

Secretary of Labor v. Wal-Mart Stores, Inc.
OSHRC Docket No. 09-1013
Respondent's Opening Brief

Exhibit B
Non-Prosecution Settlement Agreement Between Wal-Mart Stores and
Nassau County District Attorney

Filed on June 20, 2011

KATHLEEN M. RICE
DISTRICT ATTORNEY



**OFFICE OF THE DISTRICT ATTORNEY
NASSAU COUNTY**

NON-PROSECUTION SETTLEMENT AGREEMENT

WHEREAS, the Office of the District Attorney of Nassau County ("NCDA") is conducting a criminal investigation of the events that occurred at Wal-Mart Store #5293 in the Green Acres Mall in Valley Stream, Nassau County, New York, on November 28, 2008 (hereinafter referred to as "Blitz Day 2008") and that resulted in a death and injuries; and,

WHEREAS, Wal-Mart Stores, Inc. ("Wal-Mart," together with NCDA, the "Parties"), without admitting any criminal liability by it or by any of its agents or employees, enters into this Agreement to obtain forbearance by NCDA of any criminal prosecution by NCDA against it arising from the events of Blitz Day 2008; and,

WHEREAS, NCDA has agreed to the terms of a settlement with Wal-Mart that would achieve a greater benefit to the People of Nassau County and New York State than could be achieved through a successful criminal prosecution alone.

THEREFORE, the Parties agree, in consideration of such forbearance, and for other mutual consideration reflected herein and recognized by the Parties as adequate, as follows:

CROWD MANAGEMENT PLAN REVIEW PROCESS

- (1) Wal-Mart has undertaken a review of crowd management in relation to the first shopping day after Thanksgiving (hereinafter referred to as the "Yearly Event") for all ninety-two (92) Wal-Mart stores in New York State (hereinafter "Subject Stores").
- (2) Wal-Mart has hired an expert team (the "Experts"), who are familiar with the National Fire Protection Association's Life Safety Code, and in particular Chapter 37 -- Existing Mercantile Occupancies (hereinafter, the "Life Safety Code").
- (3) Wal-Mart and NCDA have selected jointly a second expert (hereinafter the "Safety Expert") who has a subject-matter expert on his team who is familiar with the written codes and other guidelines or protocols for safety relating to special events. The codes, protocols, or guidelines may include the Life Safety Code and the Occupational Safety and Health Administration's laws and regulations and other relevant and reasonable crowd and employee safety guidelines, procedures, and protocols in use within the retail industry. The Safety Expert shall be given reasonable access to and consultation with Wal-Mart.
- (4) The Safety Expert and Experts will meet and confer as necessary. Counsel for the Parties shall not participate in such meetings without notice to, and consent of, the other Party.
- (5) For the first year during the term of this Agreement, the Parties will participate in monthly conferences by telephone with the Safety Expert on the last non-holiday business day of every month to discuss the status of planning for or review of the Yearly Event under the terms of this Agreement. Unless the Parties agree otherwise, for the eight (8) weeks prior to each Yearly Event during the term of this Agreement, the Safety

Expert may participate in weekly conferences with the Parties to provide updates as to the review, implementation, and execution of the Operations Plans (as defined in paragraph 6).

(6) **The Overall Crowd Management Plan.** As a result of this Agreement, Wal-Mart and the Experts have developed a Crowd Management Plan, dated May 6, 2009 (the "Plan"), which provides the general principles and specific crowd management strategies to be used in developing individualized crowd management plans ("Operations Plans") for each of the Subject Stores. The Plan includes a methodology for assigning each of the Subject Stores to a tier-based category based on several risk factors (the "Assignment Methodology"). The Parties and Safety Expert have reviewed, and approved, the contents of the Plan and the Assignment Methodology, and agree that the Operations Plans will derive from elements contained in the Plan and Assignment Methodology.

(7) **Operations Plans.** Based on the terms of the Plan, Wal-Mart shall prepare an Operations Plan for each of the Subject Stores. NCDCA and the Safety Expert will inspect the Operations Plans. In reviewing the Operations Plans, the Safety Expert will have reasonable access to other relevant documents related to the Operations Plans, such as floor plans, claims data for the Subject Store, and access to relevant Store Managers, store-level Asset Protection personnel, the store's Event Coordinator (as defined by the Plan), the Market Manager, and Market Asset Protection Manager. The Safety Expert shall have access to the Market Manager and Market Asset Protection Manager only if either has made changes to, or provided input that affects the content of, an Operations Plan. During review of the Operations Plans and their implementation, the Parties will defer to the experience and judgment of the Safety Expert concerning the existence of

unsafe conditions. The Safety Expert, however, will not request changes or modifications to a particular Operations Plan unless, in the exercise of the Safety Expert's good faith and reasonable judgment, the Operations Plan, taken as a whole, fails to address a foreseeable risk of physical injury, as defined in Section 10(9) of the New York Penal Law ("Physical Injury"), during the Yearly Event.¹ In identifying potential safety risks, the Safety Expert may rely on all available information. The Safety Expert will work in good faith with NCDA and Wal-Mart on the evaluation of the Operations Plans so that the Operations Plans are fully reviewed and approved at least four (4) weeks in advance of the Yearly Event. In the event the Safety Expert or NCDA have had an Operations Plan for at least four (4) weeks but have not approved the Operations Plan at least four (4) weeks in advance of the Yearly Event, any failure to implement the Operations Plan because of the added delay shall not be used by NCDA in paragraph 41 below concerning potential breach of this Agreement, unless the delay is attributable to Wal-Mart's failure to change the Operations Plan according to the Safety Expert's request as permitted under this paragraph.

(8) On-Site Observations.

a. **In General.** As set forth in paragraphs 8.b and 8.c below, the Safety Expert or his representatives (together with the Safety Expert, the "Observers") will have access during the Yearly Event to (i) public areas inside and outside the Subject Stores and (ii) certain non-public areas within the Subject Stores that are reasonably requested by the Observers and are directly relevant to

¹ The Parties agree that, in determining whether a risk of Physical Injury exists, the Safety Expert shall exclude injuries that, viewed objectively, would be de minimis.

crowd management, including, but not limited to, access to Subject Stores before they are open to the public, provided that:

1. The Observers make their presence known to the Store Manager or Subject Store's Yearly Event Coordinator;
2. The Observers will not supervise or interfere with store operations in any way; and
3. The Safety Expert will have only one Observer where possible and in no event more than two Observers in any Subject Store.

b. **Year One.** During the first Yearly Event immediately following the effective date of this Agreement, the Observers may be present at no more than 20% of the Subject Stores.

c. **Subsequent Years.** For all subsequent Yearly Events during the term of this Agreement, the Observers may be present at between 10% and 30% of the Subject Stores, in the discretion of the Safety Expert based on his conclusions and findings from the prior Yearly Event.

(9) **Yearly Review.**

a. **In General.** The following general provisions apply to the Yearly Review, as defined in this Agreement:

1. After each Yearly Event during the term of this Agreement, the Safety Expert will review Wal-Mart's performance under the Operations Plans (the "Yearly Review"), based on a combination of Self-Reports (as defined in paragraph 9.b.2.b) from Wal-Mart, observations by the Observers directly pursuant to paragraph 8

("On-Site Observations"), and review of a sampling of stores pursuant to paragraph 9.b.4 ("Sampling Review") (all of which are discussed below, and are collectively referred to herein as the "Yearly Review Components"), as well as information supplied by NCDA. Subject to guidelines set forth below, the Safety Expert may use various Yearly Review Components to acquire information about the execution of Operations Plans at as many as, but not more than, 50% of the Subject Stores for any Yearly Review.

2. In all matters concerning the Yearly Review, the Safety Expert shall meet and confer as necessary with, and provide meaningful input and information to, the Parties. The Parties may make requests concerning the scope of review and bring additional information to the attention of the Safety Expert and other Party. The Safety Expert shall provide an oral, joint summary report of its findings from the Yearly Review within 120 days after the Yearly Event.
3. All work by the Safety Expert shall be covered by the confidentiality provisions of this Agreement as stated in paragraphs 33-34 below.
4. The Safety Expert will provide in-person or telephonic status updates to the Parties at the critical intervals in the planning,

implementation, and execution of the Operations Plans and the Yearly Review.

b. Terms of the Yearly Review.

1. In General.

- a. The Safety Expert shall conduct a Yearly Review, consisting of the Yearly Review Components, regarding the effectiveness of the Plan and the Operations Plans for the Yearly Event at the Subject Stores for any Yearly Event occurring during the term of this Agreement.
- b. For any Yearly Review, in any year during the term of this Agreement, the Safety Expert may request information, subject to the limitations below, from as many as, but not more than, 50% of the Subject Stores. As noted above, the Yearly Review Components consist of Self Reports (as defined in paragraph 9.b.2.b), On-Site Observation, and Sampling Review.
- c. In the first Yearly Review under this Agreement, if the Observers perform On Site Observation at 20% of the Subject Stores, the Safety Expert may have access to the information through Self Reports and Sampling Review for as many as 30% of the Subject Stores.
- d. In subsequent Yearly Reviews under this Agreement, the Safety Expert has sole discretion concerning which Yearly Review Components to use to gather information during the

Yearly Review under the provisions herein, so long as gathering information via the Yearly Review Components is requested for 50% or less of the Subject Stores in the aggregate.

2. Self Reports by Wal-Mart.

- a. Within five (5) days after the Yearly Event, Wal-Mart will provide the Safety Expert with a list (the "Incident List") containing the location and store number of any of the Subject Stores that experienced any crowd-related Physical Injury, crowd-related property damage, or crowd-related police response ("Incidents").
- b. Within forty-five (45) days after the Yearly Event, Wal-Mart will provide to NCDA and the Safety Expert self-reports (the "Self-Reports") completed by the Store Managers regarding Incidents from the Yearly Event for all of the Subject Stores on the Incident List (the "Self-Report").
- c. For any Subject Store on the Incident List, Wal-Mart will preserve relevant surveillance videos (non-forensically captured by Wal-Mart employees).
- d. Following the Self-Reports, the Safety Expert shall have the right to (i) access surveillance videos (non-forensically captured by Wal-Mart employees) that show the areas which are related to the Incidents and that are from stores that

provided Self-Reports, (ii) claims data from the stores that provided Self-Reports, and (iii) access by telephone to the Store Manager, store-level Asset Protection personnel, Event Coordinator, and all associates whom the Safety Expert believes to possess relevant information regarding any Incidents (hereinafter "Relevant Employees"). If any Incidents reflected on the Incident List involve serious physical injury, as defined in New York Penal Law § 10(10), or death to any person as a result of the Yearly Event, the Safety Expert will have in-person access to Relevant Employees.

3. On-Site Observation Review.

- a. For those stores where Observers are present for the Yearly Event in any year, the information from those On-Site Observations will be assessed during the Yearly Review, and the Safety Expert shall not request any further information concerning Incidents or compliance with the store's Operations Plan, unless an Observer observes a deviation from the store's Operations Plan that places someone at risk of Physical Injury.
- b. In the event an Observer believes he has observed a deviation from a store's Operations Plan that placed someone at risk of Physical Injury, the Safety Expert will notify NCDA and Wal-Mart concerning the Observer's observation within seven (7) days after the Yearly Event and then meet and confer with

NCDA and Wal-Mart regarding whether the observation was a significant and material deviation from the store's Operations Plan that placed someone at risk of Physical Injury. The Safety Expert will in good faith consider the views of NCDA and Wal-Mart concerning the alleged deviation.

- c. If the Safety Expert concludes that a significant and material deviation from the Operations Plan occurred, the Safety Expert shall have the right to (i) access surveillance videos (non-forensically captured by Wal-Mart employees) relevant to the deviation, (ii) claims data from the relevant store, and (iii) access by telephone to the associates who are relevant to the deviation.

4. Sampling Review.

- a. Subject to the limitations in paragraph 9.b.1 above, including its subparagraphs, for some number of the Subject Stores where there were no Self-Reports and no On-Site Observations, the Safety Expert shall have the right to access surveillance videos (non-forensically captured by Wal-Mart employees) relevant to the outside entrance and any "Hot Item" sale and access by telephone to the Store Manager and Event Coordinator.

- b. The Safety Expert will select Subject Stores for Sampling Review within five (5) days after receiving the Incident List

(the Incident List will identify the Subject Stores that will provide Self Reports pursuant to paragraph 9.b.2 and are therefore excluded from the pool of Subject Stores eligible for Sampling Review). The Safety Expert will provide Wal-Mart with immediate notice of which surveillance videos to preserve. Wal-Mart will have no obligation under this agreement to preserve surveillance videos (other than for stores subject to a Self-Report) without a timely request from the Safety Expert.

5. **Evidence of Incidents.** For all Subject Stores where there were no Self-Reports but credible evidence² of any Incidents, the Safety Expert shall have access to the following data: (i) surveillance videos (non-forensically captured by Wal-Mart employees) relevant to the outside entrance, any "Hot Item" sale, and the area relevant to any Incidents, (ii) claims data from the store, and (iii) access by telephone to Relevant Employees in the relevant Subject Store. If the Safety Expert elects to demand non-forensically captured surveillance videos during the Yearly Review based on credible evidence of any Incidents, the Safety Expert shall do so within seven (7) days of the Yearly Event. To the extent the Safety Expert becomes aware of credible evidence of any Incidents within the timeframe of that Yearly Review, the Safety Expert may

² In determining whether credible evidence exists, NCDA and the Safety Expert shall not rely on web-posted video without providing Wal-Mart an opportunity to authenticate such web-posted video.

request non-forensically captured surveillance videos from such Subject Store, but the Parties acknowledge and understand that such surveillance videos may no longer be available and that such unavailability shall not be the basis of any breach alleged under paragraph 41.

6. If, after the term of this Agreement, the Safety Expert determines that (a) several significant and material lapses in execution of the Operations Plans have occurred during the term of the Agreement, and (b) those lapses placed Wal-Mart customers or employees at risk of Physical Injury, the Safety Expert has discretion to determine that the provisions of paragraph 9 apply after the Yearly Event in 2012 until March 31, 2013.

RECOVERY FUND

(10) Wal-Mart will fund certain compensation for bona fide claimants who suffered injuries and/or losses as a result of the events of Blitz Day 2008 (hereinafter "Claimants").³ This Agreement provides an alternative to the significant risk, expense, and delay inherent in civil litigation by offering Claimants an opportunity to receive swift, inexpensive, and predictable resolution of un-reimbursed actual "out-of-pocket" losses as defined by New York Penal Law § 60.27 and applicable New York State case law (hereinafter "Remuneration"),⁴ as well as resolution of civil claims for injuries and other non-"out-of-pocket" damages (hereinafter "Compensation").

³ For the purposes of this Agreement, "Claimant" does not include any Wal-Mart employees or any public servant on duty on November 28, 2008.

⁴ For example, "out-of-pocket losses" shall mean non-reimbursed expenditures and economic losses actually incurred as a result of the events of Blitz Day 2008, including medical expenses, lost wages and

(11) As described in detail below, the payment of Remuneration and/or Compensation to any Claimant under this Agreement will be a bifurcated process. Remuneration payments will be determined and awarded to Claimants by NCDA with monies provided by Wal-Mart pursuant to paragraph 14 below. Compensation payments will be determined and awarded to Claimants by Wal-Mart based on a capped-reserve described in paragraph 15 below. Wal-Mart will provide all of the funds for Remuneration and Compensation under the terms of this Agreement to bona fide Claimants related to the events of Blitz Day 2008 without admitting fault or liability. However, prior to being awarded any Remuneration and/or Compensation, all Claimants must sign a release from civil liability for Wal-Mart ("opt-in"). If a Claimant chooses not to opt-in, Claimant may pursue claims for Remuneration and/or Compensation civilly.

(12) **Requirement of General Release.** No Claimant will be asked to sign a general release until being given notice of the dollar amount assigned by NCDA to the Claimant's Remuneration and/or the dollar amount assigned by Wal-Mart to the Claimant's Compensation. No monies will be paid by NCDA for Remuneration or by Wal-Mart for Compensation unless and until the Claimant executes a general release of any and all claims, whether existing, known, or potential, against Wal-Mart, all of its associates, affiliates, shareholders, directors, employees, agents, and any third-parties related in any way to the events of Blitz Day 2008 (the "General Release"). The General Release shall also include an agreement that any payment of Remuneration and/or Compensation shall not be deemed to constitute an admission of liability or evidence that Wal-Mart knew, or should have known, of the existence of conditions which led to or

costs of repair or replacement of damaged property. Out-of-pocket losses shall in no event include any attorneys' fees, legal costs and/or legal expenses.

were factors in the events of Blitz Day 2008, or a concession or admission by Wal-Mart that any of the above-mentioned Claimants have valid causes of action arising from Blitz Day 2008.

(13) **General Procedures for Claimants.** The following is the process for the evaluation and/or payment of claims for Remuneration, Compensation, or both (hereinafter "Claims")⁵ under the terms of this Agreement:

- a. NCDA will provide to Wal-Mart the name and contact information of the NCDA representative who will handle the Remuneration process (the "Claims Representative") for potential Claimants to contact;
- b. The Claims Representative's name and contact information will be included in the advertisements described in paragraph 14.b below;
- c. For each Claimant who contacts the Claims Representative, the Claims Representative will be responsible for maintaining records and documentation, including requiring Claimants to provide evidence to support Claims for Remuneration and/or Compensation, including a sworn affidavit from each Claimant attesting to and verifying the following: (i) that the Claimant was present at Wal-Mart's Valley Stream store on Blitz Day 2008 between 2:30 a.m. and 6:00 a.m.; (ii) the nature and extent of any out-of-pocket losses suffered as a result of events at Blitz Day 2008; (iii) the nature and extent of any injury suffered as a result of events at

⁵ The term "Claims" is used in paragraph 14 of this Agreement to refer to Claims that include a request for Remuneration. The term "Claims" is used in paragraph 15 of this Agreement to refer to Claims that include a request for Compensation.

Blitz Day 2008; and (iv) that the facts set forth by Claimant and all proof submitted in support of the Claim are true and accurate (the "Affidavit");⁶

- d. For any Claimant making a Claim for Compensation, the Claims Representative will provide relevant information, including a copy of Claimant's Affidavit, to a designated Wal-Mart representative;
- e. If NCDA determines that any Claimant has filed insufficient or fraudulent Claims, such Claims shall be denied. If NCDA determines that a Claimant has filed sufficient evidence in support of Claimant's Claim, NCDA will determine any Remuneration award and Wal-Mart will separately determine any Compensation award;
- f. NCDA will notify each Claimant of the determined Remuneration award and Wal-Mart will notify each Claimant of the determined Compensation award; and
- g. As noted above, every Claimant will provide a General Release to Wal-Mart before any Remuneration and/or Compensation payments are made.

(14) Remuneration awards and payments will be determined and distributed as follows:

- a. Wal-Mart will fund \$100,000 for Remuneration which will be distributed by NCDA among Claimants who were present at Blitz Day 2008 between the hours of 2:30 a.m. and 6:00 a.m. and who suffered out-of-pocket losses, within the meaning of New York Penal Law § 60.27 and applicable New York State case law, as a result of the crowd-related events which occurred at such time. The

⁶ The Parties understand and agree that Wal-Mart will collect and retain all additional information and evidence from any Claimant who files a Claim for Compensation under the terms of this Agreement.

money will be provided to NCDA by Wal-Mart on the effective date of this Agreement. NCDA will maintain the money in an interest-bearing escrow account pending the disbursement procedures described below.

b. NCDA will use several different outreach vehicles to publicize the Fund to Blitz Day 2008 Claimants, including:

- **Helpline:** NCDA will establish a helpline to assist potential Claimants that will be activated by the effective date of this Agreement;
- **Claims Assistance Site:** NCDA will provide assistance during specific office hours on weekdays, weeknights, and weekends for the duration of the filing period;
- **Internet:** NCDA will establish a link on its website on which the requisite filing documents will be posted as well as the other relevant information to support Claims submission and processing. The website will include an email link for individuals to email questions or comments to NCDA regarding Claims;
- **Notice:** Notice of the availability of Remuneration and/or Compensation will be published in Newsday, the Daily News, and El Diario/La Prensa for five (5) consecutive days from the effective date of this Agreement as well as for three (3) consecutive weeks in the weekly papers in Valley Stream and surrounding neighborhoods including Elmont, Inwood, Springfield Gardens, St. Albans, and Laurelton. Cost of publication is to be paid for by Wal-Mart.

c. NCDA will conduct an examination of each Claim, including a review of all documentation available, and make a determination as to the validity and extent of the Claim. All potential Claimants will be given 45 days from the date on which notice of the availability of Remuneration and/or Compensation is given pursuant to paragraph 14.b to file a Claim with NCDA. Any Claim not timely filed will be barred. Each Claim will be evaluated by NCDA, and no Claim will be approved for payment unless credible proof, including the Affidavit, has been provided by the Claimant or Claimant's representative demonstrating (i) that Claimant was present at Wal-Mart's Valley Stream store on Blitz Day 2008 between 2:30 a.m. and 6:00 a.m., and (ii) that Claimant suffered out-of-pocket

losses that were directly caused by the crowd-related events that took place at Wal-Mart's Valley Stream store on Blitz Day 2008.

d. NCDA will notify any Claimant whose Claim for Remuneration under this Agreement has been rejected. Such ineligible Remuneration Claims include (i) those for which insufficient proof is submitted; (ii) those deemed by NCDA not to have been proximately caused by the crowd-related events; (iii) those in which Claimant would not grant a General Release; (iv) those that do not fall within the meaning of "out-of-pocket losses" as that term is defined in New York Penal Law § 60.27 and applicable New York State case law; or (v) Claims not timely filed as required by paragraph 14.c above.

e. Upon determining the validity and extent of a Claim, and prior to distributing any money to a Claimant, NCDA will provide Wal-Mart with a schedule of all approved Claims for Remuneration, containing the name and address of each Claimant, the amount which NCDA proposes to pay to Claimant, and the nature of the loss and basis for the Claim. Wal-Mart will have 30 days from the receipt of the schedule to examine any proposed payout and to present any materials to NCDA that disprove or mitigate a Claim, which NCDA may accept at its discretion. As part of any Claim examination, NCDA will give to Wal-Mart an opportunity to inspect any proof which was used by NCDA to verify the Claim. Wal-Mart understands that NCDA may redact or limit the proof to only the portion thereof that NCDA determined to have supported the award.

f. NCDA will be responsible for disbursing Remuneration money to each of such Claimants in the full amount awarded. Any disbursement of Remuneration

by NCDA will be made in accordance with the conditions set forth in paragraph 12. Should the total of all Remuneration Claims which are approved exceed \$100,000, Remuneration will be made to the Claimants in pro rata shares. Should the total of all Claims which are approved be less than \$100,000, the remainder of the \$100,000 will be returned to Wal-Mart.

g. A determination by NCDA that a Claim is without merit shall not prejudice the ability of any Claimant or other individual who has a Claim to pursue any and all civil remedies that may be available to him or her under the law.

h. Nothing in this Agreement shall be deemed to constitute an admission of guilt or evidence that Wal-Mart knew, or should have known, of the existence of conditions which led to or were factors in the events of Blitz Day 2008 or a concession that any of the above-mentioned Claimants have valid causes of action against Wal-Mart arising out of the events.

(15) Compensation awards and payments will be determined and distributed as follows:

a. Pursuant to this Agreement, Wal-Mart shall administer all Claims for Compensation. Other than enforcing the terms of this Agreement, NCDA has no role in Wal-Mart's distribution of Compensation money.

b. Wal-Mart shall administer all Claims for Compensation as follows:

1. Wal-Mart will pay Compensation Claims based on a capped-reserve of \$300,000. Nothing in this Agreement requires Wal-Mart to provide any Compensation to any Claimants other than through the

administration of this single capped-reserve of \$300,000. If Claimant decides to seek Compensation, the Claimant must execute the General Release to be eligible for payment of any Compensation.

2. NCDA will notify Wal-Mart of any bona fide Claimants who assert a Claim for Compensation, regardless of whether or not their Claims also include a request for Remuneration. Except for notification of such Claimants, NCDA has no role whatsoever in the process of valuing or distributing Compensation.

3. After receipt of the Claimant's information, Wal-Mart will have sole discretion in determining the validity and valuation of the Claim for Compensation provided by Claimant. After Wal-Mart determines the award of Compensation for any bona fide Claimant, it will advise the Claimant of its determination.

(16) **Inapplicable Claimant.** Any claims by family members of Jdimytai Damour and/or Jdimytai Damour's estate are not included as part of the Remuneration and Compensation process set forth herein.

(17) **Confidentiality of Remuneration and Compensation Process.** The Remuneration and Compensation process, and all documents and information submitted or collected, shall be treated as confidential and only for settlement purposes, and the documents are inadmissible for any other purpose in any court proceeding except to impeach the credibility of any Claimant who gives sworn testimony inconsistent with any information or document previously submitted by the Claimant in connection with the Claim.

COMMUNITY GRANT

(18) Wal-Mart will fund a Nassau County Community Grant (the "Grant") for \$1,500,000 to help build strong, healthy neighborhoods by supporting innovative programs designed to serve local community needs through local grants that address pressing social, economic, and cultural needs of communities in Nassau County. Funded programs will provide opportunities to youth in career development, employment, and social/academic skills that serve to reduce risk behaviors.

(19) Upon funding of the \$1,500,000, Wal-Mart shall have no further responsibility with respect to the allocation or use of such funds.

(20) NCDA has determined that the Grant will be disbursed as follows:

a. \$300,000 will go to the United Way Long Island, specifically earmarked for Youth Build Hempstead Project/Family and Children's Association. This sum should be divided into two tranches and distributed over two (2) years as follows: \$150,000 dollars in 2009 and \$150,000 dollars in 2010.

b. The remaining \$1,200,000 will go to the Nassau County Youth Board to be distributed over three years as follows: \$500,000 in 2009, \$500,000 in 2010 and \$200,000 in 2011. The Nassau County Youth Board will distribute these funds to providers based on a series of funding criteria including service needs and program effectiveness. A contract entered into by the Youth Board to expend Grant funds requires Legislative approval in accordance with the rules that govern that specific type of contract.

- c. The Grant money given to the Nassau County Youth Board will be deposited into the General Fund of the County, and the Legislature will be asked to appropriate those funds to the desired programs.
- d. The Nassau County Youth Board portion of the Grant is subject to audit by the Nassau County Comptroller's Office.

STUDENT JOB PROGRAM

(21) Wal-Mart will provide employment opportunities in its five (5) Nassau County stores to eligible high school students. These opportunities shall provide students with work experience in Wal-Mart stores while emphasizing academic achievement, career and personal development, as well as providing financial compensation to the students. The program will be in effect for three years, beginning September 2009 and ending August 31, 2012, providing 50 positions each year ("Annual Jobs") to eligible Nassau County high school students (hereinafter "the Program").

(22) For the purposes of this Agreement, an Annual Job consists of part-time employment during the school-year months ("School Segment") and full-time employment for the summer months ("Summer Segment"). In its discretion, Wal-Mart may provide each candidate with an Annual Job, or, for each Annual Job, may allow one candidate to take the School Segment and another candidate to take the Summer Segment.

(23) Wal-Mart will allocate the Annual Jobs as follows: 10 jobs in each Wal-Mart store located in Nassau County during the Program.

(24) No student shall participate for more than a single year in the Program. Participation in this Program does not obligate Wal-Mart in any way to offer a Program participant employment once the participant has completed the Program.

(25) NCDA will identify a pool of 100 eligible students each year, of which 20 students shall be designated for each Nassau County store based on geographical convenience and feasibility. Wal-Mart shall then have the opportunity to interview each candidate and select candidates for the Program. Should Wal-Mart wish, after the interviews, to reject an otherwise-eligible student, Wal-Mart will provide NCDA with a reason for such rejection. Unless NCDA is given a valid reason why the candidate is not acceptable, any non-selected candidate will remain as an alternate for participation in the Program. In the event that a student who was selected for the Program fails to maintain any of the criteria listed below, that student shall be removed from the Program and replaced by an alternate.

(26) Wal-Mart shall have sole discretion concerning continued employment of any student, and may continue or terminate each student's job under the same terms, conditions, and standards as its other at-will employees. In the event Wal-Mart terminates any student from the Program, the student shall be replaced by an alternate.

(27) To select the pool of students, NCDA intends to use the following criteria, which it selected based on its goals for the Program:

- a. **High School Enrollment.** Students must be enrolled full-time in a Nassau County public high school or any other equivalent school in Nassau County chartered by the State of New York or one of the school districts in Nassau County and remain in such school for the duration of their participation in the

Program. Students may be selected from any such school, provided that the school agrees to notify NCDA in the event that the student is expelled or otherwise withdraws from the school. Students from each of the school districts where the five (5) Wal-Mart stores are located will be given a priority to participate in the Program over students from other Nassau County school districts.

- b. **Satisfactory Academic Standing.** Students must have a passing average for the prior marking period and maintain a passing average for the duration of their participation in the Program. Students shall be responsible for providing NCDA an official report card at the end of each final marking period.
- c. **Minimum School Attendance.** Students must have an attendance record of no less than 80% of the school days in the prior semester, and maintain such attendance for the duration of their participation in the Program and provide proof of attendance to NCDA.
- d. **Valid Work Papers.** Students must have valid work papers issued by New York State and be at least 16 years of age.
- e. **Permission.** Students under 18 years of age must have written permission from a parent or guardian.
- f. **Medical Clearance.** Students must have medical clearance.
- g. **No Criminal Record.** Students must have no prior criminal record.
- h. **School Recommendation.** Students must submit a favorable recommendation from a guidance counselor, principal, or other school official who has sufficient personal experience with the student and knowledge of the student's character.

- i. **Residence.** Students must be residents of Nassau County and must maintain such residence for the duration of their participation in the Program.
 - j. **Transportation.** Students must be able to obtain their own transportation to and from Wal-Mart during scheduled work hours.
 - k. **Work Performance and Conduct.** While participating in the Program, students must maintain satisfactory work performance and proper work conduct in accordance with what is expected by Wal-Mart of its employees engaged in similar job duties.
- (28) Wal-Mart will provide NCDA quarterly reports detailing the names of the students, job descriptions, and the stores in which they are employed.

OTHER PROVISIONS OF THIS AGREEMENT

- (29) **Non-prosecution.** NCDA shall suspend its on-going criminal investigation of the events of Blitz Day 2008 and shall not bring any action against, or prosecute, Wal-Mart, its officers, directors, agents, and/or employees in connection with the events of Blitz Day 2008. This Agreement does not relate to or cover any conduct other than those related to Blitz Day 2008.
- (30) As a condition of this Agreement, Wal-Mart has agreed that the Statute of Limitations for commencing a criminal prosecution against Wal-Mart, its officers, directors, agents, and/or employees for any misdemeanor offenses in connection with the events related to Blitz Day 2008 at Valley Stream shall be extended for two years beyond the period provided by New York State Criminal Procedure Law § 30.10. The Parties will execute simultaneously with this Agreement a separate tolling agreement (the "Tolling Agreement") to evidence this extension.

(34) The Plan, Operations Plans, and all reports, memoranda, correspondence, work papers, and other documents generated in relation to the implementation, modification, enhancement, and compliance with the Plan and Operations Plans (collectively, the "Implementing Documents") will be created and shared under a common-interest privilege and shall be treated by the Parties as privileged, confidential, and proprietary to the extent permitted by law. If any subpoena is issued in any pending or future litigation for any or all of the Implementing Documents, including but not limited to all underlying analyses, findings, and communication by any of, or between, the Parties, the Expert, or the Safety Expert, the entity to whom the subpoena is issued will immediately notify the Parties if legally permissible. Either of the Parties may move to quash the subpoena. Nothing in this paragraph is deemed to apply to any subpoena issued by a government entity or grand jury. The Parties will not seek to use or introduce any information or documents provided by any Party, the Expert, or the Safety Expert in any subsequent litigation or proceeding.

(35) Notwithstanding the above-mentioned confidentiality, this Agreement shall be disclosed to the public.

BREACH

(36) The Parties will enforce this Agreement only in good faith and will not declare or seek a judicial declaration that the Agreement is void except as provided in the following paragraphs.

(37) Should NCDA believe Wal-Mart has committed a willful and material breach of any provision of the Agreement, NCDA will provide written notice of same to Wal-Mart. Wal-Mart shall have thirty (30) days to make a presentation to NCDA that (a) no breach

(31) **No Admission.** By entering into this Agreement, Wal-Mart does not admit any criminal culpability with respect to any criminal charges that could be filed as a result of Blitz Day 2008. Nothing in this Agreement constitutes an admission or evidence that Wal-Mart knew or should have known prior to November 28, 2008, of the existence of hazards related to crowd movement or life safety matters related to any of its facilities. In addition, nothing in this Agreement constitutes an admission or evidence regarding the feasibility of any efforts or suggestions with regard to reducing or eliminating hazards associated with crowds.

(32) **Term.** The promises and obligations under this Agreement shall terminate on December 31, 2011, except that (a) the promises and obligations of paragraph 9, Yearly Review, shall continue until the Yearly Review for the Yearly Event in 2011 is completed, but in no event later than March 31, 2012; however, at the good faith election of the Safety Expert, under the provision of paragraph 9.b.6 above, paragraph 9 of this Agreement may continue until March 31, 2013; and (b) the promises and obligations of paragraphs 21 through 28, Student Job Program, shall continue through and including August 31, 2012.

CONFIDENTIALITY OF DOCUMENTATION

(33) In order to implement the provisions of this Agreement, the Parties, at various times during the term of this Agreement, may share information and documents that are privileged under law and confidential between each other. By sharing such information or documents, no Party intends to, and does not, waive any applicable privilege and such sharing of information or documents is done under an express reservation of right to assert any applicable privilege with respect to third parties.

has occurred or (b) to the extent applicable, (i) the breach was cured, or (ii) the breach was not willful or material. In making this presentation, Wal-Mart will be truthful and complete in explaining the nature and circumstances of any alleged breach.

(38) If an alleged breach concerns Wal-Mart's contractual agreement in paragraph 37 above to be truthful and complete in any presentation made to NCDA, upon a finding that Wal-Mart's breach in this regard was intentional and deliberate, NCDA may file any criminal charges against Wal-Mart it deems appropriate notwithstanding the promise of non-prosecution stated in this Agreement.

(39) If Wal-Mart fails to make a presentation to NCDA within the 30-day period set forth in paragraph 37 after receiving written notice of an alleged breach, it shall be conclusively presumed that Wal-Mart is in breach of this Agreement, and NCDA can resume its criminal investigation of Blitz Day 2008 and file any related criminal charges NCDA deems appropriate notwithstanding the promise of non-prosecution in this Agreement.

(40) If the alleged breach concerns any of Wal-Mart's contractual agreements under this Agreement other than those in paragraphs 1 through 9 (which are addressed in paragraph 41 below), and NCDA does not concur with Wal-Mart's presentation as to any alleged breach, then NCDA may file an action in New York State Supreme Court to claim a breach of the Agreement and to enforce the terms of this Agreement. The Parties shall consent to the briefing and hearing of such motion on an emergency and expedited basis. If a Court declares Wal-Mart to be in material and willful breach of this Agreement, Wal-Mart shall have ten (10) days from the Court's order to cure the breach. If Wal-Mart fails to cure the breach within ten (10) days from the Court's order, NCDA

may declare this Agreement null and void. Upon declaring the Agreement null and void, NCDA may file any criminal charges against Wal-Mart that NCDA deems appropriate notwithstanding the promise of non-prosecution stated in this Agreement.

(41) If the alleged breach concerns any of Wal-Mart's contractual agreements under paragraphs 1 through 9 of this Agreement and NCDA does not concur with Wal-Mart's presentation as to any alleged breach, NCDA may declare this Agreement null and void and may seek to present criminal charges against Wal-Mart. However, in exercising that discretion, NCDA will not declare the Agreement null and void unless (i) the breach was serious in nature, (ii) Wal-Mart's market-level managers were aware of the condition constituting the breach and failed to act appropriately to cure it in a timely manner, and (iii) Wal-Mart's customers or employees were placed at risk of Physical Injury as a result of the breach. Otherwise, NCDA will follow the procedures outlined in paragraph 40 above to remediate other, non-serious breaches of paragraphs 1 through 9 of this Agreement. NCDA shall exercise its discretion under this paragraph 41 in good faith and shall consult with the Safety Expert concerning the existence of the conditions set forth herein.

(42) **Payment for Expenses Associated With This Agreement.** Wal-Mart shall be exclusively responsible for prompt payment of the reasonable and necessary costs associated with the implementation of the provisions of paragraphs 1 through 9 ("Crowd Management Plan Review"), including the expenses and fees for the Experts and the Safety Expert engaged hereunder, as well as the notice described in paragraph 14.b herein ("Recovery Fund") and the costs associated with the Program described in paragraphs 21 through 28 ("Student Job Program").

(43) **Parties.** This Agreement is binding on NCDA and Wal-Mart but the Agreement does not bind any federal agencies or any other state or local authorities, although NCDA will bring the cooperation of Wal-Mart and its compliance with its other obligations under this Agreement to the attention of federal, state, or local prosecution offices or regulatory agencies, if requested by Wal-Mart or its attorneys.

(44) **No Third-Party Beneficiaries.** The Agreement carries no explicit or implicit rights or benefits in favor of any third party and is not intended to be enforceable other than by the Parties.

(45) **Scope.** This Agreement does not relate to or cover any conduct by Wal-Mart other than Wal-Mart's actions as they relate to the events of Blitz Day 2008.

(46) **Merger/Acquisition.** If Wal-Mart sells or merges all or substantially all of its New York State operations (stores) or assets as they exist as of the date of this Agreement to a single purchaser or group of affiliated purchasers during the term of this Agreement, it shall include in any contract for sale or merger a provision binding the purchaser/successor to the obligations described in this Agreement. Any such provision in a contract of sale or merger shall not alter the obligations of Wal-Mart or any successor entity contained in this Agreement.

(47) **New Stores.** If Wal-Mart opens new stores in New York State during the life of this Agreement, these new stores will be subject to the terms and conditions of this Agreement.

(48) **Replacement of the Safety Expert.** If the Safety Expert resigns or becomes unable to serve the balance of his term, a successor shall be selected by the Parties within

forty-five (45) calendar days after the notice. All provisions in this Agreement apply to any successor Safety Expert.

(49) **Continuity of the Safety Expert.** If the Safety Expert changes employment during the life of the Agreement and is still in a position to serve the balance of his term, the responsibilities of this Agreement will stay with the Safety Expert and not with his prior outside employer.

(50) **Notices.** Any notice provided for in this Agreement shall be valid if delivered to the person listed below (unless a Party designates another notice recipient in writing):

For Wal-Mart:

David Blackorby, Esq.
General Counsel
Wal-Mart Stores, Inc. GSAT
702 Southwest 8th Street
Bentonville, AR 72716-0185
Fax: (479) 277-5991

Jim Walden, Esq.
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166
Fax: (212) 351-5300

For NCDA:

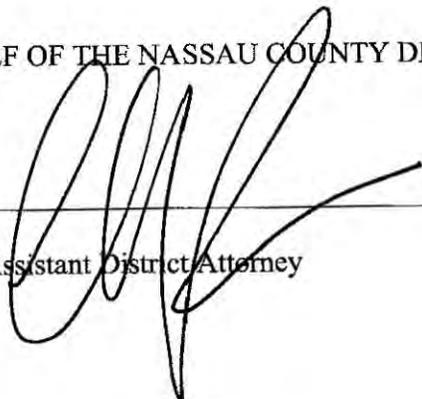
Meg Reiss, Esq.
Executive Assistant District Attorney
Investigations Division
Nassau County District Attorney's Office
262 Old Country Road
Mineola, NY 11501
Fax: (516) 571-2266

(51) **Entirety of Agreement.** This Agreement and the Tolling Agreement constitute the entire agreement between NCDA and Wal-Mart. There are no promises, agreements, or conditions, express or implied, other than those set forth in this Agreement. No modification, deletion, or addition to this Agreement will be valid or binding on any Party unless put into writing and signed by all Parties.

(52) **Survival.** Paragraphs 30, 31, 33, and 34 shall survive the termination or expiration of this Agreement even if a Party is declared in breach of this Agreement.

(53) **Effective Date.** This Agreement will become effective as of May 6, 2009.

ON BEHALF OF THE NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE



Meg Reiss
Executive Assistant District Attorney

5-6-09

Date 

Margaret M Leniston
Notary Public, State of New York
No. 01LE6002121
Commission Expires 2-2-2010

Margaret M Leniston

 Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

washshrcommission

From: Rathbun, Daniel Patrick [DRathbun@gibsondunn.com] **Sent:** Mon 6/20/2011 4:23 PM
To: washshrcommission
Cc: Darling, Jr., Ray H.; gottlieb.ronald@dol.gov; phillips.heather@dol.gov; james.charles@dol.gov; Willis Goldsmith (wgoldsmith@jonesday.com); Jacqueline Holmes (jholmes@JonesDay.com); Fellner, Baruch A.; Schwartz, Jason C.; Martin, Scott P.; Rathbun, Daniel Patrick
Subject: OSHRC Docket No. 09-1013: Exhibit B to Filing by Respondent Wal-Mart Stores, Inc.
Attachments:  [09-1013 Respondent's Exhibit B to Respondent's Opening Brief.pdf\(4MB\)](#)

Attached please find Exhibit B to the Opening Brief for Respondent in the above-captioned matter.

Daniel P. Rathbun

GIBSON DUNN

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