

Secretary of Labor v. Wal-Mart Stores, Inc.
OSHRC Docket No. 09-1013
SECRETARY'S POST-TRIAL BRIEF

Judge Rooney

APPENDIX A
Joint Pre-Hearing Statement
Filed Electronically on October 26, 2010

No.	Description
7.	Blitz Day Best Practices 2008 (Secretary's Dep. Ex. 51)
8.	October 20, 2008 e-mail from Asset Protection Communication (Secretary's Dep. Exh. 46)
9.	October 21, 2008 e-mail from Salvatore D'Amico (Secretary's Dep. Exh. 35)
10.	October 31, 2008 e-mail from David McHale to Salvatore D'Amico and others (Secretary's Dep. Exh. 36)
11.	November 7, 2008 e-mail from Salvatore D'Amico to Steve Sooknanan, Julius Blair and others attaching Black Friday Market 45 Action Plan (Secretary's Dep. Exh. 38)
12.	November 10, 2008 e-mail from Salvatore D'Amico to Julius Blair, Andrew Gilroy and others (Secretary's Dep. Exh. 43)
13.	November 18, 2008 e-mail from David McHale to Salvatore D'Amico and others (Secretary's Dep. Exh. 41)
14.	November 20, 2008 e-mail from Asset Protection Communication to Asset Protection Recovery Team (Secretary's Dep. Exh. 49)
15.	November 25, 2008 e-mail from Salvatore D'Amico to Julius Blair and others (Secretary's Dep. Exh. 50)
16.	Store safety committee notes (Secretary's Dep. Exh. 65)
17.	Invoices regarding repair of Store doors after 2008 Blitz Day (WM2009-43501/c000000866 to 875)
18.	Invoices from Solar Glass regarding repair and/or replacement of Store doors after 2008 Blitz Day, dated December 5, 2008 (WMHOp-550493-002-00001651 – 1652)
19.	Large Blueprint of the Store marked by S. D'Amico (Secretary's Dep. Exh. 27)
20.	Large Blueprint of the Store marked by S. Sooknanan (Secretary's Dep. Exh. 74)
21.	Customer Safety 3-26-02 power point (WMHOe-700162-006-00000001 to 23)
22.	Excerpts from the Life Safety Code (§12.7.6, §13.7.6)
23.	Excerpts from the Life Safety Code Handbook (§12.7.6, §13.7.6, Respondent Dep. Exh. 1)
24.	SFPE Handbook of Fire Protection Engineering, Section 3 Chapter 13
25.	One video of the Store on 2008 Blitz Day from employee Aubrey Dancy's mobile device, on DVD labeled WMFv5293-001-00000003

No.	Description
26.	One video of the Store on 2008 Blitz Day from employee Yaely Jimenez's mobile device, on DVD labeled WMFv5293-001-00000005
27.	One video of the Store on 2008 Blitz Day from employee Tanisha Richardson's mobile device, on DVD labeled WMFv5293-001-00000005
28.	Seven videos of the Store on 2008 Blitz Day from employee Keesha Boyce's mobile device, on DVD labeled WMFv5293-001-00000005
29.	Two videos of the Store on 2008 Blitz Day from employee Jamal Nelson's mobile device, on DVD labeled WMFv5293-001-00000007
30.	Thirteen pictures of the Store on 2008 Blitz Day from employee Rory Robinson's mobile device, on DVD labeled WMFv5293-001-00000007
31.	Thirteen videos of the Store on 2008 Blitz Day from employee Earl Sanders' mobile device, on DVD labeled WMFv5293-001-00000007
32.	Six pictures of the Store on 2008 Blitz Day from employee Andre Clark's mobile device, on DVD labeled WMFv5293-001-00000010
33.	Four videos of the Store on 2008 Blitz Day from employee Malukah Taalib Bey's mobile device, on DVD labeled WMFv5293-001-00000010
34.	Surveillance video from several security cameras showing the Store entrance, vestibule, parking lot from 9pm 11/27/08 to 9am 11/28/08, on hard drive labeled WM2009-43501/V00000001
35.	Surveillance video from several security cameras showing the Store entrance, vestibule, parking lot from 9pm 11/27/08 to 9am 11/28/08, on DVDs labeled WMFv5293-001-00000001 and WMFv5293-001-00000002
36.	Nassau County Police Department homicide #567-08 photographs of the Store from November 28, 2008 (WAL 883-900)
37.	OSHA photographs of the Store from November 28, 2008 (WAL 901-944)
38.	10 Questions to Ask During a Crowd Management Case (Secretary's Dep. Exh. 108)
39.	Case Studies in Crowd Management (Secretary's Dep. Exh. 109)
40.	Case Management Practices by Rob Ammon Jr. and Gil Fried (Secretary's Dep. Exh. 110)
41.	Drawing by Gil Fried (Secretary's Dep. Exh. 111)
42.	Crowd Management (FRIE 646-663)
43.	IAAM Safety and Security Task Force Best Practice Guide Emergency Preparedness (FRIE 857-912)

No.	Description
44.	Crowd Management Practices (FRIE 1454-1466)
45.	IAAM's directory of companies (online at http://iaam.officialbuyersguide.net/#)
46.	The IAAM Glossary of Terms (that Mr. Fried has in his office, produced at FRIE 1476-1485 & 1525-26)
47.	Respondent's Response to Secretary's First Set of Interrogatories Nos. 1-21, dated December 29, 2009
48.	Respondent's Supplemental Responses to Interrogatories, dated May 3, 2010
49.	Respondent's Second Supplemental Responses to Interrogatories, dated May 14, 2010
50.	Respondent's Third Supplemental Responses to Interrogatories, dated June 4, 2010

B. Secretary's Opposed Exhibits

No.	Description	Respondent's Objection
51.	Walmart 2008 Advertisement in color (Secretary's Dep. Exh. 4)	Relevance. F.R.E. 401
52.	Walmart 2008 Advertisement in black & white (Secretary's Dep. Exh. 5)	Relevance. F.R.E. 401
53.	NYIT video, on DVD labeled File footage from Wal-Mart prior to Black Friday incident, 11/24/2008	Respondent reserves the right to object to individual statements in the video if admitted for the truth of the matter asserted. F.R.E. 802.
54.	October 17, 2008 e-mail from Brian Broadus to REG1AP (Secretary's Dep. Exh. 32)	Relevance, hearsay. F.R.E. 401, 802.
55.	October 21, 2008 e-mail from Joe Dial attaching the Safety Portion of the AP Broadcast (Secretary's Dep. Exh. 86)	Relevance, best evidence. F.R.E. 401, 1002.
56.	November 3, 2008 e-mail from Joe Dial (Secretary's Dep. Exh. 87)	Relevance, best evidence. F.R.E. 401, 1002.
57.	Labor Ready Job Order Sheet 11/22/2008 (Secretary's Dep. Exh. 71)	Relevance, hearsay. F.R.E. 401, 802.
58.	Labor Ready Confirmation of Rates and Services,	Relevance, hearsay. F.R.E.

No.	Description	Respondent's Objection
	signed by Store manager 11/22/2008 (Secretary's Dep. Exh. 73, also WMHOe-550493-001-00000001)	401, 802.
59.	Drawings of Store layout by Lucy Zurek (WAL 227-229)	Best evidence. F.R.E. 1002. Parties discussed an alternative of stipulating measurements before trial.
60.	Nassau County Police Department homicide file #567-08 (WAL 807-822) The parties stipulate that these police records are authentic copies of records produced and kept by the police department in the course of its work.	Statements therein are inadmissible hearsay, F.R.E. 802, and deposition testimony demonstrates their unreliability.
61.	Large Blueprint of the Store marked by D. Fitch (Secretary's Dep. Exh. 7)	Relevance, hearsay, cumulative. F.R.E. 401, 403, 802
62.	Large Blueprint of the Store marked by A. Calhoun (Secretary's Dep. Exh. 12)	Relevance, hearsay, cumulative. F.R.E. 401, 403, 802
63.	Large Blueprint of the Store marked by D. Smokes (Secretary's Dep. Exh. 16)	Relevance, hearsay, cumulative. F.R.E. 401, 403, 802
64.	Large Blueprint of the Store marked by J. Blair (Secretary's Dep. Exh. 67)	Relevance, hearsay, cumulative. F.R.E. 401, 403, 802
65.	Large Blueprint of the Store marked by Justin Rice (Secretary's Dep. Exh. 103)	Relevance, hearsay, cumulative. F.R.E. 401, 403, 802
66.	Associate accident investigation reporting procedures (Secretary's Dep. Exh. 100)	Relevance. F.R.E. 401.
67.	Associate incident log process (Secretary's Dep. Exh. 101)	Relevance. F.R.E. 401.
68.	Associate accident review form (Secretary's Dep. Exh. 102)	Relevance. F.R.E. 401.
69.	Map of the Store (Secretary's Dep. Exh. 28)	Relevance. F.R.E. 401.
70.	Harry Potter Book Release Playbook, July 2007 (Secretary's Dep. Exh. 88)	Relevance. F.R.E. 401.

No.	Description	Respondent's Objection
71.	Blitz Weekend Priorities 2007 (Secretary's Dep. Exh. 29)	Relevance. F.R.E. 401.
72.	Valley Stream Blitz Plans 2007 (Secretary's Dep. Exh. 70)	Relevance. F.R.E. 401.
73.	2009 Crowd Management Associate Training (Secretary's Dep. Exh. 89)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
74.	2009 Event Management Plan (Secretary's Dep. Exh. 90)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
75.	2009 Crowd Management Plan Implementation power point (Secretary's Dep. Exh. 91)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
76.	2009 Event Management Plan National Tier Breakdown (Secretary's Dep. Exh. 92)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
77.	Landmark Event Staffing Services Proposal for Procurement of Crowd Management Staff for the Yearly Event 2009 (Secretary's Dep. Exh. 95)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
78.	Glossary of Crowd Management Terms 2009 (WM2009-43501/c0000001853 to 1856)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
79.	Event Management Plan 2009, Ingress Crowd/Event Management Strategies, in color, printed from the WIRE (WM2009-43501/c0000001996 to 1997)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
80.	Event Management Plan 2009, In-Store Crowd/Event Management Strategies, in color, printed from the WIRE (WM2009-43501/c0000001998 to 1999)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
81.	Event Management Plan 2009, Store Operations Plan, in color, printed from the WIRE (WM2009-43501/c0000002026 to 2027)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
82.	ABSS Contact and Pricing Information 2009 (WM2009-43501/c0000004419 to 4420)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
83.	Landmark Event Staffing Services Proposal for	Relevance, subsequent

No.	Description	Respondent's Objection
	Procurement of Crowd Management Staff for the Yearly Event 2009, Scope of Work (WM2009-43501/c0000004421 to 4422)	remedial measures. F.R.E. 401, 407.
84.	2009 Crowd Event Staff Implementation power point (WM2009-43501/c0000004423 to 4427)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
85.	2009 Yearly Event Planning Tool (WM2009-43501/c0000004634 to 4639)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
86.	Valley Stream Store Map – VS Safety Project 2009 (WM2009-43501/c0000004489 to 4495)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
87.	Blueprint for 2009 Day After Thanksgiving Day Sale in color (Secretary's Dep. Exh. 75)	Relevance. F.R.E. 401.
88.	May 6, 2009 email from Monica Mullins attaching organization chart (Secretary's Dep. Exh. 82)	Relevance. F.R.E. 401.
89.	August 26, 2009 e-mail to Monica Mullins regarding Crowd Management Plan Meeting notes (Secretary's Dep. Exh. 93)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
90.	November 9, 2009 email from Monica Mullins with 2009 Hot Item Queue Line cards (WM2009-43501/c0000004334 to 4340)	Relevance, subsequent remedial measures. F.R.E. 401, 407.
91.	Declaration of Monica Mullins (Secretary's Dep. Exh. 84)	Relevance. F.R.E. 401.
92.	Expert Report of Paul Wertheimer (Secretary's Dep. Exh. 112)	Pending Motion in Limine. Also, object to charts 1 and 2 on grounds of relevance and hearsay. F.R.E. 401, 802.
93.	Rebuttal Expert Report by Paul Wertheimer, dated March 12, 2010	Pending Motion in Limine. Also, object to charts 1 and 2 on grounds of relevance and hearsay. F.R.E. 401, 802.
94.	Documents produced by Paul Wertheimer (PW 16-163, 569-571, 583-595, 617-672, 748-778, 788, 805-808, 812-1036, 1039-1040, 1042-1043, 1046-1056, 1065-1079, 1083-1094, 1104-1159)	Relevance, hearsay. F.R.E. 401, 802.
95.	Photographs and videos taken by Paul Wertheimer	Relevance, subsequent

No.	Description	Respondent's Objection
	during the Store's 2009 day after Thanksgiving sales event on November 27, 2009, on CDs & DVDs labeled 1/10 to 10/10, 11/27/09, Wal-Mart Valley Stream NY	remedial measures. F.R.E. 401, 407.
96.	Engineering for Crowd Safety, R.A. Smith and J.F. Dickie (eds.), Elsevier, 1993 (listed in Wertheimer expert report, paragraph 10)	Relevance, hearsay. F.R.E. 401, 802.
97.	Event Safety Guide, Health & Safety Executive, HSE Books, England, second edition: 1999 (listed in Wertheimer expert report, paragraph 10)	Relevance, hearsay. F.R.E. 401, 802.
98.	Pedestrian: Planning and Design, John J. Fruin Ph.D., Elevator World, Inc., revised edition:1987 (listed in Wertheimer expert report, paragraph 10)	Relevance, hearsay. F.R.E. 401, 802.
99.	There's More to a Line Than its Wait, Richard C. Larson, Technology Review, 1987 (listed at PW 1158)	Relevance, hearsay. F.R.E. 401, 802.
100.	Perspectives on Queues: Social Justice and the Psychology of Queuing, Richard C. Larson, Operations Research, 1987 (listed at PW 1158)	Relevance, hearsay. F.R.E. 401, 802.
101.	Lives on the Line, David Linley, Chicago Tribune, November 25, 1988 (listed at PW 1159)	Relevance, hearsay. F.R.E. 401, 802.
102.	Ingredients of a Security Plan, Alexander Berlongi, M.S., Crowd Management, April-June 1995 (listed at PW 1159)	Relevance, hearsay. F.R.E. 401, 802.
103.	Top Ten Risk Factors of Special Events, Alexander Berlongi, M.S., California, 1991 (listed at PW 1159)	Relevance, hearsay. F.R.E. 401, 802.
104.	Nassau County Police Department Media Advisory, January 2009 (WAL 106-107)	Relevance, hearsay. F.R.E. 401, 802.
105.	ABC news article 2007 regarding crowd control for iPhone release (WAL 639-640)	Relevance, hearsay, prejudice. F.R.E. 401, 403, 802.
106.	AT&T document entitled Prepare Landlords for iPhone Launch (WAL 641-642)	Admissible per Judge Rooney's June 21, 2010 Order; Respondent preserves its objections.
107.	ProQuest Wall Street Journal news article 2003	Admissible per Judge

No.	Description	Respondent's Objection
	regarding crowd problems in PA & CA at 2003 Blitz Day (WAL 1441-1443)	Rooney's June 21, 2010 Order; Respondent preserves its objections.
108.	Westlaw Milwaukee Journal Sentinel news article 2006 regarding crowd problems in Milwaukee at 2006 Blitz Day (WAL 1487-1489)	Admissible per Judge Rooney's June 21, 2010 Order; Respondent preserves its objections.
109.	Westlaw Daily News news article 2006 regarding crowd problems in Palmdale, CA at 2006 Blitz Day (WAL 1490-1492)	Admissible per Judge Rooney's June 21, 2010 Order; Respondent preserves its objections.
110.	Lincoln Journal Star news article 2005 regarding crowd problems in Lincoln at 2005 Blitz Day (WAL 1501-1502)	Admissible per Judge Rooney's June 21, 2010 Order; Respondent preserves its objections
111.	WKYC.com website news article 2005 regarding crowd problems in Michigan at 2005 Blitz Day (WAL 1508-1510)	Admissible per Judge Rooney's June 21, 2010 Order; Respondent preserves its objections
112.	Employee Injury Report, Claim #C6284603, employee injury in NC at 2006 Blitz Day (WMLp-753034-010-00000495)	Admissible per 6/23 Order; Respondent preserves its objections
113.	Employee Injury Claim, Claim #C6284603, employee injury in NC at 2006 Blitz Day (WMLp-753034-010-00000636 to 637)	Admissible per 6/23 Order; Respondent preserves its objections
114.	Employee Injury Report, Claim #C4284631, employee injury in IN at 2004 Blitz Day (WMLp-753034-010-00000498)	Admissible per 6/23 Order; Respondent preserves its objections
115.	Employee Injury Claim, Claim #C4284631, employee injury in IN at 2004 Blitz Day (WMLp-753034-010-00000512 to 513)	Admissible per 6/23 Order; Respondent preserves its objections
116.	Employee Injury Report, Claim #C5283493, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000499)	Admissible per 6/23 Order; Respondent preserves its objections
117.	Employee Injury Claim, Claim #C5283493, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000514 to 515)	Admissible per 6/23 Order; Respondent preserves its objections

No.	Description	Respondent's Objection
118.	Employee Injury Report, Claim #C5278015, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000501)	Admissible per 6/23 Order; Respondent preserves its objections
119.	Employee Injury Claim, Claim #C5278015, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000526 to 527)	Admissible per 6/23 Order; Respondent preserves its objections
120.	Employee Injury Report, Claim #C5278086, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000502)	Admissible per 6/23 Order; Respondent preserves its objections
121.	Employee Injury Claim, Claim #C5278086, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000540 to 541)	Admissible per 6/23 Order; Respondent preserves its objections
122.	Employee Injury Report, Claim #C5278022, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000504)	Admissible per 6/23 Order; Respondent preserves its objections
123.	Employee Injury Claim, Claim #C5278022, employee injury in NV at 2005 Blitz Day (WMLp-753034-010-00000572 to 573)	Admissible per 6/23 Order; Respondent preserves its objections
124.	Employee Injury Report, Claim #C7290006, employee injury in WI at 2007 Blitz Day (WMLp-753034-010-00000506 to 507)	Admissible per 6/23 Order; Respondent preserves its objections
125.	Employee Injury Claim, Claim #C7290006, employee injury in WI at 2007 Blitz Day (WMLp-753034-010-00000590 to 591)	Admissible per 6/23 Order; Respondent preserves its objections
126.	Employee Injury Claim, Claim #C5278441, employee injury in GA at 2005 Blitz Day (WMLp-753034-010-00000562 to 563)	Admissible per 6/23 Order; Respondent preserves its objections
127.	<p data-bbox="337 1444 1013 1549">CMI claim documents for 163 claims of employee and customer injuries (WM2009-435010000002409 – 4894)</p> <p data-bbox="337 1591 1013 1801">The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	<p data-bbox="1036 1444 1414 1549">Admissible per 6/23 Order; Respondent preserves its objections</p> <p data-bbox="1036 1577 1414 1892">Contrary to the Secretary's assertion in footnote 1 of her Motion in Limine to Exclude Prior Crowd Related Incidents, Respondent objects—and has objected since the <i>first</i> draft of its pre-trial statement—to the introduction of the “over 160</p>

No.	Description	Respondent's Objection
		employee and customer claims" referenced here. Respondent also objects to the Secretary's characterization that this bates range includes "over 160 employee and customer claims from previous Blitz Days at its stores," as the Secretary appears to claim in her Motion.
128.	<p>Videos associated with claims of employee and customer injuries, on VHS tapes labeled WM2009-43501/v00000003 – 17 and DVDs labeled WM2009-43501/v00000018 – 42</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	Admissible per 6/23 Order; Respondent preserves its objections
129.	<p>CMI claim documents for customer injury at Valley Stream Store at 2005 Blitz Day, Claim #4847496 (Secretary's Dep. Exh. 68)</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	Admissible per 6/23 Order; Respondent preserves its objections
130.	<p>CMI claim documents for customer injury at Valley Stream Store at 2005 Blitz Day, Claim #4836912 (Secretary's Dep. Exh. 69)</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	Admissible per 6/23 Order; Respondent preserves its objections
131.	CMI claim documents for customer injury at Valley Stream Store at 2008 Blitz Day, Claim #L8907016	Hearsay. F.R.E. 802.

No.	Description	Respondent's Objection
	<p>(Secretary's Dep. Exh. 80)</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	
132.	<p>CMI claim documents for customer injury at Valley Stream Store at 2008 Blitz Day, Claim #L8908316 (Secretary's Dep. Exh. 81)</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	Hearsay. F.R.E. 802.
133.	<p>CMI claim documents for Joel Osborne employee injury at Valley Stream Store at 2008 Blitz Day, Claim #5698705 (Secretary's Dep. Exh. 78)</p> <p>The parties stipulate that the records from Claims Management System are business records kept and maintained in the ordinary course of its work. The parties further stipulate that Respondent has no information to contradict the manager statements contained in the CMI files.</p>	Hearsay. F.R.E. 802.
134.	<p>Employee Injury Claim, Claim #C8285910 (Secretary's Dep. Exh. 76), Joel Osborne employee injury at Valley Stream Store at 2008 Blitz Day</p>	Hearsay. F.R.E. 802.
135.	<p>Employee Injury Report, report of work-related accident/occupational disease for New York Workers' Compensation Board for Joel Osborne (Secretary's Dep. Exh. 77)</p>	Hearsay. F.R.E. 802.
136.	<p>Blitz Day Best Practices 2008 Weeks 43-44 (Secretary's Dep. Exh. 53)</p>	Respondent objects that the entire document, as produced, should be admitted if portions are admitted (WMLp-753034-010-00000749 - 91)
137.	<p>Operations Holiday Playbook from the Walmart</p>	Respondent objects that the

No.	Description	Respondent's Objection
	Wire Event Calendar Plus Overview and Blitz 2008 (Secretary's Dep. Exh. 56)	entire document, as produced, should be admitted if portions are admitted (WM2009-43501/c00000030 – 155)
138.	2008 Safety Mailbox for Week 40 (Secretary's Dep. Exh. 96)	Respondent objects that the entire document, as produced, should be admitted if portions are admitted (WMLp-753034-010-0000718-748)
139.	2008 Safety Mailbox for Week 42 (Secretary's Dep. Exh. 97)	Respondent objects that the entire document, as produced, should be admitted if portions are admitted (WMLp-753034-010-0000718-748)
140.	2008 Safety Mailbox for Week 43 (Secretary's Dep. Exh. 98)	Respondent objects that the entire document, as produced, should be admitted if portions are admitted (WMLp-753034-010-0000718-748)
141.	2008 Safety Mailbox for Week 44 (Secretary's Dep. Exh. 99)	Respondent objects that the entire document, as produced, should be admitted if portions are admitted (WMLp-753034-010-0000718-748)
142.	Respondent's Certified Response to Secretary's Interrogatories Nos. 22 & 23, dated May 14, 2010	Hearsay. F.R.E. 802. Respondent also asserts attorney client and work product privileges
143.	<p>Two videos of the Store on 2008 Blitz Day from employee Marvin Griffith's mobile device, on DVD labeled WMFv5293-001-00000007</p> <p>The Secretary contends that Respondent did not produce the additional three videos during discovery (Video 7, Video 2 and Video 5 were sent to the Secretary today, June 23, 2010). As such, the</p>	<p>Respondent objects that all five videos on this DVD should be admitted.</p> <p>Respondent contends that if these videos were omitted, which it does not concede, then such omission was</p>

No.	Description	Respondent's Objection
	Secretary reserves her right to object to the admission of such additional videos, should Respondent wish to proffer these videos.	inadvertent and did not cause any prejudice to the Secretary.

C. Secretary's Deposition Exhibits

See Section II for designations, counter designations and objections to deposition transcripts.

No.	Description
144.	Deposition transcript of Bibi Azeem
145.	Deposition transcript of Julius Blair
146.	Deposition transcript of Salvatore D'Amico
147.	Deposition transcript of Gil Fried
148.	Deposition transcript of Monica Mullins
149.	Deposition transcript of Justin Rice
150.	Deposition transcript of Earl Sanders
151.	Deposition transcript of Dennis Smokes
152.	Deposition transcript of Prakash (Steve) Sooknanan
153.	Deposition transcript of Jaime Thompson

D. Respondent's Unopposed Exhibits

No.	Description
1.	Excerpts from the Life Safety Code Handbook 2006 ed. (§12.7.6, §13.7.6, Respondent Dep. Ex. 1)
2.	Secretary's Responses to Requests for Admissions
3.	Rebuttal expert report of Professor Gil Fried
4.	Receipts from Highway Technology for lease of barricades (WM2009-43501/c000000653-54)
5.	FY09 Safety Playbook (WMHOe-500125-001-00000001 to 205)
6.	Blitz Day "Best Practices" documents (WMHOe-550493-002-00001362 – 91)

No.	Description
7.	Black Friday Market 45 Action Plan and November 7, 2008 cover e-mail from S. D'Amico (Secretary's Dep Ex. 38)
8.	September 23, 2008 e-mail from S. Sooknanan to S. D'Amico (Secretary's Dep. Ex. 30)
9.	October 20, 2008 email from Asset Protection Communication (Secretary's Dep. Exh. 46)
10.	Labor Ready Letter/memo 11/22/2008 (Secretary's Dep. Exh. 72)
11.	Two videos of the Store on 2008 Blitz Day from employee Mark Esposito's mobile device, on DVD labeled WMFv5293-001-00000005

E. Respondent's Opposed Exhibits

No.	Description	Secretary's Objection
12.	Excerpts from the Life Safety Code Handbook 2000 ed. (§3.3.134.2, §A.3.3.134.2, §3.3.134.9, and §A3.3.134.9)	Relevance. FRE 401.
13.	Excerpts from the Life Safety Code, 2006 ed. (§12.7.6, §13.7.6, § 4.4.2.2, §A.1.2, §3.3.168.2, §A.3.3.168.2, §6.1.10.1, §A.6.1.10.1, §6.1.10.2); Excerpts from the Life Safety Code 2000 ed. cited in Sharry expert report (§ 3.3.134.9, § A.3.3.134.9, Chapters 36 and 37, § 3.3.134.2, § A.3.3.134.2, §12.4.7, §13.4.7, §12.4, §12.7, §12/13.173, §12/13.1.7.3, §12/13.2.5.4, §12/13.4.1.1, §12/13.4.1.3, § 12/13.7.5, § 4.1.2, § A.4.1.2, §7.2.9.1); Excerpts from the Life Safety Code 2009 ed. (§ 12.4.1.2; § 12.4.1.3, § A.1.2, § A.4.1.3, § A.4.6.5, § A.4.8.2.1, § A.12.4.1.1, § A.12.4.1.3, §	Relevance. FRE 401. The Secretary objects to all excerpts of the Life Safety Code, 2006 edition, except for §12.7.6, §13.7.6. The Secretary objects to all excerpts of the Life Safety Code, 2000 edition. See also pending motion in limine regarding Mr. Sharry. The Secretary objects to all excerpts of the Life Safety Code, 2009 edition.
14.	Phone records of Andrew Gilroy (WM 2009-435011 c000000971)	Relevance, hearsay. FRE 401, 802.
15.	Phone records of Julius Blair (WM 2009-435011 c000000972)	Relevance, hearsay. FRE 401, 802.
16.	NFPA 2010 Conference Brochure (Respondent Dep. Ex. 2)	Relevance, hearsay. FRE 401, 802.
17.	March 21, 2010 news article regarding Bieber	Relevance, hearsay,

No.	Description	Secretary's Objection
	concert at Roosevelt Field Mall (Respondent Dep. Ex. 13)	prejudice, confusion of issues and waste of time. FRE 401, 403, 802.
18.	News footage of Bieber concert and "Running of the Brides" at Filene's Basement (Respondent Dep. Ex.14)	Relevance, hearsay, prejudice, confusion of issues and waste of time. FRE 401, 403, 802.
19.	The Damour case file obtained from the Nassau County Medical Examiner (Respondent's Exhibit 1 to Deposition of Dr. Gerard Catanese)	Relevance. FRE 401. [Secretary's position may change if Dr. Baden & Dr. Catanese are allowed to testify.]
20.	"Radio run" documents obtained from the Nassau County Police Department (WM2009-43501/c000000166-235)	Relevance, hearsay. FRE 401, 802.
21.	OSHA Crowd Control Fact Sheet as promulgated with accompanying press release (Respondent's Dep. Ex. 5)	Inadmissible as per Judge Rooney's June 21, 2010 Order.
22.	Drafts of OSHA Crowd Control Fact Sheet (Respondent's Dep. Ex. 21, 22)	Inadmissible as per Judge Rooney's June 21, 2010 Order.
23.	Initial expert reports of James Stanley, Dr. Arthur Barsky, Dr. Michael Baden, William Kenny, and John Sharry	Relevance, hearsay, prejudice, confusion of issues and waste of time. FRE 401, 403, 802. Also pending motion in limine.
24.	Rebuttal expert reports of William Kenny, and John Sharry	Relevance, hearsay, prejudice, confusion of issues and waste of time. FRE 401, 403, 802. Also pending motion in limine.
25.	Documents from IMIS regarding previous OSHA inspections of the e2 nightclub (Respondent's Dep. Ex. 12) and The Station nightclub.	Inadmissible as per Judge Rooney's June 21, 2010 Order.
26.	Documents from the Secretary's File involving The Station nightclub	Inadmissible as per Judge Rooney's June 21, 2010 Order.
27.	Testimony of Raphael Pellot from <i>John Doe</i>	Inadmissible as per Judge Rooney's June 21, 2010

No.	Description	Secretary's Objection
	<i>investigation</i> re e2 nightclub	Order.
28.	OSHA Workplace Violence Guidelines	Inadmissible as per Judge Rooney's June 21, 2010 Order.
29.	OSHA Workplace Violence Fact Sheet	Inadmissible as per Judge Rooney's June 21, 2010 Order.
30.	Emergency Procedures Manual (WMHOp-752516-0000001 – 304)	Relevance. FRE 401.
31.	Emergency Procedures Flipchart (WMHOp—550493-002-00000415 - 457	Relevance. FRE 401.
32.	Report of Jdimytai Damour's autopsy as produced by the Secretary (WAL 000039 – 48)	Relevance. FRE 401.
33.	Record of Valley Stream Store phone (Dep. exh. 66)	Relevance. FRE 401.
34.	Record of cell phone of Sal D'Amico (WM2009-43501/c000000967)	Relevance, hearsay. FRE 401, 802.
35.	Nassau County Police Department Communications Bureau 911 call recordings from November 28, 2008, on audio CD labeled WM2009-43501-a00000001	Relevance, hearsay. FRE 401, 802.
36.	Nassau County Police Department Communications Bureau 911 call recordings from November 28, 2008, on audio CD labeled WM2009-43501-a00000002	Relevance, hearsay. FRE 401, 802.
37.	Nassau County Police Department Communications Bureau radio transmissions from November 28, 2008, on audio CD labeled WM2009-43501-a00000003	Relevance, hearsay. FRE 401, 802.
38.	One video of the Store on 2008 Blitz Day from employee Jeran Lovence's mobile device, on DVD labeled WMFv5293-001-00000007	Relevance. FRE 401. The Secretary objects to any of the three videos from Jeran Lovence's mobile device. The Secretary also objects to any testimony by Jeran Lovence, see pending motion in limine.

No.	Description	Secretary's Objection
39.	Three videos of the Store on 2008 Blitz Day from employee Marvin Griffith's mobile device, on DVD labeled WMFv5293-001-00000007	Relevance. FRE 401. Respondent did not produce these additional three videos during discovery (Video 7, Video 2 and Video 5 were sent to the Secretary today, June 23, 2010). As such, the Secretary objects to the admission of such additional videos.

F. Respondent's Exhibits for Rebuttal or Impeachment Only

[The Secretary understands that the parties are not required to identify any documents to be used solely for impeachment purposes prior to the hearing. The Secretary reserves her right to object to any documents offered for impeachment purposes by Respondent. Further, the Secretary reserves her right to offer and/or use any documents for impeachment purposes during the hearing].

No.	Description	Objection
1.	Documents from the Secretary's Case File (WAL 0001-1525)	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
2.	Documents from Paul Wertheimer's Case File (PW 0001-1592)	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
3.	Documents from the Labor Ready Case File (LR 0001-246)	Since the Secretary does not know which specific documents will be used or how the exhibits will be used,

No.	Description	Objection
		she reserves her right to object until such time as the exhibits are introduced.
4.	Secretary's Exhibit 85	Hearsay. F.R.E. 802. The Secretary reserves her right to raise further objections when the exhibit is introduced.
5.	Articles listed in pages PW 1158-59	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
6.	Secretary's Responses to Interrogatories and Document Requests	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
7.	OSHA Press Release of May 26, 2009 (Respondent's Dep. Ex. 9)	Relevance, hearsay. F.R.E. 401, 802. The Secretary reserves her right to raise further objections when the exhibit is introduced.
8.	Postings from crowdsafe.com (Respondent's Dep. Ex 11)	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
9.	CDs with radio and television interviews of Paul Wertheimer received from the Secretary	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.

No.	Description	Objection
10.	Written responses to the document subpoena served on Paul Wertheimer	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
11.	“Squeeze play: Is festival seating worth the risk?” Chicago Daily Herald, May 11, 2001	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
12.	Deposition of Paul Wertheimer in <i>Monroe v. Snoop Dogg</i> , pp. 90-92	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.
13.	“Safety Crusader at the Forefront,” <i>USA Today</i> , Aug. 8, 2000	Since the Secretary does not know which specific documents will be used or how the exhibits will be used, she reserves her right to object until such time as the exhibits are introduced.

G. Certification

The parties certify that all exhibits other than those reserved for rebuttal or impeachment have been exchanged.

II. LIST OF DEPOSITION TESTIMONY TO BE OFFERED DURING A PARTY'S CASE-IN-CHIEF, INCLUDING THE OPPOSING PARTY'S COUNTER-DESIGNATIONS, A STATEMENT OF OBJECTIONS AND THE GROUNDS FOR THE OBJECTIONS.

A. Secretary's Deposition Offerings for Its Case-In-Chief

1. Bibi Azeem – 7:11-7:21, 18:11-19:7, 40:17-41:20, 43:25-44:21, 49:9-53:17, 56:1-14, 63:5-15, 76:23-78:15, 80:9-82:23, 86:11-90:22, 94:16-96:16, 104:6-104:25, 109:10-116:16, 119:4-122:19, 127:21-28:24, 130:18-135:5. [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

2. Julius Blair – 6:2-6:16, 13:5-27:5, 49:20-50:3, 52:13-61:25, 70:2-70:15, 71:12-73:20, 84:20-131:25, 135:10-137:8, 140:20-153:25, 154:12-162:23, 169:8-182:3, 191:21-192:23, 193:20-194:23, 196:4-196:8, 199:11-201:15, 208:25-209:25, 214:5-262:8, 267:25-267:7 268:17-269:12, 271:10-272:21, 274:15-276:8, 280:20-295:25. [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

3. Salvatore D'Amico – 7:4-7:13, 10:5-7, 10:16-11:4, 11:19-13:10, 13:18-21, 14:4-8, 15:16-18, 15:21-24, 17:7-9, 18:3-7, 20:4-20:22, 23:8-25:21, 29:16-49:18, 52:23-56:25, 59:4-64:13, 69:16-70:14, 77:8-79:2, 80:14-93:12, 94:1-112:5, 120:13-123:18, 128:5-131:14, 135:15-136:9, 139:10-140:19, 143:15-148:24, 165:21-173:4, 178:4-186:2, 189:4-209:15, 212:10-224:3, 227:25-228:5, 234:24-247:12, 249:20-294:9, 296:20-302:17, 313:22-323:24, 329:4-348:13, 352:12-363:21.) [Respondent counter-designates the remainder of this transcript]

4. Gil Fried – 12:12-12:24, 14:13- 15:6, 21:1-23:12, 34:2-51:25, 57:9-59:6, 60:23-61:10, 67:9-68:16, 90:4-91:21, 98:18-99:5, 107:10-108:25, 111:12-111:20, 115:11-116:20, 119:9-120:24, 122:18-123:14, 125:20-159:22, 169:16-70:15, 173:8-222:8, 237:23-242:20,

245:2-246:7, 252:11-259:17, 273:8-273-19, 286:2:-289:11, 290:8-292:15, 299:12-299:23, 306:13-51:7 [The June 22 order did not encompass transcripts of non-employees. Respondent continues to object that Mr. Fried's deposition transcript neither satisfies FRCP 32 nor FRE 801(d)(2). In the event, however, that these portions are admitted, Respondent counter-designates the remainder of the transcript]

5. Monica Mullins – entire transcript.

6. Justin Rice – 4:7-4:9, 6:10-6:19, 12:11-13:4, 13:9-13:14, 13:25-16:6, 17:24-18:2, 18:24-19:7, 21:5-22:6, 22:17-23:5, 26:14-26:15, 33:13-33:16, 37:25-38:9, 39:6-39:10, 39:16-40:5, 40:9-40:20, 41:8-41:22, 42:5-42:15, 43:9-43:21, 44:8-44:17, 45:15-45:18, 50:14-50:25, 51:11-52:20, 52:25-53:5, 53:15-54:3, 54:8-55:19, 56:22-57:6, 57:13-58:15, 60:13-63:11, 65:3-66:11, 66:24-67:8, 67:13-71:2, 72:16-73:5, 73:13-74:2, 75:24-76:4, 77:4-77:7, 77:14-78:8, 78:16-78:18, 80:11-82:2, 82:10-83:7, 83:12-84:13, 86:11-86:25, 89:13-89:21, 91:11-91:17, 95:14-95:22, 97:7-98:5, 98:15-100:16, 101:17-104:4, 104:9-104:17, 108:23-108:8, 109:11-109:4, 113:3-113:21, 114:1-114:5, 115:1-115:15, 117:6-118:21, 119:1-119:5, 120:14-120:23, 121:8-121:17, 122:11-122:13, 122:24-123:7, 124:7-125:9, 125:18-127:15, 128:12-128:17, 130:21-130:24, 131:9-132:2, 132:10-132:12, 133:4-134:5, 134:24-135:9, 135:14-137:13, 137:23-138:23, 139:1-139:16, 140:12-140:17, 141:5-144:18, 144:25-145:3, 145:10-146:17, 147:3-147:20, 147:25-148:3, 148:7-148:20, 148:24-149:9, 149:16-150:1, 150:9-150:12, 151:5-151:9, 151:16-152:4, 154:5-154:16, 154:24-155:21, 159:25-161:20, 168:9-168:22, 169:18-170:11, 171:6-175:6, 176:2-177:10, 177:22-178:5, 178:12-178:24, 179:24-180:19, 181:10-181:13, 182:23-183:7, 184:22-185:5, 185:12-185:18, 188:18-189:5. [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

7. Earl Sanders – 7:13-7:20, 8:13-19:7, 21:17-22:6, 23:22-26:24, 40:5-42:7, 45:12-47:7, 50:7-66:2, 68:22-70:24, 74:10-85:12. [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

8. Dennis Smokes – 7:23-8:7; 8:25-9:10; 9:13-17; 9:23-10:5; 11:23-25; 12:14-18; 13:5-17; 13:21-14:8; 16:23-18:4; 23:12-22; 25:19-26:4; 27:5-7; 27:15-23; 32:11-25; 33:9-14; 33:21-34:5; 34:16-21; 35:1-23; 36:17-37:7; 37:18-38:6; 38:21-23; 39:12-14; 40:14-20; 41:3-11; 41:22-24:25; 43:10-21; 44:7-46:10; 46:14-47:19; 48:8-10; 53:10-23; 57:21-60:24; 61:4-7; 61:12-25; 62:17-63:6; 64:2-4; 64:24-65:12; 66:3-13; 67:8-16; 69:17-20; 71:7-72:3; 72:12-73:19; 75:9-14; 76:25-77:5; 77:13-18; 79:2-5; 84:4-10; 85:3-86:6; 86:12-18; 86:22-87:24; 90:16-18; 90:24-91:19; 94:5-14; 96:19-97:13; 104:4-105:2; 106:10-107:8; 108:7-109:2; 111:2-21; 118:2-119:17; 120:13-121:17; 122:23-123:5; 123:15-17; 124:12-14; 125:4-126:15) [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

9. Prakash (Steve) Sooknanan – entire transcript.

10. Jaime Thompson – 6:24-7:5, 19:16-20:3, 22:17-23:13, 24:12-25:25, 40:1-42:24, 52:18-54:9, 63:25-70:23, 73:25-80:5, 82:1-98:2, 99:20-101:14, 105:24-118:5, 124:5-124:18, 125:9-125:25 [Admissible per June 22 order; Respondent preserves its objection, and counter-designates the remainder of the transcript]

The Secretary reserves the right to introduce additional depositions and pages for rebuttal or impeachment.

B. Respondent's Deposition Offerings for Its Case-In-Chief

1. Complete video deposition testimony and transcript of Anthony Ciuffo as a “managing agent” pursuant to Federal Rule 32(a)(3). The Secretary objects to the characterization of Mr. Ciuffo as a “managing agent.” The Secretary further objects to the introduction of Mr. Ciuffo’s entire deposition transcript, as not all sections are admissible pursuant to Rule 801(d)(2). Additionally, the Secretary objects to introducing the video deposition testimony and the transcript as cumulative.

2. Complete deposition testimony of Vicky Heza as an unavailable witness pursuant to Federal Rule 32(a)(4). [Inadmissible per Judge Rooney’s June 21, 2010 Order; Respondent preserves its objections]

3. Complete deposition transcript of Lucy Zurek. The Secretary objects to the introduction of Ms. Zurek’s entire deposition transcript, as not all sections are admissible pursuant to Rule 801(d)(2). Additionally, the Secretary objects to introducing the video deposition testimony and the transcript as cumulative.

4. Complete deposition transcript of Paul Wertheimer [Respondent's position is that the June 22 order did not encompass transcripts of non-employees. However, in the event portions or all of Mr. Fried's deposition are admitted over Respondent's objection, Respondent designates Mr. Wertheimer's deposition for purposes of consistency and fairness] The Secretary objects to the introduction of Ms. Wertheimer’s entire deposition transcript as not all sections are admissible pursuant to Rule 801(d)(2). Additionally, the Secretary objects to introducing the video deposition testimony and the transcript as cumulative.

Respondent reserves the right to introduce depositions for rebuttal or impeachment.

III. A LIST OF ALL WITNESSES, AND PRESENTLY IDENTIFIABLE REBUTTAL WITNESSES (INCLUDING ADDRESSES AND PHONE NUMBERS) WHO MAY BE CALLED AT THE HEARING; THE LIST SHOULD INDICATE THOSE WITNESSES WHO ARE EXPECTED TO TESTIFY AND THOSE WHO MAY BE CALLED IF NEEDED.

A. Secretary's Witnesses:

The Secretary expects to call the following witnesses:

1. Alton Calhoun, c/o Attorney Paul S. Hugel, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.
2. Julius Blair, c/o Attorneys Paul S. Hugel, Esq. and Harlan Protass, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.
3. Tony Ciuffo, c/o Westbury Area OSHA Office, 1400 Old Country Road, Suite 208, Westbury, NY, 11590 (516) 334-3344.
4. Salvatore D'Amico, c/o Attorney Paul S. Hugel, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.
5. Dennis Fitch, c/o Attorney Paul S. Hugel, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.
6. Sergeant Edward Grimm, c/o Nassau County Police Department, 1490 Franklin Ave., Mineola, New York, 11501 (516) 573-7000.
7. Monica Mullins, c/o Jason C. Schwartz, Esq., Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036-5303 (202) 955-8242.

8. Justin Rice, c/o Attorney Paul S. Hugel, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.

9. Prakash (Steve) Sooknanan, c/o Attorney Paul S. Hugel, Esq., Clayman & Rosenberg, LLP, 305 Madison Avenue, New York, NY 10165 (212) 922-1080.

10. Jaime Thompson, c/o Attorney Rebecca Stack Campbell, Esq., 747 Third Avenue, New York, NY 10017 (212) 661-2414.

11. Chief Robert Turk, c/o Nassau County Police Department, 1490 Franklin Ave., Mineola, New York, 11501 (516) 573-7000.¹

12. Paul Wertheimer, c/o Crowd Management Strategies, 12021 Wilshire Blvd., #792, Los Angeles, CA 90025 (310) 402-1771.

Witnesses who may be called if needed:²

13. Bibi Azeem c/o Attorney Patricia A. Pileggi, Esq., Schiff Hardin, LLP, 900 Third Avenue, New York, NY 10022 (212) 753-5000.

14. Jeffrey Hudson, [REDACTED]

15. Laura Lopez, [REDACTED]

¹ Chief Turk is not available to testify prior to Monday, July 12, 2010.

² The Secretary has offered as evidence portions of the deposition testimony of Bibi Azeem, Earl Sanders and Dennis Smokes. Entry of these depositions may preclude the need to call these persons at trial.

16. Earl Sanders, c/o Attorney Patricia A. Pileggi, Esq., Schiff Hardin, LLP, 900 Third Avenue, New York, NY 10022 (212) 753-5000.

17. Rudy Sanders, c/o Labor Ready, 35 Main Street Unit A, Hempstead, NY 11550 (516) 485-4777.

18. Sergeant Israel Santiago, c/o Nassau County Police Department, 1490 Franklin Ave., Mineola, New York, 11501 (516) 573-7000.

19. Dennis Smokes, c/o Attorney Rebecca Stack Campbell, Esq., 747 Third Avenue, New York, NY 10017 (212) 661-2414.

20. Lucy Zurek, c/o Westbury Area OSHA Office, 1400 Old Country Road, Suite 208, Westbury, NY, 11590 (516) 334-3344.

Possible Rebuttal Witnesses Who Are Presently Identifiable:

The witnesses that are expected to testify as opposed to those witnesses who will be called if needed will be determined based on the parties' stipulations and any pre-trial rulings. The Secretary may call any of the witnesses listed by either party as part of her case in chief or for rebuttal purposes. The Secretary reserves her right to call other rebuttal witnesses as needed.

B. Respondent's Witnesses:

1. Witnesses expected to testify:

Witness	Contact Information
Steve Sooknanan	[REDACTED]

	[REDACTED]
Salvatore D'Amico	[REDACTED]
Monica Mullins ³	702 Southwest 8th Street Bentonville, AR 72712 (479) 273-4000
Julius Blair	[REDACTED]
Andrew Gilroy ⁴	77 Green Acres Road Valley Stream, NY 11581 (516) 887-1027
Jeran Lovence ⁵	77 Green Acres Road Valley Stream, NY 11581 (516) 887-1027
Casey Chroust ⁶	[REDACTED]
Dr. Gerard Catanese ⁷	2201 Hempstead Turnpike, Building R East Meadow, NY 11554 (516) 572-5177

³ Ms. Mullins is available on Monday, July 12. For trial scheduling purposes, Respondent requests that she be permitted to testify on that date. The Secretary objects because she expects her case will not be concluded by July 12. Respondent requests an immediate ruling on this issue.

⁴ Mr. Gilroy has Army Reserve duty from July 9 to July 23, pursuant to orders received on June 18. Accordingly, Respondent requests that he be permitted to testify on July 7 or 8 or, in the alternative, that the Secretary agree to his deposition before trial, which could then be admitted under Rule 32(a)(4). The Secretary objects because she expects her case will not be concluded by July 8. Moreover, as Respondent's employee and witness, Respondent had ample opportunity to secure the deposition of Mr. Gilroy during the discovery period, if necessary. Respondent requests an immediate ruling on this issue.

⁵ The Secretary objects to the testimony of Jeran Lovence, see pending motion in limine.

⁶ The Secretary preserves her objection to the testimony of Casey Chroust.

2. Witnesses who may be called if needed

Justin Rice	77 Green Acres Road Valley Stream, NY 11581 (516) 887-1027
Bibi Azeem	77 Green Acres Road Valley Stream, NY 11581 (516) 887-1027
Jaime Thompson	[REDACTED]
Earl Sanders	c/o Attorney Patricia A. Pileggi, Esq. Schiff Hardin, LLP 900 Third Avenue New York, NY 10022 (212) 753-5000.
Lucy Zurek	c/o Westbury Area OSHA Office, 1400 Old Country Road, Suite 208, Westbury, NY, 11590 (516) 334-3344.
William Brosnin ⁸	Nassau County Police Department 1490 Franklin Ave Mineola, NY 11501 (516) 573-7000

[Footnote continued from previous page]

⁷ The Secretary objects to the testimony of Dr. Gerard Catanese, see pending motion limine to exclude the testimony of Dr. Baden and Jeran Lovence.

⁸ Given Respondent’s untimely disclosure of this proposed witness, the Secretary objects to the testimony of William Brosnin. Despite Your Honor’s June 16, 2010 deadline for the exchange of the names and addresses of all trial witnesses, see March 29, 2010 Order, Respondent has informed the Secretary of this witness for the very first time *today*, June 23, 2010, at 2pm. Pursuant to Your Honor’s March 29, 2010 Order, “[w]itnesses may not be permitted to testify... unless they have been identified in a timely pre-hearing exchange.” Such timely exchange
[Footnote continued on next page]

IV. A LIST OF ALL EXPERT WITNESSES

A. Secretary's Expert Witnesses

1. Paul Wertheimer. Mr. Wertheimer's initial and rebuttal expert reports are enclosed.

B. Respondent's expert witnesses

1. Dr. Michael Baden. Dr. Baden's initial expert report is enclosed.
2. Dr. Arthur Barsky. Dr. Barsky's initial expert report is enclosed.
3. Professor Gil Fried. Professor Fried's initial and rebuttal expert reports are enclosed.
4. John Sharry. Mr. Sharry's initial and rebuttal expert reports are enclosed.
5. James Stanley. Mr. Stanley's initial expert report is enclosed.
6. William Kenny. Mr. Kenny's initial and rebuttal expert reports are enclosed.

V. A CONCISE STATEMENT OF THOSE FACTS WHICH ARE ADMITTED AND WILL REQUIRE NO PROOF AT THE HEARING, TOGETHER WITH ANY RESERVATIONS DIRECTED TO SUCH ADMISSIONS.

Although the parties recognize that certain facts are undisputed, the parties were unable to agree as to how to characterize those facts. Accordingly, each party sets forth its own characterization of the facts it believes to be undisputed.

[Footnote continued from previous page]
occurred one week ago; accordingly, Respondent should not be permitted to offer the testimony of this witness.

Respondent contends that Officer Brosnin's testimony may be necessary to the Court's determination of whether Jdimytai Damour was asphyxiated, as the Secretary contends he was, and whether a "struck by" or other crowd-related hazard existed at the Store. Respondent did not originally intend to call Officer Brosnin as a witness and still hopes that the need for Officer Brosnin's testimony will be obviated by the Nassau County Police Department's identification of a suitable time for Respondent to view the relevant evidence that is currently in their possession. However, Respondent was forced to add Detective Brosnin to its witness list at this late date because of the Nassau County Police Department's refusal to comply with Respondent's initial subpoena to Officer Lee Steinberg, as Respondent explained in a letter to Your Honor this afternoon.

Statement of Such Facts by the Secretary:

Walmart Corporate Structure

1. Wal-Mart Stores Inc. (“Walmart”), a corporation organized under the laws of the State of Delaware, maintaining its principal office and place of business at 702 SW 8th Street, Bentonville, Arkansas, 72716 (“the Home Office”), and doing business in the State of New York, is and at all times hereinafter mentioned was engaged in business operating department stores and related activities.

2. Walmart owns retail stores throughout the United States including the Walmart store located at 77 Green Acres Mall, Valley Stream, New York, 11580 (“the Store” or “the Valley Stream Store”).

3. Monica Mullins is the Vice-President of Asset Protection and Safety for Walmart and oversees safety and asset protection at Walmart stores in the United States.

4. The Walmart Asset Protection division ensures that the company’s strategies regarding asset protection, such as theft prevention and loss of merchandise, are effective inside each of the markets and stores in the company or in the division.

5. In November 2008, Salvatore D’Amico was the Market 45 Asset Protection Manager and worked out of the District Office, also located in the Valley Stream Store. The Valley Stream Store was one of the seven stores in Mr. D’Amico’s jurisdiction.

6. In November 2008, Julius Blair was the Asset Protection Coordinator for the Valley Stream Store.

7. In November 2008, Mr. Blair reported to the Valley Stream Store Manager Prakash (Steve) Sooknanan and Market Asset Protection Manager Mr. D’Amico.

Walmart Incident and Accident Reporting

8. The circumstances surrounding accidents or incidents involving employees and/or customers are reported to Claims Management Inc. (“CMI”); CMI is a wholly owned subsidiary of Walmart. CMI does not serve any other clients other than Walmart.

9. Walmart management employees can access the CMI Incident Reporting System directly to obtain information on specific claims in the system.

10. Walmart analysts and other management employees have access to CMI's databases of Walmart's claims, and searches can be run for specific days and types of injuries.

Blitz Day Generally

11. The Day After Thanksgiving Day Sales Event "Blitz Day" is Walmart's largest sale and shopping day of the year and its biggest annual sales event.

12. For Blitz Day 2008, certain deeply discounted advertised items were available for sale at Walmart stores, including Valley Stream, only while supplies lasted, from Friday, November 28, 2008 at 5:00 a.m. until Friday, November 28, 2008 at 11:00 a.m. If the store ran out of a product, there were no rain checks given to customers.

13. Prior to 2009, many Walmart stores, including the Valley Stream store, opened early for business, at 5:00 a.m. on Blitz Day.

Blitz Days at the Store prior to 2008

14. The Valley Stream Store held Blitz Day sales in 2004, 2005, 2006, 2007 and 2008 and opened to customers at 5 AM.

15. During Blitz Day 2004 at the Store, prior to opening, associates spoke with customers waiting in line and shopping carts were used to line the sidewalk to keep customers from going into the fire lane.

16. During Blitz Day 2005 at the Store, prior to opening, associates spoke with customers waiting in line and shopping carts were used to line the sidewalk to keep customers from going into the fire lane.

17. During Blitz Day 2005, the outer vestibule Store doors were knocked off the frame by customers pushing on the doors as they entered the Store.

18. During Blitz Day 2006 at the Store, prior to opening, associates spoke with customers waiting in line, shopping carts were used to line the sidewalk to keep customers from going into the fire lane, and cones were used outside.

19. During Blitz Day 2007 at the Store, prior to opening, associates spoke with customers waiting in line.

20. During Blitz Day 2007, upon opening the doors, the outer vestibule Store doors were broken by customers pushing on the doors as they entered the Store.

21. During Blitz Day 2007, about five or six associates were attempting to keep customers away from the outer vestibule doors at the time of the 5:00 a.m. opening.

22. During Blitz Day 2007, at approximately 5:00 a.m., the glass from above the outer vestibule Store door broke and fell on Walmart employees.

23. The broken glass cut the hand of Department Manager Justin Rice while customers were entering the Store. Mr. Rice believes that the glass broke from employees pushing to enter the Store.

24. Two customer injuries were reported in CMI claims forms, caused by entering or rushing crowds during the Store's Blitz Day 2005.

25. In the CMI claim forms regarding one of the alleged customer injuries during the Store's Blitz Day 2005, Co-Manager Kenneth Worthington stated that "[t]he customers broke the doors completely off including the motor."

26. During Blitz Day 2005, Mr. Worthington observed people from the parking lot pushing their way into the Store when the doors opened at 5:00 a.m.

27. At Blitz Day 2005, Mr. Worthington observed that the customers broke the doors completely off including the motor. At 5:10 a.m. the Store completely shut down the doors. They were up to their limits on the number of people that they could allow in. Mr. Worthington said that they had taken a row of shopping carts trying to keep the people a little more orderly and they were trying to get the small children and handicapped out of the crowd but they had over 3,000 people there. He said that there were people still standing in line at noon to get into the store. Mr. Worthington said that he had no idea that it was going to be that bad.

28. Respondent is not aware of any information contradicting the statements of Mr. Worthington in the 2005 customer injury claim forms.

29. Upon opening the Store's doors for Blitz Day 2006, customers coming into the Store's vestibule knocked the doors off.

30. Prior to opening the Store doors for Blitz Day 2007, the crowd was against the front doors and Walmart employees had to move customers away from the doors in order to open the Store.

31. During Blitz Day 2007, Asset Protection Associate Greg Lewis instructed Mr. Rice and approximately five other employees to stand in front of the Store doors and try to get the crowd away from the doors so that the doors could be opened.

32. During Blitz Day 2007, Mr. Rice and approximately five employees positioned themselves between the crowd and the Store's outer vestibule door.

33. Mr. Rice was also instructed to help customers into the building, pick up personal effects and debris and help people up in the case they fell

34. Upon opening the Store's front doors, Mr. Rice and approximately five other employees were pushed by the crowd against the outside of the vestibule and pinned against the outside of the store for several minutes.

35. While Mr. Rice was pinned against the outside of the vestibule, customers were bumping him, stepping on his shoes, stumbling over him and hitting his arms.

36. When the Store doors opened for Blitz Day 2007, people fell as they entered the Store.

Meetings/Discussions Prior to 2008 Blitz Day

37. Store managers expected a large crowd to be waiting to enter the Store on Friday morning, November 28, 2008 (Blitz Day 2008).

38. Market Asset Protection Manager Mr. D'Amico prepared a "game plan" for Blitz Day, entitled "Market 45 Action Plan." Mr. D'Amico adapted his "game plan" from a similar plan that he developed while working for another Walmart on a previous Blitz Day.

39. Mr. D'Amico generally did not rely upon Blitz Day planning documents available on Walmart's intranet, the WIRE, in planning for Blitz Day 2008 at the Valley Stream Store.

40. Store managers believed that customers should be kept farther from the front door on Blitz Day 2008, because the crowd got too close to the door on Blitz Day 2007.

41. During an interview given on Wednesday, November 26, 2008, Steve Sooknanan described Blitz Day to a New York Institute of Technology reporter, stating "it's always the same, it's always in the morning . . . the big rush and getting everybody through the door and everybody running towards that great item."

42. Prior to Blitz Day 2008, Mr. Rice advised Mr. Sooknanan that he had safety concerns for Blitz Day 2008 based on his experience working at the Store on Blitz Day 2007.

43. On Wednesday, November 26, 2008, Mr. Sooknanan held a Store planning meeting to discuss Blitz Day 2008. This meeting was recorded by the New York Institute of Technology.

44. During this meeting, Mr. Rice asked Mr. Sooknanan if the Store would have additional help at the door for Blitz Day 2008.

45. During this meeting, Mr. Sooknanan stated that they were going to keep the line farther away from the door for Blitz Day 2008.

46. Prior to Blitz Day 2008, Mr. Rice went to Mr. Sooknanan's office to recommend that the Store use movie ropes to help manage the crowd outside for Blitz Day 2008. Mr. Rice proposed that the movie ropes could be set up along the building with two employees on each side to monitor the ropes.

47. Approximately one week before Blitz Day 2008, Mr. Blair ordered eight barricades from Highway Technology, Inc.

48. At meetings prior to Blitz Day 2008, Mr. Sooknanan stated 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.

Blitz Day 2008

49. There were no mall security guards or off-duty police officers at the Valley Stream Store on Blitz Day 2008.

50. Walmart hired temporary employees approximately one week prior to Blitz Day 2008 from a temporary hiring agency called True Blue, Inc., d/b/a Labor Ready ("Labor Ready").

51. Walmart associates provided by Labor Ready were hired for unloading merchandise, stocking shelves, and maintenance.

52. Walmart associates provided by Labor Ready were not hired for security or to help with crowds, crowd control or crowd management.

53. Some of the Walmart associates provided by Labor Ready were working in the vestibule for the Store's opening on Blitz Day 2008.

54. Mr. Blair, with help from Asset Protection Coordinator Andrew Gilroy and Associate Aubrey Dancy, set up eight interlocking barricades on the evening of November 27, 2008.

55. Each barricade was plastic, hollow and approximately six feet long.

56. In the hours prior to opening for Blitz Day 2008, the Store's vending machines were re-positioned inside the vestibule to bisect the vestibule.

57. Mr. Sooknanan instructed that flat screen TVs, a particularly popular item, be placed at the front of the store.

58. People began lining up outside the Store at approximately 5:30 p.m. on November 27, 2008.

59. At 2:00 a.m., there were believed to be over 1,000 people gathered outside the Store.

60. At 3:00 a.m., the crowd extended past National Liquidators and continued to a white fence on the far side of the parking lot. Around this time, customers moved out of line and crowded around the barricades in front of the Store's entrance. Some customers jumped over the barricades.

61. At about 3:00 a.m., Mr. Sooknanan directed Overnight Manager Mike Sicuranza to send the largest employees outside to manage the crowd.

62. Mr. Sicuranza spoke over the PA system, indicated that customers were inside the barricade, and directed several employees to form a chain inside the barricades to keep customers out.

63. The employees who went outside for this purpose included Jdimytai Damour, Dante Wedderburn, Santiago Corporan, Damion Ricketts, Dennis Fitch, Andre Cook, Antoine Lewis, Roydell Shaw, Mike Sicuranza, Dennis Smokes, Khareem Thomas, Eric Sobotcher, Julius Blair, two unidentified temporary workers, and Andrew Gilroy. These employees stayed inside the barricade for about 20 minutes.

64. At about 3:15 am, Mr. Sicuranza sent more employees outside. But because they were not able to keep customers outside of the buffer zone created by the barricades, Mr. D'Amico eventually told all employees to come back inside.

65. At around 3:35 – 4:00 a.m., the customer line extended from the front of the Store entrance doors all the way to the neighboring BJ's store.

66. After a Walmart employee brought his family around the barricades (at around 4:00 a.m.), approximately 200 customers breached the barricades and went directly in front of the Store's entrance doors.

67. Around 4:30 a.m., Mr. D'Amico noticed the Store doors starting to shake, and he and Mr. Sooknanan were concerned that the doors would fall in and shatter.

68. At around 4:30 a.m., Mr. Sooknanan held a meeting inside the Store near the customer service desk. He told employees to move to the side when customers came into the store.

69. At about 4:30 a.m., customers were pushing and banging on the glass doors and were pushing and banging on them.

70. At about 4:30 a.m., Mr. D'Amico asked employees to go outside and attempt to create space between the Store entrance doors and the crowd by creating "a wedge" to try to get people away from the doors. Several employees attempted this, but they were not able to create any space between the crowd and the front doors.

71. Shortly before 5:00 a.m. there were approximately 2,000 people outside the Store.

72. Shortly prior to 5:00 a.m. Mr. D'Amico and Mr. Sooknanan had a discussion about not opening the Store doors.

73. Mr. D'Amico advised Mr. Sooknanan to delay opening the Store, but Mr. Sooknanan felt that the doors needed to be opened at 5:00 a.m.

74. Associates inside the Store counted down from 10 to 1 before the Store's opening and took pictures and videos of the crowd entering the Store.

75. Employees positioned in the vestibule were told that when the doors opened, they should move off to the sides and let the initial surge come through.

76. Employees were instructed to assist the customers who fell down as they entered the Store when the doors opened.

77. Prior to opening the Store's doors, the glass and wall of the vestibule were shaking.

78. When the Store doors opened at 5:00 a.m., the crowd knocked the doors off of the door frame, the glass in the doors broke, and the doors fell down.

79. The door frame broke and the doors came off, and some associates were holding the doors to attempt to keep them from falling.

80. When the doors were opened, hundreds of people were rushing into the Store.

81. People started falling on the ground in the vestibule. Employees were attempting to pick people up who were falling.

82. There were articles of clothing, glass shards and door frame debris in the vestibule after the crowd passed through.

83. The crowd pushed Support Manager Alton Calhoun to one side of the vestibule as they entered. After this, he climbed on top of a vending machine and saw Mr. Damour on the ground with a door on top of him.

84. Immediately after the doors were opened Associate Dennis Fitch was knocked down by the crowd. Mr. Fitch was unable to get up and was continuously stepped on by customers for 2-3 minutes. Mr. Fitch was pushed through the vestibule and through the doors to the Store before being helped up by Assistant Manager Roydell Shaw.

85. Associate Richard Mason cut down a door that was hanging by cords with a knife. After cutting the door, he fell to the floor with a pregnant woman between his legs and held the door above his head until the glass slid out of the frame. Mr. Mason heard Mr. Damour calling for help and held his hand while the crowd was entering the vestibule.

86. Mr. Rice stated that Mr. Damour turned his back as the door broke and it fell on him when Mr. Mason cut it down.

87. Associate Jeff McWilliams was pinned by the crowd against a wall and saw Mr. Damour fall on the ground with the door.

88. Asset Protection Associate Andrew Gilroy was pushed by the crowd inside the Store, observed that the left side door was passed inside and placed by the customer service desk, and heard Mr. Blair page "big guy down" over the walkie-talkies.

89. Associate Joel Osbourne was instructed by Mr. D'Amico to push the doors outward after the opening so they would not be broken. Osbourne further stated that he became tangled in the crowd during the opening.

90. Associate Dennis Smokes stated that he was stationed inside the vestibule on the left when the doors opened. Although he was trying to help fallen customers, he was concerned he would be knocked over. Mr. Smokes tried to maneuver his way to the inside of the Store, which he was able to do after approximately 20 minutes.

91. Associate Aubrey Dancy climbed on a vending machine before the opening to film the crowd, and she was knocked off the vending machine, and then she ran inside to continuing filming.

92. Associate Jamie Thompson climbed on top of a vending machine during the opening. Mr. Thompson saw Mr. Damour hit on the back and knocked to the ground by the

falling door and customers walked on him. Mr. Thompson stated that Mr. Calhoun tried to lift the door and the fallen customers off from the decedent.

93. Mr. D'Amico got pushed back into the vending machines by the crowd during the opening.

94. Mr. Rice got pinned up against the vending machines by the crowd. His face was plastered against the glass on the door in the middle of the vestibule as customers continued to push their way into the Store.

95. Associate Antoine Lewis was pinned up against the wall by one of the doors and he fell on the floor.

96. Associate Santiago Corporan was holding the doors from the right-hand side and the crowd pushed him against the call and into the Store.

97. Mr. Damour was lying on the ground in the vestibule and people were running over him.

98. Walmart employees working at the Store on Blitz Day 2008 received no training in crowd management and/or crowd control from Walmart prior to Blitz Day 2008.

99. Walmart temporary employees, provided by Labor Ready, working at the Store on Blitz Day 2008 received no training in crowd management and/or crowd control from Walmart prior to Blitz Day 2008.

100. Prior to Blitz Day 2008, Mr. Sooknanan did not have any experience in crowd control or crowd management.

Videos of Blitz Day 2008 at the Store

101. The Valley Stream Store has surveillance cameras set up in the Store. These surveillance cameras were in operation prior to and during Blitz Day 2008. The video data captured on the surveillance cameras is transmitted to two places: (1) the Store and (2) the Home Office in Arkansas.

102. The surveillance video produced by Respondent shows the parking lot, vestibule and entrance area of the Store from 9:00 p.m. on November 27, 2008 to 9:00 a.m. on November 28, 2008.

103. Video ES301/Group 1 Camera 1 shows the northeast side of the store exterior, facing the main entrance/exit. The video clip labeled 2.59.55_5.59.59 is a portion of this video.

104. Video ES301/Group 2 Camera 2 shows the southeast side of the store exterior, facing the parking lot.

105. Video ES301/Group 4 Camera 1 shows the entrance area of the store, facing the northern portion of the vestibule. The video clip labeled 04[1].44.56_06.44.59 is a portion of this video.

106. Video ES302/Group 2 Camera 4 shows the northeast side of the store exterior, facing the main entrance/exit.

107. Video ES302/Group 3 Camera 3 shows the southeast side of the store exterior, facing the main entrance/exit.

108. Video ES304/Group 4 Camera 1 shows the entrance area of the store, facing the southern portion of the vestibule.

109. Video ES305/Group 4 Camera 3 shows the southern end of the vestibule, facing the northern portion of the vestibule.

110. Video ES306/Group 2 Camera 1 shows the entrance area of the store, facing the main entrance door into the store.

111. Video ES307/Group 2 Camera 4 shows the northern end of the vestibule, facing the southern portion of the vestibule. The video clip labeled 04.54.51_05.54.59 is a portion of this video.

112. Video ES307/Group 3/Camera 4 shows the southern end of the entrance area of the store, facing the entrance area.

113. As part of Respondent's investigation following this incident, video and images from Walmart employees' cellular phones were obtained by Walmart. These videos and images from employees' cellular phones were taken on Blitz Day 2008 at or around 5:00 a.m., in or around the vestibule of the Valley Stream Store.

2009 Day after Thanksgiving Day Sales Event

114. In 2009, Walmart renamed its Day After Thanksgiving Day Sales Event, "the Event."

115. For the 2009 Event ("the 2009 Event" or "the Event"), Walmart contracted with Landmark, a crowd management firm, both at the Store and nationwide.

116. Employees at the Store received crowd management training weeks prior to the 2009 Event both in person and through computer training.

117. Different crowd management techniques were used at the Store in 2009 that had not been used at the Store in prior years, including:

a. For the 2009 Event, although sale items went on sale at 5:00 a.m., the Store was kept open to customers for 24 hours prior to the sales time.

b. Customers arriving at the Store for the Event waited in queuing areas snaked throughout different areas inside the Store.

c. Customers waiting in queuing areas received tickets indicating whether they would receive the desired sale item. When all tickets for an item were handed out, this was indicated to customers. For each sale item there was a balloon, and once the balloon came down, the item was sold out.

d. The Store rented steel security barricades that were placed in front of the store and formed a serpentine line to the entrance of the store.

e. To the extent that the customer line extended past the barricades, customers were directed to remain on the sidewalk, and where the sidewalk met the fence on the northern end of the parking lot, to line up along the fence.

f. The Store hired private security personnel to interact with customers outside the store. Store associates also interacted with customers outside the store. Employees outside were wearing yellow vests.

g. The store provided bullhorns to several associates to make announcements, such as when all of the popular items had been accounted for by customers waiting in line.

h. Some of the associates and security personnel were on elevated viewing stands outside the Store.

118. In the early morning hours of the Event on November 29, 2009, based on a visual observation of the customers in the store, Market Manager Dave Hogan made the decision to only allow additional customers into the store as an identical number of customers left the store.

119. Customers were given a map of the Store indicating the locations of sale items.

120. The Nassau County Police Department was contacted in advance of the 2009 Event, and the police informed Walmart that they could not guarantee a police presence.

Prior CMI Claims

121. With respect to claims of incidents or accidents at Walmart stores, Respondent has no further information regarding those matters apart from the documents it produced during discovery.

122. With respect to claims of incidents or accidents at Walmart stores, Respondent has no information to contradict the manager statements contained in the CMI files.

123. Among the codes used to identify managers in CMI claims forms are: “mgr,” “AM,” “A/M,” “SM,” “S/M,” “AP,” and “MOD.”

Statement of Such Facts by Respondent:

A. Events That Took Place During Blitz Days at the Valley Stream Store from 2004-2007.

1. Day-after-Thanksgiving (“Blitz Day”) sales had previously taken place at the Valley Stream store (the “Store”) in 2004, 2005, 2006, and 2007.

2. During Blitz 2004, associates spoke with customers waiting in line, shopping carts were used to line the sidewalk to keep customers from going into the fire lane, the Nassau County Police were present at the time of opening, associates policed the Store to ensure the entrance and aisles were clean in order to prevent customer slips, trips, and falls, and associates were instructed to remain out of path of customers’ travel as they entered the store. In addition, some time after the sale had begun, based on a visual observation of the customers in the store, the store manager made the decision to only allow additional customers into the store as an identical number of customers left the store.

3. During Blitz 2005, associates spoke with customers waiting in line, shopping carts were used to line the sidewalk to keep customers from going into the fire lane, the Nassau County Police were present at the time of opening, associates policed the Store to ensure the

entrance and aisles were clean in order to prevent customer slips, trips, and falls, and associates were instructed to remain out of path of customers' travel as they entered the store.

4. During Blitz 2005, the outer vestibule entrance doors were separated from the frame by customers pushing on the doors. Concurrently, customers were instructed by the co-manager to back up from the doors, or they would not be allowed entry. They complied, the doors were set to the side of the vestibule, and customer ingress was allowed to continue.

5. During Blitz 2006, associates spoke with customers waiting in line, shopping carts were used to line the sidewalk to keep customers from going into the fire lane, cones were used to demark the area by the outer entrance door of the vestibule, the Nassau County Police were contacted in advance and were present at the time of opening, associates policed the Store to ensure the entrance and aisles were clean in order to prevent customer slips, trips, and falls, and associates were instructed to remain out of path of customers' travel as they entered the store. Associates also handed out hot drinks to customers waiting in line, and either in 2006 or 2007 maps of the store and the locations of items in the store were distributed to customers.

6. During Blitz 2007, associates spoke with customers waiting in line, the Nassau County Police were contacted in advance to ensure there would be additional patrols in the area, associates policed the Store to ensure the entrance and aisles were clean in order to prevent customer slips, trips, and falls, and associates were instructed to remain out of path of customers' travel as they entered the store. Associates also handed out hot drinks to customers waiting in line, and either in 2006 or 2007 maps of the store and the locations of items in the store were distributed to customers.

7. During Blitz 2007, the outer vestibule entrance doors were derailed from the upper rail by the force of customers pushing on the outer vestibule doors, but were held upright and did not fall. In addition, about five or six associates had been attempting to keep customers away from the outer vestibule doors at the time of the 5:00 AM opening.

8. During Blitz 2007, at approximately 5:00 AM, glass from above the outer vestibule door broke, whether from a projectile being thrown or the pushing of the customers on the door below. One piece of glass cut the back of the hand of associate Justin Rice, who described it at deposition as a “paper cut” and a “little cut.”

9. No Store employee had previously received a recordable crowd-related injury during Blitz 2004, 2005, 2006, or 2007, and with the exception of Mr. Rice’s cut, Respondent is unaware of any Store associate injury during Blitz Days 2004-2007.

B. The Events Preceding and During Blitz Day 2008.

1. Before Blitz Day 2008, Store Manager Steve Sooknanan and Asset Protection Coordinator Julius Blair planned to obtain barricades to keep customers away from the outer vestibule doors before the time of opening. Mr. Blair leased barricades from Highway Technology, Inc., and positioned them the evening of November 27, 2008, to create a “buffer zone” approximately 40 feet in length. Mr. Sooknanan’s intent was to keep customers behind the barricades and out of the buffer zone, to open the store doors at 3:00 AM for the purposes of allowing customers to see a clear path of entry, and to have them walk into the store at 5:00 AM.

2. A few weeks before Blitz Day 2008, Mr. Blair called the Nassau County Police Department on two occasions to ask if the police could be present for the store opening. Both

times, the police stated that although they could not be present throughout the night, they would be there during the opening of the store.

3. A few weeks before Blitz Day 2008, Mr. D'Amico created a "Market 45 Action Plan" containing numerous actions he expected stores to take on Blitz Day.

4. Mr. Sooknanan estimated that about 800 customers had been present at the time of opening during Blitz Day 2007, and anticipated that 1,000 customers may be present at the time of opening for Blitz Day 2008.

5. Three days before Blitz Day 2008, on November 25, 2008, Mr. Sooknanan held a meeting with Store Department Managers to discuss Blitz Day 2008. This meeting was recorded by NYIT. During this meeting, Mr. Rice asked Mr. Sooknanan if there could be more people with him at the front door, and Mr. Sooknanan responded that more people would be at the door. Following that meeting, Mr. Rice suggested to Mr. Sooknanan that "movie-type ropes" be used for the customers that would wait in line, and Mr. Sooknanan informed him that the matter had been taken care of, because barriers had been ordered.

6. At about 10:30 PM during the evening of November 27, 2008, at Mr. Sooknanan's direction, vending machines in the lobby of the Store that normally lined the outer wall were placed so as to bisect the vestibule. The intent of this placement was to prevent customers from entering the vestibule from both sets of outer vestibule doors and colliding in the vestibule; instead, customers entering the vestibule would flow into the Store through the entrance inner vestibule doors, and then later flow out of the Store through the exit inner vestibule doors, the separate, partitioned portion of the vestibule, and the exit outer vestibule doors.

7. Before Mr. Sooknanan left at approximately midnight on November 27, 2008, he instructed the overnight manager, Mr. Sicuranza, to have associates walk the line of customers at approximately 3:00 AM, and open the outer vestibule doors at that time to show customers the clear path of entry.

8. At approximately 3:00 AM, the customers that had gathered at the Store moved close to the barricades, and Mr. Blair called the Nassau County police at 3:09 AM.

9. Between 3:09 AM and 4:40 AM, various numbers of police officers were present outside the entrance of the Store, as the number of customers waiting outside the Store grew in size, and eventually, breached the barricades of the "buffer zone." Andrew Gilroy called the police at 3:38 AM and 3:56 AM. During this time, there was an altercation in line between customers, and one police officer attempted to get customers to move outside the buffer zone, but was unsuccessful.

10. At 4:40 AM, the Nassau County police departed, leaving no police presence in or around the Store.

11. Shortly before the Store was to open at 5:00 AM, customers were pushing on the outer vestibule doors. Mr. D'Amico and several associates attempted to have customers move back from the outer vestibule doors by exiting the vestibule, approaching them, and asking them to move back. This attempt failed, and all associates returned inside the store.

12. Mr. Gilroy again called the Nassau County police at 4:54 AM.

13. Mr. Sooknanan briefly considered whether not to open the Store doors at 5:00 AM. He decided that because the Store was not receiving any assistance from the police, that the

doors should be opened as planned to reduce the anxiety level of the crowd and to avoid the risk the crowd would break the doors, increasing the danger to customers. It was anticipated that employees would not be exposed to the crowd as they were instructed to open the doors and then move out of the path of the crowd, staying on the sides of the vestibule to pick up any dropped items to prevent customer slips, trips, and falls, and help up any customers that might slip, trip, or fall.

14. Store employees counted down from ten to one at the time of Store opening as had been done during previous years.

15. When the Store opened at 5:00 AM, customers pushed the outer vestibule doors out of the frame. An associate cut the rubber strip keeping the doors bound together, so that they could be removed and placed elsewhere.

16. Within minutes, associates became aware that Jdimytai Damour was on the ground and not moving. The police were called and restored order, CPR was attempted, and Mr. Damour was taken to Franklin Hospital by ambulance, where he was pronounced dead at 6:03 AM.

C. The Cause of Mr. Damour's Death as Determined by the Medical Examiner

1. According to the Nassau County Medical Examiner's autopsy report, Mr. Damour weighed 480 pounds, had a heart weight of 680 grams, had marked atherosclerosis of the left descending coronary artery, had a right ventricle of 1 centimeter thickness, and a lung weight of 1550 grams.

2. The Nassau County Medical Examiner's autopsy report contained no mention of bruises, fractures, internal injuries, or bleeding.

3. Under “cause of death” in the Medical Examiner’s autopsy report is the following text: “Mechanical asphyxia. **Other Significant Conditions:** Morbid obesity.”

4. The Nassau County Medical Examiner’s autopsy report contained no mention of tears, scuffs, or other marks on Mr. Damour’s clothing.

D. Additional Facts

1. The parties are not aware of any instance before November 28, 2008 in which a retail employee has died during a retail sales event.

2. Before November 28, 2008, the Secretary had not previously issued any citation to an employer for failure to implement crowd management measures, and had not previously issued any guidance to employers as to any crowd management measures recommended by the Occupational Safety and Health Administration.

3. The parties are not aware of any consensus standards in place before November 28, 2008 recommending crowd management measures for the retail industry or mercantile occupancies.

4. The Compliance Officer who conducted the investigation testified at deposition that the measures taken by the Store before Blitz 2008 were “reasonable, but minimal.”

5. Before November 28, 2008, the retail industry did not recognize a hazard to employees of crowd crush, crowd surge, or crowd trampling that could cause death or serious physical harm.

6. The nearby Best Buy store in the same mall as the Store, the Green Acres mall, also conducted a Blitz 2008 sale. The Best Buy store had three armed guards, taped off areas to keep customers waiting in line, and handed out tickets for items that were on sale. Police were called twice to the Best Buy store during the morning of November 28, 2008, once at 3:22 AM, and again at 4:49 AM where the caller stated that “people are going crazy outside.”

7. The Store is classified as a mercantile occupancy under the Life Safety Code. *See* Ciuffo Dep., at 124, 128; Wertheimer Dep., at 42-43.

8. Jaime Thompson testified that his deposition that the signature in the Nassau County Police Report in the statement attributed to him is not his signature, that he did not give a statement to the Nassau County Police Department, that he was not told to assist with opening the front doors, that he was not concerned for his safety, and that he did not jump on top of the vending machines.

9. Bibi Azeem testified at her deposition that she did not read her police statement as contained in the Nassau County Police Report before signing it, and that she did not observe Mr. Damour fall.

10. Justin Rice testified at his deposition that he did not give a statement to the Nassau County Police Department.

VI. A CONCISE STATEMENT OF APPLICABLE PRINCIPLES OF LAW ON WHICH THERE IS AGREEMENT.

1. 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 (84 Stat. 1590, 29 U.S.C. 651, *et seq.*) (“the Act”).

2. 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.

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

VII. A CONCISE STATEMENT OF THOSE ISSUES OF FACT WHICH REMAIN TO BE LITIGATED.

See Section V.

VIII. A CONCISE STATEMENT OF THOSE ISSUES OF LAW WHICH REMAIN TO BE LITIGATED.

Statement of Such Issues of Law By The Secretary:

A. Respondent's Employees Were Exposed to Struck By Hazards and Asphyxiation Hazards at the Store on Blitz Day 2008.

The Secretary contends that during the 2008 Blitz Day Respondent's employees at the Store were exposed to "struck by" hazards, including employees being struck by glass, doors and customers as a result of Respondent's failure to take sufficient measures to protect its employees from crowd crush, crowd surge, or crowd trampling. The Secretary contends that the minimal measures Respondent took to ensure orderly customer entry and to ensure employee safety were completely inadequate and Respondent continued to expose its employees to known "struck by" and/or asphyxiation hazards due to crowd crush, crowd surge, or crowd trampling.

B. Respondent Recognized the Hazards to Employees at the Store.

The Secretary contends that Respondent recognized the hazards to its employees at the Store. The Secretary contends that the evidence demonstrates that Respondent had actual knowledge that its employees were subject to a hazard of death or serious physical harm from crowd crush, crowd surge, or crowd trampling. Such evidence includes the events that took place upon the opening of the Store's doors for the 2004, 2005, 2006 and 2007 Blitz Day events, including customers knocking doors off while entering and causing broken glass to fall on employees, customers falling and being injured, employees being pinned against the store so they could not move, employees being pushed and stepped on by customers, meetings discussing problems when opening the Store's doors, various internal Walmart documents as well as prior incidents at Walmart's stores nationwide.

C. The Hazards Were Likely to Cause Serious Harm or Death.

The Secretary contends that when employees are asphyxiated or experience “struck by” hazards, including being struck by glass, doors and customers, the employees are subject to the risk of serious physical harm or death.

D. Feasible Means Existed to Eliminate or Reduce the Hazards.

The Secretary contends that feasible means existed as of November 28, 2008 that would have materially reduced or eliminated the hazards. Providing crowd management training to employees interacting with crowds and implementing effective commonly used crowd management techniques would have materially reduced or eliminated the hazard. 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 consultants, were measures that would have materially reduced or eliminated the hazards. These very same measures existed as of November 28, 2008 and could have been implemented.

E. Respondent’s Affirmative Defenses Are Not Valid.

1. Respondent Had Fair Notice of the Need to Protect Its Workers From Recognized Hazards.

The Secretary contends that Respondent had actual knowledge of the aforementioned hazards and had an obligation to protect its employees from those hazards. Contrary to Respondent’s bald assertion of lack of “fair notice,” inconsistent enforcement of a specific regulation is a factor in determining whether the Secretary has given a reasonable interpretation of an ambiguous regulation. Martin v. OSHRC (CF&I Steel Corp.), 499 U.S. 144, 157-58 (1991); Ohio Cast Prods. v. OSHRC, 246 F.3d 791, 799 (6th Cir. 2001). Here, the issue is not the interpretation of a specific regulation, but rather a violation of the general duty clause of the OSH Act, which hinges not on the Secretary’s interpretation of a regulation, but on Respondent’s

own recognition of the cited hazard. Indeed, the fair notice defense has absolutely no validity – whether the citation is for a violation of the general duty clause or a specific regulation – if the Secretary establishes Respondent’s actual knowledge of the hazard. See Cotter & Co. v. OSHRC, 598 F.2d 911, 914 (5th Cir. 1979) (when “an employer is shown to have actual knowledge that a practice is hazardous, the problem of fair notice does not exist.”).

Respondent’s fair notice defense is invalid, since the Secretary intends to prove Respondent’s actual knowledge of the cited hazards.

2. There Is No Evidence of Selective Prosecution by OSHA.

The Secretary contends that Respondent’s speculation about the “inconsistent enforcement” relating to other investigations is improper unless there is evidence of wrongful conduct by the Secretary. Hamilton Fixture, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). Relief is available only if the decision to inspect is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. See Vergona Crane, 15 O.S.H. Cas. (BNA) 1782 (No. 88-1745, 1992) (citations omitted). There is no evidence of such discriminatory conduct by the Secretary in relation to this or the previous investigations, and therefore Respondent’s inconsistent enforcement defense is invalid.

3. The Citation is Not Vague and Section 5(a)(1)’s General Duty Clause Is Constitutionally Applied in This Case.

Courts have long recognized that if the elements of Section 5(a)(1) are met the Secretary’s invocation of the General Duty Clause is constitutional. Moreover, “struck by” and asphyxiation are well known hazards. Similarly, terms referenced in the citation such as “crowd management” and “crowd crush” are common terms understood by people trained in crowd management, such as Respondent’s own expert, and set forth in Respondent’s own documents.

4. Chief Judge Sommer Has Previously Ruled the Amendment of the Citation Was Proper and Is Not Time Barred.

The Secretary's amendment of the citation in the Complaint has already been subject to extensive motion practice and approved by Chief Judge Sommer. See Chief Judge Sommer's Order of October 15, 2009, denying Respondent's motions to strike the amended citation as barred by the statute of limitations ("As the Secretary also indicates, the amendments are not barred by the Act. 'Section 9(c) prohibits the issuance, not the amendment, of a citation more than six months after the occurrence of a violation.' *CMH Co., Inc.*, 9 BNA OSHC 1048, 1052 (No. 78-5954, 1980) (citation omitted). Furthermore, '[a]n amendment to a claim arising out of conduct described in the original pleadings relates back to the date of those pleadings.' *Vicon Corp.*, 10 BNA OSHC 1153, 1157 (No. 78-2923,1981) (citation omitted)."). See also Chief Judge Sommer's Order of September 1, 2009, rejecting Respondent's challenge to the amended citation in the complaint. These orders are the law of the case.

5. The Feasible Means of Abatement Do Not Present a Greater Hazard.

The Secretary contends that providing crowd management training to employees who interact with crowds and using effective crowd management techniques does not expose employees to a greater hazard than having untrained employees interact with crowds using inadequate crowd management techniques.

F. Respondent's Additional Arguments Are Irrelevant.

1. The Citation is Not Dependent on the Violent Acts of Third Parties.

The Secretary objects to Respondent's characterization of the citation as being dependent upon "crowd behavior," when the citation is based on Respondent's actions and inactions in protecting its employees from known hazards posed by crowds. Moreover, the violation in this

case is not about regulating social behavior or violence presented by third-party crowds;⁹ rather it is focused on Respondent's inadequate measures, planning and training to address recognized hazards to its employees. Simply because the cited hazards involve crowds does not transform this general duty clause violation into a case about third-party violence. Consequently, the Secretary has not charged Respondent with violating any workplace violence guidelines.

2. The Actions or Inactions of the Nassau County Police Department Are Not Relevant.

The Secretary contends that Respondent has a duty to protect its employees from known hazards. The relevant considerations in this case are Respondent's actions (and inactions) and Respondent's recognition of the hazards. The actions of the Nassau County Police Department are not relevant to this case. The Secretary further contends that Respondent failed to confirm what, if any, role the police would play at the 2008 Blitz Day, and that even if the police were present, Respondent subjected its employees to known hazards.

Statement of Such Issues of Law By Respondent:

A. The Presence of an Alleged Hazard

Respondent contends that the Secretary's amendment of the Citation to add, among other things, "struck by," is precluded by the statute of limitations. Respondent also contends that no hazard of asphyxiation causing or likely to cause death or serious physical injury to employees was present at the worksite, and that no hazard of, among other things, "struck by," causing or likely to cause death or serious physical injury to employees was present at the worksite.

⁹ Accordingly, the Megawest case cited by Respondent below is inapposite and has no precedential value.

B. The Nature of the Alleged Hazard

Respondent contends that, inter alia, each of the hazards alleged by the Secretary is dependent on “crowd[s],” which in turn are made up of third parties. Respondent therefore contends that the Secretary’s citation is dependent upon the unpredictable behavior of third parties not under the control of Respondent. As a corollary to this issue, Respondent contends that Judge Spies’s decision in *Megawest Fin., Inc.*, 17 BNA OSHC 1337 (1995), establishes that prior violent acts of third parties cannot place an employer on notice of a hazard.

C. The Definition of the Hazard

The hazard present in a citation issued under the General Duty Clause cannot be defined in terms of a particular abatement method, or the absence thereof. As the OSHA Field Operations Manual states, the General Duty Clause “does not mandate a particular abatement measure.” Respondent contends that, as shown during the deposition testimony of OSHA officials, the cited hazard is effectively the *lack* of sufficient crowd management measures taken by Respondent, and under the General Duty Clause hazards cannot be defined as the lack of an abatement measure.

D. Whether Respondent Recognized a Hazard of Death or Serious Physical Harm to Employees

Respondent contends that the events that took place during Blitz 2007, during which employees were pushed by customers into the outer vestibule wall and door, and one employee received the equivalent of a paper cut from broken glass, did not cause Respondent to recognize an alleged hazard to employees from crowd crush, crowd surge, or crowd trampling, much less one that was causing or likely to cause death or serious physical harm. No employee received a recordable injury during Blitz 2007. Moreover, employees in 2008 were not placed between customers and the outside of the vestibule; they were told to remain out of the way of customers

as they entered the Store. Respondent further contends that the small number of crowd-related injuries alleged by customers at other stores, and the even smaller number of (dissimilar) crowd-related injuries to employees at other stores, did not cause Respondent or Store management to know of or recognize an alleged hazard of death or serious physical harm to employees from crowd crush, crowd surge, or crowd trampling.

E. The Feasibility of Abatement.

Respondent contends that the Secretary will not carry her burden of proving that feasible means existed as of November 28, 2008 that would have eliminated or materially reduced a hazard to employees associated with customers acting in an antisocial or sociopathic matter.

F. Respondent Implemented Reasonable Measures

Respondent contends that, based on its knowledge on and before November 28, 2008, the Store took reasonable measures primarily to ensure orderly customer entry and, to the extent argued by the Secretary but not conceded by Respondent, to ensure employee safety, such as ordering and placing barricades in front of the Store entrance, and requesting police presence at the time of opening.

G. Greater Hazard

The Secretary has suggested as an abatement measure that Respondent train employees in crowd management and have more employees interacting with customers in line for Blitz Days. Respondent contends that if the hazard depends upon actions that crowds may take in pushing or engaging in antisocial or sociopathic behavior, then this abatement measure could pose a greater hazard to employees by placing them in close proximity to these crowds

H. Inconsistent Enforcement

Respondent contends that the Secretary previously investigated crowd-related incidents in which employees were apparently exposed to hazards of crowd crush, crowd surge, or crowd

trampling—at the E2 nightclub incident in Chicago in 2003, and the Station nightclub fire in 2003—but did not cite those employers for a failure to implement crowd management measures, and, therefore, the instant Citation is subject to a defense of inconsistent enforcement.

I. Fair Notice

Based upon the consistent position and universe of experience of OSHA, NIOSH, state OSH plans, and the retail industry, Respondent did not have fair notice that the OSH Act required employers to implement particular crowd management measures.

J. Vagueness and Particularity

Respondent contends that the text of the citation is not sufficiently particular to inform Respondent of the nature of the hazard for which it has been cited or the actions it must take to abate the cited hazard. Neither of the OSHA officials deposed could decipher the terms used in the citation, stating that expert consultation was necessary to understand the meaning of the citation. As part of this defense, Respondent contends that the General Duty Clause is therefore unconstitutionally vague as applied to Respondent.

K. Respondent Reasonably Anticipated the Role of the Police in Crowd Control

Respondent contends that, after repeated interaction between Store and police personnel, Respondent had a reasonable expectation that the police would be present at the time of the Store opening to control the unruly crowd. Respondent further had the reasonable expectation that, once the police observed the conditions present before the Store opening, they would have taken appropriate action to control the customers' unlawful behavior instead of leaving the scene. The reasonably anticipated actions by the police would have, in all likelihood, minimized the existence of any alleged hazard.

IX. A CONCISE STATEMENT OF ANY DISAGREEMENT AS TO THE APPLICATION OF THE FEDERAL RULES OF EVIDENCE OR THE COMMISSION RULES OF PROCEDURE.

The parties do not disagree as to the application of the Federal Rules of Evidence or Commission Rules of Procedure.

X. A LIST OF ALL MOTIONS OR OTHER MATTERS WHICH REQUIRE ACTION BY THE ADMINISTRATIVE LAW JUDGE.

The motions currently pending before the Administrative Law Judge are as follows:

- Secretary's Motion in Limine to Exclude the Testimony of Dr. Arthur Barsky
- Secretary's Motion in Limine to Exclude the Testimony of James Stanley
- Secretary's Motion in Limine to Exclude the Testimony of John Sharry
- Secretary's Motion in Limine to Exclude the Testimony of Dr. Michael Baden and Jeran Lovence
- Secretary's Motion in Limine to Exclude the Testimony of William Kenny
- Respondent's Motion in Limine to Exclude Surprise Witnesses
- Respondent's Motion in Limine to Exclude the Testimony of Paul Wertheimer

XI. AN ESTIMATE OF TIME EACH COUNSEL ANTICIPATES WILL BE NEEDED TO PRESENT ITS CASE.

The Secretary estimates that her affirmative case will take approximately five to six days.

Given this estimate, the trial's start date on Wednesday, July 7, and the cost and expense to have witnesses on station, Respondent requests that its affirmative case begin no earlier than Monday, July 12, even in the unlikely event the Secretary's affirmative case ends before the close of business on Friday, July 9. Respondent estimates its case will take eight days.

The Secretary objects to any artificial restriction as to when her case in chief must be completed and objects to Respondent putting on its case in chief prematurely.

XII. THE SIGNATURES, TELEPHONE NUMBERS, AND EMAIL ADDRESSES OF COUNSEL FOR ALL PARTIES.

These are enclosed at the conclusion of the Pre-Hearing Statement.

XIII. A STATEMENT ON THE PRESENTATION SOFTWARE TO BE USED BY EACH PARTY DURING TRIAL, IF ANY, AND WHETHER EACH PARTY IS ABLE TO RECEIVE AND USE DIGITAL FILES OF PRESENTATION MATERIALS PREPARED BY THE OTHER.

The parties anticipate using March DVR Networks software, Quicktime software, Windows Media [or other DVD player] to display video and/or audio from the exhibits set forth above. The parties are not aware of any reason why they cannot receive and use digital files of presentation materials prepared by the other.

DATED: June 23, 2010

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