STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

Case Type: Class Action/Contract

Nancy Braun, Debbie Simonson, Cindy Severson, and Pamela Reinert, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART, INC., a Delaware Corporation, its WAL-MART Supercenters, WAL-MART Discount Stores, and SAM'S CLUB operating segments,

Defendants.

File No. 19-CO-01-9790

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above class action matter came on for a bench trial before the Honorable Robert R. King, Jr., Judge of District Court, at the Dakota County Judicial Center, Hastings, Minnesota, commencing on September 25, 2007, and continued from time to time thereafter until the completion of testimony on December 11, 2007. Both parties were ably represented by counsel. During the course of the trial, the following counsel made appearances on behalf of Plaintiffs: Justin Perl, Jonathan Parritz, Kai Richter, André LaMere, and Jennifer Benowitz of Maslon Edelman Borman & Brand, LLP; William Sieben of Schwebel Goetz & Sieben; and Rodney Bridgers and Nathan Axvig of Franklin D. Azar & Associates. The following counsel made appearances on behalf of Defendants: Neal Manne, Victoria Cook, Shawn Rabin, David Orozco, and Kalpana Srinivasan of Susman Godfrey, LLP; Jerry Blackwell of Blackwell Burke, P.A.; and James Kremer of Dorsey & Whitney, LLP.

The issues tried were limited to the following:

1. liability (whether rest breaks, meal breaks and off-the-clock violations occurred), and compensatory damages;

2. the number of statutory violations under Minnesota's Fair Labor Standards Act ("MFLSA");

3. whether the statutory violations were repeated or willful to justify the imposition of civil penalties under Minn. Stat. § 177.27, subd. 7;

4. liquidated damages under Minn. Stat. § 177.27, subd. 8;

5. whether Wal-Mart's alleged nonpayment of wages was "willful," so as to apply the applicable limitations period for three years under Minn. Stat. § 541.07(5); and

6. injunctive relief, except as set forth below; and

7. failure to keep accurate time records under Minn. Stat. § 177.30; Or. Certifying Class ¶ 36 (Nov. 3, 2003).

Other issues were bifurcated from the trial and reserved for later resolution, including but not limited to punitive damages, the amount of any civil penalties (up to $1,000 per statutory violation), the size of any award of attorneys' fees and costs under Minn. Stat. § 177.27, subd. 10, and the nature and scope of any injunctive relief regarding Wal-Mart's practice of unlawfully clocking its Minnesota hourly employees out from work one or two minutes after they clock in.

Prior to trial, the Court issued an Order limiting the parties to 60 witnesses and 100 hours of testimony per side. Or. Regarding Time to Present Case and No. of Witnesses. ¶ 2, 6 (October 24, 2006). During the course of the trial, Plaintiffs called 41 witnesses and presented more than 86 hours of testimony. Defendants called 52 witnesses and presented more than 73 hours of testimony. In addition, 1,184 exhibits were received into evidence.

On February 14, 2008, counsel for the parties submitted proposed findings of fact and conclusions of law. At the request of the Court, the parties also submitted data relating to Wal-Mart workers who worked as cashiers, and it was received.

On April 1, 2008, counsel for the parties appeared before the Court and presented closing arguments. Upon completion of these arguments, the case was taken under advisement by the Court.

Based upon all of the evidence adduced at trial, including the testimony of witnesses and the exhibits received into evidence, and upon all the files, records and proceedings, the Court makes the following:

FINDINGS OF FACT:

BACKGROUND

1. On September 10, 2001, Plaintiff Nancy Braun commenced the above-captioned class action. Plaintiffs Debbie Simonson, Cindy Severson and Pamela Reinert subsequently joined the action as named parties on April 26, 2002.

2. Wal-Mart is a Delaware corporation headquartered in Bentonville, Arkansas. Wal-Mart operates thousands of retail stores in the United States and across the world, under the names "Wal-Mart" and "Sam's Club."[1]

3. During the period from September 11, 1998 to January 31, 2004 (the "Class Period"), Wal-Mart expanded both the size of its operations in Minnesota and the number

[1] Except where otherwise noted herein, the term "Wal-Mart" refers to the company as a whole, including its Sam's Club stores and Supercenter operations.

of stores from 45 to 59. Several of these stores, including Wal-Mart's Hastings "Supercenter," are located in Dakota County. [2]

4. During the Class Period, Wal-Mart's salaried management team responsible for operating its stores consisted of store-level managers (store managers, co-managers in some stores, and assistant managers), district managers with responsibility for several stores, regional vice presidents responsible for districts in Minnesota (and also a regional personnel manager and regional loss prevention manager for each region), divisional vice presidents responsible for Wal-Mart's Minnesota regions, and several other Home Office executives.[3] Many of Wal-Mart's vice presidents and other Home Office executives testified at trial. In addition, the Court heard testimony from Wal-Mart's current and former Minnesota district managers and store managers in the field.

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[2] As of January 31, 2004, Wal-Mart operated the following stores at the following locations in Minnesota:

Wal-Mart
Store # 982 (Owatonna), Store #983 (Blue Earth), Store #1020 (Albert Lea), Store #1038 (Waseca), Store #1470 (Willmar), Store # 1472 (Hastings), Store # 1473 (Mankato), Store # 1562 (Coon Rapids), Store #1577 (Buffalo), Store # 1609 (Grand Rapids), Store # 1627 (Dilworth), Store #1632 (Alexandria), Store # 1633 (St. Cloud), Store # 1634 (Little Falls), Store # 1654 (Baxter), Store # 1657 (Faribault), Store # 1696 (Fergus Falls), Store # 1722 (Marshall), Store # 1738 (Hutchinson), Store # 1757 (Hermantown), Store # 1786 (Eagan), Store # 1855 (Eden Prairie), Store # 1858 (Montevideo), Store # 1861 (Oak Park Heights), Store # 1864 (Brooklyn Park), Store # 1865 (Redwood Falls), Store # 1929 (Cloquet), Store # 1952 (Fridley), Store # 1971 (Rochester), Store # 2087 (Vadnais Heights), Store # 2198 (Bloomington), Store # 2274 (Forest Lake), Store # 2352 (Cambridge), Store # 2367 (Pine City), Store # 2642 (Apple Valley), Store # 2812 (Rochester), Store #2820 (Worthington), Store # 2882 (Maple Grove), Store # 2937 (Hibbing), Store # 2957 (Detroit Lakes), Store # 3209 (Elk River), Store # 3233 (Bemidji), Store # 3498 (Blaine), Store # 3513 (Shakopee), Store # 3534 (Red Wing), Store # 5089 (Inver Grove Heights)

Sam's Club
Store # 4736 (Apple Valley), Store # 4738 (Eagan), Store # 4787 (Bloomington), Store # 6254 (Maple Grove), Store # 6309 (White Bear Lake), Store # 6310 (Fridley), Store # 6311 (Shakopee), became Store # 6311 (Burnsville), Store # 6312 (Inver Grove Heights) became Store # 6312, (Woodbury), Store # 6318 (St. Louis Park), Store # 6320 (Hermantown), Store # 6427 (Rochester), Store # 6510 (Mankato), Store # 8183 (St. Cloud)

[3] Sam's Club has a similar management structure, but uses different titles for some of its managers and executives (*e.g.*, store managers are called "general managers" at Sam's).

5. Wal-Mart's hourly management/supervisory team responsible for operating its stores primarily consisted of department managers and customer sales managers ("CSMs").

6. Plaintiff Nancy Braun (Braun) was an hourly employee at Wal-Mart's Apple Valley, Minnesota, store from March 1999 to May 2000. Tr. Transcr. 503:4-7 (Sep. 26, 2007). During her tenure at Apple Valley, Braun worked in the Domestics Department, in D & D, as a cashier, and later in the "Radio Grill," Wal-Mart's in-store eatery.[4] Tr. Transcr. 476:14-477:24 (Sep. 26, 2007).

7. Plaintiff Deborah Simonson (Simonson) was an hourly employee at Wal-Mart's Brooklyn Park, Minnesota, store from April 2000 to May 2001. During her tenure at Brooklyn Park, Simonson worked as a cashier in the Lawn and Garden Department, as a CSM and as an assistant manager in the Jewelry Department. Tr. Transcr. 75:16-76:3, 166: 6-10 (Sep. 25, 2007).

8. Plaintiff Cindy Severson (Severson) was an hourly employee at Wal-Mart's stores in Brooklyn Park and Maple Grove, Minnesota. Severson was employed at the Brooklyn Park store from approximately August 2000 through August 2001, working at the customer service desk and as a backup cashier. Severson was employed at the Maple Grove store from approximately September through November 2001, working as a customer service associate. Tr. Transcr. 2444:3-11, 14-20, 2445:12-22, 2462:17-19 (Oct. 9, 2007).

9. Plaintiff Pamela Reinert (Reinert) was employed by Sam's Club from April 1997 to October 2000. She began her career at Wal-Mart as an hourly associate at the St.

[4] Citations to the record are not intended to be exhaustive, but merely examples from a record consisting of nearly 10,000 transcript pages and more than 1,000 exhibits

Louis Park Sam's Club in April 1997 and worked as a cashier, floor associate, and personnel associate. In early 1998, she entered the Manager-in-Training program, and trained as a manager at the Fridley and White Bear Lake Clubs. After completing the training course, Reinert worked as an assistant manager, a salaried position, in the Fridley and Inver Grove Heights clubs. She left Sam's Club in October 1998 to take care of a terminally ill child and returned to the St. Louis Park club, as an hourly associate, from April 1999 until October 2000. During this time, she worked on the overnight crew, in merchandising, and as a cashier. Tr. Transcr. 185:17-186:24, 187:19-188:19, 189:12-190:4, 246:13-22, (Sep. 25, 2007), 314:25-315:7, 315:13-18, 315:24-316:5, (Sep. 26, 2007).

10. Plaintiffs brought this action under Minn. R. Civ. P. 23.01, on behalf of a class consisting of all current and former hourly employees of Wal-Mart in the state of Minnesota who worked off the clock without compensation and/or worked through all or part of a rest or meal break during the class period. Pls.' Fourth Amended Compl. ¶ 12 (Oct. 31, 2007).

11. In their Complaint, Plaintiffs asserted claims for breach of contract, unjust enrichment, *quantum meruit*, violations of MFLSA and its accompanying regulations, and punitive damages.[5]

12. Specifically, Plaintiffs alleged that Wal-Mart breached its contract with the Class and violated Minnesota law by (1) failing to provide the Class with sufficient and adequate rest breaks and meal periods; and (2) failing to pay the Class for "off-the-clock" work performed on behalf of Wal-Mart. In addition, Plaintiffs alleged that Wal-Mart

[5] Plaintiffs' claims for fraud and violations of Minn. Stat. §§ 181.13 and 181.14 were previously dismissed by the Court on summary judgment. *Orders dated March 15 and April 12, 2006.*

violated MFLSA by failing to keep accurate records of time worked and failing to pay for rest breaks between 15 and 20 minutes in duration.

13. Wal-Mart denies these allegations and asserts, *inter alia*, that class members did not miss breaks and meals or skipped them voluntarily for reasons unrelated to demands of the workplace, and that if they worked off the clock they did so without Wal-Mart's constructive or actual knowledge.

14. On November 3, 2003, the Honorable Thomas R. Lacy certified the case as a class action, finding the claims asserted by Plaintiffs Braun, Simonson, Reinert and Severson to be typical of the class. Order Certifying Class Action ¶ 19 (Nov. 13, 2003). This Court partially denied Wal-Mart's motion to decertify the Class. Or. Re. Dfds.' Decertification and S.J. Mots. (Sep. 24, 2007).

15. Judge Lacy limited the Class Period to September 11, 1998 through January 31, 2004, subject to a conclusion by the trier of fact that the Defendants engaged in willful failure to pay wages in conjunction with employee compensation. Order Re: Notice to Class Members and Defs.' Mot. P.S.J. as to Stat. of Limitations. ¶ 2 (May 21, 2004). If no such conclusion is reached then the class period is to be from September 11, 1999 through January 31, 2004. *Id.*, memo. 5.

SUITABILITY FOR CLASS TREATMENT (Witness Credibility)

16. Prior to trial, the Court advised the parties of its desire to hear live testimony from Wal-Mart's hourly current and former employees. The Court had the opportunity to hear testimony from more than 40 hourly employees at trial.

17. Fourteen hourly class members testified during Plaintiffs' case. They worked at Wal-Mart in various positions (but did not represent all job positions), in two dozen

stores throughout the state.[6] Their average tenure was 3.8 years, which is slightly longer than the average length of employment of nine months to 27 months for a typical Wal-Mart hourly employee. Tr. Transcr. 9651:8-9653:7 (Dec. 11, 2007).

[6] The employment history of Plaintiffs' hourly witnesses is summarized below:

CLASS MEMBER	DATES EMPLOYED BY WAL-MART	STORES	SUPPORT IN THE RECORD (Trial Transcript)
Deborah Simonson	4/2000-5/2001	Brooklyn Park (1864)	75:16-25
Pamela Reinert	Spring 1997-10/2000, with a Temporary Leave of Absence	St. Louis Park (6318); Fridley (6310); White Bear Lake (6309); Inver Grove Heights (6312)	185:17-186:24, 187:19-188:11, 189:12-190:4
Nancy Braun	1997-10/2000	Apple Valley (2642)	476:14-477:21
Cynthia Severson	8/2000-8/2001 and 9/2001-11/2001	Brooklyn Park (1864); Maple Grove (2882)	2444:3-9, 14-20; 2445:12-20; 2462:11-21
Merrie (Thorsen) Morello	7/1995-6/2005	Forest Lake (2274)	539:6-9, 540:4-541:2
Christine Rogentine	10/1993-12/2003, with a Temporary Leave of Absence	Cloquet (1929)	1183:17-1184:12
Michael Kocherer	1995-2003	Eagan (1786); Bloomington (2198); Vadnais Heights (2087); Maple Grove (2882); Apple Valley (2642); Elk River (3209). Also toured Bemidji (3233), Detroit Lakes (2957), Apple Valley (2642) and Cambridge (2352) with his District Manager	1077:2-14; 1081:22-1082:13; 1101:4-24
Janice Schuster	1996-5/1999	Eden Prairie (1855)	1518:5-8; 1523:22-1524:8
Lilly (Jenkins) Persons	1/2001-7/2003	Hibbing (2937)	2201:20-2202:1; 2202:13-15
Shane Paul	6/1996-6/1997 and 6/1998-2003	Coon Rapids (1562); Dillworth (1627); Brooklyn Park (1864); Vadnais Heights (2087); District 185 Manager – Loss Prevention from 2003-2005 and responsible for Cloquet (1929); Hermantown (1757); Bemidji (3233); Baxter (1654); Hibbing (2937); Grand Rapids (1609)	2495:24-2497:13
Linda Ditsch	4/1997-11/1999	Eden Prairie (1855)	3002:14-21; 3011:21-3012:21

18. In addition, Plaintiffs called twenty three witnesses who presently or formerly held management or executive positions with Wal-Mart.

19. The Court generally found Plaintiffs' hourly witnesses to be credible. Specifically, the Court finds that their bias or credibility was not unduly influenced by any potential financial gain. In fact, Wal-Mart conceded the honest and truthful character of some of Plaintiffs' witnesses.[7]

20. The Court specifically finds the credibility of two of Plaintiffs' witnesses to be lacking. Testimony indicated that although Pamela Reinert is a very intelligent person, she has poor swiping habits. Thus, the Court does not attach much credibility to her testimony that she missed excessive amounts of breaks. The impression the Court had of Shane Paul is that he had such a bad personal experience while working for Wal-Mart that he would say things that might be exaggerated or flat-out untrue to injure Wal-Mart. Thus, the Court cannot attach much credibility to his testimony.

21. The Court generally found those witnesses called by Plaintiffs who presently or formerly held management or executive positions with Wal-Mart to be credible. One notable exception was Tom Coughlin, discussed below.

Ashley Dolney	4/1999-12/1999	Little Falls (1634)	3166:12-3167:4
Jean Valla	2/2001-5/2002	Hibbing (2937)	4126:8-14
Carla Machado	2/2002-7/2004	Brooklyn Park (1864)	4529:13-25

[7] For example, Stanley Vaughn, Brooklyn Park store manager, described Cindy Severson as an "honest" person. Tr. Transcr. 1727:7-14; (Oct 4, 2007), Tr. Transcr. 7648:24-7649:1, 7650:6-8 (Nov. 15, 2007). Wal-Mart told Linda Ditsch she was honest, dependable, flexible, a team player, and had a positive attitude and high integrity. Pl. Tr. Exs. 251; 402. Darryl Topel testified that Jan Schuster was honest and hard-working. Tr. Transcr. 9030:15-16, 20-25 (Dec. 3, 2007). Letoy Fackelman testified that Carla Machado was "a person who maintained high integrity at all times." Tr. Transcr. 9291:6-11 (Dec. 4, 2007).

22. Wal-Mart called twenty-eight hourly associates (sixteen class members and twelve opt outs). These hourly associates represented a wider range of job positions than Plaintiffs' hourly associates. In addition, eleven Wal-Mart and Sam's Club store managers and district managers, who supervised numerous stores across the state, testified about their own experiences and their observations of the experiences of associates in job positions in every part of these stores.

23. The Court finds that the tenure of Wal-Mart's hourly witnesses was atypical and not representative of the Class. Their range of tenure from six to twenty years at Wal-Mart is well in excess of Wal-Mart's average hourly employee's tenure of nine months to twenty-seven months.[8] Further, at the time of trial, four years after the close of the Class Period, all but one of Wal-Mart's hourly witnesses was a current employee.

24. Nevertheless, in spite of their significantly greater than average tenure, the Court generally found Wal-Mart's hourly witnesses to be credible.

25. The Court found the testimony of Tom Coughlin to be particularly evasive. Consequently, the Court cannot find his testimony to be credible.

26. The testimony of the witnesses from both parties demonstrated that each associate's experience differed. The varying experiences of associates reflect differences

[8] By way of reference, the Court provides the following passages from the trial transcript, and the specific witness' name and tenure in parenthesis. 9650:25, 9651:1-6 (Fenn) ("They're not typical in how long they've been around Wal-Mart"); 4919:7-13, 4952:22-23 (Paggen, 15 years); 4989:4-15 (Habberfield, 8 years); 5289:20-21, 5313:18-19 (Johnson-Hemmah, 16 years); 5478:18-16 (Lofquist, 10 years); 5580:13-19 (Baker, 7 years); 5934:21-24, 5951:4-6 (Johnson, 13 years); 6192:13-21 (Wickre, 10 years); 6494:1-2, 6495:23-24 (Labaw, almost 15 years); 7036:3-4, 7036:7-8, 7066:25-7067:2 (Clarke, 13 years); 7071:1-6 (Simmonds, almost 16 years); 7147:7-8, 7147:15-17, 7221:5-9 (Yavis, 15 years); 7428:13-7429:1 (Leverson, 6 years); 7669:1-2, 7670:3-5, 7711:9-10, 7712:5-7, 7735:10-12 (Jarvi, 14 years); 8315:6-15 (Slad, 13 years); 9098:10-11, 9098:16-23 (Coyle, 7 years); 5036:6-8, 5064:23-24 (Roettger, almost 18 years); 5098:20-22, 5102:22-24, 5156:9-10 (Fang, about 8 years); 5262:9-13 (Miller, 16 years); 5327:11-14, 5367:3-5 (Jansen, 9 years); 5408:24-25, 5409:5-7, 5411:3-5 (Anderson, 16 years); 5527:21-22, 5527:25-5528:1, 5534:4-6 (Ross, 12 years); 5636:25-5637:7 (Meher, 10 years); 6072:5-6, 6075:4-5 (Paulson, 16 years); 6830:4-8, 6861:3-4 (Meyer, almost 12 years); 6919:25-6920:1 (Turley, 17 years); 7109:14-17 (Booth, 16 years); 8359:10-11, 8382:3-5 (Dethloff, 17 years); 5208:16-19 (Butler, 20 years).

among stores, departments, and positions at Wal-Mart and Sam's Club stores in Minnesota during the class period.

27. Additionally, stricter enforcement of policies regarding meal and rest break compliance, in the latter part of the class period, inevitably led to changes in associates' experiences. These changes in enforcement did not make associates' shared experiences so inapposite as to render either the swiping or post swiping period of the class period inappropriate for class treatment.

28. The testimony between Plaintiffs' witnesses and Defendants' witnesses differed in respect to most of the salient issues of this case.

29. The Court is unable to make a blanket finding that one side's witnesses were generally more or less credible than the other side's witnesses. Rather, the Court finds that the only fair way to assess witness credibility is to take a more microcosmic approach and make such determinations, as applicable, within the specific context of the various issues.

30. Defendants have consistently argued throughout every stage of this litigation that the class, as certified by Judge Lacy, is not appropriate for class treatment. The core of their argument is that each individual's experience is so intrinsically unique that each individual should have to testify about their experience.

31. Some general patterns and some shared experiences emerged from the testimony adduced at trial. These limited general patterns and shared experiences allowed the Court, in combination with the other evidence presented at trial, to decide the factual and legal issues in dispute on a class-wide basis.

32. The Court affirms its previous decision that the matter is appropriate for class treatment. In making this affirmation the Court acknowledges that there is no "perfect" way to decide the issues in this case. That does not, however, mean that the case is unfit for class treatment. To say that the matter cannot be treated on a class-wide basis would be the equivalent of saying that there is no meaningful possibility of legal relief for those in the class. This is contrary to public policy and the purpose behind the law that permits class actions.

33. Plaintiffs do not have to prove that every class member was harmed for the Class to prevail. Or. Regarding Amending Compl. to Add Claim for Punitive Damages 4-5 (Dec. 16, 2005).

Court's Methodology/Totality of the Evidence

34. The issues in this case are complex. As a court of first instance, it is this Court's duty to painstakingly sort through and assign the proper weight to the testimony and evidence, then make appropriate findings of fact based upon that testimony and evidence. This Court has not based its decision on any single piece of testimony or evidence, nor upon any single category of testimony or evidence. Instead, the Court has based its decision upon the totality of the testimony and evidence.

35. The Court has carefully considered the testimony of all the witnesses in this matter. In addition to carefully listening to the witnesses when they testified live at trial, and taking significant notes, the Court has reviewed the entire approximately Ten Thousand (10,000) page trial transcript in its entirety and created approximately Two Hundred (200) pages of testimony summary to help navigate the transcript. In many instances the Court has reviewed portions of the transcript numerous times.

36. The Court has meticulously reviewed the evidence received during the trial. The Court informed the parties at trial that it would be impossible for the Court to read every document in its entirety. The Court did not attempt to read every page of every exhibit. What the Court did do was topically peruse the evidence, scanning for salient parts, and creating charts and notes summarizing the most pertinent parts of the evidence, paying particular attention to those exhibits referenced by the parties in their proposed findings and arguments.

37. In making its findings the Court has analyzed the issues in light of the testimony, evidence and the attendant arguments and theories presented at trial.

38. The Court finds it appropriate to present findings regarding particularly significant areas of evidence before presenting issue-specific findings, given the applicability of such broader findings to narrower, issue-specific findings. The Court will reference these findings as necessary.

Contemporaneous Complaints

39. Wal-Mart received contemporaneous complaints that breaks were not received during the class period.

40. Many of these complaints came from the feedback that Wal-Mart received through its "Grass Roots" process. The Grass Roots process had multiple stages. The Grass Roots process began with a survey in which all associates were encouraged to participate. After the survey was complete, Wal-Mart tabulated the results, and store meetings took place that examined those results. From those meetings, an action plan was completed. Tr. Transcr. 6710:20-6712-24 (Nov. 8, 2007).

41. Grass Roots meetings "have been a long-standing part of Wal-Mart culture" and managers are directed to take notes during the post-survey meetings and to produce action plans. Tr. Transcr. 1634:17-1635:3 1637:10-14 (Oct. 4, 2007); Pl. Tr. Exs. 904; 977.

42. Plaintiffs introduced a large volume of Grass Roots meeting notes from Minnesota stores during the Class Period. The Court reviewed many of these notes. The notes address many issues, including concerns about missed breaks and meal periods. Even though questions about rest and meal break experiences were not asked on the annual survey,[9] Wal-Mart's hourly employees often spontaneously raised the issue, on their own, during Grass Roots meetings. The notes also contain issues concerning the poor work habits of associates.

43. The Court shares the Defendants' concerns that these notes were authored by class members about issues involved in their case, and that they may have been written after the time Plaintiffs filed their class action and after Plaintiffs' counsel communicated the class allegations to class members. The Court is also aware of the Defendant's hearsay concerns regarding the notes, and that in many instances it is impossible to identify the author of the notes.

44. However, the Court finds that these notes were regularly taken and kept in the regular course of business and the record indicated that the duty to take notes was frequently delegated. The Court has given an appropriate evidentiary weight to these notes.

[9] Wal-Mart has never included a question in the company-wide survey asking hourly employees whether they are receiving their rest and meal breaks.

45. Following the Grass Roots survey and Grass Roots meetings, Wal-Mart sometimes conducted follow up visits at stores with a "high UPI."[10] During some of these follow up visits, Wal-Mart asked hourly employees whether they were receiving their breaks or meals. Records of these high UPI store visits reflect that associates from a number of Minnesota stores reported that they were not receiving their rest or meal breaks. Tr. Transcr. 2997:13-16 (Oct. 11, 2007); Tr. Transcr. 4281:11-18 (Oct. 24, 2007); Tr. Transcr. 5092:7-12 (Oct. 31, 2007); Tr. Transcr. 6766:12-20 (Nov. 8, 2007); Pl. Tr. Exs. 1184; 1542; 1558; 1559; 1570; 1633; 2074; 2145; 2177; 2220; 2221; 2222; 2290; 2310; 2341; 2369; 2377. However, because of the method used in the follow-up surveys, as little as one associate claiming they were not getting breaks would be enough to cause the question to be answered "yes."

46. Beginning in 2002, Wal-Mart included a question (Question 8) in the Grass Roots survey that asked employees whether they agree or disagree with the following statement: "Where I work, we have enough associates to get the work done."

47. From 2002 until the end of the Class Period in 2004, Question 8 typically generated one of the worst responses in the entire survey, which included a total of 29 separate questions. In 2002, for the company as a whole, the response to Question 8 was the second most unfavorable response in the entire survey. Less than half (46%) of all employees who responded to this question reported that there were "enough associates to get the work done" in their store. In 2003, the nationwide Grass Roots survey results were nearly unchanged. That year, only 45% of survey participants provided a favorable response to Question 8, which again was the second-lowest rating on the entire survey.

[10] Some Wal-Mart witnesses testified that UPI stands for "union probability index" or "union predictive index." Other Wal-Mart witnesses testified that UPI stands for "unresolved people issues."

48. The results to Question 8 were slightly worse for Wal-Mart's Minnesota stores than for the company as a whole. In 2002, the response to Question 8 was either the first or second most unfavorable response in 52 of the 55 Minnesota stores for which Wal-Mart produced survey results. In 2003, the response to Question 8 was either the first or second most unfavorable in 55 of 57 Minnesota stores. In 2004, the response to Question 8 was among the top three most negative responses for 56 of 57 Minnesota stores for which Wal-Mart produced data.

49. The Plaintiffs argue that these high negative responses indicated a serious and chronic staffing shortage that Wal-Mart's managers allowed to persist. The Plaintiffs argue that Wal-Mart's managers allowed the staffing shortage to persist as they were under pressure from corporate directives (including preferred scheduling) and had a financial incentive (by keeping labor costs low and reaping the benefits of high powered bonuses) to do so.

50. The Plaintiffs argue that this environment of chronic understaffing led to missed breaks.

51. Defendants counter that Plaintiffs place undue weight on Question 8 of the Grass Roots survey by contending that this question is relevant to determining whether or not Wal-Mart was understaffed as the question goes to perceptions of staffing.

52. More specifically, they argue that Plaintiffs did not perform any studies to determine whether a store with a higher staffing level had more or fewer alleged wage and hour violations than a store with lower staffing. Tr. Trans. 4318:9-14 (Oct. 24, 2007).

53. Defendants argue that according to Gantz Wiley, a firm with expertise in this area, Question 8 was the question on which most companies received the lowest score for over a decade and across most industry groups. Tr. Trans. 6746:19-6749:25 (Nov. 8, 2007); Def. Tr. Ex. 635; Def. Tr. Ex. 636.

54. Defendants also argue that the results on Question 8 indicate that Wal-Mart scored at or better than the industry average on this measure of employee perception about staffing, both nationally and in Minnesota. Tr. Trans. 6746:2-18 (Nov. 8, 2007).

55. The Defendants also demonstrated that on questions that ask about management integrity, fairness, how employees feel they are treated, and whether employees would recommend their employer to other employees or friends, Wal-Mart did as well as or better than the retail industry average. Tr. Transcr. 9608:14-9610:13 (Dec. 10, 2007).

56. The Court finds that a high negative response to a question like Question 8 is not, in and of itself, indicative of a chronic understaffing issue that might explain why some of the missing swipes are actually missing breaks. It is typical human behavior to complain about the amount of work one has to do, and that one does not have enough help.

57. However, the Court does find that the high rate of negative responses should have alerted Wal-Mart of a potential problem.

58. Wal-Mart also received unsolicited written complaints from its Minnesota employees, some of whom testified, about missed and interrupted breaks and meals. Pl. Tr. Exs. 310; 318; 734; 805; 864; 1290; 1396; 1779; 1955; 2010; 2098; 2376; 2745; 3100; 3108;3120; 3122; 3276; 3352; 3352c; 3352e; 3352g; 3352i; 3352n; 3352p.

59. The Court finds that given the quantity and quality of these Grass Roots meeting notes and employee complaints, together with the results of the high UPI surveys, Wal-Mart should have been on notice that there was a potential widespread problem of missed rest and meal breaks.

Internal Audits

60. Wal-Mart conducted a series of internal audits that ought to have alerted all levels of the Wal-Mart corporate structure that there was a potential widespread problem regarding meal and rest break compliance. Testimony consistently established that although the results of these audits were e-mailed to many executives and management personnel and flagged with high importance, virtually every corporate executive or manager testified that he or she was not aware of the results until litigation had commenced in this matter.

61. In June 2000, Wal-Mart's Internal Audit department conducted an audit of 128 Wal-Mart stores across the United States, including Minnesota stores, focusing on the scheduling and staffing of associates ("Shipley Audit").

62. The Shipley Audit program was reviewed by Dale Sneed before the audit was conducted. Sneed was a senior auditor, who had performed a variety of auditing duties for Wal-Mart since January 1992.

63. Six of the stores included in the Shipley Audit were Minnesota stores: Store No. 1473 (Mankato), Store No. 1577 (Buffalo), Store No. 1657 (Faribault), Store No. 1738 (Hutchinson), Store No. 1786 (Eagan), and Store No. 1861 (Oak Park Heights).

64. As part of the Shipley Audit, Wal-Mart's auditors reviewed the time clock punch Exception Reports in each store, to determine whether the audited stores were in

"compliance with company policy and government regulation in the . . . allotment of meals and breaks[.]"

65. On July 17, 2000, Wal-Mart's auditors issued a report summarizing the results of this audit, and found that "[s]tores were not in compliance with company and state regulations concerning the allotment of breaks and meals." Specifically, the auditors found that there were 15,705 "too few meals" and 60,767 "too few breaks" at 127 of the [128] audited stores during the one-week audit period. As a result, the auditors concluded that "Wal-Mart may face several adverse consequences as a result of staffing and scheduling not being prepared appropriately." Pl. Tr. Ex. 754.

66. The findings for the six Minnesota stores were fairly consistent with the nationwide findings. Wal-Mart's auditors found that there were 1,064 "too few meals" and 2,642 "too few breaks" at the six audited Minnesota stores during the same one-week period. Pl. Tr. Ex. 3214.

67. The results for the Minnesota stores also were largely consistent with one another with one exception. The number of missing rest break swipes at the Hutchinson store was 73, while the number of missing meal break swipes was 203. The ratio was therefore approximately 1 to 3. At the other stores the ratios ranged between 2 to 1 up to 4 to 1. Thus, in each store, other than Hutchinson, the auditors found hundreds of meal *and* break exceptions.

68. Mr. Sneed distributed the final version of the Shipley Audit report to more than 50 members of Wal-Mart's senior management team in Bentonville, including Tom Coughlin (Wal-Mart's President), Coleman Peterson (Wal-Mart's Executive Vice President of Operations for People), Don Swann (Wal-Mart's Vice President of

Operations for People), Kendall Schwindt (Wal-Mart's Divisional Vice President for a portion of Minnesota), Charlyn Jarrells Porter (a senior member of Wal-Mart's Human Resources Department and Policy Committee), David Jackson (Wal-Mart's Divisional Vice President for a portion of Minnesota) and Marianne McDonough (Wal-Mart's Regional Vice President for Minnesota). Tr. Trans. 7567:2-10 (Nov. 15, 2007); Tr. Trans. 3536:19-3537:2, 3610:16-24, 3629:5-24 (Oct. 16, 2007); Tr. Trans. 1849:23-1850:2 (Oct. 4, 2007).

69. The Shipley auditors' methodology and findings are consistent with several other audits conducted by Wal-Mart, over a multi-year period, which evaluated compliance with Wal-Mart's Break and Meal Period Policy and/or state law based upon a review of time clock punch exception reports, time clock archive reports, or other time clock data. It is unlikely that Wal-Mart's auditors would have continued to use the same or similar methodology if they believed that these audits were flawed.

70. Rather than addressing the audit methodology or the results, Wal-Mart executives chose to ignore the results based, at least partially, on the rationale that exception reports were not accurate, and therefore the audits must be flawed. *See. E.g.*, Tr. Transcr. 2857:9-16 (Oct. 10, 2007).

71. From 1992 to 2000, Wal-Mart conducted a series of audits that examined whether Wal-Mart was in compliance with company policy and legal requirements concerning rest and meal breaks. In each case, Wal-Mart's auditors found that employees were missing rest and/or meal breaks, based upon a review of Wal-Mart's time clock reports or time clock data. These audits should have given Wal-Mart notice of a consistent,

nationwide pattern and practice of either missed breaks and meals or missed swipes for them (or, most likely, a combination of these) in Wal-Mart stores.

72. Wal-Mart also examined rest and meal break compliance as part of its STAR (Store Total Activity Review) audit program during a portion of the Class Period.

73. Wal-Mart began conducting STAR audits in 2000. Tr. Transcr. 4282:19-4283:7 (Oct. 24, 2007). The STAR audit measured the performance of the store in approximately 100 specific areas, grouped into several different categories.

74. However, Wal-Mart did not begin to examine whether employees were receiving their rest and meal breaks as part of the STAR until 2002. Tr. Transcr. 4285:19-22 (Oct. 24, 2007).

75. The STAR Audits asked employees if they were receiving their rest and meal breaks by interviewing a handful of associates in various areas of the stores. The auditors did not ask the associates how many breaks they missed. Tr. Transcr. 4283:24-4284:13 (Oct. 24, 2007) and Pl. Tr. Ex. 1610. However, the Court finds that the data is still probative and provided Wal-Mart with additional notice of the potential problem.

76. Several Minnesota stores scored "unsatisfactory" for the rest and meal break section of the STAR Audits during the class period. In fact, in November 2003, every audited store in Minnesota scored "unsatisfactory" for the portion of the audit dealing with rest and meal break compliance. Tr. Transcr. 4285:4-10 (Oct. 24, 2007). Other audited stores in Minnesota scored "unsatisfactory" for the portion of the audit dealing with rest and meal break compliance at different times during the class period. Pl. Tr. Ex. 1610; Pl. Tr. Ex. 1686.

77. On a national basis, the section of the STAR audit dealing with rest and meal break compliance was the item most frequently rated as "unsatisfactory." Tr. Transcr. 4285:11-18 (Oct. 24, 2007).

78. The Defendants argue that these internal audits were methodologically unsound. Specifically, the Defendants argue that the Shipley Audit was conducted by inventory auditors, whose main function was to supervise and take inventory of the goods in the store. Tr. Trans. 7488:2-14 (Nov. 15, 2007); Tr. Trans. 4011:20-24 (Oct. 18, 2007).

79. The Defendants downplay the importance of the audits as the auditors were not instructed to do anything beyond counting exceptions. Tr. Trans. 7517:16-25 (Nov. 15, 2007). More specifically, the Defendants argue that the failure to interview associates that appeared on the exception report makes the audit results unreliable. Tr. Trans. 7518:1-11 (Nov. 15, 2007).

80. The Defendants also argue that it was logical for management to not assign much importance to these audits as store managers felt that an audit that listed meal period or rest break exceptions was unremarkable because store managers knew from experience that there were many exceptions contained in the exception reports and exceptions were not necessarily policy violations. Tr. Trans. 9595:12-25 (Dec. 10, 2007); Tr. Trans. (1605:11-18) (Oct. 3, 2007).

81. The Court does not find Defendants' arguments regarding the inherent unreliability of the audits convincing. Common sense leads the Court to conclude that it is unlikely that Wal-Mart's auditors would have continued to use the same or similar methodology, if they believed that these audits were flawed. Also, Wal-Mart paid to have

these audits performed, and was ultimately responsible for selecting the methodology employed by and the qualifications of the auditors.

82. The Court finds that instead of blaming its own auditors at trial for not following up with associates regarding the audits, Wal-Mart management ought to have followed up with its associates contemporaneously. Wal-Mart management responded to the audits with no action. In essence, they put their heads in the sand.

Decision to Eliminate Rest Break Swiping

83. Wal-Mart implemented a change to its Break and Meal Period Policy on February 10, 2001, to stop the recording of rest break swipes. As a result of this policy change, Wal-Mart no longer had a systematic method for determining whether employees were receiving their rest breaks. Tr. Trans. 2037:11-22 (Oct. 5, 2007); Tr. Trans. 989:11-991:7 (Sep. 28, 2007); Tr. Trans. 1057:3-20 (Sep. 28, 2007); Tr. Trans. 2784:12-17 (Oct. 10, 2007).

84. Wal-Mart's suspension of rest break punching diminished its ability to monitor and enforce rest break compliance in a meaningful way. The Court finds that Wal-Mart's managers did not effectively monitor rest or meal break compliance when "coaching by walking around" the store given their limited and passing interaction with associates.

85. Wal-Mart first began to consider eliminating rest break punches in September of 2000, shortly after the July 2000 Shipley Audit Report.

86. On September 29, 2000, Mr. Harris received notes from an operations committee meeting which he likely attended as the company's Chief Operating Officer informing him that "We have a number of stores in Colorado who are in violation of our child labor laws. The state is in the process of legal action. Associates are not getting complete

breaks and meals." The notes also asked "Do we have to have associates clock in and out for breaks?" Pl. Tr. Ex. 815.

87. The very same day, Wal-Mart's Policy Committee scheduled a "Special Meeting" to discuss "proposed changes in this policy to assist our efforts in the suit and minimizing potential future litigation." Pl. Tr. Ex. 813.

88. The decision of the Policy Committee to stop recording rest breaks was discussed on October 2, 2000, at a meeting attended by all regional personnel managers. The notes from this meeting show that at least someone at the meeting saw a direct relationship between the decision to stop recording rest breaks and Wal-Mart's concerns about legal liability. Tr. Trans. 2399:15-23, 2401:16-20 (Oct. 8, 2007); Pl. Tr. Ex. 818.

89. Other notes from Wal-Mart's corporate office discuss "clock[ing] in [and] out" and state: "Breaks—Piece of Evidence."[11] Pl. Tr. Ex. 3125.

90. Based on the foregoing facts and the other evidence presented at trial, the Court finds that Wal-Mart chose to stop requiring associates to clock in and out for rest breaks, at least in part, to avoid creating what might be construed or used, whether fairly or not, as evidence of missed breaks in litigation. There were also legitimate business reasons, not related to litigation, for this change. However, it is debatable whether these legitimate business reasons would have led to the change, at the time it occurred, absent the litigation. Nevertheless, the Court is not sufficiently convinced of the reasons for the change so as to apply an "adverse" presumption in calculations, as fully discussed below.

Payroll Pressure

[11] No Wal-Mart witness took responsibility for writing these comments or shed any light on why they were written. Accordingly, the Court reads them at face value.

91. "Payroll pressure" was present throughout Wal-Mart, including Minnesota, during the Class Period, and was passed down by means of frequent direction from the company's most senior executives to all levels of Wal-Mart management.

92. This payroll pressure was sometimes conveyed in the form of hyperbole. Tr. Transcr. 3989:21-3990:24 (Oct. 18, 2007); Pl. Tr. Ex. 961.

93. Defendants' expert Wade Fenn testified that the use of hyperbole was not abnormal in the retail industry. Tr. Transcr. 9530: 14-17 (Dec. 10, 2007).

94. Wal-Mart's regional vice presidents for Minnesota attempted to follow these payroll directives, and exerted pressure on their managers to minimize payroll costs while increasing sales during the Class Period. Pl. Tr. Ex. 2454

95. Similar messages to control payroll were conveyed by Wal-Mart's district managers to some managers at the store level. Tr. Transcr. 942:8-946:25 (Sep. 28, 2007); Tr. Transcr. 1761:5-13, 23-25, 1762:1-3 (Oct. 4, 2007); Pl. Tr. Ex. 3556.

96. In addition, some of Wal-Mart's store managers instructed their management team within the store to control payroll. Tr. Transcr. 948:25-949:24 (Sep. 28, 2007); Pl. Tr. Ex. 3566.

97. Still, managers who received directives about controlling payroll did not always follow them. Tr. Transcr. 1013:1-4 (Sep. 28, 2007).

98. The Court finds that the language used in many of Wal-Mart's payroll directives during the Class Period was strong in tone and occasionally overbroad in scope, sometimes without appropriate regard for the staffing needs of individual stores. The repeated use of hyperbole probably caused some managers to focus on payroll expense over staffing needs and compliance obligations.

99. In addition to using hyperbole, Wal-Mart attempted to control payroll costs by setting a specific number of "preferred" hours for each store, based on expected store sales and last year's wages as a percentage of sales, or simply issued company-stated goals regarding reduction of wages as a percent of sales.

100. Wal-Mart had a consistent goal of staying at or below the previous year's wages as a percentage of sales in each of its stores throughout the Class Period. Tr. Transcr. 1762:17-1764:8 (Oct. 4, 2007); Tr. Transcr. 936:22-937:17 (Sep. 28, 2007); Tr. Transcr. 7368:3-7 (Nov. 14, 2007); Tr. Transcr. 1713:15-1714:10, 1716:3-7 (Oct. 4, 2007); Pl. Tr. Ex. 3618.

101. The importance of this wage percentage goal was communicated from the very highest levels of the company.

102. Based upon the sales forecast for each store, Wal-Mart's preferred scheduling system generated a preferred number of hours for each store that would result in payroll dollars as a percentage of sales falling at or below last year's percentage.

103. Wal-Mart monitored whether managers were following preferred hours, and audited compliance with preferred scheduling as part of the Shipley Audit.

104. Wal-Mart enforced its payroll directives by disciplining regional, district and store level managers who failed to meet the company's expectations with respect to payroll. For example, Minnesota managers at the regional, district and store levels received "Wage Wonder" warnings for failing to follow company direction on payroll.

105. Even when managers received written coaching forms for not controlling their payroll, they nonetheless continued to increase their wages as needed. Tr. Transcr. 6056:22-6058:1 (Nov. 5, 2007). Pl. Tr. Exs. 1094, 1371.

106. Upper level management might try to find out the cause of the overspending if it was a repeated issue, but did not act on every report of labor expenditure exceeding the budget. Tr. Transcr. 3559:16-3560:12 (Oct. 16, 2007).

107. Additionally, the subject of payroll consistently came up during the performance evaluation process. The subject of meal and rest break compliance was not considered during the performance evaluation process.

108. Wal-Mart should have been aware that this constant payroll pressure could have adversely affected the ability or desire of store managers to adequately staff the company's stores. In other words, Wal-Mart should have been aware that constant payroll pressure might possibly lead to inadequate staffing, which might in turn have made meal and rest break compliance more difficult, especially in light of the other evidence the Court has and will address which seem to indicate that there was a potential wide-spread meal and rest break compliance problem.

No Overtime

109. Wal-Mart has a written policy, PD-31, which provides that "[h]ourly associates should not be scheduled for over 40 hours in any week."

110. Testimony indicated and the Court finds that, when possible, retailers prefer to keep overtime as low as possible to maximize profit. Wal-Mart is not unique in this regard. Tr. Transcr. 9558:21-9559:4 (Dec. 10, 2007). Def. Tr. Ex. 652.

111. Wal-Mart's store managers communicated the company's policy against overtime during in-store management meetings with their salaried assistant managers and hourly department managers. Wal-Mart also regularly instructed its associates not to incur

overtime. Wal-Mart's policy against overtime is covered with employees during orientation, morning meetings, and computer-based learning ("CBL") trainings.

112. In addition, Wal-Mart posted signs by its time clocks, in at least some stores, stating that "OVERTIME IS NOT ALLOWED." Some of these signs even had skulls and crossbones depicted on them.

113. However, testimony indicated, and the Court finds that Wal-Mart did include amounts for overtime in store budgeting.

114. Class members regularly worked and received payment for overtime. Tr. Transcr. 2242:17-2243:9 (Oct. 8, 2007); Tr. Transcr. 2542:8-13 (Oct. 9, 2007); Tr. Transcr. 7707:17-25 (Nov. 16, 2007); Tr. Transcr. 1261:1-3 (Oct. 2, 2007).

115. Class representative Pamela Reinert testified that she was never reprimanded or disciplined for working overtime. Tr. Transcr. 318:17-19 (Sep. 26, 2007). She could not identify a single minute of overtime for which she was not paid. Tr. Transcr. 319:4-6 (Sep. 26, 2007).

116. Class member Linda Ditsch earned overtime for the majority of the shifts she worked during the class period. Her claim that she worked off-the-clock to avoid going over 40 hours is undermined by her overtime record. Tr. Transcr. 3086:2-3087:19 (Oct. 11, 2007).

117. During the Class Period Wal-Mart managers routinely "coached" (in this context, "gave verbal or written admonition") associates for incurring unapproved overtime, sometimes for *de minimis* amounts of time as little as one minute. The language of these coachings frequently conveyed an unambiguous and unqualified message that overtime was detrimental to the company's bottom line, and not allowed or permitted under any

circumstances. Yet, during many of these coachings, associates explained that they could not avoid incurring overtime.

118. The Plaintiffs argue that Wal-Mart's policy of no unapproved overtime combined with heavy workloads inevitably led to significant off the clock work, including associates working through their meal and rest breaks.

119. The Courts finds that Wal-Mart should have been aware that some associates would work through their meal and rest breaks to comply with the no unapproved overtime policy and still get their work done.

120. The Court finds that Wal-Mart's "no overtime" policy was a factor in causing some employees to work through their rest and meal breaks and off the clock on CBLs (see below).

"Bad Apple" Managers

121. The Court finds that store managers played a significant role in meal and rest break compliance. It is clear to the Court that some managers took this duty more seriously than others. The Court finds that, based on testimony adduced at trial, some managers engaged in meal and rest break compliance practices that were much less than "by the book."

122. It is more likely than not that the actions (or inaction) of some managers who did not make break and off-the-clock compliance a priority caused some associates to miss breaks for work-related reasons and to work off-the-clock. Specifically, store managers had the ability to make compliance a priority in their stores. While they may not have affirmatively required workers to miss their breaks or work on CBLs off-the-clock, they also did not do enough to make sure that workers were getting their breaks and not

working off-the-clock. This may have been due, in part, to the mistaken belief that "Coaching By Walking Around" would be sufficient to spot and enforce violations of policy. However, stronger action should have been taken by managers to ensure that break and off-the-clock policies and statutes were being followed. Store managers should have *insisted* that all missing swipes be investigated and resolved, and that store procedures be tightened to minimize break and off-the-clock violations.

Executive Admissions

123. During the Class Period and shortly beforehand, some of Wal-Mart's senior executives admitted that Wal-Mart's associates were not receiving rest and meal breaks. Pl. Tr. Ex. 308.

124. For example, in April 1998 (pre-class period) Coleman Peterson listed one reason for turnover being not getting lunches and breaks. However, he also said also said the root cause of the problems was at the store level and therefore did not implicate nationwide or Minnesota-wide policies. Pl. Tr. Ex. 280. In April 1999 Mr. Peterson admitted that "we cause cashiers to be negative with long hours without breaks." Pl. Tr. Ex. 430. In Sept 1999, Tom Coughlin announced that one of top five reasons cashiers quit is that they can't get breaks. The number two reason was understaffing. Pl. Tr. Ex. 512. Mr. Coughlin also admitted during his testimony that he was aware of instances in which store managers were forcing associates to work through their rest breaks and meal periods. Tr. Transcr. 40801:11-15 (Oct. 18, 2007). CEO Don Harris was at a forum/roundtable discussion with nine "best of the best" CSMs. Someone who was present then said that the top reason cashiers leave is due to not getting potty breaks. Pl. Tr. Ex. 610. The record is not clear as to who said this. However, it is logical and fair to

conclude that Mr. Harris heard this claim and thus had notice of the problem. These various comments were all made, apparently, with the intent of improving things. Wal-Mart-mart argues that these statements amount to hyperbole that was used to spur improvement.

125. These admissions corroborate other evidence presented at trial showing that class members might have missed rest and meal breaks, or had them cut short, on a potential widespread basis throughout the Class Period, and that Wal-Mart knew or should have known of the potential widespread problem.

"Corporate Culture"

126. The Court specifically rejects many of Plaintiffs' claims that Wal-Mart's "corporate culture" drove the alleged violations. Specifically, the Court finds that Wal-Mart's use of bonuses for store managers, in and of itself, was not a prevailing contributing factor to associates missing breaks or being forced to work off-the-clock. Common sense would lead any rational finder of fact to conclude that incentives do matter. It is possible that some "rogue" managers in some stores in the state during the class period were purposefully violating their duties with regard to meal and rest break compliance for personal benefit through the bonus structure. However, the Plaintiffs did not establish any such incident by a preponderance of the evidence.

127. The Court finds that Wal-Mart's failure to make compliance with corporate and statutory requirements regarding meal breaks, rest breaks, and off-the-clock work a meaningful factor in supervisor and management evaluations *did* play a significant role. Had compliance been a major factor in evaluations, it is likely that the number of labor and hour violations would have been significantly reduced.

128. Manager evaluations included a number of factors, but compliance control was not one of them. While there were a number of profit-making incentives for managers, there needed to be a counter-balance in the form of compliance-gaining incentives in place as well. In other words, Wal-Mart needed to have "teeth" in its break and off-the-clock policies. Profit-making and compliance incentives did not need to be mutually exclusive.

129. While examples were given of employees being disciplined for working off-the-clock, no substantive examples were given of managers or supervisors being *rewarded* specifically for following through with the implementation of these compliance policies. Likewise, no evidence was offered to indicate that a manager's pay was reduced for failure to insist on compliance with these labor-related requirements, or that their pay was reduced due to high unexplained "exceptions" in employee time records.

TCARs

130. Wal-Mart's Time Clock Archive Records (TCARs) were generated in the regular course of Wal-Mart's business. Throughout the Class Period, Wal-Mart required associates to clock in (or "swipe" or "punch") at the start of their shift, clock out at the end of their shift, and clock out for their meals and back in from their meals. In addition, Wal-Mart required its hourly employees to clock out for their rest breaks and back in from their rest breaks prior to February 10, 2001. Failure to do so subjected the employee to potential discipline, which was policed by Wal-Mart, in part, through a review of its time clock records.

131. At the conclusion of each day, Wal-Mart generated a Time Clock Punch Exception Report (Exception Report), which identified the hourly employees in each

store whose time records showed that, *inter alia*, (1) the employee had a pair of missing break punches or (2) the employee clocked out and back in for a break for less than the amount of time prescribed by Wal-Mart Policy PD-07. On the Exception Report, these employees were identified as having "too few meals" or a "short meal," and prior to February 10, 2001, "too few breaks" or a "short break."

132. District managers did not use the Time Clock Punch Exception Report as a regular tool. Tr. Transcr. 1286:7-13 (Oct. 2, 2007). However, stores found it easier to use exception reports to check for associates who were not swiping because the exception reports became simpler after rest break swiping was eliminated. Tr. Transcr. 5049:2-10 (Oct. 31, 2007).

133. The Time Clock Exception Reports were over and under-inclusive. Before 2001, the reports contained exceptions for associates taking breaks too late in the day, too early in the day, meal periods too early in the day and school-hour violations, among others. They contained a grace period of three minutes for rest breaks so that most rest break swipes less than 15 minutes did not even appear on the exception reports. Tr. Transcr. 7275:5-7276:18; 7277:16-22 (Nov. 14, 2007).

134. The report contained information that would not trigger any violation, like an associate working too long on a shift or taking a break too early. Tr. Transcr. 903-905 (Sep. 28, 2007); Tr. Transcr. 6002:23-6003:3 (Nov. 5, 2007).

135. Wal-Mart's Home Office considered the Exception Report a "success measure" for determining compliance with its rest and meal break policies. Wal-Mart also used the exception report to evaluate compliance with child labor laws. These violations included too many hours without a meal.

136. Wal-Mart also generated a Time Clock Punch Error Report (Error Report) on a daily basis, which identified the hourly associates in each store whose time records showed an odd number of punches due to a missing in or out punch. In the event that individual employees had missing punches, this was reported to management at the store level on the daily Error Reports.

137. These Exception and Error Reports were generated by Wal-Mart's centralized computer system at the Home Office and printed out at the store level.

138. Pursuant to Wal-Mart's Payroll Scheduling Guide, management at the store level was required to review these reports to monitor employees with punch exceptions and correct any punch errors.

139. Wal-Mart's computer system did not allow payroll to be finalized until all punch errors listed on the Error Report were cured.

140. If management determined that an adjustment to Wal-Mart's time clock records was necessary, a member of management then was required to fill out a written Time Adjustment Request Form (TARF), specifying the adjustment to be made, and obtain the affected employee's approval for the adjustment. Once this was done, a member of management then would make the necessary adjustment to Wal-Mart's time records. While the foregoing procedure was company policy, it was not always followed at the store level.

141. The majority of class members (and even several opt outs) testified that they clocked out for their breaks and meals consistent with Wal-Mart policy, and generally filled out a TARF on those occasions when they forgot to do so.

142. The Court finds that TCARs are generally superior to an associate's memory as to when or if an associate swiped on a given day. This is particularly true given the passage of time and the attendant loss of specific recollection.

143. Under Wal-Mart policy, all necessary corrections to associate time records were required to be made before payroll was finalized at the end of the pay period. If the break had been missed, the time clock record remained unchanged, reflecting a missed punch or punches.

144. Once payroll was finalized, Wal-Mart then generated a final Time Clock Archive Report (TCAR), showing the finalized time punches for each associate, the total recorded break time for each associate, and total time worked for each associate.

145. Much of the dispute in this matter hinges upon the appropriate use of Wal-Mart's Time Clock Archive Reports (TCARs).

146. TCARs are used to record the hours that associates work and to ensure associates get paid for the hours they work. Additionally, TCARs are used to determine federal and state wage withholding, and to ensure compliance with child labor laws. Testimony indicated that Wal-Mart wanted to ensure that its time records accurately reflected the total time associates worked and what they should be paid. Testimony also indicated that Wal-Mart was aware that it had a duty to maintain accurate time records. *See. Eg.*, 931:25-932:11 (Sep. 28, 2007).

147. The TCARs are not an account of how associates spent each minute of the day.

148. The Court reaffirms its earlier conclusion that a missing swipe in Wal-Mart's Time Clock Archive Reports does not necessarily mean that an associate was wrongfully

denied a break, or any portion of a break, or even that an associate missed a break, or any portion of a break, at all.

149. Despite the Court's prior ruling, the Plaintiffs repeatedly contended at trial that the presence of short break swipes or the altogether absence of break swipes in the TCARs could be used to determine whether class members received their breaks.

150. Plaintiffs argued during the trial that if a swipe is missing, it was more likely than not missing because Wal-Mart either directly (through a supervisor) or indirectly (through workload pressure) prevented the class member from taking a break.

151. Plaintiffs also contended that if the time records show swipes of less than 15 minutes for rest breaks or less than 30 minutes for meal periods, it was more likely than not that Wal-Mart either directly (through a supervisor) or indirectly (through workload pressure) prevented the class member from taking a full break or meal.

152. The Defendants presented evidence that some class members actually took some breaks for which there was no corresponding swipe in the TCARs, and that certain employees voluntarily chose not to take breaks for non-work related reasons. Thus, Defendants argued that it was inappropriate for Plaintiffs to label all missing swipes contained in the TCARs as wrongfully denied breaks in their calculation of wrongfully denied breaks.

153. Additionally, the Defendants presented evidence that some class members did not have breaks wrongfully shortened, and thus argued that it was inappropriate for Plaintiffs to include all short swipes contained in the TCARs as wrongfully shortened breaks in their calculation of wrongfully shortened breaks.

154. Also, the Defendants called into question the reliability of the swiping behavior of many associates, including named Plaintiffs, thus discounting the general reliability of the TCARs.

155. The best swiping behavior by associates is at the start or end of their shifts. Tr. Transcr. 8440:20–8441:5 (Nov. 29, 2007). The second best behavior is swiping for meal periods. Associates were worst at swiping in and out for rest breaks, when rest break swiping existed prior to February 10, 2001. Tr. Transcr. 8441:6-16 (Nov. 29, 2007).

156. It appears to the Court that unless associates had reason to believe they would be disciplined for failure to swipe out and in for rest breaks, there was little incentive for them to do so as it did not affect their pay.

157. Further, the Defendants presented testimony establishing that not all requested changes to associate time records were inputted. Associates who forgot to swipe for meal breaks and rest breaks sometimes (but not always) submitted Time Adjustment Request Forms (TARFs) to add meal period and rest break adjustments into their time records.

158. Consequently, the Defendants argue that the missing or short swipes contained in the TCARs should not be relied on, either independently, or in conjunction with other evidence, for establishing actual missing or short breaks, or off the clock work.

159. Thus, the Court was presented with two vastly different theories regarding the proper use of missing or short swipes contained in the TCARs.

160. The Court finds missing swipes contained in the TCARs useful for purposes of determining whether breaks were improperly missed or improperly shortened, or if employees improperly worked off the clock, *only* when used in context with other *issue specific* evidence.

Experts and TCARs

161. Aside from, but related to their argument that missing or short swipes contained in the TCARs should not be considered as evidence of missing or short breaks, Defendants also argue that the tally of missing or short swipes compiled by Plaintiffs' experts and submitted to the Court has too many errors and omissions to make it reliable or helpful to the Court.

162. On a preliminary note, the Court finds that all the experts in this case are well qualified to state opinions on the topics about which they testified. Whether the Court finds their individual reports and opinions useful shall be specifically addressed in later findings.

163. The Defendants expressed concern that Plaintiffs' experts did not attempt to match the associates' swipe records to class member testimony to test whether a missed swipe indicated a missed break.[12]

164. The Defendants are also concerned that the methodology Dr. Baggett used to count the number of missing swipes is not reliable because it did not accurately capture the swipes, and it is not helpful because it ignored contemporaneous data that would have greatly influenced his count of missing swipes. More specifically, the Defendants cite Dr. Baggett's exclusion of 40% of the pre-2001 TCARs due to his conclusion that this data was missing or illegible. Tr. Transcr. 3687:19–3688:4 (Oct. 17, 2007).

[12] The Court has previously expressed the belief that Dr. Baggett's theories (claiming that a missed swipe usually indicated a missed break) would be much more persuasive if he had compared swiping records to the break-taking behavior of associates. The Court has come to conclusions about the percentage of missing swipes that equate to missing breaks, below. These numbers could have been much higher had Dr. Baggett been able to show that employees' swiping records closely reflected their break history. The Court understands that cost may have been a major factor in not pursuing this form of evidence. Nevertheless, it would have been extremely helpful.

165. In order to analyze the paper form TCARs, it was necessary for Dr. Baggett to have the written documents converted into digital form. This entailed a two-step process. First, the reports were scanned by a commercial scanning firm. Second, the scanned images were transmitted to a commercial keypunching service, which then manually keypunched the information into a computer database. The method, involving "double-key verification", resulted in an accuracy rate for the keypunching of 99.9%.

166. After the TCARs were imaged, about 27% of the shift data was excluded because the images produced from the original TCARs were determined by the keypunchers not to be legible. Dr. Baggett personally checked each *scanned* TCAR image determined by the keypunchers to be illegible and agreed that these *scanned* images were, in fact, illegible. [The Plaintiffs asserted that Dr. Baggett looked only at *scanned* images of allegedly illegible TCARs. While the testimony does not make this clear, Mr. Manne did confirm this to be his understanding, and the Court will adopt this as true.]

167. Wal-Mart identified and offered into evidence 14 boxes of original TCARs.[13] Def. Tr. Ex. 619 a-n. Wal-Mart disputed Dr. Baggett's claim that these TCARs were illegible. Wal-Mart's attorneys and witness Haworth portrayed these TCARs as being the ones that Dr. Baggett described as illegible. The Plaintiffs had the opportunity to indicate that the 14 boxes of documents were not what they purported to be, but provided nothing to lead the Court to believe that they were not the disputed TCARs. They are business records and were received by the Court. The Court concludes that these records are the allegedly illegible TCARs. The Court has had the "opportunity" to spend several

[13] Other than a small number of TCARs from Cindy Severson, Wal-Mart has not identified which, if any, of the TCARs in the 14 boxes were actually excluded from the keypunched database used by Dr. Baggett. However, considering the context of the discussions about the boxes, and the Plaintiffs failure to make any claim that the boxes did **not** contain the allegedly illegible TCARs, the Court concludes that the boxes **did** contain those TCARs.

days reviewing the contents of the boxes. Nearly all of the TCARs in these boxes do appear to be "legible" to the naked eye.

168. No Wal-Mart witness contradicted Dr. Baggett's testimony that all available, final TCARs which, after being scanned, and found to be legible to the keypunch firm, were, in fact, used in his analysis. The keypunch firm, however, was remiss in scanning the documents and failed to successfully scan a significant portion of the TCARs for later use by Dr. Baggett. This failure is attributable to the Plaintiffs, in that they chose the scanning firm. However, Defendants' expert, Dr. Joan Haworth, confirmed that she found no fault with Dr. Baggett's method of extrapolation for the missing and allegedly illegible timeclock data. However, in this context she was critical of Dr. Baggett's use of extrapolation to inflate numbers that she believed were not reliable. Regardless of whether original TCARs that are legible to the naked eye were excluded from Dr. Baggett's analysis due to judgments made by keypunching or images vendors, it is likely that Dr. Baggett's methodology for extrapolation for these excluded shifts was valid. His use of the "averaging" method was appropriate. His use of the "adverse case" method was inappropriate. With that understanding, the Court finds no reason to believe that exclusion of these shifts had any material effect on the reasonable estimates generated by Dr. Baggett.

169. Dr. Baggett also testified that Wal-Mart failed to provide TCARs for 12.9 percent of the pre-2001 shifts. Tr. Transcr. 3691:2–5 (Oct. 17, 2007). Wal-Mart did not contend that this data was indeed provided. Rather, Wal-Mart argued that there was no bad faith in their failure to provide the data. There is no basis upon which the Court can find that Wal-Mart acted in bad faith in failing to provide the data. Specifically, there was no

testimony provided that would indicate that it was likely that the circumstances of the stores that had missing data were different, in a negative way, from the circumstances of stores which did provide data. Thus, there is no evidence that would indicate any motive for Wal-Mart to deliberately hide or destroy the documents in question. Wal-Mart's failure to keep these records was therefore not willful.

170. In his reports Dr. Baggett used two types of extrapolations: average and adverse. In arriving at an average extrapolation Dr. Baggett averaged the number of meal and rest break exceptions in the data that he found to be present, complete, and legible, and applied this average to the data he found to be missing, incomplete or illegible. Tr. Transcr. 3691:6-3692:10 (Oct. 17, 2007). In arriving at an adverse extrapolation Dr. Baggett substituted the worst available data in terms of meal and rest break exceptions for the missing TCAR data. Tr. Transcr. (3693:3-11) (Oct. 17, 2007).

171. Plaintiffs offered insufficient foundation for Dr. Baggett's alternative use of the worst day of swiping to extrapolate to days on which data was missing. Tr. Transcr. 8534:5-18 (Nov. 29, 2007). Wal-Mart's inability to locate a relatively small percentage of the paper TCARs (12.9%) is not evidence of spoliation or other wrongdoing and is not a basis for applying an adverse calculation. Also, no evidence was presented to show that the circumstances at the stores that were missing data, for the timeframe in question, were likely to be less favorable than the circumstances of the stores that were represented by the presented data. Thus, there is no evidence that would indicate any motive for Wal-Mart to deliberately hide or destroy the documents in question. Therefore, consistent with its previous ruling, the Court finds Dr. Baggett's adverse extrapolations unhelpful

and has not considered them in making its decision. Or. Re. Exclusion of "Worst Case Scenario" or "Adverse Inference" From Missing Data. (Jul. 18, 2006).

172. Dr. Baggett also testified that the electronic data from 2001 forward was complete. Tr. Transcr. 3685:16-17 (Oct. 17, 2007).

173. When edits are made to Wal-Mart's time records, they are sometimes implemented through lump sum payments and subsequent pay adjustments. For example, if an associate was not paid for all of the hours they worked on a particular day, Wal-Mart's personnel office could back-pay the associate by adding those hours as a lump sum payment in the time records.

174. When Dr. Baggett hired coders to manually input the Time Clock Archive Report data into a computer database, he did not have the coders input the subsequent pay adjustments, weekly regular hour adjustments, cash adjustments, or any other form of lump sum adjustments that add meaning to the hours contained in the printed TCARs. Tr. Transcr. 8473:19–8474:21 (Nov. 29, 2007).

175. The data that Dr. Baggett chose not to include in his database affected all of the counting that he included in his reports. Tr. Transcr. 8474:22–8475:23 (Nov. 29, 2007).

176. Any errors that result from exclusion of this data are magnified when Dr. Baggett made extrapolations from the incomplete data he coded. Tr. Transcr. 8532:10–20 (Nov. 29, 2007).

177. The Defendants also argue that many of the flaws in Dr. Baggett's methodology concerning his extrapolations also plague his "present" data. For example, Dr. Baggett did not account for subsequent adjustments to the TCARs, and did not consider the vast majority of available TARFs.

178. Also, the Defendants argue that rather than fixing the methodology that produced some unlikely results (i.e., an employee working 15 days straight), Dr. Baggett simply excluded such results from his tally. Consequently, the Defendants argue that the Court should not consider even the "present" data.

179. At trial the Plaintiffs made the tactical decision to not have Dr. Baggett retake the stand and respond to Dr. Haworth's criticisms of his work. The Court believes this decision was made, at least in part, due to the time constraints that the Court had previously placed on the parties. It would have been helpful to the Court, however, if Dr. Baggett had responded to these criticisms.

180. The Court begins its analysis of Defendants' concerns regarding Dr. Baggett's work by noting that, given the sheer volume of the project, the Court would expect many errors to be present. Even the soundest methodology would not be a 100% reflection of reality. The question the Court must answer is whether there are simply too many errors, either in results or methodology, so as to render Dr. Baggett's work completely unreliable.

181. The Court is troubled by Dr. Baggett's use of extrapolations, especially when part of the reason for the decision to make such extrapolations is based upon fourteen banker's boxes of data that was deemed illegible by Dr. Baggett, but which the Court painstakingly examined and determined to be at least 99% legible. The Court finds that Dr. Baggett ought to have considered the overwhelming majority of this data in his calculations. However, absent any information that the circumstances in the stores whose data was missing differed from the stores whose data *was* present, the Court believes it is appropriate to use Dr. Baggett's extrapolated data, using the averaging method.

182. Likewise the Court is troubled by Dr. Baggett's decision to just "lop off" strange results. Dr. Haworth testified that such a practice did not conform to acceptable professional standards. Dr. Baggett did not testify as to the reason for this decision. The Court finds Dr. Baggett's actual final tally more reliable as a result of removing these strange results. However, the reliability of his methodology suffers as a result.

183. Also troubling to the Court is Dr. Baggett's decision to virtually ignore a large body of data (740,000) of TARFs. The Court would expect, as the Defendants argue, that many of the TARFs would shed some light on some missing swipes in the TCARs. The Court finds that Dr. Baggett should have considered the TARFs in his analysis.

184. There was no testimony regarding how many of the TARFs were or were not properly entered into the TCARs. TARFs properly entered into the TCARs would have been considered by Dr. Baggett if present in the data that he analyzed.

185. The Court is compelled to conclude that if an employee properly submitted a TARF then it was the duty of Wal-Mart to ensure that the TCARs appropriately reflected the TARFs. Therefore, it would be unjust to penalize the Plaintiffs for Wal-Mart's failure to properly enter the TARFs.

186. The Court is compelled to acknowledge that the impact of potential errors in Dr. Baggett's analysis of the present TCAR data would be magnified when extrapolated to the remaining 40% of TCAR data.

187. However, the totality of all of the evidence of this case compels the Court to find that it is more likely than not that errors contained in the "present" data exist at the same rate in the 40% of data for which Dr. Baggett made extrapolations.

188. The Court finds that Dr. Baggett's failure to consider subsequent lump sum payments negatively impacts the reliability of his tally of missing or short breaks. The Court believes the Defendants are arguing that lump sum payments were sometimes made to associates without properly adjusting the TCARs. However, the Court was not presented with evidence sufficient to establish how frequently lump sum payments were made, or if they were made without the proper TCAR adjustments. If lump sum payments were made to associates without the proper TCAR adjustments, the Court cannot assign fault to the associates for this. Thus, the Court finds that while Dr. Baggett's failure to consider subsequent lump sum payments negatively impacts the reliability of his tally of missing or short breaks, it does not render the report fatally unreliable.

189. The impact of the extrapolated errors is somewhat mitigated by the fact that the Court cannot find sufficient evidence in the record to indicate that the rate at which meal and rest breaks were missed significantly changed at any time during the class period. The strongest such evidence is that towards the end of the class period (partially in response to litigation) Wal-Mart executives and managers became more concerned with rest break and meal break compliance. However, there was no evidence presented indicating that this actually lowered the rate of missed breaks. In contrast, a survey performed by Dr. Traugot found that 74% of the survey respondents indicated the rate at which associates missed rest breaks stayed the same while 16% indicated that it got worse after the decision to eliminate rest break swiping. Tr. Transcr. 1909:18-1910:23 (Oct. 5, 2007).

190. Based on all the evidence presented on the subject, the Court would expect the overall average of missing breaks contained in the TCAR data that Dr. Baggett actually analyzed, that which he inappropriately deemed to be illegible, and that which he legitimately determined to be missing, would be about the same.

191. The Court finds that associates bear significant responsibility for ensuring that their swiping activity is accurate to ensure that the TCARs are accurate.

192. The Defendants established that some associates had poor swiping behavior. Of all of the missing rest break swipes during the class period, about one-third of the missing swipes come from just 1000 class members. Tr. Transcr. 8454:8-18 (Nov. 29, 2007); Def. Tr. Ex. 651. Those who were particularly bad at swiping failed to swipe for almost 70% of their rest breaks. Tr. Transcr. 8455:6-12 (Nov. 29, 2007). Testimony also indicated that cashiers would walk directly outside to smoke a cigarette or walk to the McDonald's straight from their registers without first walking to the back of the store to swipe out for their rest break. Tr. Transcr. 3080:25-3081:2 (Oct. 11, 2007).

193. Also, the Court finds that there were many situations where proper swiping became difficult due to unplanned events, such as mechanical issues with the time-clock, software issues, power outages, lost or forgotten badges, distractions (i.e. assisting customers), and simple human error (i.e. forgetting when one clocked in or out). The Court cannot fault any party for such occurrences.

194. All of Plaintiffs' class member witnesses testified that they and their co-workers, with rare exception, swiped in and out for breaks and meals as required.[14]

[14] On those instances when a class member forgot to punch out for a meal or rest break that they took, the associate generally submitted a TARF which would be incorporated into the final TCAR, thus maintaining the accuracy of the records. In addition, Wal-Mart monitored and sometimes disciplined employees who took breaks without clocking out for them. This practice of this varied from store to store.

195. Of the 16 class member witnesses who testified for Wal-Mart, most testified that he or she generally clocked in and out for meal breaks as required by PD-07 or submitted a TARF when a punch was missed.

196. The testimony of Wal-Mart's corporate executives and managers in the field corroborates that hourly employees generally clocked in and out as required by Wal-Mart policy. Some of these managers also testified that they personally clocked in and out in accordance with Wal-Mart policy when they were hourly employees.

197. Wal-Mart's managers and executives also testified that Wal-Mart's time clock records are generally useful, accurate, and/or reliable indicators of swiping behavior. Tr. Transcr. 7280:25-7282:12, 21-25, 7283:1-7284:7 (Nov. 14, 2007); Tr. Transcr. 987:8-11, 987:17-21 (Sept. 28, 2007); Tr. Transcr. 1059:7-9 and 1062:4-13 (Sept. 28, 2007);

198. It would be unjust to find Wal-Mart completely responsible for errors sometimes created by their associates, the class members in this action. Thus, the Court shares Defendants' concerns with the unreliability of the TCAR data, owing to unreliable associate swiping behavior, when used to establish if a missing swipe means that a break was wrongfully missed or shortened.

199. However, the Court is deeply concerned that the TCAR data was considered "good enough" by Wal-Mart for determining federal and state withholding, and compliance with child labor laws, but not "good enough" to be considered *in the light of all of the information available to Wal-Mart, as presented at trial*, as a factor in determining whether breaks were actually missed or shortened wrongfully.

200. Ultimately, the Court finds that it is the responsibility of Wal-Mart to ensure that the TCARs are accurate. The Court cannot find that the Minnesota legislature intended employers to be able to abrogate their duty to maintain accurate records.

201. Regarding the Defendants' concern that Plaintiffs' experts did not attempt to match the associates' swipe records to class member testimony to test whether a missed swipe indicated a missed break, the Court recognizes as a practical matter it would have been difficult, if not impossible, for the Plaintiffs to compare every missing swipe identified by Dr. Baggett with the class member testimony at trial. This is especially true given the necessary time constraints placed on the parties by the Court.

202. The Court finds that the best way of determining what actually transpired would have been to call each and every class member to testify at trial. In a perfect world every witness would have perfect memory and the Court would have had the time to hear from each and every class member to definitively determine each associate's injury or lack thereof. However, it would take *many years* to try the case in this manner. Class action lawsuits were developed, in part, to avoid this evil.

203. Thus, the Court is forced to rely on representative testimony. Minnesota law provides the class action vehicle for aggrieved parties to bring grievances before a court. Therefore, the Court is comfortable receiving representative testimony. Also, as previously mentioned, the Court has given careful consideration to all the evidence and testimony presented in this matter and has weighed all evidence and testimony appropriately.

204. The theme that overwhelmingly emerged from the testimony of both parties' witnesses was that they couldn't specifically recall if they did or did not receive a full

break, or a partial break, or if they were denied their break altogether on a specific date that occurred several years ago. Another general theme that emerged was that associates had general, rather than specific, memories about how often they received their breaks in accordance with PD-07.

205. Given the totality of the evidence presented in this case, the Court cannot find that Dr. Baggett's methodology, despite the number of errors in it, used in computing his tally of missing or short PD-07 swipes make his report completely unreliable or unhelpful. The tally provided by Dr. Baggett, when considered in the light of all of the other evidence presented at trial, is useful to the Court.

206. The Court also finds that the average extrapolation methodology used by Dr. Baggett provides a sufficiently reliable basis to form the foundation of his report that reflects the number of missing and short *swipes* in the TCARs.

207. The Court finds that it is more likely than not that Dr. Baggett's tally of missing and short swipes accurately reflects the number of missing and short PD-07 *swipes* in the TCARs. As the above findings indicate, the Court has carefully considered the Defendants' criticisms of the general reliability of the TCARs and Dr. Baggett's use of the TCARs.

208. The Court finds that the statistics provided by Dr. Baggett provide a realistic estimate of the dollar value of the missing swipes if each and every missing swipe equated to a missing break. As the Court previously found, it would be illogical to conclude that every single missing swipe in the TCARs amounts to a missing break. Thus, the Court must still determine how many of these missing swipes are properly considered missing breaks.

209. The Court specifically disagrees with Dr. Haworth's opinion that Dr. Baggett's report and ultimate tally of missing swipes are too flawed to be at all reliable. Tr. Trans. 8531:21–8532:6 (Nov. 29, 2007). By making this finding the Court is not finding that Dr. Haworth's opinions were unhelpful. Her opinions were obviously well thought out and often helpful, and the Court carefully considered them.

210. The Court shall make detailed findings approximating how many of the missing swipes, compiled by Dr. Baggett, actually amount to missed or shortened breaks within the context of the various issues. The Court shall also address whose responsibility, as between the associates and the Defendants, it is that these breaks were missed or shorted. Finally, the Court must decide the issue of willfulness.

PD-07 Contractual Duty

211. During the Class Period, Wal-Mart had a written Break and Meal Period Policy, known as "PD-07," which applied to all hourly employees of the company. The terms of this policy were covered with employees during their orientation and were represented as rights to which employees were entitled. Tr. Transcr. 2899:2-14 (Oct. 11, 2008); Tr. Transcr. 6091:16-25 (Nov. 6, 2007); Tr. Transcr. 8854:6-19 (Dec. 3, 2007); Tr. Transcr. 76:6-23 (Sep. 25, 2007); Tr. Transcr. 660:18-661:5, 705:9-15 (Sep. 27, 2007); Tr. Transcr. 1009:4-9 (Sep. 28, 2007); Tr. Transcr. 8370:25-8371:19 (Nov. 27, 2007); Def. Tr. Exs. 48, 49, 50, 51, 53.

212. Under PD-07, Wal-Mart's hourly employees were entitled to a paid 15-minute rest break if they worked three to six hours, and were entitled to a second paid 15-minute rest break if they worked more than six hours. In addition, Wal-Mart's hourly employees

were entitled to an unpaid meal break of at least 30 minutes if they worked more than six hours.

213. Although PD-07 went through various language changes during the Class Period, the basic entitlements afforded to employees under this policy remained the same. Tr. Transcr. 8873:4-22 (Dec. 3, 2007).

214. Judge Lacy ruled that the rights contained in PD-07 created a contractual duty whereby Wal-Mart was contractually obligated to provide its hourly workers with a paid fifteen minute rest break for every three hours worked and an unpaid thirty meal break for every six hours worked. Order. RE: Pl. Contractual Liab. RE: Employee's Benefits 1 (July 12, 2004).

215. Judge Lacy also ruled that associates can waive these rights, but that such ". . . waiver must be at the employee's own volition and voluntary." *Id.* at ¶ 2.

216. Wal-Mart admitted through several witnesses that it had a legal obligation to provide rest and meal breaks to its employees in accordance with company policy. Tr. Transcr. 3515:13-18 (Oct. 16, 2007); Tr. Transcr. 979:1-16 (Sep. 28, 2007); Tr. Transcr. 1578:21-1579:7 (Oct. 3, 2007).

217. To document when (if) breaks were being taken, and for how long they were being taken, PD-07 also contained provisions concerning clocking in and out for breaks. Under PD-07, employees who received meal breaks were required to clock out for their meal breaks throughout the Class Period. Prior to February 10, 2001, the policy also required employees to clock out for their rest breaks.

218. Wal-Mart's policies generally did not permit Minnesota associates to skip their breaks and meals and leave early. However, for most of the class period, store managers

did not make it a priority to ensure that associates swiped for their meal and rest breaks. Tr. Trans. 6475:11-6476:12 (Nov. 7, 2007).

219. Under all versions of the policy, Wal-Mart assigned responsibility for providing rest breaks and scheduling meal breaks for its hourly employees to the immediate supervisors of its hourly employees. Def. Tr. Ex. 48-51, 53.

220. Wal-Mart's computerized scheduling system did not schedule rest breaks during the class period. Tr. Transcr. 2786:25-2787:3 (Oct. 10, 2007); Tr. Transcr. 1714:18-1715:4 (Oct. 4, 2007). The Court finds that this would have been extremely impractical given that the exact times that breaks were taken was often a product of how busy a store was, particularly at the "front end."

221. Early versions of the policy (in effect from the beginning of the Class Period until February 10, 2001) expressly stated that "Hourly Associates whose break or meal period is 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." Def. Tr. Ex. *48, 49.*

222. This language was removed from later editions of PD-07. The Plaintiffs argue that, despite this removal, the intent did not change. At the time Wal-Mart omitted the language in PD-07 relating to the remedy for interrupted rest and meal breaks it removed other language in the Policy that previously had permitted supervisors or managers to interrupt employees to perform work "in extreme emergencies where no other associate is available." The Plaintiffs argue that Wal-Mart dropped the remedy language for interrupted breaks and meals because PD-07 no longer contemplated that breaks and meals could be interrupted for *any* reason. The evidence they cite for this conclusion,

however, is not persuasive. It would be absurd to have a policy that does not allow the interruption of a break for *any* reason. For example, if a pipe were to break in a store, spewing large volumes of water and risking major damage to the premises and merchandise, the management should be able to call on *all* employees, whether on break or not, to assist in protecting the property.

223. Contrary to the Plaintiff's claim, Wal-Mart did not remain obligated, *throughout the Class Period*, to compensate its employees for interrupted rest breaks and meal breaks and to provide them with a replacement break in the event that their rest breaks or meal periods were interrupted. Wal-Mart was free to unilaterally change PD-07, including those provisions regarding replacement breaks, at any time.

Number of Missing PD-07 Meal and Rest Breaks

224. It is more likely than not that, based purely upon the enormity of the class (approximately 56,000 members strong) and the attendant millions of break opportunities, that the class members would indeed have missed some breaks over the class period. The Court has been left to approximate how many breaks have been missed or shorted for work-related reasons, whether breaks have been missed or shorted for work-related reasons on a class-wide basis, and if Wal-Mart knowingly, willfully, or intentionally caused or allowed the breaks to be missed or shorted.

225. The Court adopts Dr. Baggett's analysis of the time clock data for meal breaks, consistent with Wal-Mart Policy PD-07, as set forth in Dr. Baggett's Chart 2, below. However, within that Chart he included "adverse-case" estimates. The Court has previously rejected the use of adverse-case estimates, above, and has not considered "adverse-case" estimates in its decision.

PD07 MEALS (MISSING SWIPES)									
	number of meals earned			number of earned meals not swiped			value of time		
year	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case
1998	172,160	225,760	267,216	33,671	34,564	139,561	$143,425	$138,350	$555,799
1999	717,115	560,532	613,334	135,894	85,914	189,003	$602,555	$359,897	$784,189
2000	967,694	391,651	425,476	180,898	56,097	118,135	$852,277	$248,137	$517,125
2001	1,501,565	4,209	4,209	225,475	631	631	$1,100,832	$2,963	$2,963
2002	1,722,082	0	0	207,153	0	0	$1,020,088	$0	$0
2003	1,937,591	0	0	164,640	0	0	$815,805	$0	$0
2004	155,875	0	0	7,953	0	0	$39,285	$0	$0
SUBTOTAL	7,174,082	1,182,153	1,310,237	955,684	177,205	447,329	$4,574,266	$749,347	$1,860,076
		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case
TOTAL		8,356,235	8,484,319		1,132,889	1,403,013		$5,323,613	$6,434,342

226. Using Dr. Baggett's average extrapolation method, the Court finds that there were 8,356,235 million meal breaks earned Under PD-07 during the class period. Tr. Trans. 3697:3-5 (Oct. 17, 2007). Pl. Tr. Ex. 3774.

227. Again using Dr. Baggett's average extrapolation method, the Court finds that there were 1,132,889 million missing PD-07 meal break *swipes* during the class period. Tr. Trans. 3697:17-20 (Oct. 17, 2007). Pl. Tr. Ex. 3774.

228. The Court adopts Dr. Baggett's analysis of the duration of PD-07 meal breaks as set forth in Dr. Baggett's Chart 8 below. Pl. Tr. Ex. 3774. However, within that Chart he included "adverse-case" estimates. The Court has previously rejected the use of adverse-case estimates, and has not considered "adverse-case" estimates in its decision.

PD07 MEALS (SHORT) (ALTERNATIVE METHOD)												
	meal hours earned			short meal time			number of short meals			value of shorted meal time		
year	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case
1998	86,080	112,880	133,608	799	1,792	8,986	23,103	29,937	131,179	$6,967	$14,369	$71,577
1999	358,538	280,266	306,667	3,269	4,263	12,036	97,611	70,379	206,772	$29,652	$35,771	$99,618
2000	483,847	195,826	212,739	4,021	2,927	7,880	117,695	49,635	151,909	$38,026	$25,974	$68,843
2001	750,783	2,105	2,105	16,344	28	28	236,527	507	507	$164,765	$268	$268
2002	861,041	0	0	19,973	0	0	274,037	0	0	$207,521	$0	$0
2003	968,796	0	0	14,843	0	0	216,049	0	0	$157,853	$0	$0
2004	77,938	0	0	18	0	0	132	0	0	$205	$0	$0
SUBTOTAL	3,587,041	591,077	655,119	59,396	9,011	28,929	965,154	150,458	490,366	$604,990	$76,381	$240,306
		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case
TOTAL		4,178,118	4,242,160		68,406	88,325		1,115,612	1,455,520		$681,371	$845,296

229. Of the meal break swipes actually present in the TCAR data, again using Dr. Baggett's average extrapolation method, the Court finds that 1,115,612 meal breaks earned under PD-07 were short during the class period by 68,406 hours. Tr. Transcr. 3704:20-23 (Oct. 17, 2007). Pl. Tr. Ex. 3774

230. The Court adopts Dr. Baggett's analysis of the time clock data for rest breaks, consistent with Wal-Mart Policy PD-07, as set forth in Dr. Baggett's Chart 4, below. Pl. Tr. Ex. 3774. However, within that Chart he included "adverse-case" estimates. The Court has previously rejected the use of adverse-case estimates, and has not considered "adverse-case" estimates in its decision.

PD07 REST BREAKS (MISSING SWIPES)									
	number of rest breaks earned			number of earned rest breaks not swiped			value of time		
year	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case
1998	394,244	513,192	599,799	132,750	167,723	333,714	$280,702	$334,601	$664,830
1999	1,542,026	1,272,897	1,390,960	540,383	421,434	575,991	$1,103,929	$850,219	$1,196,355
2000	2,230,767	886,850	978,767	750,699	292,130	369,247	$1,737,927	$641,311	$851,708
2001	243,762	3,191,850	3,191,850	85,085	1,083,800	1,083,800	$205,700	$2,526,347	$2,526,347
2002	0	3,873,924	3,873,924	0	1,287,995	1,287,995	$0	$3,070,593	$3,070,593
2003	0	4,326,176	4,326,176	0	1,425,818	1,425,818	$0	$3,465,665	$3,465,665
2004	0	353,420	353,420	0	117,272	117,272	$0	$291,049	$291,049
SUBTOTAL	4,610,809	14,419,919	14,550,857	1,508,787	4,796,142	5,213,777	$3,418,348	$11,210,186	$12,068,744
		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case
TOTAL		18,930,728	19,071,668		6,304,929	6,722,564		$14,628,535	$15,487,093

231. Using Dr. Baggett's average extrapolation method, the Court finds that there were 18,930,728 million rest breaks earned under PD-07 during the class period. Tr. Trans. 3701:13-16 (Oct. 17, 2007); Pl. Tr. Ex. 3774.

232. Again using Dr. Baggett's average extrapolation method, the Court finds that there were 6,304,929 million missing PD-07 rest break *swipes* during the class period. Tr. Trans. 3701:17-20 (Oct. 17, 2007); Pl. Tr. Ex. 3774.

233. The Court adopts Dr. Baggett's analysis of the duration of PD-07 rest breaks as set forth in Dr. Baggett's Chart 8, below. Pl. Tr. Ex. 3774. However, within that Chart he included "adverse-case" estimates. The Court has previously rejected the use of adverse-case estimates, and has not considered "adverse-case" estimates in its decision.

PD07 REST BREAKS (SHORT)												
	rest break hours earned			short rest break time			number of short rest breaks			value of shorted rest break time		
year	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case	present	missing estimated by average	missing estimated by adverse-case
1998	98,561	128,296	139,690	3,838	4,939	15,941	97,210	120,714	250,575	$30,990	$39,201	$126,685
1999	410,507	318,202	332,740	16,224	12,008	22,153	408,471	294,448	433,269	$135,615	$99,037	$182,436
2000	557,689	221,640	230,942	21,247	8,237	14,227	533,522	203,582	274,225	$187,146	$71,758	$123,729
2001	60,946	797,962	797,962	2,349	29,945	29,945	56,618	739,857	739,857	$21,857	$275,804	$275,804
2002		968,481	968,481	0	36,139	36,139	0	893,749	893,749	$0	$340,289	$340,289
2003		1,082,044	1,082,044	0	40,097	40,097	0	993,665	993,665	$0	$385,816	$385,816
2004		88,355	88,355	0	3,329	3,329	0	82,538	82,538	$0	$32,717	$32,717
SUBTOTAL	1,127,702	3,604,980	3,640,214	43,658	134,695	161,831	1,095,821	3,328,553	3,667,878	$375,608	$1,244,622	$1,467,476
		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case		present plus missing estimated by average	present plus missing estimated by adverse-case
TOTAL		4,732,682	4,767,916		178,353	205,489		4,424,374	4,763,699		$1,620,229	$1,843,084

234. The Court finds that during the Class Period, class members experienced 4,424,374 rest break swipes which were shorter than the 15 minutes promised to them under Wal-Mart Policy PD-07. These breaks were short by a combined 178,353 hours. Tr. Trans. 3706:16-20 (Oct. 17, 2007); Pl. Tr. Ex. 3774.

Meaning of Missing PD-07 Meal and Rest Break Swipes

235. Ultimately, the Court was presented by the parties with two faulty positions regarding the meaning of these missing swipes and short swipes. Both parties appear to be taking an "all or nothing" approach to the interpretation of this evidence, with little recognition that human experience and common sense would indicate that not all missed swipes are missed breaks, but a significant number of them are. Similarly, common sense would indicate that not all short swipes are short breaks, but a significant number of them are. The term "significant," given the sheer enormity of the numbers involved in this case, does not mean "more than half." It means, for all practical purposes, numbers of such magnitude that the only practical way of dealing with them is through the class-action vehicle.

236. Plaintiffs consider any and all missing swipes (or short breaks) as representing breaks that were wrongfully denied (or shortened) to associates, and assign a monetary value to them. Tr. Trans. 8486:17-8487:4 (Nov. 29, 2007). Given the sheer size of the TCAR universe, and the testimony that showed that many missing swipes were due to the choices or neglect of associates or circumstances that could not be attributable to the Defendants, the Court logically concludes that this could not be the case. The Court has previously found that TCARs were not intended to keep track of associates on every minute of every shift. The Court does appreciate the Plaintiffs' position that the TCARs ought to be accurate. The Court finds that the TCARs establish, at most, a presumption that the employee was working when they were swiped in, and that they were not working when they were swiped out. In taking the position described above, Plaintiffs fail to acknowledge that other evidence can explain why some or many of these missing or short swipes are not missing or short breaks.

237. Wal-Mart argues that it was impossible to ascertain with any reasonable degree of certainty which missing swipes were breaks that were actually wrongfully denied (or wrongfully shortened). Therefore, Defendants argue that there was no basis for the Court to establish class wide liability. The Court reasons that Wal-Mart's position fails to take into account that the Court can reasonably consider Plaintiff's tally of missing and short swipes, in full awareness of the tally's methodological flaws, in light of all the other evidence presented at trial. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and its progeny. Certainty is not required.

238. The parties, predictably, presented conflicting evidence and arguments regarding how many missed and interrupted rest breaks and meal breaks were suffered by the Class.

239. The Plaintiffs argued and the Court finds most hourly workers called by the parties as trial witnesses missed breaks and had their breaks cut short for work-related reasons. Tr. Transcr. 503:21-504:10 (Sep. 26, 2007); Tr. Transcr. 194:5-7, 195:11-21 (Sep. 25, 2007); Tr. Transcr. 464:1-3 (Sep. 26, 2007); Tr. Transcr. 2456:12-14 (Oct. 9, 2007); Tr. Transcr. 77:15-17 (Sep. 25, 2007); Tr. Transcr. 3021:6-11, 3023:2-7; 3046:19-3047:4, 9-11 (Oct. 11, 2007); Tr. Transcr. 3185:6-10, 3186:7-9 (Oct. 15, 2007); Tr. Transcr. 2214:23-24 (Oct. 8, 2007); Tr. Transcr. 1078:21-1079:2, 15 (Oct. 2, 2007); Tr. Transcr. 4548:18-23 (Oct. 25, 2007); Tr. Transcr. 2497:17-19, 2450:7 (Oct. 9, 2007), Tr. Transcr. 1187:8-16 (Oct. 2, 2007); Tr. Transcr. 1527:25-1528:2 (Oct. 3, 2007); Tr. Transcr. 572:18-24 (Sep. 27, 2007); Tr. Transcr. 4130:24-4131:6, 4136:5-16 (Oct. 24, 2007).

240. The majority of class members called by Wal-Mart missed rest breaks. Tr. Transcr. 4936:16-18 (Oct. 30, 2007); Tr. Transcr. 5225:17-21, 5232:10-12, 5232:21-23

(Nov. 2, 2007); Tr. Transcr. 4999:16-24 (Oct. 31, 2007); Tr. Transcr. 5492:14-15, 5496:13-16 (Nov. 1, 2007); Tr. Transcr. 5605:15-19 (Nov. 2, 2007); Tr. Transcr. 6252:17-19 (Nov. 6, 2007); Tr. Transcr. 7086:5-23, 7087:6-9 (Nov. 14, 2007); Tr. Transcr. 7465:16-19 (Nov. 15, 2007); Tr. Transcr. 8336:24-8337:1 (Nov. 28, 2007); Tr. Transcr. 9173:2-7 (Dec. 4, 2007). Some of these witnesses missed their breaks due to their own personal desire to get their work done, rather than a *requirement* that the work get done. Others missed their breaks because of the demands of the job.

241. The testimony leads the Court to conclude, and the Court so finds, that some managers were likely *aware* of some of the breaks being missed. While the Court cannot find that any store manager instructed hourly workers to miss their breaks, some supervisors (some of whom were class members and some of whom were salaried managers) likely did request associates to work through all or parts of their breaks.

242. A few class member witnesses called by Wal-Mart acknowledged the inability of other employees in their stores to take breaks due to their store being too busy, or there being too much work to do and no one there to provide break coverage. Tr. Transcr. 5498:16-5499:1 (Nov. 1, 2007); Tr. Transcr. 6252:12-16 (Nov. 6, 2007); Tr. Transcr. 8337:14-16 (Nov. 28, 2007). Other testimony indicated that it was occasionally difficult to get breaks on time. Tr. Transcr. 7681:2-10 (Nov. 16, 2007).

243. Several class member witnesses were interrupted during their breaks and/or meals for work related reasons. Tr. Transcr. 3042:11-25, 3044:5-14 (Oct. 11, 2007); Tr. Transcr. 3182:8-10 (Oct. 15, 2007); Tr. Transcr. 2213:9-18, 2215:4-9 (Oct. 8, 2007); Tr. Transcr. 1087:15-25 (Oct. 2, 2007); Tr. Transcr. 4537:4-16, 4538:3-4539:2 (Oct. 25, 2007); Tr. Transcr. 218:16-25, 230:21-22 (Sep. 25, 2007); Tr. Transcr. 1270:15-19 (Oct.

2, 2007); Tr. Transcr. 1531:1-5 (Oct. 3, 2007); Tr. Transcr. 77:18-78:20 (Sep. 25, 2007); Tr. Transcr. 564:10-18, 567:12-15, 573:16-22 (Sep. 27, 2007); Tr. Transcr. 4134:18-4135:3 (Oct. 24, 2007).

244. Several witnesses called by Wal-Mart also had rest and/or meal breaks interrupted for work related reasons. Tr. Transcr. 5018:19-5019:13, 5020:16-20 (Oct. 31, 2007); Tr. Transcr. 5221:16-25 (Oct. 31, 2007); Tr. Transcr. 5496:19-22, 5515:21-23 (Nov. 1, 2007); Tr. Transcr. 5619:1-3 (Nov. 2, 2007); Tr. Transcr. 6228:21-24, 6230:14-18 (Nov. 6, 2008); Tr. Transcr. 6511:14-6512:3, 6512:9-11, 6534:8-10 (Nov. 7, 2007); Tr. Transcr. 7079:13-15 (Nov. 13, 2007); Tr. Transcr. 7462:12-16, 7466:18-7467:10 (Nov. 15, 2007); Tr. Transcr. 7708:17-22 (Nov. 16, 2007); Tr. Transcr. 7046:25-7047:7 (Nov. 13, 2007); Tr. Transcr. 8322:12-8323:3, 8323:15-19, 8326:25-8327:6 (Nov. 28, 2007).[15]

245. The Defendants correctly point out that only a handful of the current and former associates called as witnesses at trial (both class members and non-class members) testified that they did not feel that they had time to take a meal break – mostly because they felt they had work to finish, and that virtually no class members claimed that a member of Wal-Mart management forced them to miss a meal period. Tr. Transcr. 8329:15-22 (Nov. 28, 2007); Tr. Transcr. 7048:10-12 (Nov. 13, 2007); Tr. Transcr. 9114:11-14 (Dec. 4, 2007); Tr. Transcr. 7446:11-21 (Nov. 15, 2007); Tr. Transcr. 7698:1-17 (Nov. 16, 2007); Tr. Transcr. 7224:17-7225:7 (Nov. 14, 2007); Tr. Transcr. 5939:12-15 (Nov. 9, 2007); Tr. Transcr. 5585:21-23 (Nov. 2, 2007); Tr. Transcr. 5004:19-21 (Nov. 1, 2007); Tr. Transcr. 5211:18-23 (Oct. 31, 2007); Tr. Transcr.

[15] Additionally, some of Wal-Mart's opt-out witnesses testified that their breaks and/or meals were interrupted. Tr. Transcr. 5123:19-23 (Oct. 31, 2007); Tr. Transcr. 5462:22-24 (Nov. 1, 2007); Tr. Transcr. 6098:10-13 (Nov. 6, 2007). The testimony regarding interruptions of opt-out witnesses' breaks is probative because it corroborates the testimony of the class member witnesses that interruptions occurred.

5299:15-25 (Nov. 1, 2007); Tr. Transcr. 4927:16-22 (Oct. 30, 2007); Tr. Transcr. 6197:24-6198:10 (Nov. 6, 2007); Tr. Transcr. 6496:19-6497:21 (Nov. 7, 2007).

246. The Defendants argued and proved that many associates failed to swipe for meal periods they actually took.

247. The Defendants also established that some associates would voluntarily choose to not take their meal breaks. Additionally, the Defendants proved that management frequently permitted associates (particularly in the early part of the class period) to not take their meal breaks (at the associates' request), or allowed them to take meal breaks at the end of their shifts. Tr. Transcr. 824:9-824:11 (Sep. 28, 2007); Tr. Transcr. 1006:21-1007:9 (Sep. 28, 2007); Tr. Transcr. 5724:2-10 (Nov. 2, 2007); Tr. Transcr. 7875:10-20 (Nov. 27, 2007).

248. Testimony indicated, and the Court finds, that associates would voluntarily skip meal breaks for a variety of reasons, including to go home early, to deal with family issues, or to attend to other personal matters. Tr. Transcr. 706:15-707:3 (Sep. 27, 2007); Tr. Transcr. 5005:2-5 (Oct. 31, 2007); Tr. Transcr. 6531:22-6532:5 (Nov. 7, 2007); Tr. Transcr. 5211:6-23 (Oct. 31, 2007); Tr. Transcr. 8327: 20-24 (Nov. 28, 2007). For example, associate Rachelle Dethloff testified that she skipped her meal breaks regularly so she could leave early because her child had an illness and could not be put in daycare. Tr. Transcr. 8369:1-9 (Nov. 29, 2007).

249. Since meal breaks were unpaid, associates could also earn more money by working through a meal period. Tr. Transcr. 4180:10-16 (Oct. 24, 2007); Tr. Transcr. 7045:9-13 (Nov. 13, 2007). Testimony indicated, and the Court finds, that this provided

incentive for some associates to not take meal breaks, and that some associates chose not to take meal breaks for this reason.

250. From a statistical perspective, it is not surprising that employees scheduled for a six-hour shift might not always swipe out after exactly six hours have elapsed. In the normal course of working, employees will swipe out a few minutes before and a few minutes after six hours have elapsed. Tr. Transcr. 8491:4-16 (Nov. 29, 2007). Associates might have been unaware that even working one minute over six hours entitled them to a meal break, or may not even have known that they swiped one minute late. Tr. Transcr. 8489:10-18 (Nov. 29, 2007).

251. Almost one-third of all the missing meal period swipes identified by Plaintiffs' expert, Dr. Baggett, come from shifts on which the employee worked just a little bit past their scheduled six-hour shift. Tr. Transcr. 8488:18–23 (Nov. 29, 2007).

252. In the absence of evidence indicating that Wal-Mart supervisory personnel were aware or should have been aware that associates were "missing" breaks that they only earned because they inadvertently remained clocked in a few minutes past their scheduled six hour shift, the Court cannot fault the Defendants for such "missing" breaks.

253. Still, the TCARs contain no indication that all missing meal break swipes are missing because employees voluntarily decided not to take those meal periods. Tr. Transcr. 824:11-825:2 (Sep. 28, 2007).

254. Meal breaks that are "missing," either because employees voluntarily chose to work through them or are missing only because associates had worked a few minutes more than their scheduled six hour shift, or for any other reason discussed above, call into question the credibility of Plaintiffs' count of missing meal period swipes.

255. Of all of the shifts recorded during the class period, only about 3% of those shifts show a missing meal period swipe on shifts longer than six hours. Tr. Transcr. 8446:5-11 (Nov. 29, 2007). Of these missing meal period swipes, almost half of them come from only 1000 employees. Tr. Transcr. 8447:2–8448:3 (Nov. 29, 2007).

256. Over the course of the class period, the number of missing meal period swipes decreased for several reasons:

a. Toward the end of the class period, managers gave associates less freedom to leave early by skipping their meal periods and a greater emphasis was placed on associates following their schedules. Tr. Transcr. 6441:15-21 (Nov. 7, 2007); Tr. Transcr. 1699:2-1700:5 (Oct. 4, 2007).

b. Store managers became more aware that there were many associates who were taking their meal periods without swiping for them and began monitoring swiping more closely. Tr. Transcr.1679:10-1680:7 (Oct. 4, 2007).

c. Stores found it easier to use Exception Reports to check for associates that were not swiping because the Exception Reports became simpler after rest break swiping was eliminated. Tr. Transcr. 5049:2-10 (Oct. 31, 2007).

d. Compliance measures were enhanced in a manner that made it easier for associates to take their meal periods. (1810:7-1811:1) (D. Swann). The "clockout/lockout" prevented associates from getting on a cash register before being logged in. Tr. Transcr. 6567:5-6569:16 (Nov. 7, 2007); Tr. Transcr. 6979: 2-19 (Nov. 13, 2007). The same system would lock associates out when it was time to take a meal period. Tr. Transcr. 6577:2-22 (Nov. 7, 2007).

257. As would be expected, the most frequent meal period durations were the target 30 or 60 minutes. The next most frequent were the durations closest to 30 or 60 minutes. Tr. Transcr. 8498:16–8499:10 (Nov. 29, 2007).

258. Approximately 60% of what Plaintiffs classify as short meal periods were between 27 and 30 minutes. Tr. Transcr. 8500:5-8 (Nov. 29, 2007).

259. Dr. Baggett tallied the number of meal periods that were short of 30 minutes, even if they were only short by one minute, and assigned a monetary value to them. His analysis ignores that many meal periods might be less than 30 minutes because the associate swiped in slightly early by choice or inadvertence, wanted to return to work sooner to earn more money, or swiped in early because the associate did not know when she swiped out.

260. There is no way to tell from the TCAR data alone why a meal period was shorter than 30 minutes. In making its determination of the total number of wrongfully shortened breaks, the Court has considered the TCAR data and the parties' experts' analysis in light of all of the evidence in this case.

261. Testimony, evidence, and common sense lead the Court to find that there are several reasons an associates' meal period swipes may be less than 30 minutes apart:

a) Testimony indicated, and the Court finds, that associates may have swiped in a few minutes early because they failed to keep perfect time, not because they were forced to come back from a meal period by a manager. Tr. Transcr. (1237:4-18) (Oct. 2, 2007).

b) Testimony indicated, and the Court finds, that associates did not always need (or want) a full 30 minutes to complete their meal. A meal period of 26 or 27 minutes or

even less was sufficient depending on the circumstances. Tr. Transcr. 1238:11-24 (Oct. 2, 2007); Tr. Transcr. 5346:5-8 (Nov. 1, 2007); Tr. Transcr. 7448:3-24 (Nov. 15, 2007). For some associates, even 15 to 20 minutes was sufficient time to eat a meal. Tr. Transcr. 5108:18-23 (Oct. 31, 2007); Tr. Transcr. 3200:15-17 (Oct. 15, 2007).

c) Testimony indicated, and the Court finds, that some associates preferred to swipe back in and return to work rather than sit through a full 30-minute unpaid meal period. Tr. Transcr. 5256:13-25 (Nov. 1, 2007).

d) Testimony indicated, and the Court finds, that some associates who worked at a Wal-Mart store in a rural area with not much else around preferred to return to work in less than 30 minutes because there was nowhere to go during their meal period. Tr. Transcr. 6017:12-6018:3 (Nov. 5, 2007).

e) Testimony indicated, and the Court finds, that some associates tried to take their full thirty minutes, and that if their time records showed that they took, for example, twenty minutes, it was because they got called back to work. Tr. Transcr. 1240:8-20 (Oct. 2, 2007).

262. Although the parties presented conflicting evidence regarding *how many* missed and interrupted rest breaks and meal breaks were suffered by the Class, numerous Wal-Mart witnesses at the corporate and management levels conceded that breaks and meals were or may have been missed. Tr. Transcr. 4022:15-18 (Oct. 18, 2007); Tr. Transcr. 2066:13-20 (Oct. 5, 2007); Tr. Transcr. 1026:17-22 (Sep. 28, 2007); Tr. Transcr. 1312:24-1313:3 (Oct. 12, 2007).

263. Wal-Mart's witnesses' testimony was credible, but as the Court has previously found, their tenure is not representative of the class. When viewed in the context of the other evidence presented at trial, the testimony of these witnesses establishes, at best, that these long-tenured Wal-Mart employees (some of whom are in or aspire to management positions), received all of their rest and meal breaks, and did not have their breaks improperly shortened.

264. The Court finds that Wal-Mart violated its contractual obligations to provide associates with meal breaks and rest breaks as prescribed in PD-07 on a class-wide basis. The Court specifically finds that PD-07 meal breaks and rest breaks were missed and interrupted for non-voluntary, work related reasons on a class-wide basis in violation of PD-07. The Court finds Wal-Mart is liable for missing and shorted rest breaks. Wal-Mart is not liable for compensatory damages for missing and shorted meal breaks for reasons described herein.

265. The Court makes this finding based on the totality of all of the evidence in this case including class member testimony; contemporaneous written feedback that Wal-Mart received (and in some cases solicited) from employees during the Class Period; Wal-Mart's time clock records; the findings of Wal-Mart's internal audits; the timing of Wal-Mart's decision to stop having associates clock in and out for rest breaks, and various verbal and written admissions of Wal-Mart's corporate officers with management responsibility for Minnesota.

266. Again, given the totality of the evidence in this case, the Court cannot conclude that every, or even most, missing or short swipe contained in Dr. Baggett's tally of missing or short swipes actually represents a missing or short PD-07 break.

267. Thus, the Court is left to determine, by a preponderance of the evidence, what number of the missing or short swipes contained in Dr. Baggett's tally of missing or short swipes represents a missing or short PD-07 break in reality. In attempting to arrive at such a finding, the Court has not devised a "magic formula." Again, the Court has carefully considered and weighed the evidence in light of all of the voluminous evidence in this case.

268. The Court finds that during the Class Period, class members were wrongfully deprived of at least 226,578 meal breaks which they had earned pursuant to Wal-Mart policy PD-07.[16] (.20 X 1,132,889 = 226,578). The Court finds that Plaintiffs are not entitled to compensatory damages for these PD-07 meal breaks as PD-07 meal breaks were unpaid and associates were paid their hourly wage for the time that their PD-07 meal break was wrongfully cut short. Or. Granting Defs.' Mot. for P.S.J. on the issue of Missed Meal Breaks and Partial Judm. (Apr. 14, 2006).

269. Regarding PD-07 meal breaks that are present in the TCARs but that are less than the contractually designated duration, the Court finds that class members were wrongfully deprived of 13,681 hours of PD-07 meal breaks during the class period. (68,406 X .20= 13,681). The Court finds that Plaintiffs are not entitled to compensatory damages for these short PD-07 meal breaks as PD-07 meal breaks were unpaid and associates were paid their hourly wage for the time that their PD-07 meal break was

[16] The Court has assigned a 25% multiplier for rest breaks and a 20% multiplier for meal breaks. This reflects the Court's finding that there are a higher percentage of missed rest breaks than missed lunch breaks reflected by the missing swipes. It appears that employees were more likely to not swipe for meals than for rest breaks for reasons that benefitted the employees. For example, testimony indicated, consistent with common sense and life experiences, that employees would sometimes skip meals in order to leave work early. This appears to be something that would more likely occur in the case of meal breaks than rest breaks as meal breaks were unpaid, while rest breaks were paid. The Court's use of these multipliers is further explained in its Conclusions of Law.

wrongfully cut short. Or. Granting Defs.' Mot. for P.S.J. on the issue of Missed Meal Breaks and Partial Judm. (Apr. 14, 2006).

270. The Court finds that class members were wrongfully denied 1,576,232 PD-07 rest breaks during the class period. (6,304,929 X .25 =1,576,232). The Court finds that Wal-Mart is liable for these missing breaks and that Plaintiffs are entitled to damages for these missed PD-07 rest breaks in the amount of $3,657,133. ($14,628,535 value of missed swipes X .25= $3,657,133).

271. Regarding PD-07 rest breaks that are present in the TCARs but that are less than the contractually designated duration, the Court finds that class members were wrongfully deprived of a combined 44,588 hours of PD-07 rest breaks during the class period. (178,353 hours X .25 = 44,588). The Court finds that Wal-Mart is liable for these missing hours and that Plaintiffs are entitled to damages for these missed PD-07 rest breaks in the amount of $405,057 ($1,620,229 X .25= $405,057).

272. Pursuant to Wal-Mart Policy PD-07 up until February 9, 2001, class members were entitled to a "replacement break" for each rest break which was less than 15 minutes. Up until February 9, 2001, time records reflect swipes of less than 15 minutes in 1,714,565 instances. The Court finds that 428,641 (25%) of these short swipes actually reflect short breaks under circumstances wherein Wal-Mart should be held accountable for them. Based upon the Court's finding that the class members suffered 428,641 short rest breaks during the Class Period, the Court finds that, at an average pay rate of $9.05 per hour during the Class Period,[17] the Class is entitled to equitable

[17] The Court has determined that it cannot determine precisely the average hourly pay for all affected associates during the Class Period or portions thereof. The Court doubts that it would be possible to come up with a number that is exactly correct. The Court is therefore making an estimate that is based on the statistics available to it, and on logic. In this case, the Court has performed the following procedure: The Court has taken figures from Dr.

monetary relief in the amount of $969,798 which represents the value of the full 15-minute replacement rest break promised by Wal-Mart in Policy PD-07 up until February 9, 2001. Class members will not be awarded this compensation for work or breaks after that date.

273. The aforementioned violations at issue in this case were widespread across the entire relevant Class Period and, and encompassed most or all stores which were open during the relevant Class Period in Minnesota.

Statutory Meal Breaks

274. Wal-Mart had a statutory duty to provide its hourly workers with meal breaks in accordance with Minnesota law throughout the Class Period. Minn. Stat. § 177.254 sub. 1

275. Under this statute, Wal-Mart was required to ". . . permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal." *Id.*

276. The Court has previously held that while an employee cannot waive their right to statutorily guaranteed breaks, an employer does not need to compel an employee to take such a break. Rather, the employer must provide the employee with the opportunity to take the break. Or. Re. Waiver of All or Part of Statutory Rest or Meal Breaks 3-4 (Jun. 23, 2006). In other words, Wal-Mart should not be held responsible if the employees, for their own personal benefit, elected to not eat a meal.

277. Wal-Mart should have been fully aware of the obligations that it had relating to meal breaks under Minnesota law.

Baggett's Chart 4. The Court added up the total hours representing missing breaking swipes (377,196). The Court then determined the percentage of that figure that occurred in each year from 1998 to February 9, 2001. The percentages are: 1998- +-.088%; 1999- +-.357%; 2000-+-.498%; 2001- +-.057%. The Court then multiplied the average hourly rate for each year times its percentage. This yielded the following numbers: 1998- 2.74; 1999- 3.15; 2000- 4.61; 2001- 0.55. The Court then added these numbers together. The result was $9.05. The Court realizes that this number is lower than what the Plaintiffs advocate, and higher than what the Defendants claim. This is not surprising.

278. Wal-Mart acknowledged that it "[m]ust provide break [time] sufficient to eat a meal" for "Associates who work eight (8) or more hours." Minn. Stat. § 177.254 sub.1; Minn. R. 5200.0120, subp. 4; Tr. Transcr. 7929:15-24 (Nov. 27, 2007); Pl. Tr. Ex. 1950.

279. In addition, Wal-Mart acknowledged that "In accordance with Company policy, the Associate should be provided at least 30 minutes."

280. Wal-Mart provided meal periods more generously under PD-07 than what is prescribed by the Minnesota statute.

281. The Court finds that the most significant differences between the Plaintiffs' statutory meal break claims and PD-07 meal break claims can be found in the statutory language that calls for a "sufficient time" to eat a meal (rather than a specific 30 minute time period), and the relevant time period needed to earn a meal period (8 vs. 6 hours). Otherwise, all of the Court's other relevant findings apply to the Court's analysis of the Plaintiffs' statutory claims as well. By way of reference the Court incorporates its earlier findings into its analysis of the Plaintiffs' statutory claims.

282. Meal period swipes for less than 30 minutes in an associate's time record do not mean that the associate had an insufficient amount of time to eat a meal, as numerous class members testified. Tr. Transcr. 7448:3-24 (Nov. 15, 2007); Tr. Transcr. 4927:23-4928:3 (Oct. 30, 2007).

283. Plaintiffs put forth no class-wide analysis or data regarding whether a 30-minute meal period was sufficient time to eat a meal. Tr. Transcr. 8503:23–8504:9 (Nov. 29, 2007).

284. No current of former hourly associate claimed that she or he required a minimum of 30 minutes as sufficient time to eat a meal.

285. Given the totality of the evidence, the Court finds that Plaintiffs did not prove that the Defendants failed to honor their statutory obligation to provide associates with sufficient time to eat a meal in those instances where associates took less than a 30 minute meal break.

286. Credible testimony at trial established and the Court finds that a "sufficient" amount of time to eat a meal could be less than 30 minutes. Common sense supports this finding as well.

287. However, given the totality of the unique facts of this case, the Court finds that the Defendants violated their statutory obligation to provide associates sufficient time to eat a meal in those instances where they entirely failed to provide associates with the opportunity to take a meal break.

288. "No time" is an insufficient amount of time in which to eat a meal.

289. The Court adopts Dr. Baggett's analysis of the time clock data for statutory meal breaks, consistent with Minn. Stat. § 177.254, as set forth in Dr. Baggett's Chart 3, below. However, within that Chart he included "adverse-case" estimates. The Court has previously specifically rejected the use of adverse-case estimates, and has not considered "adverse-case" estimates in its decision.

STATUTORY MEALS (MISSING SWIPES)									
	number of meals earned			number of earned meals not swiped			value of time		
year	present	missing estimated by average	estimated by adverse-case	present	missing estimated by average	estimated by adverse-case	present	missing estimated by average	estimated by adverse-case
1998	72,198	98,492	200,454	12,391	11,620	95,203	$57,563	$46,671	$378,953
1999	301,899	247,242	370,413	49,824	29,518	109,410	$240,807	$124,541	$453,253
2000	422,105	174,372	245,843	70,378	19,122	71,401	$359,730	$85,186	$311,584
2001	701,224	1,884	1,884	78,715	217	217	$414,482	$1,027	$1,027
2002	806,309	0	0	59,859	0	0	$323,883	$0	$0
2003	876,532	0	0	36,674	0	0	$204,586	$0	$0
2004	61,281	0	0	1,002	0	0	$5,636	$0	$0
SUBTOTAL	3,241,548	521,990	818,594	308,843	60,477	276,232	$1,606,688	$257,425	$1,144,817
		present plus missing estimated by average	missing estimated by adverse-case		present plus missing estimated by average	missing estimated by adverse-case		present plus missing estimated by average	missing estimated by adverse-case
TOTAL		3,763,538	4,060,142		369,320	585,075		[1]$1,864,113	$2,751,505

290. The Court finds that it is more likely than not that Dr. Baggett's tally (using the "average" method) of 369,320 missing statutory swipes reflect the total number of missing statutory swipes present in the TCARs. As the above findings indicate, the Court has carefully considered the Defendants' criticisms of the general reliability of the TCARs and Dr. Baggett's use of the TCARs.

291. The Court finds that the statistics provided by Dr. Baggett would provide a realistic estimate of the dollar value of the missing swipes if each and every missing swipe equated to a missing break. As the Court has previously found, it would be illogical to conclude that every single missing swipe in the TCARs amounts to a missing break. Thus, the Court must still determine how many of these missing swipes are properly considered missing breaks.

292. The Court further finds that it is more likely than not that at least 73,864 (20%) of these swipes represent instances where Wal-Mart failed to provide associates with the opportunity to take a meal break.

293. Thus, the Court finds that Defendants violated their statutory obligation to provide associates with the opportunity to take a meal break 73,864 times. These violations were repeated.

Statutory Restroom breaks

294. Wal-Mart had a statutory duty to provide its hourly workers with the opportunity to use the restroom in accordance with Minnesota law throughout the Class Period. Minn. Stat. § 177.253.

295. Wal-Mart should have been fully aware of the obligations that it had to provide its hourly workers with the opportunity to use the restroom under Minnesota law.

296. Some of Plaintiffs' class member witnesses testified that they or others were only able to use the restroom during a rest or meal break. Consequently, they argue that to the extent they missed a break or meal, Wal-Mart denied them the statutory opportunity to use the restroom.

297. Most of Defendants' witnesses, both class members and opt outs, testified that they did not need to wait for a meal period or rest break to use the restroom. Tr. Transcr. 5296:2-7 (Nov. 1, 2007); Tr. Transcr. 5095:5-14 (Oct. 31, 2007); Tr. Transcr. 6210:17-25 (Nov. 6, 2007); Tr. Transcr. 6078:20-28 (Nov. 6, 2007); Tr. Transcr. 6502:1-20 (Nov. 7, 2007); Tr. Transcr. 5412:15-17 (Nov. 1, 2007); Tr. Transcr. 7436:19-22 (Nov. 15, 2007); Tr. Transcr. 7706:13-23 (Nov. 16, 2007).

298. Some class members testified that they were given adequate time to use the restroom for the entire time they worked for Wal-Mart. Tr. Transcr. 7044:6-8 (Nov. 13, 2007); Tr. Transcr. 4182:4-6 (Oct. 24, 2007); Tr. Transcr. 2251:23-2252:2 (Oct. 8, 2007); Tr. Transcr. 5947:2-9 (Nov. 5, 2007); Tr. Transcr. 5005:6-11 (Oct. 31, 2007); Tr.

Transcr. 5213:13-15 (Oct. 31, 2007); Tr. Transcr. 5295:20-5296:4 (Nov. 1, 2008); Tr. Transcr. 4935:10-12 (Oct. 30, 2007); Tr. Transcr. 6210: 8-20 (Nov. 6, 2007); Tr. Transcr. 6497:6-9 (Nov. 7, 2007).

299. Wal-Mart managers at trial testified that the practice and policy at Minnesota Wal-Mart and Sam's Club stores throughout the Class Period was that associates could use the restroom whenever they needed to do so. Tr. Transcr. 6018:13-15 (Nov. 5, 2007); Tr. Transcr. 707:22-708 (Sep. 27, 2007); Tr. Transcr. 826:10-826:18 (Sep. 28, 2007); Tr. Transcr. 7352:23-7353:2 (Nov. 14, 2007); Tr. Transcr. 7874:20-7875:9 (Nov. 27, 2007);

300. The Court questioned several witnesses about whether they were able to simply use the restroom when they really needed to, and what would happen to them if they just walked away to use the restroom. The Defendants also pressed this issue on cross-examination. Nearly all of the witnesses, both Plaintiffs' and Defendants', conceded that if the need was sufficiently urgent, they could go to the restroom with or without permission.

301. The Court finds that, class-wide, associates did not need to swipe to use the restroom and generally did not do so. Tr. Transcr. 1155:15-1156:11 (Oct. 2, 2007); Tr. Transcr. 2252:3-8 (Oct. 8, 2007); Tr. Transcr. 6211:5-10 (Nov. 6, 2007); Tr. Transcr. 5718:1 (Nov. 2, 2007); Tr. Transcr. 5596:2-25 (Nov. 2, 2007); Tr. Transcr. 7353:3-6 (Nov. 14, 2007); Tr. Transcr. 8330:18-8331:2 (Nov. 28, 2007); Tr. Transcr. 9112:2-9 (Dec. 4, 2007); Tr. Transcr. 7436:23-25 (Nov. 15, 2007); Tr. Transcr. 4935:7-9; 4935:13-25 (Oct. 30, 2007).

302. Testimony indicated, and the Court finds, that it was more difficult for associates working in some positions to take restroom breaks than associates working in other

positions. Specifically, it was more difficult for associates working in busy customer service positions to obtain coverage to allow them to use the restroom.

303. For example, it was the preferred practice for cashiers to obtain CSM permission before they left the cash register to use the restroom so the CSM could provide coverage. Tr. Transcr. 1684:12-1685:5 (Oct. 4, 2007); Tr. Transcr. 8330:2-17 (Nov. 28, 2007). However, if cashiers urgently needed to use the restroom and did not have time to tell the CSM, they could simply leave to do so. Tr. Transcr. 5718:12-14 (Nov. 2, 2007); Tr. Transcr. 9112:22-24 (Dec. 4, 2007).

304. Testimony indicated, and the Court finds that although the practice seems to have been disfavored, associates could also flash their lights to communicate to the CSMs if they needed coverage on their registers. Tr. Transcr. 9038:20-25 (Dec. 3, 2007).

305. In some instances, cashiers would walk away from the register with the light still on and a customer waiting because they needed to go to the restroom. Tr. Transcr. 7180:24-7181:11 (Nov. 14, 2007); Tr. Transcr. 5719:6-15 (Nov. 2, 2007); Tr. Transcr. 5045:23-5046:2 (Oct. 31, 2007); Tr. Transcr. 5649:6-5651:21 (Nov. 2, 2007). Managers or CSMs would, on some occasions, then cover the registers. Tr. Transcr. 5006:7-10 (Oct. 31, 2007)

306. Managers did not reprimand associates – including cashiers – for leaving their areas unattended to use the restroom. Tr. Transcr. 5719:16-21 (Nov. 2, 2007); Tr. Transcr. 6019:9-6019:21 (Nov. 5, 2007); Tr. Transcr. 6444:18-21 (Nov. 7, 2007); Tr. Transcr. 5416:10-25 (Nov. 1, 2007).

307. By contrast, any managers who prevented an associate from using the restroom were subject to discipline. Tr. Transcr. 1417:10-1418:7 (Oct. 3, 2007).

308. Thus, the Court finds that while it was sometimes more difficult to use the restroom when working in a customer service position, like on the cash register, or at the customer service desk, associates were not prohibited from using the restroom on the basis of *where* they were working in a store.

309. Because associates generally used the restroom without swiping the time clock, and sometimes did not need to use the restroom even though they were free to do so, counting the number of missed swipes in Wal-Mart's Time Clock Archive Reports does not provide a helpful framework for the Court to determine whether any Minnesota Wal-Mart workers were not provided adequate time, within each four consecutive hours of work, to use the nearest convenient restroom.

310. When considered in the unique totality of evidence in this case, the representative testimony offered by Plaintiffs' witnesses is insufficient to establish by a preponderance of the evidence that restroom breaks were denied to class members on a class basis.

311. However, there were a few situations that came to light at trial where individual associates were wrongfully denied access to the restroom.

312. For example, Nancy Braun recounted the humiliating experience of soiling herself while at work because she was not permitted time to use the restroom. After the accident, Wal-Mart told her to go purchase new clothes with her own money. Tr. Transcr. 504:13-25, 505:1-17. Ms. Braun talked to many people at the store about the inability to use the restroom, but it was not properly addressed. She spoke with Kevin Miller, her district manager, but his sarcastic "solution" that he would relieve her when she needed to use the restroom was totally implausible given that he was in Hudson, Wisconsin and she was located in Apple Valley, Minnesota. Tr. Transcr. 506:14-507:11 (Sep. 26, 2007).

313. Merrie Thorsen had to beg to use the restroom during one of her menstrual cycles. When she was finally permitted to go, her manager humiliated her in front of customers and told her to "walk, don't run" so as to avoid making a mess on the floor. Tr. Transcr. 571:1-572:12. (Sep. 27, 2007).[18]

314. The Court finds that the treatment these women received in regard to being restricted from using the restroom was dehumanizing and reprehensible. It appears, however, that this type of treatment was an aberration.

Off the clock work

315. Wal-Mart allowed a significant number of class members, as noted below, to work without compensation on CBLs during the Class Period. The Plaintiffs failed to prove that other forms of off-the-clock work occurred on a class-wide basis.

316. Plaintiffs presented evidence of this off-the-clock work on CBL terminals on a class-wide basis by comparing Wal-Mart's time clock records with electronic databases showing when class members were logged on to CBL terminals. Plaintiffs attempted to prove that off-the-clock work also occurred on cash registers. For reasons discussed below, this second claim fails. Plaintiffs also offered evidence regarding other off-the-clock work, e.g. work being done at home, work related phone calls being received at employees' homes, and "zoning" before or after employees were swiped in on the time clock. However, Plaintiffs failed to establish that these problems occurred on a class-wide basis.

[18] Mr. Rogers, Ms. Thorsen's boss, denied the incident, but admitted that Merrie Thorsen was a good, honest and truthful employee. Tr. Transcr. 9214:23-9215:3 (Dec. 4, 2007). He also conceded that all employees had to let him know when they were going to the restroom. Tr. Transcr. 9224:12-20 (Dec. 4, 2007). Mr. Rogers continues to work at Wal-Mart and has a motive to not recall the incident, as a sworn self-report of the incident would result in discipline. The Court concludes that Ms. Thorsen's testimony is credible.

317. Several class-member witnesses from across the state testified that they worked off the clock, or observed others doing so, not only on CBLs and cash registers, but throughout Wal-Mart's stores and at home. However, as to the non-CBL work, several of these witnesses did the off-the-clock work of their own volition, without direction or management's knowledge. Several knew that they could file TARFs for their time, but didn't want the bother. For these reasons and the reasons detailed below, it would not be appropriate to attribute non-CBL off-the-clock work in any way to Wal-Mart management.

Electronic Evidence of Off-the-Clock Work

318. Plaintiffs' expert, Dr. Shapiro, examined three Wal-Mart databases to determine whether Class Members performed work off-the-clock at certain work stations.

319. One of the databases that Dr. Shapiro examined is Wal-Mart's associate database ("time clock"), which contains a record of the date and time that each Wal-Mart employee swiped his or her time badge, and indicates whether the swipe was recorded at (1) the beginning of a shift, (2) the beginning of a rest break or meal period; (3) the end of a rest break or meal period, or (4) the end of a shift. In addition, this database contains demographic data relating to each employee. Dr. Shapiro also examined the payroll database containing each employee's pay rate.[19]

[19] As noted above, Wal-Mart's associate database contained a complete set of time clock data dating back to January 6, 2001. Time clock data prior to this date was retained by Wal-Mart exclusively in hard copy format on printed TCARs. These TCARs were scanned by an outside vendor, under the control of Plaintiffs' experts. The vendors failed to scan 14 file boxes full of TCARs, claiming they were not legible. The Court finds that nearly all of them, over 99%, were legible. The TCARs that were deemed legible by the vendors were scanned by them. The data from the scanned TCARs was key-punched into electronic format and analyzed by Dr. Shapiro. For the TCARs that were not scanned, Dr. Shapiro extrapolated, determining that the un-scanned data would be similar to the scanned data. For the purposes of this section of the Court's findings, the Court determines that the extrapolations, based on averaging, are appropriate.

320. Dr. Shapiro also examined Wal-Mart's database which contains records of CBL modules (i.e., training exercises) performed by class members. "CBL" is an acronym for "Computer Based Learning." The training exercises would take place on Wal-Mart computers, and were a requirement for all Wal-Mart associates. This database contains identifying information for each employee, as well as the name of the module taken, the date and time when the employee was taking the module, and the score the employee received at the end of the module. Employees were required to use unique "User IDs" when they took CBL modules.

321. In addition, Dr. Shapiro examined Wal-Mart's point of sale ("POS") database. This database also contains identifying information for each employee, and purportedly indicates the exact time when an employee logged on and off a cash register. Cash register operators were assigned and were required to use unique log-on IDs when using POS devices. Cashiers who operated certain registers, primarily those located at the "front end" of the store, were required to physically remove the cash drawer and check it in with a supervisor after logging out. Such cash registers were denominated "operator accountable," while registers in other parts of the store, which did not require that exchange of tills, were denominated "register accountable." The cashiers' actual practice differed from the "required" procedure, as noted below.

322. Dr. Shapiro merged Wal-Mart's time clock data with the CBL and POS data in order to identify whether employees were logged on to the POS or CBL system while either on a rest break, a meal break, or between shifts.[20]

[20] In conducting his analysis, Dr. Shapiro employed several restrictive criteria to attempt to make sure that he was capturing only cases of class members working on CBLs and cash registers while on break or between shifts.

323. Dr. Shapiro's analysis was confined to final timeclock data and was consistent with generally accepted statistical methods. Dr. Shapiro considered the subset of TARFs that were selected and produced to Plaintiffs by Wal-Mart and found that they did not affect his analysis.[21] Based on this analysis and the other evidence presented at trial, the Court finds that the Class Members performed a significant amount of off-the-clock work on CBL terminals during the Class Period for which they were not paid.[22] The Court further finds that the Plaintiffs failed to prove a significant amount of off-the-clock work on cash registers during the Class Period.

Off-the-Clock Work on CBL Terminals

324. Dr. Shapiro properly and conservatively calculated (1) the number of times that class members took CBL modules while off the clock; (2) the amount of time that class members spent taking CBL modules while off the clock; and (3) the amount of compensation that class members should have been paid for this off-the-clock work if such work was totally attributable to Wal-Mart. The Court adopts his calculations, set forth below in Pl. Tr. Ex. 3773, with modifications as indicated below:

[21] Wal-Mart offered into evidence a collection of TARFs, which were selected by Wal-Mart's counsel, not by its statistical expert. Dr. Shapiro randomly sampled 189 of the TARFs and found that 187 were totally unrelated to any off-the-clock work that he found. Of the remaining two TARFs presented by Wal-Mart, Dr. Shapiro found that they did, in fact, occur on days on which there was off-the-clock work but had no effect on the specific episodes of off-the-clock work detected by Dr. Shapiro. This testimony was never contradicted by Wal-Mart's expert, Joan Haworth.

[22] Dr. Shapiro examined class members' payroll records to determine whether there were any subsequent pay adjustments which followed any of the sessions of off-the-clock work. Specifically, Dr. Shapiro examined the one-week period following the close of each week and the delivery of the employees' paycheck. He found that only 8.5% of CBL episodes were followed by a pay adjustment. Wal-Mart criticizes Dr. Shapiro's failure to look out further than one week in examining subsequent pay adjustments. However, this criticism is somewhat weakened by the fact that it would be quite difficult to attribute later pay adjustments to something that had occurred weeks earlier as opposed to one week earlier.

KEY-PUNCHED DATA	PRESENT DATA	EXTRAPOLATION FOR MISSING SSN'S	EXTRAPOLATION FOR MISSING TCARS	TOTALS
Modules	17,560	23,823	38,610	38,610
Hours	3,252	4,412	7,151	7,151
Hourly Rate				$ 8.75
Time Value:				$ 62,571
ELECTRONIC DATA				
Modules	60,947	60,977		60,977
Hours	11,617	11,623		11,623
Hourly Rate				$ 9.44
Time Value:				$ 109,721
TOTALS:				
Modules				99,587
Hours				18,774
Time Value:				**$ 172,292**

325. The Court finds, based on Dr. Shapiro's analysis and Wal-Mart's records (which were supported by class member testimony and other evidence at trial), that class members took at least 69,710[23] CBL modules off the clock during the Class Period,[24] after extrapolating to account for missing TCARs and missing social security numbers.

326. Dr. Shapiro properly and reasonably assigned a value to this time, by taking the average hourly rate of the Class during the applicable period and multiplying that rate by the number of hours worked off the clock. Accordingly, the Court finds that Wal-Mart owes the Class $120,604[25] for the off-the-clock work reflected in Dr. Shapiro's CBL analysis, based on the average hourly wage for the Class during the relevant portions of the Class Period.

327. The Court has not fully adopted Dr. Baggett's calculations because not all CBL activity that *appeared* to be off-the-clock actually involved off-the-clock work, as explained below.

328. Associates were expected to complete all computer based learning (CBLs) while swiped on the clock. (4066:5-11) (T. Coughlin); (7629:6-7630:7) (S. Vaughn). In fact, in some stores, personnel managers assigned associates times during their shifts to

[23] This number is not meant to be exact, as there is no way to determine a precise number. Instead, it is based on the evidence as a whole on the issue. The Court has taken into consideration the various "exceptions" to the proposition that all CBL time that does not appear within on-the-clock records is unlawfully off-the-clock work. The Court determined that at least 70% of the 99,587 modules represent off-the-clock sessions for which the Class should recover. 99,587 X 70%= 69,710.

[24] For example, Michael Kocherer testified that he completed CBL modules while off the clock. Consistent with this testimony, Dr. Shapiro observed that Mr. Kocherer logged on to a CBL terminal on August 3, 2001 at 5:40 p.m., three minutes after clocking out for the day at 5:37 p.m. Mr. Kocherer then performed four individual CBL modules, which lasted a total of 44 "active" minutes. "Active" time is a conservative estimate of the total amount of time that Mr. Kocherer worked off the clock in this case, because it excludes time which transpired between clocking out and beginning the CBL and between individual CBL modules.

[25] $172,292 X 70%= $120,604.

perform CBLs to emphasize that this work needed to be done on the clock. (8372:11-24) (R. Dethloff).

329. Associates were reprimanded and coached for working off-the-clock, including taking work home or completing a computer-based learning module while swiped out. (1017:3-1018:13) (B. Iallonardo); (5009:5-7) (P. Habberfield); (157:16-157:19) (D. Simonson). Def. Exh. 32. Associates who were caught completing a CBL while off-the-clock were paid for that time. (8375:10-16) (R. Dethloff).

330. As noted elsewhere, there were over 700,000 unexamined TARFs provided to the Plaintiffs. The Court has to conclude that at least some of these TARFs were filed by associates who were asking for payment for time spent on CBLs.

331. Named Plaintiff Deborah Simonson performed a CBL off-the-clock and her manager became aware of it. She was paid for all the time she worked off-the-clock and was coached by management for working off-the-clock. *See* Pl. Exh. 719. Her assistant manager at the time testified that he never instructed Ms. Simonson to work off-the-clock and that she needed to keep her managers in the loop if she could not get all her work done within her scheduled hours. (9042:10-20) (L. Sovine).

332. Mismatches occurred between timeclock and CBL records when associates completed CBLs during orientation on their first days of work before they had name badges. A personnel manager entered swipes for those first days of work, including meal periods and rest breaks, after the fact. (353:14-354:16) (P. Reinert). Alternatively, the personnel manager simply added the hours worked during an orientation as a lump sum payment to the associate's time record rather than adding all of the swipes for time in and out. (5742:1-17) (K. Kimmes). The associate's time record may not reflect the actual

time during the day the associate worked. Any CBL work done during the same time would create a mismatch.

333. Associates also used CBL terminals for personal matters – like printing hotel discount coupons, accessing stock quotes and reviewing 401K benefits. (5740:1-5) (K. Kimmes). This would create mismatches even though it was not off-the-clock work because no work was being done. Dr. Shapiro assumes without any basis that every log-in to a CBL was done for the purpose of work.

Off-the-Clock Work at Cash Registers

334. Dr. Shapiro calculated (1) the number of times that class members worked on a cash register while off the clock; (2) the amount of time that class members spent working on cash registers while off the clock; and (3) the amount of compensation that class members should have been paid for this off-the-clock work. His calculations are set forth below in Pl. Tr. Ex. 3773:

POINT-OF-SALE ANALYSIS

KEY-PUNCHED DATA	PRESENT DATA	EXTRAPOLATION FOR MISSING SSN'S	EXTRAPOLATION FOR MISSING TCARS	EXTRAPOLATION FOR REGISTER ACCOUNTABILITY	TOTALS
Episodes	118,599	158,180	256,379	434,844	434,844
Sessions	117,391	159,264	258,119	437,795	437,795
Hours	25,252	34,259	55,524	84,174	84,174
Hourly Rate					$ 9.75
Time Value:					$ 824,022
ELECTRONIC DATA					
Episodes	18,276			29,764	29,764
Sessions	18,780			30,581	30,581
Hours	24,341			39,637	39,637
Hourly Rate					$ 9.44
Time Value:					$ 374,173
TOTALS:					
Episodes					464,608
Sessions					468,376
Hours					133,811
Time Value:					**$1,198,195**

335. Dr. Shapiro's analysis (which Plaintiffs claim was supported by class member testimony and other evidence at trial),[26] indicated that Class Members worked a total of 468,376 sessions on cash registers while off the clock during the Class Period.

336. Dr. Shapiro assigned a value to this time based on the average hourly wage for the Class during the relevant portions of the Class Period. In his analysis he postulated that Wal-Mart owes the Class $1,198,195 for the off-the-clock work reflected in his POS analysis.

Reliability of Dr. Shapiro's Analysis of Off-the-Clock Work at Cash Registers and CBLs

337. Dr. Shapiro's methodology of cross-referencing Wal-Mart's time clock databases with its CBL databases is generally reliable for the purpose of determining whether class

[26] The Plaintiffs cite the testimony and time records of Class representative Pamela Reinert. Ms. Reinert, though, was a prolific swipe skipper. Thus, her claims about missed breaks, off the clock work, etc. are highly questionable.

members worked off the clock during the Class Period, and is supported by other evidence. Dr. Shapiro's methodology for merging time clock databases with POS databases is *not* reliable for the purpose of determining whether class members worked off the clock during the Class Period.

338. Wal-Mart compares POS data with time clock data to investigate allegations of "time theft." Specifically, Wal-Mart "compares the POS records generated by the cash register to the time clock records" to determine whether associates are shopping while they are supposed to be working. However, just because Wal-Mart compares the data does not mean that they ultimately find it to be conclusive. It is likely that before Wal-Mart disciplines someone based on this initial data that they would investigate and give the "suspect" an opportunity to respond. Thus the data would not be at all conclusive. Furthermore, the circumstances are distinguishable. If the records showed that an associate was clocked in on the timeclock at the same time that they were using their discount number on a POS, then Wal-Mart would have reason to suspect that the employee was shopping on company time. Of course, it could be that the employee had forgotten to clock out, or had (improperly) given their employee discount information to someone else. The situations the Plaintiffs allege in this lawsuit are somewhat opposite. They argue that if the employee *wasn't* clocked in on the timeclock but was clocked in on POS then they were working off the clock. In any event, both circumstances would need further individualized investigation before a conclusion could be reached.

339. Wal-Mart's own "module" (*i.e.,* playbook) for conducting off-the-clock investigations contains a "checklist" instructing investigators to review time clock records, CBL data, and POS data, and states that such records "may be useful in

establishing the hours worked by an Associate." The Court finds that such information may indeed be useful, but would not be at all conclusive.

340. For example, cash office and loss prevention personnel found evidence of associates working under the log-in ID of another associate (in the context of cash-shortages). Tr. Transcr. 6310:15-6311:6 (Nov. 6, 2007); Tr. Transcr. 7053:14-7054:17 (Nov. 13, 2007). Because associates shared IDs, it was standard practice at Wal-Mart for loss prevention to look at more than cashier log-in IDs to determine who was on a register when a cash shortage was discovered. Tr. Transcr. 6309:9-6310:14 (Nov. 6, 2007).

341. Sometimes store management noticed that associates would appear to be checking themselves out (i.e. making a purchase at "their" cash register) because they would be making a purchase with a discount card while still signed in under their own log-in ID. Tr. Transcr. 8377:9-17 (Nov. 29, 2007). While associates did occasionally shop on the clock, further investigation revealed that these incidents often would arise because another associate would be handling the checkout on the register while still operating under the log-in ID of the associate making the purchase.

342. Wal-Mart implemented a clock out/lockout program in response to litigation that relies on this electronic data to lock associates out of electronic devices, including CBL terminals and cash registers, if they are not clocked in for work on Wal-Mart's time clock.[27]

[27] Plaintiffs' efforts in this litigation served as a catalyst for this change of behavior. Notably, Wal-Mart implemented this lockout program after Dr. Shapiro first gave a deposition in which he described his ability to analyze the cash register for evidence of off-the-clock work. This does not necessarily mean that Dr. Shapiro's results were reliable. It may simply mean that Wal-Mart recognized the possibility that Shapiro's "evidence" may be damaging regardless of its reliability, and wished to avoid that possibility.

343. In addition, Wal-Mart generates a report, known as a "Cashier Meal Enforcement Report," which lists those cashiers who were locked out of the POS system. By Wal-Mart's own admission, "[t]his information can be used in conjunction with the Time Clock Exception Report to determine any discrepancies between the time a Cashier was locked out of a register and when the Cashier went to their meal period." Plaintiffs' Exhibit 2630.

344. The Court finds it unlikely that Wal-Mart would have taken these measures unless Wal-Mart's time clock system was sufficiently synchronized with its CBL and POS systems in such a way that data from these systems could be reliably compared. However, there is a difference between using these devices for investigative purposes and for proving facts in court. While the information gleaned from these systems may have given Wal-Mart some cause for suspicion that an employee was shopping on the clock, this does not mean that such information, without a good deal more, would be enough to prove such an allegation by a preponderance of the evidence in court. Thus, its use in this case is limited.

Synchronization of Wal-Mart's Electronic Databases

345. The time and attendance system runs on the SMART system, as do CBLs. This leads the Court to conclude that Wal-Mart's time clock system is synchronized with its CBL system.

346. Wal-Mart's time clock system is synchronized to some degree with its POS system. The synchronization of the systems occurred from one to seven times a day during most of the class period, meaning that the systems were generally but not necessarily consistently synchronized. Witness Ferguson testified, and the Court finds,

that the POS system is separate from the SMART system, which runs the timeclock system. Each cash register has its own internal clock. The POS controller, which is a server separate from the SMART system, also has an internal clock. The timeclock has an internal clock that records when swipes occur. When transactions occur at a cash register the register's own time clock records the time of the transaction, and that information is what is saved. It is not necessarily the same time as what would be on the timeclock. In 2000, Ferguson and his tech team took part in trying to synch the POS individual clocks with the SMART clock. He helped write a program called "Time Synch." Initially, the program was set up so that the POS controller would contact SMART once a day to find out what time it showed, and then synch itself with that time. This took effect in the United States in August 2000. The purpose wasn't to make the time clocks sync with POS registers. Starting around August 2001 they started synching the systems seven times a day.

347. After a SMART and POS system are shut down, for whatever reason, they reboot. In the process of doing so, the POS system asks the SMART system for the date, time, time zone, etc. If SMART is still rebooting it might give "default" information which is grossly inaccurate, such as a date of 01/01/01. In 2000-2001 if a power outage occurred and if someone, e.g. a store manager, reset the time incorrectly, the mistake wouldn't be corrected until the next scheduled time synch or until someone else manually corrected it. Starting in 2001 synchronization would occur seven times a day, and that was true through the end of the class period in 2004.

348. There have been instances where a cashier will swipe in on the timeclock but, by the time they got to their registers, the data hadn't yet gotten from the SMART system to

the registers. This could make it appear that the cashier wasn't clocked in on the timeclock while using a register. After the clock-out/lockout procedure went into effect in May 2004, the cashier could not swipe in on their register until the data indicated that she had swiped in on the timeclock. With the software Wal-Mart previously had in place, there was an even greater chance of lags, so that a cashier who was actually clocked in on the time clock might not show as clocked in when they swiped in at a POS register.

349. Sometimes cashiers used other cashier's ID's on cash register logins. Sometimes cashiers thought they'd clocked out of the cash register but didn't successfully do so, and the system would show that they were logged in at the register when they weren't really working there.

350. The default idle time for POS registers in Wal-Mart is five minutes and at Sam's Clubs is ten minutes. This means that the system should show the cashier as logged out after the idle time has run. However, in practice, the idle times at the stores were configured anywhere between 30 seconds and 10 minutes. The idle time is delayed if a cash register drawer is left open. If a drawer is left open, and the cashier leaves the register, the last transaction is not shown as completed until the drawer is closed. Then idle time would start. The cashier who was logged in would not be shown as being logged out until the idle time ran out. Error codes at registers can also keep a particular cashier's logon active until the circumstance causing the error code is resolved.

351. Wal-Mart POS systems run about 35 million transactions per day. One cannot tell from the POS data or timeclock data what an associate is doing. Mr. Ferguson knew of only 3 times where POS and SMART were out of sync in Minnesota, but records only keep track of instances where the systems were out of synch for over 90 minutes. If the

out-of-sync time is less than 90 minutes the systems just sync automatically (1 to 7 times a day, depending on the time within the Class Period.) This "gap" left open the possibility that the systems could be out of synch in such a way as to call into question any strong reliance on comparisons between timeclock records and POS records.

352. The automatic synchronization process corrects discrepancies as little as 1 millisecond. However, because synchronization occurred between one and seven times a day (depending on the time frame in question) the Court has no idea whether there were substantial numbers of incidents of lack of synchronization of less than 90 minutes during the Class Period. The only way to be certain that there were no synchronization problems would be for the systems to be *constantly* synchronized.

353. The aforementioned concerns about POS/time clock synchronization do not appear to be an issue when comparing CBL records to the time clock records.

354. Accordingly, it is reasonable to compare the time stamp data in Wal-Mart's time clock system with the time stamp data in its CBL system, as Dr. Shapiro did and Wal-Mart itself does in the regular course of its business, since these systems keep the same time.

Integrity of Log-On Passwords

CBLs

355. It is also reasonable and appropriate to use employee log on data from Wal-Mart's Computer Based Learning (CBL) system to determine who was operating a CBL terminal at a specific time. There would be no logical reason for an associate to work on a CBL under another associates' log-in. The associates received credit for completing CBLs. The only circumstance the Court can conceive where one associate might use another's

ID on a CBL would be where a friend was helping another associate "pass" a CBL by "cheating." However, no testimony was presented regarding this ever occurring. Therefore, the Court concludes that it rarely, if ever, happened.

356. Accordingly, the Court finds that class members reliably and accurately logged on and off CBL terminals using their own private passwords.

Cash Registers (POS)

357. Hourly employees working on a cash register were required to log in using their own IDs, and generally did so.

358. Wal-Mart had a vested interest in ensuring that cashiers used their own log-in IDs because Wal-Mart used this log on information to determine who was responsible for cash shortages, and meted out discipline on this basis.[28]

359. Class members had little incentive to log on to cash registers using another employee's password. However, there was evidence indicating that class members sometimes forgot to log off their register Tr. Transcr. 1420:14-22 (Oct. 3, 2007), and that other register-users would then sometimes work on a register under someone else's login. Sometimes, cashiers were so busy that they would neglect to log off or on. Thus, it would appear that a particular employee was using the register when, in reality, a different employee was using it. This fact makes the method of comparing employee timeclock records to POS records less reliable than it otherwise might have been.

360. Upon finishing their work at an operator-accountable cash register, class members were required to log off their register. However, they did not always do so.

[28] Wal-Mart also relied upon cashier log in data as a production measure to track items per hour and sales.

361. If cashiers left their register without logging off, and no one else used the register in the meantime, Wal-Mart's POS system automatically would log them off after the passage of some time and they could be disciplined.

362. A merge of the time clock database to the POS database produces unreliable results. For example, the merge results indicated that one employee supposedly worked on a cash register for 89 years straight. Tr. Transcr. 8546:18–8550:2 (Nov. 29, 2007).

363. These implausible results are not unusual in Dr. Shapiro's methodology. From 2001 to 2004, 75% of the mismatches between the POS system and the time clock system are for durations exceeding 12 hours and 95% of the mismatches are for durations exceeding four hours. Tr. Transcr. 8552:2–8553:1 (Nov. 29, 2007); Def. Tr. Ex. 651, Def. Demonstrative 181.

364. From 1998 to 2001, over 70% of the mismatches were for durations greater than 12 hours and almost 80% of the mismatches were for greater than 4 hours. Tr. Transcr. 8553:15–8554:7 (Nov. 29, 2007); Def. Tr. Ex. 651, Def. Demonstrative 182.

365. Dr. Shapiro did not fix the methodology that produced these unreliable results. Instead, he excluded the implausible results by asking the Court to disregard 98% of the data generated from the merge. Wal-Mart's expert, Dr. Joan Haworth, believed it was not professionally acceptable for Dr. Shapiro to present data concerning the merging of two databases when 98% of the resulting data is admittedly invalid. Tr. Transcr. 8555:16–21 (Nov. 29, 2007). The Court agrees.

366. Even after decreasing his damage estimate by 99% and disregarding 98% of the results of his merge, Dr. Shapiro's most recent database contains a mismatch for an

associate which would have required that associate to have worked almost 26 hours straight. Tr. Transcr. 8558:19–8560:11 (Nov. 29, 2007).

367. Additional problems with Dr. Shapiro's analysis were identified during the trial. They include the following:

a) Dr. Shapiro identified mismatches because he merged the cash register log-in IDs of salaried employees to the time clock, even though salaried members of management do not swipe the time clock. Tr. Transcr. 8561:23–8564:21 (Nov. 29, 2007). For example, Dr. Shapiro identified prior to trial a mismatch for trial witness Michael Kocherer because Mr. Kocherer did not swipe the time clock on a date he had POS activity under his cashier log-in ID. Dr. Shapiro failed to recognize that Mr. Kocherer had not swiped into the time clock because he had become a salaried member of management. Salaried workers do not swipe in. *Id.*

b) Dr. Shapiro, for the pre-2001 period, relied on Dr. Baggett's coding of the TCARs. Because Dr. Baggett did not code 14 banker's boxes of legible printed TCARs, it resulted in mismatches in Dr. Shapiro's merge when there was POS data for a time period in which Dr. Baggett did not code the data. Tr. Transcr. 8565:25–8568:6 (Nov. 29, 2007).

c) TARFs, which are often completed by an associate hours or days after they work a shift, are not intended to be, and are not, perfectly accurate records of the time of day that the associate recalled taking (but failing to swipe for) their breaks, or starting or ending their shift Tr. Transcr. 8568:7–8570:7 (Nov. 29, 2007).

d) Associates provide their best guesses – rather than exact times – when adding swipes to their time records. Tr. Transcr. 5551:15-25 (Nov. 2. 2007); Tr. Transcr. 5592:5-13 (Nov. 2, 2007); Tr. Transcr. 5947:10-22 (Nov. 5, 2007).

e) Associates would approximate based on their scheduled shifts or best recollection. Tr. Transcr. 5552:1-15 (Nov. 2, 2007); Tr. Transcr. 5592:5-13 (Nov. 2, 2007).

f) Associates sometimes submitted Time Adjustment Request Forms that said only "one-hour lunch" or "half hour supper" without specifying the exact times they took their meal. Tr. Transcr. 5216:15-5217:8 (Oct. 31, 2007); Tr. Transcr. 5300:25-5303:9 (Nov. 1, 2007); Tr. Transcr. 7163:1-20 (Nov. 14, 2007); Tr. Transcr. 7076:6-24 (Nov. 13, 2007); Tr. Transcr. 7703:6-7704:10 (Nov. 16, 2007). The forms did not contain a start and stop time for the meal period. Thirty minutes were inputted at a certain interval, because that was all that was necessary to ensure the associate was properly paid. Tr. Transcr. 8570:5-7 (Nov. 29, 2007); Def. Tr. Ex. 616c.

g) An employee who fills out a TARF showing a lunch was taken from 12:00 to 1:00 may in fact have taken that lunch from 12:05 to 1:05. When 12:00 to 1:00 is inserted into the time clock database, it will create a mismatch with the POS database if the cashier had worked under her log-in ID for the five minutes between 12:00 and 12:05. *Id.*

h) Further, personnel managers did not always input into the time records the times indicated by the associate. Karen Clarke submitted a TARF adding a lunch between 1 and 1:30. That lunch was added between 3 and 3:30 in her time record. Tr. Transcr. 7052:2-7053:13 (Nov. 13, 2007).

i) Because edits to time records are imperfect, it is not surprising that 60% of all mismatches occur on shifts that contain edits. Tr. Transcr. 8573:11–8574:14 (Nov. 29, 2007); Def. Tr. Ex. 651, Def. Demonstrative 170.

j) Dr. Shapiro found a mismatch for Pamela Reinert because her meal period was inserted from 10:00 to 10:30 rather than 10:15 to 10:45. Tr. Transcr. 8571:3–8572:18 (Nov. 29, 2007). Pl. Tr. Ex. 3773.

k) Dr. Shapiro did not take subsequent pay adjustments into consideration when he performed his merges. Tr. Transcr. 8574:19–8575:12 (Nov. 29, 2007). By not looking at subsequent pay adjustments, Dr Shapiro excluded data disproving his analysis. For example, Dr. Shapiro testified that Pamela Reinert had a mismatch on October 8, 1999 and assigned a monetary value to that mismatch. Pl. Tr. Ex. 3773, Reinert 1. But, because Dr. Shapiro did not include subsequent pay adjustments in his analysis, he did not see that Ms. Reinert received a subsequent pay adjustment the next day paying her for time that Dr. Shapiro identified as a mismatch. Def. Tr. Ex. 593; Tr. Transcr. 8575:15–8578:6 (Nov. 29, 2007).

l) Of all of the mismatches identified by Dr. Shapiro, 60% of them are followed by some sort of pay adjustment (within 5 weeks) that Dr. Shapiro

excluded from his analysis. Def. Tr. Ex. 651, Def. Demonstrative 171; Tr. Transcr. 8578:7-20 (Nov. 29, 2007).

m) As noted above, there is evidence in the POS database itself which shows that cashiers use the log-in IDs of other cashiers. For example, the database shows that one cashier ID was used on two different registers at exactly the same time. Tr. Transcr. 8625:5–8629:17 (Nov. 29, 2007). Despite being impossible for one cashier to be in two places at once, Dr. Shapiro includes these types of mismatches in his counts.

368. The way associates used cashier IDs further makes Dr. Shapiro's merging of the POS database to the time clock database further unreliable. Figuring out whether an individual was operating the register at a given time is not a matter of only looking at the ID and passwords. While the log-in ID on a register could indicate where someone might be, it cannot confirm the physical location of that associate. Tr. Transcr. 6585:16-25 (Nov. 7, 2007).

a) Many employees shared registers or jumped on and off the same register using one associate's cashier log-in ID. Tr. Transcr. 5062:9-19 (Oct. 31, 2007); Tr. Transcr. 6095:1-16 (Nov. 6, 2007); Tr. Transcr. 7173:21-7174:14 (Nov. 14, 2007).

b) Associates would leave their registers signed on even when they went to swipe out for a 15-minute rest break. Tr. Transcr. 2469:15-25 (Oct. 9, 2007); Tr. Transcr. 8353:17-8354:12 (Nov. 29, 2007).

c) Associates would remain signed onto one register, then try to sign on to another register. Tr. Transcr. 8376:6-8377 (Nov. 29, 2007). This

happened not only on the front end but also in departments with only a limited number of registers. Tr. Transcr. 5455:21-5456:1 (Nov. 1, 2007); Tr. Transcr. (Nov. 8, 2007); Tr. Transcr. 3071:23-3072:12 (Oct. 11, 2007).

d) Associates received pink slips because they failed to sign off before someone else used their log-in IDs. Tr. Transcr. 5357:12-5360:12 (Nov. 1, 2007). Pink slips are given where there are cash problems with the register.

369. Thus, class members did not always log on and off cash registers in a reliable and accurate manner. They sometimes forgot to log off, and sometimes allowed other employees to work on their register under their own password. Therefore, any attempt to compare POS time records with an employee's timecard records is problematic and unreliable. Furthermore, Dr. Shapiro's methodology is suspect and the Court cannot rely on the conclusions he reached from his attempt to merge POS and time clock data.

370. The Plaintiffs, therefore, did not prove that the Class worked off-the-clock on cash registers.

Wal-Mart Willfully Allowed Off-the-Clock Work on CBLs

371. During the Class Period, Wal-Mart was on notice that off-the-clock work was occasionally taking place in its Minnesota stores from a variety of sources, including unsolicited employee complaints, Grass Roots feedback, internal investigations, a survey of the company's personnel managers, and Wal-Mart's own time records. The Court has reviewed notebooks containing Grass Roots Notes and other forms of complaints and comments made by associates regarding working conditions at Wal-Mart. The Court finds that the number of comments and complaints regarding off-the-clock work is less

impressive than the number and quality of comments regarding problems such as the receipt of breaks. A number of documents actually deal with the discipline of associates who worked off-the-clock. Such disciplinary actions belie the claim that Wal-Mart encouraged or generally permitted such work.

372. The various sources cited by the Plaintiffs do not prove that the problem was wide-spread, except regarding CBL usage. Had management compared CBL time records to employee time clock records, they would have seen that employees were working on CBLs while off the clock.

373. Based on the information and allegations that Wal-Mart management had regarding off-the-clock work, management should have taken action to determine if this was occurring. Had such action been taken, a review of CBL records against time clock records (and surveys of associates) would have quickly revealed that significant amounts of CBL work was being done off-the-clock.

374. Accordingly, the Court finds that Wal-Mart willfully allowed Class Members to work off the clock on CBLs in its Minnesota stores during the Class Period.

375. The Court has examined the various claims made by the Plaintiffs regarding Wal-Mart's knowledge of additional forms of off-the-clock work. The Court makes the following findings regarding those claims:

a) Some of Wal-Mart's hourly workers put the company on notice of off-the-clock work by spontaneously raising the issue with management.

b) Some of the class members who testified expressed concerns directly to managers in their stores about off-the-clock work.

c) Records and testimony indicate that when Wal-Mart was informed of incidents of off-the-clock work, however, it responded by informing employees that such work should not occur. Some employees were given coachings for off-the-clock work, or disciplined.

d) Wal-Mart does not inquire about off-the-clock work on the Grass Roots survey. However, Wal-Mart did receive notice of some off-the-clock work when it solicited employee feedback in other ways, such as follow-up visits to stores with high UPI scores.

e) During follow up visits to "high UPI" stores, Wal-Mart asked employees whether they were requested to work off the clock. Records of these high UPI store visits reflect that associates from a few Minnesota stores reported that they were "asked to work off the clock." However, the Court's review of many of the high UPI store follow-up reports shows that off-the-clock work requests were not a significant issue.

f) The Plaintiffs claimed that Grass Roots meetings records show that employees were reporting off-the-clock work. However, only one of the four records cited by the Plaintiffs conclusively supports this claim.

g) This employee feedback constituted additional notice to Wal-Mart of *some* off-the-clock work in its Minnesota stores during the Class Period. It does not establish, however, that the problem was class-wide.

h) Wal-Mart also was on notice of some off-the-clock work in its Minnesota stores from its own internal investigations. For example, Wal-Mart's Regional Director for Loss Prevention, Jed Penney,

conducted an investigation of Steve Cogdill, the former store manager of the Pine City, Minnesota store. He personally concluded that Mr. Cogdill knowingly allowed his personnel manager, Carrie Richardson, to work off the clock. However, he did not believe there was sufficient evidence of this to conclusively prove the matter.

i) In a separate investigation cited by the Plaintiffs, Wal-Mart determined that Rebecca Klisch, an employee at Wal-Mart's Little Falls, Minnesota store (Store #1634) worked hundreds of hours while off the clock from September 2000 to September 2002. Wal-Mart did not pay Klisch for this off-the-clock work until January 30, 2004, the day before the end of the Class Period, even though Wal-Mart's investigation file contains a statement from Klisch dated September 4, 2002, stating that "I, Rebecca J. Klisch, have been working off the clock for the past 4 years[.]." However, she said she did this without the knowledge or approval of management. Her TARF is dated January of 2004. It is unclear why it was dated then, while her initial memo was dated in 2002. The Court does not believe that this evidence is helpful without knowing more details, for example, how she could have been doing such work for so long without management knowing about it, and the nature of the work performed.

376. Despite the foregoing proof problems, the Court concludes that if Wal-Mart had been more vigilant about identifying and investigating instances of off-the-clock work in its stores, at least with regard to CBL usage, it likely would have found additional

violations. The Court is unable to conclude the same regarding other alleged off-the-clock violations.[29]

377. The Plaintiffs argue that management made several damaging admissions regarding off-the-clock work that help to establish that Wal-Mart knew of the problem and willfully ignored it. For example, they cite a comment by Don Swann at a national meeting in 2003 where he said that reports of wage and hour violations at Wal-Mart were "true" and that they "know they do some things we probably shouldn't do." However, the Court finds that this statement was so broad, considering all of the different types of wage-and-hour violations alleged against Wal-Mart around the country (including those involving minors) that the Court cannot conclude that this was an admission about off-the-clock work specifically. Furthermore, it is clear that the purpose of the comments was to encourage personnel managers to *not* allow violations to occur in their store. It is therefore difficult to use these statements against Wal-Mart when their purpose was to try to end violations, not perpetuate them.

378. The Plaintiffs also cite a March 2003 memo from Compliance Director Reid, claiming that she "expressly acknowledged" the existence of off-the-clock issues. However, the Court has reviewed this memo and concludes that she was referring to these matters as issues and allegations that had been raised in litigation. She was not acknowledging that they were problems within Wal-Mart.

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[29] The Plaintiffs point out that in July 2003, Wal-Mart sent a survey to the company's regional personnel managers and regional personnel associates (among others) "to determine the number of calls received per week related to working off the clock." The respondents to this survey, who included Wal-Mart's regional personnel manager for Minnesota, Kathy Horney, reported receiving a total of 150 calls every week specifically pertaining to off-the-clock work. The survey, however, does not say anything about the nature of the calls regarding off-the-clock work. The Court is unable to tell if they were calls complaining of it, or asking questions about what constitutes it, or chastising people for doing it, or something else. Most of the calls came from District Managers or Store Managers as opposed to hourly associates. It would seem that they were not complaining of off-the-clock work. Therefore, the value of this evidence is speculative.

15-20 Minute Rest Breaks

379. Wal-Mart was prohibited from deducting rest break time of less than 20 minutes from hours worked. Minn. R. 5200.0120, However, during the period that Wal-Mart recorded rest break swipes, it failed to pay the Class for any rest breaks greater than 15 minutes.

380. The Court previously ruled, as a matter of law, that these rest break time deductions were improper. Or. Granting Pls.' Mot. for P.S.J. on the Issue of 15-20 Minute Breaks and Partial Judm.

381. Until February 2001, Wal-Mart used rest break punches, in part, to identify breaks greater than 15 minutes in order to eliminate pay for that time. When it considered whether to drop rest break punching it recognized how much money it would lose by removing the ability to not pay for breaks over 15 minutes. These calculations involved all of the U.S. stores, not just the Minnesota stores. Most states, unlike Minnesota, did not require paying workers for up to 20 minutes for their rest breaks.

382. Wal-Mart did not hide its practice of automatically deducting associates' pay from its associates. The associates received pay stubs along with their pay checks. Those pay stubs showed how much time the employee was being paid for on a weekly or bi-weekly basis. However, the associates were apparently unaware of the requirements of the law, and did not realize that Wal-Mart should have been paying them for the extra break time. Therefore, no one complained to Wal-Mart.

383. The Court is left with two alternative scenarios regarding the issue of Wal-Mart's knowledge or lack of knowledge of the requirements of the law. First, Wal-Mart may have been quite aware of the requirements of the law and simply decided to "risk" not

obeying it in order to save money. Second, Wal-Mart may have been ignorant of the law and therefore did not make the payments required by it. Within this second possibility, though, lies the fact that a reasonable "person" (or in this case, "corporation"), when operating in a particular State, would most certainly be obligated to inform itself of the labor laws of that State. Wal-Mart has (and had) a large legal department and a large, well-trained, "People" (Human Resources) Division. The only way that Wal-Mart could not have been aware of the statutory requirements would have been if Wal-Mart's legal and People executives did not bother to look at the law. Had they looked at it they would have found that the language of the law is clear.

384. Both of the scenarios described above amount to, at the very least, "recklessness." Based on the testimony and evidence presented, the Court concludes that the more likely scenario is the latter: that the people who should have been familiar with the law never bothered looking at it. The evidence supporting the claim that Wal-Mart knew of the law and deliberately ignored it is certainly worthy of consideration, but is not compelling for reasons described below.

385. The Plaintiffs argue that Wal-Mart was aware that its practice of deducting rest break time in excess of 15 minutes violated Minnesota law. They base this claim, in part, on the fact that the statutory requirements were included in a pull-down menu that was in their computer system. The menu listed the various requirements of each state regarding various labor issues. Plaintiffs' Exhibit 1858 is a memo that includes the dropdown menu and revisions to PD-07 that were effective February 14, 2003. That memo references a time period after clocking for rest breaks ended and therefore does not prove anything. The Plaintiffs also cite Plaintiffs' Exhibit 3283. Exhibit 3283 includes

language regarding Minnesota law that says that rest periods under 20 minutes cannot be deducted from employee's hours. However, there is no date on the document. Therefore, the Court cannot attach any significance to it. Additionally, Canetta Reid testified that the drop-down menus were created in 2003. Therefore, these menus and memos do not prove knowledge on the part of Wal-Mart.

386. If Wal-Mart had made class members aware of these improper time deductions, they would have expected and wanted Wal-Mart to pay them for the deducted rest break time.

387. Based on the facts set forth above and the other evidence presented at trial, the Court finds that Wal-Mart recklessly and therefore willfully deducted rest break time from class members' pay in violation of Minnesota law.

388. Dr. Baggett, in his alternative calculations, properly calculated: (1) the number of "20-Minute Rule" violations suffered by the Class; (2) the amount of time that was improperly deducted as a result of these violations; and (3) the amount of compensation during the Class Period that class members lost as a result of these violations. The Court adopts his calculations as described below.

389. According to Wal-Mart's accounting rules in effect prior to February 10, 2001, all breaks which were more than 15 but less than 26 minutes in duration were treated as over-long rest breaks, and employees were paid for only 15 minutes of the time. For each of these breaks, Dr. Baggett properly tabulated the amount of time in excess of 15 minutes, but less than 20 minutes, which Wal-Mart failed to pay.

390. Dr. Baggett performed several analyses regarding the issue of 15-20 minute breaks. In one of his analyses (the "alternative analysis"), he limited his analysis to only

breaks which were recorded by Wal-Mart as long rest breaks. In other words, this analysis did not "reclassify" unpaid breaks that were 26 minutes or more. The Court finds this analysis to be the most persuasive.

391. Using the alternative analysis, Dr. Baggett estimated by adverse case that Wal-Mart committed 1,816,254 20-minute rule violations, depriving the Class of $836,039 in compensation. Estimating by average, Dr. Baggett found that Wal-Mart committed 1,558,101 20-minute rule violations, depriving the Class of $660,579 in compensation. The Court finds the average-based calculation to be more reliable and appropriate.

392. Based on Wal-Mart's time clock records and Dr. Baggett's analysis, the Court therefore finds that Wal-Mart committed 1,558,101 20-minute rule violations, depriving the Class of $660,579.00 in compensation.

Inserted Breaks

393. During the Class Period, some Wal-Mart personnel, including management and class members, improperly inserted unpaid meal periods into some class members' and named Plaintiffs' time clock records, without the knowledge or consent of the affected hourly workers, thereby wrongfully depriving them of pay. However, the Court is unable to conclude that this practice occurred on a class-wide basis. Wal-Mart had no policy instructing managers or personnel managers to insert meal periods and rest breaks into employees' time records without authorization. Furthermore, there were hundreds of thousands of unexamined TARFs which may have included information that supported a good number of inserted meal breaks. Also, despite the official policy of the company, the not uncommon practice was for associates to tell payroll personnel about their lunch

breaks rather than file a TARF. Payroll personnel would then insert the break into the associate's record. This practice did not deprive the associates of lunch breaks.

394. The Plaintiffs allege that Wal-Mart deprived associates of pay and rest time by inserting swipes for meal periods and rest breaks into their time records that associates did not take. Plaintiffs' method for demonstrating this purported practice is to tally up every inserted break of exactly 15, 30, or 60 minutes and assign a monetary value to them because, they allege, breaks of exactly 15, 30 or 60 minutes must have been inserted.

395. In fact, time records are routinely edited by managers, personnel managers, and payroll people at the request of associates.

396. Class members Rogentine and Leverson testified that it was appropriate for Wal-Mart to insert meal periods of exactly 30 or 60 minutes into their time records with their oral or written approval.

397. There are several reasons an associate would request meal period or rest break swipes to be added to their time records. For example, an associate who forgets their badge at home or is working at another store and therefore cannot swipe the time clock would need a personnel manager to insert time swipes into their TCAR so the associate could be paid for time worked.

398. Most of the inserted breaks Plaintiffs label as improper occur on shifts where other edits were made to the employees' time record. Had the edits not been made, the associate would have been paid less than if the edits were inserted. Some of the Plaintiffs acknowledged that without these insertions they may actually have been deprived of pay. For example, Pamela Reinert testified that she often forgot to swipe out for breaks, and

that if some of the breaks were not inserted by management it would appear that she had taken breaks of up to several hours in length when she had in fact been working.

399. Of all of the inserted meal periods counted by Dr. Baggett, 85% of them occur on shifts where there are other edits being made to that employee's time records. In other words, 85% of the meal period swipes that Plaintiffs claim are improper are part of TCAR edits that resulted in the employees being paid for the time they worked. Had these edits not been entered, then the employees would have been paid less than they were actually paid because the edits were inserted.

400. Wal-Mart knew, at least by March 2003, that it would be against written company policy and the law to insert meal punches into employees' time records without confirmation that the meal was taken. In March 2003, Wal-Mart acknowledged in a set of "Priority Notes" sent to its managers in the field, that "[i]t can NEVER be assumed that an associate took a lunch break if that break is not electronically recorded. . . . It is not only against company policy, it is against the law to adjust an associate's time without their consent or notification." Tr. Transcr. 743:10-744:6 (Sept. 27, 2007); Plf. Exh. 3517 at 024643.

401. Wal-Mart's policy, confirmed by several class members, only permitted edits to the time records if there was a signed TARF. The practice in many stores, however, was different. Edits to time records often occurred based on oral representations by the associates.

402. Wal-Mart's managers inserted approximately 422,358 meals (using average estimation) into class members' time records during the Class Period. 77.1% of these management-inserted meals were exactly 30 or 60 minutes in duration. By contrast, only

16.3% of meal breaks recorded by class members themselves were exactly 30 or 60 minutes in duration. Of course, this discrepancy is best explained by the fact that associates would likely report that they took a lunch, but not be precise about the exact number of minutes. Thus, management would be justified in inserting exactly 30 or 60 minutes in those cases. This issue could have been more easily and precisely resolved had the Plaintiffs gone through the (admittedly burdensome) process of reviewing all of the hundreds of thousands of TARFs that were made available to them.

403. Dr. Baggett used an unreliable methodology for calculating the number of improperly inserted meals. Specifically, Dr. Baggett applied what he considered to be a "strict" methodology that treated all management-inserted meals as proper, unless the inserted meal was inserted on a shift in which (1) the employee clocked in at the beginning of the shift and out at the end of the shift; (2) there were no missing punches that required the record to be edited; (3) both the clock in and clock out for a meal were added by managers; and (4) the insertion was exactly 30 or 60 minutes.[30] Limiting his analysis in this manner, Dr. Baggett calculated the number of manager-inserted meals that met these criteria, the amount of meal time inserted by Wal-Mart's managers, and the amount of pay lost by the Class as a result of these unpaid manager-inserted meals. The problem with this methodology is that it makes overly broad assumptions. First, it assumes that the associates did not tell management about the length of their lunch break. As noted above, this is inconsistent with credible testimony that was presented at trial. Second, it apparently assumes that, had such a situation occurred, the associate would have been precise as to the number of minutes involved in the lunch break. Again, the

[30] Ms. Reinert testified that her personnel manager felt guilty inserting meals that were not taken, so she sometimes inserted an amount less than 30 minutes. Dr. Baggett did not count those, making his calculation more conservative.

Court finds this to be unlikely. It would be more likely for associates to report that they had taken their lunch break and, if asked how long it was, to say that it was "approximately 30" or "approximately 60" minutes. Third, it fails to take into account the massive numbers of un-reviewed TARFs.

404. The Court therefore does not adopt Dr. Baggett's calculations regarding manager inserted breaks.

405. Further, the Court does not adopt the Plaintiffs' theories regarding the lack of propriety in having managers insert breaks.

Duty to maintain accurate payroll records

Failure to "keep" records

406. Wal-Mart was required to make and keep payroll records. Minn. Stat. §177.30.

407. Timeclock "swipe" data was transmitted daily to Wal-Mart headquarters in Bentonville, Arkansas, and maintained there in electronic format for a period of time. Wal-Mart claimed that electronic data was available only from January 1, 2001 to the end of the Class Period. Prior to January 1, 2001, Wal-Mart claimed that the only timeclock archive information available was what was retained in printed form at the store level.

408. After the class action was certified in this case, Plaintiffs requested production of all final electronic timeclock archive data, as well as all final printed TCARs retained at the store level. Wal-Mart failed to produce TCARs for certain pay periods at issue prior to January 1, 2001. As previously noted, the total number of payroll periods for which Wal-Mart failed to produce any final TCAR was 359 out of 2,784 payroll periods prior to January 1, 2001, or approximately 12.9% of all payroll periods. This corresponds to 325,188 shifts out of 2,520,840 shifts worked by class members during the Class Period.

409. Wal-Mart explained that the TCARs in question had become missing. Wal-Mart failed to provide any specific explanation for the reports becoming missing. However, they did provide information (e.g. TCARs were stored off-site for some affected stores, leaving the implication that something over which Wal-Mart had no control could have happened to them) which satisfies the Court that, as previously noted, Wal-Mart did not deliberately or recklessly dispose of the records.

410. The Plaintiffs did not provide any evidence (such as testimony from affected employees who worked at the subject stores during the relevant times) indicating that there was a greater incidence of missed breaks, during relevant times, at the stores which had missing records.

411. Therefore, the Court finds that Wal-Mart violated its statutory obligation to keep the aforesaid TCARs, but that its violation was not willful or in bad faith. It was, however, repeated.

Failure to "make" records

412. Wal-Mart violated Minn. Stat. §177.30 a total of 69,710 times during the Class Period by failing to make (and keep) a record of time spent by class members working off the clock at a CBL terminal.

Injunctive Relief

413. Wal-Mart violated statutory provisions regarding off-the-clock work on CBLs, meal breaks and record-keeping, as described above. In order to obtain injunctive relief, the Plaintiffs need not prove that their remedy at law is inadequate or that the injunction

is necessary to prevent further injury.[31] Injunctive relief would be similar to the Commissioner of Labor's power to issue cease-and-desist orders.

414. The Plaintiffs are requesting the Court to order Wal-Mart to keep, maintain, and secure all of its Minnesota time clock records and other records of time worked by its Minnesota employees. However, this request flows largely from the fact that Wal-Mart lost a number of paper TCARs. Paper TCARs have not been used by Wal-Mart for a number of years, and the problem is not at all likely to occur again. Within the Plaintiffs' request is, no doubt, an implied request that the Court require Wal-Mart to return to its previous practice of requiring rest break swiping. However, Wal-Mart's current practice appears to be consistent with current retail practices. Therefore, the Plaintiffs' request is inappropriate.

415. Evidence indicates that, more likely than not, Wal-Mart's practice of not paying employees for rest break time in excess of 15 minutes ended when rest break punching ended. Therefore, an injunction is not required to end that practice.

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[31] In *Milner v. Farmers Ins. Exchange,* 725 N.W.2d 138 (Minn. App. 2006), the Court stated:

> Appellant argues that an injunction is inappropriate because the district court did not address whether respondent's remedy at law is adequate and whether the injunction is necessary to prevent "great and irreparable injury." *Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 92 (Minn.1979)* Here, the legislative history instructs us that the legislature intended that the district court's powers mirror those of the Commissioner. Subdivision 7 requires that the Commissioner issue a case and desist order if the employer has violated the MFLSA. Minn.Stat. § 177.27, subd. 7. The Commissioner need not determine that the employee's remedy at law is inadequate nor that the cease and desist order is necessary to prevent great and irreparable harm. Because here the district court is granted the same powers as the Commissioner, we conclude that the court may issue an injunction, the equivalent of a cease and desist order, without making the generally required findings.

The Supreme Court recently upheld this portion of the Court of Appeals decision at 748 N.W.2d 608, 615-616 (Minn. 2008).

416. Evidence indicates that it is no longer possible for an employee to work on a CBL while off the clock. Tr. Transcr. 7435:3-5 (Nov. 15, 2007).

417. Therefore, it is not appropriate to issue an injunction requiring Wal-Mart to end the practice of permitting off-the-clock work on CBLs. However, it would be appropriate to require Wal-Mart to continue using the technology that assures that an employee is on the clock before the employee can use a CBL.

418. In order to effectuate the Court's requirement that Wal-Mart ensure that no further violations of meal break and record-keeping statutes occur, it would be appropriate for Wal-Mart to present the Court with an action plan to address these issues. Included within that plan should be an analysis of the pros and cons of hiring personnel to effectuate the Court's Order.

One Minute Punches

419. The Court previously granted summary judgment to Wal-Mart on the issue of one and two-minute punches. The Court, however, left open the issue of injunctive relief from this practice. The Court determined that it would decide if there was a prima facie case for the proposition that one-minute punches occurred during the Class Period and may still be occurring at Wal-Mart. If the Court made such a finding, it would hear additional evidence regarding the extent of the practice and, if the practice was sufficiently extensive in Minnesota, issue appropriate relief in the form of an injunction, if necessary. Wal-Mart reserved its right to object to the Court's jurisdiction over the issue.

420. Evidence was presented at trial that one-minute punches were inserted by management into employees' time records. These insertions were commonly done when

an employee punched in for work but then failed to punch out. Wal-Mart's explanation for this practice was that it was done as a "placeholder" so that the matter could be further investigated by payroll or management to determine the correct amount of time worked. After making such a determination, the employee's time record would be appropriately adjusted.

421. Wal-Mart called into question the Plaintiffs' claim that the one-minute punches presented a contractual or statutory violation. Wal-Mart pointed out that there were just about as many associate-inserted one-minute punches as there were management-inserted one-minute punches. This would support Wal-Mart's claim that many of the management inserted punches were done for valid reasons. The Court-ordered survey, which the Court used in deciding whether the one-minute punch claim could go forward, revealed a low percentage of employees complaining of the one-minute punch practice. However, the Court is well aware that employees who were subject to the one-minute punch may not have been aware that it happened to them. They were given "notice" of the time they were credited with working in a printout on each paycheck, but the Court concludes that many Wal-Mart workers would have lacked the level of sophistication they would have needed to be vigilant about such matters.

422. The Court is satisfied that the Plaintiffs have presented prima facie evidence that improperly inserted one-minute punches were occurring in Wal-Mart stores in Minnesota during the Class Period, although it would not be possible to determine with any reasonable estimate the frequency of or the monetary damages flowing from the practice.

423. It would therefore be appropriate to have a hearing to determine whether improperly inserted one-minute punches are still occurring in Minnesota and, if so, what should be done to stop this practice.

Based on the foregoing Findings, the Court makes the following:

CONCLUSIONS OF LAW:

BURDEN OF PROOF

1. Plaintiffs' claims are subject to the standard of proof adopted by the United States Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Order dated April 19, 2006 Reserving Decertification and Other Issues, Continuing the Trial and Ordering a Survey* at 4.

2. Under *Anderson*, Plaintiffs have the burden of proving that they performed work for which they were not properly compensated. *Anderson*, 328 U.S. at 686-87.

3. In determining whether Plaintiffs have met this burden, the Court must give due regard to the fact that it is Wal-Mart's duty to keep proper records of wages, hours, and other conditions and practices of employment, so as not to make this burden of proof an "impossible hurdle[.]" *Anderson*, 328 U.S. at 687; *see also* Minn. Stat. § 177.30.

4. To the extent that Wal-Mart "kept proper and accurate records," Plaintiffs may satisfy their burden of proof by relying on those records to show that they performed work for which they were not properly compensated. *Anderson*, 328 U.S. at 687.

5. To the extent that Wal-Mart's records are inaccurate or inadequate, Plaintiffs are not required to prove the precise extent of the uncompensated work. Plaintiffs need only show that they in fact performed work for which they were improperly compensated and produce sufficient evidence to show the amount and extent of that work as a matter of "just and reasonable inference." *Id.*

6. The burden then shifts to Wal-Mart to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from Plaintiffs' evidence. *Id.* at 687-88.

7. To the extent that Wal-Mart failed to produce such evidence, the Court may award damages to the Class, even though the damages may be only approximate. *Id.* at 688.

8. Wal-Mart cannot complain that the damages lack the exactness and precision of measurement that would be possible had it kept proper records. *Id.*

SUFFICIENCY OF PROOF

9. Plaintiffs are entitled to generally rely on Wal-Mart's time clock records because (1) Wal-Mart's time clock records are generally accurate and reliable, and (2) Wal-Mart's time clock records were corroborated by other evidence showing that a significant portion of the Class "in fact" performed work for which it was improperly compensated. *Anderson*, 328 U.S. at 687. While this reliance is justified, the Court must also take into consideration the fact that a significant number of missing swipes actually did not equate to missing breaks, as proven by the testimony presented during the Defendants' case as well as cross-examination of some of Plaintiffs' witnesses.

10. Taken together, this evidence permits the Court to determine the amount of improperly compensated work as a matter of "just and reasonable inference." Any precise or certain number would be impossible to determine, given the nature of this case.

11. Wal-Mart argues that missing swipes in its employees' time records should not be interpreted to mean missing breaks or off-the-clock work. This argument has some merit, as Wal-Mart presented evidence that a number of employees simply forgot to swipe out for breaks or chose to not do so. Wal-Mart also presented credible evidence that employees would sometimes work off-the-clock in order to satisfy their internalized work ethic, rather than at the behest of or with the knowledge of Wal-Mart. No time-keeping system is perfect, although that may change with the improvement of technology. The system that Wal-Mart, and presumably most large employers, used is a time clock. The time clock required some positive action by the employee. If the employee failed to follow through with the obligation of swiping, then the timekeeping system would be undermined. The Court is satisfied that this occurred often at Wal-Mart stores. Thus, the class members can be faulted for part of the problem because they did not follow through with their obligation towards their employer. Nevertheless, the evidence was sufficient to prove that Wal-Mart was at least somewhat at fault for employees missing breaks and meals, off-the-clock work and other problems, as has been outlined in the Findings.

12. Wal-Mart's time clock records support some of Plaintiffs' liability and damages claims, as noted below. Plaintiffs' reliance on Wal-Mart's time clock records to prove their claims is supported by the Minnesota Supreme Court's opinion in *Welfare of L.Z., C.R.P., and S.L.P*, 396 N.W.2d 214 (Minn. 1986). In *Welfare of L.Z.*, the Supreme Court held that school attendance records may be used in a criminal truancy proceeding to show *both* that (1) the child was absent and (2) there was no excuse for the absence. *Id.* at 220-21. In reaching this result,

the Court emphasized the necessity and reliability of the records at issue. The Court found that it would be "unduly burdensome" to require every teacher and school administrator who dealt with the child to "appear in person to verify what the school record says[.]" *Id.* at 219. Thus, the Court held that the necessity for admitting such records was "amply established." *Id.* The Court also held that the records were reliable because they were kept and maintained in the regular course of business. *Id.* at 220.[32] Finally, the Court found that little purpose would be served by cross-examining individual teachers about the information contained in the records because "it is unlikely a teacher could, independently of the record, recall months later if a particular child was or was not in the classroom on a particular day." *Id.* at 220; *accord*, *Stevens v. Humana of Delaware, Inc.*, 832 P.2d 1076, 1080 (Colo. Ct. App. 1992) ("One of the primary reasons for admitting business/medical records is that they are roughly contemporaneous with the events they are recording, and as a consequence, they can be more accurate and reliable than evidence derived from memories which are years old and which can be strongly biased.")

13. Here, Wal-Mart's time clock records are reliable for the purpose of showing significant numbers of missed breaks and meals and whether significant numbers of class members worked off the clock on CBLs because (1) class members generally clocked in and out as required by Wal-Mart policy; (2) Wal-Mart relied on these time clock records in its day-to-day operations for purposes of, *inter alia*, generating payroll and monitoring wage and hour compliance; and (3) Wal-Mart had a duty, under Minn. Stat. § 177.30, to keep accurate time

[32]According to the Court, "Business records are considered reliable because their regularity produces habits of precision in the recordmaker, the business relies on the records in its day-to-day operations, and the recordmaker has a duty to make accurate records as part of his job." *Id.*; *accord*, *Matter of the Child of Simon*, 662 N.W.2d 155, 160 (Minn. Ct. App. 2003) ("Business records are presumed to be reliable"); *A & L Coating Specialties Corp. v. Meyers Printing Co.*, 374 N.W.2d 202, 204 (Minn. Ct. App. 1985) ("business records are generally accurate and therefore trustworthy evidence").

records. Moreover, it is neither possible nor worthwhile to call every single class member or witness.

14. Accordingly, Plaintiffs are entitled to rely on the absence of a break punch as an inference to assist in proving "the nonoccurrence or nonexistence" a break or meal. MINN. R. EVID. 803(7) (absence of entry in record kept in ordinary course of business used to prove nonoccurrence of the matter); *accord*, *Kittelson v. Farmers* Elevator *& Mercantile Co.*, 208 N.W. 190, 190-91 (Minn. 1926) (absence of record of payment reflected non-payment).

15. Wal-Mart argues that its time records do not mean what the Plaintiffs claim they mean. However, Wal-Mart failed to come forward with sufficient class-wide evidence of its own to completely "negative the reasonableness of the inference" to be drawn from its time clock records. *See Donovan v. United Video, Inc.*, 725 F.2d 577, 584 (10th Cir. 1984). While Wal-Mart established that a significant number of missing swipes are not missing breaks, it was not able to negative the reasonableness of the inference that a remaining significant number of missing swipes *were* in fact missing breaks. When dealing with numbers that are of the magnitude involved in this case, it is quite possible to have "significant" numbers in both categories, and the Court concludes that is the case here.

16. As in *Welfare of L.Z.*, little purpose would be served by cross-examining thousands of individual witnesses about the information contained in the time records. Witnesses who testified generally did not have independent recollection of whether they missed a break or worked off the clock on a particular day. It is clear that Wal-Mart's records would generally be more reliable than their memory for the purpose of determining their work experience on any given day. Furthermore, a trial that permitted such cross-examination would take literally many years to complete.

17. Therefore, it is reasonable to rely on these records as an alternative to testimony from thousands of witnesses. *See, e.g., State v.* Moore, 385 A.2d 867, 873 (N.J. Super. Ct. App. Div. 1978) ("We are satisfied that Barrett's original payroll records, assuming they were compiled in the regular course of business, could have been admitted in this case without violating defendant's confrontation rights. The payroll records were likely to be more reliable than any recollection of the specific events they memorialized.")

18. Plaintiffs proved that a significant portion of the Class suffered damages based not only on the time clock records, but also based on the other evidence presented at trial, including (1) live testimony from more than 40 class members and dozens of other witnesses; (2) thousands of pages of Grass Roots meeting notes and other written employee feedback subject to scrutiny by Wal-Mart; (3) Wal-Mart's own internal audits finding that "[s]tores were not in compliance with company policy and state regulations concerning the allotment of breaks and meals"; and (4) admissions from Wal-Mart's senior executives and managers.

19. This evidence was more than sufficient to meet Plaintiffs' burden under *Anderson*. *See, e.g., United Video*, 725 F.2d at 584 (employee deposition testimony, employer's payroll records, and compliance officer's computations sufficient under *Anderson*); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472-73 (11th Cir. 1982) (testimony of a few employees, coupled with employer's records and other evidence, provided a sufficient basis for award to non-testifying employees); *Adam v. Brown County*, 1997 WL 406265, at *7 (Wis. Ct. App. July 22, 1997) (Fair Labor Standards Act ("FLSA") claim upheld based on employer records plus testimony from employees that they worked during breaks and off the clock without compensation because employer discouraged overtime).

20. Requiring testimony from approximately 56,000 class members would impose an "impossible hurdle," *Anderson*, 328 U.S. at 687, and would be inconsistent with existing law, Minnesota's class action procedure, and the Constitutional mandate that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs[.]" Minn. Const. Art. 1 § 8.[33]

21. "[E]ach employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.'" *New Floridian Hotel*, 676 F.2d at 472. "There is ample authority for the proposition that the court can award compensation for non-testifying employees on the basis of representative testimony" such as that from the named Plaintiffs.[34] *Donovan v. Hudson Stations, Inc.*, 1983 WL 2110, at *7 (D. Kan. Oct. 14, 1983) (citing numerous cases); *accord*, *Martin v. Tony & Susan Alamo Foundation*, 952 F.2d 1050, 1052 (8th Cir. 1992); *McLaughlin v. DialAmerica Mktg., Inc.*, 716 F. Supp. 812, 825 (D.N.J. 1989).

22. The Court is entitled to make an aggregate damages award to the Class based on representative testimony and statistical analyses. *See, e.g., Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local Union No. 396,* 637 F.2d 506, 519-21 (8th Cir. 1980); *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1323-30 (N.D. Ill. 1991); *Bell v. Farmers Ins. Exch.,* 115 Cal. App. 4th 715, 748-49 (2004).[35]

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[33] It appears to the Court that if this case is found to be unsuitable for Class Action status, the only alternative would be to permit a separate Class Action lawsuit for each Wal-Mart and Sam's Club store in Minnesota. That would result in over 50 separate lawsuits. While it is possible that such a large volume of cases could be handled by placing each case in the County where a particular store is located, the burden on the Court system, and on the litigators, would be tremendous. Having all of the stores' cases consolidated into one lawsuit, as has been done here, is far more practical and fair to the parties.

[34] This Court previously found that the named Plaintiffs are representative of other class members. In addition to their testimony, several other class members corroborated that of the representative Plaintiffs.

[35] Indeed, it is often true that "aggregate evidence of the defendant's liability is *more* accurate and precise than . . . individual proofs of loss" or witness testimony. *Long*, 761 F. Supp. at 1329 n.10 (emphasis added); *see also In re Simon II Litig.*, 211 F.R.D. 86, 148 (statistical evidence is notably a "more accurate and comprehensible form of evidence" than testimony from masses of witnesses), *vacated and remanded,* 407 F.3d 125 (2d Cir. 2005); *Aspinall*

23. Such an aggregate award of damages does not dispense with the proof of damages required by *Anderson*, "but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation." *Bell* at 749-50.

24. Therefore, it is reasonable to rely on Wal-Mart's time clock records, which were corroborated by and consistent with, *inter* alia, testimony from class members and the results of the Shipley Audit, to give some guidance in determining the amount of damages suffered by the Class.[36] *Anderson*, 328 U.S. at 687.

25. Greater precision in awarding damages is neither possible nor required, and "it would be a perversion of fundamental principles of justice" to deny relief to the Class, when Wal-Mart itself relies on its timeclock records in the regular course of its business. *See Anderson,* 328 U.S. at 698.[37]

26. Plaintiffs do not have to prove that every class member was harmed for the Class to prevail. *See Order re: Amending Complaint to Add Claim for Punitive Damages dated December 16, 2005 at 4-5* ("[Plaintiffs] rightly point out that they do not need to prove, as Wal-Mart purports to claim, that **each** member of the class needs to be harmed before the Plaintiff can prevail.") (emphasis in original); *accord*, *Bell*, 115 Cal. App. 4th at 744 ("[I]f proof of individual

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v. Philip Morris Cos., Inc., 2005 WL 3629358, at *7 (Mass. Super. Ct. Nov. 22, 2005) (same); *Bell*, 115 Cal. App. 4th at 747 n.19 ("In many cases such an aggregate calculation will be far more accurate than summing all individual claims.")

[36] In addition, the Court retained an independent survey research firm, Anderson, Niebuhr & Associates, to survey a significant number of randomly-selected class members concerning the issues in the case prior to trial. *See Order dated April 19, 2006 Reserving Decertification and Other Issues, Continuing to Trial and Ordering a Survey.* Although the results of the survey were not admitted at trial, Dr. Baggett reviewed them and testified that the survey results corroborated his analysis of the time clock data. In addition, Mr. Hirschey testified that the Court-ordered survey results corroborated his analysis and opinions. This testimony was un-rebutted.

[37] To the extent that particular individuals, even though their records reflected missed breaks or off-the-clock work, did not suffer an injury or do not wish to participate in any recovery, the Court can address these issues at a later date as part of the distribution process. *See Bell*, 115 Cal. App. 4th at 759 (citations omitted).

damages were required by all potentially affected parties as a condition for class certification, it would go far toward barring all class actions . . . . [Defendant] cites no authority that class certification should be ordered only under circumstances promising universal recovery within the class."); *Long*, 761 F. Supp. at 1325 ("[T]o the extent defendant argues that sampling is improper because it has an absolute right to individualized determinations of damages, its contention must be rejected as contrary to the case law and to the policies governing class actions.") Of course, it is essential that Wal-Mart's due process rights be protected throughout the proceedings. Therefore, a mechanism must be devised that will ensure that those Class Members who are not entitled to relief not receive it. The Court is satisfied that such a mechanism can be devised.

PERIOD OF RECOVERY

27. The period of recovery on Plaintiffs' claims is controlled by Minn. Stat. § 541.07(5). *See Order dated May 19, 2004 re: Notice to Class Members and Defendants' Motion for Partial Summary Judgment as to Statute of Limitations* at 2, ¶ 2.

28. Under Section 541.07(5), Plaintiffs' claims are governed by a two-year limitations period if Wal-Mart's failure to properly compensate Plaintiffs was the result of "mistake or inadvertence." However, if Wal-Mart's failure to properly compensate Plaintiffs was "willful," then the applicable limitations period is three years. *Id.*

29. "To be willful, Wal-Mart's conduct must be voluntary, deliberate, or intentional, or done with reckless disregard" for whether it was prohibited. *Bot v. Residential Servs., Inc.*, 1997 WL 328029, at *5 (Minn. Ct. App. June 17, 1997) (*citing McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)), holding that to justify a finding of "willful" conduct the employer must have known or shown "reckless disregard for the matter of whether its conduct

was prohibited by the statute." Malicious intent is not necessary. *Id., see also, e.g., LeGoff v. Trs. Of Boston Univ.,* 23 F. Supp. 2d 120, 125 (D. Mass. 1998).

30. Wal-Mart's failure to properly compensate Plaintiffs was willful and therefore justifies a three-year limitations period (dating back to September 11, 1998) because Wal-Mart was on notice from numerous sources of the wage and hour violations at issue, and failed to correct the problems.

31. The Court's finding of willfulness is supported by the Minnesota Court of Appeals' decision in *Bot,* supra, which directly addressed the willfulness requirement in the context of a claim for interrupted "sleeping periods" under the state and federal FLSA. In *Bot,* the court found that the employer's conduct met the willfulness standard because it was "on notice," from a prior Department of Labor investigation, that it was not paying its employees for all time worked and was not recording their hours properly, in violation of the FLSA. Here, Wal-Mart was on notice of the issues in this case from a host of sources discussed above, including but not limited to Grass Roots meetings, survey results, internal audits, and hotline and other employee complaints and feedback.

32. The Court's finding of willfulness is also supported by the decisions of several federal courts, which have applied the three-year limitations period for willful violations under the federal FLSA where the defendant failed to take steps to ensure compliance with the Act. *See, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003) (finding willful violation of FLSA where defendant "took no affirmative action to assure [sic] compliance"); *Herman v. RSR Security Servs., Ltd.*, 172 F.3d 132, 142 (2nd Cir. 1999) (willful violation where defendant "utterly failed to take the steps necessary to ensure [its] pay practices complied with the Act"); *accord, LeGoff,* 23 F. Supp. 2d at 125 (finding of willfulness can be based on "less than"

intentional conduct); 5 C.F.R. § 551.104 ("[r]eckless disregard of the requirements of [the FLSA] means *failure to make adequate inquiry* into whether conduct is in compliance with [the FLSA]") (emphasis added).[38]

33. The Court's finding of "willfulness" is further explained as follows. Wal-Mart had before it conflicting information regarding the taking of breaks. The best example of this is the Shipley Audit. The Shipley Audit revealed that there were an extremely large number of missing swipes. There was no reason to believe that this was an aberration. In other words, it would seem reasonable to conclude that missing swipes of the same magnitude were constantly occurring. The missing swipes *could* indicate a massive problem with swipe compliance, or a massive problem with missing breaks, or a mixture of both. However, no one at Wal-Mart, other than the auditors, concluded that these missing swipes could indicate a problem. Upper management simply assumed that they reflected people not swiping for breaks. They had some reasons for this assumption, and those reasons are detailed in the Findings. However, it was reckless for management to make such an assumption without making further inquiry into the matter. They had information that conflicted with this assumption, such as Grass Roots surveys, UPI follow-ups, complaints from employees, and other information detailed in the Findings. Despite this, they *assumed* facts that were favorable to Wal-Mart's bottom line, and did no further investigation. In order to comply with the law and their contractual obligations they

[38] The Court's finding of willfulness is also informed by the culpability standard for punitive damages, which does not require actual malice or intent to harm. *See* Minn. Stat. § 549.20, *Kay v. Peter Motor Co.*, 483 N.W.2d 481, 485 (Minn. Ct. App. 1992); *Hawkinson v. Geyer*, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984), *see also Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-76 (8th Cir. 1997) (imposing $350,000 punitive damages award against Wal-Mart for sexual harassment, where "members of management were made aware of the offending conduct, but did not investigate complaints or make any attempts at discipline as a result"); *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1038 (D. Minn. 1998) (conduct "consisting of inward recognition, outward abnegation, and at bottom, woeful inaction"); *Kociemba v. G.D. Searle Co.*, 707 F. Supp. 1517, 1537 (D. Minn. 1989) (responsibility for conduct was "shared throughout the defendant's corporate hierarchy, and that the conduct continued for . . . years"); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 740-41 (Minn. 1980) (defendant voluntarily chose not to make pajamas fire resistant for "purely economic reasons").

should have researched the issue further. So, while Wal-Mart, as a whole (with the exception of some rogue supervisors, both class members and non-class members), did not *deliberately* make their employees miss breaks, its management should have looked into why so many swipes were being missed. Had they done so, they would have found that there were a significant number of missed breaks as opposed to just missed swipes. With that knowledge, they could have addressed and cured the problem. Failure to look into the matter in the face of *prima facie* evidence of contractual and statutory violations amounts to willfulness.

34. The Court specifically rejects much of Plaintiffs' claim that Wal-Mart's "corporate culture" drove the alleged violations. Specifically, Wal-Mart's use of "high-powered" bonuses for store managers, in and of itself, was not a contributing factor. Instead, Wal-Mart's failure to make compliance regarding breaks and off-the-clock work a meaningful factor in supervisor and management evaluations *did* play a significant role in the problem. Incentives matter. Manager evaluations included a number of factors, but compliance enforcement regarding breaks and off-the-clock work was not one of them. While there were a number of profit-making incentives in place, there needed to be a counter-balance in the form of compliance-gaining incentives in place as well. Wal-Mart needed to have "teeth" in its break and off-the-clock policies. Policies that encourage profits and policies that encourage wage-and-hour compliance need not be mutually exclusive. While examples were given during the trial of employees being disciplined for working off-the-clock, no substantive examples were given of managers being *awarded* for following through with the implementation of these compliance policies, or of being penalized financially for having poor compliance rates at their store(s).

CONTRACT CLAIM FOR OFF-THE-CLOCK WORK

35. Wal-Mart is liable for off-the-clock work if it "either had knowledge of [the] hours being worked or had the opportunity through reasonable diligence to acquire knowledge." *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997) (*citing Reich v. Department of Conservation & Natural Resources,* 28 F.3d 1076, 1082 (11th Cir.1994)); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975). "[I]t is settled that duties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer 'knows or has reason to believe' the employee is continuing to work[.]" *accord*, 29 C.F.R. § 785.12 ("If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked."). It is not necessary that Wal-Mart had knowledge that the work was being performed off the clock, just that work was being done.

36. It is also well-established that off-the-clock work is compensable where an employer has "constructive knowledge" of such work. *See, e.g., Stewart*, 121 F.3d at 403, 407 (8th Cir. 1997). Thus, where class members performed work in an open and obvious fashion within Wal-Mart's stores, Wal-Mart was obligated to pay them for the work, even if Wal-Mart did not have actual knowledge of the work.

37. Wal-Mart had both actual and constructive knowledge, from a variety of sources, of off-the-clock work on CBLs in its Minnesota stores. Moreover, Wal-Mart knew or should have known about the specific work sessions for which Plaintiffs seek compensation, *i.e.*, work on computer training terminals, because all of this work was openly performed within Wal-Mart's stores and Wal-Mart kept a record of this work in its electronic databases.

38. Although PD-43 prohibited employees from working off the clock, this does not relieve Wal-Mart from its obligation to pay for the work. As the U.S. Department of Labor's regulations explain:

> In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough.

29 C.F.R. § 785.13; *accord, Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997) (Even if defendant had prohibited employee's overtime work, defendant could not avoid liability under the FLSA because he had actual and constructive knowledge that employee worked overtime); *Riley v. Town of Basin*, 961 F.2d 220, 1992 WL 86717, at *1, *6 (10th Cir. Apr. 24, 1992) (overtime work compensable where employee's time card reflected more than 40 hours per week of work, even though employer had a policy against unauthorized overtime and employee never claimed the overtime hours worked).

39. The Court concludes that Wal-Mart breached its contract 69,710 times during the Class Period by failing to compensate class members for time spent working at a CBL terminal. The Class is entitled to damages of $120,604 as compensation for the value of the time that class members spent working at CBL terminals but were not paid.

40. The Court concludes that the Plaintiffs have failed to prove that Wal-Mart breached its contract regarding off-the-clock work allegedly performed at cash registers (POS) or in other circumstances. The Class is entitled to no damages on those claims.

CONTRACT CLAIM FOR MISSED AND INTERRUPTED BREAKS

Missed PD-07 Rest Breaks

41. Based on Wal-Mart's time clock records and the other large volume of evidence presented at trial, the Court concludes that Wal-Mart breached its contract at least 1,576,232 (25% of 6,304,929) times by failing to provide class members with rest breaks to which they were entitled under PD-07. Accordingly, Plaintiffs are entitled to compensatory damages in the amount of $3,657,133 (25% of $14,628,535) for the PD-07 rest breaks that Wal-Mart failed to

provide them. The Court has chosen the figure representing 25% of the total number of missed swipes and the purported value of those missed swipes because it is able make a reasonable inference, with confidence, that at least that number of missed swipes were actually missed breaks that are attributable to Wal-Mart. The actual number could be higher, but the Court's confidence level would drop as the number increases.

42. Although the Court previously determined that class members *may* waive their contractual right to a PD-07 rest break, *see Order dated July 9, 2004 re: Plaintiffs' Contract Liability re: Employees' Benefits* at 10-11, Wal-Mart had the burden of proving this affirmative defense at trial. *See Fink v. Catholic Order of Foresters*, 200 N.W. 809, 810 (Minn. 1924) (holding that the burden is on the party asserting waiver to prove it); *Freeman v. Freeman*, 1988 WL 24850, at *1 (Minn. Ct. App. Mar. 22, 1988). Wal-Mart failed to prove that significant numbers of Plaintiffs waived their rights to PD-07 rest breaks. A significant number of missing swipes (and the Court considers 25% to be significant) involved situations where the employees worked through their rest breaks for workplace-related reasons, not because of purely voluntary reasons.[39] As for the remaining 75% of reported missing break swipes, the Court concludes that, while a good number of them may actually reflect situations where the associates worked through their breaks for reasons attributable to Wal-Mart, the Court is unable to conclude that such a situation is more likely than not.

Short PD-07 Rest Breaks

43. As noted above, PD-07 specifically provided that each rest break to which Plaintiffs were entitled was required to be at least 15 minutes in length. The Court previously

[39] Waiver is the voluntary relinquishment of a known right. *N. State Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925 (Minn. Ct. App. 2002). Working through rest breaks due to work demands is not "voluntary." *Cf. Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984) (citation omitted) ("[E]very contract contains an implied condition that each party will not unjustifiably hinder the other from performing").

concluded, on summary judgment, that there is no "*de minimis*" exception to this 15-minute requirement. *See Order dated June 30, 2006 Regarding Plaintiff's Motion in Limine to Preclude Any Argument or Suggestion of a De Minimis Defense.*

44. Based on Wal-Mart's time clock records and the other evidence presented at trial, the Court concludes that Wal-Mart breached its contract by failing to provide class members with uninterrupted rest breaks of at least 15 minutes. The Plaintiffs have proven that there were 4,424,374 shorted breaks during the class period. The dollar value of the time represented by these shorted rest break swipes is $1,620,299. Wal-Mart's actions (or inaction where action should have been taken) are responsible for these shorted rest breaks at least 25% of the time and the value of that time is $405,057. The Class is therefore entitled to contract damages in the amount of $405,057 for these shorted rest breaks.

45. As to these shorted breaks that are attributable to Wal-Mart, Wal-Mart failed to meet its burden of showing that class members waived their right to a full 15-minute rest break. The Court finds that the rest breaks were interrupted for the same workplace-related reasons that caused them to miss their full PD-07 rest breaks.

46. Under PD-07, each class member whose rest break was less than 15 minutes was contractually entitled to "receive compensation for the *entire* period at their regular rate of pay and be allowed an additional break[.]"

47. The Court concludes that the remedy for an interrupted rest break remained the same until February 9, 2001. At that time PD-07 was modified to remove a replacement break as compensation for an interrupted break.

48. Pursuant to Wal-Mart Policy PD-07, for each short rest break up until February 9, 2001, class members were entitled to a "replacement break" for each rest break which was less

than 15 minutes. The Court finds that the class members suffered 428,641 short rest breaks, attributable to Wal-Mart, during the Class Period up through February 9, 2001. This equates to 107,160 hours. The Court concludes that, at an average pay rate for those class members of $9.05 per hour during the Class Period, the Class is entitled to contractual monetary relief in the amount of $969,798, which represents the value of the full 15-minute replacement rest break promised by Wal-Mart in Policy PD-07.

49. Because PD-07 was modified, effective February 10, 2001, to remove the "replacement break" provision, the Class is not entitled to damages representing the value of replacement breaks for shorted breaks that occurred on and after that date.

Missed and Short PD-07 Meal Breaks

50. On April 14, 2006, the Court granted Wal-Mart's Motion for Summary Judgment on the issue of missed and short meal periods because, since meal periods are unpaid, the Plaintiffs "suffered no measurable loss as a result of a[n alleged] breach."[40]

51. In the same Order, the Court also explained why summary judgment was entered against Plaintiffs on their quasi-contract or equitable claims: "The Plaintiffs then argue that 'it is the value of the make-up breaks which were never provided to employees which constitute one item of meal period damages which Plaintiffs seek to recover in this case.' Unfortunately, the Plaintiffs do not clearly define what the value of a missed break would be. They cite no case law that supports their claim."[41]

52. The Court further clarified that it was entering summary judgment on Plaintiffs' equitable claims: "Perhaps recognizing that the monetary nature of the Plaintiffs' claims seems

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40 Order Granting Defendants' Motion for Summary Judgment on the Issue of Missed Meal Breaks, Apr. 14, 2006.

41 Order Granting Defendants' Motion for Summary Judgment on the Issue of Missed Meal Breaks, Apr. 14, 2006.

nebulous, the Plaintiffs quote Morris Kleiner to support a non-economic claim . . . The Plaintiffs claim that such losses are 'clearly compensable,' yet they cite no case law supporting this claim."[42]

53. Just as an employee was not financially harmed by working through a meal period, Wal-Mart was not unjustly enriched if an employee worked through a meal period because it paid the employee.

54. Even if Plaintiffs were not unable to bring an equitable meal period claim, as discussed above, Plaintiffs presented no evidence or testimony as to how Wal-Mart was unjustly enriched by an employee not taking an unpaid break. Indeed, there may have been an economic detriment to Wal-Mart where associates worked through an unpaid meal period because of reduced productivity, additional pay to the employee, and unplanned overtime pay.

55. As a result, as was held previously, Plaintiffs have no equitable or contractual claims, as a matter of law, for alleged missed and short meal periods.

STATUTORY CLAIMS

Missed Statutory Meal Breaks

56. Under the MFLSA, every class member who "works" eight or more consecutive hours for Wal-Mart is entitled to "sufficient time to eat a meal." Minn. Stat. §177.254.

57. In determining whether this eight hour requirement is met, rest periods of less than 20 minutes in length are considered "hours worked." Minn. R. 5200.0120, subp. 1. Bona fide meal periods are not considered hours worked. *Id.,* subp. 4. Therefore, members of the Class who worked a shift of at least 8 hours, excluding meal break time, were entitled to a meal break under Minn. Stat. §177.254.

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42 Order Granting Defendants' Motion for Summary Judgment on the Issue of Missed Meal Breaks, Apr. 14, 2006.

58. Although the parties vigorously dispute what constitutes "sufficient time" under the statute to eat a meal, it is clear that class members who were not permitted *any* time to eat a meal did not have sufficient time to eat a meal. *See Order dated April 19, 2006 Reserving Defendants' Motion for Partial Summary Judgment on the Issue of Statutory Meal Breaks* at 3.

59. Based on Wal-Mart's time clock records and the other evidence presented at trial, the Court concludes that Wal-Mart committed 73,864 (369,320 missing swipes times 20%)[43] violations of Minn. Stat. §177.254 by failing to permit class members who worked 8 or more consecutive hours *any* time to eat a meal.

60. Because meal periods are unpaid, Plaintiffs are not entitled to compensatory damages for their missed meal periods. *See Order dated April 12, 2006 Granting Defendants'* Motion *for Partial Summary Judgment on the Issue of Missed Meal Breaks.*

61. The Court previously left open the issue of whether Plaintiffs would be entitled to equitable monetary relief on their claims under Minn. Stat. §177.254. *See Order dated July 10, 2007.* The Court is unable, however, to find any statutory or case-law support for the proposition that the Plaintiffs would be entitled to equitable relief under these circumstances. The Court does find, however, that if the Plaintiffs *were* so entitled, then the amount to which they would be entitled would be $279,616. The Plaintiffs have also requested an equal award of liquidated damages pursuant to Minn. Stat. §177.27. The Court notes, however, that Subdivision 8 of that statute awards liquidated damages when "an employer ... pays an employee less than the wages and overtime compensation to which the employee is entitled under [the statutes]." Here, there

[43] The Court has chosen "20%" as the multiplier, rather than the 25% figure used in determining the number of missed rest breaks. This lower number is a reflection of the Court's finding that the likelihood is that lunch breaks swipes were missed for employee-benefitting reasons at a higher rate than were rest break swipes. There was testimony indicating that employees would sometimes skip their lunch breaks in order to be able to leave work early. This testimony makes complete sense and the Court believes it to be true. The Court also considered other factors that it has outlined in detail in its Findings to conclude that the "rate" of missing breaks to missing swipes attributable to Wal-Mart is lower for meal breaks than for rest breaks. Therefore, the Court finds a lower number of "missing" lunch breaks, as opposed to rest breaks, to be attributable to Wal-Mart.

is no claim for wages and overtime compensation. Instead, the Plaintiffs are asking the Court to attach a value to a required time period for a meal. Thus, the liquidated damages portion of the statute does not apply.

62. However, as previously noted, having *no* time to eat a meal is clearly not sufficient time in which to eat a meal. The Court has concluded that 73,864 missing swipes correspond to circumstances in which the employees were completely deprived of their statutory (and contractual) right to eat a meal. The Court previously granted summary judgment to the Defendants on the issue of the contractual violations, recognizing that the meal breaks had no inherent monetary value. The Court also recognized, however, that this fact was likely appreciated by the legislature when it passed Minn. Stat. §177.254, and that there may be a remedy under the statute. Under the Defendants' interpretation of the statute, though, there would be no remedy at all, even if the statute were to be blatantly violated by employers. The legislature, however, does not intend an absurd or unreasonable result. Minn. Stat. §645.17 (1). The statute would provide little protection for workers if it had no "teeth."[44] Therefore, the Court concludes that the statute is intended to consequence employers who provide their employees *no* time in which to eat a meal. The question then becomes what the consequence should be. The Court has determined that the statute answers the question. Subdivision 7 of Minn. Stat. §177.27 provides that an employer who violates various provisions of Chapter 177, including §177.254, is subject to a civil penalty of up to $1,000 for each violation for each employee, to the extent that these violations were repeated or willful. It is likely that the State of Minnesota, rather than

[44] The Court is aware that Minn. Stat. §177.32 provides misdemeanor penalties for violations of Chapter 177. However, there is no evidence of any prosecution of Wal-Mart for said violations in this case. Although the Plaintiffs can step into the position of the Commissioner of Labor under the statute, they do not have the authority to criminally prosecute violations of it. Therefore, for all practical purposes, the statute in question has no "teeth" without the interpretation that the Court is attributing to it.

the class members, will be entitled to any monies generated by the statutory penalties. However, that issue can be determined at a later time.

63. Wal-Mart, therefore, is subject to a civil penalty of up to $1,000 for each meal period violation, to the extent that these violations were repeated or willful. *See* Minn. Stat. § 177.27, subd. 7 ("Any employer who is found . . . to have repeatedly or willfully violated [Minn. Stat. §§ 177.21-.35] shall be subject to a civil penalty of up to $1,000 for each violation for each employee.").

64. The large number of missed meal period violations committed by Wal-Mart demonstrates that these violations were "repeated." These violations were also willful, for reasons discussed above. Accordingly, Wal-Mart is subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each missed meal period in violation of Minn. Stat. § 177.254. *See Milner*, 725 N.W.2d at 143-44 (civil penalties awarded for violations of MFLSA in action brought by private litigant).

Short Statutory Meal Breaks

65. As previously noted, Minnesota Statute § 177.254 states that "[a]n employer must permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal."

66. As the Court held several years ago, "MINN. STAT. § 177.254 merely requires employers to provide employees adequate time to eat a meal . . . The Rule does not say that a meal period must last at least 30 minutes."[45]

67. During trial, Wal-Mart made the Court aware of a federal court decision—decided before Plaintiffs put on their case and not binding on this Court—which disagreed with the law

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45 Order Reserving Defendants' Motion for Partial Summary Judgment on the Issue of Statutory Meal Breaks at 1.

of this case by holding that the Minnesota statute requires a meal period to be thirty minutes long. *See Frank v. Gold'n Plump Poultry, Inc.,* No. 04-cv-01018, 2007 U.S. Dist. LEXIS 71179 (D. Minn. Sept. 24, 2007).

68. Upon reviewing the legislative history of the Minnesota statute, it is clear that this Court's prior holding and the law of this case for the past several years is correct. The Minnesota legislature never intended to require that a meal period be 30 minutes in length. As originally proposed, the Minnesota statute required that a meal period be 20 minutes in length.[46] On April 4, 1989, however, the Senate Employment Committee amended the bill to eliminate the bright-line 20-minute minimum and inserted instead the more flexible requirement that employers provide "sufficient time to eat a meal." In other words, the Minnesota Legislature considered, but purposefully rejected, not only a bright-line minimum time requirement in general, but a less onerous minimum time requirement (20 minutes) than the bright-line requirement proposed by Plaintiffs (30 minutes). The timing of the legislative history is important because the legislature rejected a bright-line minimum time requirement years after the enactment of Minnesota Rule 5200.0120, which states that "Thirty minutes or more is ordinarily long enough for a bona fide meal period. A shorter period may be adequate under special conditions."

69. MINN. RULE 5200.0120 was adopted by the MNDOLI in 1986.[47] The Rule has not been amended or otherwise reaffirmed by the MNDOLI since 1986. When Rule 5200.0120 was adopted, MINN. STAT. § 177.254—the statute that Plaintiffs claim is authoritatively implemented by Rule 5200.0120—did not exist; it was not enacted until 1989. Because the Minnesota legislature enacted MINN. STAT. § 177.254 three years *after* the MNDOLI

46 S.F. No. 109 (December 7, 1988).

47 11 S.R. 1740; 11 S.R. 768-72.

promulgated Rule 5200.0120, the subsequently-enacted statute sets forth the controlling legal standard.

70. Consequently, the Court need only refer to the statutory standard in MINN. STAT. § 177.254, which only requires "sufficient time to eat a meal," to decide the statutory meal period claim in this case. In Minnesota, a Rule that is inconsistent with the legislative intent expressed in that statute is invalid. *See Christian Nursing Center v. Dept. of Human Servs.*, 491 N.W.2d 86, 90 (Minn. App. 1988) (court must "look[] to the reasonableness of the agency's rule in light of the statutory purpose" to determine its validity). This is particularly true where the relevant statute superseded the Rule in question. *See, e.g., McMaster v. Benson*, 495 N.W.2d 613, 614 (Minn. App. 1993). Because it is clear that the statutory purpose of MINN. STAT. § 177.254 was not to impose any minimum time requirement, this Court must uphold the law of this case and the intent of the legislature.

71. In addition to not having a minimum time requirement, the Minnesota statute also does not require an employee to eat a meal if the employee is not hungry or if the employee would prefer to work more hours rather than take time off for an unpaid meal. As the Court previously noted, "[e]mployees may have chosen, for reasons that would benefit the employee more than the employer (bearing in mind that a hungry employee may not be as efficient as a fully energized one) to forgo their meal period until the end of their shift."[48]

72. Also, as previously noted, Minn. Stat. §177.254 requires a sufficient amount of time to eat a meal, rather than a set amount of time for a meal break. Life experience shows that meals can be eaten fairly quickly. The statute does not require that meal times be sufficient for "relaxed, enjoyable eating" or similar language. The goal of the statute appears to be sustenance

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[48] Order Granting in Part and Denying in Part Plaintiff's Motion to Amend Complaint to Add Punitive Damages at 7.

for workers. Thus, a meal could conceivably be eaten in as little as 10 or 15 minutes. This Court is therefore unable to declare that meal periods of less than 30 minutes are not sufficient time in which to eat a meal. That being the case, the Plaintiffs have not carried their burden of proof on this issue. The Court will therefore not find that Wal-Mart violated the statute in cases involving "shorted" meal breaks because there was insufficient class-wide proof that the meal breaks were cut so short that employees could not eat a meal.

Statutory Rest Break Claims

73. When interpreting statutes, courts "construe the words of a statute according to their plain meaning." *River Valley Truck Ctr., Inc. v. Interstate Cos.*, 704 N.W.2d 154, 161 (Minn. 2005). Said differently, "words and phrases are construed according to rules of grammar and according to their common and approved usage." MINN. STAT. § 645.08 (1).

74. Minnesota Statute § 177.253 states that "An employer must allow each employee adequate time from work within each four consecutive hours of work to utilize the nearest convenient restroom."

75. A restroom break is not earned unless an employee works for "four consecutive hours." MINN. STAT. § 177.253 (emphasis added).

76. If an employee works for four or more hours and the shift is interrupted by an unpaid meal period, then the employee does not earn a statutory rest break. According to Minnesota statute, "[b]ona fide meal periods are not hours worked."[49] Therefore, contrary to Dr. Baggett's calculations, a four-hour shift that is interrupted by a meal period does not earn a statutory rest break because, as defined by Minnesota Rule 5200.0120, a meal period is not hours worked. *Compare* Pl. Ex. 3774, Baggett 5 (incorrectly counting a swipe as missed despite being

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[49] MINN. RULE 5200.0120 subd. 4.

interrupted by a meal period) and Pl. Ex. 3774, Baggett 5b (counting a swipe as missed only if there are four hours of consecutive work). To hold otherwise would violate the plain meaning of Minnesota Rule 5200.0120—stating that meal periods are not hours worked—and Minnesota Statute 177.253—stating that a statutory rest break is earned only when an employee has worked for four consecutive hours.

77. The Minnesota statute does not contain a minimum time requirement defining the adequate amount of time to use the restroom. As "[t]he Court has previously noted . . . the [rest break] statute does not have a minimum time requirement [and t]he Court has no authority to write in such a requirement . . ."[50]

78. The legislature's decision not to include a minimum time requirement makes sense considering that what constitutes adequate time to use the restroom depends substantially on facts specific to each individual, including his job responsibilities, work location, size of the store, location of the restroom, and how long it takes each employee to use the restroom.

79. The rest break statute also does not require the employee to take a restroom break if the employee does not want or need to go to the restroom. As noted previously, "Were the Court to interpret the applicable statutes as requiring employees to take meal/rest breaks, the Court would be adding a requirement that the legislature did not when it drafted these statutes."[51]

80. There can be no violation of the statute where employees used the restroom without swiping out or chose not to use the restroom despite having an adequate opportunity to do so.

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50 Order Reserving Defendants' Motion for Partial Summary Judgment on the issue of Statutory Rest Breaks at 1.

51 Order Regarding Waiver of All or Part of Statutory Rest or Meal Breaks at 4.

81. The only class-wide analysis presented to the Court regarding which class members allegedly did not have adequate time to use the restroom was a count of missing 15-minute rest break swipes.

82. Plaintiffs cannot meet their burden of proof of showing that employees did not have adequate time to use the restroom by tabulating the number of times that there are not 15-minute rest break swipes in the time records. Most important, Plaintiffs did not prove that class members had to swipe to use the restroom, so the swiping data is irrelevant. In fact, witness after witness confirmed that associates did not need to swipe to use the restroom. (1155:15-1156:11) (M. Kocherer); (2252:3-8) (L. Jenkins); (6211:5-10) (K. Wickre); (5718:1) (K. Kimmes); (5596:2-25) (D. Baker); (7161:10-14) (K. Yavis); (7353:3-6) (J. Komarek); (8330:18-8331:2) (C. Slad); (9112:2-9) (J. Coyle); (7436:23-25) (D. Leverson). Even if swiping were required, which it clearly was not, missing rest break swipes could mean that the employee used the restroom without swiping in and out, that the employee was provided adequate time to use the restroom, but decided not to go, or that the employee used the restroom during their meal period. The evidence overwhelmingly supports the conclusion that a missing rest break swipe does not mean that an employee was prevented from using the restroom. Plaintiffs offer no other evidence.

83. In short, the only class-wide evidence Plaintiffs offered for their statutory rest break claim does not show that it is more likely than not that any particular class member had inadequate time to use the nearest convenient restroom.

84. Sufficient evidence was presented, however, to prove that Nancy Braun and Merrie Thorsen were denied adequate time to use the restroom on several occasions.

Short Statutory Rest Breaks

85. The Court already granted Wal-Mart's Motion for a Directed Verdict on this claim because, as explained in open court, "There's been very little, if no evidence, offered indicating that somebody was using the restroom for typical restroom purposes when they got called back. There's no class-wide proof of that."

Breaks of Between 15 and 20 Minutes

86. Under Minn. R. 5200.0120, subp. 1, Wal-Mart was prohibited from deducting rest break time of less than 20 minutes from total hours worked.[52]

87. The Court concludes that Wal-Mart committed 1,558,101 violations of this Rule. Plaintiffs are entitled to $660,579, the value of the time improperly deducted by Wal-Mart, as compensatory damages for these violations of Minn. R. 5200.0120, subp. 1, plus an additional equal amount as liquidated damages, pursuant to Minn. Stat. § 177.27.

88. Wal-Mart also is subject to a civil penalty of up to $1,000 for each violation of Minn. R. 5200.0120, to the extent that these violations were repeated or willful. The large number of improper time deductions in violation of Minn. R. 5200.0120 demonstrates that these violations were "repeated." For reasons discussed in its Findings, the Court concludes that these violations were willful. Therefore, Wal-Mart is subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each improper time deduction in violation of Minn. R. 5200.0120, subp. 1..

False Meal Period Records

[52] The Court already has determined, on summary judgment, that Wal-Mart violated this Rule, and that "Plaintiffs are entitled to damages for each of the violations of Minn. R. 5200.0120 identified by Dr. Baggett[.]" *Order dated April 19, 2006 Granting Plaintiffs' Motion for Partial Summary Judgment on the Issue of 15-20 Minute Breaks and Partial Judgment.*

89. Plaintiffs have not proven that Wal-Mart violated its statutory duty to make and keep records of hours worked by inserting meal breaks into its employees' records. The evidence does not establish that Wal-Mart falsified records by inserting meal breaks. *See* Minn. Stat. § 177.30(4) (employer must make and keep information that is "necessary and appropriate" for purposes of enforcing MFLSA); Minn. Stat. § 177.32(4) (employer who "falsifies any record" is guilty of a misdemeanor).

Failure to Maintain Accurate Records

No Records of Off-the-Clock Work on CBLs

90. Pursuant to Minn. Stat. § 177.30, Wal-Mart is required to make and keep a record of, *inter alia*, the hours worked each day and each workweek by each of its Minnesota employees. Minn. Stat. § 177.30(3).

91. Wal-Mart did not keep a record *within each employee's time records* of "work" employees did on CBLs while "off-the-clock." However, a record did exist as to each instance of this "work." Without these records the Court would not have been able to conclude that the work was actually done. Thus, although it clearly was not Wal-Mart's intention to use CBL records to determine if an employee was entitled to pay and the amount of that pay, they are nevertheless being used in that fashion. Thus, although the Plaintiffs argue that Wal-Mart did not make and keep a record of this off-the-clock work by definition, it is not as easy an issue as it seems at first blush.

92. Nevertheless, the Court concludes that Wal-Mart did technically violate the requirements of this statute. CBL records might show the amount of time an employee spent on a CBL for a particular day, but there was no evidence introduced to show that the time spent on a CBL was recorded for an employee's "workweek," as required by the statute. Additionally, the

Court concludes that the statutory recordkeeping requirements are for the purpose of allowing an employee to quickly determine how much pay he or she is entitled to for a workday or week. The CBL records would not be at all helpful for an employee to make such a determination.

93. The Court concludes that Wal-Mart violated Minn. Stat. § 177.30 a total of 69,710 times during the Class Period by failing to make and keep a record of time spent by class members working off the clock at a CBL terminal. Wal-Mart, however, will be permitted to introduce evidence regarding the nature of the CBL records and their use in this case, should it choose to do so, to attempt to mitigate the civil penalties that can be imposed for a violation of the statute.

94. The Court has already found that the Class suffered damages in the amount of $120,604 for unpaid work performed on CBL terminal. Plaintiffs, however, are not entitled to their request for "an additional equal amount as liquidated damages" for these recordkeeping violations. Minn. Stat. § 177.27, subd. 8 provides for liquidated damages when an employer pays an employee less than the wages and overtime compensation to which the employee is entitled. That consequence has already been provided, supra. A failure to maintain proper records is not a failure to pay wages. Therefore, additional liquidated damages are not appropriate.

95. However, Wal-Mart is subject to a civil penalty of up to $1,000 for each time that Wal-Mart violated Minn. Stat. § 177.30 by failing to make and keep a record of time worked off the clock by members of the Class at CBL terminals. *See* Minn. Stat. §§ 177.27, 177.30. Minn. Stat. § 177.30 contains its own civil penalty provision, which subjects Wal-Mart to a "fine" of up to $1,000 for each violation of the statute, *without* regard to whether the violation was repeated

or willful. Because the penalties contained in Minn. Stat. §177.27 and 177.30 are duplicative, the court will apply the more specific language of Minn. Stat. §177.30.

96. The large number of off-the-clock work record keeping violations committed by Wal-Mart demonstrates that these violations were "repeated," although that Conclusion is not required to be made to reach the ruling made in this paragraph. The Court needn't determine whether these violations were willful. The lack of a finding on this issue will not affect the "time period" issue as the obligation to keep records is an ongoing one, for up to three years. A claim could thus be made under this statute up to two or three years after the obligation to keep the records ceased. That obligation ceased, for the purpose of this lawsuit, no sooner than September 11, 2001. Accordingly, Wal-Mart is subject to a fine (or civil penalty) of up to $1,000, under Minn. Stat. § 177.30, for each failure to make and keep a record of off-the-clock work at a cash register or CBL terminal.

97. The amount of the civil penalties will be determined in a subsequent trial of this matter.

Missing TCARs

98. As noted above, Wal-Mart was required not only to record the hours worked by its employees, but to *keep* those records. Minn. Stat. § 177.30.

99. Under Section 177.30, Wal-Mart was obligated to keep these records for three years in or near the premises where its Minnesota employees worked.

100. Accordingly, Wal-Mart had a legal obligation to keep all time clock records and other records of hours worked dating back to September 11, 1998, three years before this action was commenced.[53]

101. The Class worked a total of 2,520,840 shifts during the period, September 11, 1998 through January 12, 2001, but Wal-Mart failed to keep records of approximately 12.9% of the shifts or 325,188 shifts.

102. Wal-Mart is subject to a civil penalty of up to $1,000 for each missing shift record for each class member. See Minn. Stat. § 177.27, subd. 7; Minn. Stat. § 177.30; *Milner*, 725 N.W.2d at 143-144.

103. Minn. Stat. § 177.30 directly provides for a civil penalty of up to $1,000 for each of these recordkeeping violations, *without* regard to whether Wal-Mart's failure to keep a record of missing shifts was repeated or willful.

104. In addition, Wal-Mart is subject to a civil penalty of up to $1,000 for each of these recordkeeping violations under Minn. Stat. § 177.27, subds. 7 and 8, because Wal-Mart repeatedly failed to keep its time clock records prior to January 1, 2001. Whether this penalty can be applied *in addition to* the aforementioned penalty will be dealt with prior to the next trial.

105. The amount of the civil penalties to be awarded for Wal-Mart's failure to keep a record of "missing shifts" prior to January 1, 2001 will be determined in a subsequent trial of this matter.

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[53] As soon as the action was commenced, Wal-Mart obviously had a duty to preserve those records until the conclusion of the litigation. *See Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. Ct. App. 2005) ("Regardless of intent, disposal of evidence is spoliation when a party knows or should know that the evidence should be preserved for pending or future litigation."); L. Kindel & K. Richter, *Spoliation of Evidence: Will the New Millenium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 Wm. Mitchell L. Rev. 687, 689 (2000) ("the duty [to preserve evidence] automatically arises when a party serves or is served with a judicial or administrative complaint."); J. Perl and D. Van Tassel, *Delete at Your Peril: Preserving Electronic Evidence During the Litigation Process*, Findlaw Corporate Counsel Center – Litigation/ Minnesota, www.findlaw.com (2004). The Court, however, is not convinced that Wal-Mart disposed of the records in question after litigation commenced.

One-Minute Punches

106. The Plaintiffs have made a *prima facie* showing that they are entitled to a hearing on injunctive relief from the practice of management inserted one-minute punches. While the Court would not be able to quantify the extent of the practice (which was one of the reasons the Court declined to certify the issue) the Court is satisfied that, based on the evidence presented at trial, the practice was occurring more often that it should have in Minnesota during the Class Period. Pursuant to discussions held with the parties, the Court will hold a hearing in order to make a determination on, at a minimum, the following issues. The parties shall meet and confer in order to select a date for this hearing. The Court anticipates that the hearing will not exceed three days in length. The parties should plan accordingly:

a.) Are improper management-inserted one-minute punches currently being inserted into associates' time records in Minnesota? If this practice is occurring, what is the extent of it?

b.) Is an injunction required to stop the practice, if it exists? If so, what is the appropriate form of the injunction?

107. The parties shall be entitled to engage in additional discovery regarding this issue. They shall meet and confer regarding details and timing of discovery.

Based on the foregoing Conclusions of Law, the Court makes the following:

ORDER:

CONTRACT CLAIM FOR OFF-THE-CLOCK WORK

1. Wal-Mart breached its contract 69,710 times during the Class Period by failing to compensate class members for time spent working at a CBL terminal. The Class is entitled to

damages of $120,604 as compensation for the value of the time that class members spent working at CBL terminals but were not paid.

2. Plaintiffs are not entitled to any recovery for other claims of alleged off-the-clock work.

CONTRACT CLAIM FOR MISSED AND INTERRUPTED REST BREAKS

3. Wal-Mart breached its contract at least 1,576,232 times by failing to provide class members with rest breaks to which they were entitled under PD-07. Accordingly, Plaintiffs are entitled to compensatory damages in the amount of $3,657,133 for the PD-07 rest breaks that Wal-Mart failed to provide them.

4. Wal-Mart breached its contract by failing to provide class members, a significant number of times (totaling at least 44,588 hours), with uninterrupted breaks. Plaintiffs are entitled to contract damages in the amount of $405,057 for these shorted rest breaks.

5. Based upon the Court's finding that the class members suffered 428,641 short rest breaks during the Class Period up through February 9, 2001, the Court concludes that, at an average pay rate for those class members of $9.05 per hour during the Class Period up through February 9, 2001, the Class is entitled to equitable and contractual monetary relief in the amount of $969,798, which represents the value of the full 15-minute replacement rest break promised by Wal-Mart in Policy PD-07.

CONTRACT CLAIM FOR MISSED AND SHORTED MEAL BREAKS

6. Plaintiffs are not entitled to recovery for any claims based on contractual meal breaks.

STATUTORY CLAIM FOR MISSED AND SHORTED REST BREAKS

7. Plaintiffs are not entitled to recovery for any claims based on statutory rest breaks.

STATUTORY CLAIM FOR MISSED MEAL BREAKS

8. Plaintiffs are not entitled to recovery for any compensatory damages claims based on missed statutory meal breaks.

9. Wal-Mart, however, is subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each missed meal period (73,864) in violation of Minn. Stat. § 177.254. *See Milner*, 725 N.W.2d at 143-44; 748 N.W.2d 608, 615-616 (Minn. 2008) (civil penalties awarded for violations of MFLSA in action brought by private litigant).

STATUTORY CLAIM FOR SHORT MEAL BREAKS

10. Plaintiffs are not entitled to recovery for any claims based on statutory short meal breaks.

BREAKS BETWEEN 15 AND 20 MINUTES

11. Wal-Mart improperly deducted rest break time for rest breaks in excess of 15 minutes and less than 20 minutes on 1,558,101 occasions.

12. Plaintiffs are entitled to $660,579, the value of the time improperly deducted by Wal-Mart, as compensatory damages for these violations of Minn. R. 5200.0120, subp. 1, plus an additional $660,579 as liquidated damages, pursuant to Minn. Stat. § 177.27.

13. Wal-Mart also is subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each improper time deduction in violation on Minn. R. 5200.0120, subp. 1.

INJUNCTIONS

14. Wal-Mart shall continue to use technology that requires an employee to be on the clock before he or she can use CBL modules.

15. A separate hearing shall be had on the issue of injunctive relief regarding one-minute punches, with the issues and procedures to include those described in the Conclusions of Law. The parties shall meet and confer with themselves and communicate with the Court regarding the scheduling and scope of the hearing.

16. Wal-Mart is enjoined from providing insufficient meal periods to its employees, in violation of Minn. Stat. § 177.254. *See* Minn. Stat. § 177.27, subd. 7.

17. In addition, Wal-Mart is required to promptly submit an action plan to the Court, subject to the Court's approval, specifically indicating what "affirmative steps" Wal-Mart shall take to ensure that it does not violate Minnesota law by providing insufficient meal periods to its employees.

UNJUST ENRICHMENT AND QUANTUM MERUIT

18. Plaintiffs are not entitled to recovery for any claims based on unjust enrichment and quantum meruit.

FAILURE TO MAINTAIN RECORDS

19. Wal-Mart violated Minn. Stat. § 177.30 a total of 69,710 times during the Class Period by failing to make and keep a record of time spent by class members working off the clock at a CBL terminal. Wal-Mart is therefore subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each failure to make and keep a record of off-the-clock work at a CBL terminal.

20. Wal-Mart violated Minn. Stat. §177.30 a total of 325,188 times during the Class Period by failing to keep time clock records of its employees, as described above. Wal-Mart is therefore subject to a civil penalty of up to $1,000, in an amount to be determined in a subsequent trial of this matter, for each failure to make and keep these time clock records.

21. The violation was an ongoing one for the three year period that the records were required to be retained. Therefore, the recoverable time period goes back to September 11, 1998 for this violation. Minn. Stat. §177.30 (4).

22. The Plaintiffs are not entitled to relief for any other claims related to record-keeping, off-the-clock work, or inserted breaks.

INDIVIDUAL RELIEF

23. The Court reserves for further hearing the issue of whether Ms. Braun or Ms. Thorsen are entitled to individual relief for Wal-Mart's failure to give them sufficient time to use the restroom and, if so, what that relief should be.

FURTHER PROCEEDINGS

24. A final judgment in this matter, following trial of the remaining issues, will incorporate the foregoing Findings of Fact and Conclusions of Law and direct entry of judgment in accordance therewith and pursuant to any applicable post-trial rulings.

25. Before any further trials, including the "injunction hearing" ordered herein, the parties shall make a good faith effort to mediate a settlement in this matter.

26. The parties shall also explore the possibility of appeal, should the parties feel aggrieved by this Court's Order, prior to the jury trial of the remaining issues.[54]

27. The jury trial on the remaining issues shall commence on October 20, 2008 at 9:00 a.m. In addition to receiving a verdict from a jury, the Court will make alternative Findings and an Order. A pre-trial conference shall be held on July 18, 2008 at 9:00 a.m. Prior to that

[54] Trial courts do not normally encourage appeals of their decisions. However, the Court is aware that both parties have spent large sums of money and a massive amount of time on this case. The case is far from over. However, if certain legal issues were decided by the appellate courts before the upcoming jury trial then there may not be a need for that trial. The matter would have a much greater chance of settling if those legal issues were resolved. The Court is aware that an appeal can normally be taken only from a final judgment. There may be exceptions, however, and the Court is willing to consider taking whatever steps are necessary to assist the parties in accelerating an appeal if both parties believe that such action would ultimately resolve this matter.

date the parties shall meet and confer regarding scheduling issues and matters to discuss at the pre-trial conference.

Dated: June 30, 2008

BY THE COURT:

Robert R. King, Jr.
Judge of District Court