UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Complainant, v. WAL-MART STORES INC., Respondent.	OSHRC DOCKET No. 09-1013

RESPONDENT'S POST-HEARING BRIEF

TABLE OF CONTENTS

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

I.
INTRODUCTION

Respondent's day-after-Thanksgiving "Blitz Day" sale was a highly-anticipated annual event: the retail industry's biggest shopping day of the year. And by 2008, the Valley Stream Store ("the Store") had its preparations down to a science. Drawing on sixteen years of experience with the Company, Store Manager Steve Sooknanan began planning weeks in advance and based his efforts on the 12-13% growth trend for the year. He held regular meetings, instructed employees on safety procedures, obtained barricades to organize the line of customers, secured a police presence, and hired security guards, along with 100 temporary workers. He also consulted planning documents on the Company's intranet, and he benefitted from the input of Market Asset Protection Manager Sal D'Amico, who had been with the Company for four years and whose Market 45 Action Plan had worked without incident at the Farmingdale Store on Blitz Day 2007.

In maintaining the instant action against Respondent, the Secretary ignores these considerable preparations and declares that Blitz Day sales are "inherently unsafe." *See* Tr. 699. Indeed, she goes further than that, claiming that any sales with "low prices, limited quantities, and popular items" are problematic, *see id.*, and that "events" as minor as a cafeteria's sale of "particularly hot" chicken nuggets are potentially dangerous. Tr. 609-10. She seems to have her crosshairs fixed on nothing less than the nature of free enterprise—Area Director Anthony Ciuffo instructs that the alleged hazard arises at sales events with anywhere between "three and three million" customers, and that "Friday only" or "November 28th only" sales are "possibly" hazardous. *See* Tr. 704, 707, 767. And yet, despite these bold pronouncements, she has forwarded an abatement regime with no demonstrated connection to employee safety. Among other bizarre and ridiculous measures, she instructs that clowns, flavored coffee, and racial

profiling can improve the safety of a retail sales event, and that advertising particular quantities of particular television sets may aggravate the hazard. She seeks to use the General Duty Clause as a specification standard, requiring without the benefit of a rule or industry practice that Respondent must place its signs at twelve to fourteen feet above the ground, for example, and that it must use barricades that are "at least 40 inches high." *See* Tr. 380. And finally, in an apparent disconnect from the facts of the case, she faults Respondent for failing to take measures that it did, actually, take. She requires two to ten walkie-talkies when Respondent had at least this many. She requires twelve to fourteen crowd managers when Respondent had fifteen. She initially suggested that Respondent needed a plan with a clear "who, what, when, where, how, [and] why," but then acknowledged that it actually had all of those things. *See* Tr. 682-86. While she maintains that Respondent "didn't plan" and "didn't train [its] employees," *see* Tr. 680, the record shows that Respondent had actually implemented a *majority* of her recommendations *on Blitz Day 2008*.

The impetus for the Secretary's involvement in this case, the death of Walmart temporary employee Jdimytai Damour, was a tragic, unpredictable event without precedent in the retail industry. Despite the Store's months of planning, its coordination with local law enforcement, and its repeated attempts to keep the line calm and orderly, customers ignored the directions of Walmart associates, jumped over barricades, fought among themselves, rushed from cars to the front of the line, and broke through the doors, leaving Mr. Damour dead in their wake. The Secretary has effectively acknowledged the fluke nature of this event by conceding that Mr. Damour's death is irrelevant to her citation. But at the same time, she attempts to recast it as a workplace "crowd hazard" within her statutory mandate. She does this by feeling her way in the dark. There were no previous citations on-point, and the Secretary's Area Director Anthony

Ciuffo was not aware of "any other instance in the history of the world" when there had been "a fatality or serious injury to an employee" under similar circumstances. *See* Tr. 709-10. The hearing that was held between July 7 and July 14 showcased the Secretary's considerable overreaching and highlighted why the Court should vacate her citation.

First, the Secretary has failed to carry her burden of proving that Respondent violated the OSH Act by exposing its employees to the ill-defined hazard of "asphyxiation" or "being struck" from "crowd surge, crowd crush, or crowd trampling." Complaint ¶ 5. Her exposure evidence, which consists almost wholly of unsubstantiated video accounts and Company injury records, does not show a realistic prospect of a hazard of death or serious harm to *customers*, much less to employees; given the admitted irrelevance of Mr. Damour's death to the citation, the record only contains one reference to a prior employee injury under similar circumstances. Far from providing a basis for hazard-recognition, moreover, the size and behavior of past years' crowds supported the Store's reasonable belief that its substantial preparations would be more-than-sufficient. And the Store's reasonableness was buttressed by the parallel absence of recognition in the broader retail industry. The Retail Industry Leaders Association had not even discussed the possibility of crowd hazards in November 2008. The National Fire Protection Association's Life Safety Code—the only national consensus standard dealing with crowd management—had expressly excused retail stores from having to comply with its crowd management requirements. In line with her approach to employee exposure, the Secretary relies mainly upon a first aid injury akin to a "paper cut" and unsubstantiated records to show that the hazard was "causing or likely to cause serious injury or death." She also violates Commission precedent by relying upon the mere occurrence of injury as a basis for the citation. And her efforts to show that Respondent ignored feasible and effective means of abatement strain credulity given that Respondent

incorporated most of her recommendations and that the remainder of her scheme is premised upon things like clowns and racial profiling.

Since Area Director Anthony Ciuffo is admittedly not "competent" to understand the citation he signed and was not consulted with or involved in the citation as amended, the Secretary's case stands or falls on the shoulders of outside "expert" Paul Wertheimer. But the dubiously-monikered "marshal of the mosh pit" developed his asserted knowledge of crowds by attending rock concerts; the Secretary has not shown a *single* peer-reviewed article that Mr. Wertheimer has published, and his only demonstrated forays into retail are a handful of blog posts concerning *the events at the center of this litigation*. Mr. Wertheimer showed at the hearing that the citation could mean whatever he wanted it to mean, repeatedly using malleable, non-specific "management factors" rather than scientific principles to opine, sometimes in contradiction of his own previous positions, that the Store should have used different barricades, that it should have obtained a written agreement from the police department, and so on. In addition to showing his absence of "expertise," the record supports the conclusion that his testimony is biased: he is still under retainer by Mr. Damour's estate; he derives a majority of his income from expert testimony; he formed his opinions about this case in the days after Mr. Damour's death based upon "preliminary information;" and before the Secretary retained him—and without any facts other than second-hand media reporting—he expressed those opinions in a crude cartoon, representing that Respondent had "screwed" the public.

Second, Respondent's affirmative defenses would defeat the Secretary's case even if she *had* succeeded in carrying her burden of proof. The amended complaint is invalid because: (a) it lacks necessary legal authorization from the Secretary's Area Director, or, for that matter, anyone else within the agency responsible for the administration and enforcement of the OSH

Act, and (b) it added substantial and far-reaching new factual allegations about the nature and geography of the hazard that could not "relate back" to the original citation after the OSH Act's six-month statute of limitations had already passed. The citation also improperly targets a matter of public safety outside OSHA's jurisdiction and within the state's traditional police power. In light of the Store's substantial Blitz Day preparations, moreover, the Secretary's insistence upon additional precautions reads like an impermissible attempt to cite Respondent for failing to take specific *additional* measures.

Further, the Secretary's undue reliance upon Mr. Wertheimer amounts to an improper delegation of government authority to a private individual. And Mr. Wertheimer's muddled attempts to elucidate the citation show that the General Duty Clause is unconstitutionally vague as applied, that the citation is insufficiently particular under Section 9(a) of the OSH Act, and that the Secretary was required to use rulemaking to announce her new position on workplace crowd "hazards." Through the opaque lens of Mr. Wertheimer's testimony, the already ambiguous terms of the citation—terms like "special events anticipated to attract the public"—became even vaguer and less particular. They lack any basis in common sense, leaving employers to guess at the conduct required of them and without fair notice of how to avoid future citations.[1]

II.
THE SECRETARY'S BURDEN OF PROOF

Based on an admittedly "incompetent" Area Director and a demonstrably non-credible expert witness (much less a Compliance Officer who never testified), the Secretary has not

---

[1] Respondent respectfully refers the Court to its concurrently filed Proposed Findings of Fact for a detailed statement of facts relevant to this Post-Hearing Brief.

carried her burden of proving this seminal General Duty Clause citation for exposing Respondent's employees to workplace crowd hazards. *See*, *e.g.*, *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1263 (D.C. Cir. 1973).[2]

To meet her burden, the Secretary must prove each element of the General Duty Clause—that Respondent exposed its employees to a workplace hazard, that Respondent recognized the hazard, that the hazard was causing or likely to cause death or serious injury, and that Respondent had feasible methods to materially reduce a significant risk of harm—by a preponderance of the evidence. *See Trinity Indus. Inc.*, 15 BNA OSHC 1788 No. 89-1791, 1992 WL 190280, at *2 (OSHRC); *Arcadian Corp.*, 20 BNA OSHC 2001 No. 93-0628, 2004 WL 2218388, at *7 (OSHRC); *Pelron Corp.*, 12 BNA OSHC 1833 No. 82-388, 1986 WL 53616 (OSHRC). The pertinent inquiry is whether the Secretary's view of the facts is *more likely than not*, and the Court must consider the weight of all evidence that detracts from the Secretary's case and corroborates Respondent's. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126 No. 78-6247, 1981 WL 18810 at *4 (OSHRC) (asking whether, "based upon all the evidence, the fact[s] asserted by the Secretary" are "more probabl[y] true than false"). While the Secretary's failures of proof are more thoroughly examined in Part III, the basic flaws in her presentation are readily apparent. It is not *more likely than not* that clowns, flavored coffee, and racial profiling can improve the safety of a retail sales event. It is not *more likely than not* that Respondent

---

[2] Area Director Ciuffo at first claimed that he had gained competency in the field of crowd management, *see* Tr. 666, but he later admitted that this was not true (from Tr. 837):

> Q: Is it fair to say when you told me Friday that you felt like you had developed a competency in crowd management over the course of this case, is it fair to say that's not correct?
>
> A: Yes.

recognized a likelihood of serious injury from past incidents that resulted in nothing more than a "paper cut." At the close of the Secretary's case-in-chief, Respondent argued that these elementary deficiencies provided grounds for judgment as a matter of law. Your Honor indicated that she would reserve her decision until she had reviewed the Secretary's extensive deposition exhibits. Now, confident that nothing in the Secretary's exhibit documents establishes her case by a preponderance of the evidence, Respondent renews its motion for judgment as a matter of law.

In addition, the law of this case requires the Secretary to use a particular *kind* of evidence in carrying her burden of proof. Chief Judge Sommer narrowed the scope of discoverable evidence to focus on Respondent's efforts: "(1) to ensure the safe and *orderly entrance of people into the store*, (2) to reinstate order *should the crowd become unruly*, and (3) to protect employees and customers from a crowd that *has become unruly*." *See* Order of March 17, 2010, p. 3 (emphasis added). Judge Sommer's emphasis on crowds that *have become unruly* implicates an important distinction between "crowd management" and "crowd control," rendering the former irrelevant. As the National Fire Protection Association's *Handbook of Fire Protection Engineering* explains, crowd management involves the "beneficial exploitation" of *orderly* crowds whereas crowd control involves a "line of defense" against *unruly* crowds. *See* Govt. Ex. 24, at 3-345.[3] In disregard of Judge Sommer's Order, the Secretary has focused almost exclusively upon issues of crowd management. Her expert, Mr. Wertheimer, outlined the elaborate measures that Respondent should have taken *before* the crowd became unruly. Her cross examination of Mr. Sooknanan focused on the Store's efforts to *prepare* for Blitz Day. She

[3] The Life Safety Code recognizes this basic distinction, *see* Resp. Ex. 12, § A.12.4.1.3 (m), as does the Secretary's expert Paul Wertheimer, *see* Govt. Ex 92, at 20.

has provided no evidentiary basis from which the Court may draw a bridge between Respondent's alleged "crowd management" shortcomings and the unfortunate "crowd control" situation that developed. And, given the rarity of crowd safety incidents and the intuitive and admitted fact that crowds may either remain orderly in the absence of crowd management or become unruly in the presence of crowd management, *see* Tr. 637, 818, the absence of any evidentiary basis establishing a nexus between crowd management and crowd control is compellingly fatal to the Secretary's case.

III.
ARGUMENT

A. Respondent Took Reasonable Safety Precautions

What makes this case most remarkable is not only the lack of precedent or the novelty of the Secretary's theory of crowd "hazards," but also that the Secretary faults Respondent for taking measures that, although reasonable under the circumstances, were allegedly ineffective in retrospect. Area Director Ciuffo stated that he cited Respondent because "[a] crowd knocked people down." Tr. 692. Mr. Wertheimer thinks that Respondent needed to "*effectively* inform employees and customers" and "*effectively* address the anxiety of waiting customers," among other things. *See* Govt. Ex. 92, at 11. And the citation itself indicts Respondent for failing to use "*effective* crowd control procedures and techniques." *See* Complaint ¶ 5. Unlike other General Duty Clause citations that the Commission has upheld, in which the cited employer took no relevant precautions, *see, e.g.*, *Gearhart-Owen Indus., Inc.*, 10 BNA OSHC 2193, 1982 WL 22715, at *7 (OSHRC) ("no precautions were taken"); *Aro, Inc.*, 1 BNA OSHC 1453, 1973 WL 4317, at *2 (OSHRC) (finding that the defendant "took no precautions against injury in this circumstance"), Respondent acted at all relevant times with an abundance of caution based upon years of experience in the retail industry.

1. Respondent's Safety Precautions Were Well-Tailored to Prevent Known Risks

Given the available information and the lack of actual or industry recognition, which is discussed in Part III.B.2, *infra*, Respondent's preparations for Blitz Day 2008 were well-calculated and should have been more-than-sufficient to provide for the safety of customers and employees.

At the company level, Respondent trained new employees in safe practices, including the prevention of slip, trip, and fall accidents, *see* Govt. Ex. 148, 220-22, and this apprised employees of the basic elements of crowd management, *see* Part III.A.4, *infra*. Further, Respondent's Emergency Procedures Manual provided "how-to" instructions on addressing a myriad of potential emergencies. *See* Resp. Ex. 30, at 11.[4] And its Company intranet contained a wide variety of additional safety materials. *See generally* Resp. Ex. 136-38. Vice President of Asset Protection Monica Mullins testified at deposition that the home office began distributing *Blitz Day-specific* guidance materials several weeks before the event. *See* Govt. Ex. 148, 154-66.

At the store-level, Valley Stream Store Manager Steve Sooknanan drew upon the home office's guidance materials and his own sixteen years of retail experience to prepare for the event. In accordance with Company policy, he had "ultimate" responsibility for the Store's Blitz Day planning. Govt. Ex. 148, at 158. Even from Mr. Wertheimer's perspective, this made sense because "people in retail" have "better" information than anyone else about "the desirability of

---

[4] The Emergency Procedures Manual was readily-accessible to managers and hourly employees at "multiple locations" in individual stores. *See* Tr. 986-87. Mr. Wertheimer admitted that the EPM "may have been" an adequate safety plan, and his only stated reservations came from an erroneous understanding that the Store's only copy was "in the trunk of [Mr. D'Amico's] car." Tr. 538.

their products" and "the way in which people might react to them." Tr. 476-77. Mr. Sooknanan began planning "several weeks" in advance, and he held weekly meetings with his management team. Tr. 998-1000. Among other things, he directed employees to take the following precautions:

- Walk the line on Blitz Day and speak with customers;
- Tell customers to walk and enter the store in an orderly manner;
- Answer questions, assure customers that the Store had enough products, and provide information on the location of products;
- Stand out of the crowd's way as it entered;
- Monitor the vestibule and the store generally to prevent and clean up slip, trip, and fall hazards;
- Contact the police before Blitz Day and confirm their presence for the opening;
- Order barricades and place them forty feet in front of the entrance to create a buffer zone.

See Tr. 1111-13. Mr. Sooknanan's efforts bore a close, logical relationship to his past experiences. For example, he made staffing and equipment decisions on an assumption that the crowd would grow at 12-13% "based on [the Store's] sales trend for the year." (which seemed sufficiently cautious not only because there was no indication that the crowd would be any bigger than this but also because the heavily-reported nationwide recession made it reasonable to expect that crowds might actually *shrink*). *See* Tr. 997-98. He directed the placement of barricades *in front* of the entrance so that employees could "completely open" the doors and customers would not "feel as though" they had to rush, which was perceived to have contributed to the problem of customers "bumping against" the door in 2007. *See* Tr. 1004-05, 1047. And he instructed employees to clear debris to prevent customers from slipping and falling, which was an "every day [risk] in the retail business." *See* Tr. 1029, 1112. Importantly, Mr. Sooknanan eschewed techniques that had not worked in the past. He refrained from using carts to demarcate the line, for example, because this had caused a "tumultuous environment" in previous years. *See* Tr. 992-93. He refrained from using maps or informational pamphlets

because they had "posed" a "slip, trip and fall hazard" during a previous event. *See* Tr. 993-94. And he rented barricades, as opposed to using ropes and cones (as the Store had done in the past), as an extra measure of protection against the "minor events" of 2007 that had resulted in Mr. Rice's paper cut. *See* Tr. 269, 999.

In addition, the Safety Committee took strategies from The Wire and executed them within the Store. *See* Tr. 982. Market Asset Protection Manager Sal D'Amico held weekly calls with Asset Protection personnel to prepare them for the event. *See* Tr. 274-75. He developed market-level safety goals by operationalizing "actionable" items from company-level guidance documents and by drawing upon his own four years of Blitz Day experience. *See* Tr. 179, 230-32. He also contracted for security guards to be present for the opening. *See* Tr. 69-70; Govt. Ex. 154. And he developed a "Market 45 Action Plan" based upon practices that had worked without "any issues" at Respondent's Farmingdale store in 2007. *See* Govt. Ex. 2; Tr. 268. Asset Protection Coordinator Julius Blair and Asset Protection Manager Andrew Gilroy positioned barricades to demarcate the waiting area, and they hung a sign to indicate where customers should line up. Tr. 1053, 1062-63; *See* Govt. Rebuttal Ex. 1, at 14. Videos show that customers lined up as requested. *See* Govt. Ex. 34(a).

2. Respondent Complied with a Majority of the Secretary's Recommended Abatement Measures

Indeed, despite the absence of evidence that the Secretary's measures are reproducible or effective, *see* Part III.B.4, *infra*, Respondent *actually complied* with a majority of them on Blitz Day 2008. Throughout the hearing, the Secretary's case seemed premised on an erroneous assumption that Respondent did very little to prepare for Blitz Day 2008. Area Director Ciuffo stated that "what [Respondent was] cited for was [it] didn't plan and [it] didn't train [its] employees." *See* Tr. 680. Mr. Wertheimer had a similarly-flawed view of the facts,

summarizing Respondent's precautions as "a barrier, and that's pretty much it." *See* Tr. 378. Yet, a closer comparison between the Secretary's recommendations and Respondent's careful preparations reveals a substantial overlap that undercuts any basis for the citation. As Exhibit 1 demonstrates, Respondent actually complied with a majority of the recommendations from the citation and Complaint, as well as those from Mr. Wertheimer's expert report and the Secretary's after-the-fact November 17, 2009 Fact Sheet.[5] Respondent also complied with a number of recommendations that the Secretary introduced at trial. For example, Mr. Ciuffo initially asserted that Respondent had failed to develop a plan with a "who, what, where, when, how, [and] why," but then acknowledged that Respondent's Market 45 Action Plan actually addressed each of those questions. *See* Tr. 682-86. Mr. Wertheimer and Mr. Ciuffo faulted Respondent for not having between two and ten walkie-talkies, *see* Tr. 601-02, 837, but the record demonstrated that Respondent had at *least* this many.[6] Mr. Wertheimer and Mr. Ciuffo faulted Respondent for not having between eight and eighteen crowd managers monitoring the line, *see* Tr. 588-90, 826, but the record demonstrated that it had fifteen employees performing this task, *see* Tr. 103.

---

[5] *See* Crowd Management Safety Tips for Retailers, *available at*: http://www.osha.gov/OshDoc/data_General_Facts/Crowd_Control.pdf. This document was not admitted as a separate exhibit pursuant to the Court's Order of June 21, 2010. However, the Court is free to consider it as a public record that is "not subject to reasonable dispute" under the canons of judicial notice. *See* FED. R. EVID. 201.

[6] Mr. Rice, Mr. Thompson, and Mr. Calhoun each specifically testified that they had walkie-talkies on Blitz Day 2008. Tr. 173, 895, 924. Also, all people greeters, managerial employees, hourly supervisors, cart pushers, Electronics and Lawn and Garden employees, back room supervisors, and Asset Protection employees had walkie-talkies. Tr. 223, 1106, 1077, 1107. In addition, there were several base stations throughout the Store that employees could use to contact a manager. Tr. 1107.

3. Respondent Made Reasonable Efforts to Secure a Police Presence

Respondent also made reasonable efforts to secure a police presence for Blitz Day 2008. Mr. Sooknanan testified that he asked Mr. Blair to contact the Nassau County Police Department and "ensure that [the Store was] going to have police presence" for the opening. Tr. 999. Mr. D'Amico testified that he asked his Asset Protection team to do the same. *See* Tr. 239. Mr. D'Amico explained that he had successfully obtained a police presence in prior years based upon a single call, *see* Tr. 271, and that an officer had told him that the Store "should contact the local precinct and give them a call" to obtain coverage in 2008. *See* Tr. 238. Further, Mr. Blair testified that he called the police on two occasions before Blitz Day and officers assured him they would "be there when the store is open." *See* Govt. Ex. 145, at 188-89, 193-94. When the police arrived at the Store on Blitz Day 2008 and behaved much as they had in previous years, this gave Respondent a reasonable expectation that it had done everything required to secure their presence for the opening. *See* Tr. 1110. After the police abruptly left, Respondent made several additional calls to notify them of the dangerous situation and request that they return, *see* Tr. 1017, 1094; they only returned in response to the death of Mr. Damour, Tr. 174, 1021-22.

4. The Secretary's Criticism of Respondent's Good Faith Efforts is Unfounded

In light of the above, the Secretary's attempts to minimize Respondent's efforts are unconvincing. She takes considerable pains to show that Mr. D'Amico was inattentive to Company guidance, first of all, and that his Market 45 Action Plan was inadequate. *See* Tr. 217-18. Yet, Mr. D'Amico specifically "put into play" the "actionable" items from the Company's guidance materials, *see* Tr. 230, and his efforts must be viewed in conjunction with the Store's other efforts. Mr. *Sooknanan* had "ultimate" responsibility for Blitz Day safety planning, not Mr. D'Amico, *see id.* at 158. Along with the Store's Safety Committee, Asset Protection

Coordinator Julius Blair, and other managerial and non-managerial employees, Mr. Sooknanan took all of the substantial measures outlined above and in Exhibit 1.

The Secretary's other attacks are equally misplaced. For example, she claims that Respondent needed a "chain of command," *see* Tr. 369, but her employee-witnesses testified that they knew Mr. Sooknanan was the "overall" manager, *see* Tr. 12, 68, 125, 915. She claims Respondent needed a written agreement with the police, *see* Tr. 392, but this could not have changed the opinion of the police that the situation was "hopeless" or prevented them from leaving to attend to another situation they deemed more pressing, *see* Tr. 278-80, 1018. And the presence or absence of a written agreement was completely irrelevant given that the police actually responded to the Store's oral requests. *See* Tr. 1015. She claims that Respondent used the wrong type of barricades, Tr. 380, but she concedes that it is "possible" the "crowd could [have] line[d] up without barricades at all," *see* Tr. 569, and that the barricades it used were designed for "construction sites and roadways," *see* Tr. 379.[7] She claims that Respondent needed to conduct a "risk assessment," but Mr. Sooknanan did just that, relying upon his sixteen years of experience and precise crowd-size estimates from past years. *See* Tr. 610, 997-1000. Mr. Wertheimer admits that a "risk assessment" would have predicted a crowd that "on its own"

---

[7] Presumably, a barricade meant to protect construction workers from vehicular traffic should be sturdy enough to protect retail employees from (lighter and slower) pedestrian traffic. The Secretary's nit-picking about the height of Respondent's barricades also stands out as an impermissible attempt to use the General Duty Clause as a specification standard. While Mr. Wertheimer contended the barricades should have been "at least 40 inches high," he was unable to ground this figure in ANSI guidelines or industry customs. *See* Tr. 380, 553. And Mr. Fitch testified that "not everyone could step over [the] barricade[s]." *See* Tr. 87. Mr. Wertheimer's qualms with the height of the sign on the exterior of the Store showed a similar tendency toward specification. Without citing any guidelines or customs, he claimed that the sign should have been between twelve and fourteen feet above the ground and visible from forty feet away. Tr. 562-64.

was "generally reasonable," Tr. 503, and that crowds may pose hazards that "would not be obvious" to lay persons, Tr. 508. The Secretary's general theme is that Respondent needed *more*—more walkie-talkies, more training, etc. But she has no evidence to support these claims. *See* Part III.B.4, *infra*. Neither she nor her expert has considered the situation *ab initio* in determining what was reasonable. *See* Tr. 494-95. Instead, they engaged in an irrelevant exercise of twenty-twenty hindsight to determine what Respondent could have done with perfect information and unlimited resources after they "already knew the facts." *See* Tr. 499-500. And even then, Mr. Ciuffo and Mr. Wertheimer could not agree on the specific measures that Respondent should have taken, *see* Part III.B.4.a, *infra*.

The Secretary essentially attacks Respondent for failing to provide training by the name of "crowd management." Throughout the hearing, she repeatedly asked employees about their training "in crowd control or crowd management" while discounting their training in "slip, trip and fall avoidance" or other safety topics. *See* Tr. 1022-28. But while Respondent may not have used the Secretary's terminology, it *did* provide much training and instruction relevant to the Secretary's crowd management "techniques." Several employees testified about conduct that was clearly tailored, not only to the "goal" of "protect[ing] people who gather in crowds or who assemble in crowds," *see* Tr. 318-19, but also to the goal of protecting *employees*. Mr. Fitch testified that he patrolled the line on Blitz Day 2008 on instructions to "tak[e] carts from customers, kee[p] the customers in an orderly line . . . and just try[] to keep attitudes in check." *See* Tr. 87. He also stated that employees were supposed to come back inside before the opening and "be cautious about not getting caught up." *See* Tr. 86-87. Mr. D'Amico testified about "safety" training that covered "accidents and slips, trips and falls." *See* Tr. 180, 189. He also testified that he understood to walk the line and manage the waiting crowd on Blitz Day 2008.

See Tr. 210.[8] And despite the Secretary's differing "terminology," Mr. D'Amico testified that "crowd management" came under the Store's definition of "safety" and was "something that [employees] were trained and had resources available for." *See* Tr. 261-62. Mr. Thompson testified that Mr. Sooknanan told him to stay out of the entering crowd's way, and that he recognized his responsibility to answer customers' questions and "direct them where to go." *See* Tr. 883. Mr. Calhoun testified that, since at least 2005, his responsibilities included "mak[ing] sure the line [was] straight" and that there was "no rowdiness." *See* Tr. 901. Finally, all of Respondent's employees were trained to call 911 in an emergency, and they testified that they understood this training. *See* Tr. 101, 165, 262, 895, 923, 982.

The Secretary's inability to show that Respondent's precautions were unreasonable is fatal to her case. To carry her burden of establishing a violation of the General Duty Clause, the Secretary "must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate." *See U.S. Postal Serv.*, No. 04-0316, 2006 WL 6463045, at *8 (OSHRC); *Alabama Power Co.*, 13 BNA OSHC 1240 No. 84-357, 1987 WL 89119 (OSHRC). In *Postal Service*, the Secretary provided some evidence that her recommended ANSI-compliant vests would improve employee safety; however, she neglected to "sho[w] that the reflective garments or vests already provided by the Postal Service were inadequate such that they had to be modified or even replaced." *See U.S. Postal Serv.*, 1987

[8] Mr. D'Amico testified that he knew he was supposed to "dea[l] with the people that were outside, letting people know what type of merchandise we have, where we have it, handing out maps if applicable. Just talking to the crowd . . . seeing what they're there to do, letting them know when the doors open . . . [Telling them to] walk, [and that] we have enough product." *See* Tr. 210.

WL 89119, at *9. Here, likewise, the Secretary ignores or unduly downplays (but does not disprove) the effectiveness and extensiveness of Respondent's safety precautions.

B. The Secretary Has Not Made a *Prima Facie* Showing that Respondent Violated the General Duty Clause

Given Respondent's extensive precautions, it is not surprising that the Secretary has failed to make out a *prima facie* violation of the General Duty Clause. She has not shown that Respondent exposed its employees to a workplace hazard, that Respondent recognized the hazard, that the hazard was causing or likely to cause death or serious injury, or that Respondent had feasible and effective methods to materially reduce a significant risk of harm.

1. Respondent Did Not Expose Employees to a Hazard

The Secretary failed to meet her burden of demonstrating *employee* exposure within a recognizable "zone of danger."

a. The Secretary Has Not Shown that Respondent Exposed Employees to the Alleged Hazard at the Cited Location or Elsewhere

Since the location of the alleged hazard is "East 77 Green Acres Mall," *see* Complaint ¶ 5, the Court's inquiry about employee exposure is properly limited to events at the Store and, as discussed below in Part III.B.1.b, to a "zone of danger" within the Store. *See, e.g.*, *D.T. Constr. Co.*, 19 BNA OSHC 1305 No. 99-0147, 2000 WL 1664948 (ALJ) (explaining that the exposure inquiry should focus on whether employees were in the "zone of danger" where the alleged hazard posed an unacceptable risk of injury). But the Secretary has provided insufficient evidence to establish employee exposure at this critical location. In her opening statement, the Secretary claimed that an employee was "sliced" at the Store in 2007. *See* Tr. 20. In reality, however, Mr. Rice testified that he received a non-recordable injury "akin to a paper cut," which he treated with a Band Aid before continuing to work. *See* Tr. 167, 996-97. Other employees

testified that crowds had pushed or run to a lesser extent on prior Blitz Days, but they did not testify that crowds had pushed or struck, much less asphyxiated, *employees*. Apart from these few incidents, the Secretary's only Store-specific testimony about relevant employee experiences concerned Blitz Day 2008. But aside from Mr. Damour's death, which the Secretary concedes is irrelevant, Tr. 21, 813, none of these experiences resulted in injury. Dennis Fitch testified that he emerged "unscathed" from the vestibule. *See* Tr. 106. Likewise, Dennis Smokes testified that he promptly caught his breath and continued working after customers pinned him in the vestibule. *See* Govt. Ex. 151, at 109-110.

Given the dearth of evidence showing employee exposure at the Store, the Secretary predominantly relies upon incidents at other stores, as well as the distinguishable experiences of *customers*. But prior to 2008, only one recorded injury had occurred to an employee at *any* of Respondent's thousands of stores under even arguably similar circumstances. *See* Govt. Ex. 127, at 9 (which describes an alleged Blitz Day injury, unsupported by any extrinsic testimony or evidence as to the alleged facts, in a vestibule to an employee at a store in Bedford, Indiana). The remainder of the Secretary's bulky CMI exhibit is even more uninformative. The Secretary provided no eyewitness testimony or other direct evidence to explain the relevance of these documents, which, at best, deal with customer or crowd exposure, not employee exposure. *See, e.g.*, Govt. Ex. 127, at 94 ("cl's relatives tried to keep cl. from going into the store because she has lung cancer and needed oxygen when this happened"). And the Secretary's cumulative video exhibits are equally defective in establishing employee exposure. Throughout the hearing, she repeatedly showed videos of *customers* rushing into stores, *customers* falling down, and *customers* complaining to reporters. *See* Govt. Ex. 25-35, 128, 143. On their face, these accounts do not show *employees* being "struck" or "asphyxiated" by crowds, and the Secretary

did not offer any testimony to the contrary. In her opening statement, finally, the Secretary accused Respondent of failing to "preplan how [its] customers will flow through the store" and neglecting to "insure . . . customer safety." *See* Tr. 23-24. But since employees do not "gather in crowds" or "flow through stores," the Secretary's suggestions as to customer safety are unavailing in establishing employee exposure.

The Secretary's conflation of customer and employee exposure is improper because the Secretary must show that Respondent "actual[ly]" exposed employees to the hazard, or that employees' "access to the hazard was reasonably predictable." *See S. Masonry Constr. Co.*, 21 BNA OSHC 2208 No. 06-1792, 2007 WL 1518977, at *2. Thus, in *E. Smalis Painting Co.*, the Commission rejected the Secretary's "reliance on job classification to establish overexposure [to lead]" and required "direct evidence" that individual employees worked in the area of exposure at the time of exposure. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553 No. 94-1979, 2009 WL 1067815, at *6 (OSHRC); *see also Kastalon, Inc.*, 12 BNA OSHC 1928 No. 79-5543, 1986 WL 53514, at *4 (OSHRC) (rejecting the Secretary's efforts to show employee exposure to carcinogens based upon extrapolations from animal testing). Here too, the Secretary makes inferential leaps. While employee injuries can sometimes suffice to prove employee exposure, *see*, *e.g.*, *Townsend Tree Servs. Corp.*, 21 BNA OSHC 1356 No. 04-1157, 2005 WL 2339316, at *6, the Commission has never allowed *non*-employee injuries to show employee exposure. Customers and employees have different motives (for customers, to shop and obtain sales items with dispatch; for employees, to service customers courteously and expeditiously), as well as different fields of movement (for customers, the sales floor; for employees, who do not need to access the store as part of any crowd, only those parts of the store that are necessary to perform

their jobs). Most importantly, Respondent affirmatively *told* its employees to "get out of the way" of oncoming crowds of customers. *See* Tr. 883, 1088.[9]

Ultimately, the alleged employee experiences on record[10] do not establish employee exposure because "freakish and unforeseeable" injuries do not "trigger statutory liability under the general duty clause," *see Tuscan/Lehigh Dairies*, *Inc.*, 22 BNA OSHC 1870 No. 08-0637, 2009 WL 3030764, at *14 (OSHRC); "random antisocial acts which may occur anywhere" are not "recognized" as "characteristic of employment," *see* OSHA Interpretation Letter, Dec. 10, 1992. Given the millions of customers who enter and exit Walmart's 4,200 stores on a daily basis and the millions of employees who interact with them, *see* Govt. Ex 91 ¶ 4; Walmart Corporate Fact Sheet, *available at*: www.walmartstores.com/download/2230.pdf, the few recorded instances of employee injury are distinguishable as outliers from a generally-safe status quo. The chance of injury that is established on the record—one or two in untold millions—is nothing if not "freakish." And as Part III.B.2.c explains, the events of Blitz Day 2008 sprang from unpredictable extrinsic factors.

b. The Secretary Has Not Shown that Employees Were in a "Zone of Danger"

As shown above, the Secretary has failed to show employee exposure in general, in the Valley Stream Store, or in Respondent's other stores. The Secretary has also not established that

---

[9] Dennis Fitch testified that non-managerial employees were not even "allowed to stay in the vestibule" during the Store's opening. *See* Tr. 94.

[10] Indeed, the CMI materials which the Secretary fought so hard to introduce into the record underscore the non-fungibility of customer and employee exposure—there is only one incident of alleged injury to an employee in a vestibule under purportedly similar circumstances among the dozens of other records that the Secretary included in a highlighted binder after Your Honor instructed her to "go through each document" in her original exhibit and locate the relevant information. *See* Tr. 1156; Govt. Ex. 127.

employees were within an ascertainable "zone of danger." Commission doctrine requires a well-defined hazard that affects employees in predictable places and a predictable manner. The Secretary must demonstrate that employees were in the "zone of danger" where the hazard presented an unacceptable risk of injury. *See D.T. Constr. Co.*, 19 BNA OSHC 1305 No. 99-0147, 2000 WL 1664948 (ALJ). A failure of proof is particularly likely where the hazard depends upon human behavior, which is "not always amenable to control" like machines or other traditional subjects of OSHA regulation. *See Megawest Fin., Inc.*, 17 BNA OSHC 1337 No. 93-2879, 1995 WL 383233, at *9 (OSHRC).[11] Thus, in *Barnhart*, the Commission overturned a fall-hazard citation because the "zone" of exposure was a "short run of guardrail" that rational employees were likely to avoid. *See Barnhart, Inc.*, 20 BNA OSHC 1710 No. 03-0352, 2004 WL 235331, at *3 (OSHRC). In *RGM Construction*, the Commission rejected a similar citation where employees "had ample room" to avoid the alleged fall hazard. *See RGM Constr. Co.*, 17 BNA OSHC 1229 No. 91-2107, 1995 WL 242609, at *6 (OSHRC).

Here, as in the above cases, the Secretary has failed to show that employees were within an ascertainable "zone of danger." According to the citation, the hazard existed throughout the *entire store*. *See* Complaint ¶ 5 (listing the Store's address as the location of the hazard). The Secretary presumably believes this construction is defensible because crowds are mobile. Yet, by defining the "zone of danger" so broadly, she ignores the case law. Unless the Commission requires a "zone of danger" that is narrower than the entire workplace, the Secretary can sidestep

[11] As Mr. Wertheimer quipped, "it's not pinballs that we're dealing with." *See* Tr. 520.

her burden of proof and ignore Judge Sommer's October 17, 2009 Order.[12] Further, a "zone" that encompasses the entire workplace is impermissible. *Cf. Union Camp Corp.*, 1 BNA OSHC 3248 No. 2367, 1973 WL 4281, at *3 (OSHRC) (finding that "the citation and complaint" were inadequate because they "merely advise[d] the respondent that somewhere in its immense plant . . . there is some violation of the standard"). The danger of "crowd crush," "crowd craze," or "crowd trampling" is unlikely to exist in the same manner throughout the entire store unless we presume that all areas of the store and all sales items are equally popular, and that a "crowd" can be as few as three people (as Area Director Ciuffo incredibly testified). Tr. 767. Area Director Ciuffo conceded that Respondent could avoid citation by shutting its employees in a back room. Tr. 781. He also conceded that employees were "less likely" to be struck if they stood out of the crowd's way as Respondent had instructed. Tr. 839-840. But his testimony did not suggest a coherently-defined "zone of danger." *See* Tr. 779 (conceding that the citation "could" be read to cover the "entire interior of the store" but explaining that he would instead concentrate on the area "just beyond the vestibule" for an unspecified distance). Given the nebulous, undefined, and inconsistent definition of the zone of danger in the mind of the Area Director, this citation is fatally flawed on its face.

2. The Secretary Has Not Established a Recognized Hazard

The Secretary has not shown actual or industry recognition of the alleged hazard; rather, the events of Blitz Day 2008 stemmed from tragic, unforeseen circumstances. Moreover,

---

[12] Judge Sommer implied a limited zone of danger by narrowing the scope of discoverable evidence to focus on Respondent's efforts: "(1) to ensure the safe and orderly entrance of people into the store, (2) to reinstate order should the crowd become unruly, and (3) to protect employees and customers from a crowd that has become unruly." *See* Order of March 17, 2010, p. 3.

whatever hazard may have been present was to crowds of customers, and Respondent's precautions were more-than-sufficient given the knowledge and experience of Respondent and its industry.

a. Respondent Did Not Have Actual Recognition of the Alleged Hazard

First, the Secretary's claim that Respondent had *actual* recognition of the alleged hazard rings hollow. At the Store level, management and employees alike saw Blitz Day as an exciting occasion, and they approached it with anticipation rather than trepidation. *See* Govt. Ex. 144, at 149 (describing Blitz Day as "fun" and explaining that employees went to the front of the Store out of "excitement, the hype of Blitz"). Although minor pushing was a "normal thing" on prior Blitz Days, *see* Tr. 904, it did not raise any knowledge or anticipation of a hazard resulting in serious injury.[13] The Secretary's employee-witnesses all testified that they were not afraid, "were not concerned for [their] own safety," and "did not expect that any employee was going to be injured," even when the size and nature of the crowd were fully apparent in the minutes before the opening on Blitz Day 2008. *See* Tr. 106, 174, 896. Employee Al Calhoun, called to testify by the Secretary, brought his family to the event and testified that he "would not have let [them] wait in line if [he] thought that anyone would be injured . . . when the store was opened." *See* Tr. 926. Indeed, neither the size nor the behavior of past crowds had given any indication that the 2008 crowd would turn uniquely unruly. According to Justin Rice, prior crowds had been "minor league" in comparison to the one that assembled on Blitz Day 2008. *See* Tr. 172.

---

[13] The Store's acknowledgement that customers sometimes push does not support hazard-recognition in light of Mr. Wertheimer's contention that subways do not need elaborate crowd management plans given the "repetitious" training "of every day life," which provides notice that riders "are going to be struck and pushed and pressed against other people" when they enter a subway car." *See* Tr. 555.

Store Manager Steve Sooknanan and Market Asset Protection Manager Salvatore D'Amico both testified that they had never seen a crowd so large or unruly in their lives. *See* Tr. 278, 988. And even in Mr. Wertheimer's estimation, the Store should have expected a crowd that "on its own" was "generally reasonable" based upon past years' data. Tr. 503.

Importantly, no prior serious or even recordable employee injury had ever occurred at the Store. While the Secretary relies upon Justin Rice to show notice, he testified about a non-recordable "paper cut." *See* Tr. 167.[14] In a similar vein, Alton Calhoun testified that some *customers* had fallen in previous years but had "pop[ped] right back up" without any sign of injury. *See* Tr. 924. And previous years' property damage was also dissimilar. While the front doors had come off their rails from customers involuntarily "bump[ing] against" them, they had never come entirely out of their frame. *See* Tr. 152, 201, 995, 1038.[15] Customers had never pushed the doors before they opened, let alone intentionally "kicked down" the Store's security devices as they did in 2008. *See* Tr. 1021, 1038, 1110.[16]

At the company-level, there is comparable evidence of non-recognition. The Secretary's CMI exhibit shows just one employee who was injured on a prior Blitz Day in a purportedly similar manner. *See* Govt. Ex. 127, at 9 (describing an employee who was allegedly "pushed down and trampled" when she opened the doors on Blitz Day but who kept working despite

---

[14] Mr. Rice sustained this "paper cut," not from "being struck," but from glass that fell from the vestibule window after one rogue customer threw a boot through it. *See* Tr. 924, 996.

[15] Mr. Rice testified that he "still didn't think that the doors were going to come off the hinges" when the Store opened on Blitz Day 2008. *See* Tr. 153.

[16] In light of this new evidence of *intentional* violent behavior, Respondent renews the proffers of evidence which Your Honor excluded in her June 21, 2010 Order granting the Secretary's Motion in limine to Exclude Evidence Regarding Workplace Violence.

having "hurt her back."). No testimony or other direct evidence was offered by the Secretary to explain the circumstances of that incident. Walmart's Vice President of Asset Protection, Monica Mullins, testified that she was unaware of this or any other crowd-related injuries to employees on prior Blitz Days. *See* Govt. Ex. 91. And not for lack of attentiveness. The Company had identified common accident types (such as slip, trip, and fall accidents) using extensive data collection and analysis, and had made them the focus of ongoing safety initiatives. *See* Govt. Ex. 148, at 74-75, 148. The Company had also prepared a safety plan for all imaginable scenarios in its Emergency Procedures Manual.[17] But while it included emergencies as diverse as landslides and lost children, and accounted for the possibility of workplace violence, it contained absolutely no reference to unruly crowds. *See* Resp. Ex. 30, pp. 11-12.

In *Constructural Dynamics*, Your Honor instructed that "[r]ecognition that 'anything can happen' is not sufficient to establish actual recognition of a hazard under section 5(a)(1)." *See Constructural Dynamics, Inc.*, 22 BNA OSHC 1942 No. 07-0976, 2008 WL 7243696, at *5. Instead, Your Honor required the Secretary to show "at a minimum, that employees are exposed to a 'significant risk of harm.'" *See id.*; *Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96, 104 (2d. Cir. 1981); *Kastalon, Inc.*, 1986 WL 53514, at *4. In that case, although the Secretary had cited the concrete-producer-defendant for the hazard of "pneumatic leak testing," she only succeeded in demonstrating that the employer recognized a more serious hazard: "pneumatic *integrity* testing." *See Constructural Dynamics,* at *3. Your Honor faulted the Secretary for "attempting to demonstrate that the hazard presented by a firecracker is recognized

[17] Mr. Wertheimer conceded that the EPM "might have been" an adequate emergency plan. Tr. 538. His charitable concession is especially welcome in light of his total lack of cognizable safety expertise reflected by any OSHA safety training or credentials such as a Certified Safety Professional (CSP).

by adducing evidence that the employer recognized the hazard presented by a stick of dynamite." *Id.* at *5. Here, likewise, the Secretary's failure to provide evidence of relevant, serious injuries to employees leaves her theory of actual recognition dependent upon "anything can happen" logic. And she repeats the same faulty reasoning-by-analogy—this time trying to make dynamite ("asphyxiation," "crowd trampling," etc.) from a firecracker ("paper cuts," doors that came off their hinges, and customers who "popped back up"). Occasional paper cuts do not show recognition of a hazard presenting "significant risk of harm" to employees, especially when contextualized amidst the millions of occasions on which customers enter and exit stores *without* injuring employees or each other.

b. The Retail Industry Did Not Recognize the Alleged Hazard

Further, as the Secretary concedes, the retail industry had not recognized the alleged hazard in November 2008. *See* Tr. 711. The only national consensus standard to have discussed crowd management, the National Fire Protection Association's Life Safety Code, had expressly excused retail establishments from its sections necessitating the use of crowd managers. *See* Tr. 722-23; Govt. Ex. 22 and 23, at § 13.7.6. As Area Director Ciuffo noted at the hearing, the Life Safety Code only requires crowd managers for "assembly occupancies," and the Store was not an "assembly occupancy." *See* Tr. 722-23. The Workplace Safety Committee of the Retail Industry Leaders Association (RILA), designed to develop industry benchmarks and to anticipate legal compliance issues, had never even *discussed* safety hazards relating to crowds. *See* Tr. 1131-32. Its membership, comprised of "the top safety executives" from member companies, had not identified this issue despite discussing "employee safety" on weekly calls. *See* Tr. 1131.

The absence of industry recognition is particularly significant here because General Duty Clause citations are *typically* dependent upon such recognition. A basic IMIS search reveals over 13,000 General Duty Clause citations anchored to industry consensus standards.[18] This makes perfect sense because the absence of a specific OSHA standard means that the employer needs some *other* concrete basis for recognizing the hazard. Your Honor has expressly endorsed this principle. *See Fabi Constr., Inc.*, 21 BNA OSHC 1595 No. 04-0776, 2006 WL 1302526, at *4 (ALJ) (rejecting an expert's testimony about the custom for construction contractors to "always follow" blueprints as "an invitation to disaster" that was "clearly contrary to the intent of the General Duty Clause."). Based upon the Store's prior experience, reinforced by RILA and the Life Safety Code, recognition of a crowd hazard to employees could hardly be more opaque.

c. The Events of Blitz Day 2008 Stemmed from Unforeseen Circumstances

Ultimately, instead of being caused by commonplace crowd dynamics or ineffective Store practices, the events of Blitz Day 2008 were the result of tragic, unforeseen circumstances. Crowd disasters are incredibly rare. *See* Fruin, John J., The Causes and Prevention of Crowd Disasters (1993), *available at*: www.crowddynamics.com (finding that crowd disasters are "rare" and that "most" are "caused by personal carelessness").[19] Here, the crowd became unruly and

---

[18] This result was obtained by entering the query "ANSI OR ASME OR NFPA" into the General Duty Standard search function in OSHA's IMIS database, which is available at: http://www.osha.gov/pls/imis/generalsearch.html. Since IMIS only allows users to search in ten-year spans, Respondent's counsel added the information from ten-year searches beginning in 1972 and ending with the most recent records.

[19] Mr. Fruin's findings are particularly relevant since Mr. Wertheimer relied upon his expertise both at the hearing and in his expert report. *See* Tr. 619; Govt. Ex. 92, at 12. Further, other studies support his conclusions. *See, e.g.*, McPhail, C., "Crowd Behavior," Blackwell Encyclopedia of Sociology, 881 (2007) ("violence is the exception rather than the rule at

[Footnote continued on next page]

caused injury as a result of atypical triggering factors. Customers arrived in unprecedented numbers. *See* Tr. 278, 988. They fought each other in line, *see* Tr. 278, rushed from their cars to the entrance, *see* Tr. 926, and behaved in an unusually unruly manner, *see* Tr. 1012. This behavior took Mr. Sooknanan by surprise because the Store had "never had issues on the line before." *See id.* One associate helped his family members to the front of the line, which "enraged" the crowd. *See* Govt. Ex. 145, at 15. Despite their presence at prior Blitz Days and confirmation that they would be present for the Store's 2008 opening, the Nassau County Police Department claimed that crowd control was "not in their job description," *see* Tr. 105, and then left the Store while declaring that the situation was "hopeless," *see* Tr. 279.[20] Despite entering a contract for services, one of two security guards whom the Company hired for the event did not arrive until after the Store's opening. *See* Respondent's Supplemental Response to Secretary's Interrogatory 22, at 7, May 3, 2010. These factors undermine the Secretary's citation because "[h]azardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program." *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); *see also* OSHA Interpretation Letter, Dec. 10, 1992 (stating that "random antisocial acts which may occur anywhere" are not "recognized" as "characteristic of

---

[Footnote continued from previous page]
most gatherings"); Martin AW, McCarty JD, McPhail, C., *Why Targets Matter: Toward a More Inclusive Model of Collective Violence*, 74 American Sociological Review 821, 831 (finding that an increase in crowd size yields an increased probability that "some private property will be destroyed" but no "proportionately greater violence against either authorities or civilians"). Respondent asks the Court to take judicial notice of these materials, which are in the public arena.

[20] Of course, it was not "hopeless," as evidenced by the police gaining immediate control of the crowd when they returned in response to 911 calls related to Mr. Damour. *See* Tr. 174, 1021-22.

employment"); *Tuscan/Lehigh Dairies*, *Inc.*, 22 BNA OSHC 1870 No. 08-0637, 2009 WL 3030764, at *14 (OSHRC) ("freakish and unforeseeable" events do not "trigger statutory liability under the general duty clause"). Respondent is entitled to assume, as it did on Blitz Day 2008, based on interactions with millions of customers at thousands of Blitz Days, that its customers will not behave in an unruly, anti-social manner sufficient to endanger its employees with death or serious physical harm.

3. The Alleged Hazard Was Not Likely To Cause Serious Injury or Death

The General Duty Clause is only meant to address those hazards not already-incorporated in specific OSHA regulations that are "causing or likely to cause serious injury or death." *See* OSH Act, § 5(a)(1). But the Secretary has not shown a likelihood of serious injury or death in this case because the injuries on record are overwhelmingly less-than-serious and because, contrary to the Secretary's policy, the hazard is linked almost exclusively to the occurrence of death or injury.

First, the injuries on record are not serious. Aside from Mr. Damour's death, which she concedes is irrelevant, *see* Tr. 21, 813, the Secretary has not presented testimony about a single serious injury. Justin Rice testified that he received a "paper cut" in 2007. *See* Tr. 167. Dennis Fitch testified that he emerged "unscathed" after customers allegedly stepped on him in 2008. *See* Tr. 106. And Dennis Smokes testified that he promptly caught his breath and continued working after customers pinned him in the vestibule in 2008. *See* Govt. Ex. 151, 109-110. None of these Store incidents were even recordable injuries much less reflections of death or serious physical harm to employees. In *Tucsan/Lehigh Dairies*, Judge Phillips rejected a similarly-unimpressive string of injuries as insufficient to support a General Duty Clause citation. The Compliance Officer cited the defendant-employer for allowing employees to remove the "load

bars" on delivery trucks in a manner that raised "struck by" hazards and had allegedly resulted in one employee's death. *See Tucsan/Lehigh Dairies*, *Inc.*, 22 BNA OSHC 1870 No. 08-0637, 2009 WL 3030764, at *6 (ALJ). Yet, the court found that load bars were "removed tens of millions of times . . . without any injury" and that, based on the Secretary's witness testimony, "[t]he most serious injury which could reasonably be expected to result from a[n employee] being struck by a load bar released under pressure is a small, minor bruise." *Id.* at *14. Under these circumstances, the Administrative Law Judge found that the single employee death on record was a "freakish accident" and that the Secretary had not carried her burden of proof. *Id.*; *see also Super Excavators, Inc.*, 15 BNA OSHC 1313 No. 89-2253, 1991 WL 218314, at *5 (OSHRC) (finding that the physical harm caused by employees' exposure to hazardous substances erroneously excluded from the cited-employer's data sheets was "not likely" to be serious).

Nor can the Secretary rely on videotapes, CMI exhibits, and news-article exhibits as a speculative substitute for concrete evidence. The Secretary would have Your Honor believe that these pictures of surging crowds and third-hand newspaper reports establish that serious injuries were likely to occur to employees. But the best "evidence" the Secretary has is a twenty-one-page chart that she cobbled together on the last day of trial after she had rested her case. Exhibits 112 through 123 are workers compensation claim forms that contain cursory, uninformative descriptions of the underlying incidents. *See, e.g.*, Govt. Ex. 115, at 1 ("Opening doors for Blitz, pushed against"). And most of the other files in the Secretary's chart describe facially less-than-serious alleged injuries. *See, e.g.*, Govt. Ex. 127, at 987, 996, 1014, 1156 (indicating customers who continued to shop after their alleged injuries). Further, the chart is generally deficient for the reasons Respondent established at trial. Of the forty-nine claims listed:

- One is a duplicate. *See* Claim #5129407 on p. 14.
- Four pertain to Furby-related incidents from 1998, which the Secretary conceded were irrelevant by withdrawing Exhibit 125. *See* Claim #3028671, 2274683, 2276044, and 2276115 on pp. 18-19; Tr. 1175-76.
- Nine are single-page placeholders for incidents at the Valley Stream Store on Blitz Day 2008, which the Secretary conceded were irrelevant to notice. *See* Claim #5696364, 5697974, 5702673, 5702694, 5715080, 5727741, 5727758, 5899051, and 5904601 on pp. 19-20; Tr. 1180.
- Two pertain to fights, which Your Honor indicated were not relevant to the questions at issue in this case. *See* Claim #4836728 and 4836938 and pp 2, 8; Tr. 1186.
- One is included on the basis of an unattributed statement ("pushed or fell during blitz sell [sic]") that does not appear in the underlying claim file. *See* Claim #4836628 on p. 6).

The remaining thirty-two items display the same defects that Your Honor identified at the hearing as a basis for denying the admission of Secretary's Exhibits 133 through 135. Tr. 945-48. They are comprised almost-entirely of unattributed, incomplete hearsay statements that give no clear indication what happened in the underlying incident. Most importantly, only the two claims listed under Exhibit 129 and 130 (on pp. 20-21) involve alleged injuries at the Valley Stream Store. This flotsam and jetsam excuse for evidence cannot form the basis for the conclusion that a *serious* injury or death was *likely* during Blitz Day 2008 at Valley Stream.

In another instructive case, the Commission found that evidence of lead-inhalation, though perhaps sufficient to support an "other-than-serious" violation, was not sufficient to show a "substantial probability that death or serious physical harm could result." *See Manganas Painting Co., Inc.*, 21 BNA OSHC 1964 No. 94-0588, 2007 WL 6113032, at *18 (OSHRC) (finding that the employer had improperly created airborne lead-dust but that the Secretary's lack of evidence as to the *quantity* of lead left it unclear whether the employer caused a "substantial probability" of death or serious injury). Here, likewise, while the Secretary's unexplained records and testimony about minimal injuries might conceivably be enough to support a generic, *non*-serious citation (although the quality of the evidence is even suspect in this regard) if there

were an applicable standard (which there is not), it cannot support her attempted groundbreaking use of the General Duty Clause to cite Respondent for a recognized hazard likely to cause death or serious physical harm.

Further, the Secretary's reliance on alleged employee injuries as the only *real* evidence of a hazard is contrary to her own stated policy. As the Field Operations Manual instructs, the mere occurrence of an injury or death may not establish a hazard or provide the basis for a citation. *See* Field Operations Manual § 4-16; *see also Titanium Metals Corp. of America v. Usery*, 579 F.2d 536, 542 (9th Cir. 1978) (finding that occurrence of an accident does not, by itself, prove the existence of a violation).[21] And this policy stands to reason, for individual instances can be "freakish" without, as here, any recognition of a hazard by the cited employer, his industry, or any consensus standard-setting body. Simply put, the OSH Act is not a strict liability statute. *See Nat'l Realty*, 489 F.2d at 1265. Yet, Mr. Ciuffo testified that he is not aware of "any other instance in the history of the world" when there has been "a fatality or serious injury to an employee" under similar circumstances. *See* Tr. 709-10. Instead, he relied entirely upon the events of Blitz Day 2008 in deciding to cite Respondent, *see* Tr. 692, and he had no "other basis" for concluding that Respondent's safety practices were ineffective except that "the crowd knocked people down." *See id.* Such justifications are improper and, along with the other failures of evidence noted above, they show that the Secretary has not carried her burden of proving that the alleged hazard created a likelihood of serious injury or death.

---

[21] The agency's internal policies required it to investigate Respondent's workplace *because* of Mr. Damour's death. *See* Field Operations Manual § 11-7. However, the event that precipitated this citation is now, according to the Secretary herself, concededly irrelevant to its disposition. *See* Tr. 21, 813.

4. The Secretary Has Not Shown Effective or Feasible Means of Abatement

Since the OSH Act was intended only to hold employers accountable for "conditions over which they can reasonably be expected to exercise control," *see Pelron Corp.*, 12 BNA OSHC 1833 No. 82-388, 1986 WL 53616, at *3 (OSHRC), the Secretary must show that Respondent had available means of "eliminat[ing]" or "materially reduc[ing]" the alleged hazard. *See Nat'l Realty*, 489 F.2d at 1266-67. "The Secretary must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation." *See L.R. Wilson & Sons, Inc. v. OSHRC*, 698 F.2d 507, 513 (D.C. Cir. 1983). Here, however, she has advanced abatement measures that are entirely speculative, divorced from industry practice, and may actually expose employees to *greater* hazards. Furthermore, as noted above in Part III.B.2.b, the retail industry did not recognize the alleged hazard, much less the purported need for the measures advocated by the Secretary.

a. The Secretary's Abatement Measures are Not Reproducible or Demonstrably Effective

First, the Secretary has not provided any replicable method of developing or testing her abatement measures, nor any evidence of their effectiveness or applicability to the retail industry. The sheer size of her smorgasbord abatement regime is astounding: there are dozens of recommendations in the citation and in Paul Wertheimer's expert report, not to mention others specifically referenced in deposition exhibits and trial testimony. *See* Complaint ¶ 5; Govt. Ex. 92. Yet, the Secretary's own Area Director is admittedly not "competent" to understand or apply these measures in a way that would inform Respondent what was necessary to "avoid being cited." *See* Tr. 673. In an attempt to rescue her citation from the lack of knowledge of the agency that issued it, the Secretary relies exclusively on her expert, Paul Wertheimer. *See*

Tr. 33, 298. But on direct examination she only asked him about the "reasonableness" of her proffered abatement measures. *See, e.g.,* Tr. 377, 395. By declining to ask her only "feasibility" witness about "feasibility," she has failed to cull *any* directly-relevant testimony to satisfy her burden of proof. Further, Mr. Wertheimer was unable to suggest anything beyond the subjective application of "management factors" and racial profiling as a means of deciding upon the measures necessary for any given crowd event. *See* Tr. 449, 508-12. He instructed that stores must hire a crowd management expert to conduct a vague, two-step process (involving an initial "risk assessment" and an eventual "crowd plan") for determining the specific abatement measures that are necessary for any given crowd event. *See* Tr. 362. But he admitted that *he did not follow this process* in developing the recommendations in his expert report because he "already knew the facts." *See* Tr. 499.

Mr. Wertheimer gave similarly-imprecise and evasive[22] answers about the application of specific measures in concrete scenarios. For example, when talking about the number of crowd managers the Store should have used, he ranged from eight to eighteen. *See* Tr. 588-90.[23] When talking about the number of customers the Store should have expected, he ranged from 1,200 to 1,400 but "c[ould not] say it was unreasonable" for the Store to "assume that only a thousand customers would show up." *See* Tr. 513, 517. When talking about the number of customers the

---

[22] Mr. Wertheimer repeatedly went to extremes to avoid giving straightforward "yes" or "no" answers. *See, e.g.*, Tr. 536 (refusing to agree that "common sense" would suggest a "store manager" is "in charge" of a store).

[23] This is more crowd managers than the only relevant consensus standard, the Life Safety Code, would require even if it *were* applicable (which Area Director Ciuffo concedes it was not because the Store is a mercantile, not assembly, occupancy, *see* Tr. 722-23). For crowds in an assembly occupancy, the Code requires one manager per 250 people. *See* Govt. Ex. 12, at § 12.7.6.1. A crowd of 2,000 people, like Respondent faced in 2008, would require eight crowd managers if the facility was an assembly occupancy. *See* Tr. 829.

Store should have let in at one time, he ranged from twenty to fifty. Tr. 616. When talking about the number of walkie-talkies the Store should have distributed, he admitted that "experts" could range from two to ten. Tr. 602. And when talking about the necessary height of the sign outside the Store, he ranged between twelve and fourteen feet while indicating that it should be visible "maybe 40 feet" away. Tr. 562-64. "Instead of applying a discernible methodology to the data before him," Mr. Wertheimer "appears to rely on his instinct, an approach that cannot be tested, has no known rate of error, and is not subject to any standards." *See 24/7 Records, Inc. v. Sony Music Entertainment, Inc.*, 514 F.Supp.2d 571, 576 (S.D.N.Y.). This alone necessitates the exclusion of his testimony. *See id.* (excluding the testimony of a damages expert who "emphasized the significance of [the defendant's] personnel, artist roster, [and other things] but . . . [did] not explain how he valued these factors nor how he assessed their relative significance."); *Bethea v. Bristol Lodge Corp*. ("*Bethea I*"), No.CNA.01-612, 2002 WL 31859433, at *8 (E.D. Pa. Dec. 18, 2002) (testimony of both plaintiff's and defendant's experts concerning reasonable security measures was inadmissible because neither expert "knew of or used any analytical methodology in reaching their conclusions"); *Engleson v. Little Falls Area Chamber of Commerce*, 210 F.R.D. 667, 671 (D. Minn. 2002) (excluding expert testimony that a Craft Fair should have used four-foot plastic fencing rather than twenty-eight-inch cones to control pedestrian traffic where this opinion was not based on "any rule, regulation, or authorized manual" but was "merely [the expert's] predilection").

Often, Area Director Ciuffo's guidance for the application of specific abatement measures differed from Mr. Wertheimer's, which further highlights the lack of any reproducible standards. Against Mr. Wertheimer's recommendation of two to ten walkie-talkies, for example, Mr. Ciuffo recommended five. *See* Tr. 602, 837. Against Mr. Wertheimer's recommendation of

eight to eighteen crowd managers, Mr. Ciuffo recommended twelve. *See* Tr. 588-90, 826. Against Mr. Wertheimer's recommendation that the Store should let twenty to fifty customers in the store at one time, Mr. Ciuffo set this range between one and five (but he later acknowledged that this was not reasonable without offering an alternative range). *See* Tr. 616, 821-22. And against Mr. Wertheimer's guidance that the Store should have expected 1,200 to 1,400 customers, Mr. Ciuffo thought it should have expected 2,000. *See* Tr. 517, 715.

Importantly, Mr. Wertheimer's own "landmark" crowd management study states that crowd management precautions are *not necessary at all* for events with fewer than 2,000 attendees. *See* Tr. 530-31; Crowd Management: Report of the Task Force on Crowd Control and Crowd Safety, *available at*: http://crowdsafe.com/taskrpt/toc.html. When confronted with the contradiction between this recommendation and his statement at the hearing that the Store should only have expected 1,200 to 1,400 customers, Mr. Wertheimer claimed that his Report's recommendation was out of date, but he was not able to suggest an alternative standard. *See* Tr. 531.

Ultimately, Mr. Wertheimer conceded that there was no reproducible method for determining the measures that are necessary for any event, nor any scientific evidence that any of the Secretary's recommended measures are effective. *See* Tr. 348-50 ("research is not generally conducted, period"), 510 ("crowd management is not a science"), 625 (noting that he "[has] not independently tested the methods that [he] recommend[s]"). Area Director Ciuffo echoed his significant concessions in this regard. *See* Tr. 818 ("I have no empirical or scientific evidence").

In the absence of a reproducible formula, Mr. Wertheimer explained that he would apply different "management factors," which would necessarily have different weights, for every sales event. Tr. 626. He would simply "mesh" these factors together and then "try to ram[p] it up a

little bit." Tr. 523. But such guesswork cannot substitute for tested and objectively-effective methods. "Numerous courts have excluded expert testimony regarding a safer alternative design [such as the allegedly safer crowd management plan that Mr. Wertheimer recommends] where the expert failed to create drawings or models or administer tests." *Zaremba v. General Motors Corp.*, 360 F.3d 353, 358-59 (2d. Cir. 2004) (citing cases). In one closely-analogous case, the Northern District of Illinois excluded the testimony of a premises-security expert who testified that a number of additional security measures, such as "the failure to have physical crowd control measures," could have prevented a customer from becoming frustrated and assaulting the plaintiff-employee. *See Maguire v. Nat'l R.R. Passenger Corp.*, No. 99 C 3240, 2002 WL 472275, at *2-3 (N.D. Ill. Mar. 28, 2002). Although making deductions about human behavior, this expert "did not refer to any studies on crowd control or psychology." *Id.* at *4-5. He "relied only on his personal experience in reaching his conclusions" and failed to "review relevant literature and studies." *Id.* at *5; *see also Birge v. Dollar General Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *11 (W.D. Tenn. Sept. 28, 2006) (excluding testimony from a premises security expert who testified that a retail store "had reason to know" that "criminal acts against its customers . . . were reasonably foreseeable" but who cited "no publications, studies, research, or other data that support[ed]" his conclusions); *Santoro v. Donnelly*, 340 F.Supp. 2d 464, 475 (S.D.N.Y. 2004) (excluding the testimony of an expert who "did not cite to any specific research for [his] opinions" and instead relied wholly upon "general experience").

b. The Secretary's Expert Cannot Provide and Has Not Provided Relevant or Credible Evidence of Feasibility

Instead of relying upon scientific evidence, Mr. Wertheimer endorsed the Secretary's abatement measures on the basis of his own generalized crowd "research." But Mr. Wertheimer's unfounded generalizations and speculations are neither relevant nor credible.

There is no evidence that he has authored any peer-reviewed publications, aside from his own testimony that he "probably" authored "one," *see* Tr. 342-43,[24] and none of his analyses have pertained to retail crowds, *see* Tr. 348-350.[25] Yet, he pits his generic experience against the largest retail store in the world and, with respect to the cited Store, against the retail-specific expertise of Mr. Sooknanan and Mr. D'Amico, who had a combined twenty years of Blitz Day experience when they planned for Blitz Day 2008. *See* Tr. 179, 976. Mr. Wertheimer bases his claim to expertise upon time spent in crowds (all of which he must believe are fungible—from soccer "hooligans" and concert revelers to families waiting to enter a retail store), but he has only spent 1,000 hours in crowds over the past eighteen years (*i.e.* roughly one hour per week). *See* Tr. 337. He prides himself on having published "hundreds of pages" of "articles" on his website, but a cursory review reveals that it is nothing more than "a blog he's posted." *See* Tr. 307, 453.[26] Indeed, Mr. Wertheimer has not drafted a single crowd management plan since 1984. *See* Tr. 348. And he developed his opinions and expertise in this matter without having

---

[24] Mr. Wertheimer's lack of peer-reviewed publications would seem to belie his claim that he is "one of the better experts in the world" in crowd management. Tr. 471. In the alternative, if there are *no* peer-reviewed publications in the "field of crowd safety," *id.*, then Mr. Wertheimer's revelation would strongly undercut the Secretary's assertion that this is a "field" of expertise.

[25] The *curriculum vitae* included with his expert report shows that nearly all of his experience is specifically concerned with crowds at rock concerts. *See* Govt. Ex. 92. This is significant not only because feasibility is hinged to "experts familiar with the industry," *see Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981), but also because Mr. Wertheimer admits that "input from the retailer itself"—which he did not have—is an "important data point" for his risk assessment. Tr. 523.

[26] Mr. Wertheimer admits that the material on his website is often based upon "preliminary information" and that he does not always update it when better information becomes available. *See* Tr. 437-39, 441.

familiarity with *the facts of this case*.[27] Mr. Wertheimer's generalized crowd "research" does not qualify him to opine about the particular hazards attendant to *retail* crowds.

In a recent case, the Eastern District of New York excluded the testimony of a civil engineer who testified about alleged hazardous conditions in a retail environment. Although acknowledging the expert's generalized credentials, the court found "nothing in his resume or his report that indicate[d] that he [had] any training and experience, let alone expertise, in safety in the retail environment." *See Ascher v. Target Corp.*, 522 F.Supp. 2d. 452, 456 (S.D.N.Y. 2007). Applying this holding to the instant case, Mr. Wertheimer's testimony is inapposite because he has "no experience in the retail industry." Tr. 355; *see also Avcon, Inc.*, 98-0755, 98-1168, 2000 WL 1466090, at *29 (Rooney, ALJ) (Sept. 19, 2000) (expert who "possesses general expertise in professional safety" but "has no specialized knowledge in that aspect of professional safety relevant to this case" is "entitled to little weight."); *Nimely v. City of New York*, 414 F.3d 381, 399 n.13 (2d. Cir. 2005) ("[B]ecause a witness qualifies as an expert with respect to certain matters or areas of knowledge [a point we are not prepared to concede] it by no means follows that he or she is qualified to express expert opinions as to other fields"). The need for

---

[27] Mr. Wertheimer's lack of preparation was apparent during the hearing. When asked about the precautions that Respondent took in 2008, he stated "they had a barrier, and that's pretty much it." *See* Tr. 378. This, of course, is untrue. *See* Part III.A, *supra*. He claims that Respondent did not "make an effort to eliminate slips, trips, and falls" for Blitz Day 2008, *see* Tr. 629, but the record is positively rife with such "efforts," *see*, *e.g.*, Govt. Ex. 148, 220-22; Tr. 189, 1027, and the Secretary appeared to concede the point by not challenging employees' repeated assertions that they received slip, trip and fall training, *see, e.g.*, Tr. 189, 1027. Finally, even his definitions of "crowd management" and "crowd control" are inconsistent with materials in the Secretary's file. *Cf.* Tr. 318 (describing crowd management as involving "systematic and comprehensive planning for and management of groups of people" and crowd control as involving "the planned limitation or restriction of crowd behavior") *with* Govt. Ex. 24, at 3-345 (describing "crowd management" and "crowd control" as different fields meant to handle orderly and disorderly crowds, respectively).

specialized, as opposed to general, experience is important because experts must "emplo[y] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *See Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999).

As if Mr. Wertheimer's inexperience and unpreparedness were not enough to undermine his credibility as an expert, the record suggests several possible improper motives for his spirited denunciation of Respondent. He is still under retainer by Mr. Damour's estate. *See* Tr. 458-59. He has displayed a bias against Walmart in blog posts that pertained to events at issue in this litigation and represented, among other things, that Respondent had "screwed" the public. *See* Tr. 434-461. He derives the vast majority of his income from expert testimony on behalf of plaintiffs in crowd management cases. S*ee* Tr. 466-68. As Judge Schumacher recently found with respect to another questionable expert, Mr. Wertheimer's testimony is "at best disingenuous and at worst intellectually questionable." *See Cleveland Wrecking Co.,* OSHRC Docket No. 07-0437 (ALJ June 28, 2010).

The considerable failings of Mr. Wertheimer's expert testimony strongly implicate the Court's "gatekeeper" role under *Daubert* and its progeny. The Federal Rules of Evidence provide that expert testimony is only admissible "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702. "An opinion from an expert who is not a scientist," which Mr. Wertheimer concededly is not, "should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist." *See* FED. R. EVID. 702 advisory committee's note (2000 amendment). The Supreme Court's *Daubert* decision requires courts to ensure that an expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." *See Daubert v. Merrell Dow*

Pharm., Inc., 509 U.S. 579, 597 (1993). And *Daubert* suggests four factors that are often helpful in evaluating the reliability of an expert's principles and methods:

> "(1) whether a theory or technique can be (and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) a technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community."

Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94) (internal quotation marks, citations, and modifications omitted). Expert opinions need a "valid connection" to a "reliable factual basis." *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). It is the Secretary's burden to prove that these criteria are met. *See Daubert*, 509 U.S. at 593 n.10.

Here, Mr. Wertheimer meets none of these criteria. His opinions are not grounded on sufficient facts because he formed them substantially in the days following Mr. Damour's death based upon no more than media reports, which even he conceded were "preliminary information." *See* Tr. 438-41. And he continued to adhere to an incomplete version of the facts at the hearing. *See e.g.*, Tr. 378 (claiming that Respondent's precautions amounted to "a barrier, that's pretty much it."). Far from being reliable, Mr. Wertheimer admits that the principles (or "management factors") necessary to develop his opinion will change, along with their relative weights, in every individual crowd situation. *See* Tr. 626. He has not applied these principles to yield reliable results in this case; rather, even "kn[owing] the facts," *see* Tr. 500-01, he has not propounded anything more than imprecise, baseless ranges of acceptable behavior, *see, e.g.*, Tr. 588-90 (suggesting, with no apparent touchstone, that Respondent should have hired between eight and eighteen crowd managers on Blitz Day 2008).

Applying *Daubert*, Mr. Wertheimer has not tested his theories in any context, *see* Tr. 625, and he has never even seen a crowd management plan, let alone a scientific study of crowd management in a retail context, *see* Tr. 348, 475. He has no demonstrated peer reviewed publications and only a handful of alleged peers (whom he has not purported to work or interact with regularly). Tr. 471-73. Because there are no standards governing the application of crowd management "techniques"—Mr. Wertheimer just "meshes together" his chosen "management factors" and then "tr[ies] to ramp it up a little bit, *see* Tr. 523—it is impossible to speak of a rate of error. But the inscrutable *ipse dixit* character of his recommendations is apparent in his dismissive representation that lay people "would not understand" his methodology. *See* Tr. 602. Finally, Mr. Wertheimer's opinions and techniques are not "generally accepted" in the "relevant" communities. At least one crowd management organization, the IAAM, has "blacklisted" him, *see* Tr. 469-70, and his opinions contradict those of the National Fire Protection Association and the Retail Industry Leaders' Association, *see* Part III.B.2.b, *supra*; *cf. Dayton Tire et al.*, 18 BNA OSHC 1225 No. 93-3327, 1998 WL 99288, at *18 (ALJ) (finding that the Secretary's expert's conclusions were not accepted in the relevant communities).

For the above reasons, Mr. Wertheimer's opinions have no "valid connection" to a "reliable factual basis." *See Kumho Tire*, 526 U.S. at 149. Respondent renews its June 11, 2010 Motion in Limine to Exclude the Opinion Testimony of Paul Wertheimer and requests that the Court exercise its "gatekeeper" role to reject Mr. Wertheimer's unfounded opinions.

c. Many of the Secretary's Individual Abatement Measures are Facially Ridiculous or Illegal

Not only has the Secretary failed to establish a reproducible or demonstrably-effective abatement regime, but a number of her abatement suggestions are facially ridiculous. For example:

- Mr. Wertheimer suggested that retailers should hire clowns or entertainers, but cautioned that a crowd management expert would have to screen their jokes for "possibly off color or racial" content. *See* Tr. 635.
- Mr. Wertheimer suggested that retailers could distribute coffee to waiting customers, but cautioned that different flavors of coffee "might" have different impacts on the safety of an event and that three-ounce cups could present a slip-and-fall hazard whereas two-and-a-half-ounce cups would "probably" not. *See* Tr. 479-80.
- Mr. Wertheimer suggested that retailers should acquire portable toilets to prevent waiting customers from going to the bathroom on the ground as they wait for the store to open, which would, in Mr. Wertheimer's opinion, create a slip-and-fall hazard. Tr. 486-87.
- Mr. Wertheimer suggested that Walmart associates needed to wear different uniforms when they were outside the Store or else customers might not recognize them as employees. *See* Tr. 603.
- Area Director Ciuffo initially suggested that retailers should only admit five people every one-to-five minutes, but then acknowledged it would not be "reasonable" for the entrance of 2,000 people to take six hours. Tr. 821-22.
- Area Director Ciuffo testified that advertising "limited quantities" of one "particular TV"—a Toshiba 42-inch plasma screen—may have "contributed to the hazard." Tr. 703-05.

These attempts to micromanage the retail industry are particularly objectionable given the Secretary's conceded lack of reliable or reproducible means for developing such abatement measures. *See* Tr. 348-50, 510, 625 818.

Another of the Secretary's suggested abatement measures is patently illegal. With Mr. Ciuffo's apparent approval, *see* Tr. 828-29, Mr. Wertheimer includes racial profiling as a critical component in the two-step process that retailers must follow to abate the alleged hazard, *see* Tr. 508-512. By considering the "age, race, gender," and other "demographic" characteristics of the crowd, Mr. Wertheimer believes that retailers can intuit both the crowd's likely behavior (*i.e.* whether "some people" could "pose a danger") and the necessary abatement measures (*i.e.* whether "extra care and attention" is required). *See* Tr. 508-512. "From experience," he thinks Canadian crowd members are particularly docile in this regard. *See* Tr. 512. But this practice is clearly contrary to the public policy of the United States. *Cf.* Title II

of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a) *et seq.*; New York Executive Law 15 § 296 *et seq*. Indeed, in bringing suit against the State of Arizona's SB 1070 immigration law this past summer, Attorney General Eric Holder indicated that if he uncovered evidence of "racial profiling," he "would bring [a separate] suit on that basis."[28]

d. Other Abatement Measures Suggested by the Secretary Extend Well Beyond Crowd Management Techniques and Would Micromanage All Sales Events

Still other testimony suggested that the hazard is inherent in the nature of retail and, as such, is not subject to abatement through crowd management (*i.e.* the subject of the instant citation). Area Director Ciuffo claimed that Blitz Day was "inherently unsafe" because it involved "low prices," limited quantities, and . . . popular items." *See* Tr. 699. He also thought the Store's advertisement of "Friday only" or "November 28th only" sales was "possibly" hazardous. *See* Tr. 707-08. And he speculated that a hazard could arise from retail events that involved anywhere between "three and three million" people. Tr. 767. Mr. Wertheimer has made similar statements. In 2008, *before even knowing the specific measures that Walmart had used*, he claimed that it had "created an environment . . . known to promote competition and anxiety." *See* Tr. 435.[29] He thought Walmart had placed *customers* in "danger" by "inciting them with special retail sales discounts, early door openings, limited prize items, and hyped

---

[28] *See* Skiba, Katherine, "Arizona Law May Prompt Racial Profiling Suit," L.A. Times, Jul. 12, 2010, *available at*: http://articls.latimes.com/1010/jul/12/nation/la-na-holder-immigration-20100712.

[29] Mr. Wertheimer's efforts to base his testimony upon "anxiety" or other perceived psychological factors are irrelevant pursuant to Your Honor's June 24, 2010 ruling on the Secretary's Motion in limine to Exclude the Testimony of Dr. Arthur Barsky. Counsel for the Secretary acknowledged that Mr. Wertheimer was "not being offered as an expert in crowd psychology." Tr. 339.

advertising." *See* Tr. 439. At the hearing, he testified that hazards could arise at sales events as minor as the sale of chicken nuggets in a courtroom cafeteria or the sale of greeting cards in a stationary store. *See* Tr. 609-10.

While wandering into the thicket of racial profiling and the manner in which retailers do business, the Secretary seems to eschew any recommendations with regard to the core of what happened in this case—controlling an unanticipated, unruly crowd. And this despite Chief Judge Sommer's narrowing of this case to that issue. *See* Order of March 17, 2010, at 3 (emphasizing crowds that "have become unruly"). Area Director Ciuffo stated that "confronting an unruly crowd" was "a different issue than crowd management" and that it would not be "appropriate" to give employees "self defense" training like police receive. Tr. 847-48. Mr. Wertheimer distinguished "emergency plans" from "crowd management plans" and listed "larger crowds than expected" and "violence" as contingencies that stores should include in an *emergency* plan. *See* Tr. 375-76.[30] He also stated that the "goal" of crowd management is "to protect people who gather in crowds or who assemble in crowds." *See* Tr. 318-19. OSHA's emphasis on crowd management to the exclusion of the feasible measures that Respondent took to control the crowd –securing a police presence and having an emergency plan, among other things—further demonstrates the fatal flaws in this citation.

e. The Secretary is Unable to Show the Effectiveness or Feasibility of Abatement by Reference to Other Sales at Respondent's Stores

One of the Secretary's principal arguments for the feasibility of the measures listed in her citation is that, subsequent to Blitz Day 2008, many of these measures were implemented at the

---

[30] Respondent *had* an emergency plan that expressly accounted for these contingencies. *See* Tr. 264-65; Resp. Ex. 30, 31.

Store and at other Walmart establishments in 2009. *See* Tr. 97-100. But simply implementing a list of measures does not demonstrate their utility in materially reducing a significant hazard (here, the alleged hazard of unanticipated unruly crowds). Most importantly, the 2009 sale was fundamentally different from Blitz Day 2008. Because there was no "hard opening," there was no occasion when crowds accumulated outside the door in the manner the Secretary alleges was hazardous in 2008. *See* Tr. 162-163, 403. Videos of the event show a continuous flow of customers rather than an accumulation of people followed by a mass entrance. *See* Govt. Ex. 95. Thus, the "soft opening" of 2009 reflected a completely different crowd dynamic than the "hard opening" of 2008. As Mr. Wertheimer conceded, customers could enter "whenever they wanted . . . without the large, you know, crowd buildup in front of the Store." Tr. 403. Area Director Ciuffo believes that this *alone* "could have been responsible" for the crowd's good behavior. *See* Tr. 815-16. Further, Mr. Ciuffo admits it is "possible" the crowd was reacting to the increased publicity of the event, the fact that Mr. Damour had died during the previous year's event, or any number of things aside from the Store's use of crowd management tools. *See* Tr. 815-817.[31] It seems particularly "possible" that the crowd was reacting to the increased presence of police, which Ciuffo also concedes. *See* Tr. 815. Videos of the event show a *massive* police presence at the doors in 2009, *see* Tr. 568; Govt. Ex 95, and Mr. Wertheimer estimates that there was a "10-20%" chance that this alone accounted for the calm demeanor of the crowd. *See* Tr. 569.

---

[31] Conversely, the videos of the 2009 event show customers voluntarily forming a line far beyond the point where Respondent made efforts to direct them. *See* Govt. Ex. 95; Tr. 553-54. And Mr. Wertheimer concedes that crowds may line up and remain orderly in the absence of "any formal crowd management methods," *see* Tr. 639, especially in situations where they know to do so based upon the "training of everyday life," *see* Tr. 554-55. In other words, the crowd management techniques may have been entirely irrelevant to the orderly behavior of the crowd in 2009.

Further, the case law belies the Secretary's reliance on Respondent's 2009 experience to establish feasibility. First, in cases involving the General Duty Clause, the Secretary must "specify the particular steps [the] cited employer should have taken" and demonstrate "the likely utility of those measures." *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). The feasibility of an abatement measure is linked to its effectiveness such that a measure is *only* feasible if it "eliminate[s] or materially reduce[s] the hazard." *See Cardinal Operating Co.*, 11 BNA OSHC 1675 No. 80-1500, 1983 WL 23900 (OSHRC); *Arcadian Corp.*, 20 BNA OSHC 2001 No. 93-0628, 2004 WL 2218388, at *8 (OSHRC). An employer's use of specific abatement measures before or after the citation does not prove their feasibility. *See Nat'l Realty*, 489 F.2d at 1266 n.37 ("the question is . . . not whether the precaution's use has become customary"). Instead, the pertinent question is whether "safety experts familiar with the pertinent industry" would agree on the need for their implementation. *See Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981).

Here, since the alleged hazard sounds in Section 5(a)(1), the Secretary may not rely upon Respondent's use of abatement measures to show their feasibility. First, she only inquired whether Respondent used "*any* of the measures" from Mr. Wertheimer's report, *see* Tr. 396, but the case law requires her to show that her "particular steps," as a whole, are feasible. *See Nat'l Realty*, 489 F.2d at 1268. Second, she has not established any nexus between her recommended measures and a "material reduction" of the alleged hazard. As discussed, there is no scientific evidence that her measures are effective, *see* Tr. 348-50, 510, 520, 818, and their simple use on one or more occasions could not provide the basis for cause-and-effect assertions. Instead of pointing at Respondent's actions, the Secretary must rely upon the findings of "safety experts familiar with the pertinent industry." *See Donovan*, 645 F.2d at 830. But Mr. Wertheimer,

although enthusiastic about the Secretary's abatement regime, does not have any empirical basis for his conclusions, *see* Tr. 348-50, 510, 625, much less credibility as a safety expert in general or as a crowd management expert in particular. Most importantly, Your Honor recognized that he has "no experience in the retail industry." *See* Tr. 355. Against his unfounded testimony, the Life Safety Code's exemption of retailers from its crowd management requirements and the conclusions of RILA strongly suggest that the relevant community of experts does not consider the Secretary's measures demonstrably feasible to materially reduce a significant hazard.

f. Police are Uniquely Effective at Controlling Crowds

In contrast to the lack of support for the Secretary's recommended abatement measures, there is considerable evidence that *simply calling the police* is an (if not the only) effective means of controlling unruly crowds. First, the materials in the Secretary's inspection file unambiguously favor police over crowd managers or crowd management tools. *See, e.g.*, Federal Emergency Management Agency, "Special Events Contingency Planning Job Aides Manual," at 2-10 (March 2005), *available at*: http://www.training.fema.gov (responsibility for crowd control "passes to local authorities . . . when the situation is beyond the resources and capability of the organizers"); Helbing, Dirk et al., *Crowd Turbulence: The Physics of Crowd Disasters*, The Fifth International Conference on Nonlinear Mechanics (ICNM-V) (June 2007) ("turbulent [crowd] dynamics" are "impossible to control"). Second, several witnesses specifically testified about the effectiveness of police. Mr. D'Amico testified that the Store did not have "any incidents" in prior years when the police had remained present and "used their [lights and] bullhorns" to maintain customers' attention. *See* Tr. 271-73. Mr. Sooknanan testified that the police were effective *on Blitz Day 2008* when they interacted with the crowd. *See* Tr. 1015 (indicating that police were "driving the line" and that customers were "heeding [their] warning" at around 3:00AM). Both he and Mr. Rice testified that the police were able to

clear the vestibule in "a matter of seconds" after Mr. Damour's death. *See* Tr. 174, 1021-22. Area Director Ciuffo admitted that the police could have "possibly" calmed the crowd had they been present at the Store's opening in 2008 and that the crowd's comparative calm in 2009 was "possibly" due to the presence of police. *See* Tr. 781, 815. And Mr. Wertheimer conceded that there was a "10-20%" chance that the crowd's orderly behavior in 2009 was *entirely* due to the presence of police. *See* Tr. 569. Based upon this testimony, it is not surprising that Respondent trained its employees (and the Secretary's employee-witnesses all understood) that "if a crowd of customers became unruly, the store should call 911 or the police." *See* Tr. 101, 165, 262, 895, 923, 982.

The Secretary does not contest that police are a necessary component of crowd management planning. Instead, she contends that the Store should have obtained a written agreement from the police and utilized other measures *in addition* to securing their presence. *See* Tr. 392. But the requirement of an agreement for public services runs contrary to common sense. As Part III.A.3 discussed, the Store took reasonable measures to request and obtain assistance from the police, and they arrived according to plan. It could not have foreseen that the police would refuse to provide necessary services or leave early, in disregard of the crowd's clear unruliness (a course of action the Store could not have prevented by invoking a written agreement).

g. Abatement of the Alleged Hazard is Technologically Infeasible

Moreover, the Secretary's abatement measures were not sufficiently available to Respondent at the time of the alleged hazard, nor are they sufficiently available today. In Mr. Wertheimer's view, the retention of a crowd management expert is critical to the overall course of abatement: he or she conducts an initial "risk assessment" and then designs and implements a crowd management plan using some mixture of the Secretary's recommended

measures. Tr. 528-29. The citation echoes this view, mandating that "special events" should be "preplanned by a person trained in crowd management." *See* Complaint ¶ 5. But together, Mr. Wertheimer and Mr. Ciuffo could only name five crowd management experts *in the world*. *See* Tr. 471-72, 768-69. Respondent has 4,200 stores, with "special sales events" occurring regularly and often at the same time in multiple locations. *See* Govt. Ex. 148, at 216-218. Even if one unquestionably accepts the Secretary's purported list of crowd management providers in Exhibit 45, there are too few to go around. In light of Mr. Wertheimer's emphasis on site-specific knowledge and "circumstances," it is unreasonable under the Secretary's theory to think that one expert could provide his or her services to multiple locations at once. Tr. 451, 525. Nor is there any quick fix for the lack of experts. Mr. Wertheimer believes *training* is necessary to render an individual competent in the field of crowd management. *See* Govt. Ex. 92, at 5-6. But according to a 2010 National Fire Protection Association publication, crowd management training has been "almost non-existent." *See* Tr. 573. Mr. Wertheimer conceded that this was "a reasonable statement." *See* Tr. 580. Respondent had more stores than there were crowd-management experts in 2008, and it seems unlikely that the ratio has since evened out appreciably.

h. The Secretary's Recommended Abatement Measures Expose Employees to Greater Hazards

Finally, there is reason to believe that the Secretary's abatement measures would cause a greater hazard to employees. While "greater hazard" is usually an affirmative defense, the burden is reversed in General Duty Clause cases. The Secretary must rebut any evidence that her abatement measures would create a greater hazard in order to prove their feasibility; and without a convincing rebuttal, the Secretary *has not established her prima facie case*. *See Kokosing Constr. Co.*, 17 BNA 1869 No. 92-2596, 1996 WL 749961, at *6 n.19 (OSHRC) ("Under the

general duty clause, if a proposed abatement method creates additional hazards . . . the citation must be vacated for failure to prove feasibility; it is not the employer's burden to establish an affirmative defense of greater hazard."). For example, in *Royal Logging*, the Secretary cited an employer for rollover hazards associated with the use of heavy machinery. The Commission found that her recommendation of seatbelt use was not feasible because she had not rebutted evidence that seatbelts would leave employees exposed to the "greater" hazard of stray debris and branches (which are sometimes loosened during the logging process). *See Royal Logging Co.*, 7 BNA OSHC 1744 No. 15179, 1979 WL 8506, at *8 (OSHRC).

Here too, the Secretary has failed to rebut several indications of a greater hazard. First, as a general matter, she admits that increased proximity to an unruly crowd will increase the risk of harm. *See* Tr. 839-840 ("employees standing to the side [faced] less of a risk than members of the public who were in the midst of the crowd"). And yet, many of her abatement measures require *more* employees to be in *closer* proximity to crowds.[32] The case law unambiguously provides that the "severity" of a hazard is dependent upon the number of employees exposed and the proximity of employees to the hazard. *See*, *e.g.*, *Hackensack Steel Corp.*, 20 BNA OSHC 1387 No. 97-0755, 2003 WL 22232017, at *9 (OSHRC). Area Director Ciuffo himself considered the "length of exposure to employees" when determining the appropriate penalty in this case, Tr. 662, and he conceded that "confronting an unruly crowd" could "possibly" expose employees to a "greater hazard." Tr. 847. Second, there is evidence that some of the Secretary's specific abatement measures will cause individualized hazards. Mr. Sooknanan testified that

---

[32] The Secretary seeks to indict Respondent for failing to train its employees on, among other things, "how to reinstate order should the crowd become unruly" and "how to *protect* employees and customers from a crowd that has become unruly." *See* Tr. 856-57, 900.

maps had presented a slip and fall hazard in 2006. Tr. 994. Mr. Wertheimer and Mr. Ciuffo both testified that tickets could "possibly" lead to problems with scalping. *See* Tr. 612, 821.[33] And the other recommendations are also problematic. For example, the recommendation of clowns could cause problems because some children are scared of them. The recommendation of coffee could cause a slip and fall hazard if customers dropped coffee or cups on the ground. *See* Tr. 474. The recommendation of more sound-amplification devices could lead to irritation in those customers closest to the devices. *See* Tr. 560. By failing to rebut this evidence of a greater hazard, the Secretary has failed to carry her burden of proof.

C. Affirmative Defenses

Not only has the Secretary failed to establish a *prima facie* case, but Respondent's affirmative defenses would defeat the citation even if the Secretary *had* carried her burden. First, the amendments to the citation are void because: (1) they lack necessary authorization from the Area Director or a designated OSHA representative, and (2) they are time-barred under the OSH Act's six-month statute of limitations. The effect of nullifying the amendments on either of these bases is to negate the entire complaint, and with it, the underlying citation. Respondent hereby renews its motion to dismiss on these bases. Furthermore, regardless of whether the amended complaint stands or falls on procedural grounds, the citation cannot be sustained because:

- The Secretary impermissibly cites Respondent for failing to take specific abatement measures;
- The application of the General Duty Clause is unconstitutionally vague;
- The citation does not state the nature of the hazard with particularity;
- The Secretary was required to use rulemaking rather than adjudication;

---

[33] Indeed, police records from the Secretary's investigation file showed a problem with scalping at the Best Buy adjacent to the Store *on Blitz Day 2008*. Tr. 610-11.

- The Secretary has improperly delegated government authority to an outside expert; and
- The citation is directed to an issue of public safety outside of OSHA's jurisdiction.

1. The Amended Complaint Lacks Necessary Authorization from the Area Director or a Designated Representative of OSHA

Perhaps the single most surprising revelation during the hearing was that neither the Secretary's Area Director *nor any other identified representative of OSHA* authorized or had "something to do with" the amended complaint. *See* Tr. 759. In response to Area Director Ciuffo's unequivocal admission that the amendments "were not made with [his] authorization" and that he was not "aware" of any other OSHA official who had authorized them, *see* Tr. 759-60, the Secretary's counsel at first claimed the amendments were "a decision of the Solicitor's office," but then denied having "personal" knowledge of their authorization while maintaining that they were "not a mystery." *See* Tr. 759, 774. Area Director Ciuffo is the only agency official to offer any testimony in this seminal case, as well as the Secretary's "designated representative." *See* Tr. 300. Yet, the Secretary blithely suggests that whether Area Director Ciuffo or another agency official authorized the amended complaint is "neither here nor there." *See* Tr. 761.

Because the amendments to the citation made several major changes without the necessary approval of the Area Director or other authorized agency official, they are invalid. Among other things, the unauthorized amendments redefined the alleged hazard from one of "asphyxiation by crowd crush" to one of "asphyxiation, *or being struck*, due to crowd crush, *crowd surge or crowd trampling*;" they changed the location of the hazard from "East *entrance* of 77 Green Acres Mall" to "East 77 Green Acres Mall;" they changed the definition of incidents that triggered a need for abatement measures from "large sales events" to "special events anticipated to attract the public;" and they added a requirement of "appropriate crowd

management techniques" to the original citation's requirement of "crowd management training or [n]ecessary tools." *See* Complaint ¶ 5. As Area Director Ciuffo acknowledged, these changes broadened the definition of the alleged hazard, as well as the citation's geographic and temporal scope. *See* Tr. 771-80.

The implementation of these changes by someone without delegated authority is an impermissible abnegation. Such abnegation of responsibility occurs when a delegating official fails to retain ultimate discretion to approve or reject his delegatee's actions. *See* Richard J. Pierce, Administrative Law Treatise, § 2.7 (5th ed. 2009) (citing President Kennedy's April 13, 1961 statement to Congress). Courts also ask whether the delegation provided "intelligible principles" to cabin the delegatee's exercise of discretion, *see, e.g.*, *Whitman v. American Trucking Assn.*, 531 U.S. 457, 458 (2001), and they apply heightened scrutiny when a delegation involves particularly "broad" responsibilities, *see* Pierce, Administrative Law Treatise, § 2.6. Without a specific delegation from the agency head (or a re-delegation from the agency head's original delegate), individual officers may not act on an agency's behalf lest concurring assertions of authority create contradictory results. *See Continental Cas. Co. v. U.S.*, 113 F.2d 284, 286 (1940) ("that the [government] agent in this case had no authority to perform the act relied upon . . . is evidenced by the fact that the decision of the Comptroller General, which he cited and which controls such disbursements, held the contrary"); *Darrow v. Derwinski*, 2 Vet. App. 303 (U.S. Ct. Vet. App. 1992) (upholding a decision by the Board of Veterans Appeals that it did not have authority to grant equitable relief because the Secretary of Veterans Affairs had not *delegated* that authority to the Board).

The Secretary has run afoul of the above principles by failing to show authorization for the amended complaint. She has delegated to Area Directors the exclusive authority to issue and modify citations through an agency regulation, which provides that:

> "The Area Director shall review the inspection report of the Compliance Safety and Health Officer. If, on the basis of the report, *the Area Director believes* that the employer has violated a requirement of Section 5 of the Act . . . *he shall issue* to the employer either a citation or a notice of de minimis violations . . . ."

See 29 C.F.R. 1903.14 (italics added); *see also* OSH Act § 9(a) (explaining that a citation shall issue if "upon inspection or investigation, the Secretary *or his authorized representative* believes that an employer has violated [the Act]) (italics added). The OSHA Field Operations Manual reflects the Area Director's broad authority by indicating that amendments are only appropriate "when information is presented to the Area Director or designee [that] indicates a need for such action." *See* Field Operations Manual § 5-13 ("FOM"). And the Commission's case law supports the FOM's articulation of appropriate delegation. *See*, *e.g.*, *Hoffman Constr. Co.*, 3 BNA OSHC 1425 No. 5057, 1975 WL 4933, at *4 (stating that Area Directors are the agency's "delegated issuing authority"). Thus, in order for someone other than an Area Director (such as, for example, the Solicitor's Office) to issue, amend, or authorize the amendment of a citation, the Secretary or the Area Director would have to re-delegate that authority and provide "intelligible principles" for its exercise. But there is no evidence of such a delegation here. The Secretary has not amended Section 1903.14 in any way, and Mr. Ciuffo testified that he did not authorize anyone else to act on his behalf. *See* Tr. 759-60. To make matters worse, the Secretary has not even *identified* the responsible person or entity, so there is no assurance against the unlawful

involvement of private parties[34] and the Court should presume that there was *no* responsible entity.

While an attorney with Solicitor's Office claimed the amendments were the Solicitor's "decision" at one point in the hearing, *see* Tr. 759,[35] the Solicitor lacks the authority to give valid approval. The Secretary's regulations establish that the Solicitor's Office is responsible for "providing legal advice" and determining whether legal proceedings are "appropriate." *See* Secretary's Order 4-2010, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 75 FR 55355 (Sept. 10, 2010).[36] Similarly, Commission rules allow "the Secretary" to amend her citation or proposed penalty at the Complaint stage of a legal proceeding. *See* OSHRC Rule 34(a). But, especially given Section 1903.14, these provisions do not allow the Solicitor to make substantive changes to a citation on her own without the authority—or even the input—of the expert agency that issued the citation in the first place.[37] *Cf. Continental Cas. Co.*, 113 F.2d at 286. It would also defeat

---

[34] Any delegation of government authority to a private entity is presumptively unlawful. *See Carter v. Carter Coal*, 298 U.S. 238, 311 (1936).

[35] The identity of who in the Solicitor's Office may have made the decision to substantially broaden the gravamen of the alleged violation does, in fact, remain "a mystery." *See* Tr. 774.

[36] To the extent that this delegation to the Solicitor's Office is made *in the context of a delegation to OSHA*, it severely circumscribes her role in that context and clearly prohibits her from making changes to a citation that go well beyond "providing legal advice."

[37] The problems attendant to the lack of authorization are even more significant considering that the amendments substantially expanded the nature of the hazard, as well as its geographic and temporal scope, as discussed above. Perhaps some minor unauthorized action by the Solicitor or an unidentified individual within OSHA would not raise alarms, *cf. Perlmutter v. Commissioner*, 373 F.2d 45 (10th Cir. 1967) (allowing a district office of the Internal Revenue Service to issue tax deficiency notices without an express delegation from

[Footnote continued on next page]

the purpose of having an expert agency to enforce the OSH Act. Since the Secretary has not shown that anyone within the agency authorized the amended complaint, it lacks color of law and is not entitled to receive legal effect.

2. The Amended Complaint is Time-Barred

The Secretary's amendments are also void under the OSH Act's statute of limitations. OSHA concluded its investigation on March 13, 2009, and issued its original citation on May 26, 2009. It then waited three months to issue the amended complaint on August 14, 2009. But since the OSH Act's statute of limitations provides that no citation may be issued after the expiration of six months following the occurrence of the alleged violation, *see* OSH Act § 9(c), these changes were out-of-time.[38]

Nor does it avail the Secretary to argue that her substantial amendments "relate back" to the original complaint. The "relation back" rule is a limited exception to the statute of limitations that enables parties to achieve, through amendment, what they could not achieve in a new citation. Its applicability determines, in the first instance, whether the action is a permitted *amendment* or a prohibited *issuance*. An otherwise out-of-time amendment may "relate back" if it concerns "the conduct, transaction, or occurrence" alleged in the original Citation, *see id.*, but the cases that allow "relation back" are typically concerned with minor or technical changes, *see Duane Smelser Roofing Co.*, 4 BNA OSHC 1948 No. 4773, 1976 WL 22798, at *3 (OSHRC) (allowing an amendment to correct a "technical deficienc[y]"), *CMH Co. Inc.*, 9 BNA OSHC 1048 No. 78-5954, 1980 WL 10699, at *5 (OSHRC) (allowing an amendment to substitute a

---

[Footnote continued from previous page]
the Commissioner of Internal Revenue where such delegation could be implied), but unauthorized changes of *this* magnitude certainly should.

[38] Blitz Day fell on November 28, 2008, so the statute of limitations expired on May 28, 2009.

"closely related" company as the respondent). An amendment will *not* "relate back" if it places new facts at issue or unduly enlarges the scope of the original complaint. *See Worldwide Mfg., Inc.*, 19 BNA OSHC 1023 No. 97-1381, 2000 WL 1086717, at *3 n.2 (OSHRC) (upholding ALJ's decision not to amend complaint from a serious violation to a willful violation because it would have "placed new facts in issue"); *Roanoke Iron & Bridge Works*, 5 BNA OSHC 1391 No. 10411, 1977 WL 7489, at *3 (OSHRC) (upholding ALJ's decision not a amend complaint where the amendments would "add new factual allegations"); *B.C. Crocker*, 1975 WL 22024 (ALJ) (denying on statute-of-limitations grounds an amendment that would have added a new hazard from the same alleged cause (lack of machine guarding).

Under any reading of the applicable case law, the Secretary's amendments do not "relate back" to the original citation because they add new facts and enlarge the citation.

First, they add new hazards. While the original citation alleged a hazard of "asphyxiation by crowd crush," the amended complaint adds the garden-variety hazard of "being struck." While the original citation alleged that employees faced injury from "crowd crush," the amended complaint adds the possibility of injury from "crowd surge, or crowd trampling." *See* Complaint ¶ 5. As Respondent has previously argued, "being struck" is an entirely different hazard than "asphyxiation." OSHA's IMIS database has a unique category for "struck by" hazards, and there are multiple cases to support this separate categorization. *See Ed Cheff Logging*, 9 BNA OSHC 1883 No. 77-2778, 1981 WL 18906, at *7 (OSHRC) (distinguishing "rollover" hazards from "struck by" hazards); *Darby Creek Excavating, Inc.*, 21 BNA OSHC 1137 No. 03-1541, 2004 WL 2857354, at *3 (OSHRC ALJ) (distinguishing "pinch point" hazards from "struck-by" hazards). The Secretary explained that she sought to amend the citation "to reflect that employees were exposed to the hazards of asphyxiation *and* being struck." *See* Complainant's

Opposition, at 3. Also, Area Director Ciuffo testified that the alleged asphyxiation hazard is "more serious" than the alleged struck by hazard and that "crowd crush, crowd surge, or crowd trampling" is "more encompassing" than "crowd crush." *See* Tr. 766-67. And Mr. Wertheimer provided detailed reasons why "crowd crush," "crowd surge," and "crowd trampling" are separate phenomena. *See* Tr. 318.

Using the Secretary's videotape exhibits as an example, it is easy to see how the addition of new hazards "places new facts at issue." Instead of determining whether the employees in these exhibits were at risk of being "asphyxiated," the Court need only conclude, more broadly, that the crowd may have "struck" employees. Instead of applying OSHA's well-established definition of "crushing" (which has its own IMIS search category), the Court need only determine the likelihood of "crush," "surge," or "trampling" on Mr. Wertheimer's terms. The Secretary, quite clearly, alleges a different recognized hazard—factually and legally—in her complaint than she did in her citation.

Second, the amendments broaden the geographic scope of the violation. While the original citation placed the hazard at the "East entrance of 77 Green Acres Mall," the amended complaint encompasses the entire premises at "East 77 Green Acres Mall." *See* Complaint ¶ 5. At the hearing, Mr. Ciuffo admitted that the citation could be read to allege the presence of a hazard throughout "the entire interior of the store." *See* Tr. 779. But the Commission has rejected similar attempts to expand the cited area. *See Willamette Iron & Steel Co.,* 1978 CCH OSHD ¶ 22,587 No. 76-1201, 1978 WL 22368, at *6 (ALJ) (denying amendment where it "would enlarge the space where the violation allegedly existed to include new, additional areas").

Third, the amendments expand the temporal scope of the hazard. While the original citation required abatement measures for "large sales events," the amended complaint requires abatement measures for "special events anticipated to attract the public." Complaint ¶ 5. As Respondent has previously argued, "special events" are a subset of "large sales events;" Walmart sells computer games, books, and a number of other items that have "special" release dates but whose release does not constitute a "large sales event." *See* Respondent's Motion to Strike, at 7. Indeed, depending on how arbitrary the Secretary intends to be with respect to this nebulous allegation, "special events anticipated to attract the public" could include daily sales at every store. At the hearing, Mr. Ciuffo sanctioned this interpretation by explaining that abatement measures might be necessary for any crowd between "three and three million" people. *See* Tr. 768. Along similar lines, Mr. Wertheimer testified that things like the sale of chicken nuggets by a courtroom cafeteria could constitute "special sales." *See* Tr. 609-10. Such a broadening of the citation's temporal scope clearly exceeds the parameters of the original citation. *See Willamette Iron & Steel*, at *6.

3. If the Complaint is Rejected, the Original Citation Does Not "Snap Back."

The invalidity of the Secretary's amendments requires the dismissal of her case. An amended complaint supersedes the original citation, so the complaint may not "snap back" to avoid the negative implications of amended language. *See Int'l Controls v. Vesco*, 556 F.2d 665, at 668 (2d Cir. 1977) ("it is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect"). Yet, even if the Secretary's complaint *could* snap back, she would have no basis for maintaining an argument. Since the Secretary now concedes that the cause of Mr. Damour's death is irrelevant, she has taken the originally-cited hazard of "asphyxiation" off the table. *See* Tr. 21, 813. There is no *other* evidence that employees faced a

danger of asphyxiation because the Secretary's case focuses entirely on the improperly-alleged hazard of "being struck."

4. The Secretary Impermissibly Cites Respondent for Failing to Take Specific Abatement Measures

Further, in light of Respondent's reasonable efforts, portions of the Secretary's citation read like an impermissible checklist of "should haves." Commission precedent instructs that the Secretary may not allege a hazard in terms of the necessary abatement measures; that the presence or absence of *hazardous conditions* is determinative, not the presence or absence of *specific abatement measures*. *See, e.g.*, *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 No. 89-265, 1997 WL 212599, at *55 (OSHRC) (Gutman, Commissioner, separate opinion) ("Neither the contested citation nor section 5(a)(1) itself required Pepperidge to implement the specific abatement measures that were recommended by the Secretary's witnesses"); *Brown & Root, Inc.*, 8 BNA OSHC 2140 No. 76-1296, 1980 WL 10668 (OSHRC), at *5 ("the employer may use any method that renders its worksite free of the hazard and is not limited to those methods suggested by the Secretary"); *Arcadian Corp.*, 20 BNA OSHC 2001, 2004 WL 2218388, at *8 (OSHRC) ("stating a hazard in terms of the absence of abatement is, of course, error"). Yet, the Secretary has not provided a precise description of the alleged hazardous condition: she merely explains that the hazard of "crowd crush, crowd surge or crowd trampling" will arise to different degrees at different "special sales events" depending upon the site- and event-specific "risk assessments" of a crowd management expert, the race of the crowd, and other "demographic" factors. *See* Tr. 508-12, 610. She further makes the citation hinge upon the type of abatement measures the Store used. In the context of Blitz Day 2008, she alleges that hazardous conditions arose from the absence of "appropriate crowd management techniques." Complaint ¶ 5. In her opening statement, the Secretary explained that the alleged "hazards occurred as a result of Walmart's

failure to take sufficient measures to protect employees from crowd crush, crowd surge, and crowd trampling." *See* Tr. 18 (for example, its use of "just a handwritten sign" instead of a sign with "professional" font and layout. *See* Tr. 27, 833). Area Director Ciuffo put the matter even more bluntly at the hearing, explaining that "what [Respondent was] cited for was [it] didn't plan and [it] didn't train [its] employees." *See* Tr. 680.

5. The Application of the General Duty Clause is Unconstitutionally Vague Given the Arbitrary, Impenetrable and Nebulous Contents of the Citation

The terms of the citation also raise constitutional issues. The Supreme Court has instructed that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *See Connally v. Gen'l Constr. Co.*, 269 U.S. 385, 391 (1926). In the context of workplace health and safety, the Fifth Circuit has said that "if a violation of a regulation subjects private parties to criminal or civil sanctions, [the] regulation cannot be construed to mean what [the] agency intended but did not adequately express." *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). The Commission has said that a statute or regulation must provide "reasonably prudent employer[s]" in the relevant industry with "notice and warning" of the conditions it prohibits. *See Asamera Oil, Inc.*, 9 BNA OSHC 1426, 1980 WL 81803, at *14 (ALJ). Standards dependent upon "the whim of an Area Director" must fail. *See Santa Fe Trail & Transport Co.*, No. 331, 1973 WL 165888, at *2 (OSHRC). Thus, in *Castle & Cook Foods*, the Commission rejected a standard that required "feasible engineering or administrative controls" to protect employees from dangerous noise levels. *See Castle & Cook Foods*, 1975-1976 CCH OSHD ¶ 20,182 No. 10925, 1975 WL 21994, at *2 (OSHRC). Without some further "reasonable test," it said, this instruction left employers to "guess at their peril" what controls the Secretary would

"subjectively" consider feasible. *See id.* at *9-10; *see also Asamera Oil*, 1980 WL 81803, at *14-15 (rejecting a standard that required employers to identify and prevent fire hazards "normally prevented by positive mechanical ventilation" because there was no "rationale" for the Secretary's expert's "rule[s] of thumb").

In the context of the instant General Duty Clause citation, the void for vagueness case law applies with even greater force. Respondent lacks a "reasonable test" and must guess at required conduct. The General Duty Clause, which says only that employers must "furnish a place of employment that is free from hazards causing or likely to cause death or serious injury," is vague without further guidance concerning the specific hazard and conduct at issue. *See, e.g.*, *Davey Tree Expert Co.*, 11 BNA OSHC 1898 No. 77-2350, 1984 WL 34818, at *1 (OSHRC) (finding that the Secretary's "broad, generic definition" of a hazard arising under the General Duty Clause did not "apprise [the employer] of its obligations [or] identify conditions or practices over which [it could] reasonably be expected to exercise control"). The Secretary attempts to operationalize the Clause in this case by requiring "appropriate crowd management techniques" at "special sales events" and instructing employers to hire an expert for case-specific definitions. Complaint ¶ 5. But if the whim of an Area Director is not appropriate for the Secretary to rely upon, then neither is the whim of an outside "expert." If "rules of thumb" are insufficient, then so are Mr. Wertheimer's "management factors." And if "feasibility" is not a "reasonable test," then neither is "appropriateness." Area Director Ciuffo acknowledged the Complaint's open-endedness by conceding that abatement measures might be necessary for any crowd between "three and three million" people. *See* Tr. 768. Mr. Wertheimer did the same by testifying that everything from a cafeteria's sale of chicken nuggets to a retail store's Blitz Day sale could constitute "special sales." *See* Tr. 609-10. There is no means, derived from the text of

Section 5(a)(1), by which Respondent could guess, for example, that it needed to profile crowds, or that clowns could improve the safety of its events, or that the appropriate number of crowd managers for a sales event of 2,000 people was between eight and eighteen people. While the Secretary may have "intended" these applications, they are not "adequately expressed" in a clause generally targeting "hazards causing or likely to cause death or serious injury." *See Diamond Roofing Co.*, 528 F.2d at 649. To permit such a strained interpretation of the General Duty Clause "is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them." *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976).

6. The Citation Does Not State the Nature of the Hazard with Particularity

The Secretary must also describe alleged violations of the OSH Act with "particularity." *See* OSH Act § 9(a). While her citations need not contain "minute detail," they must "fairly characterize the violative condition" in a way that is adequate "to inform the employer of what must be changed." *See Hercules, Inc.*, 20 BNA OSHC 2097 No. 95-1483, 2005 WL 5518545, at *2 (OSHRC). Thus, in *Rasmussen*, the Commission rejected a citation that blankly called for the employer to "initiate a safety program" because it did not specify how the employer's conduct implicated specific hazards and its list of requirements was "nothing more than OSHA's own idealized minimum safety program." *See Rasmussen & Sons Constr.*, 17 BNA OSHC 1565 No. 94-1954, 1995 WL 17049980, at *5 (OSHRC). In *Whirlpool*, likewise, the Secretary's citation was initially non-particular because it did not clarify whether an alleged problem with the employer's netting system was the netting itself or the bolts that held the netting in place. *See Whirlpool Corp.*, 7 BNA OSHC 1356 No. 9224, 1979 WL 8443, at *5 (OSHRC). The Secretary must also describe the *location* of the violation with particularity. In *BW Harrison*, for example,

the Fifth Circuit rejected a citation that called for a "hearing conservation program" without identifying the particular work stations where noise violations occurred. *See Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1309 (5th Cir. 1978); *see also Union Camp Corp.*, 1 BNA OSHC 3248 No. 2367, 1973 WL 4281 (OSHRC) ("the citation and complaint merely advise the respondent that somewhere in its immense plant . . . there is some violation of the standard"). And in *Henry J. Kaiser*, the Commission explained that a citation implicating "split timbers" in a scaffolding structure was not sufficiently particular until the Secretary amended the complaint to reference specific beams. *See Henry J. Kaiser Co.*, 11 BNA OSHC 1597 No. 82-476, 1983 WL 181692, at *1-2 (OSHRC).

Here, as in the above cases, the Secretary has not described the required conduct or the location of the hazard with particularity. First, the required conduct is "not limited to" the "procedures and techniques" listed in the complaint. Complaint ¶ 5. Respondent is supposed to hire someone with "training in crowd management" to conduct a "risk assessment" for any "special event." *See* Tr. 528-29. But if the Secretary must specify between one of two equally-plausible abatement measures, as in *Whirlpool*, then she must specify the concrete "procedures and techniques" she has in mind here. If the call to "initiate a safety program" in *Rasmussen* was not particular, then neither is the Secretary's call to "hire an expert" (in so many words).[39] Second, the Secretary generically implicates "East 77 Green Acres Mall" as the location of the hazard. Complaint ¶ 5. Mr. Ciuffo unsuccessfully attempted to clarify the citation's generic

[39] Even if the Secretary's terms were not facially problematic, moreover, the lack of readily-available experts and relevant consensus standards would leave Respondent without hope of obtaining consistent guidance across events or locations. See Tr. 580 (Wertheimer, conceding that crowd management training was "almost non-existent" before 2010), 471-73 (Wertheimer, conceding that he is only aware of five crowd management experts in the world).

location, conceding that it could be read to encompass the whole store while indicating that *he* would read it to cover "the sidewalk, the vestibule, and some [unspecified] front portion of the store." *See* Tr. 779. But just as the Secretary's whole-plant locations were unacceptable in *BW Harrison* and *Henry J. Kaiser*, she cannot target the whole store (or some generic "front portion") in this case. Just like the employers in those cases could not be required to ferret out particular planks or noise hazards, Respondent should not have to start from scratch in determining how to pair specific abatement measures with specific work locations in its stores.

7. The Secretary Was Required To Use Rulemaking Rather than Adjudication

The lack of relevant industry standards pertaining to crowd control dictates that the Secretary should have proceeded by rulemaking rather than adjudication to target the alleged hazards. There was no "anchor" for the instant adjudication because the retail industry had not even discussed crowd hazards and the National Fire Protection Association had expressly excused retailers from having to comply with the Life Safety Code's crowd management provisions. The Secretary's own expert, Mr. Wertheimer, opined that the targeted conduct should be "made safe by *creating* a standard that everybody can adhere to . . . a formal standard that is adopted or applied that requires everyone to stay consistent." *See* Tr. 637 (emphasis added).

The Supreme Court has instructed that agencies should perform "the function of filling in [statutory] interstices . . . as much as possible, through the quasi-legislative promulgation of rules." *See SEC v. Chenery*, 332 U.S. 194, 202 (1947). Problems of notice and fairness arise when agencies use adjudication to develop policy on novel issues or change their existing policy. *See id.* at 203. "Where, as here, a party first receives actual notice of a proscribed activity through a citation, it implicates the Due Process Clause of the Fifth Amendment." *See Fabi*

Constr. Co., Inc. v. Secretary of Labor, 508 F.3d 1077, 1088 (D.C. Cir. 2007); *see also Martin v. OSHRC*, 499 U.S. 144, 158 (1991) (noting that "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties"). Thus, agencies must use rulemaking if the problem of retroactively deeming conduct unfair, which is inherent in the use of adjudication, outweighs "the mischief of producing a result which is contrary to statutory design." *See id.* The problem of retroactivity is particularly salient in cases of second impression, *see NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860-61 (2d. Cir. 1966), and in cases involving fines or penalties, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). While the Supreme Court has not had occasion to specify any concrete situations when rulemaking is necessary, lower courts have provided clearer guidance. In *Ford Motor Company*, for example, the Ninth Circuit announced the principle that agencies may proceed by adjudication "to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small," but must proceed by rulemaking if they seek "to change the law and establish rules of widespread application." *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981). Other courts have held similarly. *See*, *e.g.*, *CBS Inc.*, v. *Comptroller of the Treasury*, 575 A.2d 324 (Md. 1990) (finding that a state comptroller should have used rulemaking to introduce a means of calculating tax income that differed from the means used in previous audits); *Metromedia, Inc. v. Director, Div. of Taxation*, 478 A.2d 742, 750-51 (N.J. 1984) (same).

The Secretary's use of adjudication in this case raises all of the above concerns. Nothing inherent in the OSH Act's "statutory design" compels the Secretary's immediate intervention. This is an admittedly-novel theory of liability, and nothing objectively new to the workplace triggered the Secretary's sudden interest. The problems of retroactivity are heightened by this

novelty, as well as by the Secretary's attempt to impose fines and by courts' past rulings on similar issues. At the time of the alleged violation, the Commission had not considered crowd-based hazards, but it *had* instructed that "freakish and unforeseeable" injuries do not "trigger statutory liability under the general duty clause," *see Tuscan/Lehigh Dairies*, *Inc.*, 22 BNA OSHC 1870 No. 08-0637, 2009 WL 3030764, at *14 (ALJ); *see also Nat'l Realty*, 489 F.2d at 1266 (conduct that is "idiosyncratic and implausible in motive or means" is not subject to regulation under the General Duty Clause). At least one ALJ had instructed that human behavior was a "wild card" that was not directly "amenable to control" under the OSH Act. *See Megawest Fin.*, *Inc.*, 17 BNA OSHC 1337 No. 93-2874, 1995 WL 383233, at *8-9. And courts had rejected the Secretary's attempts to regulate human-behavior based hazards in other similar contexts, including workplace violence and ergonomics. *See id.*, at *9 (holding that employer did not recognize a "hazard" of workplace violence); *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1205-06 (10th Cir. 2009) (applying *Megawest* and finding that, despite guidance materials on OSHA's website, workplace violence was not a "recognized hazard" under the General Duty Clause); *Pepperidge Farm, Inc.*, 1997 WL 212599, at *51 (finding that the Secretary had not identified a feasible means of abating repetitive motion injuries); *Nat'l Realty*, 489 F.2d at 1266 (holding that the Secretary had not identified a feasible means of preventing employee horseplay). These were the most relevant guidance materials available to Respondent, and the instant citation effectively second-guessed them. The Secretary is not seeking to "enforce discrete violations of existing laws," then, but to "establish [new] rules of widespread application." This is her first case on workplace crowd hazards, and her new rules are so "widespread" that they could affect everything from a day-after-Thanksgiving sale to the sale of "particularly hot" chicken nuggets or "every day" low-priced goods. *See* Tr. 609-10, 771-72.

8. The Secretary Has Improperly Delegated Government Authority to an Outside Expert

As the holder of Congressionally-delegated government authority, the Secretary may not re-delegate her public duties to a private entity. While it is permissible for agencies to adopt industry consensus standards or to rely on private input, *see Town Constr. Co. v. OSHRC*, 847 F.2d 1187, 1190 (6th Cir. 1988), the government must retain ultimate discretion in deciding on regulatory or enforcement action, *see Wallace v. Currin*, 95 F.2d 856, 865-66 (4th Cir. 1938). While the abrogation of government duty is unconstitutional under any circumstances, the "most obnoxious" form is a delegation "to private persons whose interests may be and often are adverse to others in the same business," *see Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), or "whose objectivity may be questioned on grounds of conflict of interest," *see Sierra Club v. Sigler*, 695 F.2d 957, 962 (5th Cir. 1983).

Here, the Secretary has run afoul of basic non-delegation principles by ceding her enforcement authority to Mr. Wertheimer, who was under retainer by the Damour family while working with and testifying for the Secretary. She used Mr. Wertheimer, rather than any OSHA official, to explain the citation and elaborate on the means for selecting abatement measures. Moreover, she repeatedly indicated that Respondent would have to hire an expert "similar" to Mr. Wertheimer to determine the abatement measures for specific sales events. *See* Tr. 528. Such indiscriminate reliance upon an outside expert shows a complete abdication of government authority. Without any "competence" in crowd management or crowd control, the Secretary lacks discretion to choose among Mr. Wertheimer's suggestions or to apply them in this case. *See* Tr. 673, 683, 687, 770, 831, 835-37. If she intends to bring future crowd hazard citations, she will once again have to consult with the likes of Mr. Wertheimer to determine what action is necessary. Respondent, meanwhile, must depend on the same pool of private individuals:

Mr. Ciuffo could only name one person who was "competent in the field of crowd management," *see* Tr. 768-69, and Mr. Wertheimer could only name five, *see* Tr. 471-73. The Secretary's delegation is particularly "obnoxious" considering Mr. Wertheimer's conflicts of interest and the bias and subjectivity of his views. *See* Tr. 465-70. If the Secretary wins this case, it would translate directly into more business for Mr. Wertheimer, since his primary abatement suggestion is for retailers to hire crowd management experts like him. It would also serve to legitimate his particular views about crowd management, which, far from representing a majority viewpoint or an industry custom, are "adverse to [those of] others in the same business." *See Carter v. Carter Coal Co.*, 298 U.S. at 311. Mr. Wertheimer believes that one prominent crowd management organization, the International Association of Assembly Managers (IAAM), has "blacklisted" him. *See* Tr. 469-70. (Yet, the Secretary legitimates this organization by citing its website in support of her feasibility argument, *see* Govt. Ex. 43, 45). His assertions about the need for crowd management in retail contradict the National Fire Protection Association's Life Safety Code, as well as the conclusions of the retail industry. *See* Part III.B.2.b, *supra*. And, most importantly, his bias against Respondent for allegedly "screwing" the public cannot be denied. *See* Tr. 461.

9. The Citation Is Directed to an Issue of Public Safety Outside of OSHA's Jurisdiction

Finally, the Secretary's citation is flawed because it improperly targets an area of public safety outside of OSHA's jurisdiction and within the State's traditional police power. The OSH Act is a limited-purpose statute, meant simply to "assure safe and healthful *working* conditions" by "prevent[ing] personal injuries and illnesses arising out of *work* situations." *See* OSH Act, preamble and § 2(a) (emphasis added). Like all federal statutes, its application begins with "the assumption that the historic police powers of the States are not to be superseded." *See Gade v.*

Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 111 (1992); *see also Kelly v. State of Washington,* 302 U.S. 1, 13 (1937) (assumption against federal preemption of state power is "especially strong" where the state aims "to protect the lives and the health of its people"); *Toy Mfrs. of Amer. v. Blumenthal*, 986 F.2d 615, 602 (2d. Cir. 1992) (federal Hazardous Substances Act did not preempt Connecticut statute governing the contents of safety labels on toys because "child safety . . . lies at the heart of the states' police powers"); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681 (2d. Cir. 1996) (federal statutes governing Civilian Marksmanship Program did not preempt city ordinance criminalizing transfer or possession of certain assault weapons). "Congress did not intend the Act to apply to every conceivable aspect of employer-employee relations," and not every "condition of employment" is a potential "hazard" within the meaning of the General Duty Clause. *See Amer. Cynamid. Co.*, 9 BNA OSHC 1596 No. 79-5762, 1981 WL 18872, at *2 (OSHRC).

In *Gade*, the Supreme Court recognized the limited reach of the OSH Act by instructing that it could only preempt an Illinois statute insofar as that statute "directly, substantially and specifically regulat[ed] occupational safety and health." *See Gade*, 505 U.S. at 107. The Court cautioned that the OSH Act should not preempt "state laws of general applicability (such as laws regarding traffic safety or fire safety)" because they "regulate workers simply as members of the general public." *See id.* In *Ramsey Winch*, likewise, the Tenth Circuit implicitly rejected any OSHA foray under the General Duty Clause into traditional areas regulated by the state's police power such as the regulation of workplace violence potentially triggered by allowing guns in workplace parking lots. *See Ramsey Winch,* 555 F.3d at 1204-05. And in *American Cynamid*, the Commission found that an employer's policy of excluding women from working in a

manufacturing plant out of concerns for "fetus protection," although discriminatory, was not a "hazard" within the meaning of the Act. *See Amer. Cynamid*, 1981 WL 18872.

Here, by wading into an area that does not "directly, substantially, and specifically" concern "occupational safety and health," the Secretary steps outside of her limited jurisdiction. *Cf. Gade*, at 107. Nassau County maintains a police force for the general protection of its citizens, and its duties include responding to the unpredictable, violent actions of unruly crowds. Before 2008, the Nassau County Police Department had taken active efforts to control crowds using their lights and bullhorns during Blitz Day sales at the Store. *See* Tr. 237-38. In 2008, Officer Malley told Sal D'Amico that he could obtain police assistance with crowd control by calling the local precinct. *See* Tr. 238. The police promised assistance and initially provided support according to plan. *See* Resp. Ex. 145(a), at 188-89, 193-94; Tr. 1110. When the crowd became unruly, employees instinctively turned to the police (as anyone in their situation would have done from a basic understanding of the functions and purposes of government). *See* Tr. 105, 1017, 1094. And when the police arrived and restored order in "a matter of seconds," *see* Tr. 174, they reinforced this basic understanding. Nassau County's perception of this matter as something within its traditional police power is further evidenced by the involvement of the Nassau County District Attorney's Office.

Yet, the Secretary would have employees, rather than police, "reinstate orde[r] should a crowd become unruly." *See* Tr. 72. She would have employees, rather than police "protect [themselves] and customers from a crowd that [had] become unruly." *Id.* In doing so, she turns the OSH Act from a limited-purpose labor law to a federal mandate for the establishment of an employee defense force. She would have OSHA "regulate workers simply as members of the general public." *Cf. Gade*, at 107. Area Director Ciuffo seemed to understand the flaws in the

Secretary's logic by conceding that "confronting an unruly crowd" was "a different issue than crowd management" and that it would not be "appropriate" to give employees "self defense" training like police receive. *See* Tr. 847-48. Human beings are simply not "amenable to control" like the traditional subjects of OSHA regulation. *See Megawest*, 1995 WL 383233, at *8-9. The Secretary's thinly disguised efforts to turn unpredictable anti-social behavior into a "workplace hazard" depart from the OSH Act's limited purpose and should not be permitted.

IV.
CONCLUSION

For the above reasons, Respondent asks the Court to vacate the Secretary's citation.

DATED: October 26, 2010 BY: _/s/ Baruch A. Fellner_____

Baruch A. Fellner
Jason C. Schwartz
Daniel P. Rathbun
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5303
Tel: (202) 955-8500
Fax: (202) 467-0539
Attorneys for Walmart Stores, Inc.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Complainant, v. WAL-MART STORES INC., Respondent.	OSHRC DOCKET No. 09-1013

[PROPOSED] ORDER VACATING THE CITATION

Upon consideration of the evidence presented at the hearing and the parties' post-hearing briefs, the citation is VACATED.

Dated: _____, 2010

BY THE COMMISSION:

_____
Judge Covette Rooney

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Complainant, v. WAL-MART STORES INC., Respondent.	OSHRC DOCKET No. 09-1013

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of Respondent's Post-Hearing Brief and Respondent's Statement of Facts and Proposed Findings of Fact were electronically served on October 26, 2010 on the following parties:

Jeffrey Rogoff
rogoff.jeffrey@dol.gov
Sudwiti Chanda
chanda.sudwiti@dol.gov
Darren Cohen
cohen.darren@dol.gov
Office of the Solicitor
U.S. Department of Labor
201 Varick Street, Room 983
New York, New York 10014
Tel: (646) 264-3669
Fax: (646) 264-3660

/s/ Baruch A. Fellner
Baruch A. Fellner
BFellner@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5303