

**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

**SECRETARY’S POST-TRIAL BRIEF**

M. PATRICIA SMITH  
Solicitor of Labor

PATRICIA M. RODENHAUSEN  
Regional Solicitor

JEFFREY ROGOFF  
Senior Attorney

SUDWITI CHANDA  
DARREN COHEN  
KATHRYN L. STEWART  
Attorneys

U.S. Department of Labor  
Attorneys for HILDA L. SOLIS,  
Secretary of Labor, Complainant

Patricia M. Rodenhausen  
Regional Solicitor  
U.S. Department of Labor  
201 Varick Street, Room 983  
New York, New York 10014  
Tel. 646-264-3650, Fax 646-264-3660

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... ii

**TABLE OF AUTHORITIES** ..... v

**PRELIMINARY STATEMENT** ..... 1

**STIPULATIONS**..... 3

**FACTUAL BACKGROUND AND PROPOSED FINDINGS OF FACT** ..... 4

    A.    Wal-Mart Corporate Structure ..... 5

    B.    Wal-Mart Safety Policies and Procedures: Incident and Accident Reporting..... 5

        1.    Claims Management, Inc. as Wal-Mart’s Injury Claims Administrator ..... 6

        2.    Reporting Claims ..... 7

        3.    Access to Accident History and Summary Reports ..... 8

    C.    Blitz Day Events at Wal-Mart Stores..... 10

        1.    Crowd-Related Incidents on Blitz Days at the Store Prior to 2008 ..... 11

        2.    Crowd-Related Incidents on Blitz Days at Wal-Mart Stores Nationwide Prior to 2008..... 13

    D.    2008 Blitz Day Event..... 16

        1.    Preparation for the 2008 Blitz Day Event..... 16

            i.    The Store’s “Game Plan” ..... 17

            ii.   Construction Barricades..... 19

            iii.  No Training in Crowd Management or Crowd Control..... 21

        2.    The Events of November 28, 2008 ..... 22

            i.    Preparation for the Store’s 5 a.m. Opening..... 22

            ii.   “Melee” Rush at 5 a.m. Opening ..... 25

            iii.  Hazardous Conditions in the Vestibule..... 26

    E.    2009 Day-After-Thanksgiving Day Sales Event ..... 34

**ARGUMENT**..... 38

I.    EMPLOYEES WERE EXPOSED TO STRUCK BY AND ASPHYXIATION HAZARDS AT THE VALLEY STREAM WAL-MART STORE ON BLITZ DAY, NOVEMBER 28, 2008. .... 40

    A.    Employees Testified That They Were Exposed to Serious Crowd-Related Hazards. .... 41

B.	Graphic Video Footage From Blitz Day 2008 Confirms Wal-Mart’s Employees’ Exposure to Serious Crowd-Related Hazards.....	44
II.	<b>WAL-MART RECOGNIZED THAT ITS EMPLOYEES FACED SERIOUS STRUCK BY AND ASPHYXIATION HAZARDS FROM THE CROWDS OF CUSTOMERS AT ITS STORES ON BLITZ DAY.....</b>	<b>47</b>
A.	Wal-Mart Recognized Crowd-Related Hazards Because Employees Had Been Exposed to Serious Crowd-Related Incidents at Wal-Mart Stores Before 2008.....	50
1.	Wal-Mart Was Aware of Prior Crowd-Related Incidents at the Valley Stream Store. ....	51
i.	Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2005.....	51
ii.	Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2006.....	53
iii.	Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2007.....	55
iv.	Wal-Mart Recognized the Crowd-Related Hazards at the Store Following Blitz Day 2007. ....	58
2.	Wal-Mart Was Aware of Prior Crowd-Related Incidents at Its Stores Nationwide.....	61
i.	Wal-Mart Had Notice That Crowds Rushing Into Its Stores on Blitz Day Presented Serious Hazards to Employees.....	64
ii.	Wal-Mart Had Notice That Employees and Customers Were Pushed and Struck By Crowds Rushing Into Its Stores on Blitz Day. ....	66
iii.	Wal-Mart Had Notice That Employees and Customers Were Knocked Down and Trampled By Crowds Rushing Into Its Stores on Blitz Day.....	67
iv.	Wal-Mart Had Notice That Employees and Customers Were Pushed, Crushed or Pinned Against the Store or Doors By Crowds Rushing Into Its Stores on Blitz Day. ....	68
v.	Wal-Mart Knew That It Lacked Appropriate Crowd Control Measures at Its Stores. ....	69
B.	Wal-Mart’s Blitz Day Planning Documents Demonstrate That Wal-Mart Recognized Crowd-Related Hazards. ....	72
C.	The Valley Stream Store’s Flawed Safety “Precautions” For Blitz Day 2008 Demonstrate That Wal-Mart Recognized Crowd-Related Hazards.....	77
III.	<b>THE HAZARDS FACED BY WAL-MART’S EMPLOYEES WERE LIKELY TO CAUSE SERIOUS HARM OR DEATH. ....</b>	<b>79</b>

IV.	WAL-MART COULD HAVE MATERIALLY REDUCED THE HAZARDS TO ITS EMPLOYEES BY USING PRACTICAL, FEASIBLE CROWD MANAGEMENT MEASURES. ....	83
A.	Wal-Mart Failed to Utilize Feasible Crowd Management and Crowd Control Measures That Were Available in 2008. ....	84
B.	Wal-Mart Failed to Utilize Feasible Crowd Management and Crowd Control Measures That Would Have Materially Reduced the Hazards to Employees.....	90
V.	THE SECRETARY’S \$7,000 PROPOSED PENALTY IS REASONABLE IN LIGHT OF THE SERIOUS HAZARDS PRESENTED TO WAL-MART’S EMPLOYEES. ....	93
VI.	RESPONDENT’S AFFIRMATIVE DEFENSES ARE MERITLESS.....	94
	<b>CONCLUSION</b> .....	98
	<b>APPENDIX A – JOINT PRE-HEARING STATEMENT</b>	
	<b>APPENDIX B – SUMMARY CHART OF PRIOR CLAIMS FORMS</b>	
	<b>APPENDIX C – CHART OF VIDEO FOOTAGE FROM BLITZ DAY 2008</b>	

## TABLE OF AUTHORITIES

### Cases

<u>Arcadian Corp.</u> , 20 BNA OSHC 2001, 2004 WL 2218388 (Rev. Comm. 2004).....	39, 40, 41, 50
<u>Austin Bridge &amp; Road, L.P.</u> , 21 BNA OSHC 1815, 2006 WL 2781631 (Rev. Comm. 2006).....	85, 91
<u>Baroid Div. of NL Indus., Inc.</u> , 660 F.2d 439 (10th Cir. 1981).....	84
<u>Benedi v. McNeil-P.P.C., Inc.</u> , 66 F.3d 1378 (4th Cir. 1995) .....	63
<u>Bethlehem Steel Corp.</u> , 607 F.2d 871 (3d Cir. 1979) .....	41
<u>Beverly Enterprises, Inc.</u> , 19 BNA OSHC 1161, 2000 WL 34012177 (Rev. Comm. 2000).....	49, 77, 82, 83, 84, 85
<u>Brennan</u> , 494 F.2d 460 (8th Cir. 1974).....	40, 41, 48
<u>Carlyle Compressor Co., Div. of Carrier Corp.</u> , 683 F.2d 673 (2d Cir. 1982) .....	49, 50
<u>Cerro Metal Prods. Div., Marmon Group, Inc.</u> , 12 BNA OSHC 1821, 1986 WL 53467 (Rev. Comm. 1986).....	85
<u>Con Agra, Inc.</u> , 11 BNA OSHC 1141, 1983 WL 23849 (Rev. Comm. 1983) .....	85
<u>Continental Oil Co.</u> , 630 F.2d 446 (6th Cir. 1980).....	63
<u>Dorey Elec. Co.</u> , 553 F.2d 357 (4th Cir. 1977).....	80
<u>Dover Elevator Co.</u> , 16 BNA OSHC 1281, 1993 WL 275823 (Rev. Comm. 1993) .....	48
<u>Dun-Par Engineered Form Co.</u> , 12 BNA OSHC 1962, 1986 WL 53522 (Rev. Comm. 1986).....	48
<u>Dye Constr. Co.</u> , 9 BNA OSHC 1215, 1980 WL 10549 (ALJ 1980), <u>aff'd</u> 698 F.2d 423 (10th Cir. 1983).....	63
<u>Empire-Detroit Steel Div., Detroit Steel Corp.</u> , 579 F.2d 378 (6th Cir. 1978).....	79
<u>Fears v. Wal-Mart Stores, Inc.</u> , Civ. A. No. 99-2515-JWL, 2000 WL 1679418 (D. Kan. Oct. 13, 2000) .....	50
<u>General Dynamics, Elec. Boat Div.</u> , 15 BNA OSHC 1891, 1992 WL 184536 (ALJ 1982) .....	51
<u>General Dynamics Land Sys., Inc.</u> , 985 F.2d 560, 1993 WL 15067 (6th Cir. 1993) (unpublished) .....	49, 72

<u>Georgia Elec. Co.</u> , 595 F.2d 309 (5th Cir. 1979).....	47, 48
<u>Granite City Terminals Corp.</u> , 12 BNA OSHC 1741, 1986 WL 53439 (Rev. Comm. 1986).....	50
<u>Illinois Power Co.</u> , 632 F.2d 25 (7th Cir. 1980).....	80, 82
<u>J.A. Jones Constr. Co.</u> , 15 BNA OSHC 2201, 1993 WL 61950 (Rev. Comm. 1993).....	94
<u>Jones &amp; Laughlin Steel Corp.</u> , 10 BNA OSHC 1778, 1982 WL 22627 (Rev. Comm. 1982).....	63
<u>Kaiser Aluminum &amp; Chem. Co.</u> , 10 BNA OSHC 1893, 1982 WL 22713 (Rev. Comm. 1982).....	79
<u>Kansas City Power &amp; Light Co.</u> , 10 BNA OSHC 1417, 1982 WL 22592 (Rev. Comm. 1982).....	40
<u>Kelly Springfield Tire Co.</u> , 1982 WL 917447 (Rev. Comm. 1982), <u>aff'd</u> , 729 F.2d 317 (5th Cir. 1984).....	82
<u>Kelly Springfield Tire Co., Inc.</u> , 729 F.2d 317 (5th Cir. 1984).....	47
<u>Kus-Tum Builders, Inc.</u> , 10 BNA OSHC 1128, 1981 WL 18941 (Rev. Comm. 1981).....	49, 50
<u>Marquette Cement Mfg. Co.</u> , 568 F.2d 902 (2d Cir. 1977).....	40, 47, 79, 80
<u>McKie Ford</u> , 18 BNA OSHC 1393, 1998 WL 175008 (ALJ 1998), <u>aff'd</u> 191 F.3d 853 (8th Cir. 1999).....	47
<u>McKie Ford, Inc.</u> , 191 F.3d 853 (8th Cir. 1999).....	47, 48
<u>Mercer Well Serv., Inc.</u> , 5 BNA OSHC 1893, 1977 WL 7758 (Rev. Comm. 1977) .	49, 72, 77, 78
<u>Mineral Indus. &amp; Heavy Constr. Group</u> , 639 F.2d 1289 (5th Cir. 1981).....	40, 80
<u>Morrison-Knudsen Co., Inc.</u> , 16 BNA OSHC 1105, 1993 WL 127946 (Rev. Comm. 1993).....	90
<u>Nat'l Realty &amp; Constr. Co., Inc.</u> , 489 F.2d 1257 (D.C. Cir. 1973).....	40, 47, 80, 83
<u>Nelson Tree Services, Inc.</u> , 60 F.3d 1207 (6th Cir. 1995).....	47, 48
<u>Pepperidge Farm, Inc.</u> , 17 BNA OSHC 1993, 1997 WL 212599 (Rev. Comm. 1997).....	47, 49, 77, 83, 85
<u>Praxair Distrib., Inc.</u> , 22 BNA OSHC 1075, 2007 WL 2511145 (Rev. Comm. 2007).....	49, 50
<u>Puffer's Hardware, Inc.</u> , 742 F.2d 12 (1st Cir. 1984).....	49, 72, 77

<u>REA Exp., Inc.</u> , 495 F.2d 822 (2d Cir. 1974).....	40
<u>R.L. Sanders Roofing Co.</u> , 620 F.2d 97 (5th Cir. 1980).....	47
<u>Royal Logging Co.</u> , 645 F.2d 822 (9th Cir. 1981).....	80
<u>Safeway, Inc.</u> , 382 F.3d 1189 (10th Cir. 2004).....	48
<u>Ted Wilkerson Inc.</u> , 9 BNA OSHC 2012, 1981 WL 18797 (Rev. Comm. 1981) .....	49, 72, 78
<u>The News Press</u> , 21 BNA OSHC 2211, 2007 WL 1934885 (Rev. Comm. 2007) .....	48, 79
<u>The Timken Co.</u> , 20 BNA OSHC 1070, 2003 WL 1889150 (Rev. Comm. 2003).....	49, 72, 78
<u>Titanium Metals Corp.</u> , 579 F.2d 536 (9th Cir. 1978).....	80
<u>Tree of Life d/b/a Gourmet Award Foods, NE Div.</u> , 19 BNA OSHC 1535, 2001 WL 1154451 (Rev. Comm. 2001).....	79
<u>Ulysses Irrigation Pipe Co.</u> , 11 BNA OSHC 1272, 1983 WL 23858 (Rev. Comm. 1983).....	49, 72, 77
<u>Union Oil Co.</u> , 869 F.2d 1039 (7th Cir. 1989).....	50
<u>U.S. Postal Service</u> , 21 BNA OSHC 1767, 2005 WL 6407173 (Rev. Comm. 2005) .....	39
<u>U.S. v. Ladish Malting Co.</u> , 135 F.3d 484 (7th Cir. 1998).....	48, 61, 72
<u>Valdak Corp.</u> , 17 BNA OSHC 1135, 1995 WL 139505 (Rev. Comm. 1995), <u>aff'd</u> , 73 F.3d 1466 (8th Cir. 1996) .....	93, 94
<u>Waldon Health Care Center</u> , 16 BNA OSHC 1052, 1993 WL 119662 (Rev. Comm. 1993).....	39, 49, 77, 79, 80, 83
<u>Wal-Mart Stores, Inc.</u> , 406 F.3d 731 (D.C. Cir. 2005).....	63
<u>W.G. Fairfield Co.</u> , 285 F.3d 499 (6th Cir. 2002) .....	48
<u>Whirlpool Corp. v. Marshall</u> , 445 U.S. 1 (1980).....	80

**Statutes**

29 U.S.C. § 651, <u>et seq.</u> .....	3
29 U.S.C. § 654(a)(1).....	38

**Federal Rules**

Fed. R. Evid. 407 ..... 87

Fed. R. Evid. 801(d)(2)(D) ..... 12, 15, 52, 63

Fed. R. Evid. 1006 ..... 15

## **PRELIMINARY STATEMENT**

On November 28, 2008, a Wal-Mart employee tragically died as a crowd of customers surged into Wal-Mart's Valley Stream, NY store (the "Store" or the "Valley Stream Store") during its annual day-after-Thanksgiving Day "Blitz Day" sales event ("Blitz Day Event" or "Blitz Day"). As graphically captured on video, numerous employees and customers were struck by the crowd, caught in repeated crowd crushes and surges, knocked to the ground and trampled, and pinned against the walls of the Store's vestibule during the event. At least ten employees corroborated the horrific events depicted in the footage in their detailed testimony of, among other things, the unsafe conditions they faced inside and outside the Store, the inability to hold themselves upright as the crowd "busted through," and the danger of asphyxiation from crowd pressure and trampling. Although these grave events were unfortunate, they were not unforeseeable for Wal-Mart.

At every level of the company – from floor employees, Store management, regional managers, up to its corporate headquarters – Wal-Mart had actual knowledge of the crowd-related dangers posed to its employees on its busiest and most profitable shopping day of the year. Now, its feigned ignorance of these hazards is belied by the evidence, including extensive employee testimony and Wal-Mart's own records reporting previous crowd-related problems at the Store and its other stores nationwide.

Wal-Mart knew that crowds could knock down the front doors of the Store – indeed, the crowd surge had knocked the doors down at the Store's three prior Blitz Day Events. Wal-Mart knew that the force of the crowds and the falling doors placed its employees directly in harm's way – indeed, its own records contain extensive and

voluminous reports of crowd-related injuries at its stores during the prior five years. Wal-Mart knew that it lacked appropriate crowd management plans at its stores – indeed, its own managers stated that the “store should have had some type of crowd control” in place on Blitz Day. Wal-Mart’s Blitz Day planning documents further highlight its knowledge of the hazards, including the fact that the greatest dangers from crowds were present when the doors were opened on the morning of Blitz Day and that more than one-third of injuries on Blitz Day are “*directly related* to crowd control,” and the need to plan for crowd control.

Yet, despite its knowledge of the serious crowd-related hazards and the large crowd expected for the event, Wal-Mart’s meager safety measures utterly failed to address these known hazards on Blitz Day 2008. In fact, the only additional measure utilized in 2008 that was different from prior years was the temporary placement of eight plastic hollow barriers forty feet away from the Store’s entrance, which were removed prior to opening. Wal-Mart’s woefully inadequate steps for Blitz Day 2008, and its inactions in the face of known hazards led to its employees’ exposure to significant risks of being struck by and/or asphyxiated by rushing, unmanaged crowds. Wal-Mart failed to protect its employees by utilizing effective crowd management measures that were available and would have mitigated the crowd-related hazards. Indeed, following the 2008 Blitz Day and a criminal investigation by the Nassau County District Attorney’s Office, Wal-Mart itself developed a comprehensive crowd management plan, terms of which are consistent with the Secretary’s proposed abatement measures.

To protect Wal-Mart’s employees, and all workers at large, planned retail events, the Secretary issued a single item citation, properly amended, pursuant to Section 5(a)(1)

of the Occupational Safety and Health Act (the “Act”) based on Wal-Mart’s recognition of the hazards of asphyxiation or being struck due to crowd crush, crowd surge, or crowd trampling. While November 28, 2008 marked the first time an employee died during Wal-Mart’s annual Blitz Day Event, Wal-Mart cannot escape liability simply because its employees were fortunate enough to survive crowd-related hazards in previous years. Wal-Mart violated the Act by failing to provide a workplace free from recognized crowd-related hazards, and accordingly, the amended citation and proposed penalty should be affirmed.

### **STIPULATIONS**

The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.). See Section VI of the Joint Pre-Hearing Statement, at 49, attached hereto as Appendix A.

The parties further agree that, at all relevant times, Respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act. Id.

Respondent timely contested the citation at issue herein and the proposed penalty, pursuant to the provisions of section 10(c) of the Act. Id.

Although the parties recognize that certain facts are undisputed, the parties were unable to agree as to how to characterize those facts. See App. A, § V at 30.

## FACTUAL BACKGROUND AND PROPOSED FINDINGS OF FACT<sup>1</sup>

When Respondent opened the Store doors for its 2008 Blitz Day Event, waves of customers rushed through the entrance, knocking down the doors and flooding the vestibule. A Wal-Mart employee, Jdimytai Damour, was struck by the falling door and crowd, knocked to the ground and trampled, and subsequently died. Many others were struck, caught in the crowd surge, knocked to the ground, pinned to the wall, trampled and injured. On May 26, 2009, following an investigation by the Occupational Safety and Health Administration (“OSHA”), Respondent was issued a single item citation pursuant to Section 5(a)(1) of the Act arising out of this incident. As amended by the Complaint, the citation alleges that employees were exposed to the hazards of being struck or asphyxiated due to crowd crush, crowd surge, or crowd trampling and that Respondent failed to implement reasonable and effective crowd management to prevent these hazards.<sup>2</sup>

---

<sup>1</sup> To the extent any proposed findings of fact appear in the Argument section below and are not contained in this section, citations to the record have been included.

<sup>2</sup> Crowd crush is defined as being pressed between bodies of people in a group. Tr. at 318:13-15; 327:20-25, 328:8-329:6 (discussing Sec. Ex. 35b (video footage from the Valley Stream Store’s November 28, 2008 Blitz Day Event)); 332:20-22, 334:23-335:7 (discussing Sec. Ex. 35a (video footage from the Valley Stream Store’s November 28, 2008 Blitz Day Event)).

Crowd surge is defined as the sudden movement of a group of people in a swelling manner, like a wave. Tr. at 318:17-18, 326:23-327:19, 328:3-9, 328:21-329:6 (discussing Sec. Ex. 35b); 332:10-14 (discussing Sec. Ex. 35a).

Crowd trampling is defined as the act of being pushed down by people in a crowd. Tr. at 318:20-22, 327:20-25, 328:8-18, 328:21-329:6 (discussing Sec. Ex. 35b); 332:10-12 (discussing Sec. Ex. 35a).

Crowd management is defined as the systematic and comprehensive planning for and management of groups of people. Tr. at 318:3-5. See also Sec. Ex. 38 (10 Questions to Ask During a Crowd Management Case) at 1 (“Crowd management refers to the proactive steps that can be taken to prevent potential problems at a facility.”).

**A. Wal-Mart Corporate Structure**

¶1 Wal-Mart Stores, Inc. (“Wal-Mart”), a Delaware corporation, maintains its principal office and place of business in Bentonville, Arkansas (“the Home Office”). Compl. ¶ II; Answer ¶ II. Wal-Mart owns approximately 4,200 retail stores throughout the United States, including the Valley Stream Store. Sec. Ex. 148 (M. Mullins Dep. Tr.) at 30:15-17, 32:4-7. The company is divided into divisions, regions, markets and store levels, and the Valley Stream Store is part of what is called Market 45. Sec. Ex. 152 (S. Sooknanan Dep. Tr.) at 31:5-14.

¶2 Salvatore D’Amico was the Market Asset Protection Manager for Market 45 in 2008; he reported to the Regional Asset Protection Director, who reported to the Divisional Asset Protection Director. Tr. at 185:14-22, 186:7-12, 187:7-22. The divisional director reported to the Vice President of Asset Protection, a position based in the Home Office. Tr. at 187:7-22. Monica Mullins has been the Vice President of Asset Protection and Safety for Wal-Mart since 2007, and she oversees asset protection and safety for all Wal-Mart stores in the United States. Sec. Ex. 148 at 27:13-17, 27:18, 28:18-19, 36:19-24. Prakash Steve Sooknanan was the Store Manager during the 2008 Blitz Day Event, and he was considered part of the management team for Market 45. Sec. Ex. 152 at 30:11-17, 31:5-14.

**B. Wal-Mart Safety Policies and Procedures: Incident and Accident Reporting**

¶3 The Home Office sets safety policies for all Wal-Mart stores nationwide. Sec. Ex. 148 at 51:10-14. The Home Office generally communicates its policies to the

---

Crowd control is defined as the planned limitation or restriction of crowd behavior, crowd movement, and crowd density. Tr. at 318:8-10.

field through e-mails targeted to specific levels. Sec. Ex. 148 at 52:13-23. For example, Wal-Mart uses a “safety playbook,” available through Wal-Mart’s intranet, the WIRE, to communicate to individual stores specific safety measures that it wants stores to implement. Sec. Ex. 148 at 57:2-6. Once these policies are communicated, it is expected that they are carried out at the divisional, regional, market and store levels. Sec. Ex. 148 at 51:18-52:3. Resources regarding policies and procedures are also made available on the WIRE. Tr. at 232:4-6, 20-24. Although the Home Office could have required certain crowd management and/or crowd control measures for Blitz Day events at its stores, prior to 2009, it opted not to do so. Tr. at 186:7-187:22, 188:3-10, 15-23, 232:7-18.

*1. Claims Management, Inc. as Wal-Mart’s Injury Claims Administrator*

¶4 Claims Management, Inc. (“CMI”) is the administrator of Wal-Mart’s general liability and worker’s compensation claims. Sec. Ex. 148 at 77:18-21, 78:3-7. As described below, all injuries at Respondent’s stores are reported to CMI for processing, handling and analysis as directed by Wal-Mart. CMI is a wholly owned subsidiary of Wal-Mart that may have some of the same corporate officers as Wal-Mart. Sec. Ex. 148 at 78:8-13. CMI has been used by Wal-Mart since at least 1998, and CMI does not serve any clients other than Wal-Mart. Sec. Ex. 148 at 78:22-25, 80:13-16. CMI is located 20 minutes from Wal-Mart’s Home Office. Sec. Ex. 148 at 79:2-7. CMI pays claims on behalf of Wal-Mart, and requires approval to settle and pay claims above a certain financial threshold. Sec. Ex. 148 at 79:8-10, 80:5-12. Effectively, CMI is a unit within the Wal-Mart corporate structure. See Answer, Corporate Disclosure Statement.

## 2. *Reporting Claims*

¶5 Incidents and accidents are reported in Respondent's claims reporting system. Respondent distinguishes an incident – an occurrence that has resulted in an injury or property damage – from an accident – something that results in medical treatment or lost time from work for the injured party. Sec. Ex. 148 at 66:7-14.

¶6 Incidents are reported on Wal-Mart's incident reporting log available on its intranet, the WIRE. Sec. Ex. 148 at 66:15-23. These logs are maintained at the store level for three to five years. Sec. Ex. 148 at 68:10-16.

¶7 Accidents or incidents involving employees and/or customers are also reported electronically by Wal-Mart through CMI's Incident Reporting System ("IRS"). Sec. Ex. 148 at 72:15-22, 73:2-4, 17-19, 83:18-21. A member of Wal-Mart management completes the report online on the IRS, which is available on store computers and connected to Wal-Mart's own intranet. Sec. Ex. 148 at 72:11-22; Sec. Ex. 152 at 53:16-54:15. For accidents, corporate policy mandates that stores scan and send supporting documents to CMI, including a statement from the injured party, videos, photos, and a description of the injury from a list of pre-set injury codes provided in the reporting program is assigned. Sec. Ex. 148 at 74:5-9, 75:14-24; Sec. Ex. 152 at 54:16-22, 55:3-13. The pre-set injury codes include categories for "struck by another" and "slip, trip, and fall." Sec. Ex. 148 at 144:12-18. Furthermore, Respondent maintains a hard copy of the entire report record, including supporting documentation, with the individual store. Sec. Ex. 148 at 75:25-76:4. Importantly, with respect to reported claim files of incidents or accidents at Wal-Mart stores, including the corroborating witness statements and photographic/video footage, Respondent has stipulated that it has no further information

regarding those matters apart from the documents it produced during discovery. Sec. Ex. 148 at 116:25-118:5. Furthermore, Respondent has no information to contradict the manager statements contained in such records. Id.

3. *Access to Accident History and Summary Reports*

¶8 Respondent has unrestricted access to both employee and customer accident claims. In particular, all members of the management team, which includes managers at the store, regional, district and corporate levels, have general access to basic information about claims from Wal-Mart's internal electronic system. Sec. Ex. 148 at 69:8-20, 94:17-95:9. For example, members of management – including those in the Home Office – have access to claims at all the stores, including information regarding store location, description of injury, date and time of incident, whether any work was lost by the claimant, and whether any medical attention was required. Sec. Ex. 148 at 94:13-97:13. Moreover, each Wal-Mart store has access to its own accident claims history. Sec. Ex. 148 at 62:11-15.

¶9 In addition, Respondent can also access more detailed claim information from CMI. For example, the Home Office and Wal-Mart managers have access to all of the claims by request to CMI, or directly by viewing the claims form itself on Wal-Mart's internal electronic system. Sec. Ex. 148 at 99:2-17. Further, individual Wal-Mart employees can also request information about employee and customer claims from CMI. Sec. Ex. 148 at 88:6-8. Likewise, Respondent can and does access hard copies of claims records by category. For example, in this case, Respondent produced more than 2,500 pages of claims records from over 100 claims, in response to discovery requests seeking information on incidents where employees and/or customers were struck by or injured by

crowds entering its store doors at Blitz Day Events from 2003-2008. Sec. Ex. 148 at 104:21-25.

¶10 Additionally, accident incidence and summary reports can be requested by Respondent, and upon request, the analysis reports are prepared and generated from the information stored by CMI. Sec. Ex. 148 at 89:5-25. For example, the Asset Protection and Safety Divisions have the authority and the ability to request reports from CMI whenever needed to conduct their business. Sec. Ex. 148 at 91:2-5. The reporting system allows the claims to be searched by date, and the search can be limited to specific time frames or specific injuries by key fields. Sec. Ex. 148 at 108:9-14. Therefore, reports can be requested by type of injury, location of injury, and frequency of injury by hour of the day (i.e., all “struck by” injuries in the vestibule between the hours of 5:00 a.m. and 6:00 a.m. on Blitz Day). Sec. Ex. 148 at 89:16-25, 106:5-108:8. The data, thereafter, is aggregated based on the specific request and a summary report is generated. Sec. Ex. 148 at 89:24-25.

¶11 Indeed, just weeks prior to the 2008 Blitz Day Event, Wal-Mart personnel requested such a summary of incidents and accidents that specifically occurred in the vestibule of its stores on prior Blitz Days. See Sec. Ex. 55 (October 21, 2008 e-mail attaching safety portion of AP Broadcast and PowerPoint presentation titled “Blitz Day % of Accident Free Stores by Division, By Year”); see also Sec. Ex. 148 at 106:5-10, 143:9-11. The information was generated at the request of Wal-Mart analysts and the report was reviewed by Vice President of Asset Protection Monica Mullins before its distribution. Sec. Ex. 148 at 136:8-17, 137:13-16. This safety presentation ultimately was used for an Asset Protection broadcast to the field via Wal-Mart satellite television

and was dispersed to all stores throughout the U.S. approximately one month before the 2008 Blitz Day Event. Sec. Ex. 148 at 133:16-134:3. In particular, this report notified Wal-Mart personnel nationwide that “13 percent of general liability claims on Blitz Day in 2007 occurred in the vestibule.” Sec. Ex. 148 at 143:3-5; see also Sec. Ex. 55 at 5. In addition, it was noted that 13% of Blitz Day 2007 claims involved individuals reporting injuries from being struck by another person. Sec. Ex. 148 at 143:19-22; see also Sec. Ex. 55 at 5. Further analysis of the claims by number of incidents by hour of the day clearly demonstrated that the number of incidents spiked at 5:00 a.m. – just when the store doors are opened for Blitz Day sales. Sec. Ex. 148 at 144:19-146: 9; see also Sec. Ex. 55 at 5.

¶12 In the claims records, MGR refers to manager, id. at 128:20-24; AM refers to assistant manager, id. at 129:1-4; SM refers to store manager, id. at 129:10-13; MOD refers to manager on duty, id. at 129:22-130:2; and AP refers to asset protection personnel, id. at 129:18-21.

### **C. Blitz Day Events at Wal-Mart Stores**

¶13 The day-after-Thanksgiving Day “Blitz Day” sales event is Wal-Mart’s largest sale and shopping day of the year and its biggest annual sales event. Sec. Ex. 53 (NYIT video, on DVD labeled File footage from Wal-Mart prior to Black Friday incident, 11/24/2008) from 0:00 to 01:00 (see Tr. of Sec. Ex. 53 at 4:2-7). Prior to 2009, many Wal-Mart stores (including the Valley Stream Store) opened early for business at 5:00 a.m. on Blitz Day and offered certain deeply discounted items advertised while supplies lasted from 5:00 a.m. until 11:00 a.m. on the day of the sale. Sec. Ex. 51 (Wal-Mart 2008 Blitz Day Advertisement, in color); Sec. Ex. 52 (Wal-Mart 2008 Blitz Day

Advertisement, in black & white). As described by Store Manager Steve Sooknanan, in a videotaped interview prior to Blitz Day 2008: “it’s always the same. It’s always in the morning, you know, the big rush and getting everybody through the door and everybody running towards that great item....” Sec. Ex. 53 from 02:00 to 03:00 (see Tr. of Sec. Ex. 53 at 6:10-13).

*1. Crowd-Related Incidents on Blitz Days at the Store Prior to 2008*

¶14 The Valley Stream Store first opened for business in December of 2003, and has held Blitz Day sales events every year since. Sec. Ex. 50 (Respondent’s Third Supplemental Responses to Interrogatories) at 2 & 3. Although these special sales events were known to attract larger than normal crowds, the Store did not have a comprehensive, systematic crowd management plan in place. Rather, it was up to each individual store manager to determine what, if any, crowd management measures were necessary based on their knowledge of the store, previous Blitz Days and local conditions. Sec. Ex. 148 at 220:12-19. In certain years, for example, the Store utilized shopping carts to prevent the customers waiting on the sidewalk outside the store from going into the fire lane. Sec. Ex. 50 at 4; see also Sec. Ex. 152 at 71:9-72:6. In at least one other year, employees were instructed to pick up personal effects and debris in the vestibule and help people up who fell. Sec. Ex. 152 at 106:7-18. In one year, Store Manager Sooknanan even created a map that was handed out to customers, which included a specific instruction to “refrain from running as you enter the store to avoid injuring fellow shoppers and our associates.” Sec. Ex. 69 (Map of Valley Stream Store for Blitz Day 2006 or 2007).

¶15 Notably, beginning in 2005, at each and every Blitz Day at the Store, the outer vestibule doors were knocked down as the customers entered the Store at opening.

Sec. Ex. 50 at 3; Sec. Ex. 142 (Respondent's Certified Response to Interrogatories No. 22 & 23) at 6. During Blitz Day 2005, the outer vestibule doors were knocked off the frame by customers pushing on the doors as they rushed into the Store, and at least two injuries were reported as a result of the rushing crowds. Sec. Ex. 48 (Respondent's Supplemental Response to Interrogatories) at 9 ("Respondent is aware of injuries to two customers caused by an entering or rushing crowd during Blitz Day 2005. *See* claims 4847496 and 4836912 in the documents produced herein."); see also Sec. Ex. 50 at 2. In the records regarding one of the reported injuries, Store Co-Manager Kenneth Worthington stated that he observed people from the parking lot pushing their way into the Store when the doors opened at 5:00 a.m., and that "[t]he customers broke the doors completely off including the motor." Sec. Ex. 129 (Claim #4847496) at 3, box 1.<sup>3</sup>

¶16 Similarly, during Blitz Day 2007, customers were pushing against the doors as they tried to enter the building in a manner that concerned Store Manager Sooknanan. Sec. Ex. 152 at 203-204, 223:25-236:10. In fact, he felt that the customers got too close to the door for his comfort. Id.; Tr. at 1042:4-6. Department Manager Justin Rice and approximately five other employees were instructed to position themselves between the crowd and the Store's outer vestibule doors so that the doors could be opened. Tr. at 129:12-16, 130:7-15. Not only did the outer vestibule doors break as a result of customers pushing on the doors as they entered the Store, the glass from above the doors also shattered and fell on Wal-Mart employees, cutting the hand of

---

<sup>3</sup> Respondent has stipulated that it is not aware of any information contradicting the statements of Mr. Worthington in the 2005 customer injury claim forms. Sec. Ex. 148 at 116:25-118:5; Sec. Ex. 152 at 86:13-22. In any event, statements by Respondent's managers contained within injury claim records constitute admissions of a party-opponent and thus are admissible as non-hearsay. See Fed. R. Evid. 801(d)(2)(D).

Mr. Rice. Tr. at 124:9-23; 131:7-24; 1042:23-1043:14; Sec. Ex. 152 at 148:18-21. Several employees including Mr. Rice, moreover, were pushed by the crowd against the walls of the vestibule and pinned against the wall for several minutes. Tr. at 122:16-123:10, 123:16-19, 124:1-8. Specifically, while Mr. Rice was pinned against the vestibule wall, customers were bumping him, stepping on his shoes, stumbling over him and hitting his arms as they fell entering the Store. Id.

2. *Crowd-Related Incidents on Blitz Days at Wal-Mart Stores Nationwide Prior to 2008*<sup>4</sup>

¶17 Such incidents and injuries resulting from rushing Blitz Day crowds were not unique to the Valley Stream Store; Respondent knew of numerous similar reported crowd-related incidents and hazardous conditions at its other stores nationwide prior to 2008. Indeed, as evidenced by its internal records, Respondent had notice of over 160 reports of incidents or injuries to employees and customers who were struck or injured by crowds entering or rushing through Respondent's stores during Blitz Days in 2003-2007 across the country. See, e.g., Sec. Exs. 112-123, 127 (prior injury records of employee and customer injuries, produced by Respondent). Indeed, in its discovery responses, which Respondent was ultimately compelled by the Court to produce, Respondent admitted notice of over 100 such incidents. Sec. Ex. 48 at 15-16 (Respondent listed 114 incidents which met the following limited criteria: (1) "employees and/or customers who were struck or injured by crowds entering or rushing through the store," (2) from

---

<sup>4</sup> Respondent was ordered to produce documents regarding prior Blitz Day Events for the limited time frame of 2003 to 2008. See Chief Judge Sommer's Order of March 17, 2010. Accordingly, the timeframe of evidence presented herein is similarly limited in scope.

“centrally-located” information, (3) from “a period of five years before the subject incident,” and (4) on Blitz Days (and a few other limited holidays)).

¶18 In particular, Respondent’s own records show knowledge of many crowd-related incidents and injuries reported at prior Blitz Days at its stores, including, for example:

(1) Respondent’s store manager stated that claimant “ran through the doors and either got tripped up or knocked down and she got trampled...no crowd control measures specifically...*store should have had some type of crowd control.*” Sec. Ex. 127 at 1403 (emphasis added).

(2) Respondent’s employees were “knocked down and trampled by customers.” Sec. Exs. 112, 113.

(3) Respondent’s employees were “struck by Blitz rush customers.” Sec. Exs. 118, 119, 127 at 31.

(4) Respondent’s employees were “injured” during “Blitz rush.” Sec. Exs. 116, 117, 120-123.

(5) Respondent’s store manager stated that “when the doors were opened, it created a stampede, [customer] was pinned up against something...” Sec. Ex. 127 at 415.

(6) Customer “sustained a head injury when the doors to Wal-Mart were opened for a Black Friday sale and he was stampeded by a hoard of customers.” Sec. Ex. 127 at 707.

(7) “Customer was pinned by crowd while entering the store...[and] was crushed under the people.” Sec. Ex. 127 at 99, 102.

(8) Customer was “trying to get in the door and got slammed into it and pinned against it.” Sec. Ex. 127 at 208.

(9) Claimant was “injured at the store location during blitz day sales event due to W/M allegedly providing no crowd control.” Sec. Ex. 127 at 1011.

(10) “Once the doors were opened, the crowd began running. The [associates and managers] were actually shoved aside and had to push their way thru [sic] the crowd. Could not see the [claimant] fall but it was apparent she had [because] the [managers and associates] were pushing their way thru [sic] the crowd. Nothing on the floor to cause her to fall...[Claimant] was trampled by the crowd when doors were opened for Blitz.” Sec. Ex. 127 at 1151, 1153.

¶19 Respondent cannot deny that all of these injuries were reported and recorded in its records. See also Summary Chart of Prior Claims Forms, attached hereto at Appendix B.<sup>5</sup>

¶20 According to internal company e-mails from Wal-Mart Divisional Safety manager Joe Dial, moreover, Wal-Mart knew that the largest occurrence of customer accidents happened during the first hour of the Blitz Day Event (i.e., between 5:00 a.m. and 6:00 a.m.). Sec. Ex. 12 (November 12, 2008 e-mail from S. D’Amico to J. Blair, A.

---

<sup>5</sup> The Secretary maintains the relevance and admissibility of all pages of prior claims forms included in Sec. Ex. 127, which was admitted in its entirety during the Secretary’s case-in-chief. Tr. at 9:3-10:6. However, as directed by Your Honor at the close of the hearing, the Secretary submitted a summary chart of certain information and statements contained in Sec. Exs. 112-123, 127, 129 & 130 that are particularly relevant in establishing Respondent’s notice of hazards associated with Blitz Day crowds and admissions by managers. See App. B; see also Fed. R. Evid 801(d)(2)(D). This summary chart, with the corresponding highlighted sections of these exhibits, was provided as an aid to Your Honor given the large number of prior crowd-related Blitz Day incidents and injuries recorded in Respondent’s claims forms documents. See Fed. R. Evid 1006.

Gilroy and others) at 2; Sec. Ex. 55 at 2; Sec. Ex. 148 at 19:20-20:24. In fact, Mr. Dial – who was responsible for developing business safety plans for Wal-Mart – reported that 36% of total claims from Blitz Days were “*directly related to crowd control.*” Sec. Ex. 12 at 2, Sec. Ex. 55 at 2 (emphasis added); Sec. Ex. 148 at 20:15-24.

**D. 2008 Blitz Day Event**

*1. Preparation for the 2008 Blitz Day Event*

¶21 The Home Office, through its Fourth Quarter Safety Playbook, made clear that all Wal-Mart stores should be consistent in their focus on safety measures throughout the holiday season. Sec. Ex. 9 (October 21, 2008 e-mail from S. D’Amico); Sec. Ex. 148 at 157:2-13. Indeed, it was widely acknowledged that it was the “peak timeframe” for accidents “due to increased customer traffic.” Sec. Ex. 10 (October 31, 2008 e-mail from D. McHale to S. D’Amico and others) at 1; see also Sec. Ex. 3 (Blitz and Holiday Security Focus 2008) (discussing need for crowd control and customer safety for Blitz Day), Sec. Ex. 5 (Excerpt from Safety Playbook FY09: Holiday Safety Strategy 4th Quarter) (discussing “increased traffic during the early morning hours” of Blitz Day); Sec. Ex. 16 (Valley Stream Store safety committee notes, 2008) at 7 (“Plan for Blitz” lists “crowd control”); Sec. Ex. 54 (October 17, 2008 e-mail from B. Broadus to Region 1 AP) at 2 (discussing need to “focus on crowd control and crowd flow”). Indeed, Wal-Mart did not merely expect larger crowds on Blitz Day morning – it actively attracted these crowds for a limited supply of deeply discounted sales items offered during a limited time period (i.e. 5:00 a.m. to 11:00 a.m. on Blitz Day). See Sec. Ex. 51; Sec. Ex. 52.

¶22 Despite its awareness of crowd-related hazards and the need for crowd control, prior to 2009, Respondent lacked comprehensive crowd management policies and procedures in connection with its annual Blitz Day sales events. Rather, it was left to each individual store manager to determine what, if any, crowd management measures were necessary based on their knowledge of the store, previous Blitz Days and local conditions. Sec. Ex. 148 at 220:12-19. Moreover, these measures were not reviewed by the Home Office, and indeed the Home Office did not even verify that individual stores had, in fact, created any safety plans at all. Sec. Ex. 148 at 158:21-24. Notably, in prior years for other large sales events – such as the 2007 widely anticipated release of a new Harry Potter book – the Home Office developed a detailed safety playbook for its stores nationwide that specifically addressed crowd management issues. Sec. Ex. 70 (Wal-Mart’s Harry Potter Playbook, 2007) at 1, 3 & 11 (Wal-Mart’s 2007 Harry Potter plan included crowd management measures such as queuing, positioning employees outside the store to provide information to the crowd, and the use of multi-colored wrist bands and tickets as a means to manage crowd safety.).

*i. The Store’s “Game Plan”*

¶23 Based on “a very positive response” generated by Wal-Mart’s Blitz advertisement circulars, Respondent expected “heavier customer traffic than normal for [2008] Blitz Day.” Sec. Ex. 15 (November 25, 2008 e-mail from S. D’Amico to J. Blair and others) at 2. Stores were advised to “ensure action plans for crowd control...[were] in place.” *Id.* After receiving this notification, however, Mr. D’Amico – who as Market Asset Protection Manager was responsible for Blitz Day safety planning – took no additional steps. Tr. at 235:2-7, 260:3-7. Rather, he simply relied on his “game plan” for

Blitz Day for the Store, entitled “Black Friday Market 45 Action Plan.” Tr. at 222:1-3, 235:6; Sec. Ex. 2 (Black Friday Market 45 Action Plan, 2008). This “game plan,” however, did not constitute a crowd management plan for the 2008 Blitz Event at the Store. Sec. Ex. 148 at 159:21-23; Tr. at 368:10-23, 372:2-11. Indeed, Mr. D’Amico had no experience involving crowd management or crowd control during his employment with Wal-Mart. Tr. at 180:12-25, 181:11-17, 182:16-22, 185:9-13. Many aspects of this “game plan,” moreover, were never even implemented at the Store. See, e.g., Tr. at 1060:15-18.

¶24 Wal-Mart managers, including Mr. Sooknanan, Mr. Rice and Asset Protection Coordinator Julius Blair, had concerns regarding the 2008 Blitz Day crowd because in the prior year, customers pushed the front door and got too close to the entrance. Tr. at 1047:7-14, 1047:22-1048:1; Sec. Ex. 152 at 159:24-160:19, 207:7-23, 209:9-13; Sec. Ex. 145 (J. Blair Dep. Tr.) at 101:14-102:18; see also Sec. Ex. 53 from 17:00 to 18:00 (see Tr. of Sec. Ex. 53 at 18:19-20, 18:23-19:2, 19:7-9). In fact, prior to Blitz Day 2008, Mr. Rice met with Mr. Sooknanan and advised him that he had safety concerns for Blitz Day 2008 based on his experience working at the Store on Blitz Day 2007 and the door falling off the hinges that year. Tr. at 1047:22-1048:1; Sec. Ex. 152 at 220:5-16, 221:3-17. Mr. Rice recommended to Mr. Sooknanan that the Store use movie ropes to help manage the crowd outside for Blitz Day 2008 and “make it safe.” Tr. at 135:6-15, 136:7-13. On another occasion, during a videotaped Store planning meeting days prior to Blitz Day 2008, Mr. Rice asked Mr. Sooknanan for additional help at the door for Blitz Day 2008. Sec. Ex. 53 from 17:00 to 18:00 (see Tr. of Sec. Ex. 53 at 18:19-20).

¶25 While the Store hired 20 temporary employees from True Blue, Inc, d/b/a Labor Ready (“Labor Ready”) to work each night during the holiday season, these employees were not hired to assist with crowd management or provide security. Tr. at 1044:14-1045:10; Sec. Ex. 152 at 170:7-22, 171:2-5, 17-19, 179:18-21. Rather, these employees were hired specifically to help unload merchandise from the warehouse, clear the store, and prepare for the next business day throughout the holiday season. Sec. Ex. 152 at 172:11-173:9; Sec. Ex. 57 (Labor Ready Job Order Sheet, 11/22/2008). Their limited role was underscored by the fact that the only “site-specific” training provided to the temporary employees by Respondent was regarding the proper use of a box cutter, and nothing regarding crowd management or crowd control. Sec. Ex. 152 at 178:3-14, 226:8-19, 227:6-11, 17-25, 228:9-13; see also Sec. Ex. 58 (Labor Ready contract, signed by S. Sooknanan, 11/22/2008) at ¶ 4 (noting that Wal-Mart was responsible for “provid[ing] any necessary site-specific training and equipment”). Mr. Sooknanan took no steps to find out if the temporary employees were even trained in crowd management or crowd control. Sec. Ex. 152 at 178:24-179:4. As detailed below, some of these new, temporary employees – including the decedent Mr. Damour – ended up working outside the Store and in the Store’s vestibule during the 2008 Blitz Day Event. Tr. at 916:4-13.

*ii. Construction Barricades*

¶26 Concerned by the crowds from the previous year, Mr. Sooknanan wanted to keep the line farther away from the door in 2008. Sec. Ex. 53 at 17:00 to 18:00 (see Tr. of Sec. Ex. 53 at 18:23-19:2, 19:7-9); Tr. at 1047:11-14. The only measure he utilized to address this concern in 2008 that was different from prior years, however, was the use of a few barricades set 40 feet from the Store doors. Sec. Ex. 152 at 221:3-11,

237:25-238:4. Mr. Sooknanan instructed the use of barricades as a means to control the customers in line. Sec. Ex. 152 at 163:9-12; compare Sec. Ex. 2 at 1 (use of cones and caution tape to “control the line”). Mr. D’Amico, however, did not instruct the Store to use barricades; in fact he first learned of the barricades when he visited the Store the day before the Blitz Day Event. Tr. at 224:19-25.

¶27 Without specifying the type or number, approximately one week before the 2008 Blitz Day Event, Mr. Sooknanan simply told Mr. Blair to order barricades. Tr. at 1051:9-12, 22-24; Sec. Ex. 152 at 238:10-19. Unaided, Mr. Blair ordered eight plastic hollow construction barricades, each six-foot long, from Highway Technology, Inc. Sec. Ex. 142 at 8; Sec. Ex. 152 at 238:5-9, 242:22-23; Sec. Ex. 47 (Respondent’s Response to Secretary’s First Set of Interrogatories) at 7. The evening before the Blitz Day Event, Mr. Blair, with help of other untrained employees, set up the eight interlocking barricades in a simple L-shape formation. Sec. Ex. 152 at 240:10-11, 242:22-23; Tr. at 1053:23-25. The barricades were set approximately 40 feet from the vestibule doors. Sec. Ex. 152 at 241:7-13, 164:15-23; Sec. Ex. 47 at 7. The use of barricades for this event, however, was inadequate and problematic. Among other problems, the design and type of barriers used was not appropriate for crowd control purposes, and the barricades were not properly configured to queue the customers and assist with orderly, controlled customer flow into the building. Tr. at 379:19-24, 380:16-382:1. Moreover, whatever residual value these barriers might have had for such purposes dissipated as soon as the barriers were removed, as was done prior to the Store’s opening. Tr. at 1062:4-18

¶28 Mr. Sooknanan did not direct the use of any other devices to maintain the crowd in a certain area. Sec. Ex. 152 at 243:3-6. Indeed, no other crowd management

measures were implemented for Blitz Day 2008. Tr. at 78:12-21 (no other crowd management devices used other than barricades); 1060:15-18 (no caution tape or cones used to control line); 1065:1-3 (pull tags or tickets were not distributed); 1065:14-17 (metering, allowing limited number of customers into the Store as others left, was not done); 1076:22-1077:10 (no walkie-talkies were given to employees specifically for Blitz Day to assist in communications other than those working inside the Store in the Electronics Department and Asset Protection). Rather, Mr. Sooknanan and Mr. D'Amico simply instructed that any employees working in the vestibule at the time of the opening of the Store doors should "step to the side" to avoid the crowd entering the Store. Tr. at 246:20-247:10, 883:2-11, 888:2-11, 915:6-11; Sec. Ex. 150 (E. Sanders Dep. Tr.) at 40:24-41:1; see also Tr. at 1088:7-10 (Sooknanan did not tell employees where specifically to go to stay out of way of entering crowd).

*iii. No Training in Crowd Management or Crowd Control*

¶29 Despite concerns regarding the Blitz Day crowds, not a single one of the many Wal-Mart employees (including temporary employees) working at the 2008 Blitz Day Event received any training whatsoever in crowd management and/or crowd control from Wal-Mart. Tr. at 1028:5-12, 1045:11-14; Sec. Ex. 152 at 43:19-22; see also Tr. at 69:20-22, 132:20-22, 189:9-11, 856:18-857:6, 900:7-19, 1027:8-19; Sec. Ex. 145 at 149:2-7; Sec. Ex. 150 at 41; Sec. Ex. 48 at 14. In particular, no employee received any training from Wal-Mart on crowd control and/or crowd management, how to ensure the safe and orderly entrance of people into and out of the store, how to reinstate order should a crowd become unruly, or how to protect employees and customers from a crowd that had become unruly. Sec. Ex. 152 at 40:18-41:16, 41:17-25, 43:8-13; Sec. Ex. 148 at

223:23-224:8; see also Tr. at 72:1-14, 132:23-133:9, 190:5-17, 856:18-857:6, 900:7-19, 1027:8-19; Sec. Ex. 145 at 149:8-150:3; Sec. Ex. 150 at 41.

2. *The Events of November 28, 2008*

i. *Preparation for the Store's 5 a.m. Opening*

¶30 Customers began lining up outside the Store at approximately 5:30 p.m. on November 27, 2008, the evening before the Blitz Day Event. Sec. Ex. 142 at 8. Store Manager Sooknanan left the Store for the night at 11:00 p.m., while his employees performed “manual tasks” overnight to prepare for the sale. Tr. 1053:10-18. In the hours prior to opening for Blitz Day 2008, employees re-positioned vending machines to bisect the vestibule. Sec. Ex. 47 at 7. By 2:00 a.m., there were reportedly more than 1,000 people gathered outside the Store. Sec. Ex. 142 at 9.

¶31 Around 3:00 a.m., Mr. Sooknanan spoke to Assistant Manager Mike Sicuranza on the phone, and learned that customers had jumped the barricades and were crowding the Store's entrance. Tr. at 1084:2-4, 6-11; Sec. Ex. 152 at 244:14-25. Mr. Sooknanan also spoke with Mr. Blair on the phone, who confirmed that customers had jumped the barricades at 3:00 a.m. – two hours before the doors were scheduled to open. Tr. at 1084:12-20; Sec. Ex. 152 at 245:3-10.

¶32 Sounding very frightened, Mr. Sicuranza told Mr. Sooknanan he was scared to open the door. Sec. Ex. 152 at 244:14-25; Tr. at 1084:2-4, 6-11. Mr. Sooknanan directed Mr. Sicuranza to send the largest employees to manage the crowd outside. Sec. Ex. 142 at 10. Accordingly, Mr. Sicuranza instructed several employees to form a human-chain inside the barricades to keep customers out of the entrance area. Id. These employees included Mr. Sicuranza, Mr. Blair, Mr. Damour, Andrew Gilroy, Dante

Wedderburn, Santiago Corporan, Damion Ricketts, Dennis Fitch, Andre Cook, Antoine Lewis, Roydell Shaw, Dennis Smokes, Khareem Thomas, Eric Sobotcher, and two unidentified temporary workers. Id. As noted above, none of these employees had received any crowd management or crowd control training from Wal-Mart. Because they were not able to keep customers outside of the buffer zone created by the barricades, all employees were eventually directed to come back inside the Store. Id. at 11.

¶33 The token few employees who purportedly were tasked with walking the length of the line outside and communicating with customers did not do so in any kind of meaningful way, particularly given the large crowd of waiting customers. Tr. at 385:16-386:10. At approximately 4:00 a.m., Mr. Sooknanan arrived at the Store and saw police cars in the parking lot. Sec. Ex. 152 at 247:25-248:3. Mr. D’Amico arrived at approximately the same time and observed people standing right by the front doors of the glass vestibule; he saw that there was no buffer zone between the crowd and the Store. Tr. at 241:13-20. In light of the concerning situation, approximately 15 minutes later, Mr. Sooknanan held a meeting with employees. Sec. Ex. 152 at 252:7-13, 17-24. In the meeting, however, he simply instructed the employees to try to “stay out of the way” of the customers that were going to come into the Store. Sec. Ex. 152 at 253:7-12.

¶34 Around 4:30 a.m., Mr. D’Amico informed Mr. Sooknanan that the customers had “compromised the barricade again,” and that employees were outside attempting to back them out of the buffer zone. Sec. Ex. 152 at 254:24-255:5; Tr. at 1088:11-23, 1089:11-15. Customers were pushing and banging on the glass doors, and Mr. D’Amico heard what sounded like popping coming from the top of the door frame. Tr. at 243:21-244:2. Mr. D’Amico and Mr. Sooknanan saw the Store doors and the entire

glass facade of the vestibule starting to shake due to the mounting pressure being applied by the crowd, and they were both concerned that the doors would fall in and shatter. Tr. at 244:5-12, 19-21, 1018:22-1019:2, 1099:11-22. Indeed, Mr. D’Amico discussed with Mr. Sooknanan his concerns about the crowd being so close to the front door. Tr. at 245:3-11, 1088:11-23, 1089:11-15. Faced with this situation, Mr. Sooknanan held another meeting inside the Store, but again, simply instructed employees to move to the side when customers came into the Store. Tr. at 883:2-11, 915:6-11.

¶35 Mr. D’Amico then asked employees to go outside and “try and wedge themselves” between the Store’s entrance doors and the crowd, to try to get people away from the doors. Sec. Ex. 152 at 264:4-17; Tr. at 241:24-242:2. Again, none of these employees received any crowd management or crowd control training from Wal-Mart. Several employees attempted to form the wedge, but they were not able to create any space between the crowd and the front doors. Sec. Ex. 152 at 268:8-20; Tr. at 242:6-21. Mr. D’Amico told Mr. Sooknanan that he thought it was unsafe for the associates outside because they were too close to the crowds, and as a result the employees were directed to come back into the building. Tr. at 242:20-9, 1088:11-23, 1089:11-15; Sec. Ex. 152 at 261:22-25, 262:16-21, 263:22-24.

¶36 At approximately 4:45 a.m., Mr. Sooknanan instructed Mr. D’Amico and Mr. Blair to contact the police to ask for help because “there were too many people outside for us to open the building.” Sec. Ex. 152 at 289:14-24. Indeed, Mr. Sooknanan himself described the crowd at the door of the Store prior to opening as a “melee.” Sec. Ex. 152 at 276:8-13. Minutes prior to the opening, Mr. D’Amico again expressed his concern to Mr. Sooknanan that the Store should not open its doors without a police

presence. Tr. at 246:2-15. Although Mr. D’Amico advised Mr. Sooknanan to delay opening the Store, Mr. Sooknanan nevertheless decided to open the doors at 5:00 a.m. and specifically instructed employees to “assist in keeping the doors open.” Sec. Ex. 152 at 272:23-273:14. Mr. D’Amico had instructed employees stationed to work in the vestibule to “just stand to the side until the initial rush comes into the building.” Sec. Ex. 145 at 249:25-250:17; see also Tr. at 246:20-247:10, 247:19-20 (D’Amico instructed them to step over to the sides because he “wasn’t sure what potentially could happen when the doors open.”). Mr. Blair understood that management gave this instruction so that employees would not be pushed over by customers entering the Store. Sec. Ex. 145 at 250:18-251:12. Mr. Calhoun understood that this instruction was given because it was known that the crowd would rush and push the door. Tr. at 915:12-14. Mr. Sanders likewise understood that he was told to stay out of the way because it was known that people could “get hurt or injured” by the crowd. Sec. Ex. 150 at 42:13-18.

ii. *“Melee” Rush at 5 a.m. Opening*

¶37 After managers and employees inside the Store counted down from 10 to 1, Assistant Manager Roydell Shaw unlocked the vestibule entrance doors at 5:00 a.m. and quickly ran into the Store. Sec. Ex. 142 at 12; see Sec. Ex. 35a (from 04:59 to 05:00). This entrance was the only means of entry into the Store for the waiting customers. As the crowd of customers rushed into the Store upon opening, numerous employees were holding the front doors to attempt to open the doors and keep them from falling, and were pushing against the doors applying a counterforce to offset the pressure of the entering crowd. Tr. at 144:10-19; Sec. Ex. 25 (from 0:00 to 02:30 minutes). See also Chart of Video Footage From Blitz Day 2008, attached hereto at Appendix C. This

dangerous attempt was completely ineffective, as the crowd knocked the doors off the door frame, the door frame broke, the doors were knocked down, and the glass in the door fell out and broke. Tr. at 153:10-25, 913:16-23, 916:20-22, 917:2-9; Sec. Ex. 145 at 254:7-12; Sec. Ex. 151 (D. Smokes Dep. Tr.) at 86:22-87:8. When the Store doors were knocked down, they struck people, including Mr. Damour, as they fell. Tr. at 1102:16-24; see also Sec. Ex. 152 at 284:14-23. As the crowd surged through, both employees and customers were knocked to the ground in the entranceway, the vestibule, and in the Store. Sec. Ex. 152 at 281:15-17, 282:4-10, 283:3-6. Employees attempted to pick people up who were knocked down. Tr. at 93:13-94:1. In particular, as seen in the video footage from Respondent's Store surveillance cameras and employees' mobile telephones, individuals were caught in multiple crowd surges and repeatedly crushed and trampled by the crowd, as customers rushed to enter the Store. Tr. at 326:23-327:25, 328:3-329:6, 332:10-14, 20-22, 334:23-335:7. See also App. C. In the aftermath, articles of clothing, glass shards and door frame debris were strewn on the vestibule and Store floor. Sec. Ex. 142 at 17; see also App. C.

iii. *Hazardous Conditions in the Vestibule*

¶38 The numerous employees assigned to work in the vestibule and the entrance of the Store at the time of the Store's opening were exposed to the hazards of, *inter alia*, being struck by the doors that fell off due to crowd pressure, being struck by the surge of customers entering the Store, being struck by broken glass, and being knocked to the ground and being subjected to crowd trampling and asphyxiation. In addition, employees assigned to work in close proximity to the entering crowds were

subjected to similar hazards. One employee – Mr. Damour – died during the 2008 Blitz Day Event. Sec. Ex. 152 at 285:9-286:9.

¶39 Employee Dennis Fitch testified that he was exposed to struck by and asphyxiation hazards on Blitz Day 2008. Mr. Fitch was positioned just outside the Store's vestibule when the doors were opened at 5:00 a.m. Tr. at 88:10-15, 91:22-23. When the doors opened, he felt pressure from the crowd and he was being pushed so hard that he could no longer hold himself up. Tr. at 89:4-13. He fell and was unable to get up for several minutes, with customers stepping and stomping on him all over his body. Tr. at 90:14-15, 90:19-91:2. Mr. Fitch was first knocked down outside the Store doors, and he was on the ground the entire time as he was pushed and dragged through the vestibule into the Store. Tr. at 91:22-92:7. Eventually, he was helped up by Mr. Shaw near the customer service desk inside the Store – a considerable distance from where he was initially knocked down by the crowd. Tr. at 91:13-19. Mr. Fitch was unable to breathe easily when he was knocked to the ground and trampled because there was too much pressure on him. Tr. at 91:5-12. Upon being helped up from the ground inside the Store, Mr. Fitch took off the outer layer of his clothes so that he could breathe. Tr. at 92:14-19. Mr. Fitch was concerned for his safety when people were pushing and trampling him. Tr. at 92:8-13.

¶40 Mr. Fitch further observed fellow employees' exposure to struck by and asphyxiation hazards on Blitz Day 2008. He saw at least four or five other employees in the vestibule prior to the doors opening. Tr. at 94:17-21. He also saw other employees and customers being knocked to the ground by the crowd, near the customer service area inside the Store. Tr. at 93:13-94:1. He tried to help approximately 10-20 people up from

the ground, including Store employees. Id. Mr. Fitch also observed employees being pushed out of the way by customers entering the Store. Tr. at 96:5-17. He described how employees were being pushed by the crowd: “These customers are trying to get in to get to whatever it is that’s for sale. They’re going to bust through. You’ve got to bust through everything to get to what you want. So they’re being pushed out of the way.” Tr. at 96:13-17. Mr. Fitch also saw the entrance door broken off the frame, and he took the broken door to the Receiving area in the back of the Store. Tr. at 92:20-93:7.

¶41 Mr. Rice testified that he was also exposed to struck by and asphyxiation hazards on Blitz Day 2008. When Mr. Rice arrived for work that day, he was instructed by Manager Alton Calhoun to go to the vestibule and help to hold up the doors and “lean” against them so they would not break when the customers entered the Store (as they had in past years). Tr. at 141:21-142:7, 143:1-23. There were four or five other employees – including the decedent Mr. Damour – on each side of the doors with Mr. Rice at the time of the opening. Id. These employees were applying a counter force against the doors in an attempt to keep them from falling into the vestibule from the force of the crowd outside. Tr. at 144:10-19. When the Store doors opened, Mr. Rice heard the same creaking noise that he heard in 2007 when the doors came off, and he was again concerned that the doors might be knocked off. Tr. at 151:23-24; 163:16-18. Indeed, minutes after opening, both doors came off the hinges because of the force of the customers pushing in. Tr. at 153:10-25. The employees were then holding the doors in the middle of the vestibule. Id. The crowd pushed Mr. Rice in the vestibule. Tr. at 156:6-8. He was pushed backward into the vending machines and was pinned by customers against the vending machines. Tr. at 156:11-20. Mr. Rice also observed the

door fall, striking Mr. Damour, and saw Mr. Damour being trampled by customers in the vestibule. Tr. at 159:10-14; Sec. Ex. 142 at 14.

¶42 Mr. D'Amico also testified that he was exposed to struck by and asphyxiation hazards on Blitz Day 2008. Mr. D'Amico was located approximately one to two feet inside the Store, past the vestibule, when the doors opened. Tr. at 250:22-251:3. Within a few minutes of the opening, he managed to enter the vestibule. Tr. at 254:11-20. Upon entering the vestibule, he was met by a surge of customers and the resulting crowd surge pushed Mr. D'Amico backwards up against the wall of vending machines. Tr. at 254:22-255:4. After pulling himself on top of a vending machine, Mr. D'Amico observed fellow employees' exposure to struck by and asphyxiation hazards; he saw the vestibule filled with people, saw the front door metal frame coming off, heard noise from the door frame, and saw the door ultimately come down. Tr. at 255:5-20, 255:21-256:14.

¶43 Mr. Calhoun also testified that he was exposed to struck by and asphyxiation hazards on Blitz Day 2008. When the doors opened, he was stationed on the right side of the door in the vestibule with fellow employees, including Mr. Rice, Mr. Fitch and Mr. Damour. Tr. at 913:16-23, 916:4-18. They were all attempting to open and hold the door up so that the crowd would not knock it to the ground as they entered. Tr. at 913:16-23, 916:20-22. The door was pushed off the hinges towards Mr. Calhoun and the other employees, before it entirely came off. Tr. at 917:2-9. In fact, he was standing right behind the door when the glass came out of it. Tr. at 919:14-19. Mr. Calhoun also observed customers rushing into the Store and falling, as they had in previous years. Tr. at 919:20-920:1. As the customers rushed in, he was trying to hold the door, and trying to slow people down to make sure no one fell. Tr. at 920:2-11. He

was pushed to the side as the crowd entered the vestibule. Sec. Ex. 142 at 13. Mr. Calhoun eventually got out of the vestibule by being lifted and helped over the vending machines. Tr. at 920:21-24. He went to the Store entrance and saw Mr. Damour lying on his stomach with the door and people on top of him. Tr. at 920:25-921:10; Sec. Ex. 142 at 13. Mr. Calhoun was so affected by the events that he was forced to miss several days of work after 2008 Blitz Day. Tr. at 921:11-13.

¶44 Employee Dennis Smokes also testified that he was exposed to struck by and asphyxiation hazards on Blitz Day 2008. He was stationed in the vestibule when the doors were opened, where he observed the crowd force its way into the Store and knock the doors off. Sec. Ex. 151 at 13:10-13, 85:3-86:6. Mr. Smokes observed that one of the front doors completely broke off upon customers entering, and the other door was broken but still hanging on the frame. Sec. Ex. 151 at 86:22-87:8. He heard the door cracking and coming off, just as it had in 2007. Sec. Ex. 151 at 111:2-21. After the doors broke off, Mr. Smokes observed the crowd run into the Store and the vestibule area fill with people. Sec. Ex. 151 at 87:13-24. He saw people pushing in the vestibule and he was trying to help people up from the floor. Sec. Ex. 151 at 90:16-18, 90:24-91:19. He also observed Mr. Damour lying on the floor of the vestibule. Sec. Ex. 151 at 97:11-13. Mr. Smokes felt the crowd pushing up against him and he was concerned that he would be knocked to the ground and no one would be able to help him. Sec. Ex. 151 at 90:24-91:19, 108:7-109:2.

¶45 Mr. Blair also testified that he was exposed to struck by and asphyxiation hazards on Blitz Day 2008. Mr. Blair was located in the vestibule during the opening, and he observed customers pushed up against the glass doors prior to the doors opening.

Sec. Ex. 145 at 252:17-21, 267:25-268:7. As the associates were trying to open the Store doors, the glass was cracking and one of glass panes popped out of the door because of the force of the crowd pushing against it to get into the Store. Sec. Ex. 145 at 25:8-11, 253:14-24, 254:4-6. He observed that the door itself fell off, the glass pane popped out, the bottom glass broke, and the left door was knocked completely off the hinges. Sec. Ex. 145 at 254:7-12. Mr. Blair also observed people pushing in the vestibule as they entered the Store. Sec. Ex. 145 at 258:12-14.

¶46 Employee Antoine Lewis was also exposed to struck by and asphyxiation hazards on Blitz Day 2008. In particular, he was on the left-side door next to Mr. Damour in the vestibule. Sec. Ex. 142 at 13. While he was so positioned, one of the doors pinned him against the wall and he fell to the floor. Id.

¶47 Employee Santiago Corporan was exposed to struck by and asphyxiation hazards on Blitz Day 2008. He was positioned on the right-side door in the vestibule, and the crowd pushed him against the wall and into the Store. Sec. Ex. 142 at 13. Similarly, the crowd pinned employee Jeff McWilliams against the wall. Id. at 14. He also saw Mr. Damour fall to the floor along with the door. Id.

¶48 Support Manager Richard Mason was also exposed to struck by and asphyxiation hazards on Blitz Day 2008. He was positioned in the vestibule during the opening and saw the front doors hanging by cords. Sec. Ex. 142 at 14. He cut down the doors with a knife, but then he fell to the floor. Id. There was a pregnant woman on the floor between his legs as he held the door above his head until the glass came out of the frame. Id.

¶49 Employee Jaime Thompson testified that he observed fellow employees' exposure to struck by and asphyxiation hazards on Blitz Day 2008. When Mr. Thompson arrived at the Store before opening, he observed a crowd of customers outside. Tr. at 869:2-9, 874:23-875:1. Before the doors opened, he saw customers outside pushing on the entrance doors. Tr. at 890:13-17. He was stationed in the vestibule on top of a vending machine when the doors opened; he was holding the inner vestibule door (between the vestibule and the interior of the store) because the door had no locking mechanism. Tr. at 888:20-24, 889:1-4, 889:8, 889:13-22. After the doors opened, he observed customers pushing on the outer doors and one door broke and fell down. Tr. at 891:8-16. Employees were in the vestibule when the door was knocked down. Id. Mr. Thompson saw Mr. Damour in the vestibule, trying to turn around and run back inside before the door hit Mr. Damour in the head and he was knocked to the ground. Tr. at 891:20-24, 893:4-11. Mr. Thompson, along with other employees, tried to pick up the door off Mr. Damour, but with the number of people coming in, the door fell back down on Mr. Damour. Tr. 893:15-18. Even after the door was finally removed, Mr. Thompson observed people continue to walk on Mr. Damour. Tr. at 893:19-25. Mr. Thompson also observed several other people on the ground, including employees. Tr. at 894:1-8.

¶50 Employee Bibi Azeem also testified that she observed fellow employees' exposure to struck by and asphyxiation hazards on Blitz Day 2008. During the countdown prior to the opening, Ms. Azeem went into the Store because she was concerned that she would get hit by the crowd or fall because of too many people entering the Store at once. Sec. Ex. 144 (B. Azeem Dep. Tr.) at 81:6-21. As the crowd entered, she observed that they were running, pushing, falling, and a number of people

were out of breath. Sec. Ex. 144 at 88:22-89:20. Ms. Azeem stated that she made sure to get out of the way of the crowd to avoid getting stamped on herself. Sec. Ex. 144 at 165:5-17. She also saw people stepping over Mr. Damour on the ground. Sec. Ex. 144 at 96:7-10. After the 2008 Blitz Day Event, the entire vestibule door needed to be repaired based on the damage sustained and Ms. Azeem arranged for the damaged door to be fixed. Sec. Ex. 144 at 109:19-110:11. See also Sec. Exs. 17 (invoices regarding repairs of Store doors after Blitz Day 2008) and 18 (invoices from Solar Glass regarding repair and replacement of Store doors after 2008 Blitz Day).

¶51 Employee Earl Sanders likewise testified that he observed fellow employees' exposure to struck by and asphyxiation hazards on Blitz Day 2008. Mr. Sanders was positioned on top of one of the vending machines in the vestibule when the Store opened. Sec. Ex. 150 at 10:14-11:5. He observed Mr. Damour, one of the assistant managers, and several other associates in the vestibule by the front door at the opening. Sec. Ex. 150 at 12:15-13:7. He saw the crowd pushing as the doors opened, the doors come off the tracks and the glass fall onto the floor. Sec. Ex. 150 at 11:18-12:4, 57:8-10, 57:14-22. As the crowd rushed the door, Mr. Sanders saw one of the doors fall on top of Mr. Damour. Sec. Ex. 150 at 13:20-24, 57:14-22. Mr. Sanders also saw Mr. Damour knocked to the floor and the crowd trample over him; the crowd was running on top of both Mr. Damour and the door on top of him. Sec. Ex. 150 at 14:10-13, 15:20-22. Mr. Sanders observed that the glass from the door was broken. Sec. Ex. 150 at 15:18-19, 57:15-16. As the crowd continued to enter the Store, they pushed the vending machine that Mr. Sanders was on; he became concerned that the crowd might push it over and as a

result he got off the vending machine and went into the Store near the vestibule. Sec. Ex. 150 at 57:22-58:6.

**E. 2009 Day-After-Thanksgiving Day Sales Event**

¶52 Following the death of Mr. Damour at the 2008 Blitz Day Event and a criminal investigation by the Nassau County District Attorney, Wal-Mart agreed to implement several changes to its Blitz Day Event (at the Valley Stream Store and extended to all its stores nationwide), beginning with renaming it simply: “the Annual Event” or the “Event.” Sec. Ex. 148 at 224:21-24, 226:7-17. For the 2009 Event, Wal-Mart engaged professional crowd management experts at Populous and Landmark Consulting, and with their advice Wal-Mart developed and implemented a comprehensive crowd management plan for future Blitz Day Events (the “Plan”). See Sec. Ex. 48 at 22; Sec. Ex. 74 (2009 Event Management Plan); Sec. Ex. 75 (2009 Crowd Management Plan implementation power point); Sec. Ex. 76 (2009 Event Management Plan National Tier Breakdown); Sec. Ex. 77 (Landmark Event Staffing Services Proposal, for Yearly Event 2009); and Sec. Ex. 148 at 239:9-12. In particular, the Plan “is intended to provide crowd management strategies and tactics to store management and associates to assist them in planning and maintaining a safe store environment . . . .” Sec. Ex. 74 at 3.

¶53 As part of the Plan, Wal-Mart stores were classified into tiers based upon certain criteria including crowd density and history of accidents on Blitz Days, and the specific measures of the crowd management plan were mandated according to the risk classification of each tier. Sec. Ex. 148 at 252:10-25; see also Sec. Ex. 74. The Valley Stream Store was classified as “Tier 1” – the category requiring the most comprehensive

crowd management and preparation for the Blitz Day event. Sec. Ex. 148 at 252:12-16, 265:16-18.

¶54 The Plan is consistent with the substance of the recommendations made by the Secretary's crowd management expert, Paul Wertheimer. Compare Sec. Ex. 74 with Sec. Ex. 92 at 10-11 (Expert report of P. Wertheimer). Mr. Wertheimer's recommendations included: the creation of a written crowd management plan, proper crowd management training of employees, a proper barrier system, queuing, signage, effective communication by employees with customers, the use of walkie-talkies by all employees interacting with the crowd, and a proactive communication plan with local law enforcement – all of which are reflected in Respondent's Plan. Id.

¶55 Pursuant to Respondent's Plan, for the first time employees at the Store received crowd management training weeks prior to the 2009 Event, both in person and computer-based. Tr. at 97:11-15, 160:23-161:3; see also Sec. Ex. 73; Sec. Ex. 148 at 225:9-12, 20-22; Sec. Ex. 145 at 280:24-281:6.

¶56 Further, the Plan set forth different crowd management techniques that had not been used at the Store in prior years, including:

(1) The development of an "Operations Plan" for each store, which is to be designed "through the identification of key factors for each store . . . ." Sec. Ex. 74 at 5. Such "Operations Plan" was presumably in writing, as a "Market Management Team" reviews all store plans. Id. at 7.

(2) Training for management and other employees "to prepare for plan creation and implementation." Id. at 5, 8.

(3) Preparations for Blitz Day that include “securing necessary equipment (barricades, two-way communication devices, and emergency equipment),” a plan for placement of “hot item” merchandise, specific signage and maps, and coordination with local law enforcement officials and other security. Id. at 9.

(4) For “Tier One” stores – those with the need for the highest level of crowd management, such as the Valley Stream Store – “a queue line system protected by hard barricades” is required “to prevent customer surge.” Id. at 11. The queue line features “a serpentine line.” Id. The hard barricade is used “to help protect the queue from customers crowding in front of the line and rushing the entry doors at store opening.” Id.

(5) Employees trained in crowd management should be “posted along the hard barrier” to talk to customers, provide maps indicating the location of “hot items,” and direct customers to the entrance of the line. Id.

(6) A “command podium,” which would have “an overview of the store entry, queue lines, and parking areas to coordinate communications and responses to exterior crowd actions.” Id.

A summary of these requirements appears in the appendices to the Plan. See id. at C-1 – D-2.

¶57 For the first time ever, the Store’s specific plan was reviewed, vetted and approved by numerous managers at the store, market, regional and divisional levels, as well as in the Home Office by the Senior Vice President and by outside joint safety experts. Sec. Ex. 148 at 247:9-248:5, 249:15-17, 251:7-9.

¶58 The Store followed these new requirements by implementing various crowd management measures for the 2009 Event. For example, the Store remained open

to customers for 24 hours prior to the sales time, although sale items went on sale at 5:00 a.m. Tr. at 162:2-23; Sec. Ex. 48 at 22; Sec. Ex. 145 at 284:4-12. The Store also rented steel security barricades that were placed in front and along the outer wall of the Store and formed a serpentine queuing line to the entrance of the Store. Tr. at 98:9-20; Sec. Ex. 48 at 22; Sec. Ex. 151 at 119:5-14, 120:13-121:7; Sec. Ex. 145 at 287:4-9, 20-22. See also Sec. Exs. 95d (P1030002 photograph from 2009 Event) and 95f (P1020897 photograph from 2009 Event) (showing queuing lines and comprehensive barricade system outside the Store).

¶59 The Store also hired third-party crowd management personnel to interact with customers outside the store. Tr. at 405:16-406:5; Sec. Ex. 48 at 22; Sec. Ex. 49 at 4; Sec. Ex. 95L (P1030112 video by P. Wertheimer from 2009 Event). Store associates also communicated with customers outside the Store. See Sec. Ex. 95n (P1030018 video by P. Wertheimer from 2009 Event) from 0:43 to 1:05. The employees outside were wearing yellow vests such that the crowd could easily identify them as Wal-Mart personnel. Sec. Exs. 95L & 95n; Sec. Ex. 145 at 288:21-289:3; Sec. Ex. 151 at 125:9-21.

¶60 Additionally, the Store provided bullhorns to several associates to make announcements, such as informing customers waiting in line when all of the popular sales items had been accounted for by customers inside. Sec. Exs. 48 at 22; 95L & 95n. Other associates and security personnel were positioned upon elevated viewing stands outside the Store so that they could maintain an unobstructed view of the crowd to quickly identify any issues that may have arisen. Sec. Ex. 48 at 22; Sec. Ex. 95L; Sec. Ex. 145 at 288:4-15; Sec. Ex. 151 at 120:13-121:7; Tr. at 99:7-14, 21-25. Further, based on a visual observation of the customers in the Store, the Market Manager Dave Hogan utilized a

metering technique such that an equal number of customers were permitted to enter the Store as the number of customers who left the Store. Sec. Ex. 48 at 23; Sec. Ex. 95m (P1030108 video by P. Wertheimer from 2009 Event) from 0:45 to 1:45.

¶61 Additionally, customers were permitted to wait in queuing lines located throughout different areas inside the Store. Tr. at 162:2-23; Sec. Ex. 145 at 284:19-285:4; Sec. Ex. 151 at 125:4-8. Customers waiting in queuing areas received tickets indicating whether they would receive the desired sale item. Tr. at 162:2-23; Sec. Ex. 145 at 285:7-18; Sec. Ex. 151 at 123:17-17, 124:12-14. When all tickets for an item were handed out, this was indicated to customers. Sec. Ex. 145 at 285:7-18 (there was a balloon for each sale item and once balloon came down, item was sold out).

¶62 Notably, in 2009, Wal-Mart employees at the Store were not exposed to crowd-related hazards. In particular, customers were not pushing, people did not fall, and the doors did not break or come off the hinges, as had occurred in prior years. Tr. at 162:24-163:15; see also Sec. Ex. 95L.

## **ARGUMENT**

The Secretary has presented a multitude of evidence that demonstrates Wal-Mart's failure to abide by Section 5(a)(1) of the Act, which provides that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>6</sup> To prove a serious violation under section 5(a)(1) of the OSH Act, the Secretary must establish that: (1) there was an activity or condition in

---

<sup>6</sup> 29 U.S.C. § 654(a)(1).

the employer's workplace that constituted a hazard to employees; (2) either the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate the hazard or materially reduce it.<sup>7</sup>

Numerous Wal-Mart employees testified that they had been subject to struck by and asphyxiation hazards at Blitz Day Events at the Valley Stream Store, in 2008 and in prior years. Wal-Mart's own documents demonstrate the corporation's recognition of these serious hazards, based on events that had taken place at the Store and throughout the country before 2008. Although no employee had died prior to 2008, Wal-Mart was well aware that employees faced the threat of death or serious physical harm. Wal-Mart's minimal steps to address the hazards – such as setting up ineffective and inappropriate barricades and simply telling employees stationed in the vestibule to step aside in the face of surging crowds – were woefully inadequate in protecting its employees from the known hazards. Only after one of its employees was killed, and others injured in 2008, did Wal-Mart act to remedy the crowd-related hazards. At that point, with the assistance of retained crowd safety experts, it implemented a crowd management plan for its stores nationwide, thus demonstrating the feasibility of abatement of the hazards. In light of the clear evidence on each of the required elements, the amended citation must be affirmed.

---

<sup>7</sup> U.S. Postal Service, 21 BNA OSHC 1767, 1770, 2005 WL 6407173 (Rev. Comm. 2005); Arcadian Corp., 20 BNA OSHC 2001, 2007, 2004 WL 2218388 (Rev. Comm. 2004); Waldon Health Care Center, 16 BNA OSHC 1052, 1058, 1993 WL 119662 (Rev. Comm. 1993).

**I. EMPLOYEES WERE EXPOSED TO STRUCK BY AND ASPHYXIATION HAZARDS AT THE VALLEY STREAM WAL-MART STORE ON BLITZ DAY, NOVEMBER 28, 2008.**

The Secretary has presented compelling evidence illustrating the existence of struck by and asphyxiation hazards at the Store on Blitz Day 2008, including video footage captured on employees' mobile telephones and the Store's own video surveillance, and the trial and deposition testimony of ten employees. As the evidence demonstrates, employees were exposed to numerous crowd-related hazards, including: (1) being struck by glass; (2) being struck by falling doors; (3) being struck by customers; (4) being asphyxiated by an oncoming crowd; and (5) being asphyxiated by falling doors. Despite these evident and recurring hazards, Wal-Mart failed to implement comprehensive measures to protect its employees until one employee died and it faced prosecution by the Nassau County District Attorney's office.

As a preliminary matter, the Secretary must show only that it was "reasonably certain that some employee was or would be exposed to that danger,"<sup>8</sup> not that an employee *actually* was injured or died on November 28, 2008.<sup>9</sup> "[I]t is the hazard, not

---

<sup>8</sup> Mineral Indus. & Heavy Constr. Group, 639 F.2d 1289, 1294 (5th Cir. 1981).

<sup>9</sup> See Arcadian Corp., 20 BNA OSHC at 2009; Marquette Cement Mfg. Co., 568 F.2d 902, 910 (2d Cir. 1977) ("The Secretary need not show any actual injury to prove a § 5(a)(1) violation."). A lack of prior accidents does not establish that no hazard exists for purposes of the general duty clause. Kansas City Power & Light Co., 10 BNA OSHC 1417, 1982 WL 22592, \*6 (Rev. Comm. 1982); REA Exp., Inc., 495 F.2d 822, 825 (2d Cir. 1974) ("[Section 5(a)(1)] may well be violated even though no accident or injury occurs"); Brennan, 494 F.2d 460, 463 (8th Cir. 1974) ("[n]either the general duty clause nor section 17(k) requires any actual death or physical injury for a violation to occur"); Nat'l Realty & Constr. Co., Inc., 489 F.2d 1257, 1267 (D.C. Cir. 1973).

the specific incidence that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard.”<sup>10</sup>

As customers were entering the Store during the 2008 Blitz Day, Respondent’s “employees were exposed to the hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling.” Compl. ¶ V. Therefore, although one of Wal-Mart’s employees died on November 28, 2008, and others were injured, the relevant inquiry is the potential for employees to be injured – which has been demonstrated by an abundance of documentary and testimonial evidence.

**A. Employees Testified That They Were Exposed to Serious Crowd-Related Hazards.**

At the hearing, employees who worked in the Store’s vestibule on Blitz Day 2008 testified that they, and other employees assigned to work in close proximity to the incoming crowd both inside and outside the Store, were in direct threat of, *inter alia*, being struck by the front doors that came off and by broken glass because of the crowd pressure, and being struck by the customers entering the Store creating crowd surges and crowd crushes. These employees also testified regarding the threat of asphyxiation from crowd pressures and being knocked to the ground and subjected to crowd trampling. Such testimony was consistent with and confirmed additional record testimony from employees at depositions.

Numerous employees, including Dennis Fitch, Justin Rice, Salvatore D’Amico, Alton Calhoun, Dennis Smokes, Julius Blair, Antoine Lewis, Santiago Corporan, Jeff

---

<sup>10</sup> Arcadian Corp., 20 BNA OSHC at 2009. See also Bethlehem Steel Corp., 607 F.2d 871, 874 (3d Cir. 1979) (issue for the court was not proximate cause of incident preceding the inspection, but whether employer maintained a recognized hazard); Brennan, 494 F.2d 460, 463 (8th Cir. 1974).

McWilliams, and Richard Mason were assigned to work in the vestibule and the front of the Store – directly facing the oncoming crowd of customers – just as the front doors were opened at 5:00 a.m. As they testified, these employees personally were subjected to hazards presented by the doors, broken glass and the crowd. Other employees, such as Jaime Thompson, Steve Sooknanan, Bibi Azeem and Earl Sanders, observed fellow employees’ exposure to the cited hazards from nearby locations in the Store.

The Store employees testified that they were pushed by the crowd and/or pinned by the crowd against the vending machines and the Store wall. Mr. Rice and Mr. D’Amico were pushed backward by the surge of customers entering the store and were pinned against the vending machines. Facts ¶¶ 41 & 42. Mr. Corporan and Mr. McWilliams were pushed by the crowd and pinned against the wall. Facts ¶ 47. Mr. Smokes and numerous other employees in the vestibule area were also pushed by the entering crowd. Facts ¶¶ 44, 45 & 50.

Additional Store employees were knocked down and trampled by the crowd. Mr. Fitch was pushed, knocked down and trampled by the crowd; he spent several minutes on the ground and reported difficulty breathing. Facts ¶ 39. He also saw other employees pushed and knocked to the ground as the crowd “bust[ed] through.” Facts ¶ 40. Mr. Lewis was pinned against the wall by the door and he fell to the floor. Facts ¶ 46. Mr. Thompson saw other employees on the ground being trampled by the crowd. Facts ¶ 49. As witnessed by numerous employees, Mr. Damour was struck in the head by the falling door, knocked to the floor and trampled by the crowd. Facts ¶¶ 41, 47, 49 & 51. Additional employees saw Mr. Damour lying on the ground, with the door and people on top of him. Facts ¶¶ 43, 44 & 50. Mr. Damour subsequently died. Facts ¶ 38.

At least eight employees also testified about the hazardous conditions employees working by the doors to the Store were exposed to: doors shaking and making noises, employees struggling to apply a counter force to the doors being pushed inward by the crowd, doors coming off the hinges, the glass being knocked out of doors, doors being knocked down and striking employees. For example, Mr. Calhoun and Mr. Rice were both assigned to hold the doors and apply counter pressure in an attempt to prevent the crowd from pushing them off. Facts ¶¶ 39-41 & 43. However the doors pushed inward towards them (and other employees) and the doors came off due to the crowd pressure. Facts ¶¶ 39-41 & 43. Many other employees, including Mr. Smokes, Mr. Blair, Mr. Thompson and Mr. Sanders, saw the doors come off due to the crowd pressure. Facts ¶¶ 44, 45, 49 & 51. Additionally, the glass fell out of the door frame. Facts ¶¶ 43, 45, 48 & 51. After cutting down a dangling door from its frame, Mr. Mason fell to the floor with the door overhead and the glass fell out of the door as he was on the floor. Facts ¶ 48. Mr. Sooknanan himself admitted that the Store doors had, indeed, fallen off and struck people on Blitz Day 2008. Tr. at 1102:16-24.

As discussed in more detail *infra*, Section II.A.1.iv, Wal-Mart managers, including Mr. Sooknanan, Mr. D'Amico and Mr. Blair, were aware of each of these crowd-related hazards on Blitz Day 2008 prior to the opening of the Store. In fact, Mr. Blair stood in the buffer zone between the Store and the barricades outside (with Mr. Gilroy and six or seven other employees) when many customers crossed the barricades into the buffer zone in front of the Store doors, approximately thirty minutes prior to opening. Sec. Ex. 145 at 224:8-15, 224:16-25. Mr. Blair told the associates to go back inside the Store when this happened because it was not safe for them to be so close to the

crowd as the customers were pushing and trying to get closer to the Store doors. Sec. Ex. 145 at 225:2-16. Similarly, Mr. D’Amico told Mr. Sooknanan that he felt it was unsafe for the employees outside because they were too close to the crowd that had jumped the barricades. Facts ¶¶ 34-35.

Store Manager Sooknanan himself observed the entire glass facade of the vestibule and the glass doors shaking due to the pressure being applied by the crowd prior to the Store opening. Facts ¶ 34. He was concerned that the glass would shatter due to people pushing up against it. Facts ¶ 34. Employees were stationed in the vestibule at this point. Tr. at 1099:11-22. Mr. Sooknanan testified that he was concerned that the glass might break if the doors stayed closed and that might cause serious injury to people. Tr. at 1101:5-11. Mr. Blair and the other employees in the vestibule had been instructed by Mr. D’Amico minutes prior to the opening that when the doors open, they should “just stand to the side until the initial rush comes into the building.” Facts ¶ 36. Mr. Blair understood that management gave this instruction so that employees would not be pushed over by customers entering the Store. Facts ¶ 36.

**B. Graphic Video Footage From Blitz Day 2008 Confirms Wal-Mart’s Employees’ Exposure to Serious Crowd-Related Hazards.**

Wal-Mart’s employees’ testimony was amplified by graphic video footage of the events of Blitz Day 2008 at the Store. While a selection of these videos was highlighted at the hearing, all show the same employee exposure to serious crowd-related hazards.<sup>11</sup> Exhibit 25 (from 0:00 to 4:00 minutes), a video of the Store on Blitz Day 2008 from

---

<sup>11</sup> Each of the video clips referenced below was shown, at least in part, during the hearing in this case. For longer videos, the Secretary has included specific counter designations to direct Your Honor’s attention to the relevant portions. See also Appendix C (chart summarizing video footage of Blitz Day 2008 Store opening).

employee Aubrey Dancey's mobile device, shows the crowd entering the Store at the time of the opening. See Sec. Ex. 25 (from 0:00 to 4:00 minutes). The video begins inside the vestibule, facing the front doors as they are first opened, and then changes position to show the vestibule from just inside the Store. Id. This video clearly shows employees struggling to hold the doors open and apply a counter force, only to be exposed to struck by and asphyxiation hazards as a large crowd rushes into the Store. Id.

Six additional videos from employees' mobile devices illustrate the same employee exposure to crowd-related hazards on Blitz Day 2008. Exhibit 28c, a video of the Store on Blitz Day 2008 from employee Keesha Boyce's mobile device, shows the crowd entering the Store, from inside the store near the vestibule. See Sec. Ex. 28c, video 146 (1:46 minutes total). Exhibit 143a, a video of the Store on Blitz Day 2008 from employee Marvin Griffith's mobile device, shows the crowd entering the Store, from inside the vestibule from an elevated viewpoint. See Sec. Ex. 143a, video 1 (0:20 seconds total). In this clip, one of the vestibule front doors is visible in the air, off its hinges and posing a struck by hazard to employees. Id. Exhibit 143b, another video of the Store on Blitz Day 2008 from employee Marvin Griffith's mobile device, shows the crowd entering the Store, from inside the vestibule from an elevated viewpoint. See Sec. Ex. 143b, video 2 (0:20 seconds total). Exhibit 31b, a video of the Store on Blitz Day 2008 from employee Earl Sanders' mobile device, shows the initial crowd entry when the doors opened, from inside the vestibule. See Sec. Ex. 31b, video 45927 (0:10 seconds total). This clip shows employees positioned to hold the vestibule doors as customers rush into the vestibule. Id. Exhibit 31c, another video of the Store on Blitz Day 2008 from employee Earl Sanders' mobile device, shows the crowd entering, from inside the

vestibule. See Sec. Ex. 31c, video 45957 (0:10 seconds total). This clip also shows the Store doors off the hinges, posing a struck by hazard to employees. Id. Exhibit 31g, a third video of the Store on Blitz Day 2008 from employee Earl Sanders' mobile device, shows the crowd pushing in the vestibule as they enter, from inside the vestibule. See Sec. Ex. 31g, video 50552 (0:10 seconds total).

Three additional video clips obtained from Respondent's own security camera surveillance footage further illustrate the crowd-related hazards present at the Store on Blitz Day 2008. The clips show similar time periods of initial crowd entry from three different viewpoints: (1) Exhibit 35a (from 04:59 to 05:09) shows the vestibule from an elevated camera inside the store; (2) Exhibit 35b (from 05:01 to 05:05) shows the vestibule from a camera inside the vestibule; and (3) Exhibit 34a (from 04:59 to 05:01) shows the outside of the store along the northeast side of the store, facing the main entrance doors into the vestibule. See Sec. Ex. 35a, 04[1].44.56\_06.44.59 video (from 04:59 to 05:09); Sec. Ex. 35b, 04.54.51\_05.54.59 video (from 05:01 to 05:05); Sec. Ex. 34a, ES301/Group 1 Camera 1 video (from 04:59 to 05:01). Similar to the employees' videos, these videos vividly depict how Wal-Mart's employees faced serious physical injury as the oncoming crowd entered the Store, creating crowd crush, crowd surge and crowd trampling. Indeed, as Exhibit 35a (from 04:59 to 05:09) illustrates, Wal-Mart's employees were not exposed only to isolated or brief hazards; rather, the serious danger continued for a significant length of time as the large crowd continued to enter the Store.

**II. WAL-MART RECOGNIZED THAT ITS EMPLOYEES FACED SERIOUS STRUCK BY AND ASPHYXIATION HAZARDS FROM THE CROWDS OF CUSTOMERS AT ITS STORES ON BLITZ DAY.**

Wal-Mart had actual knowledge that its employees at the Valley Stream Store were subject to struck by and asphyxiation hazards due to crowd crush, crowd surge, or crowd trampling during Blitz Day. The Secretary presented evidence establishing Wal-Mart's recognition of the hazards, including: prior crowd-related incidents and issues at the Valley Stream Store on Blitz Days in 2005-2007, prior crowd-related incidents and injuries to customers and employees during Blitz Day events at Wal-Mart stores nationwide, various internal Wal-Mart Blitz Day planning documents, and the Store's inadequate safety precautions for Blitz Day 2008.

A hazard is deemed "recognized" when the potential danger of a condition or activity is either actually known to the particular employer<sup>12</sup> or recognized by safety experts familiar with the industry or activity in question.<sup>13</sup> Because the Secretary has

---

<sup>12</sup> See McKie Ford, Inc., 191 F.3d 853, 856 (8th Cir. 1999); Nelson Tree Services, Inc., 60 F.3d 1207, 1209-10 (6th Cir. 1995); Georgia Elec. Co., 595 F.2d 309, 321 (5th Cir. 1979) ("recognized hazard" can be established by proving that the employer had actual knowledge that a condition is hazardous); Marquette Cement Mfg. Co., 568 F.2d at 910; Pepperidge Farm, Inc., 17 BNA OSHC 1993, 1997 WL 212599, \*12 (Rev. Comm. 1997).

<sup>13</sup> Nat'l Realty & Constr. Co., Inc., 489 F.2d at 1265 n32; R.L. Sanders Roofing Co., 620 F.2d 97, 99 (5th Cir. 1980). See also Kelly Springfield Tire Co., Inc., 729 F.2d 317, 321-22 (5th Cir. 1984) ("where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question"); McKie Ford, 18 BNA OSHC 1393, 1998 WL 175008, \*5 (ALJ 1998), aff'd 191 F.3d 853 (8th Cir. 1999) ("finding of industry recognition does not require a specific showing as to the safety practices in a narrowly defined industry").

established that Wal-Mart actually recognized the hazards to its employees,<sup>14</sup> she need not prove a violation of any industry standard.<sup>15</sup>

The Secretary may demonstrate an employer's actual knowledge of the hazard in numerous ways, including knowledge of the employer's supervisors<sup>16</sup> or knowledge reflected in corporate documents.<sup>17</sup> Knowledge may also be shown through a company's lower level employees when the employee has a duty to report safety concerns.<sup>18</sup> Employer recognition, through manager and employee knowledge or corporate

---

<sup>14</sup> See McKie Ford, Inc., 191 F.3d at 856; Nelson Tree Services, Inc., 60 F.3d at 1210; Brennan, 494 F.2d at 463-64 (8th Cir. 1974).

<sup>15</sup> W.G. Fairfield Co., 285 F.3d 499, 505 (6th Cir. 2002) (citing Nelson Tree Services, Inc., 60 F.3d at 1210). See also Safeway, Inc., 382 F.3d 1189, 1195 n4 (10th Cir. 2004) (An employer "cannot ignore the presence of an obviously dangerous condition by asserting that its industry is ignorant of such hazards.").

<sup>16</sup> See, e.g., W.G. Fairfield Co., 285 F.3d at 505-506 (former supervisors' knowledge of the hazard was sufficient to charge knowledge of the hazard to the corporation); Georgia Elec. Co., 595 F.2d at 321 (a boom operator's actual knowledge that the lever was reversed could be imputed to the employer, as the boom operator, although not a superintendent or foreman, exercised supervisory authority); The News Press, 21 BNA OSHC 2211, 2007 WL 1934885, \*8 (Rev. Comm. 2007) ("News Press, through its supervisors, knew the catcher employees stood in front of the paper roll during its trolley loading procedure without any protective devices."); Dover Elevator Co., 16 BNA OSHC 1281, 1286, 1993 WL 275823 (Rev. Comm. 1993); Dun-Par Engineered Form Co., 12 BNA OSHC 1962, 1986 WL 53522, \*3 (Rev. Comm. 1986) (actual or constructive knowledge of a supervisory employee is imputed to the employer).

<sup>17</sup> See U.S. v. Ladish Malting Co., 135 F.3d 484, 492-93 (7th Cir. 1998) (corporate knowledge remains as long as information is reflected in corporate documents and even after its destruction, as long as a responsible employee remembers it).

<sup>18</sup> Ladish Malting Co., 135 F.3d at 493 (employees with duties to report safety concerns to the company can impute knowledge to the company even if they do not have general supervising responsibilities such as hiring and firing).

documents, may be based on prior instances where the hazardous condition occurred,<sup>19</sup> or prior complaints about the hazardous condition.<sup>20</sup> Recognition may also be evidenced by a company's own safety documents.<sup>21</sup> In addition, precautions taken by an employer can be used to establish recognition of a hazard, if used in conjunction with other evidence.<sup>22</sup>

---

<sup>19</sup> See, e.g., Carlyle Compressor Co., Div. of Carrier Corp., 683 F.2d 673, 677 (2d Cir. 1982) (The danger of flying metal shafts from a grinding machine was a recognized hazard because the company knew of previous cases where the shafts were expelled); Praxair Distrib., Inc., 22 BNA OSHC 1075, 2007 WL 2511145, \*3 (Rev. Comm. 2007) (Respondent recognized the hazard based on a nonfatal incident in 2004, when another employee was struck by a falling lift gate, and on a 2004 toolbox meeting document that warns employees about the dangers of falling lift gates).

<sup>20</sup> Kus-Tum Builders, Inc., 10 BNA OSHC 1128, 1981 WL 18941, \*4-\*5 (Rev. Comm. 1981) (Improperly bracing large wooden roof trusses was recognized because the employer had been warned of the dangers by its own employees and by another contractor at the worksite).

<sup>21</sup> See Puffer's Hardware, Inc., 742 F.2d 12, 18 (1st Cir. 1984) (employer's safety program may constitute evidence that employer recognized hazard at issue); General Dynamics Land Sys., Inc., 985 F.2d 560, 1993 WL 15067, \*3 (6th Cir. 1993) (unpublished) (several company safety bulletins go toward showing recognition); Ted Wilkerson Inc., 9 BNA OSHC 2012, 2016, 1981 WL 18797 (Rev. Comm. 1981) (employer's work rule evidences recognition of hazard under general duty clause). See also The Timken Co., 20 BNA OSHC 1070, 2003 WL 1889150, \*6-\*8 (Rev. Comm. 2003).

<sup>22</sup> Beverly Enterprises, Inc., 19 BNA OSHC 1161, 1190, 2000 WL 34012177 (Rev. Comm. 2000) (safety precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence); Pepperidge Farm, Inc., 1997 WL 212599, at \*41; Waldon Health Care Center, 16 BNA OSHC 1052; Ulysses Irrigation Pipe Co., 11 BNA OSHC 1272, 1275, 1983 WL 23858 (Rev. Comm. 1983) (instruction not to use unlighted, unprotected tractor at night goes toward recognition of hazard of unlit, obstacle-filled pipe storage yard); Mercer Well Serv., Inc., 5 BNA OSHC 1893, 1977 WL 7758, \*1 (Rev. Comm. 1977) (employer's own safety rule requiring derrick men to wear a safety belt while riding elevators established it had actual knowledge that riding elevator without protection of safety belt was hazardous).

**A. Wal-Mart Recognized Crowd-Related Hazards Because Employees Had Been Exposed to Serious Crowd-Related Incidents at Wal-Mart Stores Before 2008.**

Respondent was aware that its employees were exposed to crowd-related hazards before November 28, 2008. The Secretary has presented evidence of numerous prior incidents both at the Valley Stream Store, and at other Wal-Mart stores throughout the nation that establishes Respondent's knowledge of prior instances or complaints of the hazardous condition.<sup>23</sup> Although the existence of prior reported injuries is not a *sine qua non* for establishing employer recognition under Section 5(a)(1),<sup>24</sup> courts routinely deem such evidence of prior incidents, accidents, and injuries as probative of a party's notice of a dangerous condition.<sup>25</sup>

---

<sup>23</sup> See, e.g., Carlyle Compressor Co., Div. of Carrier Corp., 683 F.2d at 677 (The danger of flying metal shafts from a grinding machine was a recognized hazard because the company knew of previous cases where the shafts were expelled); Praxair Distrib., Inc., 2007 WL 2511145, at \*3 (Respondent recognized the hazard based on a nonfatal incident in 2004, when another employee was struck by a falling lift gate, and on a 2004 toolbox meeting document that warns employees about the dangers of falling lift gates); Kus-Tum Builders, Inc., 1981 WL 18941, at \*4-\*5 (Improperly bracing large wooden roof trusses was recognized because the employer had been warned of the dangers by its own employees and by another contractor at the worksite).

<sup>24</sup> See, e.g., Arcadian Corp., 20 BNA OSHC at 2005 (in context of 5(a)(1) violation, rejecting Respondent's argument that accident was "freakish and unprecedented," and therefore unforeseeable, simply because it had not occurred before); Union Oil Co., 869 F.2d 1039, 1045 (7th Cir. 1989) (rejecting Respondent's argument that pressure vessel explosion was a "freak accident" based on factual determination that hazard of hydrogen stress corrosion cracking in a vessel was widely recognized even though no rupture or explosion had occurred before).

<sup>25</sup> See, e.g., Fears v. Wal-Mart Stores, Inc., Civ. A. No. 99-2515-JWL, 2000 WL 1679418, \*2-\*4 (D. Kan. Oct. 13, 2000) (court found that discovery regarding prior injuries and incidents involving falling merchandise at all of Respondent's stores in the U.S. for a five-year period was "probative of whether [Respondent] had notice of potentially dangerous situation and failed to implement an adequate safety program"); Granite City Terminals Corp., 12 BNA OSHC 1741, 1746, 1986 WL 53439 (Rev. Comm. 1986) (a company's history of injuries is relevant to whether a reasonable person

1. *Wal-Mart Was Aware of Prior Crowd-Related Incidents at the Valley Stream Store.*

Wal-Mart experienced crowd-related incidents at the Valley Stream Store during Blitz Day events from at least 2005 to 2007: employees were pinned by the crowd, employees were pushed by customers, the doors were knocked off while customers entered the Store, and both employees and customers fell and were injured. Numerous employees testified regarding incidents during Blitz Days at the Store in 2005-2007, including Salvatore D'Amico, Alton Calhoun, Justin Rice, Steve Sooknanan, Bibi Azeem, Dennis Smokes and Julius Blair. In addition, four exhibits in particular highlight these prior incidents and hazards at the Store: Secretary's Exhibits 129 & 130 (claim records for customer injuries at the Store during Blitz Day 2005), Exhibit 48 (Respondent's Supplemental Response to Interrogatory No. 4 regarding customer injuries at the Store during Blitz Day 2005), and Exhibit 53 (NYIT video taken prior to Blitz Day 2008 with interviews of managers Mr. Sooknanan and Mr. Rice). Indeed, Store Manager and long-time Wal-Mart employee Steve Sooknanan underscored the consistently unsafe conditions present at Blitz Days in his recorded remarks made merely days prior to Blitz Day 2008: "it's always the same. It's always in the morning, you know, the big rush and getting everybody through the door and everybody running towards that great item...."

See Facts ¶ 13.

i. *Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2005.*

In 2005, the crowd pushed and rushed into the Store, the front doors to the vestibule were broken off, and at least two customers were injured due to crowd crush.

---

would recognize that the cited work practice is unsafe or hazardous) (citing General Dynamics, Elec. Boat Div., 15 BNA OSHC 1891, 1992 WL 184536 (ALJ 1982)).

Respondent was well aware of these incidents, as evidenced by the testimony of its employees and managers and by documents memorializing the crowd-related hazards. Both Mr. D'Amico and Mr. Calhoun testified that there was a crowd of customers waiting outside the Valley Stream Store before the doors opened on Blitz Day 2005. Tr. at 192:22-23, 902:7-9. Mr. Calhoun described the crowd's entry as a "bum rush" as they pushed and rushed into the Store. Tr. at 902:16, 903:16-21. Similarly, Mr. D'Amico described the crowd's entry into the Store as an "initial surge," "when it comes closer to 5:00 o'clock and the crowd is anxious, want to get in and get a hold of whatever merchandise it is they're there for." Tr. at 196:3-6, 197:21-198:1.

Both Mr. D'Amico and Mr. Calhoun testified that when the crowd rushed into the Store in 2005, the front door came off the hinges. Tr. at 202:4-7, 203:3-8, 904:13-15. Store Manager Steve Sooknanan testified that he knew the doors had come off the rails in 2005. Tr. at 1013:11-13; see also Sec. Ex. 152 at 73:7-15 (front doors came off the hinges in 2004 or 2005). Statements by assistant managers at the Store, as recorded in the claim documents for customer injuries at the Blitz Day 2005, corroborated the fact that the customers had broken the doors off completely upon entering the Store. Facts ¶ 15; Sec. Ex. 130 (Claim #4836912) at 12, box 4 ("[T]he customers that were still waiting to come in had broken down the door.").<sup>26</sup> See also Sec. Ex. 152 at 84:6-16, 86:13-22.

At least two customer injuries resulting from crowds rushing into the Store on Blitz Day 2005 were reported to Wal-Mart. Facts ¶ 15; Sec. Ex. 152 at 78:6-9. One of

---

<sup>26</sup> All the files regarding incident and injury reports were kept in the Valley Stream Store, including such reports from 2004-2008. Sec. Ex. 152 at 56:15-19. Respondent has no information that contradicts any statements made in those injury claims. Id. at 86:13-22. Moreover, statements by Respondent's managers contained within injury claim forms constitute admissions of a party-opponent and thus are admissible as non-hearsay. See Fed. R. Evid. 801(d)(2)(D).

these injuries was described by Respondent as “Blitz crushed between door and the crowd.” Sec. Ex. 152 at 79:3-5, 9-18. An assistant manager at the Store stated that “they opened the doors at 5:00 and people from the PL [parking lot] came and pushed their way in. The claimant was pushed and pinned into the door until the door broke and then she finally got away.” Sec. Ex. 129 at 3, box 1.

*ii. Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2006.*

Upon opening the doors for the 2006 Blitz Day, the crowd once again pushed and rushed into the Store, the front doors to the vestibule were broken off again, and employees were stationed in the vestibule area to assist customers when they fell down. Respondent was well aware of these incidents, as evidenced by the testimony of its employees and managers. Both Mr. D’Amico and Mr. Calhoun testified that there was a crowd of customers waiting outside the Valley Stream Store before the doors opened on Blitz Day 2006. Tr. at 199:3-6, 905:6-8. Mr. Calhoun testified that he was concerned about the doors coming off prior to opening on Blitz Day 2006. Tr. at 905:2-5. Mr. Calhoun indicated that the crowd entered “just as the last year, they rushed in.” Tr. at 905:21-22. Mr. Calhoun saw the crowd pushing on the front door; he was holding the door open as customers entered the Store. Tr. at 905:24-906:3. Mr. Calhoun testified that due to the crowd pushing on the door, the door came off the hinges again. Tr. at 910:10-12. When the door came off, it was put to the side to “make sure it don’t fall on somebody.” Tr. at 910:13-16. Mr. D’Amico also testified during his direct examination, and at his deposition, that the customers pushed on the door and the door came off the

hinges (and it needed to be repaired) on Blitz Day 2006. Tr. at 200:24-201:7, 201:12-15, 284:13-15.<sup>27</sup>

Mr. Sooknanan testified that Store employees were stationed inside the vestibule at the time of the opening on Blitz Day 2006 to help people who fell. Sec. Ex. 152 at 106:7-15. He indicated that he gave that instruction every year as a manager because every year people could fall upon entering the store. Sec. Ex. 152 at 106:16-18. He also testified that he told employees to stand to either side of the doors in the vestibule as the crowd entered the Store. Sec. Ex. 152 at 115:2-11. In preparation for either Blitz Day 2006 or 2007, Mr. Sooknanan created a map of the Store to hand out to customers at the front door. Facts ¶ 14. The map included the following statement: “Please refrain from running as you enter the store to avoid injuring fellow shoppers and our associates.” Id.; see also Sec. Ex. 69 (Map of Valley Stream Store for Blitz Day 2006 or 2007). Mr. Sooknanan wrote that statement on the map because he was concerned that running might present hazards that may injure associates. Sec. Ex. 152 at 105:9-18; Tr. at 989:25-990:2, 1030:14-1031:5. Mr. Sooknanan also wrote on the map “please wait for doors to be completely open before entering;” he included that statement, in part, “because he knew the doors were broken the year before and he wanted to make sure that similar issues did not happen again.” Sec. Ex. 152 at 106:19-107:9.

---

<sup>27</sup> Although Mr. D’Amico expressed confusion about the year(s) the Store had a problem with the door coming off the hinges during cross examination by Wal-Mart’s counsel, see Tr. at 272:7-11, 284:22-285:13, he unequivocally testified that prior to 2008 the problems with the door occurred, thereby putting Wal-Mart on notice as to potential crowd-related hazards.

iii. *Wal-Mart Knew That Crowd-Related Incidents Occurred at the Store on Blitz Day 2007.*

At the 2007 Blitz Day at the Valley Stream Store, the hazards were even more acute than in previous years as employees were pinned by the crowd against the front doors and cut by falling broken glass. The crowd was pressed up against the front doors and they pushed and rushed into the Store. The front doors to the vestibule were broken off again, glass from the vestibule broke and injured an employee, and employees were again positioned in the vestibule to assist falling and pushing customers. Respondent was well aware of these incidents, as evidenced by the testimony of its employees and managers and by a videotaped interview of a manager regarding the crowd-related hazards he experienced in 2007. Mr. Rice, Mr. Calhoun and Mr. Blair all testified that there was a crowd of customers waiting outside the Valley Stream Store before the doors opened on Blitz Day 2007. Tr. at 126:4-9 (when Mr. Rice arrived around 4:00 a.m., customers were waiting outside as far back as the next building), 911:5-10 (Mr. Calhoun stated that people were “close on the door” when the store opened); Sec. Ex. 145 at 77:5-15 (when Mr. Blair arrived at store, people outside were not in a line, they were in front of the Store doors).

Mr. Rice testified that he and other employees went outside to help “lean” people off the front door and try to get the crowd to step back because they were too close to the door. Tr. at 129:12-16, 130:7-15. The customers were right in front of the doors; Mr. Rice stated that he “could have kissed them on their forehead.” Id. Mr. Sooknanan testified that the customers were bunching at the doors, pushing and putting pressure on the doors. Tr. at 1037:9-12, 1039:3-12; Sec. Ex. 152 at 140:14-17, 141: 7-12, 142:8-23, 160:19-25, 236:4-10. Mr. Sooknanan was concerned about the crowd being so close to

the door; he testified that that the customers got “too close for comfort.” Facts ¶ 16. Nevertheless, numerous employees were stationed in or around the vestibule for the opening, including Mr. Smokes, Mr. Calhoun and Mr. Rice. Tr. at 1042:20-1043:14, 912:1-3, 7-15, 122:1-123:10, 123:16-19, 124:6-8; Sec. Ex. 151 at 36:23-37:2, 40:14-20. Mr. Blair testified that prior to the doors opening, employees were instructed by a manager to step to the side when customers were entering the store, so that they would not get hurt by customers running into the store. Sec. Ex. 145 at 93:2-14, 95:15-19. Mr. Smokes also testified that he received an instruction from a store manager to “stand back” because of the crowds and “[j]ust don’t stand in front of the door.” Sec. Ex. 151 at 41:22-42:25.

Both Mr. Rice and Mr. Smokes testified that immediately prior to the doors opening on Blitz Day 2007, there was an employee “countdown.” Tr. at 117:21-118:2; Sec. Ex. 151 at 41:3-4. Mr. Rice described how after the employees counted down to one, it was silent and then there was a cracking noise of people pushing against the glass in the doors and the vestibule area. Tr. at 117:21-118:2, 121:18-23. He testified that the force of the crowd pushing on the vestibule glass sounded like the vestibule was about to fall apart from the pressure. Id. Five employees testified that when the doors opened, the crowd rushed inside and the pressure the customers were exerting on the front door caused the door to come off the hinges. Tr. at 124:6-23 (Rice: crowd was pushing into vestibule and doors broke), 911:11-17, 912:7-15 (Calhoun: crowd rushed in and glass came off door); Sec. Ex. 151 at 44:7-45:5 (Smokes: door fell off, customers rushing in and “rammed against the door”); Sec. Ex. 152 at 140:4-9, 142:8-12, 142:21-143:2, 143:18-20 (Sooknanan: customer rush when doors opened, doors came off hinges due to

pressure from crowd); Sec. Ex. 145 at 89:5-8, 89:21-90:2, 90:9-11 (Blair: customers pushed through doors into store and front doors came off hinges).

Numerous employees were positioned in or near the vestibule at the time of the opening, including Mr. Rice, Mr. Calhoun and Mr. Smokes. Mr. Rice and other employees were pushed against the vestibule door by the crowd, and he was pinned against the door for several minutes. Facts ¶ 16. Mr. Calhoun was holding one of the doors as customers rushed into the vestibule and the glass came off the door. Tr. at 912:1-3, 7-15. Mr. Smokes was also in the vestibule and witnessed management employees trying to hold the door when it came off because of the crowd pushing. Sec. Ex. 151 at 45:6-46:10. Mr. Smokes saw many people running, pushing and falling, and he and other employees were in the vestibule trying to help customers quickly to their feet as the crowd was still rushing into the Store. Sec. Ex. 151 at 46:14-25, 47:1-19, 48:8-10, 53:13-23. Ms. Azeem and Mr. Sooknanan also witnessed customers rushing and running in the vestibule and into the Store. Sec. Ex. 144 at 40:17-41:14; Sec. Ex. 152 at 141:19-142:3.

Mr. Rice was injured by broken glass from the vestibule that broke while the doors were opening and fell down onto him. Facts ¶ 16. He put up his hand to protect his face from the falling glass and cut his hand. Tr. at 124:9-23, 131:7-24. Both Mr. Rice and Mr. Sooknanan testified that Mr. Rice informed Store Manager Sooknanan of this injury. Tr. at 138:15-18, 1042:23-1043:14.

Mr. Rice's experiences during Blitz Day 2007 and the some of the concerns he raised with Store Manager Sooknanan were also recorded in a videotaped interview with

a student reporter taken only a few days prior to Blitz Day 2008.<sup>28</sup> See Sec. Ex. 53. Mr. Rice ominously described the entry of the crowd in 2007 following the countdown: “And as soon as they said one, it got silent and all you heard was [makes cracking sound] and everybody was just pushing. It was – it was like a rampage in here. It was crazy.” Sec. Ex. 53 from 18:30 to 19:30 (see Tr. of Sec. Ex. 53 at 21:8-11). He estimated that approximately three hundred people entered the Store right as the doors opened in 2007. Tr. of Sec. Ex. 53 at 21:21-25. During the recorded interview, Mr. Rice also stated that he was going to throw different ideas at the Store Manager to attempt to “just make it [Blitz Day 2008] safe, because . . . last year was crazy.” Tr. of Sec. Ex. 53 at 22:25-23:8. Mr. Rice’s express statement of concern to Mr. Sooknanan leaves no doubt that Wal-Mart employees faced serious dangers posed by the rush of crowds at Blitz Day Events, and these dangers were identified by Wal-Mart management.

*iv. Wal-Mart Recognized the Crowd-Related Hazards at the Store Following Blitz Day 2007.*

After three years of similar incidents on Blitz Day at the Valley Stream Store, Respondent knew that it should expect the following conditions on future Blitz Days: (1) that a large crowd would be present outside the store prior to the opening; (2) that the crowd would be gathered close to the Store entrance doors and pushing on the front doors; (3) that the crowd would rush into the store and people would be knocked down; (4) that the front doors would fall down and/or be knocked off the hinges from the pressure of the crowd; (5) that employees positioned in the vestibule to hold the doors

---

<sup>28</sup> As part of a class project, students from the New York Institute of Technology (“NYIT”) received approval to interview Mr. Sooknanan regarding Wal-Mart’s Blitz Day preparations, and to video inside the Valley Stream Store prior to Blitz Day 2008. See Sec. Ex. 152 at 183:3-24, 184:23-185:3.

and assist the entering crowd would be subjected to struck by hazards posed by doors, glass and customers; and (6) that the unmanaged crowd posed serious hazards to its employees due to crowd surge, crowd crush and crowd trampling.

In fact, two management employees, Mr. Rice and Mr. Blair, specifically raised their safety concerns with Store Manager Sooknanan on separate occasions following the incidents during Blitz Day 2007 at the Store. Sometime after Blitz Day 2007, Mr. Blair had a conversation with Mr. Sooknanan regarding his concerns about the doors coming off the hinges during the opening of the Store on Blitz Day. Sec. Ex. 145 at 101:14-102:18; Tr. at 1047:7-10. Mr. Sooknanan admitted that he was also concerned because the customers got too close to the door for his comfort during Blitz Day 2007. Tr. at 1047:11-14. Mr. Blair testified that he suggested to Mr. Sooknanan that the Store use barricades for upcoming events, as a measure to prevent the door from coming off the hinges. Sec. Ex. 145 at 101:14-102:18. Although Mr. Blair, like the other Wal-Mart employees, lacked any crowd management training, he told Mr. Sooknanan that it would be easier to open the doors if the crowd was away from the doors when the doors are opening, and he suggested barricades. Sec. Ex. 145 at 102:19-25. Mr. Blair testified that Mr. Sooknanan told him “we’ll do that next year,” for the 2008 Blitz Day. Sec. Ex. 145 at 103:2-7. Mr. Sooknanan testified that, prior to Blitz Day 2008, Mr. Rice also raised concerns about customers pushing on the front door and being too close to the door during Blitz Day 2007. Tr. at 1047:22-1048:1; see also Tr. at 999:4-8 (Mr. Sooknanan admitted that Rice “had voiced some concern about the amount of people that initially entered into the store when it opened”). Based on Mr. Rice’s injury during Blitz Day

2007, as well as the concerns raised by Mr. Blair and Mr. Rice, Mr. Sooknanan decided to use barricades to create a buffer zone for Blitz Day 2008. Tr. at 999:4-8, 1047:19-21.

Mr. Blair was also a member of the Valley Stream Store's safety team in 2008. Sec. Ex. 145 at 155:4-17. Mr. Blair explained that "crowd control" was listed under "Plan for Blitz" in the Store safety committee notes (drafted weeks prior to Blitz Day 2008) because crowd control was needed so that no one would get hurt, and this concern was based, in part, on the previous year's Blitz Day in 2007. Sec. Ex. 145 at 161:6-10. Mr. Rice also testified that he was concerned about the safety of employees and customers during Blitz Day based on the incidents in 2007. Tr. at 125:10-15. Mr. Rice raised concerns with Store Manager Sooknanan during a meeting at the Store a few days prior to Blitz Day 2008, as recorded on videotape by NYIT students. See Sec. Ex. 53. During this meeting, Mr. Rice stated: "I was at the door last year, I just want somebody else out there with me." Sec. Ex. 53 from 17:00 to 18:00 (see Tr. of Sec. Ex. 53 at 18:19-20). Mr. Sooknanan responded: "We'll have enough. We'll have enough people at the door. We'll have overnight [indiscernible] going to provide a lot of people [indiscernible] at the doors.... So it's not – we're going to do it a little bit differently. We'll keep the line farther away from the door this year." Sec. Ex. 53 from 17:00 to 18:00 (see Tr. of Sec. Ex. 53 at 18:23-19:2, 19:7-9). Clearly, based on his own safety concerns and the concerns raised by other management employees regarding crowd entry on Blitz Days prior to Blitz Day 2008, Store Manager Sooknanan was aware of the potential crowd-related hazards posed to Store employees.

Indeed, the hazardous conditions present on Blitz Day 2008 at the Valley Stream Store represented a continuing pattern of unsafe conditions due to recognized crowd-

related hazards to its employees during the Store's Blitz Days, and Respondent's failure to implement appropriate crowd management planning, training and measures in the face of this knowledge. These hazards were clearly recognized by Respondent's managers at the Valley Stream Store.

2. *Wal-Mart Was Aware of Prior Crowd-Related Incidents at Its Stores Nationwide.*

The hazards at the Valley Stream Store were not unique; Wal-Mart was aware of similar reported crowd-related incidents and hazardous conditions at its other stores prior to 2008. As a corporation, Respondent's knowledge is memorialized in its documents and cannot be overlooked:

Corporations do not record knowledge in neural pathways; they record it in file cabinets (and increasingly on computer disks). File cabinets do not "forget." Files may be destroyed, and people may forget about data in file cabinets, but a [document indicating knowledge of certain fact] remains in the corporation's knowledge as long as the [document] itself continues to exist (and, even after its destruction, as long as a responsible employee remembers it).<sup>29</sup>

Here, Respondent had notice of over 160 reports of incidents or injuries to employees and customers who were struck or injured by crowds entering or rushing through Respondent's stores during Blitz Days in 2003-2007 across the country. See, e.g., Sec. Exs. 112-123, 127. Indeed, in its discovery responses, which Respondent was ultimately compelled by Chief Judge Sommer to produce, Respondent admitted notice of over 100 incidents. Sec. Ex. 48 at 15-16 (listing 114 claims of strikes to customers and employees which met the following limited criteria: (1) "employees and/or customers who were struck or injured by crowds entering or rushing through the store," (2) from

---

<sup>29</sup> Ladish Malting Co., 135 F.3d at 492-93.

“centrally-located” information, (3) from “a period of five years before the subject incident,” and (4) on Blitz Days (and a few other limited holidays)). Respondent does not deny that every single one of these injuries were reported and recorded in its CMI claims forms records. Facts ¶ 19.

CMI, Wal-Mart’s administrator for all injury claims, is a wholly owned subsidiary of Wal-Mart and effectively a unit within Wal-Mart’s corporate structure. Facts ¶ 4. Accidents or incidents involving employees and/or customers are reported electronically by Wal-Mart managers through CMI’s Incident Reporting System, which is available on store computers and connected to Wal-Mart’s own intranet. Facts ¶ 7. Wal-Mart management employees, at the store, regional, district and corporate levels, have direct access to claims from all stores, including information such as store location, description of injury, date and time of incident, whether any work was lost by the claimant, and whether any medical attention was required. Facts ¶¶ 8-9. In addition, the Home Office and Wal-Mart managers may request accident incidence and summary reports, prepared and generated from the information stored by CMI. Facts ¶ 10. Specifically, reports can be requested by type of injury, location of injury, and frequency of injury by hour of the day (i.e., all “struck by” injuries in the vestibule between the hours of 5:00 a.m. and 6:00 a.m. on Blitz Day). Facts ¶ 10. Indeed, in advance of the 2008 Blitz Day Event, Wal-Mart personnel requested a summary of incident and accident reports that specifically occurred in the vestibule of its stores on prior Blitz Days. Facts ¶ 11.

As the evidence of prior crowd-related incidents at Wal-Mart stores has been offered by the Secretary to demonstrate Respondent’s notice of crowd-related hazards,

the veracity of the underlying injury claims is not important.<sup>30</sup> Respondent's notice of reported incidents of similar hazardous conditions reflects Respondent's recognition of the cited hazards to its employees. The Commission has held that such prior incidents need not take place at the same facility.<sup>31</sup> Furthermore, in establishing notice of prior incidents, "[t]he incidents need only be sufficiently similar to make the defendant aware of the dangerous situation."<sup>32</sup> Accordingly, the fact that prior incidents may have occurred at other Wal-Mart stores, or involved injuries to customers as well as employees, does not eviscerate the relevance of such evidence in demonstrating Respondent's notice of similar hazardous conditions. Indeed, as the video footage from Blitz Day 2008 has shown, employees positioned in the same or nearby locations as

---

<sup>30</sup> However, the manager statements contained in these documents constitute non-hearsay admissions pursuant to Federal Rule of Evidence 801(d)(2)(D) and thus are offered for their truth. Fed. R. Evid. 801(d)(2)(D); see also Sec. Ex. 148 at 116:25-118:5 (Respondent does not have any information that would contradict the statements attributed to management employees in injury claim forms, beyond any information contained in claim forms or discovery responses.).

<sup>31</sup> Jones & Laughlin Steel Corp., 10 BNA OSHC 1778, 1982 WL 22627, \*3 n7 (Rev. Comm. 1982) (in a 5(a)(1) case, the Commission agreed that evidence of prior fatality at a different plant was relevant and should not have been excluded from evidence); Continental Oil Co., 630 F.2d 446, 448 (6th Cir. 1980) (affirming the Commission's ruling that Continental recognized the hazards posed by overflows of inherently dangerous product and that Continental was aware of a similar explosion at another tank farm which, like Continental, used an unmanned delivery system); Dye Constr. Co., 9 BNA OSHC 1215, 1980 WL 10549, \*8 (ALJ 1980), aff'd 698 F.2d 423 (10th Cir. 1983) (the existence of an unsafe condition was proven, in part, by the employer's knowledge of one prior accident at another location). See also Wal-Mart Stores, Inc., 406 F.3d 731, 737 (D.C. Cir. 2005) (repeat classification against Wal-Mart upheld based on violation at another store).

<sup>32</sup> Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1386 (4th Cir. 1995) (similarity of prior incidents when proving notice is more relaxed than when proving negligence; upholding admissibility of dissimilar incident reports for purposes of proving notice, finding that they were "highly probative" despite various differences).

customers were exposed to similar crowd-related safety hazards on Blitz Day.<sup>33</sup> See App. C (chart summarizing video footage of Blitz Day 2008 Store opening).

The many crowd-related incidents and injuries reported in its claims records gave Wal-Mart knowledge of the hazardous conditions its employees were exposed to on Blitz Days and the need for effective crowd management to protect its employees from the cited hazards. Specifically, Respondent's claim documents highlight its awareness of the following hazardous conditions reported on Blitz Days at its stores: (1) crowds rushing into its stores upon the opening of the doors on the morning of Blitz Day; (2) employees and customers being pushed or struck by entering crowds; (3) employees and customers being pushed or knocked down and trampled by entering crowds; (4) employees and customers being pushed, crushed or pinned against the store or doors by entering crowds; and (5) a lack of appropriate crowd control implemented by its stores.<sup>34</sup>

*i. Wal-Mart Had Notice That Crowds Rushing Into Its Stores on Blitz Day Presented Serious Hazards to Employees.*

Based on its claims forms documents, Wal-Mart had notice of crowds rushing into its stores upon the opening of the store doors for Blitz Day. Indeed, even the limited portions highlighted in Appendix B contain more than thirty references to crowds rushing

---

<sup>33</sup> As Your Honor recognized in ruling on pretrial motions, prior injuries to customers are highly relevant in showing Respondent's awareness of potential hazards to its employees. See Order dated June 23, 2010 (denying Respondent's motion in limine to exclude evidence of prior crowd-related incidents and injuries at Wal-Mart stores). As the evidence has shown, Wal-Mart employees were often stationed in the vestibule on Blitz Days and subject to the same or similar hazardous conditions as customers.

<sup>34</sup> The information and quotations cited below, contained in Secretary's Exhibits 112-123 and 127, are also easily located in the Secretary's Summary Chart of Prior Claims Forms, attached hereto at Appendix B. In the chart, the Secretary identifies 114 pages (from 51 individual claims) in Respondent's claim forms that contain specific information and statements particularly relevant to Respondent's notice of hazards associated with Blitz Day crowds. See also footnote 5.

into Wal-Mart stores on prior Blitz Days as the doors opened. See Sec. Exs. 116, 117, 120, 121, 122 & 123 (employees “injured in [or during] Blitz rush”); Sec. Ex. 127 at 18 (same); 95 (“big crowd” entered when doors opened); 102 (when doors opened “everyone . . . started crowding into the line from several directions”); 259 (“There were thousands and thousands of [people]. [People] started yelling they are opening the doors. [People] rushed.”); 282 (crowd “started to push when the doors were open”); 341 (“there was a mad rush when the doors were open”); 455-456 (“the minute the doors were being opened people tried to push their way through and customers “started busting through the exit doors”); 672 (“when the doors were opened it became a stampede of customers into the store”); 679-680 (“200 people outside trying to get in . . . [a]s soon as their keys clicked opened [sic] the customers started pouring in;” “customers appear to immediately start running into the store”); 882 & 911 & 987 (“The doors were opened and they all made a mad rush.”); 962 (“600-800 people rushing in the doors”); 986 (“customers rushed in the door on blitz day and clmt fell”); 1018 (“There was a mass rush at the door.”); 1076 (“They opened up the doors and they had a rush of customers”); 1151 (“Once the doors were opened, the crowd began running.”); 1177 & 1182 (“one minute after the hour” crowd of more than 625 people was “rushing into the store”); 1273 (“rushing in with other customers on blitz days [sic]”); 1335 (“everyone started rushing into the store when they opened the doors”); 1356 (“when the doors opened a crowd from across the cross walk stormed the store”); 1386 & 1390 (“people all rushed in at once when the door was opened;” “[w]hen the doors opened at 5:00 A, people just began pushing and rushing”); 1403 (when doors opened “they all started pushing and rushing”); 1420 & 1429 (“[w]hen the doors opened others not in line rushed up”); 2250-2251

("[Store] had a little trouble getting doors opened and when they did all the customers we[r]e anxious and they crashed thru [sic] the doors and dashed inside like a stampede.").

Video footage from certain injury claims also provided Respondent with knowledge of crowd surge and crowds rushing in its stores on prior Blitz Days. See Sec. Ex. 128f (WM2009-43501/v000000015 video footage from injury claim) from 04:00 to 05:30 (showing crowd rushing into store as doors are opened); Sec. Ex. 128d (WM2009-43501/v000000013 news coverage with video footage from injury claim) from 0:00 to 02:30 (showing crowd rushing into store as doors are opened); Tr. of Sec. Ex. 128d at 2:4-6, 12-14, 18-19 ("crowd storms the doors in the mad rush to get to those door-buster deals inside;" hundreds of shoppers rushed in, pushing and shoving as doors opened).

ii. *Wal-Mart Had Notice That Employees and Customers Were Pushed and Struck By Crowds Rushing Into Its Stores on Blitz Day.*

The limited portions of Respondent's claim documents highlighted in Appendix B contain almost twenty references to employees and customers being pushed or struck by crowds entering Wal-Mart stores on prior Blitz Days.<sup>35</sup> See Sec. Exs. 118 & 119 (employee "struck by Blitz rush customers"); Sec. Ex. 127 at 31 (same); 102 (crowd was "[p]ushing & shoving"); 235 & 238 ("pushed down" to floor "upon entering store"); 256 ("Blitz Day mob pushed her to the floor"); 280 & 282 ("[p]ushed down by other customers;" "knocked down to the floor" by crowd when entering); 409 ("[p]ushed or fell during blitz"); 411 & 415 ("Blitz pushed by customers" and "went flying into the store"); 672 ("pushed down" as crowd entered); 1151 ("The [associates and managers] were

---

<sup>35</sup> References to employees or customers being pushed or struck which also describe crowd trampling or crowd crush are not included here; such references have been noted below, see Sections II.B.2.iii & iv.

actually shoved aside and had to push their way thru [sic] the crowd.”); 1389 (“[p]eople were pushing” and it was “crazy”); 1414 & 1416 (“knocked down by customers” when doors first opened); 2312-2313 (“pushed from behind by other shoppers while trying to enter store”); 2323 (crowd was “pushing and shoving” as they entered and claimant “got knocked down”); see also Facts ¶¶ 17 and 18.

*iii. Wal-Mart Had Notice That Employees and Customers Were Knocked Down and Trampled By Crowds Rushing Into Its Stores on Blitz Day.*

The limited portions of Respondent’s claim documents highlighted in Appendix B contain more than thirty references to employees and customers being pushed or knocked down and trampled by crowds entering Wal-Mart stores on prior Blitz Days. See Sec. Exs. 112 & 113 (employee “knocked down and trampled by customers”); Sec. Ex. 127 at 12 (employee “pushed down and trampled by the crowd”); 40 (“several associates/customers were injured in trampling over Blitz sale”); 95 (“trampled [sic] by the crowd”); 261 (“knocked down and wkld [sic] over by [people] during a blitz rush”); 270 & 275 (“[p]ushed and stepped on when the doors opened;” “got trampled”); 293-294 (“lot of people ran over knock [sic] to floor;” entering crowd pushed, knocked her off her feet and “tumbled [sic] her”); 350-353 (“[r]an over by customers coming in the door;” crowd pushed and knocked down, “trampled by customers coming into the store”); 453, 455 & 456 (crowd pushed, “knocked down and trampled” as entered store); 680, 689 & 707 (“pushed down as crowd poured in” and “stampeded;” employees tried to stop crowd from running over him but “not in time for a few people to step on him”); 882 & 911 & 987 (unlocked doors and customers “all fell in;” one customer pushed from behind, fell and “the rest fell on top”); 1074 & 1076 (“Blitz – customer was trampled coming in

building;” “she was run over” by crowd rush); 1149-1150 & 1153 (“Blitz – pushed down on Blitz Day and walked on;” “pushed down by another customer and trampled by the crowd;” “trampled by the crowd when the doors were opened for Blitz”); 1182 (“pushed flat on the floor – people kept trampling over her”); 1335 & 1343 (“People in the back pushed forward” and 6 people “fell on top of the clmt;” “2 people got trampled.... “[claimant] had broke [sic] kneecaps.”); 1403 & 1411 (“got pushed down and stampeded;” “got trampled;” “someone stepped on her head, and body ... said she truly though[t] she was going to die...”); 2250-2251 (crowd “pushed her down and a lot of people started running over the top of her... too many people coming for her to get up by herself”); see also Facts ¶¶ 17 and 18.

Video footage from certain injury claims also provided Respondent with knowledge of crowd trampling on prior Blitz Days. See Sec. Ex. 128f from 04:00 to 05:30 (showing people pushing and falling during crowd entry and employees positioned in vestibule); Sec. Ex. 128d from 0:00 to 02:30 (showing people pushing and falling during crowd entry and people being trampled by crowd); Tr. of Sec. Ex. 128d at 2:1-2, 15-16, 19-20 (crowds “trampling a number of customers, sending two to the hospital”) & 3:6-7 (“lady knocked down and people trampling over her”).

*iv. Wal-Mart Had Notice That Employees and Customers Were Pushed, Crushed or Pinned Against the Store or Doors By Crowds Rushing Into Its Stores on Blitz Day.*

The limited portions of Respondent’s claim documents highlighted in Appendix B contain nearly twenty-five references to employees and customers being pushed, crushed or pinned against the store or doors by crowds entering Wal-Mart stores on prior Blitz Days. See Sec. Exs. 114 & 115 (employee “[o]pening doors for Blitz, pushed against the

doors”); Sec. Ex. 127 at 9 (same); 91 (“squished in crowd”); 98 (“pushed and pinned/door”); 99 & 102 (“pinned by crowd while entering the store;” “crushed under the people”); 205 & 208 (“[t]rying to get in the door and got slammed into it and pinned against it;” crowd “squeezed [ ] against the glass”); 338 & 341 (“crushed in customer rush blitz sale;” “pinned against the pallets outside the door”); 415 (“when the doors were opened, it created a stampede” and “pinned up against something”); 962 (“as they open [sic] the doors the wave of people got her caught in the doors and she broke two ribs;”); 998 & 1002 (“Blitz-Pinned Against Door by the Crowd;” “pushed against the wall by the crowd”); 1012 (“lot of pushing,” manager “stood there trapped [sic] for a good 10 to 15 minu[t]es”); 1016 & 1018 (“caught up in the crowd and pined [sic] against the door and the shopping cart,” “saw the older lady get pinned up against the wall”); 1273 (“pushed by other customers into the manuel [sic] doors”); 1356 (“was thrown up against the metal detector” as crowd entered); 1388 & 1390 (“pinned against the wall” by shopping cart during crowd entry); 1420 & 1429 (“crushed him up against a black bench, shopping carts and the front door”); 2242 (“several customers were pushing through doorway and she got her hand crushed”); see also Facts ¶¶ 17 and 18.

v. *Wal-Mart Knew That It Lacked Appropriate Crowd Control Measures at Its Stores.*

The limited portions of Respondent’s claim documents highlighted in Appendix B contain more than twenty references to a lack of appropriate crowd management and crowd control measures implemented by Wal-Mart stores on prior Blitz Days. See Sec. Ex. 127 at 275 (“[parking lot] was filled, line wrapped around building, no security until 5 minutes before store opened but crowd was out of control”); 294 (“no one came out to warn the crowd to be careful or anything”); 672 (store and security personnel in parking

lot were ineffective in controlling crowd); 707 (“The store security guards who opened the doors just stepped back and let the flood of customers enter without any order whatsoever.”); 882 & 911 (employees were at the doors “trying to do crowd control,” customers “not in line at all,” employees were “yelling to walk don’t run the whole time but they could not be heard over the crowd”); 984 (“people were pulling up getting out of their cars and pushing to the front”); 987 (questions in file included: “What kinds of precautions was this store taking? ...Were all [available] doors open? How many customers (estimated) were in line waiting? Were any associates warning, asking everyone not to run, proceed in normal fashion? Any numbers or any kind of system used to hand out items?”); 1011 (Blitz Day injury “due to W/M allegedly providing no crowd control”); 1018 (“We did have 1 poorly trained security guard there he was trying to control this mass people.”); 1273 (“this is not a 24hr store and [crowd injury] occurred when they opened”); 1356 & 1365 (“No crowd control. No one trying to contain the shoppers or keep order & people safe.” Claimant was a former associate “so she is well aware of [ ] what the store is like on this day.”); 1386 & 1390 (claimant and wife noted there was “no security;” “What methods of crowd control were being used by the store prior to the inc;” “[T]hey only allowed entrance at one door to better control the rush...If the crowd had not been under some control, others would have been hurt also, according to [employee].”); 1403 & 1411 (“no one outside directing the crowd;” store manager stated “no crowd control measures specifically” and “store should have had some type of crowd control;” claimant said “no one trying any crowd control measures, they just opened the doors and let them go”); 1416 (“requesting information on what precautions were taken in crowd control”); 1429 (“The store created the atmosphere in which this

customer was injured...”); 2313 (questions in file included: “did store have any [asset prevention or associates] assigned outside to maintain crowd – confirm what store was doing to maintain crowd”); 2323 (“I asked him if the [store] tried to control the crowd [employee said] there was nothing they could do except stay out of the way.”); see also Facts ¶¶ 17 and 18.

Video footage from certain injury claims also provided Respondent with knowledge of the need for appropriate crowd management and crowd control to manage Blitz Day crowds. See Sec. Ex. 128f from 04:00 to 05:30 (showing employees positioned in vestibule during crowd rush); Sec. Ex. 128d from 0:00 to 02:30; Tr. of Sec. Ex. 128d at 4:5-17 (complaints regarding the store’s “lack of security;” Wal-Mart “should hire trained uniformed security guards to help bring order to this early-morning holiday crowd”).

In addition to these extensive references in its own documents, crowd-related incidents at Wal-Mart stores during prior Blitz Day events have been the subject of media coverage. See, e.g., Sec. Ex. 107 (ProQuest Wall Street Journal article regarding crowd problems in Pennsylvania and California at 2003 Blitz Days) at 1 (report of near riot; door hinge snapped at one location; public officials met with Wal-Mart); Sec. Ex. 108 (Westlaw Milwaukee Journal Sentinel article regarding crowd problems in Milwaukee for PlayStation 3 release) at 1 (customer stampede, trampling); Sec. Ex. 109 (Westlaw Daily News article regarding crowd problems in Palmdale, California for PlayStation 3 release) at 1 (unruly crowds, concern regarding safety); Sec. Ex. 110 (Lincoln Journal Star article regarding crowd problems in Lincoln at 2005 Blitz Day) at 1 (people pushed by crowd; stampedes; location where there was a controlled line had no problems), Sec.

Ex. 111 (WKYC.com website article regarding crowd problems in Michigan at 2005 Blitz Day) at 1 (customer injured as people rush into store; crush of shoppers; people fell). It is difficult to fathom that these widely reported events simply escaped Wal-Mart's knowledge – particularly since they reflect the same type of events and incidents extensively reported in Wal-Mart's own claim documents.

**B. Wal-Mart's Blitz Day Planning Documents Demonstrate That Wal-Mart Recognized Crowd-Related Hazards.**

As noted above, an employer's knowledge of the hazard may be evidenced by information contained in corporate documents, such as the company's safety documents.<sup>36</sup> Knowledge is imputed to the corporation as long as the information is reflected in corporate documents, or if such documents are destroyed, as long as someone remembers the information contained in the documents.<sup>37</sup> Wal-Mart's documents, including both corporate-wide and Store-based planning documents and e-mails, further underscore its recognition of the crowd-related hazards posed on Blitz Days.

Numerous Wal-Mart documents, created in preparation for Blitz Days in 2007 and 2008, explicitly reference the need for its stores to plan for "crowd control." See

---

<sup>36</sup> See Puffer's Hardware, Inc., 742 F.2d at 18 (employer's safety program may constitute evidence that employer recognized hazard at issue); General Dynamics Land Sys., Inc., 1993 WL 15067, at \*3 (several company safety bulletins go toward showing recognition); Ulysses Irrigation Pipe Co., 11 BNA OSHC at 1275 (instruction not to use unlighted, unprotected tractor at night goes toward recognition of hazard of unlit, obstacle-filled pipe storage yard); Mercer Well Serv., Inc., 1977 WL 7758, at \*1 (employer's own safety rule requiring derrick men to wear a safety belt while riding elevators established it had actual knowledge that riding elevator without protection of safety belt was hazardous); Ted Wilkerson Inc., 9 BNA OSHC at 2016 (employer's work rule evidences recognition of hazard under general duty clause). See also The Timken Co., 2003 WL 1889150, at \*6-\*8.

<sup>37</sup> Ladish Malting Co., 135 F.3d at 492-93 (corporate knowledge remains as long as information is reflected in corporate documents and even after its destruction, as long as a responsible employee remembers it).

Sec. Ex. 71 (Blitz Weekend Priorities, 2007) at 4 (Blitz morning: “All AP staff ready and prepared for safety, crowd control and assisting associates.”); Sec. Ex. 3 (Blitz and Holiday Security Focus 2008) at 2 (Blitz Security Focus: “Ensure stores have action plans in place for crowd control and customer safety.”); Sec. Ex. 14 (November 20, 2008 e-mail from Asset Protection Communication to Asset Protection Recovery Team) at 1 (Blitz Response Reminder: “Review action plans for crowd control and customer safety.”); Sec. Ex. 15 (November 25, 2008 e-mail from S. D’Amico to J. Blair and others) at 2 (Blitz: Increased Customer Traffic: “Please ensure actions plans for crowd control . . . and customer safety are in place.”); Sec. Ex. 16 (Valley Stream Store safety committee notes, 2008) at 7 (“Plan for Blitz” lists “crowd control”); Sec. Ex. 54 (October 17, 2008 e-mail from B. Broadus to Region 1 AP) at 2 (“need to focus on crowd control and crowd flow”). Both Market Asset Protection Manager Salvatore D’Amico and Vice President of Asset Protection Monica Mullins testified that Wal-Mart’s “actionable” e-mail instructed stores to “review action plans for crowd control and customer safety,” see Sec. Ex. 14, required the Market Asset Protection Manager to comply. Tr. at 230:17-19; Sec. Ex. 148 at 182:20-183:7. These documents highlight Respondent’s knowledge of the cited hazards, and the necessity of planning for and providing crowd control for its Blitz Day events accordingly.

In addition to explicit language requiring action plans for crowd control, various Wal-Mart documents recommended that stores implement certain measures, such as communicating with the crowd. See Sec. Ex. 7 (Blitz Day Best Practices 2008) at 2 (“Managers should consider ‘talking’ with customers before opening. Included in talking points would be general points about shopping safely, locations of key items, not running,

not throwing merchandise, etc.”); Sec. Ex. 13 at 1 (same); Sec. Ex. 15 at 2 (“Prior to opening on the morning of Blitz, stores should consider having store associates ‘meet and greet’ customers as they wait in line.”). Such documents, emphasizing particular crowd management measures, further highlight Respondent’s recognition of crowd-related hazards and the need to implement safety measures.

Despite its failure to implement adequate crowd management planning and measures at the Valley Stream Store on Blitz Day 2008, Respondent’s recognition of crowd-related hazards is further supported by the Black Friday Market 45 Action Plan created by Mr. D’Amico in preparation for Blitz Day 2008. Facts ¶ 23. This operational document, distributed to managers to use at the Valley Stream Store, see Sec. Ex. 11 (November 7, 2008 e-mail from S. D’Amico to S. Sooknanan, J. Blair and others, attaching plan), included a handful of safety measures. The list included using caution tape or cones to “control the line,” maintaining “clearance” space in front of the entrance door, and having employees “walk the line outside” to instruct customers to walk slowly. Sec. Ex. 2 at 1 (#9: “Caution Tape/Cones to be used to control the line.” #10: “10 Feet of clearance from front door to where the cones/barricades will be set up.” #11: “One APA and One additional associate to walk the line outside encouraging everyone to walk slowly and carefully.”); see also Tr. at 223:18-22 (D’Amico: ten foot clearance was buffer or safe area to have access to open doors and communicate with crowd). These items demonstrate the knowledge of Wal-Mart’s management of hazardous conditions and that crowd management measures were necessary to “control” the crowd – by demarcating the line outside, creating a “buffer” zone to allow the store to safely open the doors, and communicating with the crowd outside. Unfortunately, the Valley Stream

Store did not implement effective crowd management measures or establish a comprehensive crowd management plan prior to 2009. See *infra* Section IV (discussing feasible crowd management plan and measures, as implemented by Respondent in 2009).

The map of the Valley Stream Store created by Mr. Sooknanan to hand out to customers on Blitz Day in 2006 or 2007 also demonstrates the knowledge of Wal-Mart's management that customers running into the store and customers entering the store before the doors were completely open posed hazards to associates. Facts ¶ 14; see also Sec. Ex. 69 at 1 ("Please wait for doors to be completely open before entering."); Tr. at 989:25-990:2, 1030:14-1031:5; Sec. Ex. 152 at 105:9-18, 106:19-107:9 (Sooknanan included instruction to customers to wait until doors were completely open "because he knew the doors were broken the year before and he wanted to make sure that similar issues did not happen again").

Additional Wal-Mart documents illustrate Respondent's knowledge of increased customer traffic and expectation of larger crowds during Blitz Days, especially in the front end of the store during peak times on Blitz morning. See Sec. Ex. 1 (Holiday Best Practices for Asset Protection 2008) at 1 (Staffing: "Store that have Asset Protection Associates should utilize these Associates to assist Customers in key areas of the store that are anticipated to attract the most Customers during peak times of the day." and Customer Flow: "Managers should be involved in scheduling, security, and Customer flow of the Front-end as these will be critical during this time."); Sec. Ex. 4 (2008 Holiday Security) at 2 (Blitz Day: "APAs, APCs, and other designated associates should be staffed at the front end during key hours of Blitz (5am-11am)..."); Sec. Ex. 5 (Excerpt from Safety Playbook FY09: Holiday Safety Strategy 4th Quarter) at 4

(“increased traffic during early morning hours”); Sec. Ex. 72 (Valley Stream Blitz Plans 2007) at 2 (“stage all empty shopping carts to prepare for customer RUSH”). Wal-Mart did not merely expect larger crowds on Blitz Day morning – it actively attracted these crowds for a limited supply of deeply discounted sales items offered during a limited time period (i.e., 5:00 a.m. to 11:00 a.m. on Blitz Day). Facts ¶ 13. In fact, in response to its 2008 Blitz Day advertisement/flier, Respondent expected a greater number of customers than normal on Blitz Day 2008. Facts ¶ 23.

Furthermore, numerous Wal-Mart documents show Respondent’s knowledge regarding the location, type and timing of Blitz Day injuries resulting from increased customer traffic and larger crowds. See, e.g., Sec. Ex. 10 (October 31, 2008 e-mail from D. McHale to S. D’Amico and others) at 1 (“The holiday season is a peak timeframe for Big 3 accidents due to the increased customer traffic and freight flow.”); Sec. Ex. 2 (Black Friday Market 45 Action Plan 2008) at 1 (#20: “Have extra accident folders made up and ready for immediate use.”); see also, Sec. Ex. 148 at 195:7-21 (in discussing a large sales event, Respondent acknowledged that “the period before the store opens and the moment the door unlocks is a critical time with regard to crowd control for the store...”). According to Respondent’s own documents, “the largest occurrence of customer accidents happen during the first hour of Blitz (5am to 6am),” and “36% of total claims are directly related to crowd control.” Facts ¶ 20; see also Sec. Ex. 10 at 1 (noting that Wal-Mart’s goal of an “accident free Blitz Day” encompasses “all accidents, associate and customer”). Another Wal-Mart document, distributed via e-mail by the Home Office, contained details about injuries from Blitz Day 2007, including that 5am was the peak time for incidents, 43% of which were classified as S/T/F (slip/trip/fall) and

13% of which were classified as “Struck By Another.” Facts ¶ 11. These documents highlight that Respondent knew of the potential hazards posed by the large crowds it attracted to its stores for Blitz Days. Specifically, Respondent knew that these hazards were greatest at or around the time of the store opening, were often directly related to crowd control, and included “struck by” hazards in particular.

**C. The Valley Stream Store’s Flawed Safety “Precautions” For Blitz Day 2008 Demonstrate That Wal-Mart Recognized Crowd-Related Hazards.<sup>38</sup>**

In addition to the evidence demonstrating that Wal-Mart was aware that crowd-related hazards were present at Blitz Day openings, Wal-Mart took specific “precautions” at the 2008 Blitz Day Event at the Valley Stream Store. While these steps were patently inadequate and ineffective in protecting its employees, they further evidence Wal-Mart’s recognition of the cited hazards. Presented in conjunction with other evidence, such “precautions” establish recognition of the hazard.<sup>39</sup>

---

<sup>38</sup> The Secretary does not concede that any of the measures discussed herein were actually preplanned and utilized by Respondent for the purposes of crowd management. Such flawed, ad hoc “precautions” simply support Respondent’s recognition of the crowd-related hazards. To the extent that Respondent has not abandoned its affirmative defense that it implemented reasonable precautions to ensure employee safety for its 2008 Blitz Day Event, the Secretary briefly addresses Respondent’s failure to support such a defense below, *see infra* Section VI.

<sup>39</sup> Beverly Enterprises, Inc., 19 BNA OSHC at 1190 (safety precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence); Pepperidge Farm, Inc., 1997 WL 212599, at \*41; Waldon Health Care Center, 16 BNA OSHC at 1061-62; Puffer’s Hardware, Inc., 742 F.2d at 18 (finding that employer’s elevator presented “recognized” hazard under general duty clause; evidence that employees had been told to be careful in using elevator, had been instructed in proper operation of elevator, had been told to keep their bodies outside of elevator shaft when waiting for the elevator, and had been told to call elevator service company in event elevator safety problems arose); Ulysses Irrigation Pipe Co., 11 BNA OSHC at 1275 (instruction not to use unlighted, unprotected tractor at night goes toward recognition of hazard of unlit, obstacle-filled pipe storage yard); Mercer Well Serv., Inc., 1977 WL

As exemplified by certain ad hoc measures, Respondent knew, based on prior incidents at the Store, of the hazards presented by crowd pressure and pushing on the doors. For example, the Store set up barricades outside in an attempt to keep the anticipated crowd farther away from the entrance doors than in prior years. See Sec. Ex. 145 at 21:3-16, 143:16-144:6, 147:21-148:4; see also Facts ¶¶ 26-27. In addition, managers specifically and purposefully instructed and placed employees in a wedge formation between the outside of the vestibule and the oncoming customers in an attempt to create a buffer zone by the entrance. See Facts ¶¶ 32 & 35. Respondent’s minimal and ineffective efforts to keep the crowd away from the door in 2008 – through the use of the inappropriate barricades and the dangerous “wedge” attempt – support its recognition of the crowd-related hazards to its employees.

Aware of the hazards posed to employees, managers further provided employees with the futile instruction to “step to the side” to avoid crowds entering the Store. Facts ¶¶ 28, 33, 34 & 36; see also Sec. Exs. 143a, 143b, 31c and 31g (video footage showing overview of vestibule and lack of space to “step to the side.”). Similarly, despite Respondent’s awareness of the hazards of employees being struck by or asphyxiated by doors, glass or customers, managers specifically tasked employees with applying counterforce on the entrance doors against the mounting crowd pressure to attempt to prevent the doors from being knocked off or falling inward. Facts ¶ 37. Indeed, this reckless “precaution” exposed employees to even greater risk of the cited hazards.

---

7758, at \*1 (employer’s own safety rule requiring derrick men to wear a safety belt while riding elevators established it had actual knowledge that riding elevator without protection of safety belt was hazardous); Ted Wilkerson Inc., 9 BNA OSHC at 2016 (employer’s work rule evidences recognition of hazard under general duty clause). See also The Timken Co., 2003 WL 1889150, at \*6-\*8.

In light of Respondent’s knowledge of prior crowd-related incidents in the vestibule during the opening at the Store, these unreasonable and ineffective “precautions” nevertheless demonstrate its recognition of the hazards – and highlight the grossly inadequate measures taken to reduce the dangers to employees who were instructed to stand directly in the stream of the rushing crowd.

### **III. THE HAZARDS FACED BY WAL-MART’S EMPLOYEES WERE LIKELY TO CAUSE SERIOUS HARM OR DEATH.<sup>40</sup>**

The general duty clause imposes upon an employer the duty to take reasonable precautionary steps to protect his employees from reasonably foreseeable recognized hazards that are likely to cause death or serious physical injury.<sup>41</sup> The criteria for determining whether a hazard is “causing or likely to cause death or serious physical harm” is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious physical harm.<sup>42</sup> Indeed, “the Act is intended to protect against ‘possible hazards’ and ‘potential danger.’”<sup>43</sup> Importantly, “[t]he Secretary need not show any actual injury to prove a §5(a)(1) violation.”<sup>44</sup>

---

<sup>40</sup> A violation is deemed serious if, in the event of an accident, there is a “substantial probability that the result would be death or serious physical harm.” Tree of Life d/b/a Gourmet Award Foods, NE Div., 19 BNA OSHC 1535, 1537, 2001 WL 1154451 (Rev. Comm. 2001). Further, Commission precedent has held that all 5(a)(1) violations are, by definition, “serious” inasmuch as the Secretary must establish as part of her *prima facie* case the existence of a recognized hazard likely to cause death or serious physical harm. The News Press, 21 BNA OSHC at 2216.

<sup>41</sup> Empire-Detroit Steel Div., Detroit Steel Corp., 579 F.2d 378, 384 (6th Cir. 1978).

<sup>42</sup> Waldon Health Care Center, 16 BNA OSHC at 1060; Kaiser Aluminum & Chem. Co., 10 BNA OSHC 1893, 1897, 1982 WL 22713 (Rev. Comm. 1982).

<sup>43</sup> Marquette Cement Mfg. Co., 568 F.2d at 910 (internal citations omitted).

<sup>44</sup> Marquette Cement Mfg. Co., 568 F.2d at 910.

Accordingly, “[t]he Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths and injuries from ever occurring.”<sup>45</sup>

As such, the existence of a hazard under the general duty clause is established if a hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.<sup>46</sup> The appropriate inquiry is the foreseeability of the general hazard, not the foreseeability of the incident as it actually occurred.<sup>47</sup> Notably, however, “although the fact of an accident may not be sufficient to prove the likelihood of an injury, it is at least prima facie evidence of a likelihood and the rest may be supplied by common sense or an understanding of physical law.”<sup>48</sup>

Although Mr. Damour’s death on November 28, 2008 was the first time an employee died during a crowd rush at Respondent’s Blitz Day events, the *likelihood* of death and/or serious harm had been present during Wal-Mart’s events and was not a freakish or utterly implausible concurrence of circumstances.<sup>49</sup> In fact, the record is replete with evidence of employees’ and customers’ experiences of the hazards, including

---

<sup>45</sup> Whirlpool Corp. v. Marshall, 445 U.S. 1, 12 (1980); see also Mineral Indus. & Heavy Constr. Group, 639 F.2d at 1294.

<sup>46</sup> See Waldon Health Care Center, 16 BNA OSHC at 1061; Titanium Metals Corp., 579 F.2d 536, 541 (9th Cir. 1978); Nat’l Realty & Constr. Co., Inc., 489 F.2d at 1265 n.33. Accord Royal Logging Co., 645 F.2d 822, 829 (9th Cir. 1981); Illinois Power Co., 632 F.2d 25, 29 (7th Cir. 1980); Dorey Elec. Co., 553 F.2d 357, 358 (4th Cir. 1977).

<sup>47</sup> Marquette Cement Mfg. Co., 568 F.2d at 910.

<sup>48</sup> Illinois Power Co., 632 F.2d at 28.

<sup>49</sup> See Waldon Health Care Center, 16 BNA OSHC at 1061; Titanium Metals Corp., 579 F.2d at 541; Nat’l Realty & Constr. Co., Inc., 489 F.2d at 1265 n.33. Accord Royal Logging Co., 645 F.2d at 829; Illinois Power Co., 632 F.2d at 28; Dorey Elec. Co., 553 F.2d at 358.

actual harm ranging from injuries to the tragic death of Store employee Damour. Most tragically, Mr. Damour was positioned in the vestibule where he was hit on the head by the falling door. Facts ¶ 49. After he was knocked to the ground, he was trampled on by the crowd, and eventually died.<sup>50</sup> Facts ¶¶ 41, 43-44, 47, 49 & 51. Other employees faced the same serious danger. For example, Store employee Fitch was positioned outside in front of the vestibule doors where he too was knocked down. Facts ¶ 39. While Mr. Fitch was on the ground, he was repeatedly stomped on. Facts ¶ 39. When he was finally able to get himself upright, he testified that he had difficulty breathing due to the cited hazards. Facts ¶ 39. Store employee Rice was stationed in the vestibule where he too was pushed by the crowd. Facts ¶ 41. Mr. Rice was also pinned up against the vending machines by the incoming mass of people. *Id.* Likewise, Store employee D'Amico was pushed up against the vending machines. Facts ¶ 42. Store employee Calhoun was positioned in the vestibule and was assigned to hold up the front door and keep it from falling in. Facts ¶ 43. Mr. Calhoun's attempt was unsuccessful, however, and the door was eventually knocked off by the incoming crowd. Facts ¶ 43. He was so affected by the events that he was forced to miss several days of work after 2008 Blitz Day. Facts ¶ 43.

As detailed above, the events of the 2008 Blitz Day were not an unusual or isolated series of events for Respondent. The evidence is further supported by the fact that employees and customers reported injuries in prior Blitz Days both at the Store and around the country. *See supra* Section II.A; *see also* Facts ¶¶ 15-18 (at the Store's 2005 Blitz Day Event, customers broke doors completely off including the motor; at the

---

<sup>50</sup> While the cause of Mr. Damour's death is not at issue here, the serious hazardous conditions to which he was exposed cannot be denied.

Store's 2007 Blitz Day Event, customers got "too close for [Store Manager Sooknanan's] comfort" and broke down the door, injuring at least one employee; various records from customers and employees from prior Blitz Day events around the country reporting injuries, being struck, knocked down, slammed, pinned, shoved, trampled and crushed). While fortunately no one died at Respondent's prior Blitz Day Events, it does not make the fact that someone was killed on Blitz Day 2008, as opposed to merely injured as in previous events, utterly implausible.<sup>51</sup> The evidence clearly demonstrates that the hazards presented could eventuate in serious harm under circumstances that were neither freakish nor utterly implausible.

Moreover, as stated in Illinois Power Co., "although the fact of an accident may not be sufficient to prove the likelihood of an injury, it is at least prima facie evidence of a likelihood and the rest may be supplied by common sense or an understanding of physical law."<sup>52</sup> Here, in addition to the numerous reports of injuries, common sense and an understanding of physical law cannot refute that untrained employees stationed in confined and close proximity to a glass doorway, facing an impending onslaught of thousands of people on the other side, were in a dangerous situation wherein they were exposed to or experienced the struck by and asphyxiation hazards, and thus were subject to the risk of serious physical harm or death.

---

<sup>51</sup> See Kelly Springfield Tire Co., 1982 WL 917447, \*4 (Rev. Comm. 1982), aff'd, 729 F.2d 317 (5th Cir. 1984) ("it is the hazard, not the specific incident that resulted in injury ... that is the relevant consideration in determining the existence of a recognized hazard"); Beverly Enterprises, Inc., 2000 WL 34012177, at \*31.

<sup>52</sup> Illinois Power Co., 632 F.2d at 29.

**IV. WAL-MART COULD HAVE MATERIALLY REDUCED THE HAZARDS TO ITS EMPLOYEES BY USING PRACTICAL, FEASIBLE CROWD MANAGEMENT MEASURES.**

In order to establish that feasible means existed to eliminate or materially reduce the recognized hazard, the Secretary must demonstrate both that the abatement measures are economically and technologically capable of being put into effect, and that they would be effective in materially reducing the incidence of the cited hazard.<sup>53</sup>

The required showing to establish feasibility of abatement was described by the D.C. Circuit as follows:

Though resistant to precise definition, the criterion of preventability draws content from the informed judgment of safety experts. Hazardous 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. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods unfeasible. All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace...The record must additionally indicate that demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred.<sup>54</sup>

Here, the Amended Citation lists the proposed abatement as:

ABATEMENT NOTES: Among other methods, feasible and acceptable methods to correct this hazard include, but are not limited to: Special events anticipated to attract the public shall be preplanned by a person(s) qualified in crowd management. Effective crowd control procedures and techniques shall be implemented which may include, but are not limited to, maintaining queuing lines, metering, comprehensive barricade systems, etc. There shall be an adequate number of trained crowd managers and

---

<sup>53</sup> Beverly Enterprises, Inc., 19 BNA OSHC at 1190; Waldon Health Care Center, 16 BNA OSHC at 1063.

<sup>54</sup> Nat'l Realty & Constr. Co., 489 F.2d at 1266-67 (footnote omitted); see also Pepperidge Farm, Inc., 1997 WL 212599, at \*43 (applying principle to all workplace hazards).

supervisors. There shall be effective signage and information awaiting customers and radios for employee communication in order to receive frequent updates and to timely provide information to customers.

In order to materially reduce or eliminate the serious crowd-related hazards, Wal-Mart could have used a number of crowd management techniques, including the ones it used in prior years at large sales events, or those proposed in the amended citation. As discussed in more detail below, developing and implementing a crowd management plan, providing crowd management training to employees interacting with crowds, and utilizing effective commonly used crowd management techniques, would have materially reduced or eliminated the cited hazards. Indeed, many of the measures implemented by Respondent for its 2009 day-after-Thanksgiving Day sales event, which were recommended by Respondent's own crowd management expert consultants, coincide with the Secretary's proposed abatement measures. Moreover, such measures did, in fact, materially reduce or eliminate the hazards in 2009. These very same measures existed as of November 28, 2008 and could have been implemented by Respondent for the 2008 Blitz Day Event.

**A. Wal-Mart Failed to Utilize Feasible Crowd Management and Crowd Control Measures That Were Available in 2008.**

"Feasible" measures are economically and technologically capable of being put into effect.<sup>55</sup> In particular, feasible measures include those precautions that are recognized by "knowledgeable persons familiar with the industry as necessary and valuable steps for a sound safety program in the particular circumstances existing at the employer's

---

<sup>55</sup> Beverly Enterprises, Inc., 19 BNA OSHC at 1190 (citing Baroid Div. of NL Indus., Inc., 660 F.2d 439, 447 (10th Cir. 1981)).

worksite.”<sup>56</sup> Further, the Commission has held that where a hazard could not necessarily be abated with a single measure, it was permissible for the Secretary to “require the employer to engage in a ‘process approach’ to determine what action or combination of actions will eliminate or materially reduce the hazard.”<sup>57</sup>

Here, the Secretary proposed various abatement measures, including providing crowd management training to employees interacting with crowds and utilizing effective commonly used crowd management techniques in planning and executing a crowd management plan. As described below, the record in this case establishes that similar approaches have been available and used successfully, both elsewhere and within Wal-Mart stores at other large sales events.

First, the Secretary has set forth unrebutted evidence that the measures proposed by the Secretary have been available and constitute feasible core components of effective crowd management and safety plans. For example, Paul Wertheimer, a crowd safety consultant admitted as an expert with respect to crowd management and crowd control practices, identified a list of more than 50 crowd management services providers that were available sources for crowd safety consultation prior to the 2008 Blitz Day Event. Tr. at 360:5-361:12 (discussing Sec. Ex. 45 (IAAM directory of companies)). Indeed, Respondent acknowledged that the various crowd management experts who it considered and consulted in advance of its 2009 Blitz Day Event were providing crowd safety advice

---

<sup>56</sup> Austin Bridge & Road, L.P., 21 BNA OSHC 1815, 2006 WL 2781631, \*4 (Rev. Comm. 2006) (citing Cerro Metal Prods. Div., Marmon Group, Inc., 12 BNA OSHC 1821, 1986 WL 53467 (Rev. Comm. 1986)); see also Con Agra, Inc., 11 BNA OSHC 1141, 1144, 1983 WL 23849 (Rev. Comm. 1983).

<sup>57</sup> Beverly Enterprises, Inc., 19 BNA OSHC at 1190 (citing Pepperidge Farm, Inc., 17 BNA OSHC 1993)).

for over 20 years prior to the 2008 Blitz Day Event. Sec. Ex. 148 at 231:23-232:10 (testimony explaining that the safety experts consulted by Respondent were “very highly regarded” for having managed crowds at large events for over 20 years). As detailed below, these crowd safety consultants provided advice regarding the appropriate use of crowd management and crowd control strategies and techniques. These measures were equally available prior to the 2008 Blitz Day Event as they were when Respondent finally sought them out in 2009.

Second, various crowd management techniques, including the proposed abatement measures, have been successfully utilized in other retail settings and at Wal-Mart’s own sales events. Sec. Ex. 92 at 4 (noting that the proposed crowd management techniques “have long been used for a wide variety of public assembly events including those sponsored by retail establishments, such as Apple and Microsoft”); see also Sec. Ex. 70 (Wal-Mart’s Harry Potter Playbook, 2007) at 1, 3 & 11 (Wal-Mart’s 2007 Harry Potter plan included proposed abatement measures such as queuing, positioning employees outside the store to provide information to the crowd, and the use of multi-colored wrist bands and tickets as a means to manage crowd safety.). For example, the iPhone launch in 2007 utilized numerous crowd management measures, including crowd metering where only a set number of people are allowed into a location at a time. Tr. at 430:14-431:6, 432:18-433:13; see also Sec. Ex. 105. Other events, such as the release of the PlayStation 2, used different crowd management measures such as a tagging system, wherein a customer is given a pull tag that assures them of getting the sale product. Tr. at 429:16-430:13. These crowd management measures were available, widely used, and

could have been implemented by Respondent in connection with its 2008 Blitz Day Event.

Notably, Respondent has not disputed that any of the proposed abatement measures are technologically or economically feasible. Nor can it, as demonstrated by its own awareness and use of the proposed abatement measures at some of its events both prior and subsequent to the 2008 Blitz Day Event. Indeed, as unequivocally established by the record, in 2009, with the advice of paid crowd management experts at Landmark Consulting, Respondent preplanned, developed and implemented a written comprehensive crowd management plan for future Blitz Day events.<sup>58</sup> See Facts ¶ 52. Putting such a management plan into writing is consistent with the Secretary's proposed abatement measures. Tr. at 362:22-363:8.

Wal-Mart's crowd management Plan "is intended to provide crowd management strategies and tactics to store management and associates to assist them in planning and maintaining a safe store environment . . . ." Sec. Ex. 74 at 3. The Plan is consistent with the Secretary's proposed abatement measures, and the measures identified by the Secretary's expert as reasonable components of a crowd management plan. Compare Sec. Ex. 74 with Compl. ¶ V and Sec. Ex. 92 at 10-11 (Reasonable and proposed abatement includes: the creation of a written crowd management plan, proper crowd management training of employees, a proper barrier system, queuing, signage, effective communication by employees with customers, the use of walkie-talkies, and a proactive

---

<sup>58</sup> To the extent that Respondent objects to any discussion of its subsequent remedial measures, the Secretary notes that it is well established that evidence of such subsequent measures taken to eliminate a violative condition are admissible and probative to demonstrate practicability and feasibility of such measures. See Fed. R. Evid. 407.

communication plan with local law enforcement – all of which are reflected in Respondent’s Plan.).

The Plan, moreover, was actually implemented during the Store’s 2009 Blitz Day Event, with employees – for the first time – receiving crowd management training weeks prior to the 2009 Event, both in person and computer-based. Facts ¶ 55. Consistent with the Secretary’s proposed abatement measures, portions of this training address methods to identify and diffuse certain problematic crowd dynamics. Sec. Ex. 73 at 71-75. Also consistent with the proposed abatement measures, the Plan includes a chain of command for communication and action. Sec. Ex. 73 at 42-44.

Moreover, the Store implemented numerous other crowd management measures at its 2009 Event, including:

(1) Remaining open to customers for 24 hours prior to the sales time although sale items went on sale at 5:00 a.m. Facts ¶ 58.

(2) Renting steel security barricades to form a serpentine queuing line to the entrance of the Store. Facts ¶ 58.

(3) Hiring third-party crowd management personnel to interact with customers outside the store. Facts ¶ 59.

(4) Positioning Store associates to communicate with customers outside the store. Facts ¶ 59. These employees wore wearing yellow vests such that the crowd could easily identify them as Wal-Mart personnel. Id.

(5) Providing bullhorns to several associates to make announcements to the crowd. Facts ¶ 60.

(6) Positioning associates and security personnel upon elevated viewing stands outside the Store to maintain an unobstructed view of the crowd to quickly identify any issues. Facts ¶¶ 60.

(7) Utilizing a metering technique such that an equal number of customers were permitted to enter the Store as the number of customers who left the Store. Facts ¶¶ 60.

(8) Permitting customers to wait in queuing lines located throughout different areas inside the Store and implementing an in-store ticketing system. Facts ¶¶ 61.

Further, as evidenced by prior events, the consideration and institution of such measures was entirely feasible and was not an unprecedented step for Respondent. Indeed, the year prior to the 2008 Blitz Day Event, Respondent implemented such an approach with respect to the widely anticipated release of a new Harry Potter book. Facts ¶¶ 22. In particular, in connection with the 2007 book release, which was expected to attract large crowds, Respondent developed a detailed playbook to address safety concerns and crowd management for its nationwide special sales event. Id.

This detailed Harry Potter playbook was developed by the Home Office and distributed to store managers across the country via the WIRE. Sec. Ex. 148 at 185:21-186:9, 209:2-5. Respondent concedes that “the period before the store opens and the moment the door unlocks is a critical time with regard to crowd control for the store and is highlighted in the best practices for the store’s management.” Sec. Ex. 148 at 195:7-21. Accordingly, the best practices for the 2007 Harry Potter special sales event included crowd management techniques such as queuing, positioning employees outside the store to provide information to the crowd, and the use of multi-colored wrist bands and tickets

as a means to manage crowd safety. Facts ¶ 22. Indeed, Valley Stream Store Manager Mr. Sooknanan admitted that he was familiar with Wal-Mart's use of certain crowd management techniques, such as ticketing, at other stores prior to the 2008 Blitz Day Event. Tr. at 1064:8-25.

All of the crowd management measures included in the Secretary's proposed abatement measures were available and reasonably could have been implemented by Respondent in preparing for its 2008 Blitz Day Event. Respondent could have developed a crowd management plan that utilized these measures in 2008, just as it did for the 2009 Blitz Day Event and the 2007 Harry Potter book release.

**B. Wal-Mart Failed to Utilize Feasible Crowd Management and Crowd Control Measures That Would Have Materially Reduced the Hazards to Employees.**

As part of establishing feasibility of the abatement measures, the Secretary must also demonstrate that the proposed abatement measures would materially reduce the cited hazard.<sup>59</sup> “[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. The Secretary is therefore not required to show that the abatement method's absence was the *sole* likely cause of the serious physical harm.”<sup>60</sup>

As discussed above, the Secretary's expert, as well as Wal-Mart's own 2009 documents and actions, demonstrated that the proposed abatement measures are “necessary and valuable steps for a sound safety program in the particular circumstances

---

<sup>59</sup> Morrison-Knudsen Co., Inc., 16 BNA OSHC 1105, 1122, 1993 WL 127946 (Rev. Comm. 1993).

<sup>60</sup> Morrison-Knudsen Co., Inc., 16 BNA OSHC at 1122 (emphasis in original).

existing at the employer's worksite."<sup>61</sup> In particular, Mr. Wertheimer's unrebutted testimony established that the implementation of the proposed abatement measures would serve to reduce the recognized struck by and asphyxiation hazards. Tr. at 396:25-397:13. For example, having a written crowd management plan for an event provides a "framework upon which to identify and abate risks and identify crowd safety techniques and management procedures that could have reasonably ensured the safety of employees." Sec. Ex. 92 at 8. Maintaining such a plan in writing, furthermore, decreases the possibility of miscommunication regarding duties, responsibilities and scheduling. Id. Additionally, planning and executing a crowd management plan by those trained in crowd safety is another effective abatement measure; professionals and individuals properly trained in crowd management can understand the concepts, principles and techniques included in the strategy and thus are well positioned to execute the crowd management plan. Tr. at 400:23-401:7. Moreover, properly training employees who are delegated to perform particular crowd management or crowd control tasks would further enhance overall safety; employees lacking training in crowd management and crowd control would be not be in the position to assume duties in areas beyond their training and capabilities. Tr. at 401:25-402:7; Sec. Ex. 92 at 8. Such methods help disseminate information and keep the event organized, creating less opportunity for hazardous conditions. Id.

Further, Wal-Mart's own 2009 Event planning documents and actions demonstrate that the proposed abatement measures were feasible and would reduce crowd-related hazards. As detailed above, many of the recommended and proposed

---

<sup>61</sup> Austin Bridge & Road, L.P., 2006 WL 2781631, at \*4.

abatement measures were implemented by Respondent in 2009. Indeed, as Respondent admits, the crowd management techniques that are incorporated in Respondent's own 2009 Plan – many of which overlap with the proposed abatement measures – are “proven crowd management strategies and tactics” to create and enhance a “safe environment.” Sec. Ex. 73 at 10. According to the Secretary's expert, and unrebutted by Respondent, measures similar to those taken by Respondent in 2009 help to safely manage and process a crowd into a facility. Tr. at 410:19-25. For example, equipping employees with uniforms and/or amplification devices allows the crowd to identify and recognize those individuals who are responsible for the event and who can provide information, and provides employees with an audible and effective means of communication. Tr. at 418:18-419:4; see also Sec. Ex. 92 at 10 (explaining how the utilization of techniques such as an amplification device for communication allows employees the “opportunity to convey sensitive information to a large gathering quickly. This is a particularly valuable method when significant changes occur during an event or an emergency situation develops.”). Likewise, positioning employees on elevated perches above the crowd – as Respondent also did in 2009 – allows for a more unobstructed view over the crowd and enables the employee to identify and address any unfavorable crowd dynamics that may develop. Tr. at 416:3-16. Additionally, measures such as keeping the Store open for the 24 hours prior to the sales event reduces the need for large crowds to gather and wait before the event, and mitigates the build-up of crowd pressure. Tr. at 403:10-24.

The reduction in hazards by utilization of crowd management techniques, including many of the proposed abatement measures, is perhaps most starkly demonstrated by the contrasting video evidence in this case. Whereas the disorganized

and hazardous conditions of the 2008 Blitz Day Event culminated in the tragic loss of employee Damour's life, the 2009 Blitz Day Event operated in a significantly more organized and safe manner and Wal-Mart employees at the Store were not exposed to the same crowd-related hazards. Compare Sec. Exs. 35a & 35b with Sec. Ex. 95L. In particular, customers were not pushing, people did not fall, and the doors did not break or come off the hinges, as had occurred in prior years. Facts ¶ 62.

It is clear that the abatement measures proposed in the amended citation were the very measures Wal-Mart successfully implemented in 2009 to reduce the cited hazards posed to its employees. Wal-Mart cannot credibly claim that after retaining independent crowd management consultants, the plan that its consultants created, which is now being implemented at its 4,200 stores throughout the United States, is ineffective or infeasible.

**V. THE SECRETARY'S \$7,000 PROPOSED PENALTY IS REASONABLE IN LIGHT OF THE SERIOUS HAZARDS PRESENTED TO WAL-MART'S EMPLOYEES.**

The Secretary's proposed penalty of \$7,000, the statutory maximum for a serious violation of the Act, is appropriate in light of the gravity of the violation and the statutory criteria.<sup>62</sup> Following a review of all materials in the case file, including interviews, statements, videotapes and other documents, OSHA Long Island Area Director Anthony Ciuffo determined the high gravity penalty based on his assessment of the severity and probability of the violation. Tr. at 660:7-11, 661:24-662:3, 662:21-663:10. "The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that

---

<sup>62</sup> See Valdak Corp., 17 BNA OSHC 1135, 1995 WL 139505, \*4 (Rev. Comm. 1995), aff'd, 73 F.3d 1466 (8th Cir. 1996) (gravity is "primary element" in penalty assessment); see also Tr. at 663:2-10.

any injury would result.”<sup>63</sup> Mr. Ciuffo classified the violation as high severity and higher probability because of the nature of the cited hazards, the exposure of the employees and the time the employees were exposed. Tr. at 660:17-25, 662:7-17. No adjustments were made to the proposed penalty. Tr. at 663:2-12. As a result, Mr. Ciuffo, on behalf of the Secretary, proposed the \$7,000 penalty, which is the maximum allowed by the Act.

**VI. RESPONDENT’S AFFIRMATIVE DEFENSES ARE MERITLESS.**<sup>64</sup>

None of Respondent’s affirmative defenses have merit. Respondent has not produced any evidence to support its asserted defenses of inconsistent or selective enforcement by OSHA, that abatement would be infeasible or present a greater hazard to employees, or that the citation presents an issue of workplace violence. Further, Respondent’s asserted defenses regarding fair notice and absence of consensus standards are misplaced because the Secretary has established Respondent’s actual knowledge of the cited hazards. See also App. A § VIII.E (citing relevant caselaw).

Respondent’s asserted defense that the Secretary’s amendment of the citation in the Complaint was time-barred was the subject of extensive motion practice and was rejected (twice) by Chief Judge Sommer. See Chief Judge Sommer’s Orders of October 15, 2009 and September 1, 2009; see also App. A § VIII.E. These orders are the law of the case and as such this defense is not valid. Wal-Mart’s suggestion that the citation was improperly amended finds no support in the OSH Act, the Secretary’s regulations, or

---

<sup>63</sup> Valdak Corp., 1995 WL 139505, at \*4 (citing J.A. Jones Constr. Co., 15 BNA OSHC 2201, 1993 WL 61950 (Rev. Comm. 1993)).

<sup>64</sup> Respondent bears the burden of proving its affirmative defenses. The Secretary reserves her right to respond in full, in her Reply Brief, to any affirmative defenses argued by Respondent in its opening brief.

Commission caselaw. The Secretary may amend the citation at the pleadings stage – and the Secretary’s actions may be implemented by her agents, whether in OSHA or the Solicitor’s Office. See, e.g., Secretary’s Order 05-2007, 72 Fed. Reg. 31160-01 (June 5, 2007) at § 4.C (Pursuant to the Secretary’s Order 05-2007 regarding the delegation of authority and assignment of responsibility to the Assistant Secretary for Occupational Safety and Health, all matters of legal representation are delegated exclusively to the Solicitor of Labor.).

Moreover, Respondent’s asserted defense that the amended citation is unconstitutionally vague lacks merit. Struck by and asphyxiation are well known hazards, the terms referenced in the citation are understood by individuals trained in crowd management and, as detailed *supra* in Section II.B, Respondent’s own documents contain references to “crowd control.”

Finally, Respondent’s asserted defense that it took reasonable precautions to protect its employees from the cited hazards flies in the face of the evidence presented in this matter, and Respondent has not produced sufficient facts to support it. On the contrary, the evidence demonstrates that the minimal steps taken by Respondent at its Valley Stream Store did not constitute adequate or effective precautions by any measure, given the magnitude of the known hazards. See, e.g., Facts ¶ 23 (Market 45 “game plan” was designed by someone with no experience in crowd management and crowd control, and was not a crowd management plan); Facts ¶ 25 (additional hired personnel were not hired or trained for crowd management and crowd control duties); Facts ¶ 27 (use of eight plastic hollow construction barricades was inadequate to manage the expected crowds, and barricades were set up by individuals with no training in crowd

management); Facts ¶ 28 (managers provided employees with the meaningless instruction to “step to the side” to avoid crowds entering the Store); Facts ¶¶ 32 & 35 (formation of wedge to move back the crowd was attempted by employees with no training in crowd management); Facts ¶ 33 (token few employees who purportedly “walked the line” did not do so in any methodical or meaningful way or for any significant length of time); and Facts ¶ 37 (employees tasked with applying counterforce on the doors against the mounting crowd pressure had no training in crowd management).

In the face of known hazards, Respondent’s glaring inactions are equally indefensible. See, e.g., Facts ¶ 22 (Respondent had no comprehensive crowd management plan); Facts ¶ 28 (other than plastic hollow barricades, Respondent utilized no other available crowd management techniques – such as ticketing, caution tape, metering or communication devices); and Facts ¶ 29 (employees were given no training in crowd management or crowd control).

Indeed, the unreasonableness and inadequacy of Respondent’s “precautions” stand in stark contrast to the measures it implemented for the 2009 Blitz Day Event. Compare Facts ¶ 27 (use of plastic hollow construction barricades in a simple L-formation in 2008) with Facts ¶ 58 (use of steel security barricades in a serpentine queuing formation in 2009); compare Facts ¶ 29 (employees were given no training in crowd management or crowd control in 2008) with Facts ¶ 55 (all employees received extensive crowd management training weeks prior to the 2009 Event, both in person and computer-based); compare Facts ¶ 22 (Respondent had no comprehensive crowd management plan in 2008) with Facts ¶¶ 52-54 (with the assistance of professional crowd management experts, Respondent developed and implemented a comprehensive written

crowd management plan for the 2009 Event); compare Facts ¶ 25 (additional hired personnel were not hired or trained for crowd management and crowd control duties in 2008) with Facts ¶ 59 (uniformed and trained third-party crowd management personnel were hired to monitor and interact with customers outside the Store in 2009); and compare Facts ¶ 28 (concerned with crowds based on prior years, other than a few plastic hollow barricades, Respondent utilized no other available crowd management techniques such as ticketing, caution tape or metering in 2008) with Facts ¶ 60 (in 2009, Store provided bullhorns to employees to assist with communications, and utilized metering) and Facts ¶ 61 (in 2009, customers waiting in queuing areas received tickets indicating whether they would receive the desired sale item).

**CONCLUSION**

Wal-Mart violated the Act by failing to provide a workplace free from recognized crowd-related hazards. Respondent had actual knowledge that its employees faced serious dangers at Blitz Day Events and failed to adequately protect them. Therefore, the amended citation and proposed penalty should be affirmed as issued.

DATED:       October 26, 2010  
                  New York, New York

M. PATRICIA SMITH  
Solicitor of Labor

PATRICIA M. RODENHAUSEN  
Regional Solicitor

BY:    /s/ Sudwiti Chanda  
          SUDWITI CHANDA  
          Attorney

/s/ Kathryn L. Stewart  
KATHRYN L. STEWART  
Attorney

U.S. Department of Labor  
Attorneys for HILDA L. SOLIS,  
Secretary of Labor, Complainant

POST OFFICE ADDRESS:

Patricia M. Rodenhausen  
Regional Solicitor  
U.S. Department of Labor  
201 Varick Street, Room 983  
New York, New York 10014  
Tel. 646-264-3650, Fax 646-264-3660

