No.

IN THE

Supreme Court of the United States

WAL-MART STORES, INC., and SAM'S EAST, INC.,

Petitioners,

v.

MICHELLE BRAUN, on behalf of herself and all others similarly situated,

and

DOLORES HUMMEL, on behalf of herself and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), this Court unanimously "disapprove[d]" the "novel project" of "Trial by Formula," in which evidence pertaining only to a subset of class members is extrapolated to resolve the claims of the entire class without "further individualized proceedings," because this procedure would impermissibly alter substantive law and preclude the litigation of "defenses to individual claims." Here, both the Pennsylvania Supreme Court and Pennsylvania Superior Court upheld a classwide judgment of more than $150 million that was the product of just such a trial.

The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state court from certifying a class action, and entering a monetary judgment in favor of the class, where the court permits the use of extrapolation to relieve individual class members of their burden of proof and forecloses the defendants from presenting individualized defenses to class members' claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Wal-Mart Stores, Inc., has no parent corporation and no other publicly held corporation owns 10% or more of its stock, and that Sam's East, Inc., is an indirect wholly owned subsidiary of Wal-Mart Stores, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Wal-Mart Stores, Inc., and Sam's East, Inc. (collectively, "Wal-Mart") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Pennsylvania Superior Court (App. 1a-235a) is reported at 24 A.3d 875. The Pennsylvania Superior Court's order denying en banc reargument (App. 350a-351a) is unreported. The order of the Pennsylvania Supreme Court granting in part Wal-Mart's petition for allowance of appeal (App. 236a-237a) is reported at 47 A.3d 1174. The opinion of the Pennsylvania Supreme Court (App. 238a-265a) is reported at 106 A.3d 656. The trial court's orders and opinion granting class certification (App. 317a-349a), order denying Wal-Mart's post-verdict motions and entering judgment (App. 297a-298a), opinion and order awarding liquidated damages under the Pennsylvania Wage Payment and Collection Law (App. 317a-349a), and post-trial opinion (App. 266a-296a) are all unreported.

JURISDICTION

The Pennsylvania Superior Court issued a decision that passed upon Wal-Mart's federal due process arguments on June 10, 2011, and denied Wal-Mart's application for en banc reargument on August 11, 2011. The Pennsylvania Supreme Court granted in part Wal-Mart's petition for allowance of appeal on July 2, 2012, but denied discretionary review of the federal due process question that Wal-Mart presented; the Pennsylvania Supreme Court issued its

opinion on the remaining issues on December 15, 2014. Although the Pennsylvania Superior Court remanded the case for a recalculation of attorneys' fees, the judgment is "final" for purposes of 28 U.S.C. § 1257(a) and is therefore within this Court's jurisdiction under that provision. *See Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003); *Pierce Cnty.* v. *Guillen*, 537 U.S. 129, 142-43 (2003).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

The Pennsylvania state courts in this case upheld a judgment of more than $150 million in favor of a class of 187,000 Wal-Mart employees who alleged that they had been denied paid rest breaks and were required to work "off the clock." Only *six* of those employees actually testified on behalf of the class; the remainder of the class's case was premised on extrapolation by the class's experts, who purported to apply evidence relating only to a small subset of class members and a portion of the relevant time period to *all* class members over the *entire* eight-year class period. Wal-Mart, in turn, was denied the opportunity to rebut the experts' extrapolation-based opinions through the presentation of individualized defenses regarding the specific facts of absent class members' claims. The Pennsylvania courts nevertheless affirmed both class certification and the ensuing

monetary judgment over Wal-Mart's federal due process objections.

In particular, with respect to the class's rest-break claims, the Pennsylvania courts concluded that the classwide judgment could be sustained on the basis of testimony from an expert who used data about employee breaks from 1998 to 2001 to estimate the number of breaks that class members missed in the ensuing five-year period (for which there was no data). The expert *admitted* that the data did not exclude the possibility that a particular employee had failed accurately to clock in or out for a break, and did not establish that Wal-Mart compelled any employee to miss a break. The Pennsylvania courts nevertheless held that Wal-Mart had no right to rebut that evidence through an individualized showing that a particular break was not in fact missed or was missed as a result of a voluntary decision by that employee to work through the paid break.

This radical approach to classwide adjudication was unanimously rejected in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), where the Court held that it was not "possible to replace [individualized] proceedings with Trial by Formula," in which a subset of class members' claims would be adjudicated and the results extrapolated to determine liability and damages for the entire class "without further individualized proceedings." *Id.* at 2561. The Court disapproved this "novel project" as a violation of the Rules Enabling Act, and therefore did not explicitly reach the question whether it would also violate due process. *Id.* While this aspect of *Dukes* was clearly informed by the "constitutional" limitations on "adventurous application[s]" of Rule 23, *Ortiz* v.

Fibreboard Corp., 527 U.S. 815, 845 (1999), the lack of an express due process holding in the case has led some courts to conclude that due process does not independently prohibit "Trial by Formula."

This case—in which the Pennsylvania courts rejected Wal-Mart's federal due process challenges to class certification and the classwide judgment—provides the Court with a rare opportunity to resolve a deepening conflict on the "important question" of the "extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., Circuit Justice). That question arises with disturbing frequency in state courts—which are increasingly experimenting with novel and untested class-action procedures—but generally evades this Court's review due to the tremendous settlement pressure exerted on class-action defendants. The Court should utilize this valuable opportunity to make clear that due process does not permit courts to facilitate classwide adjudication by adopting procedures that relieve individual class members of their burden of proof and restrict the right of defendants to raise individualized defenses.

1. Plaintiffs Michelle Braun and Dolores Hummel are former employees at two of Wal-Mart's Pennsylvania stores who filed separate putative wage-and-hour class actions against Wal-Mart in 2002 and 2004, respectively. App. 8a-9a. Plaintiffs alleged that Wal-Mart was liable for breach of contract, unjust enrichment, and violations of the Pennsylvania Wage Payment and Collection Law, 43 Pa. Stat. §§ 260.1-260.12, because it purportedly entered into contracts to provide its Pennsylvania hourly

employees with unpaid meal breaks and paid rest breaks but breached these contractual obligations by requiring employees to work through their breaks. App. 3a, 8a-9a, 240a. Plaintiffs further alleged that Wal-Mart required each of its Pennsylvania hourly employees to work off the clock—*i.e.*, without pay after a shift ended. *Id.* at 8a-9a, 240a.

Although Pennsylvania law does not require employers to provide paid rest breaks to its employees, Wal-Mart had a rest-break policy under which "a paid, 15-minute break will be given to an employee who works between three and six hours, and . . . an additional paid, 15-minute break will be given to an employee who works more than six hours." App. 243a-244a. Wal-Mart also had an "off-the-clock work policy" that "provide[d] that it is against company policy for any employee to perform work without being paid, and that employees will be compensated for all work performed." *Id.* at 244a. These policies were set forth in employee handbooks that were distributed to new employees. *Id.* at 243a.

Over Wal-Mart's objections that class certification would "trample on [its] due process right to defend itself at trial" (R.2007a), the trial court certified a class in each case consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to [May 1, 2006]" and consolidated the two cases for a class trial. App. 5a, 10a. The certified class encompasses approximately 187,000 employees in 139 Wal-Mart stores in Pennsylvania. *Id.* at 240a.

In certifying the class, the trial court emphasized that, under Pennsylvania law, "decisions applying

the rules for class certification should be made liberally" and that any "doubt should be resolved in favor of class certification." App. 330a-331a. The trial court further "reject[ed]" Wal-Mart's "contention that thousands of employees will be needed to testify that the time records are inaccurate and do not explain their individual reasons for inadequate breaks and off the clock work without pay." *Id.* at 344a-345a. According to the trial court, trying this case as a class action, and without such individualized proof, would be "fair and efficient." *Id.* at 348a.

2. To support their motion for class certification and to prove their claims at trial, plaintiffs offered the testimony of two statisticians—Dr. L. Scott Baggett and Dr. Martin M. Shapiro—who extrapolated from data pertaining only to a subset of class members and a portion of the class period to opine about the supposedly uniform experiences of all 187,000 class members across all 139 Pennsylvania stores throughout the entire eight-year class period. App. 10a, 13a-16a, 245a-248a.

Plaintiffs' rest-break expert, Dr. Baggett, analyzed Wal-Mart's time-clock records from 1998 to February 2001 to identify purportedly missed or short rest breaks. App. 13a. He then extrapolated his results to cover February 2001 to May 2006, a period in which no rest-break records existed because Wal-Mart had discontinued its requirement that employees clock in and out for rest breaks. *Id.*; R.4778a-R.4783a; R.4809a-R.4813a.[1] Dr. Baggett's

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[1] Plaintiffs alleged that Wal-Mart changed its policy to reduce litigation risk, but at trial Wal-Mart demonstrated that

extrapolation accounted for the vast majority—approximately 85%—of the 32 million missed or short rest breaks that he calculated. R.4805a. Moreover, even though Dr. Baggett admitted that he could not determine from Wal-Mart's time-clock records "whether a manager caused an employee to shorten or miss a break," Dr. Baggett nonetheless counted as a "rest-break violation" any instance in which the records showed that an employee had failed to clock in and out for a full rest break. App. 13a-14a. Dr. Baggett thus assumed both that employees always accurately clocked in and out for every rest break, and that all of the missed or short rest breaks were involuntary and caused by Wal-Mart, rather than the employee's voluntary decision to work through a paid break. *Id.*; R.5118a. In so doing, Dr. Baggett ignored unrebutted evidence developed by Wal-Mart that employees did not "always remember to swipe in and out for . . . paid rest breaks," R.5105a, and sometimes voluntarily decided to skip a paid break, R.5009a-R.5010a.

Plaintiffs' off-the-clock-work expert, Dr. Shapiro, also relied on extrapolation. Dr. Shapiro compared cash-register records to time-clock records for a subset of 16 Pennsylvania stores over the period from 2001 to 2006, and "assumed employees worked off-the-clock whenever cashiers logged onto their cash registers but were not logged into the time clock." App. 15a. Dr. Shapiro then extrapolated his

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the change was made so that employees would no longer be required to expend a portion of their fifteen-minute breaks walking to and from time clocks, and to bring the company into conformity with industry practice. R.4433a; R.5138a-R.5140a.

calculations to the remaining 123 Wal-Mart stores in Pennsylvania and across the entire class period (including the period from 1998 to 2001 for which he did not examine any cash-register records). *Id.*; R.4867a, R.4870a-R.4876a; R.4908a-R.4909a. Dr. Shapiro acknowledged that he did not consider factors other than involuntary off-the-clock work that could have been the cause of a mismatch between the cash register log-in and time-clock records, including that the cashier simply forgot to clock in or out, or was working under someone else's log-in identification. R.5114a; R.5020a-R.5021a.

3. A jury trial was held in 2006. App. 10a. Plaintiffs' case consisted largely of the extrapolation-based opinions of Drs. Baggett and Shapiro, and testimony from six of the 187,000 class members. *Id.* at 13a-15a, 125a-132a; N.T. 9/14/06 a.m. at 54; N.T. 9/15/06 a.m. at 4. Wal-Mart called certain company executives, two expert witnesses, including its own statistician, and nine other employees who worked at Wal-Mart's Pennsylvania stores, but had no opportunity to cross-examine the tens of thousands of absent class members about their claims. App. 13a-16a, 38a-57a, 157a-165a; N.T. 9/29/06 a.m. at 104; N.T. 10/05/06 at 4; N.T. 10/04/06 p.m. at 32. In particular, Wal-Mart was not able to question the absent class members about whether the assumptions underlying the opinions of plaintiffs' experts—that every failure to clock in or out represented an involuntarily missed rest break and every discrepancy between time-clock and cash-register records represented off-the-clock work—applied to their individual claims.

The jury returned a verdict in favor of Wal-Mart on all of the meal-break claims, but found in favor of the class on the rest-break and off-the-clock-work claims, awarding the class approximately $76 million on the rest-break claims and approximately $2.5 million on the off-the-clock-work claims. App. 16a-17a. The trial court subsequently awarded the class more than $62 million in statutory liquidated damages under the Pennsylvania Wage Payment and Collection Law, and ordered Wal-Mart to pay approximately $33 million in attorneys' fees, as well as interest and expenses, resulting in a total judgment of more than $187 million. *Id.* at 17a-18a.

Wal-Mart thereafter moved to set aside the verdict and decertify the class because the "effect, individually and in combination, of the Court's rulings against Wal-Mart and the conduct of the trial generally was to deny Wal-Mart a fair trial, in violation of Wal-Mart's rights . . . under the Due Process Clause of the Fourteenth Amendment." R.4007a. The trial court denied Wal-Mart's post-trial motions, reiterating its position that class certification was appropriate. App. 270a.

4. Wal-Mart appealed to the Pennsylvania Superior Court, arguing that "it was denied its due process rights to have a jury determine liability as to each individual class member, rather than relying upon the analysis of Drs. Shapiro and Baggett." App. 165a. Wal-Mart further asserted that the "trial court's improper application of the class action rules deprived Wal-Mart of its due process rights." R.206a (citing *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007)).

The Superior Court largely affirmed the judgment (as modified to correct a minor numerical error), vacating only the attorneys' fee award, which it instructed the trial court to recalculate on remand. App. 3a-4a. The vast majority of the Superior Court's opinion consists of verbatim excerpts from the trial transcript, *id.* at 38a-132a, and block quotations from cases and statutes, *id.* at 19a-37a, rather than independent analysis.

The Superior Court rejected Wal-Mart's federal due process arguments as inconsistent with class certification under Pennsylvania law. According to the Superior Court, the "contention that Wal-Mart was denied due process in not being able to question each individual employee"—and "in defending against Drs. Baggett and Shapiro"—was "in derogation of class certification" because the trial court found that "common questions of law and fact predominate." App. 165a-166a. The court concluded that "[u]nder . . . the liberal construction of Pennsylvania's class action rules, . . . the record substantiates the trial court's certification of the class" and that it "discern[ed] no denial of due process." *Id.* at 3a.

5. Wal-Mart then petitioned the Pennsylvania Supreme Court for discretionary review, asking the court to determine whether "in a purported class action tried to verdict, it violates . . . the Due Process Clauses of the U.S. and Pennsylvania Constitutions to subject Wal-Mart to a 'Trial by Formula.'" R.342a. In granting review, however, the Pennsylvania Supreme Court reformulated Wal-Mart's question presented to eliminate any reference to due process or the U.S. Constitution. *See* App. 237a (granting

review limited to "[w]hether, 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 of their claims").

Both Wal-Mart and plaintiffs nevertheless addressed in their merits briefs whether plaintiffs' use of extrapolation to prove their case, and the limitations imposed on Wal-Mart's ability to raise individualized defenses, violated Wal-Mart's federal due process rights. *See*, *e.g.*, Wal-Mart's Opening Br. at 18, 22, 50. Moreover, in its opinion, the Pennsylvania Supreme Court cited and discussed several federal due process decisions, as well as this Court's decision in *Dukes*, and concluded that "Wal-Mart's claim that it was denied due process fails." App. 256a. The court reasoned that "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here" because, according to the court, "the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole" rather than "*liability*." *Id.* at 255a-256a (emphasis in original). The Pennsylvania Supreme Court distinguished *Dukes* on that ground despite the fact that the core liability issues at trial—whether Wal-Mart required each of the 187,000 class members to miss rest breaks and work off the clock—were resolved on the basis of Dr. Baggett's and Dr. Shapiro's extrapolations and assumptions, rather than individualized proof regarding the experiences of each member of the class. *Id.*

In addition, the Pennsylvania Supreme Court affirmed the trial court's certification of the class,

reasoning that "the existence of distinguishing individual facts among class members is not fatal to certification" and that "[c]lass members may assert a single common complaint even if they have not all suffered actual injury." App. 251a n.8.

In dissent, Justice Saylor criticized the majority for upholding a judgment that was based on "the simple averaging and extrapolations offered up by [plaintiffs'] expert witnesses," who extrapolated from "16 Pennsylvania stores to 139 others" and from one time period to "a distinct four-year period," even though there were "indisputable variations across store locations, management personnel, time, and other circumstances." App. 264a. Justice Saylor emphasized that "the kinds of alterations to substantive law reflected in the majority's relaxed approach to class-action litigation . . . should not occur as a byproduct of the application of a mere procedural device by the judiciary," *id.* at 265a, and that any alterations to "the class action landscape" are "subject to constitutional limitations such as the due process constraints raised by" Wal-Mart. *Id.* at 265a n.2.

Despite these discussions of due process in both the majority and dissenting opinions, the Pennsylvania Supreme Court stated in a footnote that "[t]here are no federal due process claims asserted." App. 243a n.4. Thus, according to the Pennsylvania Supreme Court, its holding rests on state-law

grounds and does not reach any federal constitutional issues.[2]

REASONS FOR GRANTING THE PETITION

In *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court held that the Rules Enabling Act prohibits federal courts from certifying highly individualized claims that can be adjudicated on a classwide basis only by relieving individual class members of their burden of proof and restricting the defendant's right to raise individualized defenses. *Id.* at 2561. The question here is whether the Due Process Clause imposes a similar constraint on state courts.

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[2] The Pennsylvania Supreme Court's statement that it was not addressing any "federal due process claims," and its modification of Wal-Mart's question presented to eliminate the references to due process and the U.S. Constitution, indicate that the court exercised its discretion to deny review of the federal due process issue raised in Wal-Mart's petition for allowance of appeal. *See* Pa. R. App. P. 1114(a). Accordingly, Wal-Mart seeks certiorari to the Pennsylvania Superior Court, in which Wal-Mart's federal due process arguments were both pressed and passed upon. *See* Stephen M. Shapiro, *Supreme Court Practice* 178-80 (10th ed. 2013). In an abundance of caution, Wal-Mart is simultaneously filing a materially identical petition for certiorari directed to the Pennsylvania Supreme Court due to the absence of authority regarding the court to which a petition should be directed where a state supreme court denies review of a federal question passed upon by a state intermediate appellate court but issues an opinion on a state-law question. The Court should grant the petition that it deems to be directed to the appropriate court and dismiss the other petition. *See R.J. Reynolds Tobacco Co.* v. *Durham Cnty.*, 479 U.S. 130, 138-39 (1986).

In this case, the Pennsylvania courts upheld a judgment in favor of a class that relied on extrapolation to establish the elements of its claims and that was not required to confront Wal-Mart's individualized defenses to those claims. The class was permitted to recover more than $150 million from Wal-Mart without proof that any of the 187,000 absent class members actually missed a rest break or worked off the clock, and without any opportunity for Wal-Mart to provide legitimate explanations for the allegedly missed breaks or off-the-clock work, such as an individual employee's failure to clock in or out accurately or the employee's voluntary decision to work through a paid break.

The Pennsylvania courts' affirmance of this classwide judgment directly conflicts with decisions of the California Supreme Court, and three federal courts of appeals, all of which have recognized that, under "principles of due process," a "'class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014) (quoting *Dukes*, 131 S. Ct. at 2561) (alteration in *Duran*); *see also Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990). Moreover, although the Pennsylvania Supreme Court stated that it was not addressing Wal-Mart's federal due process argument, its conclusion that *Dukes* permits a "Trial by Formula" on "damages" issues nonetheless illustrates (and exacerbates) the lower courts' substantial confusion over the meaning of *Dukes* and whether its

prohibition on an extrapolation-based "Trial by Formula" extends to both liability and damages.

Nor can the Pennsylvania courts' rulings be reconciled with this Court's precedent, which has repeatedly emphasized that "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted). In their zeal to facilitate classwide treatment of plaintiffs' inherently individualized claims, the Pennsylvania courts denied Wal-Mart its due process right to raise individualized defenses and upheld a judgment that, as a result, will inevitably require Wal-Mart to pay damages to uninjured plaintiffs.

This case presents a rare and valuable opportunity for the Court to articulate authoritatively the due process constraints on state-court class actions. *See Duran*, 325 P.3d at 920 ("We encounter here an exceedingly rare beast: a wage and hour class action that proceeded through trial to verdict."). While state courts are continuing to devise ever-more-creative means of squeezing inherently individualized claims into the class-action mold, those cases typically evade review because this Court lacks jurisdiction to review state courts' interlocutory class-certification decisions and, once certified, class actions typically settle before trial. This case, which was tried to verdict and then reviewed on the merits by both the Pennsylvania Superior Court and the Pennsylvania Supreme Court, presents an excellent vehicle for this Court to make clear that the "novel project" of "Trial by Formula" rejected in *Dukes*, 131 S. Ct. at 2561, is no more acceptable, or constitutionally permissible, in state court than in federal court.

I. THE LOWER COURTS ARE DIVIDED OVER WHETHER THE USE OF EXTRAPOLATION TO FACILITATE CLASSWIDE ADJUDICATION IS CONSISTENT WITH DUE PROCESS.

A. In *Dukes*, this Court rejected an extrapolation-based approach to classwide adjudication that the Ninth Circuit believed would have allowed that case to "be manageably tried as a class action." 131 S. Ct. at 2550. Under the plan endorsed by the Ninth Circuit, "[a] sample set of the class members would be selected," and the "percentage of claims determined to be valid would then be applied to the entire remaining class . . . without further individualized proceedings." *Id.* at 2561. This Court unanimously "disapprove[d]" that procedure, which it labeled "Trial by Formula." *Id.* The Court explained that, because the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* (quoting 28 U.S.C. § 2072(b)) (citations omitted).

In light of its holding under the Rules Enabling Act, the Court in *Dukes* did not expressly address Wal-Mart's alternative argument that the Ninth Circuit's proposed "Trial by Formula" also violated due process. *See* Br. for Wal-Mart Stores, Inc. at 43, *Dukes*, No. 10-277. In the aftermath of *Dukes*, lower courts have split on whether it violates due process to facilitate classwide adjudication by permitting the use of extrapolation to relieve individual class members of their burden of proof and by eliminating class-action defendants' right to raise individualized defenses.

Several state and federal courts have rejected these procedural shortcuts as violations of federal due process. In *Duran* v. *U.S. Bank National Ass'n*, for example, the California Supreme Court reversed on federal due process grounds a wage-and-hour class-action judgment that was premised on extrapolation, rather than the presentation of individualized proof and defenses. 325 P.3d at 935. To adjudicate the claims of 260 bank employees who alleged that they had been misclassified as exempt from California's overtime laws, "the trial court devised a plan to determine the extent of [the defendant's] liability to all class members by extrapolating from a random sample." *Id.* The "court heard testimony about the work habits of 21 plaintiffs," and, "based on testimony from the small sample group, the trial court found that the *entire* class had been misclassified." *Id.* The trial court then "extrapolated the average amount of overtime reported by the sample group to the class as a whole." *Id.*

The California Supreme Court unanimously reversed the judgment. The court deemed this use of extrapolation to be "profoundly flawed" because it "prevented [the defendant] from showing that some class members were exempt and entitled to no recovery." *Duran*, 325 P.3d at 920. Agreeing with this Court's reasoning in *Dukes*, the California Supreme Court explained that courts cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action" and that "'a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" *Id.* at 935 (quoting *Dukes*, 131 S. Ct. at 2561) (second alteration

in *Duran*). The court emphasized that "[t]hese principles derive from both class action rules and *principles of due process*." *Id.* (citing *Lindsey*, 405 U.S. at 66; *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007)) (emphasis added). These due process requirements were violated, the California Supreme Court explained, when the trial court "extrapolate[d] classwide liability from a small sample" and "refus[ed] to permit any inquiries or evidence about the work habits of [class members] outside the sample group." *Id*.

Like the California Supreme Court in *Duran*, the Second, Third, and Fifth Circuits have all recognized that due process prohibits class-action procedures that relieve individual class members of their burden of proof and deprive defendants of their right to present defenses to individual claims.

In *McLaughlin* v. *American Tobacco Co.*—a nationwide smokers' class action—the Second Circuit rejected on due process grounds a trial proposal under which "an initial estimate of the percentage of class members who were defrauded," along with an estimate of "the average loss for each plaintiff," would be used to determine the "total amount of damages suffered" by the class as a whole. 522 F.3d at 231. The court held that this proposal was "likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.* This "raise[d] serious due process concerns" because when courts "permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plain-

tiffs is lost, resulting in a due process violation." *Id.* at 232.

The Fifth Circuit rejected a similar procedural approach in *In re Fibreboard Corp.*, an asbestos class action in which the plaintiffs proposed "a full trial of liability and damages" for "a total of 41 plaintiffs," with the results extrapolated to the "remaining 2,990 class members." 893 F.2d at 709. The Fifth Circuit expressed "profound disquiet" over this approach, and explained that its "concerns" with the proposed trial plan "f[ou]nd expression in defendants' right to due process." *Id.* at 710-11. The court reasoned that class certification was improper because, to "create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged," which the proposed trial plan could accomplish "only by reworking the substantive duty owed by the manufacturers." *Id.* at 712; *see also Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311-21 (5th Cir. 1998) (reaffirming *Fibreboard* and rejecting an extrapolation-based trial plan).

Similarly, the Third Circuit in *Carrera* v. *Bayer Corp.*, relying on both this Court's decision in *Dukes* and the Second Circuit's decision in *McLaughlin*, held that "[a] defendant in a class action has a *due process right* to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." 727 F.3d at 307 (emphasis added).

The Pennsylvania courts' decisions in this case cannot be reconciled with *Duran*, *McLaughlin*,

Fibreboard, or *Carrera*. While the courts in each of those cases held that due process *prohibits* replacing individualized elements and defenses in class proceedings with procedural shortcuts, such as extrapolation, the Pennsylvania courts upheld precisely such a procedure in this case over Wal-Mart's federal due process objections.

The testimony of Drs. Baggett and Shapiro—on which plaintiffs relied both to secure class certification and to prove their claims at trial—was not based on a review of evidence pertaining to all class members throughout the entire class period, but instead on a non-representative subset of data that was not geographically or temporally coextensive with the class or class period. With respect to the rest-break claims, for example, Dr. Baggett analyzed Wal-Mart's time-clock records from 1998 to February 2001. App. 13a. He then extrapolated the results of that subset to reach the conclusion that the class as a whole had amassed 32 million missed or short breaks over the eight-year class period, R.4805a—with no opportunity for Wal-Mart to examine absent class members about whether they had in fact missed breaks and the reasons that the breaks had been missed. In fact, only *six* employees testified in support of the class's claims at trial. The result is a classwide judgment awarded without requiring any of the 187,000 absent class members to prove that they had actually missed a rest break and without permitting Wal-Mart to establish that individual employees had failed to clock in or out for breaks that they had in fact taken or had made the voluntary decision to work through their paid breaks.

Despite this reliance on extrapolation, the Superior Court held that the "contention that Wal-Mart was denied due process in not being able to question each individual employee is in derogation of class certification." App. 166a. In other words, according to the Superior Court, the fact that a class was certified—a purely procedural act—meant that it was constitutionally acceptable for extrapolation to replace the claimant-specific inquiries otherwise necessary to resolve the inherently individualized claims of the 187,000 class members. The Pennsylvania Supreme Court likewise ignored the due process consequences of this procedure, holding that Wal-Mart's due process rights were not violated because "the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole," and that, as a result, "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here." *Id.* at 255a-256a (emphasis in original).[3]

This classwide judgment would not have been sustained by the California Supreme Court, or the Second, Third, or Fifth Circuits, because it rests on evidentiary and procedural shortcuts that those

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[3] Contrary to the Pennsylvania Supreme Court's assertion, extrapolation was in fact used in this case to establish both liability *and* damages because the threshold question of liability—whether Wal-Mart required each of the class members to miss rest breaks and work off the clock—was resolved on the basis of Dr. Baggett's and Dr. Shapiro's extrapolation and the testimony of six out of 187,000 class members. That these shortcuts were *also* used to calculate damages simply compounds the due process violation.

courts have categorically rejected as violations of class-action defendants' federal due process rights. In fact, if Wal-Mart had been able to remove this class action to federal court, the class could not have been certified and allowed to proceed to trial under the Third Circuit's decision in *Carrera*.

Other state appellate courts that have addressed the propriety of class certification in nearly identical class actions against Wal-Mart have reached conflicting conclusions as to whether the use of extrapolation violates due process. In *Wal-Mart Stores, Inc.* v. *Lopez*, 93 S.W.3d 548 (Tex. Ct. App. 2002), the Texas Court of Appeals reversed class certification where the plaintiffs "intend[ed] to establish their claims for missed breaks and off-the-clock work with the presentation of 'statistical analysis of Wal-Mart records and a random survey of the class.'" *Id.* at 560 (citation omitted). The court of appeals expressly rejected the plaintiffs' contention that this "trial plan [did] not violate Wal-Mart's due process rights," because the use of "such statistical evidence [would] preclude any individual inquiry . . . regarding . . . the varied circumstances surrounding each employee's missed breaks or off-the-clock work." *Id.* at 560-61. In contrast, the Missouri Court of Appeals affirmed certification of essentially the same claims, and held that "random sampling and statistical analysis [would] not violate Wal-Mart's due process rights." *Hale* v. *Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 228 (Mo. Ct. App. 2007). The court reasoned that there was "no absolute right to individualized determinations of damages" and that due process was satisfied because "Wal-Mart would have the

opportunity to contest the proofs of aggregate methods." *Id.*

Outside the wage-and-hour setting, courts have likewise endorsed class-action procedures that relieve individual class members of their burden of proof and limit defendants' opportunity to raise individualized defenses. In *Strawn* v. *Farmers Insurance Co. of Oregon*, for example, the Oregon Supreme Court upheld a judgment in favor of a class of insurance policyholders where the plaintiffs were permitted to recover on their common-law fraud claims by "prov[ing] reliance for *the class as a whole*" without providing "evidence of each class member's individual reliance" on alleged misrepresentations in their insurance policies. 258 P.3d 1199, 1210-11 (Or. 2011), *cert. denied*, 132 S. Ct. 1142 (2012) (emphasis added). The Oregon Supreme Court approved that undifferentiated, classwide evidentiary presentation over the defendants' due process objections, despite acknowledging that, outside the class-action context, one of the "essential elements of a common-law fraud claim" is that "the *plaintiff* justifiably relied on the misrepresentation." *Id.* at 1209 (emphasis added); *see also Scott* v. *Am. Tobacco Co.*, 949 So. 2d 1266, 1277 (La. Ct. App. 2007) (holding that a class of smokers alleging a fraud claim was not required to prove the individual element of reliance because the "certified claim" was one for "the class as a whole"), *cert. denied sub nom.*, *Philip Morris USA Inc.* v. *Jackson*, 131 S. Ct. 3057 (2011).

Similarly, in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 582 F.3d 156 (1st Cir. 2009), the First Circuit rejected a defendant's argument that the extrapolation of an assessment of the

class representatives' knowledge and expectations to all absent class members "violated due process by depriving [the defendant] of its opportunity to raise individual defenses." *Id.* at 191, 195-96. According to the First Circuit, it is "obvious that class-action litigation often *requires* the district court to extrapolate from the class representatives to the entire class," and the court therefore deemed a "careful[ ] examin[ation]" of the "representatives' knowledge and expectations" to be sufficient to support a classwide judgment. *Id.* at 195.

The approach to class adjudication in these cases is impossible to square with the holdings of the California Supreme Court, and the Second, Third, and Fifth Circuits, that due process prohibits courts from "abridg[ing] a party's substantive rights" in order to facilitate classwide adjudication of inherently individualized claims. *Duran*, 325 P.3d at 935. This Court's review is necessary to resolve this rapidly expanding conflict, which has been significantly deepened by the Pennsylvania courts' rejection of Wal-Mart's due process arguments in this case.

B. Granting review would also afford the Court the opportunity to clarify the scope of its rejection of "Trial by Formula" in *Dukes*. While the Pennsylvania Supreme Court did not grant review of the federal due process issue presented by Wal-Mart, it did explicitly approve plaintiffs' reliance on extrapolation based on its view that this Court's rejection of "Trial by Formula" in *Dukes* applies only to issues of *liability*, not damages, App. 255a-256a, and on its erroneous conclusion that extrapolation was only used to determine damages in this case. That aspect of the

Pennsylvania Supreme Court's reasoning deepens the existing confusion over whether the permissibility of "Trial by Formula" depends on whether the procedure is invoked to resolve liability or damages issues.

For example, the Ninth Circuit in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (Jan. 27, 2015), held that "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." *Id.* at 1167. The Ninth Circuit viewed extrapolation as permissible as long as a defendant's "due process right to present individualized defenses to damages claims" was preserved and the "form of statistical analysis . . . is capable of leading to a fair determination of . . . liability." *Id.* at 1168-69.

By contrast, the Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015), like the Pennsylvania Supreme Court, held that *Dukes* "does not prohibit certification based on the use of extrapolation to calculate damages." *Id.* at 1257. In direct conflict with *Jimenez*, the Tenth Circuit reasoned that, because the plaintiffs in that case did not "seek to prove . . . liability through extrapolation" but instead "used [extrapolation] only to approximate damages," this Court's rejection of "Trial by Formula" was not implicated. *Id.* at 1256-57. The Eighth Circuit in *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), similarly held that this Court's disapproval of "Trial by Formula" is not implicated where "plaintiffs do not prove

liability only for a sample set of class members," and therefore approved the use of averaging to "prove damages." *Id.* at 798-99.

Adding to this confusion, the California Supreme Court in *Duran* suggested that there might be a constitutionally relevant distinction between the use of extrapolation to establish liability as opposed to damages, and posited that the "use of statistical sampling to prove damages in overtime class actions is less controversial." 325 P.3d at 939.

The lower courts' disarray about the scope of this Court's rejection of "Trial by Formula" is ultimately difficult to fathom—given that the plaintiffs in *Dukes* proposed to use extrapolation to determine *both* "liability for sex discrimination and the backpay owing as a result," 131 S. Ct. at 2561, as well as this Court's refusal in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), to recognize a distinction between damages and liability issues in assessing predominance under Rule 23(b)(3). *See id.* at 1433. This case illustrates that this confusion nonetheless persists and continues to deepen.

* * *

The Pennsylvania courts' endorsement of a class-action procedure that uses extrapolation to relieve individual class members of their burden of proof and eliminates the defendants' right to raise individualized defenses conflicts with the decisions of multiple courts and compounds the growing confusion over the meaning of *Dukes*. The Court should grant review to ensure that all class-action defendants—whether sued in state or federal court—are afforded the same basic set of due process safeguards.

II. THE PENNSYLVANIA COURTS' ENDORSEMENT OF "TRIAL BY FORMULA" CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

In addition to deepening the lower courts' confusion about the due process limits on classwide adjudication, the Pennsylvania courts' approval of a "Trial by Formula" in this case is flatly at odds with this Court's due process jurisprudence.

This Court has repeatedly held that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey*, 405 U.S. at 66 (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *accord Williams*, 549 U.S. at 353 ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" (quoting *Lindsey*, 405 U.S. at 66)).[4]

This fundamental due process requirement applies with full force to class actions. This Court has emphasized that the certification of a class action is subject to "procedural protections" that are "grounded in due process" and that reflect the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892-93, 901 (2008) (quoting *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 797 (1996)). While the class-action procedure potentially enables courts to "adjudicate

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[4] *See also United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (the "right to litigate the issues raised" is a "right guaranteed . . . by the Due Process Clause"); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-examine adverse witnesses").

claims of multiple parties at once, instead of in separate suits," class actions must "leave[ ] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality op.); *see also Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) (a class action is "a procedural right only, ancillary to the litigation of substantive claims").

These due-process-based constraints on classwide adjudication bind both state and federal courts. To be sure, "[s]tate courts are generally free to develop their own rules for protecting against . . . the piecemeal resolution of disputes." *Richards*, 517 U.S. at 797. "[E]xtreme applications" of this principle, however, "may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* (citation omitted). Thus, where state courts have departed from "traditional procedures" and failed to "provide[ ] protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

Indeed, this Court has reversed state-court judgments because it identified due process deficiencies in class-action proceedings upheld by the State's highest court. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814-23 (1985); *Hansberry* v. *Lee*, 311 U.S. 32, 39-45 (1940). Those cases make clear that federal due process is an independent constraint on state class-action procedures and that, even if a state court has determined that a class action complied with state law, the proceeding still must be compati-

ble with the separate requirements of federal due process.

In this case, the Pennsylvania courts impermissibly cast aside fundamental due process protections in order to facilitate classwide adjudication of the inherently individualized claims of 187,000 class members employed at 139 different Wal-Mart stores at varying times over an eight-year period. If those claimants had filed individual actions, they each would have been required to introduce evidence that they were compelled by Wal-Mart to miss specific paid rest breaks and to work off the clock after particular shifts had ended. They likewise would have been obligated to withstand cross-examination by Wal-Mart as well as the presentation of individualized defenses showing that the supposedly missed breaks and off-the-clock work were the result of the employee's failure to clock in or out, or that breaks were missed voluntarily by the employee, rather than under compulsion from Wal-Mart. Because this suit proceeded as a class action, however, *all* of the 187,000 class members were permitted to recover even though only six employees testified on behalf of the class regarding their specific missed breaks and off-the-clock work, and the remainder of plaintiffs' case rested on extrapolation by Drs. Baggett and Shapiro. The vast majority of class members therefore were not required to prove that Wal-Mart actually forced them to miss breaks and work off the clock, and were not required to undergo cross-examination or withstand Wal-Mart's presentation of individualized defenses.

These due process violations were amplified by the imposition of more than $62 million in statutory

liquidated damages under the Pennsylvania Wage Payment and Collection Law based on Wal-Mart's supposed failure to provide rest breaks that Pennsylvania law does not even require. *See* App. 299a-316a. This sanction was imposed based on the state courts' retroactive determination that Wal-Mart's employee handbooks—which each contained an express disclaimer that the "handbook is not a contract" and that the "policies and benefits" outlined therein did "not constitute terms or conditions of employment," *id.* at 4a—had created binding contractual obligations to provide rest breaks. This type of retroactive exaction based on vague standards and without fair notice would be constitutionally suspect in any circumstance, *see*, *e.g.*, *BMW of N. Am. Inc.* v. *Gore*, 517 U.S. 559, 574-75 (1996), but it poses an especially "acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432, in this case, where the Pennsylvania courts eliminated Wal-Mart's right to defend itself against the class members' individual claims.

Yet, according to the Pennsylvania Superior Court, Wal-Mart's due process rights had to yield to the "liberal construction of Pennsylvania's class action rules," App. 3a, and Wal-Mart's contention that it was "denied due process in not being able to question each individual employee" was therefore "in derogation of class certification." *Id.* at 166a. That has it exactly backwards. The protections of due process, including the right to present "every available defense," *Lindsey*, 405 U.S. at 66 (internal quotation marks and citation omitted), take precedence over a State's desire to resolve individual claims

through aggregate litigation. *See Taylor*, 553 U.S. at 892-93, 901; *Richards*, 517 U.S. at 797.

To hold otherwise would allow state courts to utilize the class-action procedural device to alter underlying substantive law—creating one set of standards for defendants sued by an individual plaintiff and a different set of standards for defendants sued by a class of plaintiffs, who would not be required to prove the same elements, or confront the same defenses, as all other plaintiffs. That two-tiered system of justice is incompatible with this Court's recognition that *all* defendants have a due process right to "litigate the issues raised," *Armour*, 402 U.S. at 682, and that class actions "leave[ ] . . . the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1443 (plurality op.).

Moreover, even if the Pennsylvania Supreme Court had been correct that plaintiffs' reliance on extrapolation was limited to damages issues, App. 255a-256a, a class-action defendant's due process right to present "every available defense," *Lindsey*, 405 U.S. at 66 (internal quotation marks and citation omitted), is not limited to issues that could be considered pertinent to "liability" rather than "damages." If the basic protections of due process did not apply to damages determinations, defendants would have no right to contest unjustified windfalls to uninjured or minimally injured plaintiffs. There is no such gaping hole in the Due Process Clause. *See*, *e.g.*, *Williams*, 549 U.S. at 353-54 (holding that due process precludes depriving a defendant of an "opportunity to defend against [a] charge, by showing" that a "victim was not entitled to damages"). Indeed, as this Court recently explained in *Comcast*, while

damages "[c]alculations need not be exact," cases may not be forced into the class-action mold through the use of "arbitrary" damages methodologies that, like the procedures endorsed by the Pennsylvania courts in this case, result in damages awards to uninjured plaintiffs. 133 S. Ct. at 1433.

In each of these respects, the Pennsylvania courts ran roughshod over Wal-Mart's due process rights in order to uphold a class-certification ruling and classwide judgment premised on extrapolation, rather than individual proof and a full airing of Wal-Mart's defenses. The Court should grant review to condemn this radical departure from the "basic procedural protections of the common law." *Oberg*, 512 U.S. at 430.

III. THIS CASE PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO RESOLVE A QUESTION OF PROFOUND IMPORTANCE TO STATE-COURT CLASS-ACTION LITIGANTS.

This case affords the Court a rare chance to review a final judgment in a state-court class action. The Court should seize this opportunity to resolve the squarely presented, and surpassingly important, question regarding the limitations that due process imposes on state courts' class-action procedures.

The proceedings in this case, as well as the California proceedings in *Duran,* the Oregon proceedings in *Strawn*, and the Missouri proceedings in *Hale*, demonstrate that state trial courts are regularly resorting to procedural shortcuts to secure classwide adjudication of inherently individualized claims—and that state appellate courts are frequently condoning these practices. *See also*, *e.g.*, *Moore* v.

Health Care Auth., 332 P.3d 461, 465-66 (Wash. 2014) (holding that due process does not require individualized proof of damages in class actions because such a requirement would "create an unreasonable burden on class members" and "hinder . . . state policy underlying class action lawsuits").

While this Court's decision in *Dukes* has restricted the use of this practice in federal court (at least in some circuits), class-action plaintiffs have repeatedly bypassed this aspect of *Dukes* in state court by emphasizing that the Court's rejection of "Trial by Formula" was formally based on the Rules Enabling Act rather than due process. *See* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (11th ed. 2014) ("Despite this clear, due process-based directive against 'Trial by Formula,' a number of principally state courts have approved class proceedings that do not provide defendants an opportunity to introduce evidence going to individualized issues and defenses . . . ."); Kimberly A. Kralowec, Dukes *and Common Proof in California Class Actions*, Competition: J. Antitrust & Unfair Competition L. Sec. State B. Cal., Summer 2012, at 9, 12 (arguing that *Dukes* has not "placed a constitutional due process limitation on the class action device").

Granting review in this case would enable the Court to establish conclusively that a "class cannot be certified"—in either state or federal court—"on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561. That ruling would not only put an end to the alarming trend among state courts of using ever-more-novel means of extrapolation, and increasingly onerous restrictions on indi-

vidualized defenses, to facilitate class actions, but would also make clear to those federal courts that have declined to follow this Court's "Trial by Formula" ruling that the Court's disapproval of that procedure applies both to liability and damages determinations.

Opportunities for this Court to review a final judgment in a state-court class action are exceedingly rare because class actions are only infrequently tried to verdict. As this Court has recognized, class certification places significant pressure on defendants to settle even "questionable claims" in the face of potentially "devastating loss[es]." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). As a result, it is a "rare case in which a class action not dismissed pretrial goes to trial rather than being settled." *Hughes* v. *Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013). Moreover, because this Court possesses jurisdiction only with respect to final state-court judgments, 28 U.S.C. § 1257(a), there is no mechanism for this Court to review state courts' interlocutory class-certification orders (unlike certification orders in federal class actions, which are potentially subject to interlocutory review under Federal Rule of Civil Procedure 23(f) and a subsequent petition for certiorari to this Court).

This case—a rare state-court class action that was actually tried to verdict—presents an excellent vehicle for this Court to address the due process limitations on state-court class actions. At every

stage of the proceedings, Wal-Mart raised its federal due process objections to the certification and trial of this class action. Although the Pennsylvania Supreme Court declined discretionary review of the federal due process issue presented by Wal-Mart, that ruling is neither a formal nor practical barrier to review because the Pennsylvania Superior Court clearly passed upon that question. App. 3a, 165a-166a. Moreover, while it nominally has refused to address the federal due process issue, there is no doubt that the Pennsylvania Supreme Court has firmly endorsed the use of extrapolation and restrictions on individualized defenses in Pennsylvania class actions, despite the serious burdens that these procedures impose on defendants' due process rights.

The Court should take advantage of this opportunity to ensure that the critical protections of the Due Process Clause are respected in state-court class actions and that the state courts do not continue to sacrifice the fundamental rights of class-action defendants for purposes of mere expediency. It may be years before the Court is presented with another such case; the price of delay—in terms of settlements exacted, verdicts paid, and rights abridged—is simply too high to tolerate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 13, 2015

APPENDIX

APPENDIX A

2011 PA Super 121

MICHELLE BRAUN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARY SITUATED,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
WAL-MART STORES, INC., A DELAWARE CORPORATION, AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC.,	:	
Appellants	:	No. 3373 EDA 2007

Appeal from the Judgment entered November 14, 2007
In the Court of Common Pleas of Philadelphia County
Civil No.: 3127, March Term, 2002

DOLORES HUMMEL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S : CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC.,	:	
Appellants	:	No. 3376 EDA 2007

Appeal from the Judgment entered November 14, 2007
In the Court of Common Pleas of Philadelphia County
Civil No. 3757, August Term, 2004

BEFORE: MUSMANNO, DONOHUE, and FITZGERALD,* JJ.

* Former Justice specially assigned to the Superior Court.

OPINION PER CURIAM. **FILED JUNE 10, 2011**

Appellants, Wal-Mart Stores, Inc. and Sam's Club (collectively, "Wal-Mart"), appeal from a judgment in the amount of $187,648,589.11 entered in the Philadelphia County Court of Common Pleas in favor of Appellees, Michelle Braun ("Braun"), Dolores Hummel ("Hummel") (we refer to Braun and Hummel collectively as "Appellees"), and the certified class.[1] This appeal arises from claims against Wal-Mart by its hourly employees, alleging, *inter alia*, claims for breach of contract, unjust enrichment, and statutory violations. Under these unique facts and the liberal construction of Pennsylvania's class action rules, we hold the record substantiates the trial court's certification of the class and discern no denial of due process. We conclude that monetary payments for contractual rest breaks qualify as "wages" under the Pennsylvania Wage Payment and Collection Act ("WPCL").[2] Further, we hold the trial court construed 43 P.S. § 260.10 correctly to permit recovery of statutory liquidated damages and Appellees are entitled to recover under the WPCL. We also hold there was sufficient evidence in the record for a fact finder to conclude there was a breach of contract, unjust enrichment, violation of the Pennsylvania Minimum Wage Act ("MWA"),[3] and violation of the WPCL. Finally, we hold the trial court erred in calculating some of Appellees' counsel's fees by enhancing

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1 As discussed *infra*, the court inadvertently miscalculated the amount of the total judgment.

2 43 P.S. §§ 260.1-260.12.

3 43 P.S. §§ 333.101-333.115.

the lodestar to reflect contingent risk when the lodestar already accounted for contingent risk. Accordingly, we affirm the judgment in part as modified, reverse in part, and remand for further proceedings.

Class representative Braun was an hourly employee of a Wal-Mart store located at Franklin Mills, Pennsylvania, from November 1998 to January 1999. R.R. at 1626a.[4] Class representative Hummel was an hourly employee of a Sam's Club store located near Reading, Pennsylvania, from 1992 to 2002. R.R. at 1635a.

At the beginning of Appellees' respective employment, Wal-Mart gave them an employee handbook; both signed an acknowledgment page stating: "[T]he policies and benefits presented in this handbook are for your information only and do not constitute terms or conditions of employment. . . . This handbook is not a contract." R.R. at 6734a-36a, 6785a-86a. During the course of Appellees' employment, Wal-Mart had several policies in place regarding rest breaks and off-the-clock work. The rest break policy is known as PD-07 and the off-the-clock work policy is known as PD-43. Pls.' Ex. 4c; R.R. at 6987a-89a; Pls.' Ex. 27a; R.R. at 7020a-26a. PD-07 states in pertinent part that hourly associates[5] who

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[4] The certified record, particularly the notes of testimony, is voluminous, as is the reproduced record. We have attempted in most instances *infra* to cite to both the reproduced record and the notes of testimony. In some instances, however, we cite to only one or the other, either for ease of citation, lack of one in the reproduced record, or the reader's benefit.

[5] Wal-Mart employees are referred to as "associates."

work between three and six hours will be given one, fifteen-minute, paid, rest break, and those who work more than six hours will be given two, fifteen-minute, paid, rest breaks. Pls.' Ex. 4c; R.R. at 6987a-89a.

PD-07 was revised several times during the class period of March 19, 1998, through May 1, 2006. Pls.' Exs. 4a-4d; R.R. at 6974a-92a. Early versions stated that "[h]ourly associates whose break or meal periods [are] interrupted to perform work will receive compensation for the entire period at their regular rate of pay and be allowed an additional break or meal period." Pls.' Ex. 4a; R.R. at 6975a-76a. After February 10, 2001, that statement was omitted. Pls.' Ex. 4b; R.R. at 6984a-85a.

The version of PD-07 governing paid rest breaks became effective in May of 2004. Pls.' Ex. 4c; R.R. at 6987a-89a. It states:

> Associates will be provided breaks. . . . Associates are to take full, timely, uninterrupted breaks. . . . Associates will also be subject to disciplinary action for missing breaks or taking breaks that are too long, too short, or untimely. . . .
>
> * * *
>
> This policy applies to all hourly Associates. . . .
> Break Periods ("Breaks")
>
> Length — Break periods are 15 uninterrupted minutes in length. . . .

Compensation	Associates receive compensation for break time at the applicable rate of pay. Associates are not required to clock out or clock in for breaks. . . .
Providing Breaks	The Associate's immediate supervisor is responsible for providing breaks. Supervisors and salaried members of management will be subject to disciplinary action for failing to provide breaks in accordance with this policy and state laws.

* * *

Interruption of Breaks And Meal Periods

Supervisors and salaried members of management may not require nor request Associates to perform work during their breaks . . . .

* * *

Compliance

Break Exception Definition: Each occasion an Associate misses a break, takes a break that is too long or too short, or takes a break that is untimely will be measured as a "break exception."

Pls.' Ex. 4c; R.R. at 6987a-88a.

In addition to paying for non-working time on rest breaks under PD-07, Wal-Mart had a policy, PD-43, purporting to pay for all hours worked. PD-43 stated in part: "It is against Wal-Mart policy for any Associ-

ate to perform work without being paid. We are committed to compensating every Associate for the work they perform." Pls.' Ex. 27a; R.R. at 7020a. The Wal-Mart 2006 Associate Benefits Book also described all available benefits to employees under the heading "My Money":

> Pay Programs
>
> In addition to the pay you receive for a regular day's work, there are other programs and benefits that can supplement your income.
>
> * * *
>
> Paid Break Periods
>
> Take a break and get paid for it!

Defs.' Ex. 146; R.R. at 6902a-03a; *see also id*.; R.R. at 6790a, 6901a.

Wal-Mart employees used a time clock.[6] In order to keep track of their hours, Appellees were required to "swipe" or "punch" their badges in and out for breaks. Pls.' Ex. 4a; R.R. at 6975a. Wal-Mart's Time Clock Punch Exception Report ("TPER") generated a daily listing of every employee whose punches or swipes established that they took too few breaks, short breaks, or no breaks. Pls.' Ex. 2b; R.R. at 6970a-73a; Pls.' Ex. 54; R.R. at 7264a; Pls.' Ex. 90; 7443a-91a. Wal-Mart tracked employees' breaks and recorded their time from Wal-Mart's Time Clock Archive Report ("TCAR"). Pls.' Ex. 54; R.R. at 7286a-

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[6] A time clock records "information as to the time of employees' presence on the employer's premises." *Schooley v. Cmwlth., Unemployment Comp. Bd. of Review*, 402 A.2d 1109, 1110 (Pa. Cmwlth. 1979).

87a. This report detailed total hours worked and "total break" time. Pls.' Ex. 45; R.R. at 7086a. On February 10, 2001, Wal-Mart officially ended its policy of requiring hourly employees to swipe in and out for rest breaks. N.T., 9/12/06 (afternoon), at 25; R.R. at 1529a; Pls.' Ex. 142; R.R. at 7612a-13a; *see also* Pls.' Ex. 4c; R.R. at 6987a-89a. TPER and TCAR were used in the regular course of Wal-Mart's business. *See, e.g.*, N.T., 9/9/04, at 75-76; N.T., 9/10/04, at 82-85; R.R. at 342a-45a.

Meanwhile, Wal-Mart retained data reflecting which employees were operating cash registers and, during their shifts, when they were logged onto and actively operating the cash registers. N.T., 9/21/06, at 30-36; R.R. at 1758a-63a. Wal-Mart's internal audit department used TPER and TCAR to conduct internal audits of employees' compliance with the rest-break policies. Pls.' Ex. 97; R.R. at 7493a-7501a. If the audits revealed violations of the policies, then managers or employees could be subject to discipline up to and including termination. Pls.' Ex. 4c; R.R. at 6989a; Pls.' Ex. 27a; R.R. at 7020a.

Appellees alleged that Wal-Mart failed to compensate them for rest breaks and off-the-clock work as mandated in its policies. As a result, Ms. Braun and Ms. Hummel filed separate complaints against Wal-Mart. On March 21, 2002, approximately two years after her employment ended with Wal-Mart, Ms. Braun filed a complaint, on behalf of herself and all others similarly situated, against the store manager and district manager of the Franklin Mills, Pennsylvania, Wal-Mart store. Ms. Braun filed an amended complaint on March 26, 2002, and a second amended complaint on May 28, 2002. Ms. Braun al-

leged a "systematic scheme of wage abuse against its hourly employees in Pennsylvania." Braun's Second Am. Compl., at 2. More specifically, Ms. Braun alleged causes of action for breach of contract, restitution, and unjust enrichment for off-the-clock work and missed or shortened rest breaks, along with violation of the MWA, violation of the WPCL, and tortious interference with contractual relations. *Id.* at 4-5.

Ms. Hummel filed a petition to intervene in the Braun suit, which the trial court denied on August 26, 2004. R.R. at 396a. On August 27, 2004, the court granted summary judgment in favor of Wal-Mart and against Ms. Braun on her claims for violation of the MWA and WPCL, and for tortious interference with contractual relations. Order, 8/27/04; R.R. at 311a.

On August 30, 2004, Ms. Hummel filed a complaint on behalf of herself and all others similarly situated. The Hummel complaint alleged that Wal-Mart required its employees to miss or cut short rest breaks and work off-the-clock. Hummel Compl. at 1-2. The Hummel action contained causes of action for breach of contract, restitution, and unjust enrichment for off-the-clock work and missed or shortened break periods, along with violations of the MWA and WPCL. Wal-Mart denied these allegations and asserted, *inter alia*, that it did not intend to contract with its employees related to breaks. Further, Wal-Mart claimed that missed swipes did not equate to missed or skipped breaks, and sometimes employees voluntarily missed or skipped breaks for reasons unrelated to workplace demands. *See, e.g.*, N.T., 9/19/06 (afternoon), at 79-80, 96; R.R. at 1691a-92a, 1694a.

The trial court held two class-certification hearings, one in September 2004 for the Braun action, and the other in October 2005 for the Hummel action. The court evaluated hundreds of exhibits regarding Wal-Mart's policies, practices, and record-keeping, and considered arguments, testimony, and Appellees' expert reports by Drs. Scott Baggett and Martin Shapiro analyzing Wal-Mart's business records. Relying primarily on the experts' analyses, the court concluded Appellees demonstrated the systemic loss of contractual break time. The court held that Appellees established the existence of common questions of law and fact, and that common issues predominated.

On December 27, 2005, the court granted class certification for both actions. The certified class in each case consisted of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present." Trial Ct. Order, 12/27/05, at 1. On March 20, 2006, Wal-Mart petitioned this Court for interlocutory review of the class-certification decision and a stay of proceedings pending appellate review. This Court denied Wal-Mart's petition on April 26, 2006. The trial court consolidated both cases for trial.

On July 17, 2006, prior to trial, Wal-Mart filed a motion for partial summary judgment on the issue of whether meal periods and rest breaks are wages, "fringe benefits," or wage supplements under the WPCL. The court granted in part that motion on September 7, 2006.

The jury trial began on September 8, 2006, and lasted for thirty-two days. Both sides introduced evidence of Wal-Mart's business practices and proce-

dures, and fact and expert witnesses testified. The evidence focused on Wal-Mart's break and off-the-clock policies and practices. Appellees called eighteen fact witnesses and three expert witnesses: Dr. Frank Landy, Dr. Baggett, and Dr. Shapiro.

Dr. Landy, an industrial organizational psychologist, 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 receive pay for all hours worked. *See, e.g.*, N.T., 9/12/06 (afternoon), at 61-64; R.R. at 1540a-41a. He opined that paid rest breaks were a benefit. N.T., 9/12/06 (afternoon), at 11-12; R.R. at 1525a; N.T., 9/13/06 (morning), at 45-46; R.R. at 1556a-57a. Dr. Landy testified that a reasonable employee would understand the uniform disclaimer in Wal-Mart's handbook as disclaiming only the intent to form anything other than an "at will" employment. N.T., 9/13/06 (morning), at 49-51; R.R. at 1560a-61a. The employees, he testified, would not understand the disclaimer as disclaiming paid, rest-break benefits and receiving pay for all hours worked. Id. at 51-52; R.R. at 1561a-62a. Dr. Landy asserted that, based on Wal-Mart's numerous, mandatory statements, notices, postings, and labor guidelines, a reasonable employee would have understood that Wal-Mart offered and promised benefits, and that employees would receive those benefits upon working the specified number of hours. N.T., 9/12/06 (afternoon), at 76-77; R.R. at 1545a-46a.

Dr. Landy also discussed understaffing in Wal-Mart stores. He opined that Wal-Mart's "preferred scheduling" program was the "root cause" of understaffing in the stores. N.T., 9/11/06 (afternoon), at

100-02; R.R. at 1496a-98a. There is a correlation, Dr. Landy stated, between understaffing and employees' ability to receive breaks: the more understaffed the stores, the greater the pressure on managers not to provide breaks and on employees not to take breaks. N.T., 9/12/06 (afternoon), at 52-53; R.R. at 1537a. He explained how the pressure to reduce payroll costs led to understaffing. *See, e.g.*, N.T., 9/13/06 (morning), at 106-08; R.R. at 1596a-98a. Dr. Landy noted that the Wal-Mart store-manager-bonus system had a "negative effect" on compliance with Wal-Mart's policies on breaks and pay. *See, e.g., id*. at 81-82; R.R. at 1589a-91a. Lastly, Dr. Landy testified that after Wal-Mart conducted its Shipley Audit,[7] Wal-Mart eliminated the requirement that employees punch the time clock for rest breaks; he opined that Wal-Mart eliminated "smoking gun" evidence of its policy violations to limit its liability. N.T., 9/12/06 (afternoon), at 57-58; R.R. at 1539a.

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[7] On July 14, 2000, several members of Wal-Mart's upper-level management were sent the results of the Shipley Audit. Pls.' Ex. 429; R.R. at 7887a. The Shipley Audit sought to determine Wal-Mart's compliance with its policies and state laws regarding the staffing and scheduling of its employees. *Id.* Wal-Mart had previously conducted approximately ten other internal audits since September 1999 that indicated widespread break violations. N.T., 9/12/06 (morning), at 62-64; R.R. at 1502a-04a. The Shipley Audit occurred at a national level, unlike the earlier audits. *Id.* at 66; R.R. at 1506a. For two weeks, auditors visited 128 stores across the United States, including some in Pennsylvania. Pls.' Ex. 429; R.R. at 7888a. The Shipley Audit found 76,472 meal- and wage-break violations over a one-week period. *Id.* The Shipley Audit reported that 21%, or 15,705, of these violations involved "too few meals" while 79%, or 60,767, of these violations involved "too few breaks." *Id.*

In contrast, Wal-Mart's retail expert, Wade Fenn, testified that he analyzed Wal-Mart's business practices and procedures. N.T., 10/3/06 (morning), at 90-91. He claimed that Dr. Landy applied the wrong mathematical calculation between man-hour and store profitability. *Id.* at 93-94. Mr. Fenn testified that he did not believe there was a link between Wal-Mart's compensation program and rest breaks. *Id.* at 5. He stated that Wal-Mart's practices were consistent with other "big box" retailers. *Id.* at 100.

Dr. Baggett, a statistical-analysis expert, also testified for Appellees regarding rest breaks. N.T., 9/19/06 (morning), at 29; R.R. at 1656a. He conducted a computerized, statistical analysis using Wal-Mart's reports to determine the number of missed rest breaks by Pennsylvania hourly employees. *Id.* at 21; R.R. at 1653a; N.T., 9/19/06 (afternoon), at 11-15; R.R. at 1671a-74a. He analyzed swipes for rest breaks from 1998 to February 2001. N.T., 9/19/06 (afternoon), at 11; R.R. at 1671a. For the period after February 2001, Dr. Baggett statistically extrapolated the number of missed or shortened rest breaks. *Id.* at 14-15; R.R. at 1673a-74a. He testified that damages from missed rest breaks totaled $68,412,107. *Id.*at 9. Dr. Baggett calculated that damages from shortened rest breaks totaled $7,561,968. *Id.* at 26; R.R. at 1677a. He asserted that his calculations were based in part on a clause in PD-07 and Wal-Mart's rest-break policy providing for an additional break if a manager or supervisor required or requested an employee to work during his or her break. *Id.* at 46, 52-53; R.R. at 1684a, 1687a-88a.

Dr. Baggett, however, admitted he could not explain why a rest break was missed or shortened, or

ascertain whether a manager caused an employee to shorten or miss a break. *Id.* at 47-48; R.R. at 1685a-86a. His affidavit was based on an analysis of records produced by Wal-Mart. Trial Ct. Order, 10/3/07, at 10. Dr. Baggett concluded that hourly employees of the class each experienced an average of twenty-five break violations. Further, he averred that 98.81% of those employees experienced at least one rest-break violation. Decl. of L. Scott Baggett, at 3; R.R. at 2478a.[8]

Wal-Mart's expert, Dr. Denise Martin, rebutted Dr. Baggett's conclusion. N.T., 10/5/06, at 36. Dr. Martin opined that because Dr. Baggett extrapolated data that did not exist or was incorrect, his conclusion was flawed. *Id.* at 45-48, 59, 67. First, she asserted Dr. Baggett improperly assumed that a missed rest-break swipe always meant the employee did not actually take a rest break. *Id.* at 47. Second, Dr. Martin testified that Dr. Baggett incorrectly assumed an employee was denied a rest break if the employee worked over six hours. *Id.* at 49. She claimed it is statistically improper to make these assumptions and, therefore, Dr. Baggett's analysis was inaccurate and unreliable. *Id.* at 64. She opined that it was not reasonable or professionally appropriate for Dr. Baggett, as a statistician, to assume missed rest breaks when he admittedly did not know whether an employee voluntarily or involuntarily missed a rest break. Id. at 60-62.

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[8] The class damages were calculated only for actual missed or shortened rest breaks and off-the-clock work reflected by Wal-Mart records. Pls.' Exs. 512-15; R.R. at 7947a-50a.

Dr. Shapiro, a statistical expert, also testified for Appellees about off-the-clock work. He analyzed records from a sample of sixteen Wal-Mart stores in Pennsylvania to determine the amount of off-the-clock work and pre-off-the-clock work. N.T., 9/21/06 (afternoon), at 48, 54-56; R.R. at 1767a, 1769a-71a.[9] Dr. Shapiro calculated the amount of off-the-clock work by analyzing the amount of time cashiers were logged onto operator-accountable cash registers but not logged into the time-keeping system. *Id.* at 27; R.R. at 1754a-55a. He also analyzed records from 2001 through part of 2006, and extrapolated data for 1998 through 2000. Id. at 59-60. Additionally, Dr. Shapiro statistically extrapolated data for the other Pennsylvania Wal-Mart stores not included in the analysis. *Id.* at 65.

Dr. Shapiro testified that the off-the-clock data he analyzed established the rate of rest-break violations. *Id.* at 61-62; R.R. at 1772a-73a. He assumed employees worked off-the-clock whenever cashiers logged onto their cash registers but were not logged into the time clock. *Id.* Dr. Shapiro, after extrapolating his findings to include all Pennsylvania Wal-Mart stores, calculated total, off-the-clock, work damages of $2,993,063.32. *Id.* at 76; R.R. at 1775a.

Dr. Martin rebutted Dr. Shapiro's statistical conclusions. She stated that his analysis was not an appropriate method to determine whether a cashier actually worked off-the-clock. N.T., 10/5/06, at 70. Dr. Martin noted that because other employees testified

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[9] The court ultimately struck Dr. Shapiro's testimony relating to pre-off-the-clock work. N.T., 9/22/06 (morning), at 43.

an employee sometimes logged onto a cash register using another employee's identification number, she disagreed with Dr. Shapiro's underlying assumption that no employee did so. *Id.* at 70-71. Dr. Martin also claimed Dr. Shapiro's analysis was flawed because he merged the cash-register data with the time-clock data in order to reach his conclusion regarding off-the-clock work. *Id.* at 71-72. She discounted his analysis by conducting her own test in one Pennsylvania store, where she found that a cashier appeared to be logged onto a register for at least twenty-one hours. *Id.* at 72. Thus, Dr. Martin opined that Dr. Shaprio's entire analysis was unreliable. *Id.* at 79-80.

On October 12, 2006, the jury returned a verdict in favor of Wal-Mart on all claims related to meal periods, and returned a verdict in favor of Appellees on the claims related to rest breaks and off-the-clock work. Jury Verdict Interrog.; R.R. at 2181a-85a. Specifically, the jury found for Appellees on their WPCL claims, finding that Wal-Mart failed to pay employees for all the work they performed and failed to allow employees to take their paid, mandatory, rest breaks. Trial Ct. Op., 11/14/07, at 2. Wal-Mart, the jury found, required its employees to work without pay by directing them not to record their hours on Wal-Mart's computerized pay system, resulting in a savings of $1,031,430 to Wal-Mart. *Id.* The jury also found that Wal-Mart prohibited employees from taking their promised, paid, rest breaks, which resulted in Wal-Mart's saving $48,258,111. *Id.* Further, the jury concluded that Wal-Mart did not have a good-faith reason for refusing to pay its employees everything they had earned. Trial Ct. Op., 11/14/07, at 2. The jury awarded damages of $2,494,340.35 for the

off-the-clock work claims and $75,974,075.00 for the rest-break claims. Jury Verdict Interrog.-Damages, at 1-2; R.R. at 2186a-87a.

Also on October 12, 2006, Appellees moved for statutory, mandatory, liquidated damages. Appellees sought only a single, WPCL, statutory penalty per class member. Trial Ct. Op., 11/14/07, at 10. Appellees relied on the affidavit of Dr. Baggett, which averred that 98.81% of the class experienced at least one rest-break violation and calculated the statutory, liquidated damages in the amount of $62,253,000. *Id.*

Wal-Mart countered with an affidavit from Dr. Martin, who criticized Dr. Baggett's conclusion. Dr. Martin opined: "At best [Dr. Baggett's method] can only approximate the number of associates to include in a calculation of liquidated damages using extrapolated data and a probabilistic approach." *Id.* at 11. She stated that she did not believe Dr. Baggett's method, calculating liquidated damages using extrapolated data, was appropriate. *Id.* Dr. Martin, however, opined in her report that if every one of the 125,304 class members were entitled to liquidated damages, the statutory award should be $62,652,000. *Id.* at 11. On October 3, 2007, the court ordered statutory, liquidated damages in the amount of $62,253,000.

In addition to statutory, liquidated damages, the court awarded $45,694,576 in attorneys' fees. The trial court allocated the total-fee award based on recovery for the WPCL and non-WPCL claims. Trial Ct. Op., 11/14/07, at 21. The court ordered Wal-Mart to pay attorneys' fees of $33,813,986.24, with the remaining amount of $11,880,589.76 paid from the common fund. The total judgment follows:

WPCL verdict:	$ 49,568,541.00
Common Law verdict:	$ 29,178,873.35
Statutory Interest:	$ 10,163,863.00
WPCL penalty:	$ 62,253,000.00
WPCL attorney fees:	$ 33,813,986.24
WPCL expenses:	$ 2,670,325.52
Total:[51]	$187,648,589.11

[51] Attorney fees in the amount of $11,880,589.76 and expenses of $938,222.48 shall be paid from the Common Law [sic] fund created.

Id. at 22.[10] Wal-Mart timely filed post-trial motions, which the court denied on November 14, 2007. This timely appeal followed.

Wal-Mart raises the following issues:

> Did the trial court disregard class action requirements by certifying and refusing to decertify a class of approximately 187,000 current and former Wal-Mart employees for claims of breach of contract, unjust enrichment, and violations of the WPCL and MWA without a method of class-wide proof that could show Wal-Mart's liability to each class member and with a vague and overbroad class definition?

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[10] The trial court, however, erred in calculating damages by using the figure of $1,310,430, instead of the correct figure of $1,031,430. *See* Jury Verdict Interrog.-Damages, at 2; R.R. at 2187a. Thus, contrary to the court's judgment, the jury rendered a WPCL verdict for $49,289,541, not $49,568,541.

> Did the trial court deprive Wal-Mart of due process by eliminating its right to try inherently individual issues on liability?
>
> Did the trial court err by refusing to dismiss [Appellees'] claim under the WPCL when, as a matter of law, rest breaks are not "wages, wage supplements, or fringe benefits" within the meaning of the statute, and further err by awarding liquidated damages under the WPCL when [Appellees] could not establish that they met the requirement for liquidated damages under the WPCL, when Wal-Mart established as a matter of law its good faith in contesting or disputing [Appellees'] wage claim, and when [Appellees] could not identify the specific individuals entitled to liquidated damages?
>
> Did the trial court err by entering a judgment of $187,648,589.11 in favor of the class on its claims for breach of contract, unjust enrichment, and violations of the WPCL and MWA, where [Appellees] failed to establish elements of their claims?
>
> Did the court err in awarding $45.6 million in attorneys' fees following its application of a 3.7 contingency multiplier that improperly double-counted factors already included in the lodestar?

Wal-Mart's Brief at 4-5 (re-ordered to facilitate disposition).

"An appellate court will reverse a trial court's grant or denial of a JNOV only when the appellate court finds an abuse of discretion or an error of law."

Dooner v. DiDonato, 601 Pa. 209, 218, 971 A.2d 1187, 1193 (2009). "Our scope of review with respect to whether judgment n.o.v. is appropriate is plenary, as with any review of questions of law." *Shamnoski v. PG Energy, Div. of S. Union Co.*, 579 Pa. 652, 659, 858 A.2d 589, 593 (2004).

> In reviewing a motion for judgment n.o.v., the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, a judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
>
> There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, . . . and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant[.] With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Moure v. Raeuchle, 529 Pa. 394, 402-03, 604 A.2d 1003, 1007 (1992) (citations and quotation marks omitted). "Questions of credibility and conflicts in the evidence are for the [fact-finder] to resolve and the reviewing court should not reweigh the evidence." *Shamnoski*, 579 Pa. at 659, 858 A.2d at 593 (citation omitted). "If there is any basis upon which the jury could have properly made its award, the denial of the motion for judgment n.o.v. must be affirmed." *Smith v. Renaut*, 564 A.2d 188, 191 (Pa. Super. 1989); *accord Simon v. Wyeth Pharms., Inc.*, 989 A.2d 356, 365 (Pa. Super. 2009).

With respect to a request for a new trial, our standard and scope of review follows:

> To review the two-step process of the trial court for granting or denying a new trial, the appellate court must also undertake a dual-pronged analysis. A review of a denial of a new trial requires the same analysis as a review of a grant. First, the appellate court must examine the decision of the trial court that a mistake occurred.
>
> At this first stage, the appellate court must apply the correct scope of review, based on the rationale given by the trial court. There are two possible scopes of review to apply when appellate courts are determining the propriety of an order granting or denying a new trial. There is a narrow scope of review: where the trial court articulates a single mistake (or a finite set of mistakes), the appellate court's review is limited in scope to the stated reason, and the appellate court must review that reason under the appropriate standard.

> Conversely, if the trial court leaves open the possibility that reasons additional to those specifically mentioned might warrant a new trial, or orders a new trial in the interests of justice, the appellate court applies a broad scope of review, examining the entire record for any reason sufficient to justify a new trial.

Even under a narrow scope of review, the appellate court might still need to examine the entire record to determine if there is support for any of the reasons provided by the trial court.

The appropriate standard of review also controls this initial layer of analysis. If the mistake involved a discretionary act, the appellate court will review for an abuse of discretion. If the mistake concerned an error of law, the court will scrutinize for legal error. If there were no mistakes at trial, the appellate court must reverse a decision by the trial court to grant a new trial because the trial court cannot order a new trial where no error of law or abuse of discretion occurred.

If the appellate court agrees with the determination of the trial court that a mistake occurred, it proceeds to the second level of analysis. The appellate court must then determine whether the trial court abused its discretion in ruling on the request for a new trial. Discretion must be exercised on the foundation of reason. An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capri-

> cious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion. Where the record adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion.
>
> When determining whether the trial court abused its discretion, the appellate court must confine itself to the scope of review, as set forth in our preceding discussion. If the trial court has provided specific reasons for its ruling on a request for a new trial, and it is clear that the decision of the trial court is based exclusively on those reasons, applying a narrow scope of review, the appellate court may reverse the trial court's decision only if it finds no basis on the record to support any of those reasons. As a practical matter, a trial court's reference to a finite set of reasons is generally treated as conclusive proof that it would not have ordered a new trial on any other basis. Alternatively, where the trial court leaves open the possibility that there were reasons to grant or deny a new trial other than those it expressly offered, or the trial court justifies its decision on the interests of justice, an appellate court must apply a broad scope of review and affirm if it can glean any valid reason from the record.

Harman ex rel. Harman v. Borah, 562 Pa. 455, 467-69, 756 A.2d 1116, 1122-24 (2000) (citations, quotation marks, and alterations omitted). This Court may

affirm on any basis. *Donnelly v. Bauer,* 553 Pa. 596, 611, 720 A.2d 447, 454 (1998).

We address the first two issues together. Wal-Mart raises a number of claims regarding its challenge to the class certification. Wal-Mart contends the trial court disregarded class action requirements by certifying and refusing to decertify a class of approximately 187,000 current and former Wal-Mart employees for claims of breach of contract, unjust enrichment, and violations of the WPCL and MWA without a method of class-wide proof that could show Wal-Mart's liability to each class member and with a vague and overbroad class definition. Wal-Mart requests judgment notwithstanding the verdict or, in the alternative, a new trial. Wal-Mart is not entitled to relief.

> A trial court is vested with broad discretion in determining whether the criteria for maintaining a class action have been met, and its decision will not be disturbed on appeal unless the court neglected to consider the requirements of the rules governing class certification, or unless the court abused its discretion in applying the class certification rules. Moreover, it is the strong and oft-repeated policy of this Commonwealth that, in applying the rules for class certification, decisions should be made liberally and in favor of maintaining a class action.

Liss & Marion, P.C., v. Recordex Acquisition Corp., 937 A.2d 503, 505 (Pa. Super. 2007) (emphasis added

and citations and quotation marks omitted);[11] *accord Debbs v. Chrysler Corp.*, 810 A.2d 137 (Pa. Super.

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11 *Compare Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1 (Md. Ct. Spec. App. 2007), and cases cited therein, denying class certification where the courts do not liberally construe the class action rule.

> Maryland does not share the liberal construction of the class action rule espoused by the Ninth Circuit in *Dukes [v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007)] and by the Supreme Court of New Jersey in *Iliadis [v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007)]. The more exacting analysis of the class certification requirements in [*Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002)], *Basco [v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592 (E.D. La. 2002)], *Petty [v. Wal-Mart Stores, Inc.*, 773 N.E.2d 576 (Ohio Ct. App. 2002)], *Harrison [v. Wal-Mart Stores, Inc.*, 613 S.E.2d 322 (N.C. Ct. App. 2005)] is more closely aligned with the Court of Appeals's interpretation of Md. Rule 2-231 articulated in [*Philip Morris Inc. v. Angeletti*, 752 A.2d 200 (Md. 2000)] and *Creveling [v. GEICO*, 828 A.2d 229 (Md. 2003)].

Id. at 14. Courts liberally construing class action rules have certified similar classes based upon similar issues as those in the case sub judice. *See, e.g., Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1207 (Mass. 2008) (the court would abuse its discretion in denying certification "by imposing, at the certification stage, the burden of proof that will be required of the plaintiffs at trial"). Class certification would not be denied "simply because affirmative defenses may be available against individual members." *Braun v. Wal-Mart, Inc.*, No. 19-CO-01-9790, 2003 WL 22990114, at *7 (D. Minn. Nov. 3, 2003) (holding, "Predominance will be found where generalized evidence may prove or disprove elements of a claim," even if "there may be individual facts unique to particular class members"); *see also Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 221 (Mo. Ct. App. 2007) ("Likewise, '[b]ecause class certification is subject to later modification, a court should err in favor of, and not

2002); *Weismer by Weismer v. Beech-Nut Nutrition Corp.*, 615 A.2d 428, 431 (Pa. Super. 1992); *D'Amelio v. Blue Cross of Lehigh Valley*, 500 A.2d 1137, 1141 (Pa. Super. 1985); *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 454 (Pa. Super. 1982); *Bell v. Beneficial Consumer Discount Co.*, 360 A.2d 681, 688 (Pa. Super. 1976). "This is because such suits enable the assertion of claims that, in all likelihood, would not otherwise be litigated. *Bell, supra*." *Debbs*, 810 A.2d at 153.

This Court recently stated:

> Pa.R.C.P. 1702 governs class actions in Pennsylvania and states, in pertinent part:
>
> > One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if
> >
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> >
> > (4) the representative parties will fairly and adequately assert and protect the in-

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against, allowing maintenance of the class action.' "); *Armijo v. Wal-Mart Stores, Inc.*, 168 P.3d 129, 142 (N.M. Ct. App. 2007) (affirming the principle "that it is proper to err in favor of approving the class"); *Barnett v. Wal-Mart Stores, Inc.*, No. 55491-3-I, 2006 WL 1846531, at *2, 2006 Wash. App. LEXIS 1437, at *4-5 (Wash. Ct. App. July 3, 2006) (favoring liberal interpretation of class action rules).

terests of the class under the criteria set forth in Rule 1709[12] and;

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.[13]

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12 Rule 1709 provides:

Rule 1709. Criteria for Certification. Determination of Fair and Adequate Representation

In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters

(1) whether the attorney for the representative parties will adequately represent the interests of the class,

(2) whether the representative parties have a conflict of interest in the maintenance of the class action, and

(3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.C.P. 1709.

13 Rule 1708 states in pertinent part:

Rule 1708. Criteria for Certification. Determination of Class Action as Fair and Efficient Method of Adjudication

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a) . . .

(a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

Pa.R.C.P. 1702; *see* Pa.R.C.P. 1708 and 1709.

At a class certification hearing, the burden of proof lies with the proponent; however, since the hearing is akin to a preliminary hearing, it is not a heavy burden. The proponent need only present evidence sufficient to make out a prima facie case from which the court can con-

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(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.C.P. 1708(a).

clude that the five class certification requirements are met. This will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion.

At issue in this case are the second and third prerequisites for class certification—whether there are questions of law and fact common to the class and whether the claims or defenses of the parties are typical of the claims or defenses of the class. Common questions of law and fact will generally exist if the class members' legal grievances are directly traceable to the same practice or course of conduct on the part of the class opponent. The common question of fact requirement means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all. This is what gives the class action its legal viability. While the existence of individual questions of fact is not necessarily fatal, it is essential that there be a predominance of common issues, shared by all the class members, which can be justly resolved in a single proceeding.[14]

The typicality requirement is similar to the requirements of commonality and the adequa-

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14 *Accord Salvas*, 893 N.E.2d at 1207; *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 721 (N.J. 2007); *Barnett*, 2006 WL 1846531, at *7, 2006 Wash. App. LEXIS 1437, at *25-26; *Braun*, 2003 WL 22990114, at *7.

> cy of representation. The purpose of the typicality inquiry is to determine whether the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members. Where there exists various intervening and possibly superseding causes of the damage, liability cannot be determined on a class-wide basis because individual issues would predominate issues of fact and law that are common to the class and the representatives of the class.

Clark v. Pfizer Inc., 990 A.2d 17, 24–25 (Pa. Super.) (some citations, quotations, and punctuation marks omitted), appeal denied, 13 A.3d 473 (Pa. 2010).[15] "Unlike its federal counterpart at Fed.R.Civ.P. 23(b), Pennsylvania's rule does not require that the class action method be 'superior' to alternative modes of suit." *Weinberg v. Sun Co.*, 740 A.2d 1152, 1162-63

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15 *Cf. Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1199 (Ind. Ct. App. 2004) (reversing trial court's grant of certification, finding "the class definition includes individuals who have no standing in the litigation"); *Cutler*, 927 A.2d at 14 ("[A]ppellants' claims did not affect the entirety of the class"); *Alix v. Wal-Mart Stores, Inc.*, 838 N.Y.S.2d 885, 889 (N.Y. Sup. Ct. 2007) (all members of class must be aggrieved); *Harrison*, 613 S.E.2d at 327 (stating trial court's holding that "the proposed class included individuals who were not subject to the wage and hour violations that are the basis of Plaintiffs' claims"); *Petty*, 773 N.E.2d at 580 (class encompassed employees who were not subject to alleged violations). These jurisdictions do not construe class action certification rules liberally, as Pennsylvania does.

(Pa. Super. 1999) (citations omitted), rev'd in part on other grounds, 565 Pa. 612, 777 A.2d 442 (2001).[16] In *Janicik*, this Court held that "[t]he existence of individual questions essential to a class member's recovery is not necessarily fatal to the class, and is contemplated by the rules. *See* Pa.R.Civ.P. 1708(a)(1)." *Janicik*, 451 A.2d at 457.

> In Pennsylvania all class members are plaintiffs in the action upon the filing of the complaint. A trial court is empowered to require parties wishing to be excluded from a particular class to file of record, by a specific date, a written election to be excluded from the class. The United States Supreme Court has sanctioned the use of this opt-out procedure for all types of class action plaintiffs, explaining: If the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney

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16 *Cf. Basco*, 216 F. Supp. 2d at 600 (noting that federal rule requires class action be the superior method to resolve dispute); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, at *21 (D. Nev. June 20, 2008) (denying class certification because class action was not superior method for adjudication of controversy); *Bailey*, 808 N.E.2d at 1202 (addressing issue of superiority for purposes of remand, although that was not dispositive finding); *Cutler*, 927 A.2d at 9 (rule requires class action be superior method to resolve dispute); *Alix*, 838 N.Y.S.2d at 902 (denying class certification in part because plaintiffs did not establish superiority of class action method); *Petty*, 773 N.E.2d at 577 (concluding record demonstrates superiority); *Lopez*, 93 S.W.3d at 560 (denying class certification in part based upon the fact that the rule "requires the class action to be superior to other available methods").

> or thought about filing suit, and should be fully capable of exercising his right to opt out.

Prince George Ctr., Inc. v. U.S. Gypsum Co., 704 A.2d 141, 145 (Pa. Super. 1997) (citations and punctuation marks omitted). "Moreover, class members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184, 191 n.6 (Pa. Super. 2002).

> Class certification is a mixed question of law and fact. Courts should not dispose of class issues such as numerosity and typicality based on the perceived adequacy or inadequacy of the underlying merits of the claim. On the other hand, courts may need to examine the elements of the underlying cause of action in order to dispose of class issues properly. [*See Weinberg v. Sun Co.*, 565 Pa. 612, 618, 777 A.2d 442, 446 (2001)] (because false advertising claims under the UTPCPL require individualized proof of reliance, causation, and proof of loss, individual claims predominated over common issues; therefore, "the certification requirements of commonality and numerosity were not met").

Debbs, 810 A.2d at 154 (some citations omitted).

Wal-Mart contends that the trial court disregarded class action requirements "by certifying a class that lacked commonality and predominance and was defined imprecisely." Wal-Mart's Brief at 16. Further, Wal-Mart challenges the class certification of each of Appellees' claims, viz., breach of contract, un-

just enrichment, violations of the WPCL and the MWA. We thus state the required elements of each.

A breach of contract action involves: (1) the existence of a contract; (2) a breach of a duty imposed by the contract; and (3) damages. *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 716 (Pa. Super. 2005). While every element must be pleaded specifically, it is axiomatic that a contract may be manifested orally, in writing, or as an inference from the acts and conduct of the parties. *Id.* (citation omitted).

With respect to unjust enrichment, "[w]here one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied." *Meehan v. Cheltenham Twp.*, 410 Pa. 446, 449, 189 A.2d 593, 595 (1963) (citing *Bailis v. Reconstruction Fin. Corp.*, 128 F.2d 857 (3d Cir. 1942); Restatement, Restitution § 1, comment a (1936)). As amplified by this Court:

> The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Whether the doctrine applies depends on the unique factual circumstances of each case. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.
>
> Moreover, the most significant element of the doctrine is whether the enrichment of the de-

> fendant is unjust. The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.
>
> *Styer v. Hugo*, 422 Pa. Super. 262, 619 A.2d 347, 350 (1993) (quotation marks omitted).

Stoeckinger v. Presidential Fin. Corp. of Del. Valley, 948 A.2d 828, 833 (Pa. Super. 2008). It is long-settled that "the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between parties is founded on a written agreement or express contract." *Schott v. Westinghouse Elec. Corp.*, 436 Pa. 279, 290, 259 A.2d 443, 448 (1969); *accord Sevast v. Kakouras*, 591 Pa. 44, 53 n.7, 915 A.2d 1147, 1153 n.7 (2007). "Quasi-contracts may be found in the absence of any expression of assent by the party to be charged and may indeed be found in spite of the party's contrary intention." *Schott*, 436 Pa. at 290–91, 259 A.2d at 449.

The WPCL is a statute permitting employees to recover unpaid wages. *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 968 (Pa. Super.), appeal denied, 602 Pa. 668, 980 A.2d 609 (2009). 43 P.S. § 260.9a states in relevant part:

> (a) Any employe or group of employes, . . . to whom any type of wages is payable may institute actions provided under this act.
>
> (b) Actions by an employe, . . . to whom any type of wages is payable to recover unpaid wages and liquidated damages . . . .
>
> * * *
>
> (f) The court in any action brought under this section shall, in addition to any judgment

awarded to the plaintiff or plaintiffs, allow costs for reasonable attorneys' fees of any nature to be paid by the defendant.

43 P.S. § 260.9a(a), (b), (f).

The WPCL defines "wages" as follows:

§ **260.2a. Definitions**

"**Wages**." Includes all earnings of an employe, regardless of whether determined on time, task, piece, commission or other method of calculation. The term "wages" also includes fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employes' pay by the employer.

43 P.S. § 260.2a. "Fringe benefits" are defined:

"**Fringe benefits or wage supplements**." Includes all monetary employer payments to provide benefits under any employe benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.; as well as separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employes' pay by the employer; and any other amount to be paid pursuant to an agreement to the employe, a third party or fund for the benefit of employes.

Id. (footnote omitted).

Section 260.3 of the WPCL requires that employers pay or provide the fringe benefits or wage supplements:

§ 260.3. Regular payday

* * *

(b) Fringe benefits and wage supplements. Every employer who by agreement deducts union dues from employes' pay or agrees to pay or provide fringe benefits or wage supplements, must remit the deductions or pay or provide the fringe benefits or wage supplements, as required, within 10 days after such payments are required to be made to the union in case of dues or to a trust or pooled fund, or within 10 days after such payments are required to be made directly to the employe, or within 60 days of the date when proper claim was filed by the employe in situations where no required time for payment is specified.

43 P.S. § 260.3(b).

The Minimum Wage Act provides:

Employes are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employes employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are of-

> ten found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employes, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect some employes employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employes employed therein and of the public interest of the community at large.

43 P.S. § 333.101. The statute establishes the minimum wage as $7.15. 43 P.S. § 333.104. The MWA guarantees overtime pay equivalent to one-and-one-half times the regular hourly pay. 43 P.S. § 333.104(c).

Appellees contend Wal-Mart's business practices, policies, business records, and their own policy of enforcing those policies by disciplining managers and associates who violate them, were uniform among all employees, and therefore common issues of fact predominate. Additionally, common issues of law predominate, *viz.*, whether the associates relied on the employee handbook and Wal-Mart's policies concerning off-the-clock work and rest breaks resulting in a unilateral contract which Wal-Mart breached. Instantly, a careful review of the voluminous record reveals the common questions of law and fact are directly traceable to Wal-Mart's corporate policies and

practices as well as Wal-Mart's witnesses' testimony regarding the proliferation and strict enforcement of those corporate polices. The common questions of fact rely on common questions of law. *See Clark*, 990 A.2d at 24-25.

Canetta Ivy Reid was director of corporate employment compliance for Wal-Mart. N.T., 9/28/06 (morning), at 58.[17] She testified about Wal-Mart's policy regarding rest breaks, denominated as PD-07:

> Q: How are Wal-Mart associates informed about the rest break and meal period policy?
>
> A: Well, from day one, they hear about it in orientation when they – their first day at work. It's also in the handbook that they receive. There are posters. There is a computer-based learning, CBL, module. Managers cover it in talking points with associates. It's emphasized throughout the business.
>
> Q: You said CBL. What actually are those?
>
> A: Well, it's computer-based learning. And basically, it's where an associate will sit down at a computer terminal, and there is what we call a module that will be loaded on to that computer, and it will give them a video, and it will also give them text. Somebody will be talking and explaining different policies and different concepts. And throughout that video, they may be asked questions, or they may be asked

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[17] Although we attempt to cite, as much as possible, to the notes of testimony and the reproduced record, where there is only a citation to the original record, the notes of testimony were not included in the reproduced record.

> questions at the end to test their knowledge in that particular area.

Id. at 70-71; R.R. 1963a-64a. To facilitate compliance with Wal-Mart's policies, she testified that they conducted training for associates:

> Q: What is this document, Mrs. Reid?
>
> A: These are the talking points that I was referring to that we rolled out along with the policy revisions.
>
> Q: If you can go to the fourth page. What is this page?
>
> A: Well, our talking points, the way that they were formatted was there was information for managers, and then we said here are the things you specifically need to cover, as it says here, with all associates on all shifts, go through this specific information with them.
>
> Q: And who was this document sent to?
>
> A: This went to all managers. It went to, at that time, district managers. And again, the facility managers were the ones who instructed to cover it with associates in the facility.
>
> Q: By facility managers, you mean store managers and Sam's Club managers?
>
> A: Correct.
>
> Q: So Wal-Mart stores and Sam's, just to be clear? A: Correct, correct.
>
> Q: So it was across the company. Let's go through these talking points that the managers were instructed to go through. If you'll look down to the one that starts managers and su-

pervisors. This provision, Mrs. Reid, what does it convey to the associates?

A: The last bullet?

Q: Yes, ma'am.

A: Well, I mean, it was always our policy that managers should not interrupt associates on their breaks and their meal periods for any work-related reason. And this was just reemphasizing that and making sure that our hourly coworkers also didn't interrupt our associates while they were on breaks and meals.

Q: Let's go to the next bullet. This next provision says, "Although it has been our practice to coach supervisors and managers who repeatedly interrupt or fail to provide associates with their breaks and/or meals periods, it will now be an expressly stated part of the policy that performance coaching will occur in these instances. . . ."

Q: Does Wal-Mart want its employees to take their meal and rest breaks?

A: Absolutely. I mean, that's why we have the policy.

Q. And why is that?

A: I mean, again, it's something that we think is good for our associates. It's the right thing to do for our associates. And for as long as I've been here, we've done it that way. And if associates want that time to rejuvenate, we think they should have it.

Q: Now, since 2003, you've had this provision in the policy that says managers need to approve skipping these breaks; is that right?

A: That's correct. . . .

Q: Let's talk a little bit about the revisions to PD-07 that you've made. Let's look at demonstrative 91. This is going back to the March 2003 policy that we looked at a little bit before, but can you generally explain the changes that were made in 2003?

A. Yeah. One of the first things we did is, we added state-specific drop down boxes to the policy to cover what the state's specific requirements were for those states that had state-specific requirements. We then, as we talked about with the talking points, emphasized our expectations for our associates in terms of compliance with our policy on breaks and meal periods. We reemphasized managers' responsibilities and our expectations for them. And we also emphasized the potential disciplinary action for both managers and associates. But then we also provided that clarification about associate's abilities to skip a meal period or a break, provided they had approval from their manager. . . .

Q: And off-the-clock is also important here, so let's talk about Wal-Mart's policy against off-the-clock work. What is Wal-Mart's policy, just in simple terms?

A: Well, our policy is plain and simple. Off-the-clock work is not allowed. Associates are to be paid for all time worked, and so they should

not be working off-the-clock. They should not be directed to work off-the-clock. They should not be allowed to work off-the-clock, and we've written a policy on that.

Q: Has that policy been the same since you joined Wal-Mart in 1996?

A: That part has always been very clear.

Q: Let's look at the actual language of the policy. Plaintiffs' Exhibit 27A. Look at that first paragraph. It says, "It is against Wal-Mart policy for any associate to perform work without being paid." Now, Mrs. Reid, does that mean they also shouldn't voluntarily also do off-the-clock work?

A. That is correct.

Q: We are committed – it continues. "We're committed to compensating every associate for the work they perform. No Wal-Mart associate should perform work for the company without compensation. . . ."

Q: It continues: "It's a violation of the law and company policy to work off-the-clock or for a supervisor or manager to request that associates work off-the-clock. If a violation is recorded, a proper and thorough investigation will be implemented and corrective action taken when necessary. Associates who work off-the-clock will be paid for such time. The coaching policy will be used to correct violations. And the facility manager must ensure associates are properly compensated. . . ."

Q: Now, it talks in here about reporting any violations of the off-the-clock policy. How does

an associate go about reporting something like this happening?

A: Well, again, they can report it to any member of management. They can report it using the ethics hotline, which is a 1-800 number that they call, and it comes into the home office. They can report it to – again, they can report it, use our open-door and report it to any member of management, not just the ones in their facility. They can call somebody in Bentonville as well.

Q: You mentioned the ethics hotline. For [sic] long has that 1-800 been in existence for employees to call to report anything going on in their stores?

A. Well, the concept of the 1-800 number for the associates to call has been around again since before I joined the company. It was renamed Ethics Hotline in 2004. But it was available, and it was the same, essentially the same number before then.

Q. How are employees made aware they have a phone number to call?

A. Well, that policy you just reviewed, it's in there. This information is covered with associates again during orientation. It's in the computer-based learning, CBL, module. It's on posters throughout the facility. The ethics office advertises that.

Id. at 73-75, 81-82, 92-93, 120-23. She testified that there were posters over the time clocks which reiterated the policy of not working off-the-clock:

> Q. We have an old version of that poster, and let's take a look at it. It's Plaintiffs' 37. It says: "Clock in. We appreciate dedication, but do not volunteer off-duty time to work. Under no circumstances should you perform work without being compensated. "It is against Wal-Mart policy for an hourly associate to work off-the-clock for a supervisor or to request or require an associate to work off-the-clock or for a supervisor to take insufficient action when they know an associate is working off-the-clock."

Id. at 126. She testified further:

> Q: Do you understand that you are the designated representative for Wal-Mart most knowledgeable about several topics?
>
> A: I do, yes.
>
> Q: One of those being PD-07, rest and meal break policy, including but not limited to enforcement and revisions to that policy. Do you understand that?
>
> A: Yes, I do.
>
> Q: Do you understand that you were designated as the person most knowledgeable to speak on behalf of Wal-Mart regarding PD-43, the off-the-clock policy including but not limited to enforcement and any revisions to that policy?
>
> A: I do.
>
> Q: And do you understand that the third item for which you were designated as the person most knowledgeable at Wal-Mart to testify in regard to, is Wal-Mart's computerized reports

> and the use of those reports to ensure compliance with company policy and applicable laws?
>
> A: Yes . . . .

N.T., 9/28/06 (afternoon), at 54-55. When she did not concede that paid rest breaks were a benefit of employment, a video of her deposition testimony in another case involving Wal-Mart was played for the jury:

> (The following video clip is played for the jury:)
>
> "Q: The paid rest breaks are a benefit of employment, right?
>
> A: I think they could be viewed as a benefit, yeah. . . ."
>
> Q: Does that refresh your recollection that you have testified under oath that paid rest breaks and unpaid meal periods are a benefit of employment at Wal-Mart?
>
> A: Well, certainly that's what I said, yeah. . . .
>
> Q: You testified earlier that at orientation the hourly associates are told they get paid rest breaks and unpaid meal periods; correct?
>
> A: They are told about our policy regarding breaks and meal periods, yes.
>
> Q: Have you ever looked at Wal-Mart's benefits handbook?
>
> A: The SPD? Yes.
>
> Q: Does it not state under Benefits, you receive paid rest breaks?
>
> A: I don't know the answer to that question. . . .

Q: My Money and My Financial Future. Do you see the second item there?

A: Yes, My Money and Financial Future.

Q: What does it state as a benefit of employment at Wal-Mart?

* * *

THE WITNESS: I don't see where it says Benefits is what I am missing. . . .

Q: Let me read it for you. "Many people think the word "benefits" refers only to medical insurance. Not so at Wal-Mart and Sam's Club. We are proud to offer you a comprehensive benefits package ranging from profit sharing to medical insurance to child care discounts. Below you will find many benefits and opportunities for which you may be eligible." Did I read that correctly?

A: Yes.

Q: What's the second item under My Money and My Financial Future that Wal-Mart says in its own handbook is a benefit of employment?

A: The break periods?

Q: Yes. Do you now agree that break periods are a benefit of employment at Wal-Mart?

A: Again, as I said before, I did not mean benefits in the sense of a ERISA benefits. But yes.

Q: So rest breaks and meal breaks are a benefit of employment promised to the hourly associates when they come to work at Wal-Mart, right?

A: It is certainly beneficial to Associates, yes.

Id. at 60-63. Mrs. Reid was asked about the Shipley report:

Q: You agree that Wal-Mart's internal, independent audit staff stopped doing audits for rest and meal break compliance after the Shipley report in July of 2000, right?

A: I agree the Internal Audit Department did not do more audits.

Id. at 78. Mrs. Reid proceeded to testify about the timeclock lockout:

Q: The first one is Timeclock Lockout. There is two [sic] Timeclock lockouts, right? One that keeps an employee off the clock for a 30-minute meal. Correct?

A: Actually, one is clockout-lockout, and the other is a meal period time lockout.

Q: Which one is this?

A: This is the meal period timeclock lockout.

Q: All right, so this is not where the employees are locked off the computerized devices such as cash registers, CBL terminals, TL and E kiosk machines while they are off the clock, right?

A: That is accurate.

Q: You know the reason that that lockout was put into place was litigation, correct?

A: No.

Q: You don't know that?

A: I don't agree with that, no.

* * *

Q: This is an E-mail from Greg Campbell to Carol Mosely, correct?

A: Yes, it looks like.

Q: A carbon copy to Tracey Engelbrecht, correct?

A: Yes.

Q: The subject was log-in verification, correct?

A: Correct.

Q: It's talking about locking the employees off the CBLs, the SMART telxons, the pharmacy log-ins, the Tire, Lube and Express log-ins, the vision center log-ins, and the POS, which is the cash register. Correct?

A: Yes.

Q: All right.

* * *

Q: "Please help us as you are aware of this hot topic with all the current litigation we are involved in." Did I read that right?

A: Yes.

Q: It's a true statement, is it not, that these log-ins to prevent people from operating the electronic devices at Wal-Mart was done for litigation purposes?

A: I disagree.

Q: This suggestion came out of a task force that was put into place in late 2002, correct?

A: This suggestion? Yes.

Q: Yes. And it was put into place at the period of time when you were the Director of Special Projects, correct?

A: This was actually rolled – yes, by then I was in the new role.

Q: All right. You were involved with the role (sic) out of this new project, were you not?

A: We were informed of the roll out, but we did not do the roll out. My team did not do the roll out.

Q: The team that came up with this suggestion was formed to help Wal-Mart's lawyers respond to litigation involving off-the-clock allegations, correct?

A: That was one of the purposes of this team, yes.

Q: The other purpose was to identify instances where Wal-Mart employees were working off the clock, correct?

A: Certainly that would have been something they would have wanted to work on, yes.

Id. at 82-85. Mrs. Reid testified that, pursuant to the policy known as PD-43, managers were not required to report employee complaints:

Q: You do not know how many associates in the State of Pennsylvania in the last eight years have reported to store managers that they have been forced to work off the clock in violation of PD-43; correct?

A: That's correct.

Q: And the reason is, there is no requirement upon a manager to forward that complaint

made by an associate to upper levels of management; true?

A: I disagree with that statement.

Q: Okay. Let's talk about what happens if a store manager reports that he has forced an employee to work off the clock. That manager is subject to discipline, is he not, or she not?

A: Yes, certainly.

Q: And if a member of salaried management reports that one of their fellow managers is making employees work off the clock, that manager who is making associates work off the clock is subject to discipline, correct?

A: Of course.

Q: Wal-Mart requires its hourly associates to be team players, does it not?

A: I don't know where that's written, but certainly, yeah, teamwork is great.

Q: Wal-Mart requires its salaried management to be team players, correct?

A: Again, I have not seen that written anywhere, but teamwork is great.

Q: It's true, is it not, that a member of salaried management cannot apply for promotion if there is a coaching within the last twelve months in their file?

A: Yeah, that's our policy.

Q: Right, so a manager who self reports that, I am forcing an associate to work off the clock or work through their rest breaks or through their meal breaks, is subject to being disci-

plined and therefore not eligible for promotion, correct?

A: They probably would be fired, so yeah, they would not get that promotion.

Q: Similarly, if Store Manager Bob reports that Co-Manager Steve is making employees work off the clock through their rest breaks and meal periods, Co-Manager Steve can't apply for a promotion, correct?

A: If Co-Manager Steve is coached, that would be accurate.

Id. at 94-96.

Mrs. Reid testified further about Wal-Mart's policy of not working off the clock:

Q: You also stick up all sorts of posters like we saw all over the place, Do not work off the clock. Right?

A: We certainly do.

Q: You put it in policies?

A: Yes.

Q: And the reason that you do all that, why Wal-Mart does all that, is because you know you got a widespread problem with employees working off the clock, correct?

A: That is absolutely not true.

Q: If you didn't have a widespread problem why do you go through all these measures?

A: Because we choose to educate our Associates about our policies and our expectations, and we want to make sure that they are aware of our off-the-clock policy and what our expec-

> tations are for them in terms of paying them for every minute that they work.

Id. at 97-98.

The jury also heard testimony from Mrs. Reid regarding understaffing and missed breaks by cashiers:

> Q: Okay. Well, let's go to Plaintiff's Exhibit 480. . . . This is the Dallas meeting highlights, and I believe the date would be in 1999. Were you at that meeting?
>
> A: I do not remember.
>
> Q: Tom Coughlin, again, that's the CEO and Vice Chairman of Wal-Mart, the last we heard from him, correct?
>
> A: I am sorry, in '99?
>
> Q: Well, the last we heard from Mr. Coughlin in sworn testimony, that's what his job titles were, correct?
>
> A: Yes.
>
> Q: All right. "Top Five Reason Cashiers Quit". Do you see that?
>
> A: I do.
>
> Q: What are the first two bullet points?
>
> A: It says, Can't get breaks, and Understaffed.
>
> Q: Do you disagree with Mr. Coughlin that the top five reasons Wal-Mart cashiers quit are they can't get their breaks and the stores are understaffed?
>
> A: I don't know.

N.T., 9/29/06 (morning), at 32. Mrs. Reid was also questioned about an internal memorandum from a holiday meeting which occurred in 2002. *Id.* at 65-66.

> Q: What's the document?
>
> A: It appears to be notes from either a year beginning meeting or a holiday meeting.
>
> Q: And the holiday meetings or the year beginning meetings are the top key executives get together and they discuss what they want to do with Wal-Mart during the year. Correct?
>
> A: No, actually, it's when they bring in the managers and they kind of set the direction for the year, and they show them merchandise and talk about the plans for the year.
>
> * * *
>
> Q: First page, General Session One. Jim Hayworth addresses the gathering. Correct?
>
> A: These are notes from a speech – it looks like its notes from a speech he made.
>
> * * *
>
> Q: You would agree with me that what's being reported in this gathering is that Wal-Mart's turnover rate is high. Correct?
>
> A: High for Wal-Mart, yeah.
>
> Q: Well, the statement is, "Why is Wal-Mart's turnover high," correct?
>
> A: Yes.
>
> Q: And it says, "44 percent of turnover is because of Management and its practices." Correct?

A: I see that.

Id. at 68-69.

Coleman H. Peterson was executive vice president of human resources, known as People Division. He was responsible for human resources world-wide when he retired from Wal-Mart in 2004. N.T., 10/5/06 (afternoon), at 153. He reported to the president and chief executive officer. N.T., 10/6/06 (morning), at 15. He was questioned about a memo dated August 3, 1998, from Kendall Schwindt that went to district managers, regionals, and to Tom Coughlin, president of Wal-Mart at the time the memo was sent. *Id.*

> Q: In 1998 Mr. Schwindt was reporting to senior levels of management that a major issue from the Grass Roots was that the Associates were not receiving scheduled breaks and lunches. Correct?
>
> A: That's what the memo reports, yes.

Id. at 16. Mr. Peterson testified that he did not agree with this assessment. *Id.* at 15.

> A: Twice a year Wal-Mart has what we call major meetings. At the beginning of the year there is something called the Year Beginning meeting, and in the fall there is something called the Back-to-School meeting or the Holiday meetings. And all store managers, in some cases assistant store managers, but then all the district managers, regional vice presidents and kind of top management of Wal-Mart are present there.

Id. at 16. He stated that he believed he was present when Mr. Coughlin discussed with the group the five reasons cashiers quit. *Id.* at 17.

> Q: You heard, did you not, that Mr. Coughlin stated the top reason cashiers quit is they can't get their breaks. Do you remember that?
>
> A: No, sir, I don't think that that's accurate. That's not what he said.
>
> Q: And the second bullet point under here for the top five reasons cashiers quit is that the stores are understaffed. Do you remember him saying that?
>
> A: No, sir, I do not.
>
> Q: This is an internal Wal-Mart document, is it not? A: Yes, sir, that's correct, it is.
>
> Q: I mean it's posted on your Workbench, correct?
>
> A: Yes, sir, but what he said and what the memo says are two different things.
>
> THE COURT: What does posted on your Workbench mean?
>
> MR. BRIDGERS: That's what I was going to ask.
>
> THE COURT: Okay, good.
>
> Q: Tell the jury what the Workbench is?
>
> A: There is an internet system within Wal-Mart where all Wal-Mart associates can read. It doesn't go to the outside but it's inside. And so after meetings, generally what is done is just kind of a summary of what took place at meetings and then it's kind of put on the web-

site so that management people who were not able to make the meeting can go to that website and kind of see what was talked about and what the key points were.

Q: And when this was put on the Workbench, that was for every Associate with access to a Wal-Mart computer to find out what Mr. Coughlin said at that meeting, correct?

A: That would be correct, yes.

Id. at 17-19. Mr. Peterson was then questioned about a memo dated October 9, 2000, from Mr. Oneil Clark to Don Harris. *Id.* at 20.

Q: Sir, now that we are on the same page, do you now remember when you originally saw this four months after the Shipley Audit that you were advised that meal and break exceptions was a chronic problem and the exceptions were running between 300 and 600 daily?

A: No, sir, I was not particularly struck by that. I was not, no.

Q: And you understand that 300 to 600 daily means per store. Do you not?

A: That's what the memo reports, yes.

Q Rather than putting in the salaried personnel manager, what Wal-Mart did instead was eliminate rest break punching so there wouldn't be so many exceptions to investigate, correct?

A: I am not sure I understand the relationship between the two so I would say no, sir.

> Q Well, you know that – let's see, October, November, December, January, three months later, Mr. Harris is advising the Wal-Mart Management that we are going to eliminate rest break punching. You know that, don't you?

Id. at 27.

Dr. Baggett testified about Wal-Mart's business records:

> Q: The records show the swipes made by employees, correct? . . . .
>
> A: No, sir. They're a reflection of the activity of the associates.
>
> Q: That's my point. And the activity of the associate is to either go to the time clock and swipe to create a record of a break, right?
>
> A: Yes, sir.
>
> Q: And whether the associate does that, you can see how much time there is between they swipe out for a meal or a break and when they swipe back in, correct?
>
> A: Yes, sir, that's correct.
>
> Q: And that's measurable by you and your computer program as a statistician, correct?
>
> A: Yes, sir, that's correct.
>
> Q: The other thing that the records show is in many instances, that the employee did not swipe for a meal break or arrest [sic] break at all on a given today [sic], right?
>
> A: Yes, sir, that's correct.

Q: And that's identifiable objectively from those swiping records, correct?

A: Yes, sir, along with other support information from Wal-Mart that validates those records.

Q: And you are able to and have counted up all the times that an associate either didn't swipe at all or did swipe but swiped back in sooner than 30 minutes for a meal break or sooner than 15 minutes for a rest break, correct?

A: Yes, that's correct.

N.T., 9/19/06 (morning), at 18-19; R.R. at 1650a-51a.

After being qualified as an expert, Dr. Baggett testified:

Q: And were you given an assignment by plaintiff's counsel in this litigation?

A: Yes.

Q: Can you tell the jury [what] that assignment was?

A: The assignment was to take a large, and I emphasize large, amount of data that was provided by Wal-Mart and condense it down and present it in a form that is easy for the jury to understand.

Q: And I note that your binding has just been put before you. Glad to see it made it up there. Dr. Baggett, did you in fact summarize and finalize hourly employee time records for all 139 Wal-Mart stores in the State of Pennsylvania from 1998 through the beginning of 2006?

A: Yes, I did.

Q: And were all those – did all that data – that's data provided by Wal-Mart?

A: Yes. . . .

Q: My question is, as a general matter so the jury can understand what Wal-Mart does with this document, does the Payroll Scheduling Guide set out how Wal-Mart's time-keeping system works?

A: Yes.

Q: And you see the six steps we have up in the demonstrative on the screen?

A: Yes.

Q: Can you just run through those steps? Are those all in the Payroll Scheduling Guide in great detail?

A: Yes. Well, first, the employee will clock – will swipe a time card whenever they go for a break or lunch or swipe in at the first of the day or swipe out when they go home.

Q: And we saw that in the PD-07 just now when we looked at it, the obligation to punch in and out for rest breaks and meal breaks?

A: Yes, that's correct. And then there's time, something called a time clock punch exception report that's generated, and this report contains information like missed meals, missed rest breaks, short meals, and short rest breaks, among other things.

And then the Payroll Scheduling Guide specifies that the store managers investigate the exceptions and reconcile those. And after those

are reconciled, the time clock archive report is generated in its finalized version right here.

Q: What happens next?

A: What happens after that is, payroll is generated. And again, this is in the Payroll Scheduling Guide. And once the store managers receive the checks, they reconcile the hours on the check with what's on item four, the time clock archive report, and –

Q: I'm sorry.

A: – if those match, they then assign the – they give the check to the employee.

Q: The ultimate activity, the employee gets paid?

A: Yes.

Q: I'd like to take just a few minutes, hopefully only a few minutes, and go through some of the specific sections in the Payroll Scheduling Guide. If I could direct your attention, Dr. Baggett, I want to go step by step through these things we've identified in the demonstrative. If I can direct your attention, sir, to Section 809 of the Payroll Scheduling Guide. . . . Dr. Baggett, what about Payroll Scheduling Guide section 809, the time clock punch exception report, was important to you in formulating your opinion?

A: Well, there's two parts of this that are important to me. The first part is that this is Wal-Mart's own guide in their own language where it describes the things that you will find in the time clock punch exceptions report. And

among those are about meal, short break, too few meals and too few breaks.

Q: Now those are Wal-Mart's own words about how it reads the punches in the time-keeping system in its own guide for the time-keeping systems; is that correct?

A: Yes, that's correct.

Q: And Dr. Baggett, was there anything else in the Payroll Scheduling Guide Section 809 that was important to you?

A: Yes, at the bottom of this same page.

Q: What about that section?

A: It states what's supposed to be done with the report, and it states specifically management should use this report to monitor associates and the type of exceptions that occur. . . .

Q: Dr. Baggett, I'd like to put up an actual sample of time clock punch exception report so the jury can see closely what we're all talking about when we talk about time clock punch exception report. . . . Dr. Baggett, can you tell me what was important about Plaintiffs' Exhibit 2-b?

A: Yes. Yes. At the top of the page, it states that the following rules apply to all hourly associates.

Q: And do you understand that all the rules that are referred to in this legend to the time clock punch exception report are the same rules Mr. Campbell was speaking about yesterday in his video deposition?

A: Yes.

Q: And these are based upon Wal-Mart's corporate policies?

A: Yes.

Q: Dr. Baggett, is there anything else that you found important in Plaintiffs' Exhibit 2-b?

A: Yes. The rules include, among other things – and these are things that show up on the exception report – short break, short meal, too few breaks, and too few meals.

Q: Again, Wal-Mart's own words in its time clock punch exception report?

A: Yes.

Q: Dr. Baggett, if we can take a look now at the actual – this is the legend to the report. Can you explain what a legend is?

A: Yes. It is a guide to help you interpret the report.

Q: And now can we take a look, still as part of Plaintiffs' Exhibit 2-b. . . . Was there anything in particular that was important to you in formulating your opinions in this case on this page?

A: Yes.

Q: What was it?

A: Well, this is important in that this is an example of the exceptions report, and what it lists are the actual exceptions that occurred for a day. And what's interesting about this one is, we have Dolores Hummel identified with too few meals and too few breaks for one shift on May 30, 2000.

* * *

Q: Dr. Baggett, what about this excerpt from [Appellee]s' Exhibit 83, Ms. Hummel's time clock are [sic] archive report for May 30th, 2000, is important to you?

A: Well, down below is, this number is the total hours worked. There's a legend over here to the side that indicates what those two rows are. And these are in hundredths of hours. So 6.5 would be six-and-a-half hours, for example. So she's worked for 6.82 hours and had .2 hours of meal breaks. But within – so that shift earned two breaks and one meal, but only one break is recorded. So this is in military time. She clocked in the morning at 8:01, went to her break at 10:06, came back from her break at 10:18. It was a 12-minute rest break. And then clocked out at the end of the today [sic] at 2:50. Is that 2:50? 2:50.

Q: Now, Dr. Baggett, under Wal-Mart's policy, corporate policy, PD-07, based upon your review of that policy, did Ms. Hummel earn – was she promised two rest breaks or that shift and meal period?

A: Yes, based upon PD-07 and if she works over six hours for that shift, then during that shift, she earned two rest breaks and one meal.

* * *

Q: Dr. Baggett, up on the screen is Payroll Scheduling guide 701. What about this document was important to you?

A: Well, this section all the way up through I believe the Payroll Scheduling Guide, Section 705, describes how the time-keeping record is maintained and edited.

Q: And does Payroll Scheduling Guide 701 explain how adjustments and edits are made on the computer system for individual punches?

A: Yes.

Q: If you can turn, Dr. Baggett, to Section 702? That's at page WMB-204. What about Payroll Scheduling Guide 702 was important to you?

A: Well, this describes the punch error report. And basically a punch error is just an odd number of punches in a day. For example, if you just clock in in the morning and clock out, say, a couple of hours later, that would be two punches. And if it's just one punch then there's a problem with it.

Q: Now, we can turn, Dr. Baggett, to Section, Payroll Scheduling Guide Section 703. That starts at page WMB-211. What about this section of the Payroll Scheduling Guide was important to you?

A: This describes how the time clock record can be edited by Wal-Mart personnel in order to maintain its accuracy.

Q: We can go on to Section 704 of the Payroll Scheduling Guide. That starts at page WMB-220. That's titled, Editing and Finalizing Payroll, Finalize Daily. [Sic] About this section was important to you?

A: This section just describes a little bit more about editing and also about finalizing the payroll or finalizing the time clock archive record for the paychecks to be written off of it.

Q: This section's called Finalize Daily?

A: Yes.

Q: Is this for finalization of the specific days' payroll hours the following day?

A: Yes.

Q: And if I could direct your attention, sir, to Section 705 which starts at WMB-222. What about this section was important to you, Finalize Weekly?

A: This is the same thing as the daily, only it's a weekly finalization. So when – what the definition of finalized weekly is, it means all of the errors are removed from the time clock record via the reports that are printed out that go with it.

Q: Now see the sentence that Ryan highlighted? "Finalizing weekly payroll hours transmits the payroll hours for your store associates to the home office." Do you have an understanding, sir, what the home office is as it's used in this Payroll Scheduling Guide?

A: Yes.

Q: What's that?

A: That would be Bentonville.

Q: Wal-Mart's corporate headquarters?

A: Yes.

Q: Dr. Baggett, if we could look at Section 805 of the Payroll Scheduling Guide that starts at WMB-232 and that section entitled Time Clock Archive Report. Those are the records you've worked with on behalf of Plaintiffs' counsel, is that correct?

A: Yes. The time clock archive report is generated from the same records that I worked with.

Q: Now, what about Payroll Scheduling Guide, Section 805, was important to you in formulating your opinion?

A: Well, it defines what the time clock archive report is and which very simply shows the total time worked by day during the pay period, both actual and edited, for each associate.

Q: And this is a definition in Wal-Mart's own manual, Wal-Mart's Bible of the Payroll Scheduling Guide, of what the time clock archive report is; is that correct?

A: That's correct.

Q: Dr. Baggett, is there anything else in Section 805 that was important to you?

A: Yes. There's a retention time stated that the time clock archive report – again, that's the same data that I work with and that the exceptions, Wal-Mart's exceptions report, is printed from, that those records are to be retained for five years.

Q: So Wal-Mart keeps this data as a general matter for five years?

A: Yes.

Q: And do you have any understanding, sir, as to why they do that?

A: Well, yes. I understand that these types of records need to be maintained as part of law, because –

* * *

A: And my understanding is that they're kept because tax information is provided, withholding tax, Social Security information's, [sic] provided to the federal government from these records.

Q: And to the government of the state of Pennsylvania?

A: Yes.

Q: The Commonwealth of Pennsylvania.

A: Yes.

Q: Dr. Baggett, if I could direct your attention next to six 706 – I'm sorry. Well, let's go to the 706 of the payroll [scheduling] guide that begins at page 224 of Plaintiffs' Exhibit 54. Now Doctor Baggett, can you tell me with [sic] what was important, with [sic] what was important about Payroll Scheduling Guide seven on '06 in your formulation of your opinions?

A: Well, this is the section that deals with where a store supervisor verifies the hours on the check that we talked about a little while ago and confirms those hours with the time clock record itself.

Q: Wal-Mart doesn't pay its associates unless the numbers on the time clock archive report

and the numbers on the paychecks match; is that correct?

A: That's correct. There's a direct link, of course, between the hours and the paycheck. . . .

Q: How many shifts did you have in your data?

A: There were about 46 million shifts.

Q: And were those all the shifts that the employees in the State of Pennsylvania worked during the period between 1998 and 2006?

A: No. Those were all the shifts that I received from Wal-Mart.

Q: Did Wal-Mart provide all of the shifts, the data on the shifts worked by employees?

A: No.

Q: Do you have any understanding as to why some of the shifts were missing, some of the data on the shifts?

A: There's some data that's just completely missing, and I don't know why that's missing. But there's other data that, as you saw in one of the slides before, that's just too hard to read to be able to key in. So that was – we – I considered this as missing as well.

Q: Dr. Baggett, did Wal-Mart maintain this data, the time clock archive data, and punches in two different formats during the course of the period from 1998 to 2006?

A: Yes. . . .

Q: And prior to January 2001, was all this time clock archive data, was that kept in paper?

A: Yes. . . .

Q: And starting in about January of 2001, did Wal-Mart begin maintaining its time clock data in different format?

A: Yes.

Q: Can you explain to the jury what that format was?

A: Well, after January of – after about January of 2001, they started keeping data on computer, so it was in an electronic form that was easier to interpret by a computer.

Q: And in connection with the work that you did on the data, did you have to combine the information on the paper data with the information in the electronic date [sic]?

A: Yes.

Q: Can you explain just generally how that was accomplished?

A: Yes. Since the paper data couldn't be handled by computer, we have to have the paper data, the time clock record on paper, translated into an electronic format, to it was hand-keyed in.

Q: And were there all sorts of – strike that. Ultimately was all of the data provided by Wal-Mart keyed in?

A: Yes.

Q: And were you able then to review that data in your computer using statistical methods and computer programming?

A: Yes. . . .

Q: And I'd like to just direct your attention to, I think the next one in your book is Plaintiff's Exhibit 142 for identification. It's a document dated January 4, 2001, from Don Harris, changes in payroll processes. What about that was important to you in formulating your opinion?

A: On the third paragraph down, this is a directive from Don Harris from Wal-Mart. Says: ["]Secondly, effective February 10th, we will no longer require hourly associates to clock in or out for their break periods. . . ."

Q: Dr. Baggett, I'd like to direct your attention to Exhibit 437 . . . . Dr. Baggett, did you review this document, this part of Plaintiff's 437, which is a memo from Pat Harris to Nancy Bass entitled Break Hours, and it's dated December 4, 2000?

A: Yes.

Q: And can you tell the jury what you found important about this document? And I don't know if everyone – perhaps you could read the text in it because it's still a little hard to make out in that size.

A: It says these numbers are based on computing one day's worth of break time over 15 minutes by the number of stores across the country, I think, times 365 and divided by 60. . . .

Q: Dr. Baggett, why was this document important to you? . . .

A: Because it's a calculation by Wal-Mart across the country, and that amount is the value that they dock employees for rest breaks over 15 minutes.

Q: And do you know that because there's an answer to one of Plaintiffs' Interrogatories in this Plaintiffs' 437 [sic] that describes that?

A: Yes. . . .

Q: What about this explanation was important to you in understanding the document?

A: Well, it described how that number was calculated. And it begins –

Q: I'm sorry to interrupt. The numbers we're talking about was the 26 million dollar number that was handwritten on that document.

A: Yes. . . .

Q: And can you explain to the jury what those 3,185,444 hours were that were being discussed in this document.

A: That's number of hours across the United States or 3,000 stores at the time that Wal-Mart docks its employees for rest breaks over 15 minutes.

* * *

Q: And I'd like to direct you still in your binder to Plaintiffs' Exhibit 46, Plaintiffs' Trial Exhibit 46. This is a document dated April 17, 2000, and it's from Greg Campbell. We saw Mr. Campbell testify yesterday as part of the

information systems division at Wal-Mart, the computer people at Wal-Mart. What about this document, Dr. Baggett, is, was, of importance to you in formulating your opinions?

A: Well, this is one example of Wal-Mart's reliance on the time clock punch exception report. And that's the same report that lists the missed breaks and meals and short breaks and meals. And in particular, item two down below states the time clock punch exception report is a report that reported any kind of labor violation that could have some legal repercussions. . . .

Q: Dr. Baggett, what does the document state with regard to why it was sent?

A: Up at the top, it says: "There has been a bit of confusion in relation to the exception reporting. I am hoping to clear it up with this e-mail."

Q: Now, Dr. Baggett, the date of this document, April 17, 2000, was that significant to you for any reason?

A: Well, it's close to the time of the Shipley [A]udit.

Q: And was the Shipley [A]udit, Plaintiffs' Exhibit 88, was that another document you relied on in forming your opinions in this case?

A: Yes. . . .

Q: Dr. Baggett, can you tell me what about the Shipley [A]udit was important to you in formulating your opinions?

A: Well, this audit was done using the same data that I use to generate my numbers for the work that I do in this case, and they came up with the same conclusion that I did.

Q: Do you understand what data was used in the Shipley Audit, the time clock punch exception reports?

A: Yes.

Q: Are those the same time clock punch exception reports referred to in Plaintiffs' Exhibit 46 by Mr. Campbell?

A: Yes.

Q: Those are the reports that reported any kind of labor violation that could have some legal repercussion; is that correct?

A: That's correct.

Q: Going back to the Shipley Audit, Dr. Baggett, Plaintiffs' Exhibit 88, can you tell me what in particular in the Shipley [A]udit was important to you in forming your opinions in this case?

A: Yes. On the second page of the audit, there's a particular section on breaks and meals which was part of the Shipley [A]udit. And it specifically states: Stores were not in compliance with company and state regulation concerning the allotment of breaks and meals, as 76,472 exceptions were noted in 127 stores reviewed for a one-week period. . . .

Q: Dr. Baggett, if I could direct your attention to Plaintiffs' Exhibit 89. What about this doc-

ument, Dr. Baggett, was important to you in forming your conclusions in this matter?

A: Well, this document has the individual stores, of which there were five in the State of Pennsylvania. . . .

Q: Dr. Baggett, can you explain exactly what's shown on Plaintiffs' Exhibit 89? . . .

A: These are numbers for two of the five stores. This is store number 2252 in the first column and store number 1623 in the second column. And Wal-Mart has indicated the number of missed meals and the number of missed breaks that they recorded in the exception report for each of those two stores.

Q: And does the balance – Dr. Baggett, what about the third page of Plaintiffs' Exhibit 89 was important to you?

A: These are two additional stores, store number 2287 and store number 2597, of which, all of these are in Pennsylvania. And again, for those two stores, the same numbers are indicated. In other words, Wal-Mart recorded too few meals and two few breaks and wrote those numbers down in these two columns for each of those two stores.

Q: Do you understand that those are the actual computations done as part of the Shipley Audit in these four stores?

A: Yes.

Q: Now, Dr. Baggett, you mentioned a fifth store. We don't – are the numbers for the fifth store in this document, Plaintiffs' Exhibit 89?

A: No.

Q: Did you receive any information about the fifth store?

A: I did, but you couldn't read it. . . .

Q: I'd like to direct your attention, Dr. Baggett, to Defendant's Exhibit 78. Is this a document you reviewed in connection with formulating your opinion?

A: Yes.

Q: And what about this document was important to you?

A: Well, there's a couple of parts of this. The top section says: "Providing break and meal periods is part of our culture. It is the right thing to do for our associates. We've also updated our breaks and meals period policy." And then the section down or the bullet point down from that right here states that: "Due to the importance of associates taking their breaks and meal periods timely and completely, associates are subject to performance coaching for repeatedly failing to clock in or out for meal periods, missing breaks and/or meal periods or taking breaks and/or meal periods that are too long, too short, or untimely."

Q: Now, why was this particular piece of information important to you, Dr. Baggett?

A: Because that piece of information tells me that voluntary waivers of breaks and meals were not allowed. . . .

Q: Is there anything else, Dr. Baggett, that was of significance to you in this document?

A: Yes. Down below, in this real long paragraph here, states that meal periods should be a minimum of 30 minutes in accordance with company policy and may be provided for up to 60 minutes which I understand is the standard in Pennsylvania depending upon business needs. . . .

Q: Dr. Baggett, you have . . . Plaintiffs' Exhibit 47. That's an April 20, 2000, memo from Bob Montfill to regional; subject, Department of Labor Investigation. What about this document, sir, was important to you in formulating your opinions?

A: Well, this was a directive from Bob Montfill to the regional directors, and it states – it describes that Wal-Mart directs their regional directors to the time clock punch exception report to determine violations in the time clock. . . .

Q: And if I could direct your attention, sir, to the next exhibit in the book, Plaintiffs' Exhibit 48? . . . This is a memo dated April 21, 2000, to Don Harris. And what about this document was of importance to you in formulating your opinions?

A: It again describes Wal-Mart's reliance on the time clock punch exception report. . . .

Q: And the additional lines that appear under the highlighted section on Plaintiffs' Exhibit 51, were those important to you as well?

A: Yes. It just – it signifies additional importance to the record that Wal-Mart places on the accuracy of the time clock record. "Re-

> search all errors listed on the time clock punch errors report. Research the time clock activity log report and retain and then finalized [sic] daily payroll."

N.T., 9/19/06 (morning), at 21, 27-32, 35-36, 38-44, 51-56, 58-68; R.R. at 1653a-59a, 1662a-63a, 1165a-68a.

At the start of the afternoon session, Dr. Baggett was asked about a chart he prepared entitled, "Summary Analysis of Missed Rest Breaks." He was asked to explain the chart:

> A: For each of the 52 million shifts – or actually, 46 million that Wal-Mart provided, I compared the shift with what the rule stated in PD-07 as far as how many rest breaks and meals they got, and this chart is just – this is the total or indicates the totals after I added all those shifts up of the missed rest breaks. So this first column is just the rest breaks promised by Wal-Mart in PD-07. Then the next column is the number of rest breaks owed, which I tallied up from all the 46 million shifts, plus the additional ones that Wal-Mart didn't provide. And then the third column is just based upon each associates' hourly rate at that time. And so the totals of the three columns are indicated below, and the total damages to the Wal-Mart Associates for missed rest breaks is $68,412,107.

N.T., 9/19/06 (afternoon), at 9.

During the statutory period, Wal-Mart saved $48,258,111 by prohibiting rest breaks. Trial Ct. Op., 10/3/07, at 2. The jury was shown a chart which

showed Wal-Mart's Timeclock Archive Report Data based upon the forty-six million shifts and Statistically Determined Timeclock Archive Report Data. N.T., 9/19/06 (afternoon), at 10; R.R. at 1670a. Dr. Baggett explained the latter data:

> Q: And when you use the term "statistically-determined timeclock archive report data," what does that refer to?
>
> A: It means that all that I basically did was take the average number of missed rest breaks and apply it over to the data that was missing.
>
> Q: Okay. Dr. Baggett, in the column Statistically [D]etermined [T]imeclock [A]rchive [D]ata have you also included the shifts for which Wal-Mart did not provide you with data?
>
> A: Yes. And all those shifts include shifts that were recorded after February 10 of 2001. . . .
>
> Q: And how many shifts were missing from the data that Wal-Mart provided to you?
>
> A: There was about 10 percent of them missing.
>
> Q: So how many was that total in absence [sic] number?
>
> A: Well, it went – the number of shifts that Wal-Mart provided me was about 46 million, and then it ended up being 52 million with the shifts that Wal-Mart didn't provide. So a total of a little over 52 million shifts.
>
> Q: And did you use statistically-accepted methods, common statistical methods to derive

the missing shifts where Wal-Mart did not provide data as to the shifts?

A: Yes, I did.

Q: And do you hold your opinion about the missing shifts, about your deduction as to the missing shifts to a reasonable degree of statistical certainty?

A: Yes, I do.

Q: Did you do any testing in your work to ensure that your calculation of the missing shifts was correct?

A: Yes.

Q: Can you describe that work generally?

A: Yes. I did have the payroll data, but the payroll data just has information on pay period by pay period, which is a two-week time span. I don't have daily payroll data, it's just a total after two weeks. So I calculated the number of shifts that should be in the payroll data and compared that with the number of shifts that I estimated or that I determined statistically and compared those. And actually, the number that I determined statistically is about 5 percent less than what's indicated in the payroll.

Q: So your number of statistically-determined shifts is a conservative number based upon your testing of the data; is that correct?

A: Yes. It's conservative in Wal-Mart's favor. . . .

Q: And for that period after Wal-Mart eliminated rest break punching [February 10, 2001

to 2006], can you explain to the jury how you statistically determined the number of rest breaks promised by Wal-Mart pursuant to PD-07?

A: Yes. From all of the timeclock archive data that's prior to February 10, 2001 that I had, I used the average information on missed rest breaks to then fill all of this information where Wal-Mart had no longer recorded rest breaks. . . .

Q: Dr. Baggett, the methodology that you used to statistically determine the missing data, was that a statistically-accepted method in the community of people who study statistics?

A: It's probably the most commonly used technique in statistics. It's just a simple average is all [sic] I used.

Q: Do you hold the opinions reflected on this chart to a reasonable degree of statistical certainty?

A: Yes.

Q: If we could turn to the next chart that would be Summary analysis of Short Rest Breaks. . . . And that's expressed again in hours rather than in number of breaks?

A: Yes, and then Rest Break Hours Owed to Class Members due to Short Rest Breaks. So I tallied up for all of the 52 million shifts the number of hours that were owed to the Class members. . . .

> Q: Okay, and the Rest Break Hours Owed to Class Members Due to Short Breaks, that was a total of 902,460 hours?
>
> A: That's correct. . . . For each shift I took that Associate's hourly pay and then determined what they were owed based upon the amount of time out of the short rest breaks. And that total comes out to $7,561,968. . . .
>
> Q: And, Dr. Baggett, the explanation that you provided to the jury in connection with the first chart that we looked at, the Summary analysis of Missed Rest Breaks with regard to how the statistically-determined timeclock archive data was derived, is that the same for this chart?
>
> A: Yes.

N.T., 9/19/06 (afternoon), at 11-16, 18-19; R.R. at 1670a-76a.

Dr. Baggett was asked to explain the one-minute docking of employees for long rest breaks:

> Wal-Mart doesn't care about this period or interval. Actually they do. If that rest break is 1 minute too long, if it's 16 minutes long, they dock the associate for that 1 minute.
>
> And we saw an example here yesterday of where Dolores Hummel received a 16-minute rest break and an 11-minute rest break. And even though she was promised 34 minutes for that rest break, she only received – she was docked 1 minute. She was paid for 15 minutes of the 16-minute rest break and 11th [sic] minutes of the other rest break.

> So it's like they disregard short rest breaks until they're 11 minutes or shorter on the one side. But on the other side, if it's as much as 1 minute too long, the associate gets docked.

N.T., 9/20/06 (morning), at 28.

Dr. Martin Shapiro, an expert in statistics, computer programming, and psychology, testified. N.T., 9/21/06 (morning), at 13, 20; R.R. 1745a, 1748a. He compared the time-clock data to the cash-register data. *Id.* at 20; R.R. at 1749a. Each cashier had a unique cashier identification number. *Id.* at 21; R.R. at 1750a.

> Q: Is this a computer file that is linked to the cash register database?
>
> A: Yes, the cash register database is in fact the daily compilations of this file. Every day, there's a file created for every cash register transaction that happened in the store that day.
>
> Q: And did you then compare those records that the cash registers generated electronically with the time-keeper record that is generated when an employee swipes a badge in and out for shifts or meals or rest bricks (sic)?
>
> A: Exactly. That is, what I did was merge or, if you wish, marry the two files, so that I could see, or the computer would see. Obviously I didn't look at each one of them individually. But the computer could track whether the individual had clocked in for the day or whether they had clocked out for the day before they got on the cash register.

Q: And can you tell by looking at the data whether the person clocked in at the beginning of the shift, clocked out at the end of the shift, clocked in for a rest break, clocked out after a rest break, clocked in for a meal, clocked out after a meal?

A: What happens in the Wal-Mart computer system, is every time you punch the clock, well, you swipe your badge, but, old fashioned, we call it punch the clock, every time you punch the clock, it creates a record in the time-keeper database. And the time-keeper database categorizes, names, that record, either as a punch in for the day or a punch out for a rest or a punch back in for a rest or the same with a meal, a punch out or in, and then finally they punch at the end of the day. And they literally are what is called a punch code. And a one is that you just clocked in for the day. A two is the end of your shift. A three is the beginning of a rest. And a four is the end of a rest, and a five is the beginning of a meal, and a six is the end of a meal. And a nine is that you didn't really clock out, but the manager clocked you out.

Id. at 21-23; R.R. at 1750a-52a.

Q: Was that lock-out program put in by Wal-Mart before or after you told them you could do this analysis?

A: It was done after I said that I was going to do the analysis of comparing the two databases, and then they initiated the lock-out.

Q: How long after you told Wal-Mart you could do this analysis did they start implementing this time clock lock-out program?

A: I think it would be about six months.

Q: Now, what is the significance to you that Wal-Mart instituted a lock-out program to prevent cashiers from operating cash registers when they weren't on the time clock?

A: Well, it signifies several things: One is, you know, apparently there was something that had to be changed. There was a problem that had to be cured, and so that's one clear thing. The third is that of course they in essence were agreeing with me that the analysis, the comparison, could be done, because the lock-out system is really the same thing; that is, every time somebody tries to get on the register, you're comparing – you're looking at the time clock and asking whether they're clocked this in or not, so it essentially is the same analysis that I was doing. So they're verifying that the analysis can reliably be done, because they're doing it.

Q: Okay. And the problem that you mentioned, is this the problem of associates operating cash registers while they're not on the time clock?

A: Yes.

Q: Is this lock-out program something Wal-Mart could have done prior to the beginning of this class period back in 1998?

A: Yeah, of course. I mean, it was no different – the computer system is no different then than it is now.

Id. at 29-30; R.R. at 1756a-58a.

Q: You have the cash register activity logs that show who's operating that register and whether it's actually being operated, correct?

A: Correct.

Q: And on the other hand, you have the payroll data automatically generated by Wal-Mart's computers from the employee swiping in and out?

A: That's correct.

Q: Or the managers editing?

A: Correct.

Q: Tell me what you do in one sentence, please, at that point in time so I can have follow this (sic).

A: One sentence. . . . Well, you add the two files together so that they're now in one file. But of course, they're in the wrong order because when you just put 'em together, all of one kind's at the top, and all of the other kind's at the bottom. So you have to sort them. And, you know, just like you would do on e-mail or Excel or, you know, any other computer program, you tell the computer to sort, put all the data from the first store together. Then with – and do the same for the second store and so forth. Then once you have it sorted by store, sort it by person – that is, associate ID number – so that all the data for a particular

person are together. Then finally sort it by date and time so that now the records are in chronological sequence.

Q: Okay. What I kind of envision – tell me if I'm wrong – is, I have a letter I've got over here and a letter I'm writing to somebody else over there. And I want to put it all into one letter and send it to both of them, so I drag the information off this letter and pull it over. Is that what you did with these two databases?

A: That's the first step, yes.

Q: All right. And then you sort it?

A: Then you sort it by store, individual employee, and chronological order. So what you end up with is in a sense a time record of – one record for all the time clock work and all the cash register work inter-leafed together; that is, in one long column for each person.

Q: And do you do that so that you can match up what the person's doing on the cash register to what their time clock shows?

A: That's right. For each cash register action. I want to know were they on the clock or off-the-clock; that is, what's the last time record that, time clock record, that you have. . . . And once you have these two databases merged so that you can line these times and persons in stores up, is that when you run your sort function and ask for it to identify these type of shifts?

A: Well, the sorting is done first so that they're inter-leafed. And then you run a select; that is, let me see those that are off the clock. Now, when I say let me see, the computer isn't real-

ly pulling them out. It's just flagging them; that is, it's just, you know, putting a one next to all – each one that's off the clock, so that now when you go to count them or something like that, it knows what to count versus what to ignore because it's not off the clock. . . .

Q: Now, you mentioned 16 stores that you looked at the data; and as I understand it, that's data from 2001 to 2006, because Wal-Mart had purged certain data before 2000; is that correct?

A: That's correct.

Q. For those six – you mentioned something earlier about putting a one up there to identify off-the-clock work. Can you explain that?

A: Well, what I mean is, the final analyses are done by counting time only in the cash register actions that are off the clock. So what you have to do first is identify those cash register operations that are off the clock. And what the computer does simply is, you tell it the rule to use, and next to each off-the-clock record, it puts a one, and next to all the other records, it puts a zero. So now when you do your counting and so forth, you're just counting off the clock.

Q: And you're counting the ones?

A: Well, you may be counting instances – that's counting how many ones there are – but more likely you're counting the time difference between successive ones, because you want to know the total time off the clock, so the time record is what you're looking at usually.

Q: So you're looking at the length of time between the successive ones for that particular associate?

A: That's right, and then you're going to add them up, yes.

Q: And the difference in the ones, the time interim of the ones, is where the employee is actively operating the cash register but not punched in on the time clock?

A: That's correct. . . .

Q: For the period of 2001 through part of 2006 of this class period, did you tabulate those instances of time where the associate was operating a cash register but not on the time clock?

A: Yes. . . .

Q. And this chart, can you explain what you did, why you included this chart in your report?

A: Yes. For each year, I looked at two, two sets of times. The first set of times are in the next two columns labeled off clock. Those are the number of hours off the clock and the number of actual cash register operations off the clock and – yes, those two columns.

Q: So the off-the-clock total time – strike that. The off-the-clock number, that's the instances that you saw where this happened?

A: Yes.

Q: And by this happening, you're talking about the lengths of time where the employee was operating the operator accountable cash register but not on Wal-Mart's time clock?

A: That's correct.

Q: And the second column, off-clock total time, is that the hours that you get when you add up all these instances of that period of time?

A: Yes.

Q: That period of time again being the time where the employee is operating a Wal-Mart operator-accountable cash register but not on the time clock?

A: Yes. We can be a little more specific: The time after the cashier logs on to the register; that is, actually puts in his password again, and then stays on the register.

Q: So the operator that is responsible for that cash register would input his or her own unique PIN number and start operating the cash register but not be on the time clock?

A: That's right. . . .

Q: So for the years 2001 through the number of months we've included in 2006, you identified 22,875.6 hours of associates in Wal-Mart and Sam's Clubs operating operator-accountable cash registers but not on the time clock?

A: That's correct. . . .

Q: Did you see an increased correlation in the amount of time the cashiers were on the clock ringing up items during their shift after Wal-Mart eliminated rest break punching?

A: Yes, that time increases.

Q: Have you seen that in Pennsylvania as well as the other states that you have analyzed?

A: Yes, I believe that pattern holds.

Q: And you hold that opinion to a reasonable degree of certainty in your areas of expertise?

A: Yes.

Id. at 43-47, 49-50, 52-54, 57, 62-63; R.R. at 1766a-70a, 1773a.

Dr. Shapiro explained how he extrapolated data from the 16 stores:

Q: Now you talked about the 16 stores earlier. How did you apply it to the 102 stores in Pennsylvania that existed in 2001?

A: Okay. What I did was, I divided that number by 16, so I now had the number of hours per store. I then multiplied the number of hours per store by 102 to increase it to account for all 102 stores.

Q: Is that acceptable in your areas of expertise?

A: Yes. I mean, that's how you would extrapolate 20 from a sample to a population.

Q: And do you hold that opinion within a reasonable degree of certainty in your areas of expertise?

A: Yes.

Q: All right. When you calculated the 1,309.4 hours we saw on the last chart for the 16 stores, what did you come up with this number as 3 applied to the 102 stores?

A: It's 8,347.4.

Q: And is that hours?

A: Yes, those are hours.

Q. So you were able to identify through this method statistically that there were 8,347.4 hours between the time a Wal-Mart associate had clocked out and the time they began running the cash register off the clock?

A: Yes.

Q: All right. And if you remember the chart a minute ago, you had 7,520.3 hours for off the clock, and that is the time that the associate was actually working on an operator-accountable cash register, actively working up items or ringing up items while they were off the clock?

A: Yes.

Q: That sum was 7,520.3 hours. When you divide that by 16 and then multiply it by the 102 stores that exist, what do you come up with?

A: 47,941.9.

Q: And again is that hours, Dr. Shapiro, that Wal-Mart associates are operating accountable cash registers but not on the clock in Wal-Mart and Sam's Club stores?

A: Yes. . . .

Q: Now, the next column is average hourly rate. What did you use for the average hourly rate?

A. Actually I got the average hourly rate from Dr. Baggett's report because he had done it already. I mean, it's simple enough to do. You just take the payroll file and calculate the average for each year. But he had calculated al-

ready, and I simply used his numbers, and his number was $8.20.

Q: Do you dispute the figure that Dr. Baggett had gotten?

A: No, not at all. . . . I added – and another extrapolation for the missing operator ID; that is, because they were purged, erased by Wal-Mart until 2003, there are people in 2001 and 2002 that can't be identified either. In fact, there are 9 percent of the people who can't be identified. . . .

Q: All right. Let's go to 2002. Did you do the same methodology for 2002?

A: Yes. . . .

Q: I noticed that between 2002 and 2003, the number went from $738,472.30 to 242,765.47.

A: Yes, it's a big drop.

Q: What do you account for that large drop?

A: In 2003, Wal-Mart changed their policy and introduced the lock-out; that is, they literally were doing the analysis we're looking at now in the sense that if you were off the clock, the system would not allow you to log on to a cash register. . . .

Q: Is the manager override and the ability for a manager to come in after the employee has left and clock 'em out earlier, is that what accounts for the fact that you continued to see some off-the-clock work for cash register operations after they instituted the lock-out program?

A: That's right. You can't tell in 2003, because the lock-out was introduced partway through the year. But you can see it in 2004 and –

Q: Why don't we go to 2004. What did your analysis in 2004 show for off-the-clock work?

A: Well, there are 130 stores, and you see the amount of off-the-clock work total drops to $93,000. . . .

Q: All right. Did you do the same for 2005?

A: Yes.

Q: And did you do the same for 2006?

A: Yes.

Q: All right. Now, what we have blank on our demonstrative is 1998, 1999 and 2000. Can you tell the jury what you did to account for the off-the-clock work in the stores for which you do not have the data because Wal-Mart had purged it?

A: Yeah. I simply took the average of 2001, 2002, in terms of per store, because you then have to account for the fact that there are fewer stores in those years. I took the average per store and simply applied it to the earlier years, corrected by how many stores there were.

Q: So you took 2001 and 2002, because that was the lowest number of stores; is that correct?

A: Well, I took it because those are the data from before the lock-out. So if you want to look backwards, you really have to look at 2000 and 2001 where the rules at Wal-Mart were the same as they were in '98, '99, and 2000. You

really can't use the time after 2003, because they changed the rules.

Q: So the change in the rule was the implementation of the lock-out program?

A: Yes.

Q: What did you come up with for 1998, Dr. Shapiro?

A: Well, in 1998 for the 68 stores, it's $262,208. And actually the date begins August 21st, 1998, so it's just a partial year.

Q: All right. What did you do for '99?

A: For the 92 stores, it's $467,086.92. Again, all of these are corrected for the 9 percent because they're using 2001 and 2002 data.

Q: And what did you find out for the year 2000? A: And in 2000, 95 stores are $511,928.27.

Q: I noticed in 1998 through 2002, the numbers are relatively increasing, with the exception of maybe $4,000 between 2000, 2001. Do you see that?

A: I'm sorry, say that again.

Q. Sure. You have $262,280 in off-the-clock work in 1998. . . . What was the total of the amount of off-the-clock work that you calculated during the class period for Wal-Mart associates who were operating operator-accountable cash registers while off Wal-Mart's time clock?

A: $2,993,063.32.

Q: What is your opinion as to the value of the time of the Wal-Mart associates who were working off the clock and operating operator accountable cash registers in the State of Pennsylvania?

A: $2,993,063.32.

Q: And do you hold that opinion and all opinions that you have given us here today within a reasonable certainty within your areas of expertise?

A: Yes.

Id. at 64-66, 68, 70, 72-76; R.R. at 1774a-75a.

In the afternoon session, Dr. Shapiro's testimony continued and his report of September 18, 2006, was discussed. The calculation of damages in that report differed from numbers given earlier in his testimony:

Q: The new report changes virtually every single calculated number, doesn't it?

A: Yes, but the – a large number of the changes are very, very small. I think quite easily it's described to you what the change is. It's a very specific point that I realized that the data analysis did not exactly reflect what I intended my analysis to be, and so I re-ran the analysis to reflect the description of the analysis. . . .

Q: The new report that I got last night says that there were 10,086.5 hours less pre-off-clock work than you had calculated with scientific certainty on August 30th. Correct?

A: Correct. That is the one area that I changed. . . .

Q: Now let me ask you about edits to employee's time records. We heard a little bit about that from other witnesses and you talked a little bit about edits to the timeclock archive reports as well?

A: That's not quite – edits to the timekeeping data. The Timeclock Archive Report would show the final set of times. . . .

Q: Let me rephrase it again. You are here to testify on behalf of the Class in support of its claim for damages for off-the-clock work, correct?

A: A specific kind of off-the-clock work, yes.

Q: And the specific kind of off-the-clock work that you have studied is limited to operator-accountable registers, correct?

A: And operators, which represent about 30 percent of the Class probably.

Q: Yes, right. And to your knowledge, there is no other study or analysis of any kind in this case of any kind of other off-the-clock work, is there?

A: There are no data for the ones you specify because they are not tracked through a data base. . . .

Q: Does the work that the Wal-Mart cashiers on a Wal-Mart-accountable cash register in Wal-Mart stores who were not punched in on time clocks appear on the Timeclock Archive Report used to pay the Wal-Mart employees?

A: No, those times are not in the data, the timekeeping data used to derive payroll.

Q: So do you just have to look at the Timeclock Archive Reports to pay the employees for every minute they work as required by Wal-Mart's own written policy PD-43?

A: No.

Q: What else do you have to look at, Dr. Shapiro?

A: Well, you've got to look at the other evidence for work that is not on the Timeclock Archive Report.

Q: Do you have to look at the analysis that you have done and to find out that the Class has been underpaid by $2,993,063 and 32 cents?

A: Yes.

Q: Has Wal-Mart always, since 1998, been able to look at its own records and do this analysis?

A: Yes. . . .

Q: Has Wal-Mart locked the employees off that unless they are on the timeclock since you told Wal-Mart you could do this analysis?

A: Yes. . . .

THE COURT: All right. What is your opinion as to whether the final Archive Time Report accurately reflects all the work that Wal-Mart workers did in Pennsylvania?

THE WITNESS: The Timeclock Archive Reports reflect the paid time and the recorded breaks. They do not reflect off-the-clock work of the other varieties that I have been asked about.

N.T., 9/21/06 (afternoon), at 9-11, 21, 48-49, 60-62, 69-70; R.R. at 1780a-82a, 1792a, 1801a-02a.

Wal-Mart's expert testified and attempted to discredit Drs. Baggett and Shapiro:

> Q: I understand what you are hired to do, but your team came up with the same number of shifts, correct?
>
> A: Yes. We were able to understand what Dr. Baggett did and to replicate his counting of the time swipes in the data system, yes.
>
> Q: So Dr. Baggett correctly counted the time swipes and the shifts, correct?
>
> A: Yes. We were able to replicate his analysis fairly closely.
>
> Q: I think last year when you testified, that you came up within .003 percent of the same number that Dr. Shapiro came up with?
>
> A: Yes, that's right. Again, we were able to replicate his counts, not at all that we agree with his conclusions.

N.T., 10/5/06, at 33. She testified further:

> Q: Is your criticism of Dr. Baggett based on some inability of his to simply count?
>
> A: No. No. Again, and we talked about this a little bit earlier, but we can replicate what he did. We can understand what he did. And he has counted properly. Our criticism goes to the conclusions that he draws from that counting.

Id. at 37. The following occurred at side bar outside of the jury's presence.

> The Court: What do you assume is wrong?

> The Witness: The two major things are that a missed swipe is not equal to a missed break.
>
> * * *
>
> The Court: What else?
>
> The Witness: He is assuming – he is doing the big extrapolation for missing data. And so he is taking data that we know is bad and he is using it to fill in data that's missing. So he is filling in – necessarily, by definition, he is filling in data that's bad. And that's a statistically improper thing to do.
>
> The Court: Okay. Is there anything improper if the data was good?
>
> The Witness: No. Extrapolation is a technique that statisticians can use.

Id. at 46-48. When asked if she was "critical of Wal-Mart for eliminating rest break swiping," she replied, "No. That's not part of my opinion here at all." *Id.* at 90. Dr. Martin's criticism was based on her opinion that the data was "bad," rather than that the methodology of extrapolation was flawed.

> Q: Now, are you as confident in your testimony that a punch exception report in the year 2000 would not identify a 12-minute rest break as you are of any other opinion you have offered in this case?
>
> A: Yes. My understanding is that rest breaks between 12 and 14 minutes did not show up on the exception reports.
>
> Q: So, if I show you an exception report that this jury has seen from May 30, 2000 that identify [sic] 12-minute rest breaks, 13-minute

rest breaks, and 14-minute rest breaks, will you agree your opinions in this case are wrong?

A: No. I would have to look at that data.

Q: Well, let's look at it then. Let's look at Plaintiff's Exhibit 2b. You have seen Plaintiff's Exhibit 2b, haven't you?

A: I don't know that I have seen exactly this exhibit. I have certainly seen a lot of timeclock punch exception reports. . . .

Q: Isn't it true, Dr. Martin, that the only request you made was for Mr. Manne to give you what he thought was important for you to look at?

A: No. That's absolutely not true.

Q: Did he show you this document, Exhibit 2b?

A: I don't know if I have seen this. They all look very familiar. I am not sure I have seen this exact document. I have certainly seen many documents that are timeclock punch exception reports.

Q: Do you understand that this document identifies 12-minute rest breaks?

THE COURT: Do you want to read the whole document, or do you want to read a portion of it, or just wait until she reads it off the screen?

Q: Let's look at the fourth shift down. I believe it's of a Christopher Boas. Do you see the last break there? On the right?

* * *

A: Okay. I see that that says Too Few Meals and Too Many Breaks.

Q: It says he got a 13-minute rest break, doesn't it? Right there on the right. It says ":13"?

A: Yes. But that's not the reason that the entry is showing up on this report.

Q: It's on the report, is it not, for any manager in that store to look at, right?

A: Sure, it's on the report.

Q: So you are wrong that 13-minute rest breaks did not show up on this report, correct?

A: No, that's incorrect.

Q: All right. Let's look at the shift for Mary Brossman. She has a 14-minute rest break there. Do you see that?

A: Yes, I see that.

Q: You also know, because you have read the Payroll/Scheduling Guide, that she was docked a minute for her 16-minute rest break that's shown there, but she didn't get it back although she got a shortened rest break at 14 minutes, right?

A: Yes.

Id. at 91-94.

Q: Now, in reaching your conclusions, you didn't rely on any of the testimony of Wal-Mart's key executives, did you?

A: No, that's not right.

Q: Did you rely on Cannetta Ivy Reid's testimony?

A: Yes.

Q: You know that she is the voice of Wal-Mart with regard to compliance?

A: I know that she is head of compliance, yes.

Q And you know that she was put on this witness stand by Wal-Mart, the same witness seat that you are sitting in, as the designated representative for compliance?

A: Yes, I understand that.

Q: If you read her deposition you would agree with me, would you not, that she says the exception reporting is done?

A: Exception reporting is done?

Q: Yes, where they go in and – the manager goes in and looks at the punch exception report and investigates and resolves what's on that report before the timeclock records are finalized. Do you not know that?

A: No. That's not what she testified to.

Q: All right. Let's play her testimony so we can all see it.

(At this time the following video clip of Cannetta Ivy Reid is played for the jury:)

"Q: Okay, fair enough. There can be a limited number of exceptions to that general statement that the timeclock punch exception report investigation needs to be done before the timeclock archive report is finalized?

"A: Yeah.

"Q: But those should be limited exceptions?

"A: That is our goal.

"Q: It should not be the preponderance of the time?

"A: Our goal would be that all exceptions to the best of that manager's ability need to be investigated and, you know, if in fact the person did get a meal period, that that be reflected accurately in the records. That is our goal.

"Q: Similarly, it is your goal to make sure that if the employee did not get a meal period that is also reflected in the timeclock archive report?

"A: Yes, that would be.

"Q: And the timeclock archive report is the finalized payroll document that's used to pay Wal-Mart hourly Associates?

"A: Again, I am not going to say it's used to pay them, but it does show the Associate, Here are the hours that we've recorded for you for this week for this pay period.

"Q Fair enough. And if an employee's timeclock archive report shows 39.85 hours, they're going to be paid for 39.85 hours in that payroll period?

"A: They should be, yes."

[Appellees' Counsel:] Do you remember that testimony?

A: I didn't see it live before, but yes, I remember that.

Q: Ms. Reid, the designated spokesman for Wal-Mart, confirms that the punch clock exception reporting is investigated and resolved

before the payroll records are finalized, correct?

A: No. She didn't say that. She said it was the goal, the policy.

Q: Is it your testimony that when Mr. Holley signs the Wal-Mart tax returns under oath, under the penalty of perjury, that those tax returns are inaccurate?

A: No.

Q: You know who Mr. Holley is, don't you? A: No, actually, I don't recognize his name.

Q: Mr. Manne didn't give you Mr. Holley's sworn testimony?

A: I don't believe I read Mr. Holley's sworn testimony, no.

Q: Would you agree with me that the top executives in this company like Mr. Tom Coughlin, Mr. Don Swann, Mr. Mike Huffaker, know more about what goes on at Wal-Mart than you?

A: Yes.

Q: You would defer to their testimony under oath what really happens at Wal-Mart rather than the opinions you have been hired to give this jury, correct?

A: No, I wouldn't agree with that.

Q: Did you read Mr. Coughlin's deposition?

A: No, I did not.

Q: Did you read Mr. Harris' deposition?

A: No.

Q: Did you read Mr. Swann's deposition?

A: No.

Q: Did you read Mr. Castural Thompson's deposition?

A: No.

Q: Do you know who Mr. Castural Thompson is?

A: No.

Q: Did you view the video clip of Tom Coughlin saying, They are to get their breaks. This just drives me crazy. They are to get their breaks. It's not an optional issue. Did Mr. Manne show you that video clip?

A: I have seen a video clip, I believe in trial, of Tom Coughlin. I wouldn't agree with your representation of it.

Q: Did you see the video clip of Don Swann addressing the personnel – strike that – yeah, the personnel managers at the shareholders meeting, where he says the allegations are true, and it's because of payroll pressure?

A: Again, I have seen that video clip in trial. I wouldn't – I am not sure if those exact words were used.

Id. at 100-05 (colons added). Dr. Martin was questioned regarding the use of extrapolation in the field of statistics:

Q: All right. Now, extrapolation. You criticize both Dr. Baggett and Dr. Shapiro for extrapolation, correct?

A: Yes, for the – for their extrapolation in these situations, absolutely.

Q: And both Dr. Baggett and Dr. Shapiro extrapolated to fill in gaps for data Wal-Mart had destroyed, correct?

A: I don't know whether Wal-Mart – no, no, I wouldn't agree with that.

Q: Dr. Baggett extrapolated to fill in the gaps in the data he was given, correct?

A: Yes, it's correct that one reason he extrapolated was to fill in data that was illegible. He couldn't read it on the printed TCAR reports.

Q: It was illegible, and in fact, some were missing, correct?

A: Yes, I believe some of the reports were not available, that's right.

Q: And Dr. Shapiro had to extrapolate for information that Wal-Mart had erased. Correct?

A: No, I don't recall that.

Q: You don't recall from reading his report and reading his testimony that Wal-Mart had destroyed 9 percent of the operator I.D. information?

A: Now that you say that, I do remember that he had – that for 9 percent of the data in that particular instance he extrapolated. So you are right, I am sorry.

Q: And another extrapolation Dr. Baggett did was to fill in the gap because Wal-Mart was no longer allowing its employees to clock in and out for rest breaks after February 9, 2001, correct?

A: I disagree with your characterization of not allowing their employees. They made a deci-

sion in February of 2001 not to have employees swipe for rest breaks anymore. So there is no sort of, by definition, there is no rest break data after that point.

Q: You know why they did it, don't you?

A: No, I don't – I wasn't part of that decision.

Q: You know why they did the timeclock lockout to prevent Dr. Shapiro from doing this analysis was because of litigation, don't you?

A: No, I don't know that.

Q: Put up Exhibit 522 please. Did Mr. Manne show you this E-mail?

A: Yes, I have seen this E-mail.

Q: And you read it carefully, didn't you?

A: Yes, I read this E-mail.

Q: You know that Greg Campbell in the ISD Department was asking for these lockout programs, and he said, "Please help us, as you are aware of this hot topic with all the current litigation we are involved in." Did you not notice that when you read it?

A Yes, I noticed that.

Q: So it's a true statement, is it not, that the timeclock lockout program was done because of litigation?

A: This document – yes, I believe this document says that one of the reasons for the timeclock lockout decision is litigation. I am sure there are other reasons.

Q: You are reading that into this on behalf of Wal-Mart, aren't you?

THE COURT: Reading what into what?

Q: That there are other reasons. It says the current litigation. It doesn't say anything else, does it?

A: This document doesn't say anything else, no.

Q: Thank you. And you know that Wal-Mart eliminated the rest break punching because of litigation, don't you?

A: No, I don't know that.

Q: All right. Dr. Baggett had to extrapolate the rest break punching after Wal-Mart – strike that. Dr. Baggett had to extrapolate the missed rest breaks after Wal-Mart eliminated the rest break punching because Wal-Mart did away with the proof of that; correct?

A: Yeah, I wouldn't agree with the way you are characterizing it. He had to extrapolate because there was no rest break swiping after February of 2001. So there was, by definition, no rest break swiping data.

Q: Let's see if we can agree on this. You would agree if Wal-Mart was still punching out for rest breaks, Dr. Baggett wouldn't have to extrapolate to find out when the timeclock archive reports showed a missed break, right?

A: Yes, that's right. If there was still swiping, he would have data rather than extrapolation.

Id. at 107-11; R.R. at 2079a-83a. Dr. Martin testified that she used extrapolation when she testified in a case against Wal-Mart in California.

Q: Wal-Mart hired you last year in the matter in which you testified in November to extrapolate for them, didn't they?

A: No, they didn't hire me to extrapolate for them. . . .

Q: Did you extrapolate last November on your own?

A: Yes. That was one of the pieces of analysis that I did.

Q: Right. You extrapolated for meal break waivers, correct, prior to March of 2003, right?

A: Yes, that's right.

Id. at 111; R.R. at 2083a.

Q: Now, I believe when we broke you were talking about the opinions that you had given on behalf of Wal-Mart a year ago when you extrapolated that. Do you remember that?

A: Yes.

Q: In fact, what you did is, Wal-Mart began taking written waivers from its employees regarding meal breaks in California, correct?

A: Yes, that's right.

Q: You took the evidence of written waivers beginning in March 2003 and applied them to the period before March 2003. You remember that?

A: Yes. I used extrapolation to draw a conclusion about waivers orally that had occurred before 2003, that's right. . . .

Q: Do you remember admitting on cross-examination that there were 207 written

waivers in Wal-Mart's system prior to March 2003?

A: Oh, I am sorry, 207. I thought you said 207,000. I didn't know what you were talking about.

Q: I misspoke. Let me make sure we understand each other, okay? You extrapolated that there should be 600,000 waivers prior to March 2003, correct?

A: Yes. That was approximately the number of oral waivers that I estimated occurred during that time period.

Q: Right. And you extrapolated that estimate of oral waivers based upon the number of written waivers Wal-Mart got from their Associates after March 2003, right?

A: Yes, that's right. . . .

Q: Dr. Baggett, where there was missing data prior to 2001, filled in the gaps by extrapolating, correct?

A: Yes.

Q: You understand, do you not, that Dr. Baggett verified those extrapolations by comparing the shifts that he estimated by the total hours on the TCARs. Did you know that?

A: I read his report, yes.

Q: He did not disregard any data to do that, did he?

A: No, I am not aware that he disregarded any data. . . .

Q: You know for a matter of fact, do you not, from reading [Dr. Shapiro's] testimony that Wal-Mart had purged 9 percent of the operator information, correct?

A: Yes. I understand that 9 percent of the operator information was missing, according to Dr. Shapiro's report.

Q: And Dr. Shapiro then extrapolated from the data he did have to fill in for that 9 percent, correct?

A: Yes.

Q: In addition to that, Dr. Shapiro extrapolated from his example of 16 stores to the 139 stores in general, correct?

A: Yes, that's right.

Q: You have access to the same data, don't you?

A: Yes.

Q: And you have never done the analysis for those other hundred-some-odd stores either, have you?

A: No, I have not. . . .

Q: Now let's talk about your criticism of Dr. Baggett for the six-hour shifts. You have read PD-07, correct?

A: Yes.

Q: If an employee goes over six hours working for Wal-Mart, even if it's six hours and one minute, they are entitled under PD-07 to a meal break, right?

A. Yes.

Q: And they are entitled to a rest break, right?

A: Yes.

Q: A second rest break, correct?

A: Yes. . . .

Q: They are entitled to it because Wal-Mart has promised them as a benefit of their employment, correct?

A. Yes.

N.T., 10/5/06 (afternoon), at 122-28; R.R. at 2085a-86a.

Dr. Frank Landy, an expert in human resources, industrial organizational psychology, and statistics, testified for Appellees that a reasonable employee would understand Wal-Mart to have offered and promised the benefits.

Q: Dr. Landy, could you tell the jury what Defendant's Exhibit 146 is?

A: This is a description of various benefits that associates get when they come to work for Wal-Mart.

Q: It's called the associate benefits book?

A: The Associate Benefits Guide, The Associate Benefits Book, yeah.

Q: And what about this document did you consider important?

A: Well, what I particularly found important were pages 110 and 111 of this document.

* * *

A: . . . Section is called My Money, right. And if you highlight Paid Programs, just the first

two lines, right. That's good. In addition to the pay you receive for regular day's work, there are other programs and benefits that can supplement your income. And then they're going to list a number of these benefits.

So if you go to the next page, the very first item on the top says one of those benefits they were just talking about, paid break periods: Take a break and get paid for it. Paid breaks differ by facility. See your personnel representative for details about paid break time in your division and your facility. Yesterday we saw a comparison of Sam's Club and Wal-Mart. And what it showed was that in all facilities, the break policy is the same. If you work three hours, you get one break. If you work six hours, you get two breaks.

So in this benefit guide they hand to associates, this says this is a benefit; this is what you get, this is part of your money. . . . Because they're all communications to the associates. They all represent the same promise, the same agreement. They say it on posters. They say it on the website. They say it on benefit guides. They say it every place they can, that this is a benefit.

So the associates say, they've said it often enough and in as many different places and in as many different ways, so this is their promise. And Tom Coughlin said this is a nonnegotiable.

Q: Dr. Landy, I'm going to ask you to refer to Plaintiffs' Exhibit 460, which I think was right

around, yeah. I think you have it there, 460. It's the associate handbook?

A: Yes.

Q: Can you tell the jury what this is and when associates get it?

A: My understanding is that when the associate is – it's one of the early steps in them becoming a 1 worker for Wal-Mart. They're given an associate handbook. They're asked to read it and to sign it and acknowledge that they have seen what's included in it.

Q: And can you refer us to the page where they have to acknowledge it?

* * *

A: I see, right. This is in the left-hand section, give the signed – read and sign the acknowledgment, separate the acknowledgment at the perforation; give the acknowledgment to your manager.

Q: Is there anything that you reviewed in the text below that you considered in developing your opinions in this case?

A: There is a sentence about halfway down that paragraph that begins, from time to time, if you can highlight that right. From time to time, Wal-Mart may determine that it needs to change some of the policies or programs in this handbook in order to better meet the requirements of our associates and the company.

Then the next sentence: If any policies or programs are changed, modified, deleted, or supplemented, Wal-Mart will notify associates as

> soon as possible. . . . [T]hey have told them in every way they can that paid breaks are a benefit. They've told them on the website. They've told them on the paper guideline, the booklet. They've told them on posters. Tom Coughlin has said it in messages. I mean, they've said it every way they can that this is our promise to you.

N.T., 9/13/06 (morning), at 42-44, 46-47, 52; R.R. at 1553a-55a, 1557a-58a, 1562a.

Dr. Landy testified that the manager bonus program impacted negatively on the rest breaks and off-the-clock benefits:

> And as we had seen a number of times yesterday and the day before, the single biggest expense for a manager was payroll. It was payroll. So if a manager could reduce payroll and stay within the hours they gave him or her, in all likelihood, as long as the sales stayed where they were supposed to be, the manager would make a bonus. And the lower the expenses, the bigger the bonus. So I was already concerned about preferred hours. Everybody was concerned about that. There were managers concerned about it. There were associates concerned about it. We don't have enough people. That translated directly into bonuses for managers; that is, running a store with fewer people meant lower expenses and a bigger bonus. . . .
>
> Q: Did you make any association between a store manager's ability to capture missed breaks, missed meals, off-the-clock work, and his bonus?

A: I did.

Q: Can you tell the jury what your association was?

A: I did some calculations, and there's really big numbers. But I can give you the bottom line to this: If we have a manager who takes – who's able to capture one minute a week, just one minute a week, so if I have two minutes in a year, is able to or her store, so let's just assume that there were 300 associates in the store, which is not an outrageous number. That's kind of average, maybe a little low. All he had to do is get one minute of their time every week for 52 weeks and he would add to his bonus something around $1300 for one minute. So if he could capture one minute a week from 300 people, that would increase his bonus by $1300. Now, if –

Q: $1300 a week?

A. No. $1300 at the end of the year, but that's for one minute.

Q: Oh, I see.

A: If he was able to capture one hour, this is over just one hour, a week, his bonus would be enhanced by $82,000.

Q: So if an associate missed two breaks and one lunch?

A: $82,000. If 300 associates missed two breaks and one lunch a week, or you could have two hours of off-the-clock, it really doesn't matter how you put it together, it's

> rest break, meal break – he would see $82,000 more in his bonus at the end of the year.

Id. at 77-79; R.R. at 1585a-88a. Dr. Landy testified that Wal-Mart was aware of the violations of company policy:

> A: Exhibit 98 is a memo from Kendall Schwindt. We've talked about him before. He was one of the generals. And he says that in this memo, which goes to store managers, so this is one of the generals talking to the troops. A major issue from grass roots was that our associates are not receiving scheduled breaks and lunches. Now grass roots was an employee survey they do every year to find out whether the employees are happy. And the employees were saying they're not getting their scheduled breaks and lunches. He says not only is this against company policy, it is also a violation of federal law. Violation of this policy will result in disciplinary action. He's saying it is our responsibility to keep track of records and to give people their appropriate breaks. It's not only law, it's also company policy.
>
> Q: All right. Now, who was this memo sent to?
>
> A: Well, the memo was sent to all store managers. But on the right-hand side, you can see it went to all the Division 1-A district managers and all the regionals and then to Tom Coughlin. And Tom Coughlin is the CEO. So the date of this memo was also kind of important. It's 1998.

N.T., 9/12/06 (morning), at 51-52. Dr. Landy was asked whether there was a problem with cashiers:

> Q: Had there been any indications other than the grass roots survey, had there been other surveys that top management had seen at Wal-Mart indicating they may have a problem with staffing or cashiers or something like that?
>
> A: Well, yeah. I mean, there are cashiers, what's called a cashiers' survey, where they were concerned about the turnover with cashiers. The turnover for cashiers might run 120 percent, 140 percent, which means the average cashier stays with Wal-Mart in a store that has 140 percent turnover six months, seven months, then we're go. We're spending time to train them. We're getting them into the schedule, and then they're leaving. What's going on? So they would survey cashiers to see how come they're leaving. And one of the things that cashiers would frequently say is, we're not getting our breaks. We're on our feet too long. We're not getting relieved. It's just a grueling kind of job. . . .
>
> Q: Exhibit 48 what you're referring to?
>
> A: Yes.
>
> Q: Was there something significant about where this went to, and can you tell the jury about this?
>
> A: Well, the issue is that this was something that Tom Coughlin said at a Dallas meeting, and that is that the top five reasons cashiers quit are, they can't get breaks and they're un-

derstaffed. Understaffed means not enough people. Same thing as [sic] since there's not enough people, they can't get breaks.

Q: Is there a correlation between understaffing and the ability to get breaks and meals?

A: Yeah. I mean, it's logical. If you don't have enough people to relieve somebody, they can't get a break. So if I have staffed a store of some kind with just enough people to run every part of the store but I don't have one extra person who can wander around and give people relief, what are you going to do? I mean, you can't just say sporting goods is closed for an hour or, you know, we're not going to unload a truck.

Id. at 55-57. Dr. Landy described the purpose of the internal audits that were performed.

Q: Now I think you indicated that there were a number of audits then done?

A: Correct.

Q: Tell the jury approximately how many? I think we have a stack of them?

A: Yeah. There are about ten. And they begin in September of '99, which is about the same time as that memo we saw about Tom Coughlin and the Dallas meeting. It was in '99, around that time period. They start doing individual audits, sometimes just a single store like a store in Alabama or Iowa.

Q: Like 104?

A: Correct, that's a good example.

Q: And these run through – and rather than throwing them all up, just so we can save the

jury some time, how many are we talking about, what?

A: I think there are ten.

Q: So like 104 through 113?

A: Yeah.

Q: But this is an example, a good example, of all the rest we would look at?

A: Yeah, the only difference being if you want to highlight audit scope, yeah. This one was conducted in 12 stores across the United States. Some of them were done with just one store. Some of them were done with collections of stores, so some of them are big, and some of them are small. But yeah, they're all – the structure of them is pretty much the same.

Q: And what did you find significant about using this as an example of the 12 others – 10 others?

A: Well, a couple things. First, if you go to the upper right-hand CC, yeah, just highlight the whole thing, we say first this is going to Tom Coughlin. I'll just pick out some of the names of the four-star generals. It was going to Rob Hay, who was Tom Coughlin's deputy assistant. It's going to go Mike Huffaker. It's going to Dale Jackson, going to Coleman Peterson who is here in the courtroom. It's going to Kendall Schwindt. It's going to Larry Williams. It's going to regional VPS. So it's going to a (sic) lots of folks, generals. So that was the first important thing. The second important thing is if you go down to breaks and lunches because that's obviously what one of the

things that interested me was breaks and lunches, there were in these 12 stores during this week, there were 738, 15-minute breaks scheduled, and there were 208 exceptions. An exception could be a break that wasn't taken or a break that was too short. So that's an exception. So 28 percent of the scheduled breaks were not taken or at least were too short. And then if you look at the lunch breaks, 344 were scheduled in these 12 stores during this week, and 28 of them were exceptions, meaning that either they got too short a break or the break came too – or the lunch or break or the lunch came too late or they didn't get a lunch at all. So that's 8 percent of 'em. So what they're saying essentially is, the relative thing, is that the violation of the company policy about the 15-minutes breaks proportionately is much, much greater than the violation of lunches, but missing eight percent lunches and missing 28 percent breaks? That's a big deal.

Q: And now there are audits that were done for at least nine other places or groups of places, correct?

A: Yeah. Just let me make one more point about that, the first line of that. Says a review of the time clock archive report was conducted so the time clock archive report – that's the gold standard. That's what you look at. That's what with (sic) the auditors looked at. Anyway, there were nine more of these that were done either for an individual store, for a group of stores, during a period roughly from September of '99 through March, April, May, of

> 2000. So a period of about a six, seven months, there's ten of these audits that concentrate on meal and rest breaks.
>
> Q: And you relied on all of those exhibits 104 through 113 in developing your opinions in this case, correct?
>
> A: I did.

Id. at 62-65.

Dr. Landy testified about the Shipley Audit, a nationwide audit of 128 stores, 5 of which were in Pennsylvania. *Id.* at 65-67. The audit indicated that 76,472 exceptions were noted in 127 stores for a one-week period. *Id.* at 67. The audit indicated that the number of too-few breaks was 60,767, the balance missed meals. *Id*. at 68. He stated: "There aren't enough people in the store because of preferred scheduling, which is leading to missed breaks and missed meals. So now this is all starting to make some sense. And the audit says, we've got a problem." *Id.* at 74. There was a policy for correcting mistakes:

> The average store runs between 30 and 50 time adjustment slips daily. This is 300 to 600 exceptions, but only 30 to 50 adjustments. Adjustment means that the associate actually comes and says, no, no, I actually did get my break; I just forgot to swipe in or out for. So it says the magnitude of this problem even after they correct it for honest mistakes is big.

Id. at 81-82. The parties stipulated that the jury would be told how many lawsuits against Wal-Mart had been filed. *Id.* at 86. As a result of the Shipley Audit, the following actions were taken:

> They – well, two things: First is that they didn't do any more audits. We saw those admissions for rest breaks or off-the-clock work. And the second was that they eliminated the process whereby associates would punch in or swipe in and out for rest breaks, so they just eliminated punching in and out for rest breaks.

Id. at 88.

The commonality of proof of the loss of rest breaks and work off the clock was demonstrated by Appellees relying upon Wal-Mart's own business records.[18] Dr. Landy testified:

> Q: [W]hy did you consider the time clock archive reports important in performing your analysis?
>
> A: Well, there's the – the important part of the time clock archive reports is that this is the official record of – of how, for example, when we talked yesterday about you'd lose a minute if you're a minute too long on break, you don't get it back, and you said that it's the time clock archive report that shows. And we looked at it yesterday, a version of it. It shows you how the computer adds and subtracts time, which means adds and subtracts money. So

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18 *Cf. In re Wal Mart Employee Litig.*, 711 N.W.2d 694, 695 (Wis. Ct. App. 2006) (denying class certification based upon unmanageability of class; because "much of the pertinent Wal-Mart payroll records were generated in the first instance by members of the proposed class," Wal-Mart would have right to examine those individuals).

the time archive report is the official record. That's how Wal-Mart pays its people and presumably pays taxes on them and does other kinds of things. So that's – that's – that's the official record. . . .

Q: Other than getting the little documents again, we created a sheet. What did you consider important about this, and can you tell the jury what it is?

A: Well, this is – this is a report that comes off of the report we just saw. So the time clock archive report says you should have had a 15-minute break, you had a 14-minute break. It would appear here on the next report – this is a more refined report – as a long break, for example. . . . So a long shift means, watch out, this person could be headed for overtime, and you may want to take some hours back later in the week so you don't get into overtime, because overtime is not good. So we have all sorts of these things that are indicated here: Short break, short shift, meal too early, too many meals, long break. So this is the report, which comes off of the time archive report, now identifies for the store manager all sorts of key little things. Now, it does a couple of things. It tells the manager what's going on here so a long shift, the manager says, "Ooh, you know, Mike Donovan worked ten hours. I got to keep an eye on his hours for the rest of the week because we can't get into overtime. The second thing that's – that it indicates what that computer down in Bentonville is going to do. A short break is going to take some

> time off – I mean a long break will take your time away. If you're on a break two minutes too long, that's coming out of your paycheck. . . . But what it does say, when you have too few breaks, you now – you're now notified in an official sense this could be a problem. There could be a violation of some kind, company policy, the promise, a wage and hour law if it's a lunch or meal. So, this report tells you a lot of things.

Id. at 30-34.

Ms. Hummel was a named class representative. She testified that she started to work at a Sam's Club store in 1992. N.T., 9/18/06 (afternoon), at 11, 24; R.R. at 1632a, 1635a.

> Q: Do you remember that there was an orientation at the start of your working at Sam's Club in 1992?
>
> A: Yes.
>
> Q: And during that orientation did you receive a Handbook?
>
> A: Yes, I did.
>
> Q: Did you also sign an Acknowledgment form?
>
> A: Yes.
>
> Q: And did you understand when you did that that you could quit Sam's Club at any time?
>
> A: Yes.
>
> Q: Did you also understand that Sam's Club could terminate you at any time?
>
> A: Yes.

Q: Did you understand, in other words, that you were an employee at will?

A: Yes.

Q: Now during this orientation at Sam's Club, did you learn that you were entitled to get paid rest breaks?

A: Yes, that's what I was told.

Q: And did you understand you were entitled to paid rest breaks depending upon the length of the shift that you worked, the number of hours?

A: Correct. . . .

Q: Did you ever miss meal or rest breaks during the time you worked at Sam's Club?

A: Yes.

Q: And did you – were you told by any manager at Sam's to work through your rest breaks or meal breaks to get your productivity up? . . .

THE WITNESS: Yes.

Q: Ms. Hummel, did you work off the clock while you were an employee at Sam's Club?

A: Yes, I did, many times.

Q: And why did you do that?

A: Because my managers told me to.

Id. at 13-14, 20-21; R.R. at 1634a. She was terminated after ten years and told that there was not enough work for her in the bakery. *Id.* at 23.

Ms. Braun was an employee at Wal-Mart from November 17, 1998, until she was fired in late January of 1999. N.T., 9/15/06 (afternoon), at 9; R.R. at 1626a.

Q: Do you remember that first day you went to Wal-Mart?

A: Orientation, going through the Handbook, them explaining what was to be done and how it's to be done. Yeah.

Q: About how long did that last?

A: About four – four hours everything lasted.

Q: Did you read the Handbook?

A: Did I read it in its entirety? No, but I did skim through it, and I can remember a lot of things.

Q: What do you remember about the Handbook or your first day there at orientation about the rest and meal breaks?

A: Fifteen minute meal – I am sorry, one-hour meal breaks, fifteen-minute breaks, regular breaks, to clock in and out, to – well, it was basically what we were entitled to.

Q: And as a result of that – well, let me back up first. Did they show you where the timeclock was?

A: Yes.

Q: Was there any posters around the timeclock?

A: Yes. There was posters all over the place.

Q: What did the posters say?

A: Punch in and out, make sure you get your meal breaks, make sure you get your breaks, be accordingly(sic) when you are on your breaks.

Q: You were hired as a cashier, correct?

A: Yes.

Id. at 7-8; R.R. at 1624a-25a. Ms. Braun was asked to describe the time between the day after Thanksgiving, which was referred to as Blitz, and through Christmas:

Q: Was that a busy day?

A: Busiest. It was as if they were standing there pounding on the door to walk in that morning. I am looking at them before they walked in the door.

Q: Now between Blitz, the day after Thanksgiving, and right before Christmas when you stopped being a cashier, can you tell the jury what it was like there as a cashier?

A: It was horrible. Some days you got your breaks, all of them. But there was a lot more times where, especially being a cashier, you would be on your lunch for 23 minutes, you would get called right back in. They would come outside and get you.

If you were sitting outside enjoying your meal break, they are out the door getting you. They would bring you back in, but I got to clock back in. You can't, you don't got time for that, you got to get back on the register, look at the all lines we got there (sic). . . .

Q: Now you mentioned having to zone. Did you ever have to zone off the clock?

A: All the time.

Q: How would that come about?

A: When I was on the cash register we would go up count out our money, throw our bags in

the cash room, come down, do our registers, go to the door, getting ready to leave, ready to leave. No, you got to go help soft lines, or, you got to go help the electronics department, or, you got to go help the hunting department. I thought my job was done, and I was told – I had said my schedule is until 11 o'clock. I am to leave at 11.

Q: Did you work at the Franklin Mills store?

A: Yes.

Q: Did that store close at 11 p.m.?

A: Yes.

Q: Were you told to go zone after the store was closed?

A: Yes.

Q: When you went and tried the front doors, what did you find?

A: It was locked.

Q: Who told you to go back and zone?

A: A lot of occasions it would be a customer service manager. On two occasions it was Travis Bailey, the Store Manager. . . .

A: I was told if I had a complaint, problem, personal problem, door is always open.

Q: And what happened when you used it to complain about being locked in the store?

A: I got fired.

Q: When you were the cashier, how would you signal the Cashier Service Manager that you desperately needed a break?

A: You flick your light up and it blinks.

Q: Were there store meetings concerning that?

A: Yeah.

Q: What were you told in the store meetings by Wal-Mart managers?

A: Exactly the way they said it?

Q: Yes.

A: "Starting to look like Christmas out there, stop blinking them lights."

Q: Was that out on the floor?

A: That meeting was on the floor. . . .

Q: Did you miss rest breaks at Wal-Mart?

A: Yes.

Q: Did you receive short breaks at Wal-Mart?

A Yes. . . .

Q: Were you forced to work off the clock?

A: Yes.

Id. at 10-11, 18-19, 26-28.

Patricia Holley testified that she worked at the Franklin Mills Wal-Mart:

Q: You were told by a member of salaried management at the Franklin Mills store that despite the policy that said you got two rest breaks, your second one was a privilege?

A: Yes.

Q: Were you working more than six hours so that you earned it under PD-07?

A: I was actually in the Wal-Mart store for nine hours. My schedule scheduled me for nine hours.

Q: How did it come up that you were asking about the second break that you weren't receiving?

A: Because I never got them and I wanted to know, I asked, well, I thought I was supposed to get two breaks. And he said that's it, the second one was the privilege.

Q: How did you know you were supposed to get two 15-minute rest breaks?

A: I did read it.

Q: Did read what?

A: I read it in the Handbook.

Q: You were fired from Wal-Mart, correct?

A: Yes.

N.T., 9/22/06 (afternoon), at 6-7.

Delores Killingsworth Barber was a Wal-Mart employee from 2003- 2005. N.T. 9/25/06 (afternoon), at 16; R.R. at 1897a.

Q: Do you recall anything from your orientation at Wal-Mart?

A: We just – different people were there for different positions, they had addressed us by positions, what our responsibilities would be according to our positions. They let us know about their policies, that we get breaks – we get two breaks and we get a lunch. So I thought that was a great benefit. They let us know about their insurance, the 401(k), their stock plan, different things like that. . . .

THE WITNESS: We didn't get our breaks because there wasn't enough people to cover us,

> to relieve us to get our breaks, to take our first fifteen minutes. Sometimes our lunch we wasn't able to take until the end of the shift, or we would have to take a half a lunch, things of that nature.
>
> Q: Was anything said to you by anyone about your second break that stands out in your mind?
>
> A: They – we would request our breaks and they would just let us know that we couldn't take it, they didn't have anyone to relieve us, as soon as they could that they would. And this was said to us by the Customer Service Managers, the CSMs and sometimes the assistant managers, the salaried managers.
>
> Q: How frequently would this happen?
>
> A: That we didn't get our breaks? Probably about three times a week we didn't get our breaks.

Id. at 16-17, 20; R.R. at 1897a-98a, 1901a.

Instantly, the trial court opined:

> In support of their claim, [Appellees] present expert analysis of [Wal-Mart's] own computer records of employee time and activity. [Appellee] relies upon the expert opinion of Dr. L. Scott Baggett[,] a highly qualified consulting statistician, the opinion of Martin M. Shapiro[,] a highly qualified psychologist and researcher at Emory University with significant experience in the application of the statistical quantification of measurement operations, each of whose reports are of record and the "Shipley Audit[,]" an analysis performed

for management purposes by [Wal-Mart]. All expert analyses relied upon [Wal-Mart's] own computer records maintained in the regular course of their business for business purposes, namely to determine the pay earned by hourly employees. These computer records are mandated by law including the Pennsylvania Minimum Wage Act of 1968 which states: "Every employer of employees shall keep a true and accurate record of the hours worked by each employee and the wages paid to each . . . ."

[Wal-Mart's] business record, the "Time Clock Archive Report" records the "total hour's (sic) worked" and "total breaks" for every employee for every shift worked. [Wal-Mart's] own records, the Time Clock Punch Exception Report lists missed or inadequate breaks. These reports have been utilized and relied upon by [Wal-Mart's] management for payroll and evaluation purposes. The same reports were relied upon and analyzed by [Appellees'] experts.[5]

[Wal-Mart] claims to have an unalterable written policy of providing all employees and there all putative class members with all mandated rest and meal breaks. This policy, applicable to all employees, incorporated in "PD-07" requires that all "work associates" receive one paid rest break of 15 minutes during any three hour work period and two paid 15 minute rest breaks and one unpaid meal break of 30 minutes over a six hour work period. [Wal-Mart] further claims to have an unalterable written policy incorporated into "PD-43"

that no associate "should perform work for the company without compensation" and that no supervisor may request or require any associate to work without compensation. [Wal-Mart] is mandated by law in Pennsylvania to advise every employee of the wage payments and "fringe benefits" to which they are entitled.[6]

Dr. Baggett examined management reports from March 1998 to December 2000 for twelve stores in Pennsylvania. Based upon an analysis of 23,919 individual shifts covering 2,250 individual associates Dr. Baggett concluded that 17,556 or 64.4% of the shifts contained deficiencies in duration of rest and meal breaks and 10,889 or 40% of workers did not receive the appropriate number of breaks. As to [Appellee] Hummel herself, Dr. Baggett found 35.8% of her breaks were deficient in duration and 28.3% deficient in number.

These findings for Pennsylvania stores by [Appellee's] retained expert are consistent with [Wal-Mart's] internal audit performed in June 2000. After studying the computer "exception reports" in 127 stores nationally including five stores in Pennsylvania, [Wal-Mart's] Internal Audit division found "Stores were not in compliance with company and state regulations concerning the allotment of breaks and meals as 76,472 exceptions were notes in 127 stores reviewed for a one week period." 75% of these missed breaks concerned rest breaks 25% concerned missed meal breaks. [Wal-Mart's] own internal management analysis revealed that an average of 2

> breaks per associate per week were either missed or shorted at every store. The internal audits findings concerning the Pennsylvania stores actually revealed greater deficiencies than Dr. Baggett's conclusions.
>
> Other computer records were also analyzed by [Appellees'] experts. [Wal-Mart's] database records time associates spent on other electronic devices such as cash register and computer based learning terminals. [Appellees'] expert Dr. Shapiro compared this database with time records and determined that while associates were recorded as taking breaks they were also recorded as being engaged in employment related activities.

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[5] Even though [Wal-Mart] relied upon these records which are mandated by law, to determine associate's pay, [Wal-Mart] claims that their employment records are inaccurate and may not be relied upon. While this defense may be persuasive at trial, for purposes of this preliminary procedural certification decision the [c]ourt accepts these business records as *prima facie* accurate.

[6] 43 P.S. 260.4, actual notification is not required since posting is sufficient for compliance.

Trial Ct. 1925(a) Op., 9/3/08, at 5-6 (quoting Trial Ct. Cert. Op., 12/27/05, at 8-10).

Wal-Mart avers that Dr. Baggett's testimony could not demonstrate on a class-wide basis whether employee swipe records adequately reflected missed breaks. Individual employees would have to be questioned, Wal-Mart claims, to determine whether Wal-Mart managers forced class members to work

through or cut short their breaks. Similarly, Dr. Shapiro's methodology could not show off-the-clock work. His analysis of data from cash registers at sixteen Wal-Mart stores could not show whether or why employees worked off the clock. Simply because an employee was not logged onto Wal-Mart's timekeeping system, Wal-Mart argues, did not prove that the employee was forced to work off the clock. In support of its contentions regarding Appellees' experts, Wal-Mart cites *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592 (E.D. La. 2002), *Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1 (Md. Ct. Spec. App. 2007), *Petty v. Wal-Mart Stores, Inc.*, 773 N.E.2d 576 (Ohio Ct. App. 2002), *Harrison v. Wal-Mart Stores, Inc.*, 613 S.E.2d 322 (N.C. Ct. App. 2005), and *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002).[19] These cases are distinguishable from the instant case because those courts do not liberally construe class action rules. See *Cutler*, 927 A.2d at 14. Furthermore, the Petty Court did not discuss the Baggett-Shapiro testimony. In *Basco* and *Lopez*, the courts do not discuss the Baggett-Shapiro testimony, and they are further distinguishable from the instant case since they involve claims for breach of oral contracts. *See Basco*, 216 F. Supp. 2d at 602-03; *Lopez*, 93 S.W.3d at 556-57.

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[19] Wal-Mart acknowledges that other jurisdictions certified class actions, viz., *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (Mass. 2008), *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo. Ct. App. 2007), *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007), and *Armijo v. Wal-Mart Stores, Inc.*, 168 P.3d 129, 142 (N.M. Ct. App. 2007). Wal-Mart's Brief at 35. Wal-Mart also notes that it has reached settlement agreements in *Hale*, *Iliadis*, and *Armijo*. *Id.* at 35 n.22.

It is undisputed that corporate, written directives existed governing rest breaks and off-the-clock work, *viz.*, corporate policies PD-07 and PD-43. Prior to February, 2001, all hourly employees were required to clock out for breaks. The parties stipulated that after January 4, 2001, this policy changed and that there was pending litigation:

> Stipulation on litigation pending as of January 4, 2001: Wal-Mart stipulates and agrees that by January 4, 2001, at the latest, it had decided that it would no longer require employees to swipe in and out for rest breaks. "That policy change became effective on February 9, 2001. As of January 4, 2001, 2 lawsuits alleging violations of Wal-Mart's rest break policy had been filed against Wal-Mart on behalf of employees in seven states: Colorado, Indiana, Louisiana, New Mexico, North Carolina, Ohio, and Texas.

N.T., 9/26/06 (morning), at 5; R.R. at 1905a.

Furthermore, in response to a request for admissions, Wal-Mart stated:

> [Appellees' counsel]: For the record, Your Honor, the Request For Admission Number 47 asked:
>
> "During the relevant period, Wal-Mart Corporate Policy PD-07 was dictated to associates at Wal-Mart stores and Sam's clubs by corporate headquarters in Bentonville."
>
> "Response: Defendants admit only that PD-07 was communicated to hourly associates in Pennsylvania stores during the relevant period in a variety of ways, including, among other

things, during the training of new hourly associates, signs posted in stores, computer-based learning, the pipeline/wire, and Wal-Mart's closed-circuit television system, and that many of communications concerning PD-07 originated from defendant's corporate headquarters in Bentonville, Arkansas. In all other respects, this request is denied." And in addition, Your Honor, plaintiffs will publish to the jury the request for admission relating to the grass roots survey and rest breaks. This was similar to the ones that were already published on meal breaks and off-the-clock work. It's Request for Admission 324. For the record, this reads: "In the year ended January 31, 1999, the grass roots survey inquired about whether associates received their rest breaks.

"Response: Defendants admit that the grass roots survey for the year ended January 31, 1999, did not include any direct question concerning whether or not hourly associates who worked in Pennsylvania stores received rest breaks. "However, the grass roots survey did measure overall hourly associates' job satisfaction concerning, among other subjects, associate treatment and the application of defendant's policies. In all other respects, this request is denied."

Your Honor, this same request, this identical request, without me reading it into the record, was also admitted in the same language for each of the years 2000 through 2006.

N.T., 9/26/06 (morning), at 6-8, R.R. at 1906a-08a.

Wal-Mart's own policies and its directives for enforcement of the policies are undisputed. The individual most qualified to speak of Wal-Mart's policies, Mrs. Reid, testified that managers and associates would be disciplined if they violated the rest break policy. The policies were strictly enforced by Wal-Mart. If a manager reported that a fellow manager forced an employee to work off the clock, then that manager would be subject to discipline. In fact, that manager would not be promoted and may be fired.

Undisputed testimony from Wal-Mart's own personnel verified that the associates were not receiving rest breaks. The executive vice president of human resources worldwide, Mr. Peterson, who reported to the president and chief executive officer, Mr. Coughlin, acknowledged a memo sent as early as 1998 that associates were not receiving rest breaks. Every associate had access to the twice-yearly meetings attended by all store managers and Wal-Mart's top management via an internal internet system. It is undisputed that Wal-Mart's policies were disseminated to associates.

Mrs. Reid testified that associates received employee handbooks at orientation which contained the promise of certain benefits.[20] "Unilateral contracts . . . involve only one promise and are formed when

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[20] Wal-Mart noted: "Wal-Mart's rest break policy was not mentioned at all in some versions of the employee handbook." Wal-Mart's Brief at 24 n.14. Both of those employee handbooks contain the following statement: "Note: All associates please refer to your Benefits Summary Plan Description (SPD) Booklet for eligibility requirements and details of your benefits." R.R. at 6719a, 6779a. The SPD references rest breaks. R.R. at 6789a.

one party makes a promise in exchange for the other party's act or performance." *First Home Sav. Bank, FSB v. Nernberg*, 648 A.2d 9, 14 (Pa. Super. 1994). *In Bauer v. Pottsville Area Emergency Med. Servs., Inc.*, 758 A.2d 1265 (Pa. Super. 2000), this Court stated:

> Provisions in a handbook or manual can constitute a unilateral offer of employment which the employee accepts by the continuing performance of his or her duties. A unilateral contract is a contract wherein one party makes a promissory offer which calls for the other party to accept by rendering a performance. 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.
>
> *Darlington v. General Electric*, 350 Pa. Super. 183, 210-12, 504 A.2d 306, 320 (1986) (Beck, J., concurring).

Id. at 1269.

Instantly, Appellees do not argue that the handbook supplanted their employee at-will status. On the contrary, they contend that at-will employees may be parties to a unilateral contract. In *Bauer*, as in the case *sub judice*, the employee handbook provided a disclaimer that the employer was an employer-at-will. The Bauer Court found that an employee handbook could create a contractual relationship while not supplanting the at-will employer-employee relationship:

[T]he employee handbook stated, in relevant part:

EMPLOYMENT

Pottsville Area E.M.S., (herein referred to as PAEMS), is an "at will" employer. This means that employment may be offered or denied at any time for any reason. Both PAEMS management and the employee reserve the right to terminate employment at any time for any reason.

* * *

STATUS CLASSIFICATIONS

Full Time-Any employee scheduled for at least 36 hours per week for a period of 90 consecutive days will be treated as a full time employee.

(Employee Handbook, effective May 1, 1998, at 1.) In addition, the handbook set forth appellee's policy regarding attendance, vacation, paid sick time and other benefits. Specifically, full-time employees are given forty (40) hours of sick time per year, eight (8) hours of compensated time off for holidays, up to twenty-four (24) hours of bereavement leave, health coverage, and compensation for military service and jury duty. The handbook does not provide for part time and per diem employee benefits.

In its Opinion, the trial court found there was no contract upon which to base a cause of action because appellee evidenced its intent to maintain the at-will employment relationship.

> We [i.e., the *Bauer* Court] disagree. In this case, a reasonable person in appellant's position would understand that his continued performance would bear the fruits of his employer's policies. Appellant worked the requisite 36 hours per week for in excess of 90 days and received none of the benefits provided for in the handbook.

Id. "A handbook distributed to employees as inducement for employment may be an offer and its acceptance a contract." *Morosetti v. Louisiana Land & Exploration Co.*, 522 Pa. 492, 495, 564 A.2d 151, 152 (1989). In *Morosetti*, however, "[t]he employees in their evidence were able only to show that they believed there was a policy of severance pay." *Id.* at 495, 564 A.2d at 153.

We are persuaded by the reasoning in a decision by the United States District Court for the Eastern District of Pennsylvania, *Caucci v. Prison Health Servs., Inc.*, 153 F. Supp. 2d 605 (E.D. Pa. 2001), where the court stated:

> An employment handbook is enforceable against an employer if a reasonable person in the employee's position would interpret its provisions as evidencing the employer's intent to supplant the at-will rule and be bound legally by its representations in the handbook. The handbook must contain a clear indication that the employer intended to overcome the at-will presumption. The court may not presume that the employer intended to be bound legally by distributing the handbook nor that the employee believed that the handbook was a legally binding instrument. Generally, explicit dis-

> claimers of contract formation in an employee handbook preclude a breach of contract claim.
>
> Notwithstanding this, provisions in a handbook or manual can constitute a unilateral offer of employment which the employee accepts by the continuing performance of his or her duties. A unilateral contract is a contract wherein one party makes a promissory offer which calls for the other party to accept by rendering a performance. 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. Thus, the provisions comprising the unilateral contract may be viewed as a contract incidental or collateral to at-will employment. An employer who offers various rewards to employees who achieve a particular result or work a certain amount of overtime, for example, may be obligated to provide those awards to qualifying employees, although retaining the right to terminate them for any or no reason.

Id. at 611 (citations and quotation marks omitted); *see also Golkow v. Esquire Deposition Servs., LLC*, No. 07-3355, 2009 WL 3030218, at *3, 2009 U.S. Dist. LEXIS 87226, at *7 (E.D. Pa. Sept. 23, 2009) (stating, "A unilateral contract is proven if the plaintiff can show that 'one party made a promissory offer, which calls for the other party to accept by rendering

performance.'" (quoting *Bauer*, 758 A.2d at 1269)); *Pilkington v. CGU Ins. Co.*, No. 00-2495, 2000 WL 33159253, at *6-7, 2001 U.S. Dist. LEXIS 3668, at *22-*23 (E.D. Pa. Feb. 9, 2001) (employer can create a unilateral contract with employee-at-will by offering additional terms of employment conditioned upon the employee's continued performance of his job).

In *McGough v. Broadwing Commc'ns*, Inc., 177 F. Supp. 2d 289 (D.N.J. 2001), applying Pennsylvania law, the court stated:

> Defendants are correct in maintaining that this Compensation Plan, which is attached to the Complaint as an exhibit, does not in and of itself alter the Plaintiffs' status as at-will employees. *See Herbst v. General Accident Insurance Company*, 1999 WL 820194 (E.D. Pa. 1999); *Anderson v. Haverford College*, 851 F. Supp. 179, 181 (E.D. Pa. 1994); *Raines v. Haverford College*, 849 F. Supp. 1009 (E.D. Pa. 1994).[5] Plaintiffs' status as at-will employees, which appears to be undisputed, does not, however, excuse Defendant Broadwing from providing compensation for services rendered prior to their termination. The presumption of at-will employment confers a legal status upon employees hired for an undefined term of employment which addresses a particular aspect of the employment relationship-the ability of both employer and employee to terminate their employment relationship at any time without explanation or cause. *See Herbst*, 1999 WL 820194 at *8; *Ruzicki v. Catholic Cemeteries*, 416 Pa. Super. 37, 610 A.2d 495, 497 (1992). The doctrine does not, however, ad-

dress other aspects of the employment arrangement, such as issues regarding the promised form and amount of compensation for work completed prior to an employee's termination. *See Kotlinski v. Mortgage America, Inc*.[,] 40 F. Supp. 2d 298, 307 (W.D. Pa. 1998); *see also Martin v. Safeguard Scientifics, Inc*., 17 F. Supp. 2d 357, 368 (E.D. Pa. 1998). While an employer may permissibly discharge an at-will employee at any time with or without cause, the doctrine does not relieve an employer of its contractual obligation to provide the compensation promised in return for an employee's services. Moreover, while the language of the Plan's disclaimer may reserve Broadwing's right to alter the nature and extent of Plaintiffs' compensation for future services, it cannot and does not permit Broadwing to retroactively modify the terms of Plaintiffs' compensation for work performed prior to such modifications.

An express contract is formed when the terms of an agreement are declared by the parties either verbally or in writing. However, even where no such clear declaration exists, a contract may nevertheless be implied-in-fact. A contract implied-in-fact is an actual contract which arises when parties agree on the obligation to be incurred, but their intention, instead of being expressed in words, is inferred from the relationship between the parties and their conduct in light of the surrounding circumstances. *See Halstead v. Motorcycle Safety Foundation, Inc.*, 71 F. Supp. 2d 455 (E.D. Pa.

1999).[6] An offer and acceptance need not be identifiable and the moment of formation need not be precisely pinpointed. *See Ingrassia Construction Co., Inc. v. Walsh*, 337 Pa. Super. 58, 67, 486 A.2d 478 (1984). In general, there is "an implication of a promise to pay for valuable services rendered with the knowledge and approval of the recipient, in the absence of a showing to the contrary." *Martin v. Little, Brown and Company*, 304 Pa. Super. 424, 429, 450 A.2d 984 (1981). As one Pennsylvania court has explained, "a promise to pay the reasonable value of the service is implied where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails himself of the service." *Id.* at 430, 450 A.2d 984 (citing *Home Protection Building & Loan Association*, 143 Pa. Super. 96, 98, 17 A.2d 755 (1941) and 12 Amer. Jur. Contracts, § 5). However, a promise to pay for services can only be implied, however, in circumstances under which the party rendering the services would be justified in entertaining a reasonable expectation of being compensated by the party receiving the benefit of those services. *Id.*

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5 Under Pennsylvania law, in order to rebut the presumption of at-will employment, a plaintiff must establish the existence of additional consideration other than the services he was engaged to perform, an agreement for a definite duration, or an agreement specifying he will be discharged only for just cause. *See Herbst v. General Accident Insurance Company*, 1999 WL 820194 at *8 (E.D. Pa. 1999). A

> document such as the Compensation Plan promulgated by Broadwing is only enforceable as a contract modifying an employee's "at-will" status "if a reasonable person in the same position as the employee would interpret its provisions as evidencing an intent by the employer to overcome the at-will presumption." *Anderson*, 851 F. Supp. at 181. Courts have consistently held that, under Pennsylvania law, the existence of a disclaimer expressly disavowing any intent to contract are sufficient to retain the at-will presumption. *See id.* at 182.
>
> 6 Defendants do not suggest that averment of an express contract is necessary to state a valid cause of action under the WPCL. As case law suggests, the statute merely requires the existence of a binding legal duty upon the employer to provide the compensation sought by the complainant. Under Pennsylvania law, a contract implied-in-fact "has the same legal effect as any other contract" and "differs from an express contract only in the manner of its formation." *Ingrassia Construction Co., Inc. v. Walsh*, 337 Pa. Super. 58, 67 n. 7, 486 A.2d 478 (1984).

Id. at 295-97. "[I]t is the intention of the parties which is the ultimate guide, and, in order to ascertain the intention, the court may take into consideration the surrounding circumstances . . . ." *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 839 (Pa. Super. 1986) (citation omitted).

Appellees claimed that Wal-Mart deprived the class of unpaid, thirty-minute meal-periods and paid, fifteen-minute rest-breaks pursuant to Wal-Mart's PD-07 policy and required its employees to work off the clock without compensation, in violation of PD-43. Appellees claim they continued to work in reliance on the promise that these corporate policies would be enforced.

In *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007), the Supreme Court of New Jersey reversed the trial court's refusal to certify a class of "all current and former hourly employees of Wal-Mart (including Wal-Mart Stores, Supercenters and Sam's Clubs) in the State of New Jersey during the period May 30, 1996 to the present." *Id.* at 714.[21] The Court held "that common questions of law and fact predominate over individualized questions and that the class-action device is superior to other available methods of adjudicating this dispute." *Id.* On virtually identical facts, the Court opined:

> First, plaintiffs allege breach of implied-in-fact contracts concerning rest and meal breaks and off-the-clock work. Such contracts arise from promises implied by words and conduct in light of the surrounding circumstances. *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford*, 144 N.J. 564, 574, 677 A.2d 747 (1996). Implied-in-fact contracts are formed by conditions manifested by words and inferred from circumstances, thus entailing consideration of factors such as oral representations, employee manuals, and party conduct. *See Troy v. Rutgers*, 168 N.J. 354, 365, 774 A.2d 476 (2001).

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[21] The *Iliadis* Court observed, "New Jersey courts, as well as federal courts construing the federal class action rule after which our rule is modelled [sic], have consistently held that the class action rule should be liberally construed." *Id.* at 718. Further, New Jersey requires, unlike Pennsylvania, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 720.

> Second, the proposed class seeks recovery for breach of unilateral contracts, allegedly embodied in the Associate Handbook. In a unilateral contract, one party's promise becomes enforceable only on the performance of the other party's obligation. *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 302, 491 A.2d 1257 (1985). To recover, plaintiffs must establish that they acted in accordance with the Associate Handbook—if a trier of fact deems it contractual—and that Wal-Mart did not honor its promises.

Id. at 722. In *Iliadis*, as with the instant case,

> The core of the present dispute is whether Wal-Mart engaged in a systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations to hourly employees in this State by refusing to provide earned rest and meal breaks and by encouraging off-the-clock work. Essential to that issue are other salient and common questions, most notably the meaning and significance of Wal-Mart's corporate policies concerning breaks and off-the-clock work. The impact of the Associate Handbook's disclaimer and the uniformity of new employee orientation also are prominent common questions.

Id. at 723.

Canetta Ivy Reid, the designated representative of Wal-Mart who was most knowledgeable about the policies known as PD-07 and PD-43, testified that Wal-Mart associates were told from day one in orientation that they were supposed to get rest breaks. Associates received employee handbooks and were

told of Wal-Mart policies. She stated that it was against Wal-Mart's policy to work without getting paid.[22] She also conceded that the employee handbook promised these benefits to employees. Drs. Shapiro and Baggett reviewed Wal-Mart's own records, which were used to generate payroll. Payroll hours were transmitted to corporate headquarters in Bentonville. Wal-Mart's own internal audits revealed violations of company policies regarding missed breaks and work off-the-clock.

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[22] In a Nevada case, one court found:

> The Court finds Plaintiffs have established commonality. Plaintiffs allege common policies emanating from the Home Office caused payroll manipulation over a widespread period of time over many stores in each state. Plaintiffs have presented evidence in the form of Wal-Mart's own internal memos, audits, reports, and communications regarding a company-wide policy of centralized wage cost control enforced through detailed computer records and daily and weekly communications from the Home Office. Plaintiffs also have presented statistical evidence of missed rest breaks, unauthorized management edits to employee time, and a uniform timekeeping system that did not credit employees for missed break time. Plaintiffs also have presented anecdotal evidence of missed breaks, one minute edits, and off the clock work. Wal-Mart's efforts at showing lack of commonality generally go to the weight of Plaintiffs' evidence, such as challenges to Shapiro's statistical analysis, rather than its admissibility. Further, Wal-Mart's arguments on the topic are stronger with respect to whether common issues will predominate rather than whether there are any common issues at all.

In re Wal-Mart Wage & Hour Employment Practices Litig., No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, at *13 (D. Nev. June 20, 2008).

In *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (Mass. 2008), again on virtually identical facts, the court held that the trial court erred in granting Wal-Mart's motion to decertify the class:

> The plaintiffs present the additional materials, including policy directives, employee handbooks, and the like, as evidence of an implied-in-fact contract or enforceable promise concerning work breaks and off-the-clock work. *See LiDonni, Inc. v. Hart*, 355 Mass. 580, 583, 246 N.E.2d 446 (1969) ("In the absence of an express agreement, a contract implied in fact may be found to exist from the conduct and relations of the parties"). The judge found these general corporate materials (among other things) sufficiently specific to the contract issue to survive a challenge on summary judgment. They are no less persuasive on the issue of class certification, where all members of the class were unarguably the beneficiaries of identical terms of employment.

Id. at 1211; see also *Armijo v. Wal-Mart Stores, Inc.*, 168 P.3d 129, 140 (N.M. Ct. App. 2007) (holding "that the question of whether a missed break constitutes a breach of contract is also an issue common to the class").[23]

Instantly, the employee handbook contained Wal-Mart's policies regarding rest breaks, off-the-clock

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[23] *Cf. Basco*, 216 F. Supp. 2d at 602 (denying class certification because individualized issues predominated in claim of breach of oral contract); *Harrison*, 613 S.E.2d at 328 (same); *Lopez*, 93 S.W.3d at 557 (same).

work and meal breaks, policies which were reinforced by Wal-Mart's corporate-wide policies and orientation sessions in which the handbook was disseminated and signed for by the hourly associates, resulting in a unilateral contract between Wal-Mart and the members of the class. *See Bauer*, 758 A.2d at 1269.

The video of the Cheryl Lippert deposition was read to the jury at the time of trial:

> Q: Was it fair to say that the time clock adjustment forms, white slips, were one of the primary means that Wal-Mart used to ensure that the archive report was accurate at the end of the payroll period?
>
> A: It was the primary tool but not only. Even with the direction given, which was, we want to see a white slip for every change in the payroll, do I know that, you know, there are changes made to payroll when a PTC called the employee at home because it's a payroll clause, they can call them at home and say I am missing a punch; what time did you leave. Do I know that happened? Yes. . . .
>
> Q: They would get a time clock exception report on a daily basis and look to see whether in fact there were punch exceptions that day, correct?
>
> A: The direction was given that they review it on a daily basis.
>
> Q: That was the expectation, correct?
>
> A: The expectation was, yes.

Q: Okay. Then under Wal-Mart's expectation, they would investigate the exceptions and attempt to obtain a white slip to correct the exceptions that were reflected on that report; am I right?

A: That is correct, that is correct. . . .

Q: And then assuming that they were able to get satisfactory explanations for exceptions or – and documented with the time clock adjustment forms, they would then finalize the time clock archive report for payroll purposes, right?

A: Yes, generally that was the standard process.

Q: Okay. So then at that point, the time clock archive report with, you know, maybe a few last minute changes every now and then would become the final data upon which the company would rely in generating bi-weekly payroll, right?

A: Yes. The archive report contained the data that contained a payroll report and generated a payroll run, that is correct.

N.T., 9/15/06, at 36-39; Supp. R.R. at 8125a-28a.

The trial court opined:

It is unusual in the extreme for [Wal-Mart], who relies on their records for business purposes to contend that although required by law to be created and maintained, their records are so unreliable that they cannot constitute prima facie proof of their contents. Since 1939 the Business Records Act, 42 Pa.C.S.

[§] 6108, allowed business records into evidence without any actual proof of their accuracy because the law presumed the regularity and accuracy of records maintained in the regular course of business. The purpose of the legislatively enacted statute is the same as that of the Supreme Court [when it] adopted Rule 803(6) of the Pennsylvania Rules of Evidence. Records created and maintained for independent business purposes are not self-serving or created for litigation. As stated by the Supreme Court in *Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987): ". . . the basic justification for the business records exception to the hearsay rule is that the purpose of keeping business records builds in a reliability which obviates the need for cross-examination." Because important business decisions routinely depend upon the accuracy of regularly kept records, they are admissible and constitute prima facie proof of their contents whether offered by their creator or an antagonist. Without question, a party opponent's business records may be offered against their creator, are prima facie proof of their contents, and may even constitute opposing party admissions against pecuniary interest. The presumption of reliability of business records which are created and maintained by affirmative requirement of law are utilized for payroll purposes is beyond question.

* * *

> The computer records demonstrate the existence of common questions of law and fact, and that common issue predominate.

Trial Ct. Op., 12/27/05, at 11-12. We agree.

Instantly, "there are questions of law or fact common to the class." Pa.R.C.P. 1702(2). The evidence presented at the time of trial by Wal-Mart and Appellees shows that Wal-Mart violated its own corporate policies promising benefits to associates. After considering all of the factors enunciated in Rule 1702, the court found that common questions of fact predominated based upon, *inter alia*, Wal-Mart's own internal memos, audits, payroll records, and policies. *See Clark*, 990 A.2d at 24-25; *Bauer*, 758 A.2d at 1269; *Janicik*, 451 A.2d at 457.

Wal-Mart claims the trial court's definition of the class was vague and overbroad. The trial court certified the class as follows: "[A]ll current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998, to the present." The class was certified from March 19, 1998, to May 1, 2006, the opt-out date. The class period was set using the notice opt-out deadline of May 1, 2006, as the end date. Wal-Mart cites *Bailey* and *Harrison* for the proposition that the definition of the class was overly broad because it included employees who never missed breaks or worked off-the-clock. As previously discussed, those cases are distinguishable. Further, to reiterate: "[C]lass members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Baldassari*, 808 A.2d at 191 n.6 (emphasis added).

Next, Wal-Mart avers the court prevented it from raising the affirmative defense of voluntary waiver of rest breaks. However, a review of the record reveals Wal-Mart withdrew this defense at the close of Appellees' case:

> [Appellees' counsel]: Your Honor, plaintiff has 2 motions.
>
> THE COURT: That's it. Okay.
>
> [Appellees' counsel]: Plaintiff moves for a directed verdict on defendant's affirmative defense of waiver. There has been no evidence whatever that, one, waiver is a defense in this case, since it's precluded by statute. And two –
>
> THE COURT: Wait a minute. Is there a defense of waiver, [Wal-Mart's counsel]?
>
> [Wal-Mart's counsel]: 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.
>
> THE COURT: Did you raise any waiver defense as an affirmative defense?
>
> [Wal-Mart's counsel]: We are not making a waiver defense.

N.T., 10/6/06, at 87-88; R.R. at 2100a-01a.

Wal-Mart also contends the trial court deprived it of due process by eliminating its right to try inherently individualized issues on liability. The court did

not preclude Wal-Mart from presenting employees to testify as to their individual experiences. The trial court stated:

> Although [Wal-Mart] 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 miss[ed] breaks or off-the-clock work, no prohibition on calling 1[8]6,000 witnesses was ever imposed beyond the [c]ourt commenting on the absurdity of the "threat." [Wal-Mart] 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.

Trial Ct. Op., 9/3/08, at 4 n.4.

Wal-Mart, in fact, called several witnesses. Denise Pettigrew, a cake decorator at a Sam's Club store in Reading, Pennsylvania, testified that during her seven years of employment, she never had a manager ask her to miss a rest break or interrupt her during a break or ask her to work off-the-clock. N.T., 9/26/06 (afternoon), at 11-12, 15. She opted out of the class. *Id*. at 26. Tyrone Johnson, an employee of a Wal-Mart in Bechtelsville, Pennsylvania, also testified. *Id.* at 33. He testified that in six years of working for Wal-Mart, he was never asked by a manager to take a short rest break, skip a rest break, or interrupt a rest break. *Id.* at 36; R.R. at 1912a. He stated that since the termination of the swipe cards, he observed employees taking more and longer breaks. *Id.* at 38. He noted that when he works off the clock, he fills out a time-adjustment sheet. *Id.* He also opted out of the class. *Id.* at 47. Janet Ulmer, who worked for a

Wal-Mart in Harleysville, Pennsylvania, and opted out of the class, testified:

> Q: Were you paid for the time when you came in the morning and there were too many folks there?
>
> A: Absolutely. I was always paid for my time.
>
> Q: When you started working at Wal-Mart, were you told anything about Wal-Mart's policy on working off-the-clock?
>
> A: I was told it was expressly forbidden. You did not work off-the-clock.
>
> Q: And when and how did you learn about this policy?
>
> A: I learned about that policy at orientation, my initial interviews. It was constantly reminded to me by different managers. Even the associates I worked with. It was just a constant rule.
>
> Q: Now, were there ever occasions when you were working and doing something related to your Wal-Mart work, but you were not literally swiped out of the clock?
>
> A: There were three specific occasions.
>
> Q: Okay. Could you describe those for the jury?
>
> A: The first occasion, I was new at Wal-Mart and we had a customer call in and she was looking for a specific item and I could not locate it. I had to contact my department manager who worked a different shift than I did. So when I was on break for my job during the day, I called the department manager to find

out about the merchandise, and I had left a note with the customer's name and telephone number at the desk. And I had contacted her also to let her know whether the product was available or was not available. And when I came in that evening, I got kind of dressed down for it, said we're filling out a time adjustment record. You absolutely have to get paid for your time; you're not allowed to do that. That was the first time. The second time, I had come in, and I meant to talk with a manager. The store was between my home and my day job. So I stopped in on my way home to talk with a manager. And we have to punch in; you have to be paid for your time to work. And I wasn't working; I was talking with her, but I had to get paid for the time, so I was. And the third time was when I stopped in to let them know that I would not be able to continue working with them, and I was told again I had to be paid for my time.

Q: Just to be clear, because I don't think we covered this, were you a full-time employee, a part-time employee? How many hours did you work roughly?

A: No, sir, I was a part-time employee. I worked about 20 or so hours a week.

Q: And during the day, what was the day job that you had during that time?

A: I worked as a secretary.

Q. Now, did you ever work off-the-clock at Wal-Mart and you didn't get paid for it?

A: No, absolutely not.

Q: Let's switch gears now and talk about meal breaks and rest breaks. Did you ever come to learn about Wal-Mart's policies on meal breaks and rest breaks?

A: Yes, sir. That was also discussed with me at the initial orientation.

Q: And was there any discussion of it after the initial orientation?

A: Sure. I mean, everybody would ask you, it's like did you get a break, do you need a break, do you want a break, do you want to stop, do you need a rest? It was constant.

Q: Let's talk first specifically about the paid rest breaks that you got. Were you able to take a paid rest break whenever you wanted to?

A: Any time I needed one, you can take a break. They were very good.

Q: Now, I believe you said you worked as a cashier from time to time; is that right?

A: Yes, I did.

Q: When you worked as a cashier, were you still able to take your paid rest breaks when you wanted?

A: Sure. . . .

Q. Now, were there times when you took paid rest breaks that were longer than 15 minutes?

A: Absolutely.

Q: Did you take 20-minute paid rest breaks?

A: I'd take 20-minute rest breaks. Sometimes they were 30 minutes, 35 minutes.

Q: When you took a 20-minute paid rest break, were you paid for that entire 20 minutes of time?

A: Absolutely. It was a paid rest break.

Q: How about for 30 and 35 minutes, were you paid not just for the 15 minutes, but for the whole 30 or 35 minutes?

A: I was paid for the full time.

Q: Were there any times that you didn't take all 15 minutes of your paid rest breaks?

A: Absolutely.

Q: Why wouldn't you do that?

A: Well, it's similar to like when I was on the register. You get going; you're having a good time; you're working with some terrific people. The customers are nice. And I don't smoke; I don't need a smoke break. I wasn't hungry necessarily and I didn't need to use the bathroom, so I can't imagine just sitting around doing nothing for 15 minutes or whatever.

Q: Do you believe Wal-Mart owes you money for the times when you didn't take your full 15-minute paid rest breaks?

A: No, sir. They paid me for all the time I worked.

Q: Did anyone at Wal-Mart ever force you to skip or cut short your paid rest breaks?

A: No, absolutely not.

N.T., 9/27/06 (morning), at 32, 33-39; R.R. at 1917a-18a.[24] Bill Clinton, a full-time, hourly employee at the Wal-Mart in Quakertown, Pennsylvania, and who opted out of the class, also testified for Wal-Mart:

> Q: Has any manager at Wal-Mart since you started working there in July 1998 ever kept you from taking a break?
>
> A: No, they never have.
>
> Q: Has any manager at Wal-Mart ever interrupted a rest break that you were on or forced you to come back from that break sooner than you would have?
>
> A: No, that has never happened. . . .
>
> Q: What sorts of things would cause you to swipe out a little late and go slightly over your scheduled six hours?
>
> A: Well, finishing up putting a bicycle together or anything of that nature or – and I just wasn't being watchful going out for that six-hour time. . . .
>
> Q: Well, let me ask you about off-the-clock work, Mr. Clinton. Do you know what Wal-Mart's off-the-clock policy is?
>
> A. Yes, I do. You just don't work off the clock for any reason.
>
> Q: What is your understanding of that policy based on? How do you know that?

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[24] The reproduced record at 1917a only partially reproduces page 38 from the original record.

> A: It's brought to our attention regularly. Any meetings we have, this issue comes up at all these. They tell us there's no excuses for it in any way. Do not work off the clock.

N.T., 10/3/06 (morning), at 11, 13-14, 19; R.R. at 2057a-59a. Rosemary Aquilino worked at a Wal-Mart store in Franklin Mills, Pennsylvania, for nine years. N.T., 10/4/06 (afternoon), at 38. She was an hourly employee in the accounting office. *Id.* She testified:

> Q: And let me ask you this about rest breaks, how do you in the cash office take rest breaks?
>
> A: Okay, there is usually a few of us that work in the cash office, so we just take turns taking, you know, our breaks. If one person wants a break before the other, it's usually not a problem. It's never been a problem. We always had our breaks.
>
> Q: Do you always take two exact 15-minute breaks?
>
> A: No. . . .
>
> Q: Do you feel like at any time you have been deprived of rest breaks at Wal-Mart?
>
> A: No. . . .
>
> Q: What has been your experience with whether the people at the Franklin Mills store, Associates, are getting their rest breaks since rest break swiping ended?
>
> A: They are probably taking longer breaks, a lot of them sometimes, because there is no way to calculate. People do get their breaks as far as what I can see.

Q: Has any manager ever suggested or asked you to work off the clock at the Franklin Mills store?

A: Absolutely not. Absolutely not.

Id. at 39-41. She also opted out of the class. *Id.* at 47. Susan Detwiler testified for Wal-Mart. She was a cashier at the Wal-Mart in Harleysville:

Q: Have you ever not been able to take a rest break when you wanted to?

A: No.

Q: Has anyone ever asked you, any manager at Wal-Mart, any co-worker, asked you to shorten a rest break?

A: No. . . .

Q: What – do you have an understanding of what I mean by working off the clock?

A: Yes, sir.

Q: How do you understand that term?

A: Working off the clock is working before I punch in or working after I punch out for lunch or working after I punch out for the day.

Q: Have you ever in the entire time you have been at Wal-Mart ever worked off the clock, Ms. Detwiler?

A: No.

Q: Has anyone ever asked or suggested that you do so?

A: No.

Q: Do you know whether or not Wal-Mart has a policy on working off the clock and taking your rest breaks and your lunch breaks?

> A: Yes.
>
> Q: Tell me what that policy is, as you understand it?
>
> A: It was explained to me when I was hired that, you are required to take your 15-minute breaks and your lunch break and under no circumstances would they take them away from you.
>
> Q: Now that was when you were first hired you were told that?
>
> A: Well, they told us, too, at the meetings.
>
> Q: What meetings are you talking about?
>
> A: We will have meetings with the certified nurse's assistant and the managers.

Id. at 49, 51-53.

Wal-Mart argues that it was denied its due process rights to have a jury determine liability as to each individual class member, rather than relying upon the analysis of Drs. Shapiro and Baggett, citing *Alix*, *Lopez*, and *Basco*. As discussed above, those cases are distinguishable from the instant case. Wal-Mart avers that it was denied its due process rights in defending against Drs. Baggett and Shapiro. Wal-Mart's argument is in derogation of class certification. Wal-Mart contends:

> To defend itself adequately against [Appellee]s' experts' testimony, [Wal-Mart] would need to call each class member whose time records show missed or short swipes or database overlap, as well as other witnesses with pertinent knowledge. . . . [Appellee]s tried this case not with testimony of what happened to

> individual Wal-Mart employees . . . , but with the flawed notion Dr Baggett's and Dr. Shapiro's analysis could create a composite picture of the experiences of the class as a whole.

Wal-Mart's Brief at 39-41. Appellees counter that Wal-Mart's "own policies and promises, its own business records, its own uniform scheduling plans, its own centralized staffing dictates, its own bonus practices and its own corporate admissions" applied to the members of the class. Appellees' Brief at 35. As the trial court opined:

> It is unusual in the extreme for [Wal-Mart], who relies on their records for business purposes[,] to contend that although required by law to be created and maintained, their records are so unreliable that they cannot constitute *prima facie* proof of their contents.

Trial Ct. Op., 10/27/05, at 11.

The contention that Wal-Mart was denied due process in not being able to question each individual employee is in derogation of class certification, since common questions of law and fact predominate. *See Debbs*, 810 A.2d at 153; *see also Iliadis*, 922 A.2d at 726. The primary and predominant issue was whether Wal-Mart promised its employees breaks, and whether it encouraged, at times, a culture of denying those promised breaks. We discern no abuse of discretion by the trial court. The court considered all of the factors enumerated in Pa.R.C.P. 1702 and certified the class. *See Liss & Marion, P.C.*, 937 A.2d at 505.

With respect to Wal-Mart's third issue, we briefly restate the background. Appellees brought a WPCL claim against Wal-Mart for breach of an agreement to pay wages for rest breaks and off-the-clock work. As part of Wal-Mart's benefits for all employees, Wal-Mart had instituted a guaranteed, paid, single, fifteen-minute rest break if an employee worked more than three hours in a shift, or two such breaks if an employee worked more than six hours in a shift. Wal-Mart's employee handbook and PD-07 policy referenced these rest breaks as a benefit to Wal-Mart employees.

Wal-Mart counters that the employees were not denied any payment for missed rest breaks because they were paid regardless of whether they took a break or not. First, Wal-Mart argues that the WPCL's definitions of "fringe benefits" and "wage supplements" exclude rest breaks. Wal-Mart insists that the WPCL encompasses only payments to employees, such as cash, stock, or stock options. Conversely, Wal-Mart suggests, the WPCL does not cover rest breaks because rest breaks are not "payments." Wal-Mart's Brief at 50. Wal-Mart asserts that rest breaks are distinguishable from payments recognized under the WPCL because "the opportunity to rest cannot be exchanged for money." Wal-Mart's Reply Brief at 27-28.

Second, Wal-Mart contends that rest breaks do not constitute "fringe benefits" or "wage supplements" because the deprivation of the rest breaks does not give rise to a contractual right to payment. Wal-Mart reasons it pays employees regardless of whether they took rest breaks, missed rest breaks, or had shortened rest breaks. Thus, because employees

are paid regardless, Wal-Mart concludes employees have no statutory right under the WPCL to payments for missed or shortened rest breaks. In other words, Wal-Mart insists its own corporate policies do not grant employees "extra" pay if they missed a rest break. Because employees do not receive "extra" pay if they missed a rest break, Wal-Mart suggests employees are not entitled to payments under the WPCL. Wal-Mart's Brief at 49-50 (citing *Harding v. Duquesne Light Co.*, 882 F. Supp. 422 (W.D. Pa. 1995)).

Should this Court conclude, however, that Appellees are entitled to payments for missed rest breaks under the WPCL, Wal-Mart advances four alternative arguments. First, Appellees failed to present evidence that "shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter . . . ." 43 P.S. § 260.10. If an employer underpays by less than 5%, Wal-Mart suggests that Appellees have alternative methods of recovering damages. Absent record evidence of such shortages, Wal-Mart claims the court erred in calculating damages. Second, Wal-Mart introduced evidence of its good faith in disputing Appellees' claims for payments under the WPCL. Third, the court erred in charging the jury regarding the requirements for liquidated damages under the WPCL. Fourth, Appellees failed to identify the specific plaintiffs entitled to liquidated damages. Simply, Wal-Mart's arguments pertain to reducing or eliminating the amount of $62,253,000 in statutory liquidated damages.

In sum, Wal-Mart's argument is three-fold. First, the WPCL excludes rest breaks. Even if the WPCL encompasses rest breaks, Wal-Mart's own employment agreement does not grant employees a right to "extra" pay for missed rest breaks. Finally, even if this Court finds otherwise, Appellees failed to meet their burden of proof, the court erred in calculating damages and charging the jury, and Wal-Mart acted in good faith.

Appellees counter that they established Wal-Mart's agreement to pay for rest breaks and all time worked. They dispute Wal-Mart's interpretation of the liquidated damages provision. Specifically, Appellees argue the court awarded liquidated damages based on wages unpaid "for thirty days beyond the regularly scheduled payday . . . ." 43 P.S. § 260.10. Appellees contend Wal-Mart waived its 5%-shortage argument and, regardless, they introduced evidence supporting the court's calculation of damages. Further, Appellees suggest Wal-Mart failed to establish good faith by clear and convincing evidence by, *e.g.*, offering evidence that it was unaware of the alleged failures to pay for rest breaks, investigated the alleged failures, or undertook remedial measures upon learning of the alleged failures. Appellees contend the jury evaluated conflicting testimony regarding Wal-Mart's good-faith efforts and the jury's determination should not be disturbed.

In addition to disagreeing with Wal-Mart's interpretation of the WPCL, Appellees claim Wal-Mart waived the issue. Appellees note that the court granted Appellees' motion *in limine* to preclude Wal-Mart from introducing evidence regarding statutory liquidated damages. Appellees therefore reason that

Wal-Mart cannot challenge the court's alleged error of failing to charge the jury on shortages. Appellees also contend they were not required to identify the specific class members entitled to statutory liquidated damages because Wal-Mart waived the issue. Appellees suggest that because they were precluded from making any jury arguments regarding liquidated damages, Wal-Mart cannot now contend Appellees were required to identify class members entitled to liquidated damages. Regardless, Appellees conclude, the WPCL does not require identification of class members.

In reply, Wal-Mart disputes Appellees' statutory construction of the WPCL. Wal-Mart also relies on *Hartman v. Baker*, 766 A.2d 347 (Pa. Super.), appeal denied, 564 Pa. 712, 764 A.2d 1070 (2000), in insisting it acted in good faith in disputing Appellees' wage claim. Specifically, Wal-Mart contends that because it has consistently argued it had no contract with Appellees for paid rest breaks, it has demonstrated good faith. Finally, Wal-Mart reiterates its challenge to the court's allegedly improper jury charge on the WPCL.

The trial court reasoned that Appellees' claim is for payment of wages that were earned but unpaid because they were required to miss rest breaks and to work without time-clock records, which constituted "wages," "fringe benefits," and "wage supplements" as defined by the Act. Trial Ct. Op., 11/14/07, at 3. Because equity interests that highly-paid executives may have qualify as "protected fringe benefits and wage supplements," the court similarly concluded that "the monetary equivalents of 'paid [rest] break[s]' . . . are protected fringe benefits and wage

supplements." *Id.* at 6. The court found that mandatory liquidated damages apply to wages withheld from employees who worked off-the-clock. Trial Ct. Op., 11/14/07, at 6.

We initially examine whether the WPCL's definition of "fringe benefits" encompasses paid rest breaks. "Because statutory interpretation is a question of law, our standard of review is de novo, and our scope of review is plenary." *Snead v. Soc'y for Prevention of Cruelty to Animals of Pennsylvania*, 604 Pa. 166, 171, 985 A.2d 909, 912 (2009).

> The object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa.C.S. § 1921(a). When the words of a statute are clear and free from all ambiguity, their plain language is generally the best indication of legislative intent. A reviewing court should resort to other considerations to determine legislative intent only when the words of the statute are not explicit. 1 Pa.C.S. § 1921(b). In ascertaining legislative intent, this Court is guided by, among other things, the primary purpose of the statute, *see* 1 Pa.C.S. § 1921(c)(4), and the consequences of a particular interpretation. *Id.* § 1921(c)(6).

In re Carroll, 586 Pa. 624, 636, 896 A.2d 566, 573 (2006) (case citations omitted). Moreover, "[i]t is axiomatic that in determining legislative intent, all sections of a statute must be read together and in conjunction with each other, and construed with reference to the entire statute."

Penn Jersey Advance, Inc. v. Grim, 599 Pa. 534, 540, 962 A.2d 632, 634 (2009). "[T]he Pennsylvania rules of statutory construction require the civil provisions of the WPCL to be liberally construed." *Hartman*, 766 A.2d at 353 (citing 1 Pa.C.S. § 1928(c)).

By way of background, the WPCL "provides employees a statutory remedy to recover wages and other benefits that are contractually due to them." *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 204, 696 A.2d 148, 150 (1997) ("*Oberneder II*"); *Lugo*, 967 A.2d at 968.[25] The WPCL defines "wages" as including "any other amount" pursuant to an employment contract. *See* 43 P.S. § 260.2a. For example, bonuses, commissions, and stock options are "wages." *See id.* Thus, if an employee demonstrates that any "amount to be paid pursuant to an agreement" "remain[s] unpaid," then that employee may be entitled to liquidated damages. *See* 43 P.S. §§ 260.2a, 260.10.

"To present a wage-payment claim," the employee must aver a contractual entitlement "to compensation from wages" and a failure to pay that compensation. *Sullivan v. Chartwell Inv. Partners, LP*, 873 A.2d 710, 716 (Pa. Super. 2005); *Hartman*, 766 A.2d at 352 (stating WPCL "establishes an employee's right to enforce payment of wages and compensation

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[25] We agree with the following observation: "This court has also attempted to review the legislative history of the Wage Payment Collection Law to further determine the purposes underlying the law. Unfortunately, there are no substantive remarks included in the history of this law which would instruct this court." *Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 134 n.5 (3d Cir. 1991); see *McGoldrick v. TruePosition, Inc.*, 623 F. Supp. 2d 619, 630 (E.D. Pa. 2009).

to which an employee is otherwise entitled by the terms of an agreement."); *see also Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990) (stating, "The contract between the parties governs in determining whether specific wages are earned."). We agree with the United States Court of Appeals for the Third Circuit's observation that, absent a formal employment contract or collective bargaining agreement, an employee raising a WPCL claim would have to establish, at a minimum, an implied oral contract between the employee and employer. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 309 (3d Cir. 2003).

As the *Hartman* Court noted, "the courts of Pennsylvania have had little opportunity" to interpret the WPCL. *Hartman*, 766 A.2d at 353. In *Hartman*, an employee, in exchange for a reduction in pay, agreed to an equity stake in the company. *Id.* at 350. That employee wanted to exercise his equity stake, but the employer refused. *Id.* at 350-51. The Court addressed whether the employee's equity interest in the company constituted "wages" under the WPCL. *Id.* at 353.

In resolving this issue, the *Hartman* Court relied on *Bowers v. NETI Techs., Inc.*, 690 F. Supp. 349 (E.D. Pa. 1988).[26] In *Bowers*, the employees had an agreement providing for severance pay and an option by the employees to sell their equity interest—the employer's stock—back to the employer. *Bowers*, 690

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[26] While we recognize federal district court cases are not binding on this court, Pennsylvania appellate courts may utilize the analysis in those cases to the extent we find them persuasive." *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 68 (Pa. Super. 2005) (citations omitted).

F. Supp. at 352. The employer was required to repurchase any such stock. *Id.* The employees sued the employer under the WPCL. *Id.*

The employer filed a motion for judgment on the pleadings, arguing that severance pay and the employer's payment to repurchase the employees' stock did not qualify as "wages" under the WPCL. *Id.* at 353. The *Bowers* court denied the employer's motion, reasoning that severance pay was both "guaranteed pay" and an amount to be paid pursuant to an agreement under the statute. *Id*. (citing 43 P.S. § 260.2a). Similarly, the court concluded that the stock-repurchase payment was also a "wage" because it was a payment pursuant to an agreement, and "offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment." *Id.*

Because the stock repurchase payment in *Bowers* qualified as "wages," the *Hartman* Court similarly concluded that the equity interest at issue also qualified as "wages." *Hartman*, 766 A.2d at 353. The *Hartman* Court reasoned that the equity interest was a payment offered to the employee in exchange for a reduction in pay. *Id.* Further, the employer did not offer the equity interest for reasons unrelated to the employee's employment. *Id*.

In *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59 (Pa. Super. 2000), this Court examined whether a gainsharing plan constituted earnings of an employee or a fringe benefit.[27] Initially, the *Kafando* Court

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[27] The *Kafando* Court defined "gainsharing plan" as follows:

> Through this plan, employees could receive bonuses in addition to their regular wages. The gainsharing pro-

declined to define a gainsharing plan as earnings of an employee "because the funds in the plan" were "not determined based upon an employee's time or task, piece or commission. Rather, the program is entirely dependent upon the ratio of the total cost of goods manufactured by" the employer. *Id.* at 62.

The Court then considered whether the gainsharing plan was a "fringe benefit" or "wage supplement":

> [W]e first note that the gainsharing plan does not involve any employee benefit plan as defined by ERISA, nor is the gainsharing plan a reimbursement for expenses or related to the payment of union dues. The money paid through the gainsharing plan likewise cannot be considered separation, vacation, or holiday pay for the same reason that the money in the plan is not earnings-because the fund is calculated in a manner that is entirely unrelated to any employment activities of the individual employees but rather is solely dependent upon [the employer's] earnings during the time period. There are, therefore, two possibilities left which would include the gainsharing plan in the WPCL definition of fringe benefits or wage supplements, "guaranteed" pay and "any other amount to be paid pursuant to an agreement."

> gram is based upon the profitability of the company and generates a pool of funds, which are then periodically distributed to eligible employees, in proportionate shares.

Id. at 61.

> By the terms of the gainsharing plan set forth in the employee handbook, the plan can only be considered "guaranteed pay" if the conditions set forth in the handbook are met. The plan sets forth responsibilities of [the employer's] employees and management; these can be described as goals designed to enhance the profitability and productivity of the company. Further conditions are set forth in paragraph ten of the program as quoted above; specifically, the employee must be on the payroll both on the last day of the calculation period and on the date that the gainsharing checks are distributed. It is only if these conditions are met that the gainsharing payments are guaranteed. The conditions were not met in this case.

Id. at 62-63 (footnote omitted). Because the employee was not on the payroll as of the last day of the calculation period and the date of distribution, the employee did not comply with the terms of the agreement. *Id.* at 63. Thus, the *Kafando* Court concluded that because the employee did not comply with the agreement, the gainsharing plan could not be considered "guaranteed pay" or a payment "pursuant to an agreement." *Id.*

The *Kafando* Court also distinguished the cases relied upon by the employee:

> Moreover, the cases Kafando cites in support of his claim do not require a different result. In *Hartman v. Baker*, 2000 PA Super 140, this Court determined that an employment contract entered into between the employer and employee had created an equity interest in the business which constituted wages under the

WPCL. The equity interest was offered to the appellee as an employee, and for no other reason unrelated to his status as an employee. Importantly, the equity interest in *Hartman* was offered pursuant to a binding contractual agreement between the parties. The employee had taken a reduction to his salary in consideration for obtaining an equity interest in the company. The terms of the contract in *Hartman* clearly distinguish that case from the instant one.

Kafando also cites *Bowers v. NETI Technologies, Inc.*, 690 F. Supp. 349 (E.D. Pa. 1988). This reliance is likewise misplaced. In *Bowers*, the District Court found that a stock repurchase agreement constituted a wage or other fringe benefit in accordance with the provisions of the WPCL. The court stated that the repurchase payments "were certainly 'wages' within the broad definition of the WPCL in that they were payments pursuant to agreement, and they were offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment by Phoenix." 690 F. Supp. at 353. Like in *Hartman*, however, the payments arose out of an employment contract and the parties agreed that the contractual terms had been complied with by the employees. In the present case, Kafando does not dispute that he has not fulfilled the clear contractual terms of the gainsharing agreement because he did not remain in [the employer's] employ at the time of distribution. This fact is dispositive of the issue.

Id. at 63.

An employer that has contractually agreed to "pay or provide" fringe benefits and wage supplements must "pay or provide" them within a certain timeframe. 43 P.S. § 260.3; *Regier v. Rhone-Poulenc Rorer, Inc.*, No. 93-4821, 1995 WL 395948, at *6, 1995 U.S. Dist. LEXIS 9384, at *16 (E.D. Pa. June 30, 1995) (stating "pay or provide" phrase "suggests that fringe benefits and wage supplements are not limited to cash compensation and that the phrase 'amount to be paid' contained in § 260.2a should be construed to include the value of non-monetary obligations owed to an employee." (footnote omitted)). "It is the contract between the parties that governs the determination of whether specific 'wages' or benefits were 'earned.' *See, e.g., DeAsencio v. Tyson Foods, Inc.*, 342 F.3d 301, 309 (3d Cir. 2003); *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148, 150 ([ ] 1997); *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. [ ] 2000)." *Integrated Serv. Solutions, Inc. v. Rodman*, No. 07-3591, 2009 WL 1152162, at *7 (E.D. Pa. Apr. 29, 2009).

Employing a broad interpretation of the WPCL, courts have defined various monetary forms of compensation as "wages" under the WPCL. The statute specifically covers monetary compensation such as separation, vacation and holiday pay, and bonuses. *See* 43 P.S. § 260.2a; *Bowers*, 690 F. Supp. at 353; *Dep't of Transp. v. Pennsylvania Indus. for the Blind & Handicapped*, 886 A.2d 706, 714 (Pa. Cmwlth. 2005). Other forms of compensation defined as "wages" include equity interests, put options, and call options. *See Bowers*, 690 F. Supp. at 353; *Hartman*, 766 A.2d at 353; *Regier*, 1995 WL 395948, at *6. This

Court has recognized those forms of compensation as "wages" under the WPCL when "they were offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment." *Hartman*, 766 A.2d at 353 (quoting *Bowers*, 690 F. Supp. at 353).

Consistent with the foregoing, we hold that monetary payments for rest breaks pursuant to an agreement between an employer and employee are "fringe benefits," and thus "wages" under the WPCL. Similar to the severance pay in *Bowers*, the payment associated with a paid, agreed-upon rest break is both "guaranteed" and pursuant to an agreement. *Bowers*, 690 F. Supp. at 353. Analogous to the equity interest in Hartman and Bowers, the payment associated with a paid rest break is offered pursuant to an agreement with an employee. *Id.*; *Hartman*, 766 A.2d at 353. Unlike the gainsharing plan in *Kafando*, the payment is not dependent upon an employer's earnings and is dependent on an employee's compliance with an agreement. *Kafando*, 764 A.2d at 62-63. Thus, an employer's failure to timely pay the amount associated with a paid, agreed-upon rest break could constitute a violation of the WPCL. 43 P.S. § 260.3; *Sullivan*, 873 A.2d at 716; *Hartman*, 766 A.2d at 352; *see Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1325 (E.D. Pa. 1994) (stating WPCL provides remedy when employer breaches contractual right to wages). Conversely, if an agreement provides for unpaid rest breaks, we suggest a violation of the WPCL could not occur because no monetary payments are involved. 43 P.S. § 260.2a; *see Doe*, 862 F. Supp. at 1325.

We reiterate that a violation of the WPCL occurs when an employer fails to timely pay the monetary

amount associated with a paid, agreed-upon rest break. 43 P.S. § 260.3. An employer's failure to provide the rest break itself does not establish a violation of the WPCL. An employee retains the burden of, *inter alia*, establishing that the wages associated with a paid rest break were guaranteed or pursuant to an agreement. 43 P.S. § 260.2a. An employee, of course, still has the burden of establishing an employer's untimely payment of or failure to pay those wages. Thus, the evidence establishing a breach of an agreement to provide a paid rest break and a violation of the WPCL overlap, but are not identical.

Having established that monetary payments associated with paid rest breaks could be "wages" under the WPCL, we examine Wal-Mart's second argument. Briefly, as summarized above, Wal-Mart argues that Appellees cannot recover under the WPCL because there is no contractual right to payment for missed or shortened rest breaks. We disagree.

"[T]he interpretation of the terms of a contract is a question of law for which our standard of review is de novo, and our scope of review is plenary." *McMullen v. Kutz*, 603 Pa. 602, 609, 985 A.2d 769, 773 (2009) (citation omitted). Furthermore:

> Contract interpretation . . . requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

Pennsylvania Indus. for the Blind & Handicapped, 886 A.2d at 711 (citations and quotation marks omitted).

"The WPCL does not create a statutory right to compensation. Rather, it provides a statutory remedy when the employer breaches a contractual right to earned wages. Whether specific wages are due is determined by the terms of the contract." *Doe*, 862 F. Supp. at 1325 (citations omitted); *accord Sullivan*, 873 A.2d at 716; *Hartman*, 766 A.2d at 352. Courts have refused to find a contractual right to payment when an employee offers no evidence in support of that right. *See Weldon*, 896 F.2d at 801 (holding that, under WPCL, a suspended employee who was then terminated had no right to wages during suspension because there was no contractual or implied contractual obligation to pay wages during suspension unless employee was reinstated); *Doe*, 862 F. Supp. at 1325-26 (holding that because discharged employee had no contractual right to payment for accrued but unused vacation days, summary judgment in favor of employer was proper for WPCL claim). For example, in *Harding*, Duquesne Light Company fired the employee for failing a drug test. *Harding*, 882 F. Supp. at 424. The employee sued under the WPCL to recover a claimed contractual right to payment for unused vacation time and for a stock-appreciation right. *Id.* at 425.[28] The court explained that the employer's written policies governing payment for un-

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[28] "A stock appreciation right ("SAR") is the right to receive any increase in market value of Duquesne Light Company common stock between the date the SAR was granted and the date the SAR is exercised." *Id.* at 425 n.2.

used vacation and stock-appreciation rights expressly identified certain situations where an employee could receive payment for accrued-but-unused vacation time and could continue to exercise a stock-appreciation right. *Id.* at 428. Those policies did not provide such a right to fired employees. *Id.* Thus, because the employee failed to identify material issues of fact with respect to his contractual right, the court granted summary judgment in favor of the employer. *Id.* Similarly, if an employee does not comply with the agreement, that employee usually does not have a right to payment under the WPCL. *See Kafando*, 764 A.2d at 63 (holding that because employee did not comply with terms of agreement, employee was not entitled to payment under WPCL).

In this case, Wal-Mart's policy states that employees "are to take full, timely, uninterrupted breaks" and shall "receive compensation for break time at the applicable rate of pay." PD-07, Revised May 2004; R.R. at 6987a-88a. This language is unambiguous and incapable of alternative interpretations. *Pennsylvania Indus. for the Blind & Handicapped*, 886 A.2d at 711. Indeed, Wal-Mart reinforced the mandatory nature of the paid rest breaks by warning employees they could be disciplined for missing or taking shortened rest breaks. PD-07, Revised May 2004; R.R. at 6987a-88a. Management would also be disciplined for failing to provide paid rest breaks pursuant to PD-07. *Id.* In conjunction with PD-07, Wal-Mart also guaranteed payment for all hours worked. PD-43; R.R. at 7020a. Essentially, Wal-Mart promised to pay a full-time hourly employee for a forty-hour workweek in exchange for thirty-seven-and-a-half hours of labor (including meal peri-

ods) and two-and-a-half hours of rest. Given such unequivocal language, we disagree with Wal-Mart's argument that its refusal to provide or curtailing of a contractual, paid rest break negates its WPCL liability because "[e]mployees are paid regardless of whether or not they take their rest breaks." Wal-Mart's Brief at 50.

The WPCL requires Wal-Mart to make any payments pursuant to an agreement. 43 P.S. § 260.2a. Appellees introduced evidence that Wal-Mart had the contractual obligation to provide paid rest breaks. PD-07, Revised May 2004; R.R. at 6987a-88a; *Weldon*, 896 F.2d at 801; *Harding*, 882 F. Supp. at 428; *Doe*, 862 F. Supp. at 1325-26. Appellees also introduced evidence that they could not take rest breaks. *See, e.g.*, N.T., 9/15/06 (afternoon), at 16; Kafando, 764 A.2d at 63. Wal-Mart's failure to provide those paid rest breaks triggered both a breach of contract claim and a WPCL claim. *See Sullivan*, 873 A.2d at 716; *Hartman*, 766 A.2d at 352; *accord Doe*, 862 F. Supp. at 1325.

After viewing the evidence in the light most favorable to Appellees, the instant case is distinguishable from *Weldon* and *Doe*. In *Weldon*, the Court affirmed summary judgment against the employee on the WPCL claim because the evidence failed to establish material issues of fact regarding the employer's express or implied contractual obligation to pay the wages at issue. *Weldon*, 896 F.2d at 801. The Doe court similarly affirmed summary judgment in favor of the employer on the employee's WPCL claim because the employee could not establish a contractual right to payment for accrued-but-unused vacation time. *Doe*, 862 F. Supp. at 1325-26.

In contrast to *Weldon* and *Doe*, Appellees established their contractual right to payment for taking a mandatory rest break. *See* PD-07, Revised May 2004; R.R. at 6987a-88a. Indeed, if Appellees did not take their rest breaks, then Wal-Mart could discipline them. *Id.* Thus, unlike in *Kafando*, where the employee did not satisfy the agreement's terms for payment, Appellees complied with the terms of the instant contract by working shifts of the requisite length necessary for a rest break. *See, e.g.*, N.T., 9/15/06 (afternoon), at 16; *cf. Kafando*, 764 A.2d at 63.

Similarly, Wal-Mart's reliance on *Harding* is inapt. Wal-Mart cites *Harding* for the proposition that an employee, to recover under the WPCL, must establish "a contractual right to payment if the benefit is not provided." Wal-Mart's Brief at 49. In *Harding*, the contract specified the circumstances under which an employee could receive payment for unused vacation and for a stock-appreciation right. *Harding*, 882 F. Supp. at 428. For example, a retired or disabled employee was entitled to payment. *Id.* An employee fired for failing a drug test, however, was not identified as one of those circumstances warranting payment. *Id.* at 428-29. Unlike *Harding*, Appellees established a contractual right to paid rest breaks after working a qualifying number of hours. PD-07, Revised May 2004; R.R. at 6987a-88a. The policy did not specify any additional conditions that would, like the employer in *Harding*, absolve Wal-Mart of any contractual obligation to pay Appellees. Once Appellees worked a shift of a qualifying length, they had a right to be paid for temporarily not working, pursuant to their agreement. See PD-07, Revised May

2004; R.R. at 6987a-89a. Nothing in the agreement indicates that Appellees forfeited their right to paid rest breaks when they failed to receive or had to work during those breaks. Having established Wal-Mart's breach of that agreement, Appellees demonstrated entitlement to the wages they should have received.

Barring or cutting short a paid, agreed-upon rest break provides a basis for a WPCL claim because the employer is no longer paying the employee to rest, but to work. Thus, refusing to provide or curtailing a paid, agreed-upon rest break results both in a violation of the agreement to provide a paid rest break and a violation of the WPCL when the employer fails to make the payment associated with taking, e.g., a fifteen-minute rest break. That the employee is not entitled to extra pay for a missed or shortened rest break does not negate the employer's contractual obligation to provide a paid rest break and WPCL obligation to pay the employee for taking that agreed-upon rest break. Under these specific facts, the WPCL does not permit an employer to escape liability when it receives the benefit of, for example, an employee's eight hours of labor when that employee agreed to be paid to work seven-and-a-half hours and to rest for one-half hour. Having discerned no error in concluding Appellees have established a contractual right to payment for missed or shortened rest breaks, we examine whether the court erred in awarding liquidated damages.

To reiterate briefly, Wal-Mart argues that the court misinterpreted 43 P.S. § 260.10, the liquidated damages provision of the WPCL. Wal-Mart interprets the first two sections of that provision as ad-

dressing a scenario of when the employer completely fails to pay wages, while the third section addresses when the employer fails to pay a portion of wages only. Because Appellees alleged underpayment of wages, as opposed to a complete nonpayment of wages, Wal-Mart argues that Appellees' WPCL claim falls under the third section only. Wal-Mart thus suggests Appellees had, but failed, to demonstrate a wage shortage exceeding five percent in order to obtain liquidated damages. Specifically, Wal-Mart claims Appellees did not establish they had wage shortages of over five percent of their gross wages on any two paydays within three months. If Appellees' WPCL claim is considered an allegation for partial unpaid wages, Wal-Mart suggests that the third section is mere surplusage. Absent Appellees' shortages calculation, Wal-Mart claims the court had no basis to award liquidated damages. In sum, Wal-Mart argues that because the first two sections do not apply, the only applicable section is the third, and Appellees failed to establish liability under the third section. Because Wal-Mart's liability is not limited to the third section only, we disagree.

Wal-Mart's "claim requires us to consider the proper interpretation of § 260.10, making the issue a question of law for which our standard of review is de novo and our scope of review is plenary." *Thomas Jefferson Univ. v. Wapner*, 903 A.2d 565, 574 (Pa. Super. 2006) (citing *Krebs v. United Refining Co. of Pa.*, 893 A.2d 776, 787 (Pa. Super. 2006)); *see generally Snead*, 604 Pa. at 171, 985 A.2d at 912 (discussing standard of review for statutory interpretation); *Penn Jersey Advance, Inc.*, 599 Pa. at 540, 962 A.2d at 634 (same). Punctuation may be used to construe

the statute, but cannot override or otherwise affect the legislative intent. 1 Pa.C.S. § 1923(b). The word "or" is disjunctive and the word "and" is conjunctive. *In re Paulmier*, 594 Pa. 433, 448, 937 A.2d 364, 373 (2007); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 510 Pa. 1, 15, 507 A.2d 1, 8 (1986). We acknowledge our mandate to construe the WPCL liberally. *Hartman*, 766 A.2d at 353 (citing 1 Pa.C.S. § 1928(c)).

The liquidated-damages provision states:

> **§ 260.10. Liquidated damages**
>
> Where wages remain unpaid for thirty days beyond the regularly scheduled payday, **or**, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employe of a proper claim or for sixty days beyond the date of the agreement, award or other act making wages payable, **or** where shortages in the wage payments made exceed five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter, **and** no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employe shall be entitled to claim, in addition, as liquidated damages an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater.

43 P.S. § 260.10 (emphases added).[29] The legislative history for this provision is sparse.

Because the WPCL is analogous to the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, this Court has examined federal cases interpreting the FLSA. *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 296 (Pa. Super. 2005) (relying on *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), and *Friedrich v. U.S. Computer Sys., Inc.*, No. 90-1615, 1995 WL 412385, 1995 U.S. Dist. LEXIS 9791 (E.D. Pa. July 10, 1995), in interpreting the WPCL).[30] In *Brooklyn Sav. Bank*, the United States Supreme Court interpreted the then-existing version of the FLSA and observed "the liquidated damage provision is not penal in its na-

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[29] As originally enacted, the statute stated:

> Where wages remained unpaid for thirty days beyond the regularly scheduled payday and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employe shall be entitled to claim, in addition, as liquidated damages an amount equal to the amount of the claim still unpaid and not in contest or disputed: Provided, however, that the amount of such liquidated damages shall not exceed two hundred dollars ($200) or six percent (6%) of the claim, whichever is greater.

43 P.S. § 260.10 (1961) (current version at 43 P.S. § 260.10 (2009)).

[30] Briefly, under the FLSA, "[a]n employee who brings suit . . . for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S. Ct. 1187, 1192, 90 L. Ed. 1515, 1522 (1946).

ture but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank*, 324 U.S. at 707, 65 S. Ct. at 902, 89 L. Ed. at 1309. Compensating the aggrieved employee with both lost wages and liquidated damages acknowledges the employee's injury from the delayed payment. *Id.*

Pennsylvania courts have similarly acknowledged the compensatory purpose of the WPCL's liquidated damages provision. The *Signora* Court, for example, adopted the rationale of *Friedrich*, which relied on *Brooklyn Sav. Bank*, and concluded that "both the liquidated damages and pre-judgment interest are intended to compensate for the loss of use of the proper amount of wages payable" and such damages are not "punitive in nature." *Signora*, 886 A.2d at 296;[31] see also *Oberneder v. Link Computer Corp.*, 674 A.2d 720, 722 (Pa. Super. 1996) ("*Oberneder I*") (noting "the primary goal of the WPCL is to make whole again[] employees whose wages were wrongfully withheld by their employers"); *accord Ambrose v. Citizens Nat'l Bank of Evans City*, 5 A.3d 413, 420 (Pa. Super. 2010), appeal denied, ___ A.3d ___, 2011 WL 1134712 (Pa. 2011). As the Superior Court observed, "[t]he WPCL is not only a vehicle for recovery of unpaid wages; it also provides for damages in the

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[31] In this case, Appellees did not request pre-judgment interest for any WPCL award. Order, 11/14/07. The *Signora* Court cautioned against awarding both prejudgment interest and liquidated damages under the WPCL. *See Signora*, 886 A.2d at 296.

event an employer withholds compensation in the absence of good faith." *Wapner,* 903 A.2d at 574.

The WPCL defines "wages" as including "fringe benefits," which encompasses "any other amount to be paid pursuant to an agreement". *See* 43 P.S. § 260.2a. For example, bonuses, commissions, and stock options are "wages". Thus, if an employee demonstrates that any "amount to be paid pursuant to an agreement" "remain[s] unpaid," then that employee may be entitled to liquidated damages. *See* 43 P.S. §§ 260.2a, 260.10.

The liquidated damages statute identifies three conditions separated by two disjunctive "or" clauses, followed by a comma and then a conjunctive "and" clause requiring "no good faith." *See* 43 P.S. § 260.10; *In re Paulmier*, 594 Pa. at 448, 937 A.2d at 373; *Rivera*, 510 Pa. at 15, 507 A.2d at 8. To succeed on a claim for liquidated damages, a claimant must establish one of the three conditions separated by the disjunctive "or". *Cf. In re Paulmier*, 594 Pa. at 448, 937 A.2d at 373; *Rivera*, 510 Pa. at 15, 507 A.2d at 8. Our conclusion is bolstered by the original language of the statute, which required only "no good faith" and a single condition that a claimant had to fulfill: unpaid wages beyond thirty days. *Cf.* 43 P.S. § 260.10 (1961) (current version at 43 P.S. § 260.10 (2009)). If a claimant establishes one of those three conditions, then the burden of proof shifts to the employer to establish good faith. *Wapner*, 903 A.2d at 575 (holding employer has burden of proof); *Hartman*, 766 A.2d at 353 (assuming, without deciding, employer bore burden of proof).

We discern no statutory language in the first condition limiting recovery of liquidated damages to fac-

tual scenarios where, as Wal-Mart suggests, there is a complete nonpayment of wages. *See Penn Jersey Advance, Inc.*, 599 Pa. at 540, 962 A.2d at 634 (noting, absent ambiguity, "plain language is generally the best indication of legislative intent"). The WPCL defines "fringe benefits" as including "any other amount to be paid pursuant to an agreement". *Id.* Thus, the liquidated damages statute provides: "Where 'any other amount to be paid pursuant to an agreement' remains unpaid for thirty days", the employee may be entitled to liquidated damages. 43 P.S. § 260.10. This construction does not render the third condition mere surplusage. The third condition addresses the factual scenario of when an employer consistently pays an employee late, *i.e.*, not on the regularly scheduled payday, but within thirty days of the regularly scheduled payday. *See id*. The third condition closes a loophole in the first condition, under which a dilatory employer might avoid liquidated damages by paying the amount owed within thirty days. *See id.* The amount owed, however, must exceed 5%. *See id.*

Instantly, to establish a claim for liquidated damages, an employee must demonstrate that any monetary amount associated with a paid rest break remained unpaid for at least thirty days beyond a regularly scheduled payday. *See* 43 P.S. § 260.10. The monetary amount does not have to exceed 5% of gross wages payable. *See id.* Alternatively, an employee must prove that the employer underpaid the monetary amounts associated with paid rest breaks and the amount of underpayment exceeds "five percent (5%) of the gross wages payable on any two regularly scheduled paydays in the same calendar quar-

ter". *Id.*[32] Under this proviso, the employee does not have to establish a thirty-day window of time and only has to establish, inter alia, the amount of underpayment. *See id.*

Under Wal-Mart's proposed interpretation, an employer, in bad faith, could underpay an employee by 4%. If the first condition was limited to a complete nonpayment of wages, then the employee would have no claim for liquidated damages. The employee, similarly, would have no claim for liquidated damages under the third condition because the shortage is less than 5%. Accordingly, because of the compensatory purpose of this section, we are reluctant to construe the first condition as limited to a complete nonpayment of wages, as that interpretation could potentially bar liquidated damages should an employer, for example shortchange an employee 4% in bad faith. *See Signora*, 886 A.2d at 296; *see also Oberneder I*, 674 A.2d at 722; *cf. Brooklyn Sav. Bank*, 324 U.S. at 707, 65 S. Ct. at 902, 89 L. Ed. at 1309; *Friedrich,* 1995 WL 412385, at *3, 1995 U.S. Dist. LEXIS 9791, at *10 (commenting, in reference to Pennsylvania's Minimum Wage Act, "violators would in effect enjoy an interest-free loan for as long as they could delay paying out the wages."). In that circumstance, an employee should have the ability to recover compensatory damages, i.e., liquidated damages, under the WPCL, and not under some alternative legal theory. *See Oberneder I*, 674 A.2d at 722; *see also Oberneder II*, 548 Pa. at 204, 696 A.2d at 150; Lugo, 967 A.2d at

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[32] The parties agree the remaining condition set forth in section 260.10 does not apply.

968. Otherwise, an employee is not necessarily guaranteed damages for the injury caused by the delay. *See Brooklyn Sav. Bank*, 324 U.S. at 707, 65 S. Ct. at 902, 89 L. Ed. at 1309. Contrary to Wal-Mart's contention, Appellees did not have to introduce evidence establishing shortages of at least 5% because Appellees' WPCL claim was cognizable under the first condition. Thus, we discern no error of law. *See Wapner*, 903 A.2d at 574.

Wal-Mart next claims it met its burden of establishing, via clear and convincing evidence, a "good faith contest or dispute" of Appellees' wage claims. 43 P.S. § 260.10. Wal-Mart, although conceding the statute identifies "non-exhaustive examples of 'good faith,'" contends that the court should focus on the employer's litigation conduct because section 260.10 identifies the "right of set-off or counter-claim" and "litigation is the only possible forum for assertion of set-off or counterclaim rights." Wal-Mart's Brief at 53. Given this focus, Wal-Mart suggests it had a reasonable legal basis for withholding Appellees' wages even if a court concludes that basis was incorrect. *Id.* (citing *Hartman*, 766 A.2d at 354-55). Wal-Mart notes that no Pennsylvania court has resolved these WPCL issues. Further, Wal-Mart argues, Appellees abandoned, or the jury rejected, a number of claims, giving further credence to Wal-Mart's position that its litigation conduct was in good faith. Wal-Mart is not entitled to relief.

In reference to the phrase, "[N]o good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment," the WPCL does not define "good faith." 43 P.S. § 260.10. With

respect to the term "include," "[t]he term 'include' is to be dealt with as a word of 'enlargement and not limitation.'" *Pa. Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n,* 453 Pa. 124, 130-31, 306 A.2d 881, 885 (1973) (alterations omitted); *accord Samantar v. Yousuf*, ___ U.S. ___, ___ n.10, 130 S. Ct. 2278, 2287 n.10, 176 L. Ed. 2d 1047, 1062 n.10 (2010). As one treatise notes:

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated. . . ."

2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes & Statutory Construction § 47:7 (7th ed. 2007) ("Sutherland") (footnote omitted).

The *Hartman* Court analogized lack of good faith with bad faith in insurance caselaw in holding that an employer must establish good faith by clear and convincing evidence:

> "Good faith" is defined as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. Black's Law Dictionary (7th ed. 1999), at 701.

> "Bad faith" in the insurance context is defined as "[a]n insurance company's unreasonable and unfounded (though not necessarily fraudulent) refusal to provide coverage **in violation of the duties of good faith** and fair dealing owed to an insured." Black's Law Dictionary (7th ed. 1999), at 134 (emphasis added).

Hartman, 766 A.2d at 354 n.3; *see also Oberneder II*, 548 Pa. at 206 n.3, 696 A.2d at 151 n.3 (noting, in *dicta*, "that employers that act in bad faith in contesting an employee's claim for wages must pay liquidated damages").

In *Hartman*, the employer misunderstood the binding nature of the agreement at issue and interpreted the WPCL as excluding payment for equity interests. *Hartman*, 766 A.2d at 354-55. The *Hartman* Court reversed an award of liquidated damages, reasoning:

> We find that the record provided appellants with sufficient reason to dispute [the employee's] claim that the parties were bound by the terms of the revised memorandum and that [the employee] was entitled to payment of the equity interest in the form of wages under the WPCL. The following facts and averments demonstrate that [the employer's] misunderstanding was reasonable and not indicative of bad faith:
>
> 1. The parties never signed a document reflecting [the employee's] revised pay structure.
>
> 2. The accounting system to determine the percentage of the equity interest was not defined by the revised February memorandum.

3. Due to the absence of a defined accounting system, [the employer] believed that no value could be placed on [the employee's] equity interest and that, accordingly, this interest did not qualify as "wages" under the WPCL.

4. [The employee's] testimony that, prior to his decision to exercise his equity interest and resign, both parties had set forth opposing points of view regarding the binding nature of the revised February memorandum.

5. [The employer's] belief that the resignation of Sam Colletts may have cancelled any agreement reached by the parties concerning [the employee's] revised pay structure.

Similar to the insurers in [*Collins v. Allstate Indem. Co.*, 626 A.2d 1162 (Pa. Super. 1993), the instant employer] made an incorrect legal conclusion in good faith that was based upon supportive authority and a thorough examination of the parties' course of conduct. As we found in the insurance context that mere bad judgment is not bad faith, so to do we find that mere bad judgment does not prevent an employer from acting in good faith under the WPCL. *Cf.* [*MGA Ins. Co. v. Bakos*, 699 A.2d 751 (Pa. Super. 1997)]. Thus, we find that the Chancellor erred by finding that [the employer] failed to prove that they acted in good faith by disputing [the employee's] claim for payment.[6]

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[6] Although the Chancellor stated that [the employer was] denied the benefit of a good faith defense due to the fact that [the employer] failed to pay [the em-

> ployee] $222.86 for work done on a particular project, we find this conclusion far overreaching. Even assuming [the employer] did not act in good faith when [it] refused to pay the $222.86, we fail to see any connection to the present dispute in which the parties possessed varying interpretations of a memorandum. Simply because an employer failed to prove that it acted in good faith in one particular episode of disputed wages, does not deny the employer the benefit of a good faith defense under the WPCL in a subsequent wage dispute involving a different set of circumstances with the same employee.

Id. at 355 (some citations omitted). Accordingly, the *Hartman* Court held that the employer established it acted in good faith because it had a reasonable, although incorrect, legal conclusion. *Id.*

In the case of *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. 1999), this Court interpreted a statute providing for damages if an insurer acted in bad faith. *Id.* at 906 (interpreting 42 Pa.C.S. § 8371). The *O'Donnell* Court held that "section 8371 was designed to remedy all instances of bad faith conduct by an insurer, whether occurring before, during or after litigation." *Id.* at 906; *accord Bombar v. West Am. Ins. Co.*, 932 A.2d 78, 92 (Pa. Super. 2007); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 415 (Pa. Super. 2004) (en banc). The *O'Donnell* Court, however, refused to permit recovery under the statute for alleged discovery violations because "the Pennsylvania Rules of Civil Procedure provide an exclusive remedy[.]" *Id.* at 909.

More recently, in *Wapner*, a hospital defended a WPCL claim by arguing it withheld the physician's wages on the basis that it exercised its right of set-off in good faith. *Wapner*, 903 A.2d at 574. The *Wapner* Court disagreed, holding that the record suggested

the hospital failed to pay the wages owed to the physician for several months before learning the physician was not complying with his employment agreement, which could have justified the nonpayment. *Id.* at 575. Thus, the *Wapner* Court affirmed the trial court's denial of the hospital's motion for judgment notwithstanding the verdict, reasoning, "[T]he issue of good faith was properly a question for the jury because it was neither established as a matter of law, nor a matter about which two reasonable minds could not disagree." *Id.* at 575.

We disagree with Wal-Mart's suggestion that courts should examine "good faith" in the context of claims and arguments raised in litigation only. As Wal-Mart acknowledges, the term "include" is non-exhaustive and it is long-settled that "include" is not a term of limitation, but a term of enlargement. *Alto-Reste Park Cemetery Ass'n*, 453 Pa. at 130-131, 306 A.2d at 885; 2A Sutherland, *supra*, § 47:7. The statute's use of the word "including" and listing, as examples, the "right of set-off or counter-claim," does not limit the examination of good faith to solely the claims raised in litigation. We observe that in *Wapner*, the employer's defense of set-off was based on facts predating the litigation itself. *Wapner*, 903 A.2d at 574. The jury in *Wapner* did not examine whether the employer raised the defense in good faith during the litigation, but whether the employer acted in good faith by raising a right to set-off at the time it refused to pay the employee's wages. *Id.* at 575. Similarly, the *Hartman* Court examined the events and the employer's conduct prior to the lawsuit in determining whether a fact-finder could conclude the employer acted in good faith. *Hartman*, 766 A.2d at 355

& n.6 (assuming the employer "did not act in good faith when [it] refused to pay"). Further, the liquidated damages statute compensates the employee for lost wages and not, for example, only an employer's lack of good faith with respect to claims raised during litigation. *Signora*, 886 A.2d at 296; *see also Brooklyn Sav. Bank*, 324 U.S. at 707, 65 S. Ct. at 902, 89 L. Ed. at 1309. Interpreting that statute as focusing exclusively on the employer's litigation conduct—occurring after the withholding of wages—undermines the compensatory purpose of the statute. *Cf. O'Donnell*, 734 A.2d at 906 (concluding the insurance bad-faith statute encompasses bad faith conduct "before, during or after litigation").

To the extent Wal-Mart relies on Hartman, that case is distinguishable because the jury could, and did, find instantly that Wal-Mart did not meet its burden of clear and convincing evidence. In *Hartman*, the employer satisfied the evidentiary standard because there was little indication from the parties' conduct that anything more than "mere bad judgment" regarding the employer's legal obligations caused the employer's failure to pay. *Hartman*, 766 A.2d at 355. The employer, the Hartman Court concluded, "made an incorrect legal conclusion in good faith that was based upon supportive authority and a thorough examination of the parties' course of conduct." *Id.* (emphasis added).

In contrast to *Hartman*, the instant record provides ample evidence from which a juror could conclude Wal-Mart's failure to pay was not a result of a

good-faith, but incorrect, legal conclusion. *Id.* [33] The record reflects testimony and documentary evidence suggesting that because of pressure from the home office to reduce labor costs and the availability of significant bonuses for managers based on store profitability, Wal-Mart's scheduling program created chronic understaffing, leading to widespread rest-break violations. *See, e.g.*, Pls.' Ex. 429; R.R. at 7787a-88a; N.T., 9/13/06 (morning), at 106-08; R.R. at 1596a-98a. Wal-Mart's own audit reports identified many such violations. *See, e.g.*, N.T., 9/12/06 (morning), at 61- 65; R.R. at 1501a-05a. This case is more akin to *Wapner*, in which the record established that the facts purportedly justifying the hospital's right of set-off occurred months after the hospital's refusal to pay. *Wapner*, 903 A.2d at 575. Appellees introduced evidence that Wal-Mart did not permit its employees to take breaks and that it recognized off-the-clock work violated the law. *See, e.g.*, N.T., 9/15/06 (morning), at 19; R.R. at 1617a; Pls.' Ex. 27a;

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[33] The fact-finder, of course, does not determine the validity of the legal conclusion. Rather, the fact-finder examines whether the employer had a good-faith basis for contesting or disputing the wage claim at the time the employer challenged the wage claim. This approach, we conclude, naturally prevents an employer from invoking a justification, legal or otherwise, after the fact. That a court may later hold an after-the-fact legal justification legally sound does not, we suggest, negate the employer's burden to establish its good faith at the time it challenged the wage claim. *Cf. Hartman*, 766 A.2d at 354. We are, for example, unaware of evidence of record that Wal-Mart's proffered legal justification for nonpayment was the actual basis for nonpayment, i.e., Wal-Mart "governed its behavior in accordance with an **incorrect** interpretation of state and federal statutes and regulations." *Id.*

R.R. at 7020a. After viewing the entire record in the light most favorable to Appellees, the record does not compel the conclusion that Wal-Mart established good faith. *Moure*, 529 Pa. at 402-03, 604 A.2d at 1007. Similarly, we cannot conclude the record does not support the court's reasoning for denying a new trial on this particular basis. *Harman*, 562 Pa. at 467-69, 756 A.2d at 1122-24. Analogously, post-hoc events such as abandoned or dismissed claims and an award of damages in an amount less than that sought by Appellees do not, under these facts, tend to establish Wal-Mart's good faith under this provision. Accordingly, we cannot agree that, in examining whether an employee may receive liquidated damages, the statute limits examination to whether the employer acted in good faith "in the context of the claims made in the litigation." Wal-Mart's Brief at 53.

Wal-Mart's third argument challenging the liquidated damages award is that the trial court's jury instruction misstated the law regarding liquidated damages under the WPCL. The court instructed the jury as follows:

> The Wage Payment and Collection Law was enacted by our legislature to provide a vehicle for employees to enforce payment of their wages and compensation which the employers have not paid them. The underlying purpose is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages. The Act does not establish a new right to wages, it simply

> establishes an employee's right to enforce payment of wages.
>
> If the defendant had a good faith contest or dispute of any wage claim, then those provisions of the Act do not apply. That was all the argument about good faith and bad faith. You will have to judge whether Wal-Mart acted in good faith when they failed to pay and contested the claims made by the plaintiffs.
>
> Good faith is a state of mind which consists of honesty in belief or purpose. It can be a state of mind which consists of faithfulness to one's duty or obligation. It can be a state of mind which consists of the absence of intent to defraud or to seek unconscionable advantage.
>
> That's what good faith constitutes. Simple negligence or bad judgment is not bad faith.

N.T., 10/11/06, at 48-49; R.R at 2145a-46a.

After the jury began deliberating at 11:40 a.m., the jury returned with a question at 1:50 p.m.: "We need more clarification about good faith contest." *Id.* at 75. Wal-Mart's counsel opined that the court should not respond to the question, but if it opted to respond, to reread only the section defining good faith. *Id.* at 80. Wal-Mart's counsel reiterated, "I do not think that the Court should provide them elaboration about what good faith is beyond the charge that has already been given." *Id.* at 81. The court agreed and briefly repeated the relevant sections of the charge to the jury, including the section defining good faith. *Id.* at 83-85. After additional discussion with counsel, the court clarified the scope of good faith to the jury. *Id.* at 95.

Wal-Mart contends that the court erred in rejecting its request that the jury make a finding that the wage shortages exceeded five percent of the gross wages payable on any two regularly scheduled paydays in the same calendar quarter. Wal-Mart also claims that the court erroneously charged the jury on good faith. In support of that assertion, Wal-Mart refers to an alleged misstatement of law in the verdict form, which asked if Wal-Mart "[had] a good faith contest or dispute when [it] failed to pay class members for every hour worked," and if Wal-Mart °[had] a good-faith contest or dispute when [it] failed to provide rest breaks to class members." Jury Verdict Interrog., at 2-3; R.R. at 2182a-83a. Wal-Mart suggests that the court should have asked whether Wal-Mart acted in good faith in disputing the wage claims raised by Appellees in this lawsuit. Wal-Mart is not entitled to relief.

As a prefatory matter, we address Appellees' claim that because Wal-Mart filed a successful motion precluding Appellees from referring to or introducing evidence regarding liquidated damages, Wal-Mart waived its argument that the jury is required to find shortages. Appellees' claim of waiver lacks merit. We fail to discern how, under these facts, winning a pretrial motion precluding evidence is the equivalent to waiving a challenge that the court instruct the jury properly.

Having resolved Appellees' allegation of waiver, the standard of review for this issue is one of abuse of discretion. *Rettger v. UPMC Shadyside*, 991 A.2d 915, 931 (Pa. Super. 2010). "[O]ur courts have made clear that an appellant must make a timely and specific objection to a jury instruction to preserve for re-

view a claim that the jury charge was legally or factually flawed." *Stumpf v. Nye*, 950 A.2d 1032, 1041 (Pa. Super. 2008) (citations and quotation marks omitted).

> In reviewing a claim regarding error with respect to a specific jury charge, we must view the charge in its entirety, taking into consideration all the evidence of record to determine whether or not error was committed. If we find that error was committed, we must then determine whether that error was prejudicial to the complaining party. Error will be found where the jury was probably misled by what the trial judge charged or where there was an omission in the charge which amounts to fundamental error.

Price v. Guy, 558 Pa. 42, 46, 735 A.2d 668, 670–71 (1999) (citations and footnote omitted). Similarly:

> Error in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error. A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental.

Stewart v. Motts, 539 Pa. 596, 606, 654 A.2d 535, 540 (1995) (citations and quotation marks omitted). Finally,

> The court is vested with substantial discretion in fashioning the charge and may select its own language cognizant of the need to adequately apprise the jury of the law as it applies to the evidence adduced at trial. Unless the language the court chose incorrectly states the law or mischaracterizes the evidence in a way that prejudiced the jury's consideration and thereby undermined the accuracy of the verdict, we will not interfere with the court's exercise of discretion.

Rettger, 991 A.2d at 931 (citations, alterations, and punctuation marks omitted); *Ettinger v. Triangle-Pacific Corp.*, 799 A.2d 95, 106 (Pa. Super. 2002).

> Initially, Wal-Mart preserved its objection:
>
> [Wal-Mart's counsel]: The language we want, Your Honor, is, Did defendants act in good faith in disputing the rest break fringe benefit claims.
>
> The Court: In the lawsuit?
>
> [Wal-Mart's counsel]: Yes, Your Honor.
>
> The Court: Any other objection? That request is overruled. Any other objection?
>
> [Wal-Mart's counsel]: No, Your Honor . . . .

N.T., 10/10/06, at 30. Wal-Mart again preserved its challenge the next day:

> The Court: What's the problem with, Did defendant have a good faith contest or dispute when they failed to provide rest breaks to class members?
>
> [Wal-Mart's counsel]: We don't believe that's law under the Wage Payment and Collection

> Act or good faith in what the determination should be focused on.
>
> The Court: Right.
>
> [Wal-Mart's counsel]: We believe good faith in the statute is directed to whether we disputed the claims asserted in this case in good faith.
>
> The Court: Right, in the case, right. You are saying that the Act doesn't kick in until such time as plaintiffs bring a lawsuit. I disagree. You put that on the record, you preserved that. . . .

N.T., 10/11/06, at 5-6; R.R. at 2135a-36a. Wal-Mart preserved its challenge to the scope of good faith in the liquidated-damages statute. *See Stumpf*, 950 A.2d at 1041.

For the reasons discussed above, however, we discern no merit to Wal-Mart's claim that the court should have instructed the jury to find wage shortages in excess of five percent in order to impose liquidated damages. To recover liquidated damages, Appellees did not have to establish wage shortages under that section. *Cf. In re Paulmier*, 594 Pa. at 448, 937 A.2d at 373; *Rivera*, 510 Pa. at 15, 507 A.2d at 8. Similarly, Wal-Mart's argument that an examination of good faith was limited to its actions in this lawsuit lacks merit. The liquidated damages statute does not limit examination of the employer's good faith to the employer's litigation conduct. *Alto-Reste Park Cemetery Ass'n*, 453 Pa. at 130-31, 306 A.2d at 885; *Wapner*, 903 A.2d at 574-75; *Hartman*, 766 A.2d at 355 & n.6. The court could not accept Wal-Mart's proposed instructions, as they did not reflect the law accurately. After considering only Wal-Mart's specif-

ic, preserved challenges, the court did not err by limiting the jury's examination of good faith to only Wal-Mart's conduct after litigation commenced. *See Price*, 558 Pa. at 46, 735 A.2d at 670-71; *Stewart*, 539 Pa. at 606, 654 A.2d at 540.[34] We perceive no abuse of discretion. *See Rettger*, 991 A.2d at 931.

Wal-Mart also argues that Appellees are not entitled to a liquidated damages award because Appellees did not identify specific individuals who are owed liquidated damages. Wal-Mart asserts that Appellees are required to identify those individuals because the WPCL's liquidated damages provision provides that liquidated damages are awarded to an "employee." Therefore, Wal-Mart reasons that the provision does not contemplate an award to unidentified employees that comprise a class. Wal-Mart further contends that the compensatory purpose behind the liquidated-damages provision confirms its view that Appellees need to identify specific class members. Wal-Mart notes that its elimination of its policy requiring employees to swipe for rest breaks after February 9, 2001, means there are no time records identifying which particular employees were denied rest breaks in whole or in part. To the extent liquidated damages are proper, Wal-Mart suggests that any award be calculated via a claims-administration process. Wal-Mart theorizes that a claims-administration process would create a wage claim under 43 P.S. § 260.10 that obviates an award of liquidated damages as long as it was paid within sixty

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[34] We decline to find error on an argument not raised or preserved by Wal-Mart at trial. *Stumpf*, 950 A.2d at 1041.

days. Further, the process ensures that liquidated damages are awarded only to aggrieved individuals, as opposed to the class. Wal-Mart is not entitled to relief.[35]

Liquidated damages under the WPCL are compensatory, and not punitive, in nature. Signora, 886 A.2d at 296. The WPCL also states:

> **§ 260.9a. Civil remedies and penalties**
>
> * * *
>
> (b) Actions by an employe, labor organization, or party to whom any type of wages is payable to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction, by such labor organization, party to whom any type of wages is payable or any one or more employes for and in behalf of himself or themselves and other employes similarly situated, or such employe or employes may designate an agent or representative to maintain such action or on behalf of all employes similarly situated. Any such employe, labor organization, party, or his representative shall have the power to settle or adjust his claim for unpaid wages.

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[35] Appellees again counter that Wal-Mart waived this argument because it filed a successful motion to preclude evidence and references to liquidated damages. As previously noted, under these circumstances, Wal-Mart's successful pretrial motion did not result in Wal-Mart's waiving this argument.

43 P.S. § 260.9a(b). The statute does not specify that individual members of a class action must be identified in order to receive liquidated damages.

Instantly, Wal-Mart correctly notes the liquidated-damages statute is compensatory in nature. *Signora*, 886 A.2d at 296. We discern nothing in the WPCL, however, that requires Appellees to identify individual employees entitled to liquidated damages. Additionally, narrowly construing section 260.10 in that fashion would result in a seeming conflict with section 260.9a, which permits a representative to maintain an action to recover liquidated damages on behalf of all similarly situated employees—not just an individual employee. 43 P.S. § 260.9a. We decline to read these two sections together in a manner that could potentially render them at odds, particularly given our mandate to construe the WPCL liberally. *Penn Jersey Advance, Inc.*, 599 Pa. at 540, 962 A.2d at 634; *Hartman*, 766 A.2d at 353. Thus, absent explicit legislative language to the contrary, we decline to impute into section 260.10 a requirement that, in order to recover liquidated damages, the plaintiff must identify every individual employee entitled to such damages. On that basis, we also reject Wal-Mart's arguments regarding usage of a claims-administration process. Adopting Wal-Mart's reasoning would permit Wal-Mart to evade an award of liquidated damages by requiring individual employees to come forward or pay wages long-since overdue. As Wal-Mart acknowledged, liquidated damages is compensatory in nature and designed to compensate the employee for the loss of spending power of wages that an employee should have had. *See Signora*, 886 A.2d at 296; *see also Oberneder I*, 674 A.2d at 722;

Friedrich, 1995 WL 412385, at *2, 1995 U.S. Dist. LEXIS 9791, at *5.

With respect to Wal-Mart's fourth issue, we affirm based on reasons similar to those set forth in our resolution of Wal-Mart's first issue. As with Wal-Mart's challenge to class certification, Wal-Mart suggests that because the policies and handbook did not establish a contract, the evidence was insufficient to establish a breach of contract. Wal-Mart contends that the testimony of Drs. Baggett and Shapiro was the only testimony establishing class-wide liability. Wal-Mart suggests that because their testimony was erroneous, it was insufficient to establish breach of contract, unjust enrichment, and violation of the WPCL and MWA. Notably, Wal-Mart rests its challenge to the sufficiency only on the policies, handbook, and testimony of Drs. Baggett and Shapiro. Because of the limited nature of Wal-Mart's challenge to the sufficiency of evidence, and because of our resolution of Wal-Mart's challenge to class certification, we similarly conclude that this evidence, viewed in the light most favorable to Appellees, tends to support Appellees' claims. Conversely, we cannot conclude, after giving every reasonable inference of fact in favor to Appellees, that "the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant." *Moure*, 529 Pa. at 402, 604 A.2d at 1007.

We also observe that Wal-Mart agreed to pay Appellees for taking rest breaks, and therefore had to comply with the WPCL statute providing for timely payments of fringe benefits. *See* 43 P.S. § 260.3. Because Wal-Mart failed to provide rest breaks and the

associated payments for those rest breaks, Wal-Mart violated that section. *See id.* Appellees are thus entitled to compensation under the WPCL. *See id.*

We next examine Wal-Mart's fifth issue. We briefly restate the pertinent facts. On October 30, 2006, Appellees filed a petition for attorney fees and moved for prejudgment interest. Trial Ct. Op., 9/03/08, at 2. That same day, Wal-Mart filed a post-trial relief motion asking the Court either to enter judgment in Wal-Mart's favor notwithstanding the jury's verdict, or to grant a new trial. *Id.* at 2-3.

In support of their petition for attorney fees and expenses, Appellees provided detailed fee and expense reports identifying the hours spent over five years by each of the five firms involved, categorizing each firm's hourly rate, and summarizing the expenses incurred. Trial Ct. Op., 11/14/07, at 3. Appellees' petition also included affidavits from counsel averring their hourly rates for, among other personnel, twenty-six lawyers and seventeen paralegals. *Id.* at 3.[36] Appellees claimed total counsel fees of

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36 For example, for one firm, the partners' hourly rates ranged between $550 to $600, the associates' hourly rates at $175, and the paralegals' hourly rate at $145. Ex. A. to Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2275a. Paragraph four of the affidavit states:

> The hourly rates for the attorneys in my firm included in Exhibit A are the same as the regular current rates charged for their services in other contingent matters and in class action litigation.

¶ 4 of Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2271a. Of the 5,900.40 hours billed, 3,764.40 hours were billed by the partner

with the $600 hourly rate. Ex. A. to Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2275a. The exhibit reflects counsel fees of $2,701,093.50 and expenses of $1,214,326.80. Id.; Ex. B. to Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2277a.

Similarly:

> The hourly rates for the attorneys in my firm included in Exhibit A are the same as the regular current rates charged for their services in other contingent matters in class action litigation.

¶ 4 of Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2287a. Exhibit A defines the partners' hourly rates as ranging between $650 to $850, the associates' hourly rates as ranging between $250 to $550, the paralegals' hourly rates at $235, and the interns' hourly rates as ranging between $185 to $200. Ex. A. to Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2291a. Of the 12,806.90 hours billed, 3,729.80 hours were billed by the partner with the $650 hourly rate. *Id.* The exhibit states counsel fees totaling $5,393,255.00 and expenses of $1,709,858.12. *Id.*; Ex. B. to Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2293a. Total claimed counsel fees for the firms of Mr. Donovan and Ms. Spanier, were $8,094,348.50 and total expenses were $2,924,184.92, for a combined total of $11,018,533.42.

By way of comparison, the firm of Azar & Associates, P.C., stated its counsel fees "include[] the total lodestar amount for attorney, law clerk and paralegal time, calculated at the firm's current complex litigation hourly rates on this litigation." ¶ 9 of Aff. of Franklin D. Azar in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2306a. The firm of Bader & Associates, LLC, used identical language. ¶ 24 of Aff. of Gerald L. Bader, Jr. in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2331a. Dyer, Garofalo, Mann & Shultz, L.P., calculated its counsel fees based on the "firm's current complex litigation hourly rate". ¶ 18 of Aff. of John A. Smalley in Supp. of Pls.'

$12,336,547.15 and $3,583,782.62 in expenses. Ex. A and B to Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2245a-48a. Wal-Mart filed an answer to Appellees' fee petition and Appellees filed a reply. Trial Ct. Op., 11/14/07, at 3. The trial court ordered Wal-Mart to reveal the aggregate fees expended in its defense, which amounted to $10,048,944 in fees and $7,006,982 in expenses. *Id.* at 4, 19.

On February 27, 2007, the trial court heard oral arguments on Wal-Mart's post-trial motions and Appellees' petition for attorney fees and costs. There was a two-day fee-petition hearing in February and April of 2007. Two Wal-Mart witnesses testified, challenging the reasonableness of Appellees' fee request. John Marquess, a fee auditor, testified as an expert in fee cutting, although he had no academic training in fee auditing or certification.[37] For multiple reasons, the court rejected his expert opinion. Although Mr. Marquess criticized Appellees' counsel fees, the court noted a lack of a factual basis for his methodology. He concluded, for example, that Appellees' counsel who appeared at trial, but did not actually participate at trial, should not bill their time at trial because, inter alia, he could not ascertain

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Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2343a. Thus, these firms calculated their lodestar based on their hourly rates for complex litigation in contrast to the first two firms, which calculated their lodestar based on their hourly rates for contingent matters. In an apparent oversight, only Mr. Donovan did not aver that receipt of fees was contingent upon success.

37 We do not opine on whether certification exists.

whether they participated at each stage of the litigation. N.T., 2/27/07, at 45-48. The trial court stated:

> Mr. Marquess declined to offer an opinion about what fees had been earned. However, when provided with a calculator in the courtroom he could easily calculate [a fee of $10,359,200 and] offered no criticism of [that figure]. His criticism such as it is, is limited to $277,200.00 claimed by the Dyer firm, $550,505.00 in what he calls "duplicate attorneys" at trial and $202,991.00 for intern and law clerk work.
>
> Mr. Marquess's opinion is totally and entirely rejected on the basis that he had no pretense to knowledge of what a plaintiff's firm needs to do to prepare and try a case action jury trial to verdict and has no factual basis to evaluate the work performed in this case. His testimony is rejected as grossly lacking in necessary and readily obtainable facts. His testimony lacks all credibility, repeatedly demonstrating an unwillingness to have his statements cross-examined, by providing misleading and transparently disingenuous answers in a conscious effort to obfuscate.

Trial Ct. Op., 11/14/07, at 13.

Wal-Mart's second expert, Ralph Wellington, Esq., testified about reasonable attorney fees. He opined that he had no criticism of the number of attorneys involved, work performed, and hours spent by Appellees' litigation team. He disputed, however, some of the hourly rates identified by some of Appellees' counsel. *Id.* at 14. After considering the affidavit, evidence, and conflicting testimony of the parties'

experts regarding the reasonableness and necessity of the legal services provided, the court held that the rates requested by Appellees' counsel and the work performed by all attorneys, associates, paralegals, and interns were reasonable. *Id.* at 14.

The trial court then examined the reasonableness of Appellees' lodestar. The court compared the value of the total recovery, $151,164,277.35, against the $12,336,547.15 in fees, or a contingency equivalent of 8%. *Id.* at 20. The court categorically opined:

> No [p]laintiff's firm would have accepted this case on such a contingency. No plaintiff's firm would have accepted any contested liability claim on such a low contingency fee. No competent firm would have accepted this case on less than a one-third contingency had they recognized that over $3,000,000.00 [in expenses] would have to be advanced and litigation prior to appeal would extend over 5 years.

Id. at 20.[38]

Appellees' counsel requested a contingency multiplier[39] of 3.7, or 370% of their fees and expenses, for a total of $45,600,000, or approximately 31% of the

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[38] We observe the trial court cited no authorities for these propositions. We acknowledge one treatise's observation that in so-called "mega-fund" cases, fee recovery can range from 1.73% to 28% of the total recovery. 4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 14:6 (4th ed. 2002) ("Newberg").

[39] "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re AT & T Corp.*, 455 F.3d 160, 164 n.4 (3d Cir. 2006) (citation omitted).

value of the total monetary recovery. *Id.* at 21. The court summarily held:

> Their request for total fee [of] $45.6 million in fees is reasonable taking into serious consideration all appropriate factors, including those specifically detailed in [Pa.R.C.P.] 1716.
>
> This award is reasonable. The fees awarded herein represent 31% of the total value of recovery exclusive of fees. The contingency multiplier requested is appropriate because of the exceptionally high degree of difficulty in the case and the remarkable success achieved.

Id. at 21. The trial court did not discuss any other factors, including those set forth by Pa.R.C.P. 1716.

On appeal, Wal-Mart argues that the court erred in approving a contingency multiplier when the contingency risk was already factored into the hourly rate. Wal-Mart thus contends that the trial court contravened the holding of *Birth Ctr. v. St. Paul Cos.*, 727 A.2d 1144 (Pa. Super. 1999). Wal-Mart alleges that no Pennsylvania court ever approved a 3.7 multiplier, particularly considering the prediction by the United States Court of Appeals for the Third Circuit that the Pennsylvania Supreme Court would accept a 1.5 multiplier as the outer limit. Wal-Mart's Brief at 61 (citing *Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524, 536 (3d Cir. 1997)). Wal-Mart asserts that where damages exceed $100 million, using a multiplier that results in counsels' recovering 33% of that figure in fees contradicts the maxim that "percentage awards generally decrease as the amount of the recovery increases" because "in many instances the increase in recovery is merely a factor of the size of the class and has no direct relationship

to the efforts of counsel." Wal-Mart's Brief at 61 (quoting *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 339 (3d Cir. 1998)). For these reasons, Wal-Mart suggests the trial court abused its discretion.

Appellees counter that Wal-Mart waived the issue for three reasons. First, Wal-Mart conceded that Appellees' counsels' hourly rates were appropriate. Second, Wal-Mart's experts did not opine that those hourly rates accounted for the contingency risk. Third, the multiplier ensures that litigants with small claims have access to class action counsel. On the merits, Appellees insist that this Court cannot make a factual determination as to the reasonableness of counsels' fees. Further, because the federal courts have found no difference between non-contingent and contingent hourly rates, Wal-Mart has no basis to assert that Appellees' counsels' hourly rate mitigated the contingency risk. Appellees suggest Pennsylvania's public policy justifies the 3.7 multiplier. [40] Wal-Mart is entitled to limited relief, at the moment.

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40 We acknowledge the parties' citations of common-fund cases. *See, e.g.*, Appellees' Brief at 69 n.37. Appellees opted for a lodestar. Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses, at ¶ 45; R.R. at 2238a; *see generally* 4 Newberg at §§ 14:5-14:6 ("The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." (citation omitted)). "Although it is sensible for a court to use a second method of fee approval to cross check its conclusion under

"[A]ppellate review of an order of a tribunal awarding counsel fees to a litigant is limited solely to determining whether the tribunal palpably abused its discretion in making the fee award." *Lucchino v. Commonwealth*, 570 Pa. 277, 284, 809 A.2d 264, 268–69 (2002) (citation omitted); *First Pa. Bank, N.A. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 580 A.2d 799, 803 (Pa. Super. 1990). "An abuse of discretion is not simply an error of judgment. It requires much more. If in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused." *Bedford Downs Mgmt. Corp. v. State Harness Racing Comm'n*, 592 Pa. 475, 487, 926 A.2d 908, 916 (2007) (quotation marks, alterations, and citations omitted).

In *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987) (plurality), the dissent set forth the background of contingency fees:

> In the private market, lawyers charge a premium when their entire fee is contingent on winning. . . .
>
> The premium added for contingency compensates for the risk of nonpayment if the suit does not succeed and for the delay in payment

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the first method, we believe that each method has distinct advantages for certain kinds of actions, which will make one of the methods more appropriate as a primary basis for determining the fee." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) ("*In re GM Truck*").

> until the end of the litigation-factors not faced by a lawyer paid promptly as litigation progresses.
>
> In the private market, the premium for contingency usually is recouped by basing the fee on a percentage of the damages recovered. The premium also could be computed as part of an hourly rate that the lawyer bills after the litigation succeeds. **Under either approach, the market-based fee or hourly rate that is contingent on success is necessarily higher than the hourly rate charged when payment is current and certain**. This fee enhancement ensures that accepting cases on a contingent basis remains an economically attractive and feasible enterprise for lawyers.

Id. at 735-37, 107 S. Ct. at 3092-93, 97 L. Ed. 2d at 604-05 (Blackmun, J., dissenting) (citations omitted and emphasis added).

A "lodestar" is "the product of reasonable hours times a reasonable rate." *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S. Ct. 2638, 2640, 120 L. Ed. 2d 449, 454-55 (1992) (citation omitted);[41] *Krebs v.*

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41 In *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984), the high Court opined that a reasonable rate is the fee charged to a client who pays regardless of winning or losing. *Id.* at 895 n.11, 104 S. Ct. at 1547 n.11, 79 L. Ed. 2d at 905 n.11 (stating calculation of reasonable fee based on prevailing market rate that client pays "whether he wins or loses"); *accord Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, ___, 130 S. Ct. 1662, 1672, 176 L. Ed. 2d 494, 505 (2010) (stating, "[T]he lodestar method produces an award that roughly approximates

United Ref. Co. of Pa., 893 A.2d 776, 790 (Pa. Super. 2006). The court must consider the factors set forth in Pa.R.C.P. 1716 in calculating the lodestar. *Birth Ctr.*, 727 A.2d at 1160. The lodestar "should be reduced in proportion to time spent on distinct claims which do not produce finding of liability." *Logan v. Marks*, 704 A.2d 671, 674 (Pa. Super. 1997); *accord Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943, 76 L. Ed. 2d 40, 55 (1984). After finalizing the lodestar, the court may then apply a multiplier, i.e., enhancement. *Logan,* 704 A.2d at 674.[42]

The *Dague* Court examined whether a court "may enhance the fee award above the 'lodestar' amount in order to reflect the fact that the party's attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services." *Dague*, 505 U.S. at 559, 112 S. Ct. at 2639, 120 L. Ed. 2d at 454. In reversing a 1.25 multiplier of the lodestar, the high Court noted:

> The "lodestar" figure has, as its name suggests, become the guiding light of our fee-

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the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case"); *see also Report of Third Circuit Task Force on Court Awarded Attorney Fees*, 108 F.R.D. 237, 243 (3d Cir. 1986) (noting lodestar "could be increased or decreased based upon the contingent nature or risk in the particular case involved").

[42] A contingent enhancement is "entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation." *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc); *accord Blum*, 465 U.S. at 903 n.*, 104 S. Ct. at 1551 n.*, 79 L. Ed. 2d at 905 n.* (Brennan, J., concurring).

shifting jurisprudence. We have established a strong presumption that the lodestar represents the "reasonable" fee, and have placed upon the fee applicant who seeks more than that the burden of showing that such an adjustment is **necessary** to the determination of a reasonable fee. The Court of Appeals held, and [the respondent] argues here, that a "reasonable" fee for attorneys who have been retained on a contingency-fee basis must go beyond the lodestar, to compensate for risk of loss and of consequent nonpayment. Fee-shifting statutes should be construed, he contends, to replicate the economic incentives that operate in the private legal market, **where attorneys working on a contingency-fee basis can be expected to charge some premium over their ordinary hourly rates.** Petitioner . . . argues, by contrast, that the lodestar fee may not be enhanced for contingency.

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. **Taking account**

of it again through lodestar enhancement amounts to double counting.

Id. at 562-63, 112 S. Ct. at 2641, 120 L. Ed. 2d at 456-57 (citations and quotation marks omitted; second and third emphases added);[43] *accord Perdue*, ___

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43 The *Dague* Court also observed:

> [W]e see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail.
>
> Second, . . . we have generally turned away from the contingent-fee model-which would make the fee award a percentage of the value of the relief awarded in the primary action-to the lodestar model. We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. *See, e.g.*, Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). . . . Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it. Contin-

U.S. at ___, 130 S. Ct. at 1673, 176 L. Ed. 2d at 505 (reiterating holding "that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation").

In *Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit addressed whether this Commonwealth would permit courts to evaluate contingent risk in awarding attorneys' fees. Initially, the district court addressed whether counsel was entitled to a contingency enhancement for a contract and a bad-faith claim. With respect to the contract claim, the district court "first calculated the lodestar amount based on the stipulated hourly rate for [counsel's] work in **non-contingency matters** and stipulated number of hours allocated to the contract claim." *Id.* at 533 (emphasis added). The district court rejected any enhancement for the contract claim, concluding "the contract claim was not unique or complex, and that it did not entail a substantial risk of failure." *Id.* The *Polselli* Court agreed, finding the district court did not abuse its discretion. *Id.*

With respect to the bad-faith claim, the district court enhanced the lodestar by 60%, a 1.6 multiplier, but then eliminated the enhancement, finding that

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> gency enhancement is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

Id. at 565, 122 S. Ct. at 2643, 120 L. Ed. 2d at 458 (quotation marks and some citations omitted). This Commonwealth, however, has not adopted the high Court's rejection of a contingency enhancement.

the law barred any such award. *Id.* at 533-34. The Third Circuit thus had to "predict whether the Pennsylvania Supreme Court would permit consideration of the contingent risk of a particular case in calculating a reasonable fee for that case." *Id.* at 535. In concluding the Pennsylvania Supreme Court would permit consideration of contingent risk in calculating attorneys' fees, the Polselli Court reasoned:

> The federal fee-shifting statutes considered in *Dague* did not provide for consideration of contingent risk. . . . The *Dague* majority found no justification for recognizing a common law enhancement for contingent risk; a statutory provision requiring consideration of enhancement would have been quite another matter.
>
> Unlike courts assessing fees under the federal fee-shifting statutes like those considered in *Dague*, courts assessing fees under section 8371 are guided by Pennsylvania Rule of Civil Procedure 1716. . . . Thus, even if the Pennsylvania Supreme Court was persuaded by *Dague*, it would be bound by Rule 1716.
>
> [W]e predict that the Pennsylvania Supreme Court would permit courts to consider a case's contingent risk when calculating a reasonable fee [and] also predict that the court would conclude that a contingency enhancement would not apply in every case. As the Supreme Court reasoned in *Dague*, a contingency enhancement often will duplicate factors already subsumed in the lodestar amount. For example, a difficult case may require a high number of hours dedicated to research or discovery. Or, it might require the skills of someone who ordi-

narily bills at a high hourly rate. Both of these factors are considered in calculating the lodestar amount, and they should **not** be reconsidered in enhancing the lodestar.

We predict that the Pennsylvania Supreme Court would permit a trial court to enhance the lodestar amount to account for a particular case's contingent risk **only** to the extent that those factors creating the risk are not already taken into account when calculating the lodestar amount. Thus, when a trial court is faced with a request to enhance a fee based on contingent risk arising from the magnitude, complexity and uniqueness of the litigation, the court should exercise caution so as **not** to skew the calculation of a reasonable rate by **double counting**. For example, if the complexity of a case is reflected in the high number of hours researching the complex issues or in the relatively high regular hourly rate of the attorney, complexity does not justify a contingency enhancement.

The court should also consider whether the attorney was able to mitigate the risk of nonpayment. For example, an attorney who has entered into a contingency-fee contract in a suit seeking substantial damages has significantly mitigated the contingent risk; in exchange for accepting the risk of nonpayment, the attorney obtains the prospect of compensation under the agreement substantially in excess of the lodestar amount. Likewise, "attorneys who are paid a portion of their reasonable hourly fee irrespective of result have par-

tially mitigated the risk of nonpayment." *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202, 1229 (1995).

We emphasize that the determination of a reasonable fee is an inherently case-specific endeavor. Just as every case is unique, so too are the particularized risks faced by attorneys accepting contingency-fee cases. We are therefore reluctant to provide courts with a specific list of factors to consider in determining whether and to what extent a contingency enhancement is appropriate in any given case. When applying Rule 1716, courts must consider whether the receipt of a fee was contingent on success. Courts must not, however, deviate from their ultimate responsibility—the calculation of a "reasonable" fee. To the extent that the factors creating a contingent risk in a particular case are mitigated or are already taken into account when calculating the lodestar amount, a contingency enhancement is not "reasonable" and should not be applied.

In *Rendine*, the New Jersey Supreme Court departed from *Dague* and established a rule favoring the award of contingency enhancements to prevailing parties under the New Jersey Law Against Discrimination. The court held that "a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." *Rendine*, 661 A.2d

> at 1228. The court focused on risk of attorney non-payment, and it recognized that such risk will vary with the circumstances of each unique case. The court concluded that "contingency enhancements in fee-shifting cases ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id.* 661 A.2d at 1231. We believe that our prediction of Pennsylvania law is not significantly different from the statement of New Jersey law in *Rendine*. *See, e.g., id.* 661 A.2d at 1228 (acknowledging concern about overpayment and double counting).

Id. at 535-36 (emphases added).

As both parties acknowledge, *Birth Ctr.*[44] is one of the seminal Pennsylvania cases addressing a contingency enhancement. In *Birth Ctr.*, the Court remanded the issue of attorneys' fees to the trial court. *Id.* at 1160. Because the applicable statute did not identify the factors the court should consider in awarding attorneys' fees, the *Birth Ctr.* Court instructed the court to consider the factors in Pa.R.C.P. 1716. *Id.* at 1160 (citing *Polselli*, 126 F.3d at 532-39). The *Birth Ctr.* Court embraced the reasoning of the *Polselli* Court and reinforced:

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44 In *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153 (2003), the Pennsylvania Supreme Court disapproved of *Birth Ctr*. to the extent that case stood for the proposition that 42 Pa.C.S. § 8371 permitted a jury trial. *Id.* at 274 n.3, 824 A.2d at 1157 n.3. That proposition is not at issue in this case.

> The court may also consider the discretionary application of a fee enhancement to reflect the contingent risk of the particular . . . claim at issue. A contingent risk enhancement, however, **shall be inappropriate** where the factors creating the risk have been mitigated[12] or already taken into account in the calculation of number of hours times fee per hour [i.e., the lodestar]. Additionally, fee recovery may include the reasonable fees incurred in the preparation and litigation of the fee petition if the client retains a material interest[13] in the fee litigation.
>
> 12 *See Polselli, supra* at 535 (suggesting that the existence of a fee contract or an agreement for payment of a portion of the reasonable hourly rate regardless of result may significantly mitigate contingent risk).
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> 13 Whether a client maintains a "material interest" means whether a client has anything to lose if the counsel fees are denied. If counsel must prevail on the fee petition to get paid at all, then the client has nothing to lose if counsel fees are denied because the client is not liable for the fees. Under this scenario, the client does not maintain a material interest in the fee petition and attorneys' fees associated with the petition itself would be inappropriate.

Id. at 1161 (emphasis added).

In considering whether to apply an enhancement to the lodestar, the court shall evaluate the degree of success, the deterrent effect of the verdict or decision, the potential public benefit, and the potential inadequacy of a private fee agreement. *Logan*, 704 A.2d at 674; *accord Krebs*, 893 A.2d at 790. "[T]he degree of success is the critical consideration . . . ." *Logan*, 704 A.2d at 674. The court shall consider

"whether an award of fees and costs would promote the purposes of the" statute(s) in question. *Krebs*, 893 A.2d at 789-90; *Logan*, 704 A.2d at 674. "The court may consider the relationship between the damages sought and those recovered." *Logan*, 704 A.2d at 674; *accord Krebs*, 893 A.2d at 789. If a contingency-fee agreement exists, then the court may consider the agreement in determining the enhanced amount, but the agreement cannot create an "artificial ceiling based on the percentage agreed upon between attorney and client." *Krebs*, 893 A.2d at 791. The court, however, "may not lower the fee to achieve proportionality with the size of the verdict." *Logan*, 704 A.2d at 674; *accord Krebs*, 893 A.2d at 789. If an enhancement is applied, then the resulting sum should be "sufficient to attract competent counsel who might otherwise" refuse to represent the class. *Logan*, 704 A.2d at 674; *accord Krebs*, 893 A.2d at 790. The court should refrain from enhancing the lodestar based on factors incorporated into the reasonable fee. *See Birth Ctr.*, 727 A.2d at 1161; see, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air Act*, 478 U.S. 546, 566, 106 S. Ct. 3088, 3099, 92 L. Ed. 2d 439, 457 (1986) ("*Delaware Valley*") (stating, "Because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting'").[45] Finally,

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[45] The *Delaware Valley* Court agreed with this Commonwealth's argument that the lower court erred by increasing the fee amount to account for counsel's superior performance. *Del-*

the court is not limited to discussing only these factors in determining whether to apply an enhancement. *Krebs*, 893 A.2d at 791; *see Polselli*, 126 F.3d at 536 (noting, "We are therefore reluctant to provide courts with a specific list of factors to consider in determining whether and to what extent a contingency enhancement is appropriate in any given case").

In sum, courts are permitted to award a reasonable fee pursuant to a lodestar, a percentage of the common fund, or, if necessary, a hybrid approach. With respect to a lodestar, the court analyzes multiple factors in considering whether to apply a contingency enhancement, i.e., multiplier. *See, e.g., Krebs*, 893 A.2d at 790-91; *Birth Ctr.*, 727 A.2d at 1161; *Logan*, 704 A.2d at 674. A contingency enhancement on top of the lodestar is appropriate only if the lodestar does not reflect counsel's contingent risk. See *Birth Ctr.*, 727 A.2d at 1161; *see also Perdue*, ___ U.S. at ___, 130 S. Ct. at 1673, 176 L. Ed. 2d at 505; *Dague*, 505 U.S. at 562-63, 122 S. Ct. at 2641, 120 L. Ed. 2d at 456-57; *Polselli*, 126 F.3d at 536.

As a prefatory matter, we address Appellees' claim that Wal-Mart waived its argument. The record reflects that Wal-Mart challenged the imposition of a contingency multiplier when Appellees' counsel's hourly rates incorporated a contingency risk factor. Wal-Mart's Supplemental Mem. of Law in Opp'n to Pls.' Pet. for Award of Att'ys' Fees and Expenses, at 14; R.R. at 2651a (citing ¶ 4 of Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Re-

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aware Valley, 478 U.S. at 566, 106 S. Ct. at 3099, 92 L. Ed. 2d. at 457.

imbursement of Costs; R.R. at 2271a; and ¶ 4 of Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2287a). Wal-Mart's concession to the appropriateness of counsel's hourly rates is not equivalent to waiving its double-counting argument. Further, Appellees refer us to no caselaw suggesting Wal-Mart's experts had to opine on Appellees' counsel's hourly rates. Regardless, Appellees submitted sworn declarations identifying the hourly rates for contingent matters. *See* ¶ 4 of Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2271a; ¶ 4 of Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2287a. To the extent Appellees contend that the multiplier ensures access to class action counsel, that contention has no bearing on whether Wal-Mart waived the argument on appeal.

With respect to the merits, in applying an enhancement, the court inadvertently double-counted contingency factors incorporated into the counsel fees for the firms of Donovan Searles, LLC, and Abbey, Spanier, Rodd, Abrams & Paradis, LLP. The affidavits for those firms state, "The hourly rates for the attorneys in my firm included in Exhibit A are the **same** as the regular current rates charged for their services in **other contingent matters** in class action litigation." ¶ 4 of Aff. of Michael D. Donovan in Supp. of Pls.' Pet. for Att'ys' Fees and Reimbursement of Costs; R.R. at 2271a (emphases added); ¶ 4 of Aff. of Judith L. Spanier in Supp. of Pls.' Pet. for an Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2287a (emphases added). In contrast,

the affidavits for the other firms aver they used their firms' "complex litigation hourly rates" to calculate their lodestars. ¶ 9 of Aff. of Franklin D. Azar in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2306a; ¶ 24 of Aff. of Gerald L. Bader, Jr. in Supp. of Pls.' Pet. for Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2331a; ¶ 18 of Aff. of John A. Smalley in Supp. of Pls.' Pet. for an Award of Att'ys' Fees and Reimbursement of Expenses; R.R. at 2343a. Because the instant lodestar was based in part on contingency rates, and not the rates paid by a client regardless of winning or losing, the court should not have enhanced the lodestar to the extent the enhancement double-counted counsel's contingent risk. *See Birth Ctr.*, 727 A.2d at 1161; *see also Perdue*, ___ U.S. at ___, 130 S. Ct. at 1672, 176 L. Ed. 2d at 505; *Dague*, 505 U.S. at 559, 112 S. Ct. at 2640, 120 L. Ed. 2d at 454-55; *Blum*, 465 U.S. at 895 n.11, 104 S. Ct. at 1547 n.11, 79 L. Ed. 2d at 905 n.11. Indeed, in *Polselli*, the United States Court of Appeals for the Third Circuit accepted without question the calculation of a lodestar based on counsel's hourly rate in "non-contingency matters". *Polselli*, 126 F.3d at 533. The instant trial court erred in applying an enhancement which partially double counts because, according to the affidavits, Donovan Searles, LLC, and Abbey, Spanier, Rodd, Abrams & Paradis, LLP, charged a "premium over their hourly rates" to reflect their contingent risk. *See Birth Ctr.*, 727 A.2d at 1161 (instructing that a fee enhancement, or multiplier, "shall be inappropriate where the factors creating the risk have been . . . already taken into account in the calculation" of the lodestar); *see also Dague*, 505 U.S. at 562-63, 112 S. Ct. at 2641, 120 L. Ed. 2d

at 456-57; *Polselli*, 126 F.3d at 535-36. Accordingly, because the trial court misapplied the law, we reverse the fee award and remand for proceedings in accordance with this decision. *See Bedford Downs Mgmt. Corp.*, 592 Pa. at 487, 926 A.2d at 916; *Lucchino*, 570 Pa. at 284, 809 A.2d at 268-69.[46]

Upon remand, the court should explain thoroughly its rationale in approving the lodestar, including the factors set forth by Pa.R.C.P. 1716 and the *Logan* Court. *See* Pa.R.C.P. 1716; *Logan*, 704 A.2d at 674. We note, however, that in reviewing the court's opinion, we also find its justifications for applying a multiplier insufficient, particularly in light of its application of a 3.7 multiplier, compared to the Third Circuit's prediction that 1.5 would be the outer limit of acceptable multipliers in this Commonwealth. *See Polselli*, 126 F.3d at 536. Accordingly, if the court concludes an enhancement is warranted, then the court shall discuss comprehensively the factors it finds would justify an enhancement. *See, e.g., Krebs*, 893 A.2d at 790; *Birth Ctr.*, 727 A.2d at 1161; *Logan*, 704 A.2d at 674; *see also Delaware Valley*, 478 U.S. at 568, 106 S. Ct. at 3099, 92 L. Ed. 2d at 458 (noting, inter alia, that "absence of detailed findings" warranted reversal of fee enhancement for superior

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46 Although we do not believe another hearing is required, we defer to the trial court. We agree wholeheartedly with the *Polselli* Court's admonishment that litigation over attorneys' fees should not result in a second major round of litigation. We trust the parties will "resolve amicably the amount of [the] fee." *Polselli*, 126 F.3d at 539 (citation omitted).

performance).[47] In considering whether to apply an enhancement, the court should not reconsider factors "subsumed in the lodestar amount[, *e.g.*,]" "a difficult case [requiring] a high number of hours dedicated to research or discovery [or] the skills of someone who ordinarily bills at a high hourly rate." *Polselli*, 126 F.3d at 535; *Birth Ctr.*, 727 A.2d at 1161. The court may wish to apply a second method of calculation as a cross-check. *See In re GM Truck*, 55 F.3d at 820.[48] Because the trial court made a patent mathematical error while calculating damages, we also modify the judgment to reflect a WPCL verdict for $49,289,541, instead of $49,568,541. *In re Paxson Trust I*, 893

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[47] Should the court, on remand, again justify an enhancement, the court has the option of using a different enhancement for each counsel to avoid double-counting any contingent risk. As noted *supra*, in approving the lodestar and 3.7 multiplier, the trial court failed to discuss comprehensively the factors set forth above, including those in Pa.R.C.P. 1716. Should the court, upon remand, impose a multiplier exceeding the outer limits of what it believes this Commonwealth would accept—which the Third Circuit predicted would be 1.5, although we decline to make any affirmative holding as to the outer limits at this time—then the court shall thoroughly explain its reasoning, including a discussion of all pertinent factors. *See Polselli*, 126 F.3d at 536.

[48] Because the trial court inadvertently double-counted factors in granting an enhancement, the court, on remand, may not necessarily impose the same 3.7 multiplier. It is well-settled that Pennsylvania "courts should not give answers to academic questions or render advisory opinions or make decisions based on assertions as to hypothetical events that might occur in the future." *Phila. Entm't & Dev. Partners, L.P. v. City of Phila.*, 594 Pa. 468, 480, 937 A.2d 385, 392 (2007). Accordingly, we decline to render an advisory decision on the merits of a 370% enhancement.

A.2d 99, 132 (Pa. Super. 2006) (modifying amount of judgment to correct mathematical error); *see supra* n.10. Accordingly, the judgment is affirmed in part as modified, reversed in part, and remanded for further proceedings in accordance with this decision.

Wal-Mart's application to strike Appellees' August 13, 2009 letter brief is denied. Judgment affirmed in part as modified, and reversed in part. Case remanded for further proceedings. Jurisdiction relinquished. Judgment Entered.

s/_____
Prothonotary

Date: _____

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

MICHELLE BRAUN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Respondent	:	No. 551 EAL 2011
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court
WAL-MART STORES, INC., A DELAWARE CORPORATION, AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Petitioners	:	
DOLORES HUMMEL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Respondent	:	No. 552 EAL 2011
v.	:	Petition for Allowance of Appeal from the Order of the Superior Court
WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Petitioners	:	

ORDER

PER CURIAM

AND NOW, this 2nd day of JULY, 2012, the Petition for Allowance of Appeal is **GRANTED**, **LIMITED TO** the issue set forth below. Allocatur is **DENIED** as to all remaining issues. The issue is:

> 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.

Further, Petitioners' Applications for Leave to File Post-Allocatur Communications and a Reply are **DENIED** as moot.

APPENDIX C

[J-43A&B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

MICHELLE BRAUN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellee v. WAL-MART STORES, INC., A DELAWARE CORPORATION, AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Appellants	:	No. 32 EAP 2012 : Appeal from the Judgment of Superior Court, entered on June 10, 2011, at No. 3373 EDA 2007, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Philadelphia County, Civil Division, entered November 14, 2007, at No. 3127, March Term 2002 : ARGUED: May 8, 2013

DOLORES HUMMEL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellees v. WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Appellants	:	No. 33 EAP 2012 : Appeal from the Judgment of Superior Court, entered on June 10, 2011, at No. 3376 EDA 2007, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Philadelphia County, Civil Division, entered November 14, 2007, at No. 3757, August Term, 2004 : ARGUED: May 8, 2013

OPINION

PER CURIAM DECIDED: December 15, 2014

This discretionary appeal concerns whether the class action proceedings in this case improperly subjected Appellants to a "trial by formula." The trial court certified the class, a jury rendered a divided verdict, and the Superior Court affirmed in part and reversed in part. We now affirm.

Appellees brought various class action claims against their former employers, Wal-Mart Stores, Inc., and Sam's Club (hereinafter "Wal-Mart"), based on policies and conduct pertaining to rest breaks and

meal breaks. Appellees asserted that Wal-Mart had promised them paid rest and meal breaks, but then had forced them, in whole or in part, to miss breaks or work through breaks, and also to work "off-the-clock," *i.e.*, to work without pay, after a scheduled shift had concluded.[1] The trial court certified a class consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present December 27, 2005." *See* Order, 12/27/05, at 1. The class ultimately consisted of 187,979 members.

The jury trial of this class action alleging systemic wage and hour violations spanned six weeks, resulting in a voluminous record. Appellees called eighteen fact witnesses and three expert witnesses during their case-in-chief. The parties' examinations of Appellees' expert witnesses took six full days of trial (September 11, 12, 13, 19, 20, and 21). Additionally, lengthy arguments were conducted during trial but outside the hearing of the jury on Wal-Mart's motions to strike portions of the testimony of Appellees' experts. Ultimately, the jury rendered a verdict in favor of Wal-Mart on all claims relating to meal breaks but in favor of Appellees on all claims relating to rest breaks and off-the-clock work. The amount of the judgment ultimately entered on the verdict was $187,648,589.[2] Wal-Mart appealed the

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[1] Appellees alleged claims against Wal-Mart for breach of contract, unjust enrichment, and violations of the Pennsylvania Wage Payment and Collection Law ("WPCL") and Pennsylvania Minimum Wage Act ("PMWA").

[2] This amount breaks down as follows:

WPCL verdict:	$ 49,568,541

judgment, and the Superior Court affirmed in part and reversed in part in a published unanimous *per curiam* opinion, which corrected a patent mathematical error committed by the trial court,[3] reversed the award of attorneys' fees, and remanded to the trial court to recalculate the lodestar it had employed to determine the amount of attorneys' fees. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. 2011). This Court granted Wal-Mart's request for discretionary review, limited to the following issue framed by Wal-Mart:

> 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.

Braun v. Wal-Mart Stores, 47 A.3d 1174 (Pa. 2012).

The issue accepted for review requires this Court to address: (1) whether Wal-Mart was subjected to a "trial by formula"; and (2) whether Appellees were

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Common Law verdict:	$ 29,178,873
Statutory Interest:	$ 10,163,863
WPCL liquidated damages:	$ 62,253,000
WPCL attorney fees:	$ 33,813,986
WPCL expenses:	$ 2,670,325

Additional attorney fees in the amount of $11,880,589 and expenses of $938,222 were ordered to be paid from the fund arising from the common law verdict.

[3] The Superior Court's correction of the error reduced the WPCL verdict amount from $49,568,541 to $49,289,541.

thereby improperly relieved of their burden to produce class-wide common evidence on key elements of their claims. Notwithstanding Wal-Mart's inclusion of the phrase "purported class action" in the issue presented for review, the propriety of the certification of the class in the first instance is not before the Court in this appeal. Notably, however, much of Wal-Mart's challenge to the method of trial is premised upon its contention that the class never should have been certified because Appellees did not present sufficient, class-wide "common" evidence of contract formation, breach, or unjust enrichment. Moreover, Wal-Mart asserts that the trial court's class certification, the jury verdict, and the Superior Court affirmance all improperly relied upon "sham statistics and baseless extrapolations of [Appellees'] expert witnesses, Drs. Baggett and Shapiro[,]" regarding "Wal-Mart's time clock and cash register records." Appellants' Brief at 27, 30. In short, Wal-Mart asserts that Appellees' statistical and extrapolation evidence was flawed in that it failed to show "that class members, on a class-wide basis, missed breaks, took shortened breaks or worked off-the-clock." *Id.* at 18-19.

More specifically, Wal-Mart claims that the time clock and cash register records did not show that employees had been forced to miss breaks or work off-the-clock, and that Appellees' expert analysis reaching the opposite conclusion was based on faulty assumptions that failed to account for the actual practices of Wal-Mart and its employees. Specifically, Wal-Mart claims that the analysis regarding rest breaks failed to account for "voluntary" missed breaks, and that the analysis regarding off-the-clock

work failed to account for the alleged fact that it was not uncommon for cashiers to log into and operate cash registers under another employee's name. Thus, Wal-Mart asserts that the class was overbroad, that appellees had not shown proper proof of Wal-Mart's liability as to each "purported" class member, and that Wal-Mart had been subject to a "trial by formula" that denied Wal-Mart its right to due process in violation of Pennsylvania law.[4] Appellants' Brief at 18-19. Specifically, Wal-Mart claims it was denied the right to defend inherently individual issues of liability. *Id.* at 22-24.

The Superior Court's slip opinion in this case is 211 pages long, and thoroughly details the evidence presented at trial. We set forth here only those facts necessary for resolution of the single issue raised on appeal, in which Wal-Mart challenges the method by which the trial was conducted.

Wal-Mart employees (characterized as "associates" in Wal-Mart's employee handbooks and other written policies) are required to "punch" time clocks. During orientation for new employees, employee handbooks are distributed that, among other things, inform employees that they are entitled to paid rest breaks and that they will be paid for all hours worked. Additionally, all employees are informed, through a variety of means, about Wal-Mart's rest break policy, known as PD - 07, and its off-the-clock work policy, known as PD - 43. The rest break policy states that a paid, 15-minute break will be given to an employee who works between three and six hours,

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[4] There are no federal due process claims asserted.

and that an additional paid, 15-minute break will be given to an employee who works more than six hours. The rest break policy requires that employees take full, uninterrupted breaks, and warns that disciplinary action may result if an employee misses breaks or takes breaks that are either too long or too short. Wal-Mart's off-the-clock work policy provides that it is against company policy for any employee to perform work without being paid, and that employees will be compensated for all work performed.

Prior to February 10, 2001, Wal-Mart employees were required to clock out and clock back in for each rest break, *i.e.*, employees were required to "punch" or "swipe" a time clock at the beginning and end of every rest break. Beginning in 1999, Wal-Mart conducted approximately ten regional internal audits that indicated widespread rest break violations, such as missed breaks, breaks that were too long, or breaks that were too short. In 2000, Wal-Mart conducted the "Shipley Audit," which was national in scope and included an examination of time clock and cashier log-in records. The Shipley Audit revealed that in one week, across 127 Wal-Mart stores, including five in Pennsylvania, more than 60,000 rest break violations had occurred. The Shipley Audit showed that an average of two rest breaks per week per employee were either missed or shortened at every store. The results were reported to top-level Wal-Mart executives, and on February 10, 2001, Wal-Mart eliminated its policy requiring employees to

clock out and clock back in for each rest break.[5] Additionally, there was evidence that, prior to 2003, it was possible for Wal-Mart cashiers to log in to and operate cash registers even if they were "off-the-clock." In 2003, Wal-Mart instituted a "lock-out" system whereby no employee who was off-the-clock could log in to a cash register. However, the system permitted managers to override lock-outs, *i.e.*, to enable an off-the-clock employee to log in to and operate a cash register.

In both seeking certification of the class and litigating their case at trial, Appellees presented the expert opinions of statisticians L. Scott Baggett, Ph.D., and Martin M. Shapiro, Ph.D., who had analyzed Wal-Mart's own business records regarding hours worked, breaks taken, and wages paid to each employee, as well as the results of the Shipley Audit.[6] At trial, Dr. Baggett testified that he had been

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[5] Wal-Mart stipulated at trial that as of one month prior to the change in policy, lawsuits alleging violations of Wal-Mart's rest break policy had been filed in seven states: Colorado, Indiana, Louisiana, New Mexico, North Carolina, Ohio, and Texas.

[6] Wal-Mart maintained "Time Clock Archive Reports" that showed total hours worked and total breaks taken by every employee for every shift worked. Wal-Mart's "Time Clock Punch Exception Reports" showed missed, inadequate, or overly-long breaks for all employees. These business records were used by Wal-Mart primarily for purposes of calculating payroll, and were analyzed by Appellees' experts. At the class-certification stage, Dr. Baggett testified that he had analyzed some 24,000 individual employee work shifts in twelve Pennsylvania Wal-Mart stores between March 1998 and December 2000, and had concluded that some 40% of hourly workers had not received the number or duration of rest breaks to which they had been entitled. Dr. Baggett stated that his analysis squared with the

provided the hourly employee time clock, rest break, and payroll records for all 139 Wal-Mart stores in Pennsylvania for the period from 1998 through early 2006, which amounted to 46 million individual shifts. Dr. Baggett further testified that the data provided had been incomplete, and that statistical extrapolation from the data revealed that, in fact, 52 million individual shifts had occurred during that time period; he testified that his computation of that total had been formulated within a reasonable degree of statistical certainty. Dr. Baggett also explained his methodology for determining how many rest breaks should have been earned over the course of those 52 million individual shifts, and how many rest breaks had been missed. Among other things, this undertaking required calculating numbers for the period from February 2001 to 2006, during which time actual rest break data was no longer available, due to the 2001 change in Wal-Mart's policy that eliminated the requirement for employees to clock out and clock back in at the beginning and end of rest breaks. Dr. Baggett explained that his method for extrapolating the total amount of breaks that had been missed but unrecorded included baseline calculations of the

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results of the Shipley Audit. In challenging class certification, Wal-Mart presented the deposition testimony of its own expert to explain that the evidence relied upon by Appellees' experts to show missed breaks was not reliable because an employee's failure to clock out and clock back in from any given break did not necessarily indicate that the employee had failed to take a break. In certifying the class, the trial court ruled that "the discrepancies in testimony [regarding the accuracy/reliability of the business records] will undoubtedly be an issue for jury determination at trial." Trial Court Opinion, 12/27/05, at 11.

number of known, recorded missed breaks that had occurred prior to the 2001 change in rest break time clock policy. Based on these extrapolations, coupled with the average rate of pay for hourly Wal-Mart employees, all of which had been calculated within a reasonable degree of statistical certainty, Dr. Baggett testified that the total damages to Wal-Mart hourly employees for missed rest breaks during the relevant time period had been $68,412,107. Dr. Baggett also testified that, although he could not tell from the data why any individual rest break had been missed, he presumed rest breaks had not been missed voluntarily because Wal-Mart's policy prohibited employees from missing or working through scheduled rest breaks.

Dr. Shapiro testified for Appellees regarding off-the-clock work. Dr. Shapiro stated that he had compared the Wal-Mart time clock, payroll, and rest break computer databases, and found numerous recorded instances of employees actively logged in to cash registers or computer-based learning terminals during times when they had simultaneously been clocked out for a break or had been clocked out of a shift altogether. He added that the total amount of such off-the-clock work hours decreased significantly after Wal-Mart instituted its "lock-out" policy in 2003. Dr. Shapiro had been provided with time clock and cash register log-in data for sixteen Pennsylvania Wal-Mart stores for the period from 2001 to 2006. In his testimony, Dr. Shapiro explained how he had extrapolated from that data to determine the average total number of hours of off-the-clock work performed by all hourly employees at all Pennsylvania Wal-Mart stores during the period from 1998 to

2005. He calculated that the unpaid earnings for all Wal-Mart employees working off-the-clock during the relevant period was $2,993,063.32, and testified that his computation had been formulated within a reasonable degree of statistical certainty.

Appellees also presented the expert testimony of organizational psychologist and statistician, Frank Landy, Ph.D., who testified that Wal-Mart had promised all its employees, through a variety of means, that paid breaks were a benefit of employment with Wal-Mart, and that its employees understood and expected that all breaks were to be paid breaks. In discussing the Shipley Audit, Dr. Landy testified that Wal-Mart stores had used daily "time adjustment slips" to correct known rest break violation errors. He explained: "Adjustment means that the associate actually comes in and says, no, no, I actually did get my break; I just forgot to swipe in [and] out for [it]." Dr. Landy testified that only approximately 10% of the total number of rest break violations had been corrected through time adjustment slips, which led him to the conclusion that "the magnitude of this problem even after they correct it for honest mistakes is big." *See Braun*, 24 A.3d at 932 (quoting Dr. Landy's trial testimony).[7]

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[7] Dr. Landy also testified, *inter alia*, that Wal-Mart store managers earned significant year-end bonuses for maximizing profits, the key to which was keeping payroll costs down by intentionally understaffing their stores and forcing employees to miss breaks and work off-the-clock. He opined that a store manager could earn a $1300 annual bonus by simply shaving one minute per week per employee from a store's payroll obligation. He further explained that if a manager could shave one

Appellees also presented the testimony of a number of former and current Wal-Mart employees, who testified that they had regularly been forced to work without taking breaks (or to take shortened breaks) because the stores in which they worked were chronically understaffed. In response, Wal-Mart presented the testimony of a number of current and former employees (all of whom had opted out of the class),

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hour per week per employee from a store's payroll obligation, the annual bonus would be $82,000. The Superior Court summarized Dr. Landy's testimony as follows:

> Dr. Landy also discussed understaffing in Wal–Mart stores. He opined that Wal–Mart's "preferred scheduling" program was the "root cause" of understaffing in the stores. There is a correlation, Dr. Landy stated, between understaffing and employees' ability to receive breaks: the more understaffed the stores, the greater the pressure on managers not to provide breaks and on employees not to take breaks. He explained how the pressure to reduce payroll costs led to understaffing. Dr. Landy noted that the Wal–Mart store-manager-bonus system had a "negative effect" on compliance with Wal–Mart's policies on breaks and pay. Lastly, Dr. Landy testified that after Wal–Mart conducted its Shipley Audit, Wal–Mart eliminated the requirement that employees punch the time clock for rest breaks; he opined that Wal–Mart eliminated "smoking gun" evidence of its policy violations to limit its liability.

Braun, 24 A.3d at 887 (citations to record and footnotes omitted).

In contrast, Wal-Mart's retail expert, Wade Fenn, testified that there was no link between Wal-Mart's managers' bonus compensation program and rest breaks, that Wal-Mart's practices were consistent with other big-box retailers, and that Dr. Landy's testimony regarding hypothetical year-end bonuses had been based on an erroneous comparison of employee hours to store profitability.

who testified that they had never been forced to miss a rest break and had always been paid for the breaks they did take.

During the defense case, Dr. Denise Martin, an expert statistician, testified that she had identified a number of alleged errors in the methods used by Appellees' experts to arrive at their estimated damages computations. Principally, Dr. Martin took issue with Dr. Baggett's premise that an employee's failure to clock out and clock back in from a rest break indicated a missed rest break, as well as his conclusion that no missed breaks were voluntary. In Dr. Martin's opinion, Dr. Baggett had used "bad" data to account for missing data, which is "statistically improper." With respect to Dr. Shapiro's methodology, Dr. Martin criticized his assumption that cashiers did not routinely log in to cash registers under another employee's name. On this basis, Dr. Martin testified that Dr. Shapiro's comparisons of time clock data to cash register log-in data were improper and resulted in an erroneous calculation of the number of hours of off-the-clock work that had occurred during the relevant time period.

In this appeal, Wal-Mart asserts that it was subjected to "trial by formula," a practice disapproved by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426 (2013). The Court notes that Wal-Mart's formulation of the issue accepted for review focuses on the procedural conduct of the trial. Nevertheless, Wal-Mart argues that the class was improperly certified because Appellees failed to prove that questions of law and fact were common to the

class, and that common questions predominated over individual issues.[8]

In effect, Wal-Mart's arguments in support of its assertion that the class should not have been certified mirror its arguments in support of the assertion that it was subjected to a trial by formula. Neverthe-

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[8] Specifically, Wal-Mart asserts that the trial court, in certifying the class, and the Superior Court in affirming class certification, disregarded the "individualized issues [that] included whether class members actually missed breaks or had them cut short; whether, if a class member missed a break, his or her actions were voluntary; whether cashiers whose cash register log-in records did not match their time clock records actually worked off-the-clock; whether Wal-Mart intended to be contractually bound to each class member by the employment handbooks [promising paid breaks]; and whether each class member relied on the employee handbooks in deciding to work at Wal-Mart." Appellants' Brief at 28. The Court notes that an order granting class certification will not be disturbed on appeal unless the court abused its discretion in applying the procedural requirements for class certification. *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 15 (Pa. 2011). In deciding whether class action procedural requirements were misapplied or an incorrect legal standard was used in ruling on class certification, our standard of review is *de novo* and our scope of review is plenary. *Id.* Wal-Mart's allegation that both courts below disregarded individualized issues does not prove misapplication of procedural requirements because the existence of distinguishing individual facts among class members is not fatal to certification. *Id.* at 23. Appellees here were not required to prove that the claims of all class members were identical. Class members may assert a single common complaint even if they have not all suffered actual injury, and demonstrating that all class members are subject to the same harm will suffice. *Id.* (citing *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 666 (Pa. 2009)). For this reason, we do not discern an abuse of discretion in the pre-trial certification decision.

less, the focus in this appeal should be primarily on the proofs offered at trial and whether the proceeding conducted by the trial court amounted to a trial by formula that relieved Appellees of their burden to produce common evidence on key elements of their claims.[9] Our review of this question of law is plenary and *de novo*. *Lower Makefield Twp. v. Lands of Dalgewicz*, 67 A.3d 772, 775 (Pa. 2013).

In response, Appellees argue that on the merits, class certification was warranted here, and that Wal-Mart was not subjected to a trial by formula, but rather was faced with a recognized and acceptable style of class action known as "replicated proof," in which the same underlying evidence, if relevant and credible, proves each class member's claim as if each class member had proceeded alone. Appellees' Brief at 18 (citing *Liss & Marion v. Recordex Acquisition Corp.,* 983 A.2d 652 (Pa. 2009)). In a reply brief, Wal-Mart largely reiterates the positions in its original brief. Appellants' Reply Brief at 1-25. The Court notes that a number of *amicus curiae* briefs were also filed in this appeal.[10]

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[9] *See Samuel-Bassett*, 34 A.3d at 34 ("Once the jury rendered its decision, the trial court's certification of the class was no longer revocable. [Pa.R.C.P. 1710(d)]. The only available avenue for [Defendant] to obtain relief from the judgment based on post-verdict arguments that evidence personal to [individual Plaintiff] was not probative of the class claims was to challenge the sufficiency or weight of the evidence.").

[10] Two groups filed *amicus* briefs in support of Appellees: one group consisted of various labor organizations and the other consisted of various legal aid and legal rights organizations. Four entities filed *amicus* briefs in support of Wal-Mart: the

Due process in legal proceedings requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970). As observed by the United States Court of Appeals for the Third Circuit, the validity of an argument challenging the manner in which a trial has been conducted and alleging that it was so highly prejudicial so as to amount to a denial of due process must be measured against the background of the trial as a whole; the complexity of the litigation; the length of the trial; the quantity of evidence received; and, the difficulty of the task that confronted the factfinder. *Citron v. Aro Corp.*, 377 F.2d 750, 752 (3d Cir. 1967). The class action mechanism is designed to permit a named individual to proceed to trial on behalf of the class, including him- or herself, and to try all of the class members' claims together to judgment. *Samuel-Bassett*, 34 A.3d at 34 (citing Pa.R.C.P. 1715(c)).

The United States Supreme Court's disapproval of "trial by formula" in *Dukes* was directed at a plan to try a sample set of class members' claims of sex discrimination and, if discrimination was found and the claims were meritorious, to then multiply the average back-pay award to determine the class-wide recovery without further individualized proceedings. *Dukes*, __ U.S. at __, 131 S. Ct. at 2561. To the High Court, this "novel" process would have robbed Wal-Mart (in that case) of its right to litigate its defenses to individual claims, because liability for all but the

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Defense Research Institute, the Product Liability Advisory Council, a group of national and state retail associations, and a group of national, state, and local chambers of commerce.

sample set would never be tried. *Id.* The United States Court of Appeals for the Sixth Circuit has described the "trial by formula" method disapproved in *Dukes* as follows:

> Dukes proposed a "Trial by Formula" process. Under this system, the district court would appoint a master to determine whether and how much backpay was due to a sample set of class members. The court would then multiply the total number of class members by the percentage of claims the special master determined were valid. Next, it would multiply that number by the average backpay award for sample claimants with a valid claim to determine the class's recovery. The Court did not make clear whether Dukes proposed that the class's recovery would be distributed *pro rata*, whether there would be some sort of claims procedure, based on the particular applicant's date of non-promotion, or whether class counsel would dispose of the money through a *cy pres* distribution. Regardless, the Court held that the Trial by Formula approach would violate the Rules Enabling Act because it would abridge or modify Wal-Mart's right to present affirmative defenses to individual backpay determinations. *Dukes*, 131 S.Ct. at 2561.

Davis v. Cintas Corp., 717 F.3d 476, 486 n.2 (6th Cir. 2013).

Similarly, a Magistrate Judge of the United States District Court for the Southern District of New York described the "trial by formula" method disapproved in *Dukes* in the following terms:

> Specifically, the Supreme Court rejected a "Trial by Formula," in which the plaintiffs would hold a trial for a sample set of class members' claims of sex discrimination and then multiple the average backpay award to determine the class-wide recovery without further individualized proceedings. Under this proposal, Wal-Mart would have been denied its right to litigate its defenses to individual claims of discrimination, as liability for all but the sample set would have never been tried. Chipotle contends that *Dukes* requires individualized discovery of opt-in plaintiffs so that it can litigate its individualized defenses, and that the denial of this information might, in fact, render certification inappropriate.
>
> ***
>
> In *Dukes*, the Supreme Court focused on the need for a common contention that is capable of class-wide resolution: "Without some glue holding the alleged reasons [behind all of Wal-Mart's individual employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Dukes*, 131 S.Ct. at 2552 (emphasis in original).

Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 188, 191 (S.D.N.Y. 2014) (citations and quotation marks omitted).

In this case, contrary to Wal-Mart's assertions, the now-disapproved "trial by formula" process at issue in *Dukes* was not at work here, because there was no initial or prior adjudication of Wal-Mart's lia-

bility to a subset of employees that would then be extrapolated to the rest of the class. Instead, the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole. By contrast, the evidence of Wal-Mart's *liability* to the entire class for breach of contract and WPCL violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits. These records were sufficient to support the factfinder's determination that there was an extensive pattern of discrepancies between the number and duration of breaks earned and the number and duration of breaks taken. Both parties had ample opportunity to present evidence to explain these discrepancies, *i.e.*, to show that the discrepancies were or were not evidence of class-wide wage-and-hour violations. Thus, Wal-Mart's claim that it was denied due process fails.

Also, in *Dukes*, the class-action was brought for alleged violations of Title VII of the Civil Rights Act of 1964, and specifically alleged sexual discrimination in the hiring and promotion of female workers. The evidence in *Dukes* showed that Wal-Mart had an express policy prohibiting sex discrimination. Importantly, although some Wal-Mart managers applied their own subjective gender biases in making hiring and promotion decisions, some did not. Thus, the High Court ruled that the element of class commonality was lacking because the required showing of "significant proof" that Wal-Mart operated under a "general policy of discrimination" was "entirely absent." *Dukes*, __ U.S. at __, 131 S.Ct. at 2553. The Court noted that the expert opinion evidence of a

"general policy of discrimination" offered by the plaintiffs could not assess "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.*

In this case, where systemic wage-and-hour violations were asserted, evidence was presented by appellees that, if believed, supported an inference that Wal-Mart managers company-wide were pressured to increase profits and decrease payroll by understaffing stores through the preferred scheduling system, and that these factors, including the managers' annual bonus compensation program, impeded the ability of employees, across the board, to take scheduled, promised, paid rest breaks. The lack of proof of class commonality present in *Dukes* is not present here.

Turning to *Comcast v. Behrend*, which Wal-Mart also cites here, the question for review before the High Court in that case was "[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." __ U.S. at __, 133 S. Ct. at 1431 n.4. In that matter, two million Comcast customers comprised the class alleging various antitrust violations. The Court noted that both the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit had perceived no need for the plaintiffs to "tie each theory of antitrust impact" to a calculation of damages. *Id.* at __, 133 S.Ct. at 1433. The Court determined that the District Court and the Court of Appeals had entirely ignored the "first step" of a "damages study,"

which requires "the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Id.* at __, 133 S.Ct. at 1435 (italics in original) (citing Federal Judicial Center Reference Manual on Scientific Evidence 432 (3d ed. 2011). Because the damages methodology used in *Behrend* identified damages that were not the result of the specific antitrust violation for which the class had been certified, the High Court reversed the order upholding the class certification. *Id.* at __, 133 S.Ct. at 1434-35.

The *Behrend* Court, did, however, recognize that where a theory of liability is capable of class-wide proof, calculations of damages need not be exact. *Id.* at __, 133 S.Ct. at 1433-34. Indeed, as one federal district court has noted, one takeaway from the Supreme Court's decisions in this area is that "the propriety of class certification in wage and hour cases that involve recordkeeping violations should be assessed in light of the relaxed burden of proving damages." *Gomez v. Tyson Foods, Inc.*, 295 F.R.D. 397, 400 (D. Neb. 2013) (citing *Behrend and Dukes*). It is also well-settled that when an employer fails to keep complete records of hours, employees may prove their hours through representative testimony. *Anderson v. Mt. Clemens Pottery Co., Inc.*, 328 U.S. 680, 688 (1946), *superseded by statute on other grounds*. "[E]ven where the lack of accurate records grows out of a *bona fide* mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Id.* One federal Circuit Court has observed that "[a] rule

preventing employees from recovering for uncompensated work because they are unable to determine precisely the amount due would result in rewarding employers for violating federal [and state] law." *Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 69 (2d Cir. 1997) (citing *Mt. Clemens*, 328 U.S. at 687).

Unlike the plaintiffs in *Behrend*, who failed to translate the legal theory of their harm into an analysis of its economic impact, Appellees here offered data and analysis from Wal-Mart's own business records, including time clock and cashier log-in data, to support their claim of damages related to systemic wage and hour violations. Wal-Mart responds now, as it did at trial and on direct appeal, that the time clock and cash register log-in data do not necessarily reflect that breaks were missed or shortened. Nevertheless, by advancing this argument, Wal-Mart impliedly acknowledges that its record-keeping has been incomplete, and it cannot now avoid the relaxed burden of proving damages through extrapolation. *Mt. Clemens*.

The essence of Wal-Mart's appeal is its assertion that the class-action device, in this instance, had "run amok," resulting in a "trial by formula" during which Appellees' requirement to prove the essential elements of their claims as to each class member was eliminated. Appellants' Brief at 18. Indeed, Wal-Mart seems to suggest that the class claims of breach of contract and unjust enrichment could only be properly proven by an individual examination of the 187,979 class members to determine whether each had been promised paid breaks that they were then forced to miss, or partially work through, and wheth-

er each had, or had not, been forced to work off-the-clock. Relatedly, Wal-Mart suggests that any determination of damages is only proper on an individual class member basis, and that any tabulation of damages across-the-board would violate due process. The Court disagrees.[11]

There was a single, central, common issue of liability here: whether Wal-Mart failed to compensate its employees in accordance with its own written policies. On that question, both parties presented evidence. Wal-Mart's liability was proven on a class-wide basis. Damages were assessed based on a computation of the average rate of an employee's pay (about eight dollars per hour) multiplied by the number of hours for which pay should have been received but was not. In our view, this was not a case of "trial by formula" or of a class action "run amok." Accordingly, the judgment of the Superior Court is affirmed.

Jurisdiction relinquished.

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[11] We are persuaded by the observation of the federal district court in *Jackson v. Bloomberg*, 298 F.R.D. 152, 168 (S.D.N.Y. 2014), which declined to read into *Behrend* "a principle that would fundamentally undermine the use of the class action vehicle in the wage-and-hour context." In addition, we subscribe to what appears to be the prevailing view that *Dukes* does not bar class actions in wage and hour cases. *See Ensor v. Chipotle Mexican Grill, Inc.*, 300 F.R.D. 188, 191 (S.D.N.Y. 2014) ("The weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases."); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) (collecting cases).

Former Justice McCaffery did not participate in the decision of this case.

Mr. Chief Justice Castille, Messrs. Justice Eakin and Baer and Madame Justice Todd join the opinion.

Mr. Justice Saylor files a dissenting opinion.

[J-43A&B-2013] [M.O. – Per Curiam]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MICHELLE BRAUN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellee v. WAL-MART STORES, INC., A DELAWARE CORPORATION, AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Appellants	:	No. 32 EAP 2012 : Appeal from the Judgment of Superior Court, entered on June 10, 2011, at No. 3373 EDA 2007, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Philadelphia County, Civil Division, entered November 14, 2007, at No. 3127, March Term 2002 : ARGUED: May 8, 2013

	:	No. 33 EAP 2012
	:	
	:	Appeal from the
DOLORES HUMMEL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,	:	Judgment of
	:	Superior Court,
	:	entered on June 10,
	:	2011, at No. 3376
Appellees	:	EDA 2007, affirming
	:	in part and reversing
v.	:	in part the
	:	Judgment of the
WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC.,	:	Court of Common
	:	Pleas of Philadelphia
	:	County, Civil
	:	Division, entered
	:	November 14, 2007,
	:	at No. 3757, August
Appellants	:	Term, 2004
	:	
	:	ARGUED:
	:	May 8, 2013

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: December 15, 2014

I agree with Appellants that the trial court implemented, and the intermediate court approved, a severely lax approach to the application of governing substantive law in the issuance and sustainment of an almost two-hundred-million-dollar verdict based on proof which was insufficient to establish liability and damages across a 187,000-member class. Although I take no issue with the majority's observation that the burden of proof may be relaxed to some de-

gree in wage-and-hour cases, *see* Majority Opinion, *slip op.* at 17, the latitude extended in this case is of an untenable magnitude. Here, the Appellee class was permitted to effectively project the anecdotal experience of each of six testifying class members upon thirty-thousand other members of the class at large, to extrapolate abstract data concerning missed and mistimed "swipes" from 16 Pennsylvania stores to 139 others, to overlay discrete data taken from several years' experience across a distinct four-year period, and to attribute a single cause to missed and mistimed swipes, all despite indisputable variations across store locations, management personnel, time, and other circumstances.[1] The sorts of gross generalizations and assumptions which permitted the simple averaging and extrapolations offered up by Appellees' expert witnesses to stand in support of the conclusion that some tens of millions of missed or mistimed swipes reflected rest breaks foregone on account of payroll pressure exerted from the Wal-Mart boardroom would never hold up to peer review as a matter of science. Therefore, it is very troublesome for the same to be relied upon in courts of law as the essential support for a large scale class-action verdict.

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[1] For example, presumably as a result of Wal-Mart compliance initiatives, the numbers of missed swipes for meal breaks dropped dramatically over the years. *See* N.T., Sept. 19, 2006 (afternoon), at 61-62. Nevertheless, in extrapolating rest-break data taken from 1998 through 2001 into the 2002 through 2006 timeframe, Appellees' expert witness took the liberty of assuming that none of Wal-Mart's compliance measures were of any effect whatsoever relative to the rest breaks. *See id.* at 67.

Certainly, I am sympathetic to efforts to vindicate the interests of workers with modest claims who may lack the ability and incentive to pursue remedies on an individualized basis. Nevertheless, I remain of the view that the kinds of alterations to substantive law reflected in the majority's relaxed approach to class-action litigation should be the subject of overt consideration in the political branch and should not occur as a byproduct of the application of a mere procedural device by the judiciary. *Accord Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 466-77, 34 A.3d 1, 58-65 (2011) (Saylor, J., dissenting).[2] I maintain this position, in particular, in light of the broad-scale social effects likely to attend these sorts of modifications. In this regard, and more generally, I also incorporate by reference the remarks set forth in my dissent in the *Kia* case. *See id.*

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[2] The ability of the General Assembly to alter the class action landscape via legislation is, of course, subject to constitutional limitations such as the due process constraints raised by Appellants.

APPENDIX D

IN THE COURT OF COMMON PLEASE
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

MICHELLE BRAUN	:	MARCH TERM, 2002
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3127
DOLORES HUMMEL	:	AUGUST TERM, 2004
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3757

OPINION

These two class action matters come on appeal following a jury verdict in favor of plaintiffs and the Court's denial of defendants' Post-Verdict Motions.

On March 21, 2002, Plaintiff Michelle Braun filed a class action complaint against Defendants, alleging class damages resulting from earned rest break and meal break time workers were prohibited from taking in defendant's Pennsylvania stores. On August 30, 2004, Plaintiff Dolores Hummel also filed a complaint against defendants on the same grounds, but also raised additional statutory claims.[1] On Decem-

[1] These cases ran in parallel until they were formally consolidated by the Court sua sponte, on the morning of trial. N.T. 8/18/06, p. 3:8-14.

ber 27, 2005, the Court granted plaintiffs' Motions for Class Certification and entered a Memorandum Certification Opinion. The class was certified to include "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present." A copy of this opinion is attached hereto and made part hereof.

Trial began on September 5, 2006 and lasted for twenty-nine days. During the trial, the jury heard class representatives Braun and Hummel's testimony that defendants forced them and other class members to work through contractually promised rest and meal breaks without pay. Other former employees also testified to the same effect. Expert witnesses calculated the financial effect of this policy.

A jury of twelve jurors deliberated and returned a verdict in favor of plaintiffs' class. The jury found that plaintiffs' class was entitled to damages totaling $1,462,910.35 for off-the-clock work that was required from March 19, 1998 through December, 31, 2001. The jury awarded the class additional damages totaling $1,031,430.00 for off-the-clock work from January 1, 2002, through May 1, 2006. The jury awarded the class damages totaling $27,715,964.00 for rest break violations that occurred from March 19, 1998 through December 31, 2001, and $48,258,111.00 for rest break violations occurring January 1, 2002, through May 1, 2006.

On October 12, 2006, plaintiffs filed a Motion to Award Statutorily Mandated Liquidated Damages. On October 30, 2006, plaintiffs filed a Motion to Assess Interest on Damage Amounts Awarded for the Period of March 19, 1998 through December 31, 2001 and a Motion for Counsel Fees. That same day, de-

fendants filed a Motion for Post-Trial Relief. On February 27, 2007, the Court heard Oral Argument on Defendants' Post-Trial Motions, and plaintiffs' Petition for Award of Attorney Fees and Costs. On October 3, 2007, the Court awarded statutory damages in the amount of $62,253,000.00 to plaintiffs' class. On November 14, 2007, the Court denied Defendants' Post-Verdict Motions and entered judgment in favor of plaintiffs' class and against defendants, totaling $187,648,589.11.[2] On November 14, 2007, the Court also entered an Order awarding plaintiffs' class prejudgment interest in the amount of $10,163,863.00. On December 7, 2007, defendants timely appealed both Orders entered on November 14, 2007. Opinions issued as part of the October 3, 2007 and November 14, 2007 Orders are attached hereto and made part hereof.

Defendants Post-Verdict Motions asked the Court to enter judgment in Wal-Mart's favor notwithstanding the jury's verdict or alternatively to grant a new trial. Although the defendant purports to raise hundreds of points of error in the twenty-six paragraphs of their Motion for Post-Trial Relief, the claims are excruciatingly repetitive, many were not briefed and they will not all be addressed individually. Defendant claims:

(1) the cases should not have been certified as class actions;

(2) that promised rest breaks and lunch are not "fringe benefits";

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[2] This includes statutory attorney fees of $33,813,986.24 and non-statutory attorney fees of $11,880.589.76.

(3) that venue was improper in Philadelphia;

(4) that it was error to preclude defendant from speaking to its employees about trial issues prior to trial;

(5) that all defendant's requested points for charge were not given;

(6) that the Court did not use the exact words Wal-Mart requested on its jury verdict interrogatory;

(7) that the Court answered the jury's question; and finally

(8) in rambling, unclear, repetitive and confusing run on sentences purportedly raise every objection made by defendants.[3]

In their brief, the defendant has abandoned most of their inconsequential boilerplate claims.

Defendant avers error in granting Class Certification. Defendant claims that class certification was improper because plaintiffs failed to establish the prerequisites and requirements for class certification, as set forth in Pa.R.C.P. 1702 and 1708. It claims that plaintiffs' class lacked numerosity, commonality, predominance, typicality, and that the class representatives did not fairly and adequately

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[3] Paragraphs nineteen and twenty-one of defendant's post verdict motion. Defendants purport also to raise the denial of summary judgment and non-suit motions, which are unappealable after a verdict has been rendered. *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d l038 (Pa.Commw. 1997).

represent the class.[4] Defendant contends the testimony of plaintiffs' experts Dr. Baggett and Dr. Shapiro did not prove on a class-wide basis, why breaks were missed or shortened or why class members worked off the clock. Defendant also argues that the prima facie standard applied by the Court for class certification was incorrectly applied.

All preserved claims raised in Post-Verdict Motions challenging Class Certification have been adequately addressed in the Opinion issued contemporaneously with certification and will not be repeated herein. Rather, the Memorandum Opinion of December 27, 2005 granting certification of the class is attached and made part of this Opinion. This Court addressed every point related to class certification on which defendants requested post-trial relief. In this opinion, the Court addressed how every specific requirement for class certification was met and detailed why the testimonies of both Drs. Shapiro and Baggett were permissible. The trial itself demonstrated that the trial was manageable as a class action.

As explained in that certification opinion dated December 27, 2005:

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[4] 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 miss 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.

"In support of their claim, plaintiffs present expert analysis of defendant's own computer records of employee time and activity. Plaintiff relies upon the expert opinion of Dr. L. Scott Baggett a highly qualified consulting statistician, the opinion of Martin M. Shapiro a highly qualified psychologist and researcher at Emory University with significant experience in the application of the statistical quantification of measurement operations, each of whose reports are of record and the "Shipley Audit" an analysis performed for management purposes by defendant. All expert analyses relied upon defendant's own computer records maintained in the regular course of their business for business purposes, namely to determine the pay earned by hourly employees. These computer records are mandated by law including the Pennsylvania Minimum Wage Act of 1968 which states: "Every employer of employees shall keep a true and accurate record of the hours worked by each employee and the wages paid to each . . . ."

The defendant's business record, the "Time Clock Archive Report" records the "total hour's worked" and "total breaks" for every employee for every shift worked. The defendant's own records, the Time Clock Punch Exception Report lists missed or inadequate breaks. These reports have been utilized and relied upon by defendant management for payroll and evalu-

ation purposes. The same reports were relied upon and analyzed by plaintiffs' experts.[5]

Defendant claims to have an unalterable written policy of providing all employees and therefore all putative class members with all mandated rest and meal breaks. This policy, applicable to all employees, incorporated in "PD-07" requires that all "work associates" receive one paid rest break of 15 minutes during any three hour work period and two paid 15 minute rest breaks and one unpaid meal break of 30 minutes over a six hour work period. Defendant further claims to have an unalterable written policy incorporated into "PD-43" that no associate "should perform work for the Company without compensation" and that no supervisor may request or require any associate to work without compensation. The defendant is mandated by law in Pennsylvania to advise every employee of the wage payments and "fringe benefits" to which they are entitled.[6]

Dr. Baggett examined management reports from March 1998 to December 2000 for twelve

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[5] Even though the defendant relied upon these records which are mandated by law, to determine associate's pay, defendant claims that their employment records are inaccurate and may not be relied upon. While this defense may be persuasive at trial, for purposes of this preliminary procedural certification decision the Court accepts these business records as prima facie accurate.

[6] 43 P.S. 260.4, actual notification is not required since posting is sufficient for compliance

stores in Pennsylvania. Based upon an analysis of 23,919 individual shifts covering 2,250 individual associates Dr. Baggett concluded that 17,556 or 64.4% of the shifts contained deficiencies in duration of rest and meal breaks and 10,889 or 40% of workers did not receive the appropriate number of breaks. As to plaintiff Hummel herself, Dr. Baggett found 35.8% of her breaks were deficient in duration and 28.3% deficient in number.

These findings for Pennsylvania stores by plaintiff's retained expert are consistent with defendant's internal audit performed in June 2000. After studying the computer "exception reports" in 127 stores nationally including five stores in Pennsylvania, the defendant's Internal Audit Division found "Stores were not in compliance with company and state regulations concerning the allotment of breaks and meals as 76,472 exceptions were noted in 127 stores reviewed for a one week period." 75% of these missed breaks concerned rest breaks 25% concerned missed meal breaks. The Defendant's own internal management ana1ysis revealed that an average of 2 breaks per associate per week were either missed or shorted at every store. The internal audits findings concerning the Pennsylvania stores actually revealed greater deficiencies than Dr. Baggett's conclusions.

Other computer records were also analyzed by plaintiff's experts. Defendant databases record time associates spent on other electronic devices such as cash register and computer

> based learning terminals. Plaintiff's expert Dr. Shapiro compared this database with time records and determined that while associates were recorded as taking breaks they were also recorded as being engaged in employment related activities.[7]"

Defendant argues that they are entitled to JNOV because they contend the evidence was insufficient to allow plaintiffs' Wage Payment and Collection Act ("WPCL"), contract, and unjust enrichment claims to go to the jury. They claim that meal periods and rest breaks are not fringe benefits or wage supplements as a matter of law. This incorrect claim was fully addressed in the Memorandum Opinion of October 3, 2007, incorporated herein. As said therein:

> "In this class action, by special verdict, the jury found that the defendant required its employees to work without pay by directing them not to record their hours on Walmart's computerized pay system. The jury found that

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[7] The reports of experts John Zogby and Dr. Thompson, which claim that a random sampling survey of class members can "provide a valid means to determine the uncompensated off-the-clock time of the class of employees," were stricken in the Hummel matter pursuant to the Order granting defendant's Frye Motion, have been rejected as providing no assistance whatsoever in the Braun matter. These expert "opinions" about the reliability of unsworn and untested recollections expressed anonymously by former employees in a telephone interview years after the event provide no methodology whatsoever, no analysis whatsoever, and no reason whatsoever to believe that these self-serving self-interested hearsay results will in any way comport with historical reality or even be arguably admissible in evidence under Pennsylvania law.

Walmart saved $1,031,430.00 during the statutory period by not paying their workers for all the time they had worked. The jury also found that defendant Walmart prohibited employees from taking the needed rest breaks which they had been promised. By prohibiting promised rest breaks during the statutory period defendant Walmart saved an additional $48,258,111.00.

By agreement of the parties, and in accord with Pennsylvania law, the jury was also specifically asked, and properly found, that defendant Walmart did not have a good faith reason for refusing to pay their employees everything they had earned. Thus, the jury found that defendant Walmart abused their workers in precisely the manner for which remedies were created by the Pennsylvania Wage Payment and Collection Law. Following these valid jury findings, the Court must add statutory damages to the verdict.[8]

Defendant Walmart claims these verdicts are not subject to the liquidated damages provision of the WPCL.

The WPCL defines "wages" as:

"All earnings of an employee, regardless of whether determined on time, task, piece, commission, or other method of calculations. The term 'wages' also includes fringe benefits

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[8] *Obeneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148 (1997).

or wage supplements whether payable by an employer from his funds or from amounts withheld from the employee pay by the employer."

The term "Fringe benefits" is also defined, to include:

"Separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employee's pay by the employer and any other amount to be paid pursuant to an agreement to the employee . . . ."[9]

Only in defense of litigation does Walmart claim that their employees' hourly earnings during guaranteed "paid rest breaks" are not "compensation." Every Walmart employee has been given an Associate benefit book called "My money." This book describes paid rest breaks as a supplement to employee wages. Under the heading: "Pay Programs" Walmart tells every employee: "In addition to the pay you receive for a regular days work, there are other programs and benefits that can supplement your income." "Paid Break Period: Take a break and get paid for it" The class employees claim for payment of wages earned but unpaid because they were required to miss rest breaks and to work without time clock records, is clearly seeking payment for "wages," "fringe benefits," and "wage supplements" as defined by the Act.

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9 43 P.S. Section 260.2a.

In cases brought by highly paid executives, the Federal District Court, the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have all held that "esoteric" fringe benefits are subject to the protection of the WPCL. These cases have held that the penalty of "liquidated damages" were mandated even though the individual executive plaintiffs had been regularly and fully paid their substantial base salaries.

In *Regier v. Rhone-Poulenc Rorer, Inc.*,[10] the District Court for the Eastern District of Pennsylvania held that the WPCL protects stock options given "to a small member of key executives." That Court found that those highly paid executive were entitled to liquidated damages. The District Court said:

"The WPCL is the statutory vehicle for employees to recover wages and fringe benefits that are contractually owed to them by their employers. *See Wurst v. Nestle Foods Corp.,* 791 F. Supp. 123 (W.D. Pa. 1991). The statute itself does not create a separate right to compensation, but rather gives additional protections to employees by providing statutory remedies for an employer's breach of its contractual obligation to pay wages. *See Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577 (E.D. Pa. 1985), *affd*, 800 F.2d 1138 (3d Cir. 1986).

The term "wages" is broadly defined by the WPCL. It encompasses "all earnings of an em-

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10 1995 U.S. Dist. Lexis 9384

ployee" and specifically includes "fringe benefits" and "wage supplements," which, in relevant part, are defined as "separation . . . pay . . . and any other amount to be paid pursuant to an agreement to the employe." 43 P.S. § 260.2a.

The Court's examination of the paucity of cases which interpret the WPCL reveals none which squarely address the question whether an employer's blocking of options such as the ones in this case subjects it to liability under the WPCL. However, because the Court predicts that the Pennsylvania Supreme Court would hold that the WPCL should be broadly construed to protect all forms of compensation due to employees, the Court concludes that the actions of defendants violated the WPCL."

Even non-monetary compensation is included:

"Non-monetary compensation is "earnings of an employe" which is included in the definition of "wages" contained in § 260.2a, and there is no reason to believe that the Pennsylvania Legislature intended § 260.3 to restrict the statute's coverage. *See Sanzone v. Phoenix Technologies, Inc.*, No. 89-5397, 1990 U.S. Dist. LEXIS 4656 (E.D. Pa. April 19, 1990) ("payment" in stock covered by WPCL).

Second, according to the rules of construction enacted by the Pennsylvania Legislature, the Court is directed to construe the WPCL liberally "to effect [its] objects and to promote justice." l Pa. Cons. Stat. Ann. § 1928(c). The Court concludes that the object of the WPCL is

to provide employees with statutory remedies to recover compensation of all types which are owed to them by their employers. *See Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 133 (3d Cir. 1991) ("Generally, the purpose underlying the WPCL is to protect employees, and to remove some of the obstacles to litigation facing many employees."). There is nothing in the statute itself or in its legislative history which suggests that the WPCL was intended to apply only to compensation which is "payable" in the manner defendants assert. The definition of "wages" contained in the statute includes "all earnings of an employe" and there is no reason to believe that cash compensation was intended to receive more protection than non-cash compensation."

Likewise in *Bowers v. National Technologies*,[11] the District Court for the Eastern District of Pennsylvania held payments in the form of "put options" were wages under the Act. That Court said:

"Nor may plaintiff's claim to the stock repurchase payments be dismissed. Although defendants argue that such payments were not true "wages", earned by plaintiffs, I find to the contrary. For purposes of this motion for judgment on the pleadings, I conclude that the stock repurchase payments were offered by defendants to plaintiffs to encourage plaintiffs to join Phoenix as employees. Like other fringe

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11 690 F. Supp. 349 (1988).

benefits, which are offered to employees when they first join a company, the stock repurchase payments were not provided to the employees on a weekly or even annual basis. Nevertheless, they were certainly "wages" within the broad definition of the WPCL in that they were payments pursuant to agreement, and they were offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment by Phoenix."

In *Hartman v. Baker*[12] the Superior Court found that even an "equity interest" was included in the definition of wages under the WPCL and therefore subject to liquidated damages penalties. The Superior Court said:

". . . we consider it worthwhile to set forth the statute's purpose and focus. "Pennsylvania enacted the WPCL to provide a vehicle for employees to enforce payment of their wages and compensation held by their employers." *Oberneder v. Link Computer Corp.*, 449 Pa. Super. 528, 674 A.2d 720, 721(Pa.Super.1996), affirmed, 548 Pa. 201, 696 A.2d 148 (1997). "The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages." *Id.*, 674 A.2d at 722. The WPCL "does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to en-

12 2000 Pa. Super. 140, 766 A.2d 347 (2000).

force payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement." *Banks Engineering Co., Inc. v. Polons*, 697 A.2d 1020. 1024 (Pa.Super. 1997), appeal granted, 550 Pa. 715, 706 A.2d 1210 (1998) (citation omitted)."

"Like the plaintiff in *Bowers*, *supra*, the equity interest offered to appellee was payment pursuant to a binding agreement. As we stated previously, the equity interest was provided in exchange for a reduction in appellee's pay structure. This equity interest was offered to appellee as an employee, not for some reason unrelated to his employment with appellants. *See Bowers*, *supra*. Thus, pursuant to a liberal construction of § 260.2a of the WPCL and the reasoning in *Bowers*, *supra*, we agree with the Chancellor's determination that appellee's equity interest constitutes "wages" as defined by the WPCL."

The Supreme Court of Pennsylvania in *Oberneder v. Link Computer Corp.*,[13] held that the WPCL mandates attorney fees to the prevailing party. *Oberneder* was a claim by the company President for a percentage of the sale of a Division of his corporation. This percentage compensation claim was subject to the WPCL.

The law in its majesty applies equally to highly paid executives and minimum wage clerks. Just as highly paid executives' prom-

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13 548 Pa. 201, 696 A.2d 148 (1997).

> ised equity interests, or put options or percentage of sale proceeds are protected fringe benefits and wage supplements, so too the monetary equivalents of "paid break" time cashiers and other employees were prohibited from taking are protected fringe benefits and wage supplements. Even more clearly, the wages which were withheld because employees were forced to work "off the dock" are subject to mandatory liquidated damages. Clearly the WPCL liquidated damages provision applies to the verdict in this case.
>
> Defendant claims that even though their employees did not receive all money earned, a fact now proven at trial, statutory liquidated damages are not required because the employees were paid some of what they were owed. Case law however demonstrates that highly paid executives may recover statutory liquidated damages even though they had timely and correctly received their entire substantial base pay.[14]"

Defendant claims that venue of the *Hummel* matter should have been transferred to Reading, Pennsylvania. Venue was clearly proper in this class action, which included numerous Philadelphia residents and several Philadelphia stores.

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14 The inclusion in the statutory definition of "reimbursement for expenses, union dues" and "any other amount to be paid pursuant to an "agreement" would be nonsense if any partial payment vitiated recovery under the act.

Defendant claims error in precluding potentially harassing ex parte conversations with class members pre-trial. This Order was fully explained by the Honorable Albert Sheppard in an Opinion dated January 15, 2003, which is fully incorporated herein. There was no error in this Order. Defendants have failed to even allege how they have been hampered in their defense or how this alleged error could possibly have contributed to the verdict.

Defendant claims to raise countless errors in evidentiary rulings. Many of these claims are repetitive and demonstrably inapposite. Nonetheless, the Court has reviewed each claim insofar as it can be understood and finds no error. The Court further finds that the complained evidentiary rulings did not adversely affect the verdict which was overwhelmingly supported by factual first hand testimony, augmented by proper expert opinion and the defendant's own records and analysis.

In its brief, defendant claims reversible errors on rulings denying five Motions in Limine. Since many of these claims are duplications and repetitive, this Court will sequentially address only the salient. The Defendant claims reversible error in the denial of their Motion in Limine seeking "to preclude non-Pennsylvania evidence and references."[15] This Motion, as presented, challenged the relevancy of anything that happened outside of Pennsylvania. However, at argument, counsel conceded that the motion

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15 Defendants' cite to the transcripts of 8/18/06, pages 53/19-56/3 and 9/5/06, pages 95/14-96/21, in support of this claim of error.

should not apply to corporate policy, but rather exclusively to "how a certain personnel manager in the State of New York might have instructed associates to fill out adjustment requests." In response to this concession, the Court said: "Look, you give me an Order that's so general that precludes your own witnesses from Arkansas and then you say, we really mean evidence relating to any actual or potential wage and hour claims by current or former Walmart employees not employed in Pennsylvania . . . . and that is totally different from the Order you have submitted."[16] The Motion in Limine was revisited and ruled upon on September 5, 2006: "The Motion is denied with leave to renew at trial for any objectionable thing that is raised." The ruling on this overly broad Motion in Limine cannot be the basis of any reversible error unless specifically inappropriate and impermissible evidence was actually introduced over objection at trial.

Defendant raises as error the ruling on their motion to preclude evidence of time shaving and improper editing of time records. On September 5, 2006, the Court also ruled on this motion: "Motion is denied with leave to renew at trial if any objectionable material is submitted or any objectionable question is asked."[17]

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16 N.T. 8/18/06, Pages 54-55.

17 A Motion in Limine is a motion for an evidentiary ruling pretrial. *Com. v Bobin*, 916 A.2d 1164 (Pa. Super. 1992). There is no requirement that evidentiary rulings be made out of context.

Defendant claims error in denying the Motion in Limine to preclude an argument "that the end of rest breaks swiping is evidence of spoliation or was adopted to destroy evidence or for some other improper purpose." In fact, the evidence at trial clearly revealed that the corporate response to class action lawsuits filed in many states and the adverse publicity from the revelation that Walmart corporate policy was to stop employees from taking meal and rest breaks was to cease all record keeping for rest break periods. No explanation other than the desire to eliminate evidence of corporate conduct was ever presented as to why corporate policy changed to stop this record keeping.[18] The jury was clearly entitled to draw the inference that the change in policy was for the specific purpose of ensuring that no computer record of employees missed rest breaks existed. The plaintiffs were clearly entitled to argue this inference. The Motion in Limine was properly denied.[19]

Defendant claims error in an Order concerning Dr. Bagget's testimony. In this motion, defendant's sought to control the specific words that a proper expert witness employing a proper methodology could use in describing his opinions and conclusions. In argument:

> "The Court: Is [this motion] trying to control the words they use?

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[18] The defendant resisted all discovery efforts about this policy reversal because their lawyers were instrumental in the decision.

[19] The jury charge allowing an adverse inference was proper, as well.

> Mr. Hanson [on behalf of the defense]: Yes, it is trying to control the words they use. . . . we would like Dr. Baggett to only testify as to what he actually does, which is to analyze swipes and employee time records and where they go.
>
> The Court: Yes. But what do you want him to call it instead of missed meals.
>
> Mr. Hanson: I want him to call them missed meal swipes. I want him to call them missed break swipes.
>
> The Court: And instead of missed swipes, you want him to call it swipes that are not there?
>
> Mr. Hanson: No. I like missed swipes.
>
> The Court: Oh Ok. So instead of saying missed breaks or missed meals you want him to use the words 'missed swipes.'
>
> Mr. Hanson: Precisely."

The Court correctly ruled that the defense could not mandate the specific words plaintiffs' expert witness would use. An expert witness may use the words which in their expert opinion accurately describe their opinions and conclusions.[20] This effort to micromanage opposing expert testimony is unprecedented and improper. There can be no possible error in the denial of this Motion in Limine. The Court specifically advised defense counsel: "You can cross-examine and demonstrate that their words are non-

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20 Pa.R.E. 611 vests the Court with wide discretion to control the mode and manner of interrogation.

sensical or whatever you want to do. But I am not going to require that they use the words you want them to use. It's reasonable for them to use the words 'missed meals.' Whether or not it's accurate, that's for the jury to decide and for you to cross-examine."[21] In fact, at trial cross-examination on this point was extensive.

A second claim of reversible error concerns another Motion in Limine to the same effect. At argument:

> "The Court: I think this one does the same thing does it not?
>
> Mr. Manne [on behalf of defense]: It's the same issue.
>
> The Court: It is just saying don't use these words use these other words right?
>
> Mr. Manne: That's correct.
>
> The Court: And it's not that the words are meaningless. They are just unwarranted?
>
> Counsel: That's correct."

This Motion in Limine precluding defense counsel from choosing the words used by Plaintiffs expert was also properly denied.

At the conclusions of all the ruling on Motions in Limine the Court specifically and clearly explained

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[21] The Court at that point believing that conceivably it had missed something in this motion and it was in fact something more substantive than merely trying to control the words which the opposing expert could use specifically asked counsel "But all this is doing is telling them what words they have to use right?" And Mr. Hanson for the defendant confirmed that this was the entirety of this Motion in Limine.

to defense counsel the effect of these rulings. The Court explicitly advised counsel that the denial of the Motion in Limine was merely the refusal to generally preclude categories of evidence out of context and before trial started. There can be no possible error in the denial of a Motion in Limine unless specific evidence which was both objectionable and actually objected to at trial was presented at trial. On August 18, 2006, immediately after the conclusion of extensive argument on the countless Motions in Limine filed by the defense, the Court said: "The Rules of Evidence provide that where there is a definitive ruling on a Motion in Limine, it does not have to be reraised during trial to be preserved for appeal. I think in this case the Motions in Limine which have been denied represent a denial pretrial. If there is something that occurs during the trial that you think is improper that should be objected to in context – let me just leave it at that." Clearly, there can be no error where counsel was specifically directed to raise any objections during trial so they could be ruled upon in context.

Defendant did raise some specific objections at trial. Evidence of corporate activities emanating from defendant's headquarters in Arkansas demonstrating corporate policy in action across the country were obviously admissible and relevant to the central issue in the case namely Walmart's management policies precluding employees in Pennsylvania from taking earned rest breaks and meal periods. The Class Action case claimed that national policy was to stop employees from using their promised and earned break and lunch time. A company internal national review, the Shipley Audit, demonstrated this nation-

al problem. The testimony related the defendant to Pennsylvania actionable conduct. The corporate decision to stop recording the start and end times of breaks without offering any explanation other than in reaction to Class Action litigation and bad publicity concerning this policy, and the trial stipulations entered into by defendant concerning national litigation, further demonstrate that there was no error in the admission or reference to national policy and conduct.

The defendant claims that expert testimony in the form of legal opinion and speculation was permitted. The Court has reviewed these claims and finds no improper legal opinions or speculation was permitted into evidence over objection and further notes that specific testimony identified as objected to, was subject to extensive cross-examination.[22]

Defendant claims error in admitting various exhibits. The Court has reviewed these exhibits in ruling on the post-verdict motion as it did at trial and finds that they are permissible, were appropriately used, some were stipulated to at trial, some were

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[22] Other testimony identified as error is incomprehensible. In its brief, defendant identified the September 12, 2006 testimony at page 49, 15 through 24. This testimony reads: "This is what I was talking about a little bit earlier about seven years – tenure means how long you been with Walmart. Seven years tenure means you have seven years of ever [sic] seniority. One year of tenure means you have only been with Walmart one year. Over the past four years the average associate's tenure has increased by .2 months per calendar year. As a result more associates qualify for participation in the benefits program like the profit-sharing and 401-K plan and for more time off." The Court can find no colorable claim of evidentiary error in this testimony.

never objected to, and many were merely summaries admissible under Pennsylvania Rule of Evidence 1007.[23]

Defendant objects to the Court's jury charge. In evaluating jury instructions, the entire instruction must be evaluated in context. Error can only be premised on a jury charge which, when considered in its entirety fails to properly and accurately describe the appropriate law the jury.[24] Defendant claims that no adverse inference charge should have been given, that the Court should not have told the jury that an employer is required by law to keep accurate records of time worked and that the Court improperly charged on the definition of contract. Walmart also claims reversible error in the use of the term of "agree" instead of the word "contract" in the jury verdict form.

None of defendant's claims concerning the jury charge and the jury verdict interrogatories are valid. The Court properly and accurately instructed the jury on all aspects of contract law needed to properly decide the factual questions presented in this case. In fact, employers in Pennsylvania, including defendant Walmart, do have a duty to keep accurate records for many purposes. There was no error when

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[23] See *Department of Transportation v. Aniq Construction Company*, 666 A.2d 753 (Pa. Commonwealth 1995). "Summaries of records are admissible, so long as the originals are available for inspection and the preparer of the summary is available for cross examination."

[24] See e.g., *Thompson v. Maryland and Pennsylvania Railroad Preservation Society*, 612 A.2d 450 (Pa. Super. 1992).

the Court instructed the jury or quoted from statute to this effect.

Walmart is required by law to accurately maintain these records. These records are the only documentation the defendant maintains for Federal Tax, State Tax, and other regulatory or internal management purposes. Federal, and State and municipal tax withholding, unemployment compensation assessments, social security deductions and employee contributions, are based entirely on the accuracy of these records. Presumably insurance premiums such as worker's compensation, and pension payments are also be based upon these records. The testimony clearly established that defendant's corporate management relied upon the accuracy of these records for a myriad of purposes, including an internal analysis referred to as the "Shipley audit" which documented the company's abuse of their employees.

Walmart presented no evidence at trial, which has contested the accuracy of these records. Indeed the defense at trial claimed that the payroll records did not prove the reasons why breaks were missed or demonstrated only employee failure to properly record time. Walmart contended that the $28,000,000.00 compensation hourly employees had earned but had not been paid represented dedicated employees voluntarily renouncing their breaks. This was the issue presented to the jury which found in favor of the plaintiff class.

The special verdict interrogatories were carefully constructed in conference and in conjunction with counsel and in fact substantially agreed upon. Again, Walmart inappropriately objects to the use of a synonym for the single word they prefer.

Post-trial, defendant disingenuously raised the claim that the WPCL violations should have been incorporated into the jury interrogatories. Walmart claims for the first time post verdict that the jury should have been asked whether rest breaks and meal periods were fringe benefits. Throughout trial, in Motions in Limine filed by the defense and granted by the Court, and during conferences on verdict interrogatories in charging conferences, the defense insisted that no such question be submitted to the jury. Only after the verdict did the defense claim it was reversible error for the Court to agree with the position they had consistently advanced during trial; that none of this should be presented to the jury.

Prior to trial the defense asked that the Court preclude any mention of liquidated damages, either entitlement or amount, before the jury. The Court entered the order the defendant requested. The defendant moved in limine to preclude plaintiff from presenting any evidence concerning their statutory liquidated damages claim to the jury. On August 18, 2006, during argument on that Motion in Limine, counsel for the defense said:

> Ms. Cook: "In the Wage Payment and Collection Act there is a provision that provides that claimants can recover 25 percent or $500.00 as a liquidated damages additional clause.
>
> The Court: Alright
>
> Ms. Cook: Under the case law that calculation is a matter for the Court and not the jury so we are moving to exclude any references or talking about calculating these damages for the jury."

Less than a month later, at the pretrial conference of September 5, 2006, Ms. Cook reiterated that defense request. At that conference the Court asked if plaintiff opposed defendant's "Motion in Limine to Preclude any Evidence in Support of Making Reference to Liquidated Damages." Mr. Donovan for the plaintiff class raised no objection. Because all parties agreed that the issue of the liquidated damages calculation was exclusively for judicial determination the Defendant's "Motion to Preclude any Reference to Liquidated Damages before the Jury" was granted.[25]

One month later, on Friday, October 6, 2006, counsel for the defendant further agreed that the determination of the number of people who would be subject to the liquidated damages calculation was also for the court to make. Counsel for the defense, Mr. Manne stated:

> "'There is no use that the jury could make of that information so it wouldn't be appropriate for it to go to the jury. And if the jury findings on the special verdict question make the kind of damages a relevant issue post verdict, I agree that information could be provided to the Court with respect to the parties views as to the number of people implicated with respect to liquidated damages. I don't think there is any issue remaining for the jury with respect to that people. In short there is nothing to do here with the jury. Anything we have

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[25] The order was entered on September 5, 2006 on motion control number 081291.

to do on liquidated damages can be done later."

Apparently, this statement, while clear and precise in the reading, was still confusing at the time, because the Court said:

> "So I am not quite following except to hear both counsel saying to me that insofar as there is any number of people to be determined for purposes of damages that are to be applied by the Court, that factual finding is a court factual finding."
>
> Mr. Manne [for the Defense]: Agreed.
>
> Mr. Donovan [for plaintiff]: Agreed.
>
> The Court: Good."

A party may not cavalierly diametrically change their position after a jury finds against them. Having argued strenuously for an order precluding any mention of liquidated damages before the jury, it is disingenuous to claim, on post-verdict motions, after the jury has rendered a verdict and been discharged, that this issue should have been submitted for jury determination. Additionally, defendant's position, strenuously and repeatedly advanced prior to verdict that liquidated damages is exclusively for Court determination is a correct statement of Pennsylvania law.

Likewise, the defense correctly claimed pretrial that the question of whether meal and rest breaks were covered by the Wage Payment and Collection Act is also a matter of law for Judicial determination. On September 29, 2006, Mr. Manne for the defense said: "It does need a ruling at some point, but in our

view it is an issue of law so it doesn't effect, in our view, any jury decision."

The defense claims error because the Court answered a question presented by the jury during deliberations. After written questions were received on October 11, 2006:

> "The Court: Is it your position that I should say anything or not?
>
> Mr. Manne: My position is you should say nothing, but if you're going to say anything you should only those four sentences which I just re-read."

The Court rejected the proposition that when a jury is properly asking for an explanation the Court should ignore their request and instead expect the jury to return a verdict rendered in confusion. The Court appropriately and accurately charged the jury in response to their two questions, showed them the jury interrogatory form and accurately explained it. In fact, at the conclusion of this responsive instruction, defense counsel at sidebar asked the Court to further clarify the instruction, which was done. At the conclusion of this entire response to the jury question, the Court again specifically invited counsel to voice objection and none was raised. The only possible claim of error which is preserved for appeal is the claim that the jury questions should not have been answered at all. It should have been and properly was.

Finally, defendant claims that the jury verdict was against the weight of the evidence. The factual testimony over the twenty-nine days of trial was

dramatic and more than sufficient to prove the class claims presented.

For the reasons set forth above, the verdict of the jury and the Judgment of the Court should be affirmed.

By the Court:

9/3/08 s/
DATE MARK I. BERNSTEIN, J.

APPENDIX E

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN	:	MARCH TERM, 2002
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3127

DOLORES HUMMEL	:	AUGUST TERM, 2004
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3758

ORDER

AND NOW, this 14th day of NOV, 2007, Post Verdict Motions are hereby DENIED. Judgment is entered in favor of Plaintiff Class and against Defendant Wal-Mart Stores, Inc., et al., in the total amount of $187,648,589.11 as follows:

Wage Payment and Collection Law verdict:	$49,568,541.00
Statutory Liquidated Damages:	$62,253,000.00
Wage Payment and Collection Law attorney fees (to be added to verdict):	$33,813,986.24
Wage Payment and Collection Law expenses (to be added to verdict):	$ 2,670,325.52
Common Law non-statutory claims:	$29,178,873.35

Statutory Interest:	$10,163,863.00
Common Law non-statutory claims attorney fees (to be paid from the common fund created):	$11,880,589.76
Common Law non-statutory claims expenses (to be paid from common fund created):	$ 938,222.48

BY THE COURT

s/_____

MARK F. BERNSTEIN, J.

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN	:	MARCH TERM, 2002
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3127
DOLORES HUMMEL	:	AUGUST TERM, 2004
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3758

OPINION

The Pennsylvania wage payment and collection law (WPCL) 43 P.S. Section 260.10 provides:

> "Where wages remain unpaid for thirty days beyond the regularly scheduled payday . . . and no good faith contest or dispute of any wage claim or counterclaim exist accounting for such non-payment the employees shall be entitled to claim, in addition, as liquidated damages an amount equal to 25 percent of the

total amount of wages due or $500.00 whichever is greater."[1]

By this statute the legislature created significant financial incentives for employers to pay workers all the money they've earned by their hard work. Reasonably the legislature exempted an employer who had a "good faith" dispute about what was actually owed.

In this class action, by special verdict, the jury found that the defendant required its employees to work without pay by directing them not to record their hours on Walmart's computerized pay system. The jury found that Walmart saved $1,031,430.00 during the statutory period by not paying their workers for all the time they had worked. The jury also found, that defendant Walmart prohibited employees from taking the needed rest breaks which they had been promised. By prohibiting promised rest breaks during the statutory period defendant Walmart saved an additional $48,258,111.00.

By agreement of the parties, and in accord with Pennsylvania law, the jury was also specifically asked, and properly found, that defendant Walmart did not have a good faith reason for refusing to pay their employees everything they had earned. Thus, the jury found that defendant Walmart abused their workers in precisely the manner for which remedies were created by the Pennsylvania Wage Payment and Collection Law. Following these valid jury find-

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[1] The parties agree that $500.00 liquidated damages is greater than 25% of the total of wages due and found owing by the jury in this case.

ings, the Court must add statutory damages to the verdict.[2]

Defendant Walmart claims these verdicts are not subject to the liquidated damages provision of the WPCL.

The WPCL defines "wages" as:

> "All earnings of an employee, regardless of whether determined on time, task, piece, commission, or other method of calculations. The term 'wages' also includes fringe benefits or wage supplements whether payable by an employer from his funds or from amounts withheld from the employee pay by the employer."

The term "Fringe benefits" is also defined, to include:

> "Separation, vacation, holiday, or guaranteed pay; reimbursement for expenses; union dues withheld from the employee's pay by the employer and any other amount to be paid pursuant to an agreement to the employee. . . ."[3]

Only in defense of litigation does Walmart claim that their employees' hourly earnings during guaranteed "paid rest breaks" are not "compensation." Every Walmart employee has been given an Associate benefit book called "My money." This book describes paid rest breaks as a supplement to employee wages.

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[2] *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148 (1997).

[3] 43 P.S. Section 260.2a.

Under the heading: "Pay Programs" Walmart tells every employee: "In addition to the pay you receive for a regular days work, there are other programs and benefits that can supplement your income." "Paid Break Period: Take a break and get paid for it." The class employees claim for payment of wages earned but unpaid because they were required to miss rest breaks and to work without time clock records, is clearly seeking payment for "wages," "fringe benefits," and "wage supplements" as defined by the Act.

In cases brought by highly paid executives, the Federal District Court, the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have all held that "esoteric" fringe benefits are subject to the protection of the WPCL. These cases have held that the penalty of "liquidated damages" were mandated even though the individual executive plaintiffs had been regularly and fully paid their substantial base salaries.

In *Regier v. Rhone-Poulenc Rorer, Inc.*,[4] the District Court for the Eastern District of Pennsylvania held that the WPCL protects stock options given "to a small member of key executives." That Court found that those highly paid executive were entitled to liquidated damages. The District Court said:

> "The WPCL is the statutory vehicle for employees to recover wages and fringe benefits that are contractually owed to them by their employers, *See Worst v. Nestle Foods Corp.*, 791 F. Supp. 123 (W.D. Pa. 1991), The statute

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4 1995 U.S. Dist. Lexis 9384.

itself does not create a separate right to compensation, but rather gives additional protections to employees by providing statutory remedies for an employer's breach of its contractual obligation to pay wages. *See Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577 (E,D. Pa. 1985), *aff'd*, 800 F.2d 1138 (3d Cir. 1986).

The term "wages" is broadly defined by the WPCL. It encompasses "all earnings of an employe" and specifically includes "fringe benefits" and "wage supplements," which, in relevant part, are defined as "separation . . . pay . . . and any other amount to be paid pursuant to an agreement to the employe." 43 P.S. § 260.2a.

The Court's examination of the paucity of cases which interpret the WPCL reveals none which squarely address the question whether an employer's blocking of options such as the ones in this case subjects it to liability under the WPCL. However, because the Court predicts that the Pennsylvania Supreme Court would hold that the WPCL should be broadly construed to protect all forms of compensation due to employees, the Court concludes that the actions of defendants violated the WPCL."

Even non-monetary compensation is included:

"Non-monetary compensation is "earnings of an employe" which is included in the definition of "wages" contained in § 260.2a, and there is no reason to believe that the Pennsylvania Legislature intended § 260.3 to restrict the statute's coverage. *See Sanzone v. Phoenix Technologies, Inc.*, No. 89-5397, 1990 U.S.

Dist. LEXIS 4656 (E.D. Pa. April 19, 1990) ("payment" in stock covered by WPCL).

Second, according to the rules of construction enacted by the Pennsylvania Legislature, the Court is directed to construe the WPCL liberally "to effect [its] objects and to promote justice." 1 Pa. Cons. Stat. Ann. § 1928(c). The Court concludes that the object of the WPCL is to provide employees with statutory remedies to recover compensation of all types which are owed to them by their employers. *See Barnhart Compugraphic Corp.*, 936 F.2d 131, 133 (3d Cir. 1991) ("Generally, the purpose underlying the WPCL is to protect employees, and to remove some of the obstacles to litigation facing many employees."). There is nothing in the statute itself or in its legislative history which suggests that the WPCL was intended to apply only to compensation which is "payable" in the manner defendants assert. The definition of "wages" contained in the statute includes "all earnings of an employe" and there is no reason to believe that cash compensation was intended to receive more protection than non-cash compensation."

Likewise in *Bowers v. National Technologies*,[5] the District Court for the Eastern District of Pennsylvania held payments in the form of "put options" were wages under the Act. That Court said:

"Nor may plaintiffs claim to the stock repurchase payments be dismissed. Although de-

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5 690 F. Supp. 349 (1988).

> fendants argue that such payments were not true "wages", earned by plaintiffs, I find to the contrary. For purposes of this motion for judgment on the pleadings, I conclude that the stock repurchase payments were offered by defendants to plaintiffs to encourage plaintiffs to join Phoenix as employees. Like other fringe benefits, which are offered to employees when they first join a company, the stock repurchase payments were not provided to the employees on a weekly or even annual basis. Nevertheless, they were certainly "wages" within the broad definition of the WPCL in that they were payments pursuant to agreement, and they were offered to plaintiffs as employees, and not for some reason entirely unrelated to their employment by Phoenix."

In *Hartman v. Baker*[6] the Superior Court found that even an "equity interest" was included in the definition of wages under the WPCL and therefore subject to liquidated damages penalties. The Superior Court said:

> ". . . we consider it worthwhile to set forth the statute's purpose and focus. "Pennsylvania enacted the WPCL to provide a vehicle for employees to enforce payment of their wages and compensation held by their employers." *Oberneder v. Link Computer Corp.*, 449 Pa. Super. 528, 674 A.2d 720, 721 (Pa.Super. 1996), affirmed, 548 Pa. 201, 696 A.2d 148 (1997). "The underlying purpose of the WPCL

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6 2000 Pa. Super. 140, 766 A.2d 347 (2000).

is to remove some of the obstacles employees face in litigation by providing them with a statutory remedy when an employer breaches its contractual obligation to pay wages." *Id.*, 674 A.2d at 722. The WPCL "does not create an employee's substantive right to compensation; rather, it only establishes an employee's right to enforce payment of wages and compensation to which an employee is otherwise entitled by the terms of an agreement." *Banks Engineering Co., Inc. v. Polons*, 697 A.2d 1020, 1024 (Pa.Super. 1997), appeal granted, 550 Pa. 715, 706 A.2d 1210 (1998) (citation omitted)."

"Like the plaintiff in *Bowers*, *supra*, the equity interest offered to appellee was payment pursuant to a binding agreement. As we stated previously, the equity interest was provided in exchange for a reduction in appellee's pay structure. This equity interest was offered to appellee as an employee, not for some reason unrelated to his employment with appellants. *See Bowers*, *supra*. Thus, pursuant to a liberal construction of § 260.2a of the WPCL and the reasoning in *Bowers*, *supra*, we agree with the Chancellor's determination that appellee's equity interest constitutes "wages" as defined by the WPCL."

The Supreme Court of Pennsylvania in *Oberneder v. Link Computer Corp.*,[7] held that the WPCL mandates attorney fees to the prevailing party.

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7 548 Pa. 201, 696 A.2d 148 (1997).

Oberneder was a claim by the company President for a percentage of the sale of a Division of his corporation. This percentage compensation claim was subject to the WPCL.

The law in its majesty applies equally to highly paid executives and minimum wage clerks. Just as highly paid executives' promised equity interests, or put options or percentage of sale proceeds are protected fringe benefits and wage supplements, so too the monetary equivalents of "paid break" time cashiers and other employees were prohibited from taking are protected fringe benefits and wage supplements. Even more clearly, the wages which were withheld because employees were forced to work "off the clock" are subject to mandatory liquidated damages. Clearly the WPCL liquidated damages provision applies to the verdict in this case.

Defendant claims that even though their employees did not receive all money earned, a fact now proven at trial, statutory liquidated damages are not required because the employees were paid some of what they were owed. Case law however demonstrates that highly paid executives may recover statutory liquidated damages even though they had timely and correctly received their entire substantial base pay.[8] Defendant further claims in a post verdict revisionist rewriting of history that both the issue of entitlement and the amount of liquidated damages

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[8] The inclusion in the statutory definition of "reimbursement for expenses, union dues' and "any other amount to be paid pursuant to an agreement" would be nonsense if any partial payment vitiated recovery under the act.

should have been presented for jury determination. Defendant is incorrect in these contentions.

Prior to trial the defense asked that the Court preclude any mention of liquidated damages, either entitlement or amount, before the jury. The Court entered the order the defendant requested. The defendant moved in limine to preclude plaintiff from presenting any evidence concerning their statutory liquidated damages claim to the jury. On August 18, 2006, during argument on that Motion in Limine, counsel for the defense said:

> Ms. Cook: "In the Wage Payment and Collection Act there is a provision that provides that claimants can recover 25 percent or $500.00 as a liquidated damages additional clause.
>
> The Court: Alright.
>
> Ms. Cook: Under the case law that calculation is a matter for the Court and not the jury so we are moving to exclude any references or talking about calculating these damages for the jury."

Less than a month later, at the pretrial conference of September 5, 2006, Ms. Cook, reiterated that defense request. At that conference the Court asked if plaintiff opposed defendant's "Motion in Limine to Preclude any Evidence in Support of Making Reference to Liquidated Damages." Mr. Donovan for the plaintiff class raised no objection. Because all parties agreed that the issue of the liquidated damages calculation was exclusively for judicial determination

the Defendant's "Motion to Preclude any Reference to Liquidated Damages before the Jury" was granted.[9]

One month later, on Friday, October 6, 2006, counsel for the defendant further agreed that the determination of the number of people who would be subject to the liquidated damages calculation was also for the court to make. Counsel for the defense, Mr. Manne, stated:

> "There is no use that the jury, could make of that information so it wouldn't be appropriate for it to go to the jury. And if the jury findings on the special verdict question make the kind of damages a relevant issue post verdict, I agree that information could be provided to the Court with respect to the parties views as to the number of people implicated with respect to liquidated damages. I don't think there is any issue remaining for the jury with respect to that people. In short there is nothing to do here with the jury. Anything we have to do on liquidated damages can be done later."

Apparently, this statement which is clear and precise when read, was still confusing because the court said:

> "So I am not quite following except to hear both counsel saying to me that insofar as there is any number of people to be determined for purposes of damages that are to be applied by

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[9] The order was entered on September 5, 2006 on motion control number 081291.

the Court, that factual finding is a court factual finding."

Mr. Mannie [for the Defense]: Agreed.

Mr. Donovan [for plaintiff]: Agreed.

The Court: Good."

A party may not cavalierly diametrically change their position after a jury finds against them. Having argued strenuously for an order precluding any mention of liquidated damages before the jury, it is disingenuous to claim, on a Motion to Calculate and Assess Liquidated Damages after the jury has rendered a verdict and been discharged, that this issue should have been submitted for jury determination. Additionally, defendant's position, repeatedly advanced prior to verdict, that liquidated damages is exclusively for Court determination is a correct statement of Pennsylvania law.[10]

Likewise, the defense correctly claimed pretrial that the question of whether meal and rest breaks were covered by the Wage Payment and Collection Act is also a matter of law for Judicial determination. On September 29, 2006, Mr. Manne for the defense said "It does need a ruling at some point, but in our view it is an issue of law so it doesn't effect, in our view, any jury decision."

On this motion plaintiff presented the expert affidavit of Dr. Scott Baggett calculating the number of

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10 The defense claim that plaintiff has waived their right to liquidated damages because evidence was not presented to the jury may be reasonably described as first eating the cake and thereafter taking the cake.

class members to whom liquidated damages are owed, and determining the amount owed."[11] Dr. Haggett determined that 98.81 percent of the 126,005 class employees or 124,506 people had not been properly paid within the statutory period. Seeking liquidated damage for only one violation per class member regardless of the number of times a class member had been wronged he concluded that the sum of $62,253,000.00 was owing.[12]

The defense at oral argument makes the remarkable claim that no class member exists.[13] At argument, Defendant claims that even should the verdict be affirmed on appeal no class member is owed a penny of the millions dollars awarded by the jury. Defendant's own expert affidavit however belies counsel's words and acknowledges liquidated damages in an amount remarkably close to plaintiffs expert's calculation albeit slightly higher.[14]

The opinion expressed in Plaintiff's expert affidavit is valid. That opinion is grounded in an analysis

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[11] The strict rules of evidence are relaxed for purposes of preliminary questions and other matters which are to be decided by the Court. Accordingly affidavits are admissible.

[12] To avoid any possibility of overlapping claims by class members plaintiffs are limiting their claims.

[13] At oral argument on this motion defense counsel refused even to concede that Ms. Hummel herself the named class member who testified at trial, was individually entitled to recover any damages.

[14] Exhibit 1 to the affidavit of Dr. Denise Martin presented by the defense, calculates the maximum awardable statutory damages as "62,652,000.00."

Walmart's payroll records, the precise records used by both parties, admitted at trial, and on which the jury rendered its verdict. Walmart is required by law to accurately maintain these records. These records are the only documentation the defendant maintains for Federal Tax, State Tax, other regulatory, or internal management purposes. Federal, and State and municipal tax withholding, unemployment compensation assessments, social security deductions and employee contributions, are based entirely on the accuracy of these records. Presumably insurance premiums such as worker's compensation, and pension payments are also be based upon these records. The testimony clearly established that defendant's corporate management relied upon the accuracy of these records for a myriad of purposes, including an internal analysis referred to as the "Shipley audit" which documented the company's abuse of their employees.

Walmart has presented no evidence whatsoever, either at trial or by affidavit on this motion, which has contested the accuracy of these records. Indeed the defense at trial claimed that the payroll records did not prove the reasons why breaks were missed or demonstrated only employee failure to properly record time. Walmart contended that the $28,000,000.00 compensation hourly employees had earned but had not been paid represented dedicated employees voluntarily renouncing their breaks. This was the issue presented to the jury which found in favor of the plaintiff class.

The declaration of Scott Baggett concluded that hourly class associates experienced an average of 25 rest break violations per associate. The Act requires a $500.00 penalty for each violation. Nonetheless

plaintiff's are seeking only a single $500.00 penalty per class member. Scott Baggett's affidavit based upon analysis of records defendant is required to accurately maintain, affirms that 98.81 percent of the hourly class associates experienced at least one rest break violation. All hourly associates have been sent class notices and few have opted out. Accordingly, Dr. Baggett calculated the $500.00 statutory liquidated damages in the amount of $62,253,000.00.[15]

In response the defense presented the Affidavit of Denise Neumann Martin a well qualified Harvard educated expert. She is a Senior Vice President of National Economic Research Associates, Inc. Ms. Martin had not been asked to calculate the number of class members.[16] Ms. Martin was asked only to criticize Dr. Baggett's opinion. Dr. Martin states: "At best they can only approximate the number of associates to include in a calculation of liquidated damages using extrapolated data and a probabilistic approach."[17] Ms. Martin does not believe this is an appropriate method "to determine which unique associ-

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15 The Court notes that even the lesser calculation of 25 percent of the jury award (which requires no calculation of the number of class members or the number of specific violations) would be $12,392,135.25. The Court further notes in the event no award for liquidated damages is entered over $6,000,000.00 would be added as interest. Given these calculations Walmart's adamant position that no sums whatsoever can be added to the verdict is inexplicable in the extreme.

16 Walmart offers no calculation whatsoever although the computer records remain accessible in their possession.

17 Page 1 Martin Affidavit.

ates maybe entitled to damages."[18] Dr. Martin's affidavit does however acknowledge the extent of the class. She says: "However, even if we assume that every single one of the 125,304 class members who worked after January 1, 2002 should be entitled to receive $500.00 in liquidated damages-which is itself a likely overstatement-total damages would only be about $63,000,000.00.[19] Her report, entered into evidence by the defense expresses her opinion that if every one of that 125,304 class members were entitled to claim liquidated damages the statutory award should be $62,652,000.00 a sum greater than plaintiffs claim.[20] Accordingly, if each class member had not received their pay just once $62,253,000.00 in liquidated damages must be awarded.[21]

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18 Page 1 Martin Affidavit.

19 Page 4 Martin Affidavit.

20 In awarding the required aggregate statutory damages the court need not determine which "unique associates" will recover. The jury in their award of $46,000,000.00 was not asked to identify unique associates nor must they now be identified by the Court. The class members have been identified and provided with an option to opt out through repeated class action notices which have met all due process requirements. At a subsequent procedure class employees entitled to recovery will be paid.

21 In enacting the WPCL the legislature did not provide for any free failure to pay wages. An employer who fails to pay an employee is not thereafter immunized from penalties for additional violations to that same employee in other pay periods or for additional violations as part of a systematic and continual practice. Nonetheless the Court awards only the lesser sum of one $500 sum as liquidated damages per class member because

Finally, defendant's remaining objections[22] are either grounded in inaccurate statements of law or claims which do not exist in plaintiff's request.

The sum of $62,253,000.00 in liquidated damages pursuant to the WPCL is awarded together with attorney foes.

BY THE COURT

DATE MARK I. BERNSTEIN, J.

that is what competent class counsel seeks and the defense has not raised this inadequacy issue.

22 Walmart claims that WPCL liquidated damages may not be awarded where statutory interest has also been claimed. In support of this position, defendant directs the Court to the case of *Signora v. Liberty Travel*, 2005 Pa. Super 366, 886 A.2d 284. The *Signora* decision holds that interest and statutory liquidated damages may not be awarded on the same verdict for the same period of time. Plaintiff's herein are not seeking interest for any period for which they seek liquidated damages. The holding of *Signora* that a party may not make a double recovery is both salutory and irrelevant. Plaintiffs are seeking statutory mandated liquidated damages, not a double recovery. If interest were permitted $6,000.00 would be added to the verdict.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN	:	MARCH TERM, 2002
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3127

DOLORES HUMMEL	:	AUGUST TERM, 2004
vs.	:	
WAL-MART STORES, INC., ET AL.	:	NO. 3758

ORDER

AND NOW, this 3rd day of October, 2007, statutory liquidated damages in the amount of $62,253,000.00 are awarded to the plaintiff class.

BY THE COURT

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MARK I. BERNSTEIN, J.

APPENDIX G

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN, on behalf of herself and all others similarly situated	:	MARCH TERM 2002
vs.	:	
WAL-MART STORES, INC., et al.	:	NO. 3127

ORDER

AND NOW, upon consideration of Plaintiffs Motion for Class Certification (the "Motion"), the Memorandum of Law in support thereof, the Certification of Judith L. Spanier dated June 7, 2004 and all exhibits and Deposition Testimony Submitted in Support of Plaintiff's Motion and Defendants' response thereto,

IT IS, this 27th day of December, 2005, HEREBY ORDERED that the Motion is GRANTED. This action shall be maintained as a class action in accordance with Pennsylvania Rules of Civil Procedure 1701 *et seq.* pursuant to the following findings of fact:

1. The "Class," defined as all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present, is so numerous that joinder of all members is impracticable;

2. There are questions of law and/or fact common to the Class.

3. The claims of Plaintiff Michelle Braun are typical of the claims of the Class.

4. Plaintiff and her counsel will fairly and adequately protect the interests of the Class.

5. A class action is a fair and efficient method of adjudicating this controversy for the following reasons:

a) The common questions of law or fact predominate over any question affecting only individual members of the Class;

b) There are no unmanageable difficulties likely to be encountered in the management of the action as a class action;

c) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would confront the defendant with incompatible standards of conduct;

d) Adjudications with respect to individual members of the Class would as a practical matter be dispositive of the interests of other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests;

e) This Court is an appropriate forum for the litigation of the claims of the Class;

f) In view of the complexities of the issues and the expenses of litigation, the separate claims

of individual Class members are not sufficient in amount to support separate actions; and

g) The amount which may be recovered by individual Class members will not be small in relation to the expenses and effort of administrating the class action.

It is further

ORDERED, that Plaintiff Michelle Braun is certified as Class representative; and it is further

ORDERED, that the firms of Donovan Searles, LLC, Abbey Gardy, LLP, Bader & Associates, LLC, and Franklin D. Azar & Associates, P.C., shall serve as Class Counsel; and it is further

ORDERED, that Plaintiff shall submit a proposed form of notice to the Class within thirty (30) days of entry of this Order.

BY THE COURT

s/

MARK I. BERNSTEIN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

DOLORES HUMMELL, on behalf of herself and all others similarly situated	:	AUGUST TERM, 2004
vs.	:	
WAL-MART STORES, INC., and SAM'S CLUB	:	NO. 3757

ORDER

AND NOW, upon consideration of Plaintiffs Motion for Class Certification (the "Motion"), the Memorandum of Law in support thereof, the Certification of David A. Searles and exhibits thereto, the Appendix of Deposition Testimony Submitted in Support of Plaintiffs Motion, the Certification of Judith L. Spanier with exhibits annexed thereto, compendium of unreported decisions, and the exhibits submitted in connection with hearing regarding the plaintiffs motion for class certification in *Braun, et al. v. Wal-Mart Stores, Inc.*, March Term, 2002, No. 3127 (C.P. Phila.) and incorporated by reference herein and Defendants' response thereto,

IT IS, this 27th day of December, 2005, HEREBY ORDERED that the Motion is GRANTED. This action shall be maintained as a class action in accordance with Pennsylvania Rules of Civil Procedure 1701 *et seq.* pursuant to the following findings of fact:

1. The "Class," defined as all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present,

is so numerous that joinder of all members is impracticable;

2. There are questions of law and/or fact common to the Class, including but not limited to the following questions:

a. Whether Wal-Mart was obligated to provide Plaintiff and the Class with rest and meal breaks.

b. Whether Wal-Mart failed to provide Plaintiff and the Class with the required rest and meal breaks.

c. Whether Plaintiff and the Class should be compensated for all time worked.

d. Whether Wal-Mart failed to compensate Plaintiff and the Class for all times worked.

3. The claims of Plaintiff Dolores Hummel are typical of the claims of the Class;

4. Plaintiff and her counsel will fairly and adequately protect the interests of the Class;

5. A class action is a fair and efficient method of adjudicating this controversy for the following reasons:

a. The common question of law or fact predominate over any question affecting only individual members of the Class;

b. There are no difficulties likely to be encountered in the management of the action as a class action;

c. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which

would confront the defendant with incompatible standards of conduct;

d. Adjudications with respect to individual members of the Class would as a practical matter be dispositive of the interests of other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests;

e. This Court is an appropriate forum for the litigation of the claims of the Class;

f. In view of the complexities of the issues and the expenses of litigation, the separate claims of individual Class members are not sufficient in amount to support separate actions; and

g. The amount which may be recovered by individual Class members will not be small in relation to the expenses and effort of administering the class action.

It is further

ORDERED, that Plaintiff Dolores Hummel is certified as Class representative; and it is further

ORDERED, that the firms of Donovan Searles, LLC, Abbey Gardy, LLP, Bader & Associates, LLC, and Franklin D. Azar & Associates, P.C., shall serve as Class Counsel; and it is further

ORDERED, that excluded from the Class are all defendants and all officers and directors of Wal-Mart Stores, Inc.; and it is further

ORDERED, that Plaintiff shall submit a proposed form of notice to the Class within thirty (30) days of entry of this Order.

BY THE COURT

s/_____

MARK I. BERNSTEIN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	:	MARCH TERM, 2002
VS.	:	
WAL-MART STORES INC. ET AL.	:	NO. 3127
DOLORES HUMMEL ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	:	AUGUST TERM, 2004
VS.	:	
WAL-MART STORES INC. ET AL.	:	NO. 3757

ORDER

AND NOW, this 27th day of December, 2005, it is hereby ORDERED and DECREED that Plaintiffs' Motion for Class Certification is granted. Plaintiffs counsels are appointed as counsel for the Class. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order. Discovery for trial shall commence. A new Case Management Order shall be issued.

BY THE COURT

s/_____

MARK I. BERNSTEIN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

MICHELLE BRAUN ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	:	MARCH TERM, 2002
VS.	:	
WAL-MART STORES INC. ET AL.,	:	NO. 3127
DOLORES HUMMEL ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED	:	AUGUST TERM, 2004
VS.	:	
WAL-MART STORES INC. ET AL.,	:	NO. 3757

MEMORANDUM OPINION

Plaintiffs individually and on behalf of similarly situated employees and former employees of defendant bring this lawsuit for damages resulting from alleged missed rest and meal breaks and mandated "off the clock" work in defendant's Pennsylvania stores. Plaintiffs bring contractual claims; claims for unjust enrichment, and in the Hummel case, statutory claims pursuant to the Pennsylvania Minimum Wage Act, 43 P.S. 333.101 et. seq. and the Pennsylvania Wage Payment and Collection Act, 43 P.S. 260.1 et. seq. The sole issue presently before this court is whether the prerequisites for certification are satisfied. The purpose behind class action law-

suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". *DiLucido v. Terminix Intern. Inc.*, 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
>
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

> In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]
>
> a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses or litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members

> will be so small in relation to the expense and effort of administering the action as not to justify a class action.
>
> (b) Where equitable or declaratory relief alone is sought, the court shall consider
>
> (1) the criteria set forth in subsections (1) through (5) of subdivision (a), and
>
> (2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.
>
> (c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." *Cambanis v. Nationwide Ins. Co.*, 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (Pa. Super. 1985). The moving party needs 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.*, 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002) (quoting *Janicik v. Prudential Ins. Co.*, 305 Pa. Super. 120, 451 A.2d 451, 455 (Pa. Super. 1982)

In other contexts, the prima facie burden has been construed to mean "some evidence," "a colorable claim," "substantial evidence," or evidence that creates a rebuttable presumption that requires the op-

ponent to rebut demonstrated elements. In the criminal law context, "the prima facie standard requires evidence of the existence of each and every element." *Commonwealth v. Martin*, 727 A.2d 1136, 1142 (Pa. Super. 1999), alloc. denied, 560 Pa. 722, 745 A.2d 1220 (1999). However, "The weight and credibility of the evidence are not factors at this stage." *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001).

In the family law context, the term "'prima facie right to custody' means only that the party has a colorable claim to custody of the child." *McDonel v. Sohn*, 762 A.2d 1101, 1107 (Pa. Super. 2000). Similarly, in the context of employment law, the Commonwealth Court has opined that a prima facie case can be established by "substantial evidence" requiring the opposing party to affirmatively rebut that evidence. See, e.g., *Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm.*, 512 A.2d 1339 (Pa. Commw. 1986).

Courts have consistently interpreted the phrase "substantial evidence" to mean "more than a mere scintilla," but evidence "which a reasonable mind might accept as adequate to support a conclusion." *SSEN, Inc., v. Borough Council of Eddystone*, 810 A.2d 200, 207 (Pa. Commw. 2002). In *Grakelow v. Nash*, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: "To ordain that a certain act or acts shall be prima facie evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made; . . . it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question."

Class certification is a mixed question of fact and law. *Debbs v. Chrysler Corp.*, 2002 Pa. Super. 326, 810 A.2d, 154 (Pa. Super. 2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice." *Janicik*, 451 A.2d at 454, 455. Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

"The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden." *Professional Flooring Co. v. Bushar Corp.*, 61 Pa. D&C 4th 147, 153, 2003 WL 21802073 (Pa. Com. Pl. Montgo. Cty. Apr. 14. 2003), citing *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153-54 (Pa. Super. 2002): *Janicik v. Prudential Inc. Co. of America*, 451 A.2d 451, 455 (Pa. Super. 1982). See also *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184. 189 (Pa. Super. 2002); *Cambanis v. Nationwide Insurance Co.*, 501 A.2d 635 (Pa. Super. 1985). The prima facie burden of proof standard at the class cer-

tification stage is met by a qualitative "substantial evidence" test. The burden of persuasion and the risk of non-persuasion however, rest with the plaintiff.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action. *Weismer by Weismer v. Beech-Nut Nutrition Corp.*, 615 A.2d 428, 431 (Pa. Super. 1992). See also *Janicik*, 451 A.2d at 454, citing and quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action").

Likewise, the Commonwealth Court has held that "in doubtful cases any error should be committed in favor of allowing class certification." *Foust v. Septa*, 756 A.2d 112, 118 (Pa. Commw. 2000). This philosophy is further supported by the consideration that "[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied." *Janicik*, 451 A.2d at 454

Within this context, the court will examine the requisite factors for class certification.

I. Numerosity

To be eligible for certification, Appellant must demonstrate that the class is "so numerous that joinder of all members is impracticable." *Pa.R.C.P. 1702(1)*. A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources

of the litigants should plaintiffs sue individually." *Temple University v. Pa. Dept. of Public Welfare, 30 Pa.Cmwlth. 595. 374 A.2d 991, 996 (1977)* (123 members sufficient); *[FN4] ABC Sewer Cleaning Co. v. Bell of Pa., 293 Pa.Super. 219, 438 A.2d 616 (1981)* (250 members sufficient); *Ablin, Inc. v. Bell Tel. Co. of Pa., 291 Pa.Super. 40, 435 A.2d 208 (1981)* (204 plaintiffs sufficiently numerous). Appellant need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." *Janicik, 451 A.2d at 456*. These actions potentially involve 150,000 class member employees and former employees of defendants 130 stores in Pennsylvania. Clearly Numerosity has been demonstrated.

II. Commonality

The second prerequisite for class certification is that "there are questions of law or fact common to the class." Pa. R. Civ. P. 1702(2). Common questions exist "if the class members' legal grievances arise out of the 'same practice or course of conduct on the part of the class opponent." *Janicik*, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all." *Weismer by Weismer v. Beechnut Nutrition Corp.*, 419 Pa. Super. 403, 615 A.2d 428 (Pa. Super. 1992)). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist. *Janicik*, supra. 457.

"While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." *D'Amelio v. Blue Cross of Lehigh Valley*, 347 Pa. Super. 338, 487 A.2d 995, 997 (Pa. Super. 1985). In examining the commonality of the class claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." See *Weismer by Weismer v. Beech-Nut Nutrition Corp.*, 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (Pa.Super.). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. *Cook v. Highland Water and Sewer Authority*, 108 Pa. Cmwlth. 222, 231, 530 A.2d 499, 504 (Pa. Cmwlth.1987).

Related to this requirement for certification is whether trial on a class basis is a fair and efficient method of adjudication under the criteria set forth in Rule 1708. In addition to the existence of common questions of law and fact, plaintiffs must also establish that the common issues predominate. Accordingly the analysis of predominance under Rule 1708 (a) (1) is closely related to that of commonality under Rule 1702(2). *Janick*, supra. 451 A.2d at 461.

Plaintiff proposes to certify a class for trial as follows: "All current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from Mach 19, 1998 to the present." In support of their claim, plaintiffs present expert analysis of defendant's own computer records of employee time

and activity. Plaintiff relies upon the expert opinion of Dr. L. Scott Baggett a highly qualified consulting statistician, the opinion of Martin M. Shapiro a highly qualified psychologist and researcher at Emory University with significant experience in the application of the statistical quantification of measurement operations, each of whose reports are of record and the "Shipley Audit" an analysis performed for management put-poses by defendant. All expert analyses relied upon defendant's own computer records maintained in the regular course of their business for business purposes, namely to determine the pay earned by hourly employees. These computer records are mandated by law including the Pennsylvania Minimum Wage Act of 1968 which states: "Every employer of employees shall keep a true and accurate record of the hours worked by each employee and the wages paid to each . . . ."

The defendant's business record, the "Time Clock Archive Report records the "total hour's worked" and "total breaks" for every employee for every shift worked. The defendant's own records, the Time Clock Punch Exception Report lists missed or inadequate breaks. These reports have been utilized and relied upon by defendant management for payroll and evaluation purposes. The same reports were relied upon and analyzed by plaintiffs' experts.[1]

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[1] Even though the defendant relied upon these records which are mandated by law, to determine associate's pay, defendant claims that their employment records are inaccurate and may not be relied upon. While this defense may be persuasive at trial, for purposes of this preliminary procedural certification

Defendant claims to have an unalterable written policy of providing all employees and therefore all putative class members with all mandated rest and meal breaks. This policy, applicable to all employees, incorporated in "PD-07" requires that all "work associates" receive one paid rest break of 15 minutes during any three hour work period and two paid 15 minute rest breaks and one unpaid meal break of 30 minutes over a six hour work period. Defendant further claims to have an unalterable written policy incorporated into "PD-43" that no associate "should perform work for the Company without compensation" and that no supervisor may request or require any associate to work without compensation. The defendant is mandated by law in Pennsylvania to advise every employee of the wage payments and fringe benefits to which they are entitled.[2]

Dr. Baggett examined management reports from March 1998 to December 2000 for twelve stores in Pennsylvania. Based upon an analysis of 23,919 individual shifts covering 2,250 individual associates Dr. Baggett concluded that 17,556 or 64.4% of the shifts contained deficiencies in duration of rest and meal breaks and 10,889 or 40% of workers did not receive the appropriate number of breaks. As to plaintiff Hummel herself, Dr. Baggett found 35.8% of her breaks were deficient in duration and 28.3% deficient in number.

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decision the Court accepts these business records as prima facie accurate.

[2] 43 P.S. 260.4, actual notification is not required since posting is sufficient for compliance.

These findings for Pennsylvania stores by plaintiffs retained expert are consistent with defendant's internal audit performed in June 2000. After studying the computer "exception reports" in 127 stores nationally including five stores in Pennsylvania, the defendant's Internal Audit Division found "Stores were not in compliance with company and state regulations concerning the allotment of breaks and meals as 76,472 exceptions were noted in 127 stores reviewed for a one week period." 75% of these missed breaks concerned rest breaks 25% concerned missed meal breaks. The Defendant's own internal management analysis revealed that an average of 2 breaks per associate per week were either missed or shorted at every store. The internal audits findings concerning the Pennsylvania stores actually revealed greater deficiencies than Dr. Baggett's conclusions.

Other computer records were also analyzed by plaintiffs experts. Defendant databases record time associates spent on other electronic devices such as cash register and computer based learning terminals. Plaintiffs expert Dr. Shapiro compared this database with time records and determined that while associates were recorded as taking breaks they were also recorded as being engaged in employment related activities.[3] Clearly, should the jury conclude that

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[3] Although plaintiff continues to argue in memoranda that the reports of experts John Zogby and Dr. Thompson demonstrate that a random sampling survey of class members can "provide a valid means to determine the uncompensated off-the-clock time of the class of employees", this contention is nonsense. These expert opinions, which were officially stricken in the Hummel matter pursuant to the Order granting defendant's

this evidence meets plaintiffs burden of proof at trial and demonstrates to a preponderance of the evidence systemic violations of contractually required unalterable corporate policy as to breaks and payment for time worked, plaintiff will have proven its statutory claims, its contractual violations and that the defendant has been "unjustly enriched". Clearly common questions as to the failure to provide rest and meal breaks, and whether the class members have been actually compensated for all time worked predominate.

While plaintiff offered the testimony of employees in support of these expert conclusions, the Court relies primarily on the expert analysis of computer records to conclude that the systemic loss of contractual break and meal time in Pennsylvania stores has been prima facie demonstrated. It thus becomes a factual determination as to why these statistically significant demonstrated discrepancies between the recorded time records and unalterable company policy exists. The defendant has offered deposition testimony to explain reasons for the inaccuracy of the time records. Since credibility may not be the focus of a certification decision the Court merely notes that

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Frye Motion, have been rejected as providing no assistance whatsoever in the Braun matter. These expert "opinions" about the reliability of unsworn and untested recollections expressed anonymously by former employees in a telephone interview years after the event provide no methodology whatsoever, no analysis whatsoever, and no reason whatsoever to believe that these self-serving self-interested hearsay results will in any way comport with historical reality or even be arguably admissible in evidence under Pennsylvania law.

the discrepancies in testimony will undoubtedly be an issue for jury determination at trial.[4]

The class action certification rules explicitly permit the use of deposition testimony. Common practice in class action certification proceedings discourages or even forecloses live witness or video tape deposition testimony specifically because credibility is generally not an issue. Every jury however, which must evaluate credibility, is instructed that they should observe how each witness acts, speaks and looks while testifying because observation is so important to their final evaluation. Our Supreme Court even mandates that the court specifically caution jurors not to allow note taking to distract them from the important task of observing each witness. Although this court was offered a few carefully selected snippets of video taped deposition testimony it is certainly improper to decide credibility on this basis. Neither would it be proper to deny certification because this court concluded that the plaintiffs have not proven their case to the satisfaction of the Court sitting as if conducting a non-jury trial. One need only recall the symbolic placement of the middle finger of captured crew members of the USS Pueblo in photographs displayed by their North Korean captors along with their "confessions" to recognize the need to observe all the testimony of current employees testifying under their employer's watchful eye that they voluntarily worked off-the-clock without pay because

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[4] The Court notes that the statutory requirements cannot be waived by agreement. See 43 P.S. 260.7 and 43 P.S. 333.113.

of their devotion to the ideal of corporate profitability through customer satisfaction.

It is unusual in the extreme for the defendant, who relies on their records for business purposes to contend that although required by law to be created and maintained, their records are so unreliable that they cannot constitute prima facie proof of their contents. Since 1939 the Business Records Act, 42 Pa. C.S. 6108, allowed business records into evidence without any actual proof of their accuracy because the law presumed the regularity and accuracy of records maintained in the regular course of business. The purpose of the legislatively enacted statute is the same as that of the Supreme Court adopted Rule 803 (6) of the Pennsylvania Rules of Evidence. Records created and maintained for independent business purposes are not self-serving or created for litigation. As stated by the Supreme Court in *Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987): ". . . the basic justification for the business record exception to the hearsay rule is that the purpose of keeping business records builds in a reliability which obviates the need for cross-examination." Because important business decisions routinely depend upon the accuracy of regularly kept records, they are admissible and constitute prima facie proof of their contents whether offered by their creator or an antagonist. Without question, a party opponent's business records may be offered against their creator, are prima facie proof of their contents, and may even constitute opposing party admissions against pecuniary interest. The presumption of the reliability of business records which are created and maintained by affirm-

ative requirement of law and are utilized for payroll purposes is beyond question.

It will be plaintiffs burden at trial to demonstrate culpability. The computer records demonstrate the existence of common questions of law and fact, and that common issues predominate. Indeed, for those class members for whom computer records exist[5] the computation of damages, should a liability verdict be obtained, can be easily determined by claim presentation of the computer results.

The plaintiffs have proven the requirement of commonality.

III. Typicality

The claimants must also meet the requirement of typicality. The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests will advance those of the proposed class members. *DiLucido v. Terminix Intern. Inc.*, 450 Pa. Super. 393, 404. 676 A 2d 1237, 1242 (Pa. Super. 1996).

Plaintiffs were employed in Pennsylvania stores for many years. Both claim that they were forced to work off the clock during missed break and lunch pe-

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[5] The court notes that while litigation in many states was pending in February, 2001, defendant decided that rest break data should no longer be maintained by computer record.

riods. Plaintiff Hummel's claim is supported by an analysis of defendant computer records which for a two week period demonstrated that during a two week period in March 1999, 19 out of 53 shifts worked were deficient in duration of breaks and 15 of 53 shifts were deficient in the number of rest and meal breaks. Plaintiff Braunn's individual computer record also demonstrates missed breaks.

Defendant contends that these "disgruntled" employees are not representative. The computer records belie this contention; the analysis reveals significant break time lost. Regardless of how disgruntled they or other employees who believe they have been forced to work off the clock without pay may be, their interests are sufficiently aligned with the interests of the entire class.

The Court finds that the claim presented satisfies the typicality requirement of Rule 1702 (3).

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa. R. Civ. P. 1702 (4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

> "(1) whether the attorney for the representative parties will adequately represent the interests of the class.
>
> (2) Whether the representative parties have a conflict of interest in the maintenance of the class action, and

> (3) Whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed." Rule 1709.

"Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession." *Janicik*, 305 Pa. Super. at 136, 451 A.2d at 458. Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict." *Janicik*, 305 Pa. Super. at 136, 451 A.2d at 458.

The Court is familiar with the class action work of local counsel, including the successful class action trial to verdict and personally knows that the firm consistently performs at the highest level of professional competence and professionalism. Pro Hac Vice counsel has also demonstrated tenacity, diligence and competence in representing this class. The Adequacy of Representation requirement of Rule 1702 (4) has been met. The court has considered defendant' claims of conflict among class members and finds them deficient to defeat the demonstrated adequacy of representation by counsel and the named class representatives.

V. Fair and Efficient Method of Adjudication

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. Since the court has determined that a Class satisfies the other requirements of Pa. R. Civ. P. 1702 and

plaintiffs do not request equitable relief, it is not necessary to consider subdivision (b) of Rule 1708.

1. Predominance of Common Questions of Law and Fact

The most important requirement in determining whether a class should be certified under Rules 1702 (5) and 1708 (a) (1) is whether common questions of law and fact predominate over any question affecting only individual members. In addition to demonstrating the existence of common questions of law and fact, plaintiffs must also establish that common issues predominate. The analysis of predominance under Rule 1708 (a) (11 is closely related to that of commonality under Rule 1702(2). *Janick*, supra. 451 A.2d at 461. The court adopts and incorporates its analysis of commonality and concludes that the requirement of predominance has been satisfied. The difficulties plaintiff class may encounter in proving liability for the time period after specific work activity computer record keeping was ceased by the defendant's decision does not change the common nature of the allegations to be proven. Plaintiffs may be able to demonstrate consistency in corporate conduct despite a change in corporate record-keeping. Plaintiff may fail in its proofs for the time after detailed record-keeping ceased. Nonetheless, common issues of triable fact and law predominate. The eventual verdict need not predicted before certification is ruled upon.

2. The Existence of Serious Management Difficulties

Under Pa. R. Civ. P. 1708 (2), a court must also consider the size of the class and the difficulties likely to be encountered in the management of the action

as a class action. While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight. Problems of administration alone ordinarily should not justify the denial of an otherwise appropriate class action for to do so would contradict the policies underlying this device. *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972). Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. *Id.* (citing *Buchanan v. Brentwood Federal Sav. and Loan Ass'n*, 457 Pa. 135, 320 A.2d 117. 131 (Pa. 1974)).

Defendants argue that class treatment would not be fair and reasonable since there are individual fact issues which render class treatment unmanageable. However, many of the claims can be easily litigated to both liability and damages verdicts without any manageability issues. Plaintiffs contend that at least until defendant's record keeping policies were changed, their own business records prove both corporate liability and the exact calculation of damage sustained by each class member. The defendant's contention that their records cannot be relied upon and that individualized explanations make these records questionable as proof of liability or damages are questions of fact for jury determination. If either defense is accepted by the jury at trial plaintiffs will simply fail to meet their burden of proof. The court rejects defendant's contention that thousands of employees will be needed to testify that the time records are inaccurate and do not explain their individual reasons for inadequate breaks and off the clock work

without pay. If the defense contentions are true, the inaccuracy of mandated records on which the company relied for years, can surely be more convincingly demonstrated than through employee rote testimonials of company loyalty. The court knows that such testimony is routinely rejected by jurors and is confident that experienced defense counsel would never present a case to a jury in such an amateur and ultimately dysfunctional manner.

Should the jury determine that these records do demonstrate liability and have accurately recorded missed breaks meals and other off the clock work, then damages for each class member becomes a ministerial calculation. Specifically tailored jury verdict interrogatories or bifurcation may be required for the time period after the defendant changed its recording policies but the need for such distinctions in verdict interrogatories or even bifurcation are certainly manageable trial issues. The court is confident that such individualized issues of computation or payment of damages that may eventually exist should plaintiff prevail on their overriding common issues can be justly resolved by any one or combination of a number of common management tools. Whatever management problems remain, this court is confident that the ingenuity and aid of counsel can justly resolve in accord with this certification decision. *Janicik*, 305 Pa. Super. at 142, 451 A.2d 462.

3. Potential for Inconsistent Adjudications

Pennsylvania Rule 1708 (a) (3) also requires a court to evaluate whether the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. In

considering the separate effect of actions, the precedential effect of a decision is to be considered as well as the parties' circumstances and respective ability to pursue separate actions. *Janicik*, 305 Pa. Super. at 143, 415 A.2d at 462.

A substantial risk of inconsistent adjudications exists if individual actions are pursued in these cases. As a certified class, one case will determine liability, a multiplicity of litigation is rendered unnecessary and the potential for inconsistent adjudications is avoided.

4. Extent and Nature of any Preexisting Litigation and the Appropriateness of this Forum

Under Pa. R. Civ. P. 1708 (a) (4) and (a) (5), a court should consider the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues. Although preexisting litigation raising the same issues have been filed in many states, the court is aware of no conflicting litigation concerning the Pennsylvania plaintiffs in the certified class. This court finds that this forum is appropriate to litigate the claims presented. The Court of Common Pleas of Philadelphia County Complex Litigation Center has achieved a well earned national reputation for excellence in the expeditious and just case management and trial of complex mass tort and class action matters. This is an appropriate forum for this class action concerning Pennsylvania stores and employees.

5. The Separate Claims of the Individual Plaintiffs are Insufficient in Amount to Support Separate Claims or their Likely Recovery

Rule 1708 also requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. Thus, a court must analyze whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate amounts. Pa. R. Civ. P. 1708 (a) (6). Alternatively, the rules ask the court to analyze whether it is likely that the amounts which may be recovered by individual class members will be so small in relation to the expense and effort of the administering the action as not to justify a class a action. Pa. R. Civ. P. 1708 (a) (7). This criteria is rarely used to disqualify an otherwise valid class action claim. *See Kelly v. County of Allegheny*, 519 Pa. 213, 215, 546 A.2d 608.609 (Pa.1988). (Trial court erred in refusing to certify a class on the grounds that the class members' average claim was too small in comparison to the expenses incurred.)

Although the amounts vary and may be small, if any sums are owing to class members, at least as to those claims proven by defendant's own records, administration is simple and straightforward. For most if not all class members the amounts involved in comparison to the substantial litigation necessary for recovery effectively means that no individual litigation could ever be pursued.

This criteria is met.

6. Appropriateness of Equitable or Declaratory Relief

Since plaintiffs do not seek equitable relief it is not necessary to consider the criteria set forth in Pa. R. Civ. P. 1708 (b).

Having weighed the Rule 1702 requirements, this court finds that a class action is a fair and efficient method for adjudicating plaintiffs claim and an appropriate Order is issued herewith.

CONCLUSIONS OF LAW

1. The class is sufficiently numerous that joinder of all its members would be impracticable.
2. There are questions of law and fact common to the Class.
3. The claims of Plaintiff are typical of the class claims.
4. Plaintiffs will fairly and adequately assert and protect the interests of the Class.
5. Allowing Class claims provides a fair and efficient method for adjudication of the criteria set forth in Pa. R. Civ. P. 1708.

CONCLUSION

For these reasons, Plaintiffs' Motion for Class Certification is granted. Plaintiff's counsels are appointed as counsel for the Class. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order. Discovery for trial shall commence. A new Case Management Order shall be issued.

A contemporaneous order consistent with this Opinion is Filed.

BY THE COURT

12/27/05 s/

DATE MARK I. BERNSTEIN, J.

APPENDIX H

MICHELLE BRAUN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellee v. WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3373 EDA 2007
DOLORES HUMMEL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Appellee v. WAL-MART STORES, INC., A DELAWARE CORPORATION AND SAM'S CLUB, AN OPERATING SEGMENT OF WAL-MART STORES, INC., Appellants	:	No. 3376 EDA 2007

ORDER

AND NOW, this 11th day of August, 2011, IT IS HEREBY ORDERED:

THAT the application filed June 24, 2011, requesting reargument of the decision dated June 10, 2011, is DENIED.

PER CURIAM