos (cheers and applause) showed the benefits to the company of the "payroll pressure" practices. Under Wal-Mart's policy of calculating sales per man hour, Wal-Mart concretely benefitted by receiving approximately $8,242,500,000 in revenues through the capture of $78.5 million in unpaid labor from its hourly employees. *See* R.1486a-95a, 7646a-83a, 832a-38a (Huffaker Video).

THE SUPERIOR COURT'S DECISION

In the Superior Court, Wal-Mart appealed the denial of JNOV or a new trial. The Superior Court affirmed, finding the factual record substantiated the grant of class certification and that Wal-Mart was not deprived of due process because (i) it withdrew its waiver defense at

the close of trial, and (ii) the trial court did not prevent it from calling any witnesses. Slip Op. 134-135. The Superior Court expressly found that common questions of law and fact were "directly traceable to Wal-Mart's corporate policies and practices," that the common questions of fact relied on common questions of law (*id*. at 34), and that the "commonality of proof of the loss of rest breaks was demonstrated by [] Wal-Mart's own business records." *Id*. at 106.

The Superior Court further found that the payments for contractual rest breaks constituted wages under the WPCL. It expressly rejected Wal-Mart's argument that it could escape liability because "employees are paid regardless of whether they take their breaks," finding that "Wal-Mart promised to pay…employee[s] for a forty hour workweek in exchange for thirty-seven-and-a-half hours of labor (including meal periods) and two-and-a-half hours of rest." *Id*. at 160. Noting that Wal-Mart challenged the sufficiency of the evidence based "*only* on the policies, handbook and testimony of Drs. Baggett and Shapiro" (*id*. at 188), the Superior Court found: "Because of the limited nature of Wal-Mart's challenge to the sufficiency of evidence, and because of our resolution on Wal-Mart's challenge to class certification [not the subject of allocatur], we similarly conclude that this evidence, viewed in the light most favorable to Appellees, tends to support Appellees' claims" and thus does not warrant JNOV or a new trial. *Id*.

SUMMARY OF ARGUMENT

The General Assembly in the WPCL, 43 P.S. § 260.9a, this Court in *Kelly v. County of Allegheny*, 519 Pa. 213, 223, 546 A.2d 608, 613 (1988), the Superior Court in *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293-94 (Pa. Super. 2005), *alloc. denied*, 591 Pa. 716 (2007), 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 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 this law.

In certifying the Class 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. The court then conducted a model class action trial of wage payment claims for over 186,000 hourly employees who would not otherwise have an opportunity to assert their 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 trial counsel expressly withdrew the alleged individual affirmative defense of voluntary waiver – a defense that was precluded as a matter of law by the specific provisions of the WPCL. Besides, all of Wal-Mart's alleged defenses actually presented common and predominating questions. And, the trial court correctly exercised its discretion in ruling on all evidentiary objections that were properly presented and preserved by the parties.

The jury and the trial court also correctly 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, and the Superior Court correctly affirmed.

LEGAL ARGUMENT

I. THIS WAS A TRIAL-BY-CORPORATE-RECORD CLASS ACTION BASED ON "REPLICATED PROOF," NOT A "TRIAL BY FORMULA".

The question presented for review, as stated by Wal-Mart, misrepresents the nature of this class action and how it was tried and reviewed by the lower courts.

There are at least two different types of class actions: 1) aggregate proof class actions; and 2) "replicated proof" class actions. *See, e.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 115-123 (2009) ("Nagareda"); *see also Principles of the Law, Aggregate Litigation* §§ 2.02-2.08 (ALI 2010). Aggregate proof class actions depend on the existence of a market-wide or protected-class impact, as in securities, antitrust or Title VII disparate impact class actions. *See id*. Replicated proof class actions, by contrast, do not presuppose an aggregate impact but instead rely on the same documentary, testimonial and other business record evidence that, if believed, would prove each class member's claim even if each proceeded individually. *See id*. For example, the systematic overcharging of all record requesters for copies from microfilm instead of at a lower default rate would entail replicated proof, as each class member would present the same facts and evidence if each proceeded through an individual trial. *See Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 603 Pa. 198, 220-222, 983 A.2d 652, 665-666 (2009) (affirming class certification of breach of implied contract claim, because proof of contract formation and breach entails "a uniform inquiry into the conduct of [the defendant] which is common to all the members of the class.").

"Replicated proof . . . does not portend a displacement of the factfinder at trial." Nagareda, 84 N.Y.U.L. Rev. at 123. The factfinder is not asked to re-examine a market or

protected-class model previously examined by the certification court, but instead is tasked with considering the fundamental credibility and weight of the direct business record and testimonial evidence. In other words, the "sameness" of the evidence in a replicated proof class action pre-exists and is independent from the certification decision. *See id.*; *see also* Alan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1080 (2005) (arguing that dissimilarity among class members and their claims is significant and that "resolvability" should be the test for class certification). A replicated proof class action, therefore, does not and cannot result in a so-called "trial by formula."

In this context, the catchphrase "trial by formula" is particularly loaded and inapt. In *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 113 S. Ct. 2541 (2011) ("*Dukes*"), the phrase appears in the opinion's discussion of whether claims for monetary relief – namely, back pay under Title VII – may be certified under Rule 23(b)(2), which governs claims for injunctive and declaratory relief under the Federal Rules of Civil Procedure. The Court said no, "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." *Id*. at 2557. In so holding, *Dukes* observed that a Title VII disparate impact case requires a separate, second phase of trial, distinct from the case-in-chief, in which the defendant may attempt to "'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" *Id*. at 2560-61 (citing 42 U.S.C. § 2000e-5(g)(2)(A); quoting *International Broth. of Teamsters v. United States*, 431 U.S. 324, 361 (1977)).

But the second stage trial plan embraced by the lower courts in *Dukes* (a statistical sampling "determined in depositions supervised by a master") did not allow the defendant its statutory right to prove a "lawful reason," either individually *or* classwide. *Dukes*, 131 S. Ct. at 2561. This problem – derided by the Supreme Court as "Trial by Formula" – presented a statutory obstacle unique to Title VII cases. *Id*.; *see Ross v. RBS Citizens, N.A.*, 667 F.2d 900,

908 n.7 (7th Cir. 2012) (affirming certification of misclassification claims under state and federal labor laws, finding *Dukes* inapplicable where defendant had no "statutory right" comparable to the Title VII statutory right addressed in *Dukes*); *Ramos v. SimplexGrinnell LP*, No. 07-981, 2011 U.S. Dist. LEXIS 65593 at *14-17 (E.D.N.Y. June 21, 2011) (citing certified wage and hour cases and distinguishing *Dukes* on the grounds, among others, that the *Ramos* plaintiffs had "come forward with class-wide proof culled from defendant's electronic data").

Here, the trial was unitary because no statute mandated a second-stage trial plan. In addition, Wal-Mart expressly waived and abandoned the only arguable individual defense it had asserted – voluntary waiver of off-the-clock wages and paid breaks. Slip Op. 134-135. Unlike the plan in *Dukes*, the trial here also did not proceed based on a model of market-wide or protected-class impact, but instead based on common proof of centralized and uniform payroll scheduling systems, audits, time-clock reports that stated, in defendant's own words, "TOO FEW BREAKS" and "SHORT BREAK," express corporate admissions in published policies and bulletin board postings, and undisputed senior officer testimony about the impact of "payroll pressure" on store staffing and Employee class members. *See supra* pp. 12-15. Even the expert evidence of Employee damages was calculated by arithmetic, not by formula. *See* NT 9/19/06 p.m. at 9/7-13; 26/17-20 (totals after expert "added up" "52 million shifts"). The damages experts simply added up the missed and shorted breaks and off-the-clock work reflected in Wal-Mart's own business records and then extended these observations to time frames in which Wal-Mart ceased keeping or failed to produce the same business records. *See id.* Unlike *Dukes*, Wal-Mart here had a full and fair opportunity to challenge and rebut its own business records as well as the arithmetic calculations utilized by Employees' damages experts. *See Ramos*, 2011 U.S. Dist. LEXIS 65593 at *14-17; *see also Liss*, 630 Pa. at 220-222, 983 A.2d at 665-666.

Wal-Mart's brief, not to mention its statement of the issue, exaggerates the "trial by formula" short-hand based solely on the class action form of the trial to displace much of the historic discretionary powers of the judiciary to control the types and amount of evidence permitted at trial. Recent scholarship has shown there is no sound textual or doctrinal support for this position. *See* Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 389 ("Moller") (arguing that due process arguments of class action defendants lack any historical or textual support, except for two repudiated cases from the discredited *Lochner* era of the Supreme Court); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 194-198 (1st Cir. 2009) (rejecting the defendant's due process arguments), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41.

This Court and many others have held repeatedly that trial courts have broad discretion to control the nature and types of evidence presented, the course of proceedings and the avoidance of repetitive or redundant testimony. *See Commonwealth v. Laird*, 605 Pa. 137, 168, 988 A.2d 618, 636 (2010); *Samuel-Bassett*, 34 A.3d at 29, 39-41; *Brodowski v. Ryave*, 885 A.2d 1045, 1063 (Pa. Super. 2005); Pa. R. Civ. P. 1713; Pa. R. Evid. 403. Whether there is or should be a constriction of these discretionary powers based on the procedural form of the action or the substantive nature of the claims implicates public policy choices that arc between the judicial and legislative branches. *See* Moller, 2012 Utah L. Rev. at 392 (questioning whether "Congress ought to have a choice about how class claims can be proven"); *Basile v. H&R Block, Inc.*, 52 A.3d 1202, 1211 (Pa. 2012) (noting "General Assembly's superior ability to examine social policy issues and to establish appropriate substantive legal standards").

Unlike the individual statutory defense in *Dukes*, the General Assembly here has made a different public policy choice – to expressly authorize class and representative claims in the WPCL, 43 P.S. § 260.9a(b), with full knowledge of the courts' historic discretionary powers and

without any limitation or qualification that would constrict those powers in the class context. *See Kelly*, 519 Pa. at 223, 546 A.2d at 613 (longstanding public policy recognizes the "Commonwealth's solicitous protection of employees' compensation" through representative class actions). In other words, the class trial here proceeded exactly as contemplated by the substantive law and avoided all of the replication, redundancy, costs, and burdens that 186,979 identical trials with identical evidence would have imposed. *See id*.

Contrary to Wal-Mart's arguments on appeal (WMBr. at 20-29), the "trial by formula" catchphrase does not outlaw the use of routine and well-regarded summaries of voluminous business records "presented in the form of a chart, summary, or calculation." *See* Pa. R. Evid. 1006; *see also* 42 Pa. C.S. § 6108 ("Uniform Business Records as Evidence Act"). In fact, it is a well-established common law principle that contract damages may be reasonably estimated if based, as here, on specific and admitted business records, including the very payroll records the defendant used to calculate and report federal and state taxes, employee withholdings and public company results. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) ("an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence to negative the reasonableness of the inference drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."); *Spang & Co. v. US Steel Corp.*, 519 Pa. 14, 26-28, 545 A.2d 861, 866-867 (1988) ("While damages cannot be based on a mere guess or speculation, yet where the amount may be fairly estimated from the evidence, a recovery will be sustained even though such amount cannot be determined with entire accuracy" (internal quotes and citations omitted)); *Delahanty v. First Pennsylvania Bank*, 318

Pa. Super. 90, 464 A.2d 1243, 1257 (1983) ("justice and public policy require that the wrongdoer bear the risk of uncertainty which his own wrong has created and which prevents the precise computation of damages"), cited with approval in *Spang*, 519 Pa. at 27, 545 A.2d at 867 and *Ferrer v. Trustees of University of Pennsylvania*, 573 Pa. 310, 342, 825 A.2d 591, 611 (2002); *accord Samuel-Bassett*, 34 A.3d at 41 (citing *Zenith Radio Corp. v Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931) ("although the factfinder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly")).

As the lower courts found, the parties followed this substantive law at trial. Unlike the proposed plan in *Dukes*, Employees' expert Dr. Baggett did not use a "sample" to perform his damages analysis, but instead used all of the rest-break records produced by Wal-Mart.[5] Although Dr. Shapiro used a sample of operator-accountable cash register records and compared them to Wal-Mart's corresponding time-clock records, Wal-Mart did not contend below that this sample or the method of extrapolation were in error. Slip Op. at 86. It instead made the purely factual and common argument that the two time-clock systems were not "synchronized" (NT 10/10/06 at 205), which the jury rejected. All of these electronic payroll records were before the trial court and the jury on two hard-drives (P. Exh. 453) and were stipulated to by the parties. NT 10/10/06 at 135; *see also* P. Exh. 529 (stipulation). No second-stage proceeding or evidence was necessary, because the claims and the losses were tried on unitary basis and anchored to the same business-record evidence. *See Liss*, 603 Pa. at 202-222, 983 A.2d at 665-666.

[5] At class certification, Dr. Baggett properly applied his analysis to a statistically significant "sample," because Wal-Mart had not produced all of its payroll records at that time. See WMBr. App. C Tr. Op. 12/27/05 at 9.

Thus, Wal-Mart's mischaracterization of this case as a "trial by formula" should be rejected and its appeal summarily dismissed as improvidently granted.

II. WAL-MART HAS FAILED TO DEMONSTRATE ANY VIOLATION OF PENNSYLVANIA LAW RESULTING FROM THE CLASS TRIAL.

In *Dukes*, the high Court also observed that the second-stage proceedings it considered to be "Trial by Formula" would interpret Rule 23 to "abridge, enlarge or modify" Wal-Mart's substantive statutory right to present the individual defense of "lawful reason." *Dukes*, 131 S. Ct. at 2561. Though invited to do so by this Court's re-phrasing of the Question Presented, Wal-Mart has not demonstrated a similar point in this case. Despite the Pennsylvania Constitution's cognate provision in Article V, § 10 relating to procedural rules, Wal-Mart failed to preserve below and never even argued that any trial plan, procedural ruling or interpretation of the state class action rules abridged, enlarged or modified any substantive right. *See Montgomery County Bar Ass'n v. Rinalducci*, 329 Pa. 296, 298, 197 A. 924, 925 (1938) ("Matters not raised in, or considered by, the court below cannot be invoked on appeal even though they involve constitutional questions" (citations omitted)). Neither its brief on appeal to the Superior Court nor its post-trial motion even cited Article V, § 10. And, while its brief to this Court does cite the Constitutional provision, it completely fails to identify or articulate any procedural construct that in any way altered the applicable substantive rights of any party. Because the record reflects and Wal-Mart concedes it had adequate notice and opportunity to participate and defend itself in the courts below, and because it has failed to identify any procedural application that altered or modified any of its substantive rights, Wal-Mart has not met its burden of proof on appeal here.

First, unlike the second-stage proceedings in *Dukes*, a two-stage trial was never proposed or contemplated, and the trial court never limited any defenses proposed or pled by Wal-Mart. Slip Op. at 135-136. Wal-Mart does not and cannot argue it had any statutory defense analogous to the Title VII defense discussed in *Dukes*. More important, Wal-Mart expressly waived and

was barred by the WPCL from asserting that Class members voluntarily relinquished their rights to rest-break wages and pay for off-the-clock work. *Id*. at 134-135. In fact, the un-rebutted testimony at trial proved that there was no procedure or policy to permit an employee to forgo a rest break or to work for free off-the-clock. Hence, nothing about the class proceedings or the trial here altered any individual defense rights of Wal-Mart.

Second, Wal-Mart's more generic denial defense (*i.e.* it has a substantive right to deny liability) was and is in truth a *common* defense that was fully litigated and decided at trial. Among other things, Wal-Mart contended that its business records were not reliable or adequate to show that any Class member suffered "TOO FEW BREAKS" or a "SHORT BREAK." But this fact-bound business record defense was common to all Employees because it necessarily applied to each and every Class member, as the Class members were the employees reflected in the business records and because it would be the same defense if raised in 186,000 individual jury trials. As a matter of fact, Wal-Mart asserted the defense throughout trial, but the jury rejected the position that the business records were unreliable, did not mean what they said, or were otherwise inaccurate representations of the express statements "TOO FEW BREAKS" and "SHORT BREAK" used in Wal-Mart's own records. As a result, this common defense argument by Wal-Mart was and is a fact-bound assertion – not one of procedural construct or presumption – that was properly evaluated and decided by the jury and affirmed by the courts below.

Third, Wal-Mart's contention that it could demonstrate the inaccuracies of its business records only by cross-examination of all hourly employees is also fact-bound. As recognized by the trial court, Wal-Mart could have presented such testimony, if truthful, through its records custodian or CFO. WMBr. App. C Tr. Op. 12/27/05 at 16. But the corporate designees in fact testified that the payroll records and systems were accurate. R.932a-943a; R.1266a-1268a. Besides, Wal-Mart did present individual hourly employee testimony at trial. Wal-Mart

examined or cross-examined no fewer than ten (10) current and former employees on the so-called "bad business record" defense, but the jury rejected this tactic. Overwhelming documentary and testimonial evidence presented by Employees, including the Shipley Audit, Swann's admission of violations caused by "payroll pressure," the massive home office control of the records, and the manifold videos showing conscious, uniform and persistent efforts to press-down on storewide wages (P. Exh. 451a-i), all put the lie to Wal-Mart's "bad business record" defense. In other words, Wal-Mart had a full and fair opportunity to present the defense, and nothing about the procedural form or conduct of the trial impaired or altered any substantive right.

Fourth, Employees' damages experts did not construct a financial, market-price or socio-economic model as in *Dukes* or other aggregate litigation cases. Instead, they compiled and analyzed Wal-Mart's own voluminous business records by taking the records as they found them, accepting the precise terms as used in the records themselves, and using the data exactly as Wal-Mart had used the data. Where certain Wal-Mart records were corrupted, not produced or no longer kept because Wal-Mart stopped keeping the records after suit was filed, the experts applied ordinary and unremarkable extrapolation principles to fill-in the gaps caused by Wal-Mart itself. Wal-Mart did not object to the method of extrapolation either at trial or on appeal below. Instead, it advanced the common defense that none of the records showed what they purported to show.

With respect to Dr. Shapiro's comparison of the time-clock data to the operator-accountable cash register data (to show off-the-clock work), Wal-Mart likewise did not object below to the extrapolation of the data. Instead, it presented a factual objection – decided by the jury – that the two time-clocks allegedly were not "synchronized." NT 10/10/06 at 205. Therefore, both of Wal-Mart's objections to Employees' experts were common, fact-bound

objections tied not to the suitability or propriety of socio-economic data or assumptions, but instead to the reliability and meaning of Wal-Mart's own business records. Because all of these same records were before the jury (P. Exh. 453), and because Wal-Mart's own corporate representatives could have countered, explained, or negated them, there was nothing about this unitary, replicated proof trial that altered, abridged or affected any substantive right of Wal-Mart.

These fact-intensive points all show that Wal-Mart is attempting to use this appeal improperly to re-litigate if not re-examine the factual determinations in this case. *Cf.* U.S. Const. amend. VII. But this type of factual review of the record – even of the severely abridged version portrayed by Wal-Mart – receives the most deferential approach a court can take because fact and credibility determinations are the province of the jury. *See Ferrer*, 573 Pa. at 343, 825 A.2d at 611; *Morrison*, 538 Pa. at 134, 646 A.2d at 571. Indeed, Wal-Mart's "trial by formula" label is a clumsy effort to bypass meaningful consideration of the actual facts and circumstances resulting in the judgment below. *See Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1272 (11th Cir. 2008) ("courts do not simply slap on a talismanic phrase" (internal quotes and citation omitted)), *cert. denied*, 130 S. Ct. 59 (2009).

As with the Superior Court here, the appeals court in *Morgan* also confronted and rejected the uncandid arguments of an employer-defendant found liable after a jury trial to its employees for unpaid wages. *See id.* In *Morgan*, as here, the plaintiffs did not rely solely on representative or anecdotal testimony to prove their *prima facie* case. *See id.* at 1276-1277. Instead, as here, they relied on the company's own payroll records for each of the employees. *Id.* These records, as in this case, showed when each employee worked, how many hours they worked, how much they were paid, and that they did not receive full pay for all time worked. *See id.* Like the Superior Court below, the *Morgan* court also noted that the parties presented "an abundance of trial evidence," including a "vast array of corporate manuals," "detailed charts

summarizing wages and hours," testimony from corporate executives, district managers, regional managers who "oversaw thousands of stores," emails, internal corporate correspondence, payroll budgets and other "non-testimonial evidence [that] was equally high in quality and largely comprised of [the company's] corporate records." *Id.* at 1277. The *Morgan* court concluded, like the Superior Court did here, that "[t]he jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence." *Id.*

As in *Morgan*, and as found by the Superior Court, the evidence here was more than legally sufficient. As in that case, no corporate officer of Wal-Mart disputed the accuracy or business record *bona fides* of any of Wal-Mart's payroll, audit or other internal records. Wal-Mart's own expert, Dr. Denise Martin, agreed with the extrapolation methodology employed by both of Employees' experts. She herself used the exact same methodologies when testifying on behalf of Wal-Mart in similar litigation pending in California. Slip Op. at 95-96. Moreover, Wal-Mart's own "clock-out, lock-out" function (adopted after Dr. Shapiro had delivered his initial expert report and which prevented clocked-out employees from operating the cash registers) used the same comparison program used by Dr. Shapiro, thereby validating his methodology. *Id.* at 80.

The key dispute at trial was a purely factual one that was not just common but indeed uniform for all Class members: did Wal-Mart's corporate records mean what they said when they reported "TOO FEW BREAKS," "SHORT BREAK," and off-the-clock work on cash registers. Not only was this a classic credibility question for the jury to decide but also it is and would be the exact same fact and credibility question for 100 or more juries to decide in 100 or more individual trials, all of which would be based on the same business records, the same expert summaries, the same methodologies, the same corporate audits, the same corporate admissions, and the same substantive jury charges. This is illustrated by Employees' trial Exhibit 77, signed

by over 40 hourly workers of the York, Pa. Wal-Mart on January 28, 2005, complaining, among other things, that "While having their hours cut due to low sales, associates are still expected to get the same amount of work done. This shortens tempers, while increasing anxiety and the possibility of accidents. Some associates skip breaks because they have to get their work done." R.____ (P. Exh. 77). Of course, Wal-Mart's attack on the weight and sufficiency of this type of evidence "is among the least assailable of [the lower court's] rulings." *Samuel-Bassett*, 34 A.3d at 39.

In sum, the class trial here "generated common *answers* apt to drive the resolution of the litigation." Nagareda, 84 N.Y.U. L. Rev. at 132, quoted with approval in *Dukes*, 131 S. Ct. at 2551. The jury was free to weigh the importance and meaning of all of Wal-Mart's corporate records in light of the explanations and testimony presented at trial and the contemporaneous reactions of Wal-Mart management to the data and records during the Class Period. *Cf. Mahoney v. Farmers Ins. Exchange*, No. 09-2327, 2011 WL 4458513 (S.D. Tex. Sept. 23, 2011) (refusing to decertify class while noting that the defendant could meet representative testimony with its own at trial); *Ramos*, 2011 U.S. Dist. LEXIS 65593 at *14-17. This was and is a classic jury function (*Samuel-Bassett*, 34 A.3d at 34), and nothing about the trial deviated one iota from the procedure or manner in which any other civil trial, individual or class, would proceed. Because the jury verdict should not and may not be re-examined on appeal, Wal-Mart has not met its appellate burden.

III. WAL-MART WAIVED ITS ARGUMENTS ON APPEAL.

Despite the Supreme Court's admonishment in *Dilliplaine v. Lehigh Trust Co.*, 457 Pa. 255, 322 A.2d 114, 116-17 (1974), that appellants can only raise issues on appeal that were timely raised before the trial court, Wal-Mart is attempting to raise multiple issues that were not raised below and therefore have been waived.

A. Wal-Mart Expressly Abandoned Its Alleged Defense of Individual Voluntary Waiver of Rest-Break Wages and Off-The-Clock Work Pay.

Wal-Mart contends the trial court did not provide it with the opportunity to present the affirmative defense of voluntary waiver of off-the-clock wages and paid rest breaks. Wal-Mart misrepresents the record. At the close of the evidence, Employees moved to dismiss Wal-Mart's affirmative defense and, in response, Wal-Mart's counsel expressly withdrew the voluntary waiver defense. R.2100a-2102a (Court: "Is there a defense of waiver, Mr. Manne?" Manne: "There is no defense of waiver per se. We don't seek a jury question on the waiver issue. So it's clear and notwithstanding the Court's ruling, we certainly believe that the issue of employee voluntariness is relevant to the jury's consideration of other issues in the case, but we are not asking for and we are not submitting a waiver question or making a waiver defense." Court: "Did you raise any waiver defense as an affirmative defense." Manne: "We are not making a waiver defense. I don't think I have mentioned waiver once in the whole trial." Court: "I don't know what you are talking about. In so far as there has ever been a waiver defense pled, I understand Mr. Manne to withdraw that at the Bar of the Court."). Accordingly, Wal-Mart has abandoned its voluntary waiver defense.

B. Wal-Mart Waived All De-Certification Arguments and Agreed to the Standards Utilized In The Lower Courts

Wal-Mart has waived all de-certification arguments because it did not properly make such arguments before the trial court. On July 27, 2006, Wal-Mart moved *in limine* to exclude the testimony of two of Employees' expert witnesses, Drs. Baggett and Shapiro. R._____ ("Motion to Exclude . . . and Revoke Class Certification"). Wal-Mart failed to attach an expert report to that motion as required by Pa. R. Civ. P. 207.1. The trial court denied the motion because Wal-Mart failed to comply with the rule. R.1452a-53a. Wal-Mart could have remedied this procedural defect at any time. Wal-Mart elected not to do so, and thus failed to raise this

issue properly before a decision on the merits. During the trial, Wal-Mart's counsel conceded that this *in limine* 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").

Rule 227.1(b)(1) provides that post-trial relief may not be granted unless the relief was requested in pre-trial proceedings or by motion, objection or other appropriate method. This Court has emphasized that the failure to comply with the requirements of Rule 227.1(b)(1) constitutes a waiver of the issue. *Straub v. Cherne Industries*, 583 Pa. 608, 880 A.2d 561 (2005). Defendants also failed to move for decertification at the close of Employees' case-in-chief. That motion was required to preserve the argument for post-trial or appellate review based on post-certification developments. This is a different point from whether Wal-Mart retained the right to challenge the initial class certification decision based on the pre-trial class certification record, which it did. *See Samuel-Bassett*, 34 A.3d at 19. The point here under controlling "scope of review" standards is that Wal-Mart failed to preserve any decertification arguments based on subsequent proceedings when it failed to file a proper motion based on subsequent evidence. *See id*. at 21 (highlighting differences in "scope of review"). In other words, absent a proper later-filed motion enabling the lower court to address, correct or adjust for any developing error, Wal-Mart may not conflate subsequent evidence and proceedings with that considered in connection with the earlier class decision to attack the earlier exercise of discretion. *See id.* Because Wal-Mart did not properly move to decertify, it has waived any challenge that subsequent proceedings or evidence mandate vacatur of the class certification decision.

With respect to the 2005 class decision, Wal-Mart concedes that if commonality and predominance were properly established, then its defense rights were also protected. *See* WMBr. at 26 (arguing that commonality and predominance are "essential" to the protection of defense

rights); *but see Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (noting that due process focuses on "the protection of the interests of absent parties who are to be bound" and that commonality, adequacy, notice and opportunity are essential to class member interests). Thus, if the 2005 class decision was not an abuse of discretion, as so held by the Superior Court, then Wal-Mart has no claim that its defense rights were violated. *See In re Pharm.*, 582 F.3d at 194-99 (rejecting defendant's due process argument), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41; *Morgan*, 551 F.3d at 1263 (holding properly certified class does not invade substantive right of defendant). Because Wal-Mart's appeal to this Court does not argue, as it must, that the 2005 class decision was an abuse of discretion, and because it argues only that the class trial allegedly violated its substantive rights despite the absence of a proper pre-trial or mid-trial motion to decertify, Wal-Mart has waived all of its arguments against class certification. After all, a party "may not complain on appeal of errors that he himself invited or provoked." *Harvis v. Roadway Exp. Inc.*, 923 F.2d 59, 60 (6th Cir. 1991); *Kriner v. Dinger*, 297 Pa. 576, 582, 147 A. 830, 832 (1929) (same).

Although Wal-Mart suggests (WMBr. at 23) that a different pre-trial standard 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. 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 (Pa. Super. 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.3399.

Thus, any contention that the trial court applied an erroneous standard at class certification has been waived. *See Kriner*, 297 Pa. at 582, 147 A. at 832.

C. Wal-Mart Waived All Challenges To Employees' Experts

Wal-Mart has waived all challenges to Employees' experts, Drs. Baggett and Shapiro. As noted, Wal-Mart's *in limine* motion to preclude the expert testimony was procedurally defective under Pa. R. Civ. P. 207.1, NT 9/5/06 at 126/13-127/14. Wal-Mart does not and cannot argue that the denial of that motion was an abuse of discretion. Moreover, Wal-Mart never advanced a procedurally correct motion to strike or exclude the expert testimony. In fact, following *voir dire* examination of Dr. Baggett, Wal-Mart's counsel stated, Dr. Baggett was "qualified to count missing or short swipes." NT 9/19/06 p.m. at 20/7-13. The trial court advised Wal-Mart's counsel to make specific objections to testimony at the time the testimony was offered. NT 9/19/06 p.m. at 20/18-20. Wal-Mart did not renew its *Frye* challenge to Dr. Baggett, nor did it tender a report from its expert as required by Rule 207.1.

Wal-Mart did raise the same procedurally defective *Frye* challenge to Dr. Shapiro on September 21, 2006. This oral motion, heard in chambers outside the presence of the jury, also lacked an expert report challenging the applied methodology as required by Rule 207.1. Wal-Mart's counsel, upon questioning from the Court, admitted that, despite the intervening 15 days, he still was not tendering a report from Dr. Martin challenging Dr. Shapiro's methodology as required by court rule. Wal-Mart's *Frye* challenge was again denied as procedurally defective. NT 9/21/06 a.m. at 15/6-17/23. As with Dr. Baggett, Wal-Mart did not challenge Dr. Shapiro's

qualifications as an expert in the fields of computer programming and statistics. *Id*. at 12/24-14/1. Wal-Mart's challenge to Dr. Shapiro in the field of psychology was denied. *Id*. at 18/25-19/2. The trial court again cautioned Wal-Mart to make timely objections to the substance of Dr. Shapiro's testimony as it was tendered. *Id*. at 19/2-7. Wal-Mart's appeal here fails to identify, as it must, where it properly preserved the evidentiary objections to the testimony of Drs. Baggett and Shapiro.[6] Therefore, it has waived any challenges to Employees' experts.

D. Wal-Mart Waived Any Objections To The Adverse Inference Instruction

Although its brief to this Court merely insinuates a perceived error in the trial court's adverse inference instruction, Wal-Mart also has waived that belated challenge.

During the October 6, 2006, charging conference the trial court explicitly stated:

> If there is anything that is erroneous in the instruction to preserve it for appeal, you must go to sidebar and preserve it for appeal. And it is not my policy to allow counsel to say, for all the reasons raised in this four-week trial we renew everything, because that's not really giving the Court an opportunity to correct it. So I have told you what I would charge. I have told you I will not be straight-jacketed by language either stated on the record today or contained in the case. I think counsel is entitled to a transcript before the charge is given. Counsel is entitled to know what the Court will give. If the charge is in any way erroneous, I am confident you will go to sidebar and if necessary it will be corrected at that time." NT 10/6/06 at 157/2-19.

On October 11, 2006, the trial court charged the jury, including the adverse inference instruction. R.2141a-42a. Wal-Mart did not object to the adverse inference instruction following the jury charge and accordingly waived the issue. *Cruz v. Northeastern Hosp.*, 801 A.2d 602, 610-611 (Pa. Super. 2002) (quoting *Randt v. Abex Corp.*, 448 Pa. Super. 224, 671 A.2d 228, 232 (1996)) (explaining "where a party fails to specifically object to a trial court's jury instruction,

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[6] Wal-Mart also claims that Dr. Landy's testimony should have been "disregarded." WMBr. at 38. But Wal-Mart waived that point below because it stated during the trial: "Your Honor, we have no objection to Dr. Landy's qualifications as an expert," NT 9/11/06 p.m. at 28/14-16, and it failed to make any such argument in its post-trial motion or on appeal. *See* Pa. R. Civ. P. 227.1(b)(2); Pa. R. App. P. 302(a).

the objection is waived and cannot subsequently be raised on appeal."). Moreover, the trial court disposed of this issue by holding that "[t]he jury charge allowing the adverse inference was proper as well." WMBr. App. I Tr. Op. 9/3/08 at 12 n.19. Despite this ruling, Wal-Mart again waived the issue because it did not argue before the Superior Court that the adverse inference instruction was improper. *See Anderson v. McAfoos*, No. 9 WAP 2011, 2012 WL 6720532, at *10 (Pa. Dec. 18, 2012) (holding that an argument was waived because appellants did not raise the argument at the time of trial or in the Superior Court).

Wal-Mart says on appeal, without any citation to authority, that it had no obligation to continue maintaining accurate records. WMBr. at 37 n.31. Yet, Wal-Mart failed to object to the portion of the jury charge instructing that Wal-Mart had an obligation to maintain its records. *See* NT 10/11/06 at 32. It also failed to raise this purported issue post-trial or on appeal to the Superior Court, meaning that this contention has been waived as well.

Finally, Wal-Mart has not appealed the Superior Court's holding "that monetary payments for rest breaks pursuant to an agreement between an employer and employee are 'fringe benefits,' and thus 'wages' under the WPCL." Slip Op. at 156. Because Wal-Mart has failed to appeal this issue, it is bound by the WPCL and Minimum Wage Act record-keeping requirements. These requirements include: (i) under 43 P.S. § 33.108: "[e]very employer of employees shall keep a true and accurate record of the hours worked by each employee and the wages paid to each" and (ii) under 34 Pa. Code § 231.31(a): "every employer shall keep a true, accurate, and legible record for each employee. The records … shall contain the following information: (5) Time and day that the work begins … (6) The number of hours worked daily and weekly … (9) Total additions to or deductions from wages paid each pay period." Therefore, Wal-Mart has waived any argument that it was not obligated to maintain these records.

E. Wal-Mart Waived Any Argument Under the Pennsylvania Constitution.

Wal-Mart's arguments based on the Pennsylvania Constitution are waived because Wal-Mart did not raise these arguments before the trial court. *See Lamm v. Fisher*, 903 A.2d 1259, 1261 n.3 (Pa. Super. 2006) (holding appellant's argument "raised for the first time in her appellate brief, which tardiness renders the contention waived for appeal purposes" and noting "issues not raised below are waived on appeal, even if issues raised on appeal are of constitutional dimension"). Wal-Mart's only argument before the trial court based on the Pennsylvania Constitution was under Article I, Section 9, which concerns criminal trials. *See* R. ___ (Post-trial motion, p. 3). As noted, Wal-Mart did not cite below Article V, § 10, thereby waiving all contentions under that provision. *See Montgomery County*, 329 Pa. at 298, 197 A. at 925. Accordingly, Wal-Mart has waived its new arguments under the Pennsylvania Constitution.

F. Wal-Mart Waived Any Challenge To Its Witness List, The Unilateral Contract Instruction, and the Verdict Form.

Wal-Mart says the trial court prevented it from raising substantive defenses by limiting the number of witnesses it could call. Wal-Mart not only misrepresents the record but it also never preserved this alleged "issue." On September 5, 2006, Wal-Mart withdrew its amended witness list, which it had delivered to Employees for the first time on September 2, 2006, the very eve of trial. NT 9/5/06 at 79:12-16 (Manne: "With that clarification, so it's clear, we are voluntarily withdrawing the amended witness list, or I guess the new names on the amended witness list, reverting to the old list, if you will."). In the post-trial opinion, the trial court found: "Although Defendant also claims to argue that they should have been permitted to call each of the 126,005 employee class members to explain why their time records showed missed breaks or off-the-clock work, no prohibition on calling 126,000 witnesses was ever imposed beyond the Court commenting on the absurdity of the 'threat.' Defendant did, however, identify hundreds of new witnesses never listed on their pre-trial memorandum the weekend before trial. However,

even the request to call these witnesses was withdrawn." WMBr. App. I Tr. Op. 9/3/08 at 4 n.4. Wal-Mart did not challenge or appeal this finding to the Superior Court.

Wal-Mart also expressly waived its after-the-fact contention to this Court that the testimony of each of the 186,979 class members was required to supply the proof of Wal-Mart's contractual intention and its Employees' acceptance. *See* NT 9/10/04 at 54:13-19; NT 10/6/06 at 155-156 (admitting that an objective, "reasonable person" standard applied). In fact, Wal-Mart expressly agreed at trial that Employee acceptance was controlled by an objective, reasonable person, standard: MR. MANNE: "No, I disagree, Your Honor. The key requirement of the instruction is the intent of the employer to be bound. There must be something from which the reasonable person would view the -- there must be promises that a reasonable person would view as evidencing an employer's intent to be bound. That's the critical portion of the instruction." *Id*. The trial court provided this very instruction, NT 10/11/06 at 42, and Wal-Mart did not argue otherwise on appeal to the Superior Court.

With respect to the verdict form and the applicable law provided to the jury, Wal-Mart likewise waived all of its appellate arguments to this Court. Wal-Mart did not object at trial to the "fail to provide" language in the verdict form. *Cf*. WMBr. at 17 (insinuating otherwise). Wal-Mart also never asked the trial court to add "forced" or "compelled" language to the jury instructions, and never argued to the Superior Court that such concepts or words were part of Employees' burden of proof. *See* 43 P.S. § 336.2 ("Employ" includes "suffer or permit to work."). Accordingly, all of Wal-Mart's newly-minted arguments about the elements of Employees' case and the applicable legal standards have been waived. *See, e.g., Samuel-Bassett*, 34 A.3d at 44-46.

IV. WAL-MART'S DUE PROCESS ARGUMENT IS BASELESS.

A. APPLICABLE STANDARDS

Recent legal scholarship has examined and debunked Wal-Mart's argument that it was somehow denied "substantive" due process as a result of the class trial here. *See* Moller, 2012 Utah L. Rev. at 389. In that article, Professor Moller expressly repudiates a prior article in which he had contended, based on "intuition," that "class-specific evidentiary shortcuts are inconsistent with due process." *Id*. at 324 n.30, citing and repudiating Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 857 (2005); *see also In re Pharm*., 582 F.3d at 194-99 (rejecting defendant's due process argument), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41.

Surveying the history of the "due process" concept and its "law of the land" synonym, Professor Moller develops that "the common law imposed a variety of limits on parties' ability to present probative evidence to economize on the cost and unpredictability of jury fact-finding," and that American courts – "the inheritors of that tradition" – did not construe the Due Process Clause otherwise. *Id*. at 389. He notes that while legislatures are free to alter the types or quantum of proof required in civil trials (as Congress did in Title VII), "[d]ue process does not impose any firm restrictions or alterations in the type or quantity of evidence presented in ordinary civil proceedings. Everything, in practice, turns on a judicial judgment, guided by dictates of good sense, equity, and convenience." *Id*. In other words, apart from notice and the opportunity to be heard, due process does not alter or confine the basic abuse of discretion standard of review applicable to trial court decisions. *See In re Pharm*., 582 F.3d at 197-99; Pa. R. Civ. P. 1713.

This point is significant because any constitutional constriction on the historic discretionary powers of the courts (as urged here by Wal-Mart) would impact, necessarily, all

forms and stages of action whether they be criminal or civil, at preliminary or class certification hearings, during pre-trial discovery or motions *in limine*, or in connection with mid-trial evidentiary decisions or requests for jury charges. But, as other courts have recognized, the Court's decision in *Dukes* did not "work[] some sea change in class action jurisprudence." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 482 (D. Kan. 2012). The *Dukes* Court emphatically did not establish or define a new substantive due process right for defendants. Rather, it emphasized the statutory right of employers, expressly provided by Congress in Title VII, to assert the "individual affirmative defense" of "lawful reason," and found that a procedure that short-circuited that individual statutory defense ran afoul of the Rules Enabling Act. 131 S. Ct. at 2561. Contrary to Wal-Mart's arguments here, the *Dukes* Court only discussed due process in the context of *class member rights* to notice and the opportunity to opt-out, both of which occurred below. *Id*. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process").

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." *Id*. at 334. 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"); *Kelly*, 519 Pa. at 222-23, 546 A.2d at 612-13 (same); *Salvas*, 452 Mass. at 369, 893 N.E.2d at 1213 (same); *Iliadis*, 191 N.J. at 103, 922 A.2d at 718 (same); 43 P.S. § 260.9a(b) (substantive

Pennsylvania law providing that employee may pursue wage payment claims on behalf of a class of similarly situated workers).[7]

The courts 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 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.

B. BUSINESS RECORDS

As recognized by the courts below, 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

[7] *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 n.8 (1974) ("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).

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 (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). 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), *cited with approval in Samuel-Bassett*, 34 A.3d at 28. Thus, Employees' reliance on Wal-Mart's own business records to prove the Class's claims and losses in no way offended due process. *See In re Pharm.*, 582 F.3d at 194-99 (rejecting defendant's due process argument), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41.

To the extent Wal-Mart wanted to disprove, discredit or otherwise undermine the accuracy of its TCARs, TPERs and other payroll records, it was free to call countless executives and computer technology personnel to testify, if they could, that the payroll records were not reliable concerning rest-break wages. Similarly, to the extent Wal-Mart wanted to challenge a centerpiece of Employees' case – the Shipley Audit and the 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 31), Employees did not rely on Drs. Baggett and Shapiro to establish whether and why an employee missed a break or worked off-the-clock. Employees directly relied on Wal-Mart's TCARs and related business records, which specifically reported missed breaks and off-the-clock work. 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[8] – to present a comprehensible damage amount based on Wal-Mart's own data. Therefore, the issue whether the payroll records accurately reflected the hours worked, breaks missed, and wages paid – as Wal-Mart had represented previously to government authorities, employees and shareholders – was a common, predominating question for all of the Employees that the jury resolved 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 for 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 would have had any bearing on this issue, as Wal-Mart and not Employees dictated the scheduling system and the bonus and staffing practices. The common contention that individual employees "voluntarily" worked through their promised breaks or donated their personal time to Wal-Mart by working off-the-clock was also presented to the jury, despite the fact that Wal-Mart's own written and enforced policies expressly prohibited such "voluntary" and gratuitous conduct. *Cf*. 43 P.S. § 336.2 ("Employ" includes to "suffer or permit to work"); *Mahoney*, 2011 WL 4458513 at *6 n.49 ("the reason an employee continues to work is immaterial"; "the additional hours must be

[8] R.2079a-83a, 1765a-66, 1843a-45a, 2085a-86a.

counted"). Thus, the central issue of corporate and business record credibility was (and remained) a common predominating issue of fact that could be and was fairly tried to the jury.

According to Wal-Mart's brief, this appeal does not present the class management issue that concerned this Court (and the dissent) in *Samuel-Bassett*, 34 A.3d at 29, 40-42 & n.27, 64. In that case, a uniform measure of each class member's damages was presented by the class's expert. The defendant failed to object to that testimony and "did not challenge the expert's method of calculating damages." *Id*. at 41. The dissent observed, and the majority agreed, that the damages evidence did not account for variables resulting from the different experiences and personal expenditures of class members. *See id*. at 40, 59, 60-61 & n.7. The dissent contended that the absence of trial court management over the individual damages issue cast doubt on whether the class trial was a "fair and efficient method for adjudication of the controversy" as set forth in Pa. R. Civ. P. 1705(2) and 1708(a)(2). The majority disagreed, noting that the defendant did not object contemporaneously, but nonetheless emphasizing that it was not expressing a definitive view on whether proving aggregate damages is "lawful and proper" or whether estimating the individual damages was sound. *Id*. at 40-42 & n.27.

Here, Wal-Mart has not argued (and cannot argue) that the absence of trial court direction on the issue of individual damages contravened Rules 1705 or 1708. Unlike the facts in *Samuel-Bassett*, the Class damages here were calculated based on Wal-Mart's own employment records, which is common proof expressly contemplated by the substantive law. *See* 43 P.S. § 260.9a(b); *Mt. Clemens*, 328 U.S. at 687-88; *Ferrer*, 825 A.2d at 611. Expenditures by individual class members were not at issue. Moreover, Wal-Mart did not argue pre-trial, post-trial or before the Superior Court that any specific management plan was required to account for any individual differences in class member damages. In fact, Wal-Mart's contentions with respect to the expert calculations of damages were uniform for all Class members: it argued "a missed swipe did not

mean a missed break," and "the cashier and payroll time-clocks were not synchronized." *See* NT 10/10/06 at 205. As noted, these were common credibility and weight questions that were properly submitted to the jury and affirmed by the courts below. Because business records may be relied upon to establish class damages, and because the common credibility and weight issues here were fairly and efficiently adjudicated with a uniform answer to the uniform questions, the class trial in no way impaired the substantive rights of any party. *See In re Pharm.*, 582 F.3d at 194-99 (rejecting defendant's due process argument), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41; *see also Liss*, 603 Pa, at 220-222, 983 A.2d at 665-666.

C. WAL-MART'S CASES ARE OFF-POINT.

Wal-Mart's reliance on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008), is misplaced. 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 id.* 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 v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131, 2142 (2008) (holding that reliance is not an element of a RICO claim).

The insinuation by Wal-Mart that Employees created a "fictional" "composite 'class'" (WMBr. at 41) 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). In that case,

there were four (4) fundamental problems with the class trial. 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. Fourth, the *Broussard* trial was infected with a "hodgepodge" of widely varying misrepresentation, fiduciary breach, unfair practices and related tort claims that were legally improper and incorrectly conflated with the contract claims. *See id*. at 342-352. Here, just two basic and alternative legal theories were presented on a unitary basis for all Class members: breach of unilateral contract or unjust enrichment. *Cf. Morgan*, 551 F.3d at 1280 (affirming collective action judgment for unpaid wages). As a result, *Broussard* has nothing in common with the Class claims tried in this case.[9] *See In re Pharm.*, 582 F.3d at 194-99 (rejecting defendant's due process argument), *cited with approval in Samuel-Bassett*, 34 A.3d at 40-41.

[9] Wal-Mart's citation to and reliance on two Third Circuit cases in particular is also misplaced. *See* WMBr. at 22 n.20 & 28, citing *Hohider v. United Parcel Serv. Inc.*, 574 F.3d 169 (3d Cir. 2009) and *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011). Both are examples of non-opt-out Rule 23(b)(2) "aggregate proof" class actions that are entirely different from the "replicated proof" by business record opt-out class action involved here. In *Hohider*, a disability discrimination case similar to the *Dukes* Title VII case, the court of appeals reversed certification of a Rule 23(b)(2) class because the preliminary statutory issue of whether a particular employee was "qualified" to perform was necessarily individual and incapable of resolution on a class-wide basis. *See* 574 F.3d at 196-198. In *Gates*, the court of appeals affirmed the denial of a Rule 23(b)(2) medical monitoring class on the basis that the expert evidence of exposure to toxic vinyl chloride was a "hypothetical composite" that was "not shared by all (possibly even most) individuals in the class." 655 F.3d at 266. Here, by contrast, Employees all worked under the

The trial below focused on Wal-Mart's own policies and promises, its own business records, its own uniform scheduling system, 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.[10] Therefore, Wal-Mart's due process argument is specious and should be rejected.

V. THE RECORD EVIDENCE MORE THAN SUFFICES TO SUSTAIN THE JURY'S VERDICT

A. THE UNIFORM PROMISE

Ignoring the fact-bound record and its own repeated concession that an objective "reasonable person" standard applies, Wal-Mart argues that Employees presented "no proof" of Wal-Mart's contract offer or Employees' acceptance of that offer. This argument has been waived. *See supra* pp. 29-37. The lower courts and the jury correctly decided the contract formation issue, which was undoubtedly common and indeed uniform.

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identical corporate policies and relied at trial on Wal-Mart's own payroll records, which identified for each and every Class member the hours worked, the pay each received, the rate of pay and the work-time for which each was not paid. Employees did not rely on an environmental model or a composite; they submitted the company's own payroll data for 52 million shifts. *See* P. Exh. 453 (hard drives containing Wal-Mart electronic data).

[10] 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 needed his job. *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. 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.

Undisputed principles of Pennsylvania law provide that: (i) a unilateral contract is "formed when one party makes a promise in exchange for the other party's act or performance," *First Home Sav. Bank, FSB v. Nernberg*, 436 Pa. Super. 377, 387, 648 A.2d 9, 13 (1994) (citing *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 526 A.2d 1192 (1987)); and (ii) a unilateral contract "is not formed until such time as the offeree completes performance." *Id*. The common proof below met these standards.

At trial, Employees founded their case on PD-07 and PD-43. R.6974a-92a, 7020a-33a. Wal-Mart does not and cannot dispute that these policies were uniformly and repeatedly communicated to all Class members both directly and through the "We Commit To You" posters; the Home Office "Talking Points;" the corporate admissions by Wal-Mart's CEO, who described them as "the LAW," "non-negotiable" and "not optional." The testimony of Wal-Mart's corporate designee, Ms. Reid, confirmed the uniformity and the communication of the promises to all employees at the commencement of employment and throughout each employee's tenure. R.1963a, 2019a, Supp.R.8135a-37a. Wal-Mart's determination now to address only the terms of its Handbook[11] (WMBr. at 43-45) and its refusal to address the corporate policies themselves does not alter the record evidence and the sufficiency of Employees' common proof.[12]

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[11] Wal-Mart's 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. Wal-Mart does not refute that it made such other specific communications to Employees in the form of the policies, the posters, and the Associate Benefit Book to name only a few.

[12] Wal-Mart cannot argue that Employees' legal theories changed midstream by virtue of class certification. At class certification, Wal-Mart conceded that Employees' claims were not

Because Wal-Mart's intention to contract was measured by an objective, reasonable person standard, the issue necessarily presented a common, predominating question for 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 paid 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.[13]

Tellingly, Wal-Mart proffered *common* proof on its common defense of 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 benefits to any employee for work performed. 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. The trial court correctly left resolution of the ultimate, common issue of corporate intent to the jury.

Contrary to Wal-Mart's assertion (WMBr. at 43-44), in *Morosetti v. Louisiana Land Exploration Co.*, 45 Pa. D. & C.3d 545 (Allegheny Cty. 1986), *vacated by* 564 A.2d 151 (Pa. 1989), this Court specifically recognized that a contract with employees could arise out of a company policy widely communicated to employees.[14] *See also Andrews v. Comp USA, Inc.*, No.

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based on the Handbook. NT 9/10/04 at 54:3-5 ("[Employees are not] arguing a contract based on a handbook …. Instead, they have this unilateral contract argument based on the company's policies").

[13] 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.

[14] On appeal, the *Morosetti* trial court's directed verdict on behalf of a certified class of employees asserting a contract claim for severance pay was vacated *only* because the plaintiffs'

3:00-CV-1368, 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).

More directly, in *Bauer v. Pottsville Area Emergency Medical Services, Inc.*, 758 A.2d 1265 (Pa. Super. 2000), the Superior Court found that company policies 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), the *Bauer* Court said:

> 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 Nernberg*, 436 Pa. Super. at 387, 648 A.2d at 14; *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 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").[15] That the policies could be altered prospectively did not alter their

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evidence was insufficient: "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).

[15] Wal-Mart's reliance (WMBr. at 43-44) upon cases involving wrongful termination is misplaced. Unlike *Donahue v. Federal Express Corp*., 2000 Pa. Super. 146, 753 A.2d 238 (2000), *Luteran v. Loral Fairchild Corp*., 455 Pa. Super. 364, 688 A.2d 211 (1997), and *McCloud v. United Parcel Serv., Inc*., 543 F. Supp. 2d 391, 403 (E.D. Pa. 2008), 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 their employment as

binding nature for wages due on work already performed. *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996) ("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."); *accord 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"). [16]

Contrary to Wal-Mart's argument (WMBr. at 44), handbook disclaimers do not preclude a contract or destroy a promise as a matter of law. *Andrews*, 2002 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. 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).

On a contract claim, the intent of the parties 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"); *Gen. Warehousemen and Emp. Union Local No. 636 v. J. C. Penney Co*., 484 F. Supp. 130, 135 (W.D.

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promised in PD-07 and PD-43. R.1560a-62a. Wal-Mart's cases are also factually inapposite as they involve handbooks only, not the kind of uniformly-communicated corporate policies at issue here.

[16] In *Abbott*, 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 Abbott*, 805 A.2d at 559 (quotations and citations omitted).

Pa. 1980) ("The test for interpretation of an offer or acceptance is not what the party making it thought it meant, but what his manifestation of agreement was"); *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. 2006) ("Under contract law, the objective manifestation of the parties is the governing factor regardless of subjective beliefs and reservations. An 'actual' meeting of the minds is not necessary to form a contract" (citations omitted)).

Employees' burden was to proffer common proof of a *reasonable employee's* understanding of Wal-Mart's affirmative promises.[17] Employees offered precisely such common proof and, unfortunately for Wal-Mart, the jury was persuaded that the preponderance of the evidence demonstrated Wal-Mart's intent to contract. The common evidence of intent included the unambiguous corporate policies PD-07 and PD-43, *which were devoid of disclaimer language*,[18] and which were 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 also saw and heard CEO Coughlin attest that these policies were "non-negotiable" and that anyone who violated them would be disciplined. R.1551a-52a; 1557a. He said specifically, Employees "are to get their breaks. They are not optional." P. Exh. 451h.

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[17] *Diehl v. Elec. Data Sys. Corp.*, No. 07-CV-1213 (M.D. Pa. July 10, 2008), cited by Wal-Mart (WMBr. at 44), also employs the "reasonable person" test, but is distinguishable because the fact-bound record there demonstrated no reasonable person would conclude that the employer intended to displace the "at will" rule.

[18] Wal-Mart could have included disclaimer language on the face of PD-07, but it chose not to do so. Defendants were "free to issue statements which are not contractually binding so long as such statements are accompanied by an appropriate conspicuous disclaimer." *Banas v. Matthews Int'l. Corp.*, 348 Pa. Super. 464, 503, 502 A.2d 637, 657-58 (1985). Unlike, for example, PD-10 (Spanier Cert., Exh. 15), PD-07 and PD-43 contain no disclaimers, conspicuous or otherwise.

The jury saw Wal-Mart's "We Commit To You" poster, which was signed by management. R.7008a. In language pregnant with promise[19] and *devoid of any disclaimer*, Wal-Mart posted the following in every break room: "*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). The jury was permitted to determine why *no* disclaimer was ever appended to the signed posters or to PD-07 even after the commencement of litigation asserting contract claims based on these promises.

To prevail on this appeal, Wal-Mart must persuade this Court that, considering the evidence in the light most favorable to Employees, giving Employees the benefit of every reasonable inference of fact and resolving any conflict in the evidence in Employees' favor, no two reasonable minds could disagree that the outcome should have been rendered for Wal-Mart. Slip Op. at 19-20. Wal-Mart's counsel's admission at class certification that Wal-Mart did intend to be bound by PD-07 illustrates precisely why the jury could have found and did find that Wal-Mart intended PD-07 as a contractual promise:

> THE COURT: Let me ask you this on behalf of your client: When your client promulgated everybody should take breaks and supervisors have to enforce it, did they intend to be bound?
> WAL-MART'S COUNSEL: Absolutely.
> And they intend to follow that policy. Let me make a distinction. They didn't intend to be contractually bound.
> THE COURT: Let's back up to the question. When they issue a policy that everybody has two fifteen-minute breaks in a two-hour period…did Wal-Mart intend to be bound?
> WAL-MART'S COUNSEL: Contractually bound, no.
> THE COURT: Did they intend to be bound in any other way?
> WAL-MART'S COUNSEL: Only a non-contractual, moral binding. They wanted this policy to be followed.
> THE COURT: They intended it as a moral precept as opposed to anything binding on the corporation, is that what you're urging me? As a moral preceptor we'd love to do it.

[19] "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.).

WAL-MART'S COUNSEL: And we intend to do it.

NT 10/18/05 at 218-219. Wal-Mart did not present the promises in PD-07 to its employees as "moral" precepts or "aspirational goals." Employees who failed to comply with the policies were subject to being fired for such violations; it is difficult to imagine that even Wal-Mart could fire employees for failing to attain "aspirational goals." Slip Op. at 120. The jury was permitted to reject Wal-Mart's self-serving characterizations of its promises.

In considering whether Wal-Mart intended PD-07 to be viewed as a contract, the jury was permitted to consider common evidence as to *how* Wal-Mart used PD-07 to its own advantage. In "educating" its hourly employees about the reasons why labor unions were not beneficial or in addressing employees' "tough questions" on pay, Wal-Mart repeatedly compared the benefits contained in union contracts to Wal-Mart's benefits including those provided by PD-07, urging that the Wal-Mart workplace was as good as (if not better than) a unionized workplace. P. Exh. 28, 29; NT 9/12/06 p.m. at 65-67. If a reasonable person could have divined that PD-07 was just a guideline with no contractual force or nothing more than a "moral obligation," then Wal-Mart's pitches to employees to reject union workplaces would have failed.

In asserting its entitlement to a JNOV, Wal-Mart ignores the decision and order in the Minnesota class action, *Braun v. Wal-Mart, Inc.*, Court File: 19-00-0109790, Dakota County, July 12, 2004. R._____(8/16/06 JLS Cert. Exh. 37). There, the trial court granted plaintiffs' motion for summary judgment finding that an offer of contract had been made and accepted based on Wal-Mart's policies, and that PD-07 was a "contractual obligation that defendants are obligated to fulfill." While not binding on this Court, the decision illustrates that at least one presumptively reasonable trier of fact could determine, without need of a trial, that the provisions of PD-07 were expressions of contractual intent made in definite form to Wal-Mart's employees and were clearly understood and accepted by such employees through performance:

> The benefits that are the subject of Plaintiffs' claims were treated by Wal-Mart as more than matters of policy. They were the rules of the workplace, and it is not unreasonable to conclude that the employees accepted these rules as contractual rights. Wal-Mart suggests in its brief that the crucial question is whether Wal-Mart expressed contractual intent as opposed to practical intent to adhere to the stated policies as a matter of business judgment. It is fundamentally clear that Wal-Mart intended that the statements were the rules of the workplace. However, now that litigation has ensued over the . . . rules, Wal-Mart takes the position that the rules were policy and Wal-Mart should not be contractually bound, and, therefore, Wal-Mart should not have to bear liability if it is ultimately determined that it violated the rules that it established.

R._____(8/16/06 JLS Cert. Exh. 37 at 7-8).

As above, the disclaimers and the ability to alter the policies – common defenses offered by Wal-Mart – were simply factors for the jury to consider. Based on the totality of the evidence, the jury reasonably concluded that Wal-Mart intended its employees to understand its promises to be binding commitments and contractual obligations to provide breaks and pay.

Wal-Mart's assertion that its unilateral distribution of the policies and its ability to alter the policies negated any intent to contract (WMBr. at 44) misconceives the nature of unilateral contracts. Unilateral contracts do not require mutuality of obligation. *DiBonaventura v. Consolidated Rail Corp*., 372 Pa. Super. 420, 425, 539 A.2d 865, 868 (1988), makes clear that "mutuality of obligation" in the unilateral contract context is a "thoroughly discredited notion." 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. *DiBonaventura* further confirms what Wal-Mart has repeatedly conceded: the issue before the jury based on the totality of the evidence was what a reasonable

employee in the class members' positions would have understood and not dependent on proof of the understanding of 186,979 individuals.

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.

The same is true for employee acceptance by performance. At trial, that performance was evidenced in Wal-Mart's records of the 52 million shifts worked by employees in which breaks were earned. R.6974a-92a ("The number of [rest] breaks depends on the number of consecutive hours an [Employee] works.").

Wal-Mart's argument that proof of "reliance" was an element of Employees' contract claim is wrong.[20] In *Liss*, 603 Pa. at 220-221, 983 A.2d at 665, this Court rejected that very argument. In doing so, it distinguished the very cases relied upon by Wal-Mart here, WMBr. at 46. Noting that *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442 (2001), and *Klemow v. Time Inc.*, 466 Pa. 189, 352 A.2d 12 (1976), asserted UTPCPL or fraud claims, this Court held: "The analysis of courts in [*Klemow* and *Weinberg*] is not applicable here because 'reliance,' or 'justifiable reliance' more specifically, is not an element that the class must prove to recover for breach of contract." *Id.* This Court's holding in *Samuel-Bassett*, 34 A.3d at 43-45, is to the same effect. Finding that the Kia class was not required to prove "reliance" as an element of its breach of express warranty claim, this Court held: "General contract law supports this

[20] Wal-Mart's citations to *Luteran* and and *Vincent v. Fuller Co.*, 582 A.2d 1367, 1370-1 (Pa. Super. 1990), are misleading. Both *Luteran* and *Vincent* discuss reliance only in the context of the plaintiffs' equitable estoppel claims.

interpretation. 'Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood.'" *Id.* (citations omitted).[21]

Hence, the contract elements of the unilateral contract claim and the related WPCL claim were proved through common evidence.

B. WAL-MART'S BREACH AND UNJUST ENRICHMENT

Wal-Mart's arguments on breach and unjust enrichment rest precariously on two assertions, neither of which has any merit. First (and throughout its brief), Wal-Mart argues that a missed swipe does not equal a missed break. WMBr. at 31-33. As discussed *supra*, whether a missed swipe equaled a missed break was a common question of fact as to the credibility of Wal-Mart's records that was properly decided by the jury.

Wal-Mart's entire appeal is premised upon the counter-intuitive argument that its vast business records created and maintained at great expense did not mean what they said. The trial court expressly found at class certification that this was a central common factual question that could and should be decided by the jury. WMBr. App. C Tr. Op. 12/27/05 at 16. In this respect, it was entirely proper for the jury to hear and consider how Wal-Mart used the common business records to pay, dock pay and measure corporate policy violations through internal audits and otherwise. As Wal-Mart conceded at class certification and at trial, Employees' experts simply took Wal-Mart's records and summarized them. NT 9/10/04 at 79:10-12; 9/19/06 p.m. at 20/7-13. Employees' experts used the records exactly as Wal-Mart itself used them. Though Wal-Mart in passing challenges Employees' experts' use of widely accepted extrapolation techniques (WMBr. at 35-36), its arguments boil down to the same old attack on the credibility of its

[21] To the extent the issue of "justifiable reliance" ever arises in a unilateral contract setting, it does so only in the case of partial performance and revocation by the offeror (*e.g.*, offeror promises to pay $100 if offeree walks across the Brooklyn Bridge and when offeree is almost across the bridge offeror revokes). *See generally* Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. Davis L. Rev. 1 (1992).

records. Indeed, Wal-Mart's own expert, Dr. Martin, conceded the propriety of Employees' experts' extrapolation, a common statistical technique that she herself used to testify on Wal-Mart's behalf. R.2083a-84a.

Wal-Mart's argument (WMBr. at 33-35) that Employees bore the burden to prove as part of their case-in chief that Wal-Mart *forced* Employees to miss breaks or work off-the-clock has been waived and is wholly unsupported by any pertinent authority or law. Wal-Mart's only case citation, *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012), actually refutes the contention. In *Brinker*, the California Supreme Court affirmed class certification of a statutory rest break class and held: "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief;" it is the employer's burden to plead and prove such affirmative defense. *Id*. at 545. Indeed, Wal-Mart expressly pleaded this affirmative defense in its Answers docketed below. R.____ (Wal-Mart Answers). The withdrawal of that defense at trial in the face of the WPCL provision prohibiting waiver of employee rights does not preserve the issue or transform the outlawed defense into an affirmative element. *See Kriner*, 297 Pa. at 582, 147 A. at 832 (appellant cannot complain about perceived error it invited or provoked).

1. Wal-Mart's Business Records Were Common Evidence.

Keeping accurate records was Wal-Mart's duty. Wal-Mart repeatedly has conceded that obligation. See *supra* III. D. That duty is imposed by law on Wal-Mart. Apart from pertinent federal laws, the Commonwealth imposes recordkeeping requirements on Pennsylvania employers. See *id*. The Superior Court, in an unappealed portion of its ruling, determined that paid rest breaks constitute fringe benefits and/or wage supplements under the WPCL, as 43 P.S. § 260.2a expressly defines "wages" to include "fringe benefits or wage supplements." Thus, the

record-keeping requirements of the WPCL are triggered; without records of such rest breaks, the enforcement mechanisms in the WPCL could not be effectuated. *See Brinker*, 273 P.3d at 545 (addressing California meal period statute and explaining that "'without the recording of all in-and-out time, including meal periods, the enforcement staff would be unable to adequately investigate and enforce'" statutory violations).

Wal-Mart's criticism of the work of Drs. Baggett and Shapiro is based on the false assertion that its own legally required business records were not probative of their own contents. First, Wal-Mart conceded at class certification that its business records were sufficient *prima facie* proof of breach for each individual class member. NT 9/10/04 at 88/11-20. More critically still, Wal-Mart persists in ignoring the fact-bound record. On the reliability and accuracy of the records, Employees and Wal-Mart introduced extensive testimonial and documentary evidence showing that (i) Wal-Mart dictated every aspect of the creation, editing and maintenance (for up to five years) of its records; (ii) TPERs generated daily showed, in Wal-Mart's own words, "TOO FEW BREAKS" and "SHORT BREAK;" (iii) TCARs generated weekly showed total hours worked and total rest break time (measured in tenths of minutes); (iv) Wal-Mart edited the records to ensure their accuracy and reliability; (v) Wal-Mart required the investigation of missing or irregular swipes daily; (vi) swipe records were used to generate paychecks; (vii) swipe records were used by Wal-Mart to dock employee pay without Wal-Mart inquiring whether breaks were actually long or whether such long breaks were taken voluntarily; (viii) Wal-Mart saved approximately $26 million annually by using the swipe records to automatically dock pay (P. Exh. 140); (ix) the swipe records were used to discipline and fire employees who did not adhere to Wal-Mart's policies; (x) in addition to time clock data, Wal-Mart kept computerized point-of-sale data from which data Wal-Mart itself was able to determine that Employees were working on cash registers while clocked out on the time clock; (xi) Wal-Mart's

Corporate Controller, Charles Holley, testified to the accuracy of the payroll records; (xii) Wal-Mart executives received a series of internal audits culminating with the Shipley Audit that used the TPERs and TCARs, without more, to count rest break violations; and (xiii) Wal-Mart executives understood the probative value of the rest break records and accordingly eliminated the recordkeeping rather than cure the violations.

In the face of the foregoing proof, Wal-Mart attempts to re-characterize the record by simply failing to address the bulk of it. Instead, Wal-Mart argues that the proof of the inaccuracy of the rest-break records was apparent from the testimony of two hourly employees who opted out of the class, conceding that they had no claim in this case. The cited testimony (WMBr. at 31) concerns meal periods and not rest breaks. More critically, none of the testifying hourly employees was responsible to keep accurate records. That was and remains Wal-Mart's duty.

As noted at class certification and at trial, Wal-Mart's common defense that the records were inaccurate and unreliable could have been proved by Wal-Mart proffering a witness with responsibility for such records – the records custodian, the CFO, the COO, or Wal-Mart's financial auditor – who could have attested to the unreliability of the records. No such witness was proffered and the jury was entitled to draw an adverse inference against Wal-Mart by virtue of the absence of such a corporate witness. Far from offering proof of inaccuracy, Wal-Mart's conduct in reliance on the records, its use of the records to audit for violations, to dock pay and to discipline employees, and its own executives' testimony supported the conclusion that the records were, as Dr. Landy testified, the "gold standard" and that they were eliminated because they were "smoking guns." NT 9/12/06 p.m. at 58 and 64/18-24.

Wal-Mart suggests that the courts below "misunderstood" how Wal-Mart used its records and "misapplied" Pennsylvania's business record rule, 42 Pa. C.S. § 6108. WMBr. at 32. This argument is refuted by the wealth of evidence at certification and at trial supporting the

admissibility of the business records, Wal-Mart's concession that the records could be used to prove Employees' *prima facie* case on breach of contract and Wal-Mart's various waivers.

Wal-Mart's assertion (WMBr. at 33) that the courts below "failed to ask" for what purpose the records were compiled is absurd. The trial court expressly inquired why the records were kept and why Wal-Mart ceased keeping the records. NT 9/5/06 at 108-110; NT 10/6/06 at 135-145. Wal-Mart failed to provide any meaningful answers to those questions or any explanation of such matters that the jury found credible.

Wal-Mart employs sleight-of-hand to undermine the records' significance, arguing that regardless of whether it recorded the breaks, it nevertheless fully paid Employees. *See* WMBr. at 33. This argument was expressly rejected by the Superior Court. Slip Op. at 160. The notion that short or missed breaks had no effect on the accuracy of its payroll records because Employees were paid for all time worked was presented to and rejected by the jury. The record is clear: Wal-Mart had two policies – PD-43 promised pay for all time worked and PD-07 promised pay for up to one half hour for no work at all. As Wal-Mart's Associate Benefit Book promised: "*In addition to the pay you receive for a regular day's work,* there are other programs and benefits that can supplement your income" including paid rest breaks: "Take a break and get paid for it." R.6902a-6903a. Wal-Mart broke this promise and violated the WPCL.

2. The Expert Extrapolations

Wal-Mart's attack on the extrapolation technique used by Drs. Baggett and Shapiro is unfounded. Employees' experts extrapolated only where Wal-Mart failed to provide records that were in its possession for time periods prior to February 2001, where Wal-Mart had purged pertinent records despite the pendency of this litigation, or where Wal-Mart determined to cease keeping legally required records in order to avoid its substantial liability to its hourly employees in Pennsylvania. The adverse inference instruction by the trial court, as to which Wal-Mart

failed to object, was fully warranted given Wal-Mart's overt statements that it was eliminating rest-break swiping to spare itself from liability on Employees' claims combined with its post-February 2001 conduct refusing to permit the creation of any records of rest breaks and its elimination of rest-break questions on employee surveys.

Contrary to Wal-Mart's assertion (WMBr. at 35), the work performed by Drs. Baggett and Shapiro was not based on modeling or assumptions. They did not calculate average numbers of missed breaks or off-the-clock work to be applied to all class members. Dr. Baggett summarized all hourly employee time records, as provided by Wal-Mart, for all stores in Pennsylvania. NT 9/19/06 a.m. at 21/17-24. He performed an analysis of the voluminous time clock records to determine compliance with PD-07. NT 9/19/06 p.m. at 9/7-13; 26/17-20. Dr. Baggett ***made no assumptions or judgments*** about the data he analyzed. Rather, he conducted his statistical analysis using the data in a manner consistent with Wal-Mart's own use of the same data. *Id.* at 60/10-16 (explaining that the Shipley Audit used the same records Dr. Baggett used); NT 9/19/06 p.m. at 31/8-12; 40/6-41/16; 96/2-8. In fact, his conclusions utilized the same categories and characteristics set forth in the records themselves: "SHORT BREAK" and "TOO FEW BREAKS." *Id.* at 29/5-15; 31/19-32/2; 61/25-62/8; *see* R.6970a-6973a (Legend to Wal-Mart's TPERs indicating exceptions of "short break" and "too few breaks"); R.7441a-7442a (Memo to Don Harris discussing the Shipley Audit findings of extensive occurrences of "Too Few Breaks.").

Wal-Mart's own counsel conceded to the trial court that Wal-Mart had no objection to Dr. Baggett's statistical methodology. NT 9/20/06 p.m. at 42/23-43/8 ("… MR. MANNE: I do not challenge his counting of missed swipe occasions in the records prior to February 10, 2001…[f]or rest breaks.). Wal-Mart's counsel explained that the objections were limited to Dr.

Baggett's alleged ***assumption*** that the data provided to him was accurate. *Id.* at 43/12-24 ("MR. MANNE: … He testified that [missed swipes] were, in fact, missed rest breaks …").

Wal-Mart's contention that Drs. Baggett and Shapiro failed to account for Wal-Mart's supposed "compliance initiative" in the latter part of the Class Period is another impermissible attempt to re-weigh the evidence. The jury was well within its bounds to reject Wal-Mart's repeated assertions that, while it eliminated rest-break punching, it had increased compliance. Other evidence confirming the validity and conservatism of Dr. Baggett's 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) Thompson's testimony that rest break violations were still widespread at Wal-Mart when he left the company in April 2005, 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-856a, 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-11a at Q.6.c., Supp.R.8087a-8102a. In fact, the complaints of missed breaks were so prevalent in the CORT reviews conducted in 2005 that Wal-Mart elected to omit the survey 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. Class members testified at trial about 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. *See Mt. Clemens*, 328 U.S. at 688; *Delahanty*, 464 A.2d at 1257.

In this respect, Wal-Mart does not and cannot dispute that *Mt. Clemens* is controlling law. Courts applying Pennsylvania law have specifically adopted *Mt. Clemens* and its progeny. *See Walker v. Washbasket Wash & Dry*, 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 *Mt. Clemens*); *see also Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 359-60 (9th Cir. 1966).

In any event, the conservative, fact-based assessment that rest-break violations continued unchanged after Wal-Mart eliminated rest-break recording goes to the opinion's weight not to its admissibility. The standard of review of a trial court's evidentiary ruling, including a ruling as to admissibility of expert evidence, is limited to whether the trial court abused its discretion. *Samuel-Bassett*, 34 A.3d at 39 (trial court's decision based on weight of the evidence is among "the least assailable of its rulings"); *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, the sufficiency of the evidence must be reviewed in the light most favorable to the verdict winners. *Simonetti v. School Dist. of Phila.*, 308 Pa. Super. 555, 454 A.2d 1038, 1041 (1982).

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: (i) the direct testimony of Dr. Shapiro about the information upon which he relied (R.1749a-52a, 1754a, 1762a); (ii) Dr. Shapiro's cross-examination during which these factual challenges were raised (R.1783a-84a, 1788a-89a, 1794a-98a); (iii) the testimony of Rosemary Aquilino, a Wal-Mart employee, about whether employees sometimes work under each other's ID numbers (R.2071a); and (iv) the testimony of Britt Roberts-Faulk, a Wal-Mart store manager, about whether time clocks and cash registers were always synchronized (R.1921a-22a). Hence, the jury again was presented with and decided a common, predominating factual question, which reaffirms the propriety of the lower courts' rulings.

3. Wal-Mart Was Unjustly Enriched.

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). Overwhelming evidence of

Wal-Mart's centralized business practices, the specifically designed "Payroll/Scheduling Guide," the Shipley Audit, the inverted management incentives to press down on wages to produce manager bonuses, and the acknowledged payroll pressure all established beyond doubt that Wal-Mart knew of and appreciated the benefits it received from the unpaid labors of Employees. These fact-bound points, already affirmed by the Superior Court, are so pervasive that they do not merit review by this Court. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) (the Court "do[es] not grant *certiorari* to review evidence and discuss specific facts.").

Contrary to Wal-Mart's arguments (WMBr. at 31-35), Drs. Baggett and Shapiro were not offered to attest to this factual "causality." Instead, manifold witnesses and documents evidenced the "payroll pressure" that caused the rest-break violations and off-the-clock work. Among other things, Dr. Landy, Thompson, Coughlin, and Swann all testified to and explained the payroll pressure. Uniform documentary evidence also confirmed the widespread and persistent nature of the violations and their cause. Wal-Mart's suggestion that this Court re-weigh only a few bits and pieces of the 29 day trial record is contrary to controlling standards of appellate review. *See Samuel-Bassett*, 34 A.3d at 39.

As explained in detail at trial, Wal-Mart benefited from the "payroll pressure" by avoiding overtime costs, minimizing expenses for additional staff, imposing "out-of-hours" practices, having work performed off-the-clock or through breaks to get the work done, and maximizing margins and, in turn, company profitability and management bonuses. Even Wal-Mart's own meeting videos (cheers and applause) showed the benefits to the company of the "payroll pressure" practices. R.____ (P. Exh. 451a-i). Based on the record and Wal-Mart's policy of calculating sales per man hour, Wal-Mart concretely benefitted by receiving approximately $8,242,500,000 in revenues through the capture of $78.5 million in unpaid labor from its hourly employees. *See* R.1486a-95a, 7646a-83a, 832a-38a (Huffaker Video).

In sum, Wal-Mart's mischaracterization of the issue to this Court, together with its mis-description of the facts and its mis-portrayal of the rulings and proceedings below, all demonstrate how appropriate it was to submit this replicated proof class action based on common business records and practices to the jury. The lower courts committed no error in affirming.

CONCLUSION

For all of the foregoing reasons, Employees-Appellees respectfully request that the Court summarily dismiss the appeal as improvidently granted or, in the alternative, affirm the judgment below.

Respectfully submitted,

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