UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. KING, individually and on behalf of others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware corporation; the Wal-Mart Retirement Plans Committee; and JOHN/JANE DOES 1-15,

Defendants.

Civil Action No. ______________

CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, Robert J. King, individually and on behalf of all those similarly situated, by and through his attorneys, hereby alleges as follows:

I. NATURE OF ACTION

1. This is a class action brought on behalf of the Wal-Mart Profit Sharing and 401(k) Plan (the "Plan") pursuant to §§ 502 (a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(2) and (a)(3), against the fiduciaries of the Plan, a defined contribution 401(k) retirement plan sponsored by Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company").

2. Plaintiff's claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interests of the Plan's participants and beneficiaries, as well as Defendants' failure to exercise all the required skill, care, prudence and diligence in

administering the Plan and the Plan's assets during the period February 1, 1997 to the present (the "Class Period"). Specifically, Plaintiff alleges that Defendants participated in a conspiracy, or at the very least failed to take any corrective action, concerning Wal-Mart's miscalculation and underpayment of retirement benefits to those hourly employees of Wal-Mart who participated in the Plan throughout the Class Period.

3. This action, brought on behalf of the Plan, seeks to recover tens or hundreds of millions of dollars of retirement savings that should have been, but were not, paid to the Plan as a result of Wal-Mart's illegal underpayment and suppression of employee wages.

4. As more fully explained below, the Plan provides that Wal-Mart contributes to the Plan each year a percentage of the annual "regular salary or wages" of Wal-Mart's employees. Although Wal-Mart publicly proclaimed that it was contributing a specified percentage of employee wages to the Plan each year, in reality Wal-Mart underpaid its contributions to the Plan by wrongfully manipulating the underlying employee wages on which Wal-Mart based Plan contributions. Wal-Mart did so through a variety of illicit practices, described below. By fraudulently lowering the total amount of wages Wal-Mart employees received, the Company, with the other Defendants' complicity, also fraudulently reduced the amount of retirement benefits hourly workers received.

5. Wal-Mart willfully and intentionally conspired to unlawfully lower the wages of its hourly employees by systematically failing to pay them for all of the time they actually worked. Specifically, Wal-Mart deleted hundreds of thousands of hours of time worked from employee payroll records -- a practice known in the industry as "time-shaving" -- and required hourly employees to work hours "off the clock" that were not recorded in Company payroll

records. Wal-Mart used a variety of illicit practices to pay its workers less than it was required to pay them, including:

- deleting overtime hours that employees worked in excess of forty hours;
- altering employee records to make it appear as if the employees' workday ended one minute after their meal period concluded, effectively denying employees their pay for the three or four hours of work they performed after the meal period;
- deleting employee punches so that employees would not be paid for an entire day or afternoon of work;
- altering employee time records to make it appear as if employees took meal periods when in fact they did not, resulting in unauthorized deductions from employee paychecks; and
- failing to pay employees for all reported time.

6. Not only did such illicit practices improperly suppress Wal-Mart employees' wages, they also improperly reduced hourly workers' retirement savings. This occurred because Wal-Mart's illegal suppression of employees' wages reduced the "regular salary or wages" on which Wal-Mart calculated its Plan contributions. This action seeks relief for the Plan against Defendants for their breaches of ERISA fiduciary duties in allowing Wal-Mart to underpay its promised contributions to the Plan.

7. This action seeks relief from Defendants, as fiduciaries of the Plan, to make the Plan whole for the losses suffered as a result of Defendants' failure to discharge their fiduciary obligations. Because the violations alleged in this Complaint caused the Plan (and not just individual participants) to suffer losses, and because ERISA authorizes a Plan participant to sue for plan-wide relief for breaches of fiduciary duty, Plaintiff brings this action on behalf of herself and on behalf of all Plan participants and beneficiaries during the Class Period to recover

losses to the Plan pursuant to ERISA § 409, 29 U.S.C. § 1109, as well as for other relief for the Plan.

8. This action is brought on behalf of the Plan and seeks to recover losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiff seeks other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, equitable tracing, and other monetary relief.

9. In Count I, Plaintiff alleges that Defendants breached their fiduciary duties of prudence and loyalty to the Plan's participants in violation of ERISA by failing to act solely in the interests and for the exclusive purpose of Plan participants. In Count II, Plaintiff alleges that Defendants breached their fiduciary duties by failing to disclose important information to participants and beneficiaries of the Plan. Count III alleges that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, and complete and accurate communication.

10. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiff to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiff brings this action as a class action under Fed. R. Civ. P. 23 on behalf of all participants and beneficiaries of the Plan.

11. In addition, because Plainffs' claims are based, in part, on documents solely in Defendants' possession, certain of Plaintiffs' allegations are by necessity upon information and belief. At such time as Plaintiff has had the opportunity to conduct discovery, Plaintiff will, to

the extent necessary and appropriate, amend this Complaint, or, if required, seek leave to amend to add such other additional facts as are discovered that further support Plaintiff's claims.

II. JURISDICTION AND VENUE

12. This is a civil enforcement action for breach of fiduciary duty brought pursuant to ERISA § 502(a), 29 U.S.C. 1132(a). This Court has original, exclusive subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

13. ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of Defendants are residents of the United States, and the Court therefore has personal jurisdiction over them. This Court also has personal jurisdiction over Defendants pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure because Defendants are each subject to the jurisdiction of a court of general jurisdiction in the Commonwealth of Pennsylvania.

14. This Court has personal jurisdiction over Defendants because each of them, directly or indirectly and/or through their subsidiaries, related entities, or agents, is doing business in the Commonwealth of Pennsylvania.

15. Venue is proper in this judicial district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan was administered in this district, some of the fiduciary breaches for which relief is sought occurred in this district, and one or more of Defendants may be found in this district. Venue is also proper in this district pursuant to 28 U.S.C. § 1391, because Wal-Mart systematically and continuously does business in this district and because a substantial part of the events or omissions giving rise to the claims occurred within this judicial district.

III. PARTIES

16. Plaintiff, Robert J. King, has been an hourly worker employed by Wal-Mart in a Wal-Mart store located in Philadelphia. Plaintiff is a resident of Pennsylvania and, at all relevant times, a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), whose retirement savings are invested in the Plan.

17. Defendant Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company") is a Delaware corporation headquartered in Bentonville, Arkansas. Wal-Mart operated nearly 4,000 stores throughout the United States last year. Outside the U.S., the Company operated more than 1,000 stores. Wal-Mart's annual sales last year totaled more than $300 billion, and Wal-Mart transacts millions of dollars of business within Pennsylvania each year. In 2006, the Company employed approximately 1.8 million employees worldwide, 1.3 million of whom were employed in the United States. Wal-Mart has been at all relevant times a fiduciary of the Plan within the meaning of ERISA.

18. Defendant the Wal-Mart Retirement Plans Committee (the "Committee") is a "Named Fiduciary" of the Plan pursuant to the provisions of the Plan and was responsible for managing the Plan, during the Class Period.

19. Plaintiff does not currently know the identity of the Committee members who served during the Class Period. Therefore, the members of the Committee are named fictitiously, as Defendants John/Jane Does 1-15. Once their true identities are ascertained, Plaintiff will seek leave to join them under their true names.

IV. THE PLAN

20. The Wal-Mart Profit Sharing and 401(k)Plan (the "Plan") is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). The Plan is an "eligible individual account plan" within the meaning of ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3), and is also a "qualified cash or deferred arrangement" within the meaning of I.R.C. § 401(k), 26 U.S.C. § 401(k).

21. The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). In a breach of fiduciary duty action such as this, however, the Plan is neither defendant nor plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. ERISA § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

22. ERISA requires that every employee benefit plan be "established and maintained pursuant to a written instrument." ERISA § 402(a)(1), 29 U.S.C. ERISA § 1102(a)(1). Wal-Mart established the Plan as a benefit for its employees, and Wal-Mart is the "sponsor" of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B).

23. The Wal-Mart Stores, Inc. Profit-Sharing Plan (the "Profit Sharing Plan") was established in 1971 as an employee stock ownership plan (an "ESOP") that invests primarily in Wal-Mart stock. Wal-Mart established the Plan on February 1, 1997, under the name of the Wal-Mart Stores, Inc. 401(k) Retirement Savings Plan. The Plan was amended, effective October 31, 2003, to merge the assets of the Wal-Mart Stores, Inc. Profit Sharing Plan applicable

to United States participants with the Plan. In connection with the merger, the Plan was renamed Wal-Mart Profit Sharing and 401(k) Plan.[1]

24. The responsibility for operation and administration of the Plan (except for investment management and control of assets) is vested in the Committee. Committee members are appointed by the Company's Vice-President, Retirement Plans, with ratification of a majority of sitting committee members. The trustee function of the Plan is performed by Merrill Lynch Investment Managers LLC (the "Trustee").

25. At all relevant times, the Plan had two separate components: (1) a contributory component, which consisted of participant contributions; and (2) a matching component, which consisted entirely of employer contributions.

26. All eligible Wal-Mart employees may participate in the Plan and may elect to contribute from one percent to 25 percent of their eligible wages to the Plan. Regardless of whether an associate contributes to the Plan, he or she is entitled to receive a portion of the Company's Qualified Non-Elective contributions and Profit Sharing contributions, if otherwise eligible. To be eligible to receive Company contributions, an employee must complete at least 1,000 hours of service during the Plan year for which the contributions are made, as well as be employed on the last day of that Plan year.

27. Although technically, Wal-Mart's contributions to the Plan are discretionary and can vary from year to year, at the end of each Plan year the Board of Directors of the Company,

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[1] All employees who were participants in the Plan prior to the 2003 merger continued to be Plan participants after the merger, as long as they continued to be eligible employees. Each eligible employee who was not a Plan participant prior to October 2003, and who completed at least 1,000 hours of service in a consecutive 12 month period is eligible to participate in the Plan.

or its authorized committee or delegate, has determined that the Company will contribute a particular amount to the Plan. Each year, the Company's contribution for each employee is based on a percentage of the associate's wages for the Plan year. For the Plan year ended January 31, 2006, Wal-Mart announced that it was contributing two percent of eligible participants' compensation as the Company's Profit Sharing contribution to the Plan. The 2006 Summary Plan Description ("SPD") provides:

> At the end of each plan year, Wal-Mart determines the amount of its contribution (if any) for the plan year. The contribution will be a percentage of your pay while you were a participant for such plan year. . . . Currently, Wal-Mart anticipates making a contribution from 0% to 2% of your pay to your Profit Sharing Account and a contribution of 0% to 2% of your pay to your Company-Funded 401(k) Account. . . . For purposes of determining the amount of your Wal-Mart contributions, your pay will include:
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> > - Regular salary or wages, including any pre-tax dollars you use for your 401(k) contributions or to purchase benefits available under Wal-Mart's health and welfare plan.

2006 Associate Guide at p. 162.

28. Plan participants are immediately vested in all elective contributions, catch-up contributions, Qualified Non-Elective contributions, roll-over contributions, tax credit contributions and Profit Sharing Plan rollover contributions. A participant's Profit Sharing contributions vest based on years of service at a rate of 20% per year from years three through seven. Profit Sharing contributions become fully vested upon Participant retirement at age 65 or above, or total and permanent disability or death.

V. FIDUCIARY STATUS OF THE DEFENDANTS

29. ERISA requires that every Plan provide for one or more "named fiduciaries" who will have "authority to control and manage the operation and administration of the Plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

30. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under ERISA § 402(a)(1), but also any other persons who actually act as fiduciaries, perform fiduciary functions, or hold fiduciary authority. ERISA makes a person a fiduciary "to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such Plan . . . or has any discretionary responsibility in the administration of such Plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

31. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and participants under ERISA in the manner and to the extent set forth in the Plan's documents, through their conduct, and under ERISA. As fiduciaries, Defendants were required by ERISA §404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's assets solely in the interests of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

32. Pursuant to the Plan's documents, Defendant Wal-Mart is a fiduciary within the meaning of ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(I). Wal-Mart, at all applicable

times, exercised control over the activities of its officers and employees that performed fiduciary functions with respect to the Plan, including the Committee, and could hire, terminate and replace such employees at will. Wal-Mart is thus responsible for the activities of its officers and employees through principles of agency and *respondeat superior* liability.

33. Finally, as a matter of corporate law, Wal-Mart is imputed with the knowledge that its employees and the other Defendants had of the misconduct alleged herein, even if not expressly communicated to Wal-Mart.

34. Consequently, in light of the foregoing duties, responsibilities and actions, Wal-Mart was both a named fiduciary of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and a *de facto* fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that it exercised discretionary authority or discretionary control respecting the management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary responsibility in the administration of the Plan.

35. Pursuant to the Plan's documents, during the Class Period, the Committee served as the "named fiduciary" of the Plan as that term is defined under ERISA. As the Named Fiduciary of the Plan, the Committee is generally responsible for the management, interpretation, and administration of the Plan, including, but not limited to, eligibility determinations, investment policies, benefit payments and other functions required, necessary, or advisable to carry out the purpose of the Plan. The Plan's documents provided that the Committee "shall supervise the administration and enforcement of the Plan . . . and shall have all powers necessary to accomplish these purposes. . . ."

36. Consequently, in light of the foregoing duties, responsibilities and actions, the

Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

37. ERISA permits fiduciary responsibilities to be shared among various individuals and entities. Given ERISA's functional concept of a fiduciary, absent full discovery it is impossible to know which fiduciaries exercised which functions. Based on the information available at this juncture, the Defendants' fiduciary responsibilities were at least partially allocated among Wal-Mart and the Committee and its members.

VI. <u>FACTUAL ALLEGATIONS</u>

38. ERISA mandates that plan fiduciaries owe a duty of loyalty to the plan and its participants, which includes the duty to act "solely in the interest" of plan participants and beneficiaries and for the "exclusive purpose" of providing plan benefits and defraying reasonable expenses of plan administration. ERISA also requires that plan fiduciaries speak truthfully to the plan and its participants when communicating with them. A fiduciary's duty of loyalty to plan participants under ERISA includes an obligation not to materially mislead, or knowingly allow others to materially mislead, plan participants and beneficiaries. Moreover, ERISA requires plan fiduciaries to act with the "care skill prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1); 29

U.S.C. §1332(a)(1).

39. Throughout the Class Period, Defendants made or oversaw Company contributions to the Plan that were lower than the amount of contribution that Wal-Mart had committed to Plan participants that it would contribute to the Plan. Wal-Mart claimed that it was contributing a certain percentage of Plan participants' salaries and wages, when in reality it was contributing a materially lesser amount, calculating Company contributions based on fraudulently suppressed base wages.

40. One of Wal-Mart's largest expenses is the payroll for hourly-paid employees. Although Defendants claim to "respect the individual," they cheat employees out of earned wages. Since at least January 1, 1997, Wal-Mart has created and implemented a system that fails to compensate hourly-paid employees nationwide for all hours worked. This is accomplished in a variety of ways, including, but not limited to: altering employee time records; failing to pay employees for all time worked; shaving time worked from payroll; and requiring and/or pressuring employees to work off-the-clock (*i.e.*, not clocked into the time keeping system). . The employment law violations and Wal-Mart's other fraudulent and illicit tampering with Plan participant's wages have been widespread throughout the Company and throughout the United States during the past decade.

41. Upon information and belief, managerial personnel routinely deleted time from hourly employees' payroll records by: (1) an unlawful one-minute clock-out practice; (2) altering time records to make it appear as if employees took meal periods of 30 or 60 minutes in length when in fact they did not, thereby deducting time worked from employees' paychecks without basis; (3) deleting overtime hours from payroll and time records; (4) deleting employee punches

so that employees would not be paid for an entire day or afternoon of work; and (5) various other unlawful means.

42. The work performed by Plaintiff and the Class Members for which they were not properly compensated was for the benefit of Wal-Mart and was not *de minimis* or incidental.

43. Beginning at a date unknown to Plaintiffs, but at least as early as January 1, 1997, Defendants committed, and continue to commit, such wrongs against its hourly paid employees nationwide.

44. Wal-Mart's policy of failing to pay its hourly employees for all time worked is, in part, facilitated through its corporate culture. As noted above, Wal-Mart attempts to convince its employees that they are part of its "family," where they will be rewarded for being a team player and following Sam Walton's rules. Conversely, hourly employees are consistently reprimanded and threatened with termination for committing the slightest infraction of corporate rules. Thus, hourly employees quickly learn that in order to keep their jobs they must strictly adhere to corporate mandates.

45. Having instructed and conditioned its employees to be team players or lose their jobs, Wal-Mart gives them work assignments that typically cannot be completed within their scheduled hours. Wal-Mart also routinely requests its employees to do work when not clocked in to the time-keeping system, such as when they are on breaks, and/or clocked out for the day.

46. Wal-Mart's Store, District, Club/General, and Regional Managers have financial incentives to suppress store expenses, the largest of which is employee payroll. Their financial compensation and bonuses are directly tied to their ability to reduce employee payroll.

47. Wal-Mart's corporate office sets staffing and scheduling for each of its stores.

Throughout the Class Period, Wal-Mart has grossly understaffed its stores and implemented a strict no overtime policy in order to reduce payroll expenses. Notwithstanding that the stores are understaffed and employees cannot work overtime, Wal-Mart demands that each store increase its sales and profits each year. As Wal-Mart well knows, stores cannot increase sales and profits without adequate staffing and/or overtime unless employees work without pay. Moreover, although Wal-Mart was and is aware that employees are routinely working without pay in order to meet profitability requirements it has imposed, it has done nothing to eliminate that practice and/or fully compensate its employees.

48. Wal-Mart has, for years, attempted to hide behind its written policy that purports to forbid these unlawful labor practices while at the same time committing them. If employees make an issue of not being paid for unrecorded time, or not being allowed to take their rest and meal breaks, Wal-Mart feigns "ignorance" and "coaches" said employees. Behind any coaching is the veiled threat of termination. Wal-Mart uses its written policies to shield itself from paying for off-the-clock work and overtime and then terminates employees who complain about having to do such work.

49. Wal-Mart knew or should have known that the employees were working off-the-clock by virtue of the fact that: (a) such work was recorded in its electronic databases; (b) its managers directed, pressured and/or encouraged employees to work off-the-clock; (c) it systematically understaffed its stores in order to meet arbitrary corporate profitability objectives; and (d) it regularly tracked and studied employee hours worked and wages paid.

50. The earliest date any Class member could have possibly learned of potential time shaving practices at Wal-Mart followed and postdated publication of an article in the New York

Times in April 2004. Upon information and belief, by August 2004, plaintiffs in other class actions had obtained databases from Wal-Mart that allowed them to confirm the existence of Wal-Mart's time shaving practices nationwide. Although Wal-Mart's electronic records clearly demonstrate its wrongdoing, hourly employees could not previously have discovered Wal-Mart's time shaving practices, both because they lacked access to Wal-Mart's databases and because such data can only be deciphered and understood only through the work of a computer/statistical expert. Upon information and belief, the data remains under protective order and is unavailable to class members in this action. In addition, Wal-Mart continues to deny that it perpetrates time shaving and similar illegalities.

51. Significantly, in addition to finding thousands of instances in which Wal-Mart improperly altered its payroll records to steal wages from its hourly employees, plaintiffs in wage and hour litigation against Wal-Mart also discovered that Wal-Mart failed to pay its employees for large amounts of earned wages that were recorded in its database but were not recognized by Wal-Mart's time-keeping system. Once again, both the discovery and extent of Wal-Mart's misconduct could be identified only by a computer/statistical expert.

52. The April 2004 New York Times article addressed Wal-Mart's surreptitious deletion of hours from employees' time records– in effect, stealing money from its own employees. The practice, known as "time shaving," is "easily done and hard to detect," according to the article. It was reported that, as early as April 2003, Wal-Mart had created and circulated to all of its United States store managerial personnel (but not generally to employees or the public) a videotape and a newly-revised "payroll integrity" policy memorandum discussing this unlawful practice.

53. Plan participants had no knowledge or reasonable basis to know of Wal-Mart's unlawful time shaving practice, the existence of the payroll videotape, or the revised "payroll integrity" policy memorandum. Indeed, no plaintiffs in any litigation were able to confirm the existence of the practices discussed in the April 2004 New York Times article until sometime after July 2004, when Wal-Mart produced for the first time some evidence exposing its misconduct.

54. Upon information and belief, in July 2004, Wal-Mart produced a videotape to a group of plaintiffs in wage and hour litigation against Wal-Mart that had entered into a protective order. That videotape revealed that in addition to the "one-minute clock out" practice, Wal-Mart engaged in another form of time shaving by which Wal-Mart deleted certain employee punches so that the affected employee would not be paid for an entire afternoon of work. As Wal-Mart admitted on the videotape, by deleting the "final punch ... that's four hours [the employee] wasn't paid for."

55. Upon information and belief, sometime thereafter, Wal-Mart produced another videotape to plaintiffs in litigation that had entered into a protective order. That videotape included a speech by one of Wal-Mart's top executives, Don Swann, to personnel managers at Wal-Mart's 2003 Annual Shareholders' Meeting. In the videotape, Mr. Swann acknowledges yet another widespread time shaving practice at Wal-Mart– namely, deleting overtime so that employees did not earn over 40 hours (the "40 Hour Club")– and explains that store managers felt pressured to practice it.

56. Upon information and belief, an April 2003 training memorandum concerning the widespread "one-minute clock out" practice that was referenced in the April 2004 New York

Times article was produced to plaintiffs in litigation. This training memorandum was sent to all United States personnel managers. Specifically, all Wal-Mart and Sam's Club personnel managers were now instructed:

> Wal-Mart must pay Associates for all the time they work. Wal-Mart is also responsible for maintaining records that accurately document the time worked by Associates.
>
> When an Associate fails to clock in and out correctly, leaving an odd number of punches, Wal-Mart is left with an incomplete time record,...[I]n order to close out the daily payroll, a decision must be made as to how many hours the Associate probably worked based on the records that are available at that time. The only records available at this time are the punch, which shows when the Associate reported in to work, and the shift schedule, which shows what the Associate was expected to work.
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> Based solely on these records, the most reasonable conclusion is that the Associate worked the full shift. In contrast, there are no records to support the assumption that the Associate either did not work after clocking in or that the Associate left after one minute. Accordingly, eliminating the punch or advancing the time record one click is not an appropriate method to handle the incomplete time record.

57. For a reasonable period after publication of the April 2004 New York Times article, at the earliest, Plaintiffs and Class members were unaware that Wal-Mart had a company-wide practice of regularly deleting several hours of pay from unsuspecting hourly employees by surreptitiously clocking them out one minute after they had returned from a break, by deleting certain clock-in punches, or by improperly adding meal periods. Nor did Plaintiff and similarly situated Class members have any way of unearthing these time shaving practices.

58. By contrast, beginning at least as early as January 1, 1997, Wal-Mart knew the facts concerning its wrongful time shaving practices and its resultant failure to pay its employees for all hours worked, yet Wal-Mart willfully concealed those facts from Plaintiffs and the Class members.

59. Although Plan participants exercised due diligence during the Class Period and had diligently sought to protect themselves from unlawful practices, they could not have discovered the improper and illegal time shaving practices by the exercise of due diligence because of the affirmative, deceptive and willful practices and techniques by Wal-Mart to avoid detection and affirmatively conceal such practices.

60. These practices of secrecy and concealment included, but were not limited to: a materially false and misleading public relations campaign that falsely represented Wal-Mart's employee practices, the dissemination of false information through press releases, public statements by Wal-Mart officers denying such practices, unqualified denials of such practices in like litigation, and a demand for retraction of the New York Times article.

61. Wal-Mart has never revealed the existence of their time-shaving practices and one-minute clock out practice in their handbook, corporate policies or in a standardized hourly employee orientation. Moreover, when confronted with evidence of its wrongdoing, Wal-Mart has actively sought to conceal its misconduct by mounting an expensive and deceptive public relations campaign in which it repeatedly denies that it has failed to compensate employees. For example:

a. In a statement signed by H. Lee Scott, President and Chief Executive Officer of Wal-Mart, and posted on Wal-Mart's website, Mr. Scott said, "For too long, others have had free rein to say things about our company that just aren't true." The website specifically addresses allegation of off-the-clock work by saying, "Although we do not want even one minute worked without pay, keep in mind that anyone can file a lawsuit, and most of these lawsuits have not yet been decided." The website implies Wal-Mart's innocence by arguing that "any manager who requires or even tolerates 'off-the-clock' work would be violating [company] policy and labor laws. As a result, he or she would be disciplined, and possibly even fired, depending on the situation."

b. On *Good Morning America*, Mr. Scott responded to Charles Gibson's inquiry regarding "off-the-clock" claims by stating, "Our policy is that we pay everyone for every hour worked. And if a manager allows someone or requires someone to work off the clock, they're terminated. I think there's a difference between what you're sued for and what you're found guilty of."

c. On the Fox News program *Your World with Neil Cavuto*, Mr. Scott denied that employees had their hours deleted by stating, "It's going to take Lee Scott to be on TV to say, every associate knows, because right by the time clock is a big sign that says if your manager does something with your pay that is inappropriate, asks you to work hours that they're not going to pay you for, you call this number and we'll fix it. People aren't going to talk about it except me and that is [communicated in] the visits I have personally had in our meetings with store managers saying, if you do these things you will be terminated, period."

62. Despite Wal-Mart's campaign to deny their illicit underpayment of wages, in recent months, courts considering allegations of time-shaving and failure to compensate Wal-Mart employees for work performed rendered verdicts against Wal-Mart. For example, in October 2006, a Pennsylvania jury ordered Wal-Mart to pay at least $78 million in compensation to a class of Pennsylvania-based Wal-Mart workers who were found to have been forced to work without pay during break times during the period March 1997 through May 2006 . The jury also found that Wal-Mart had acted in bad faith with regard to these workers. Previously, in December 2005, a California court ruled that Wal-Mart must pay $172 million in back compensation to 116,000 employees who had been denied compensation for meal breaks during which they worked. In March 2005, Wal-Mart agreed to pay $11 million to settle allegations that it had failed to pay overtime to janitors, many of whom worked seven nights a week. In 2007, Wal-Mart agreed to pay $33 million in back wages to thousands of employees in connection with an agreement entered into with the U.S. Department of Labor.

63. Wal-Mart's 2006 Annual Report indicated that the Company faced 57 wage and hour lawsuits throughout the country. Major lawsuits alleging significant wage and hour violations causing severely decreased wages have either been won or are working their way through the legal process in states such as California, Indiana, Minnesota, Oregon, Nebraska, Alaska, Pennsylvania and Washington.

64. Based on the documentary evidence and the fact of the sheer volume of litigation filed against the Company, Defendants knew or should have known that Wal-Mart had a Companywide problem concerning wage and hour and fair labor standards violations resulting in significantly decreased employee wage compensation. Despite this knowledge, and despite their position as Plan fiduciaries, the Defendants did not take sufficient steps to address the problem and protect Plan participants' retirement savings.

65. Moreover, throughout the Class Period, in communications with Plan participants, Defendants addressed the issue of Company contributions to the Plan, but failed to disclose the significant underpayment of Company contributions.

66. As Plan fiduciaries, Defendants knew or should have known the correct amount of wages that Plan participants had earned. At the very least, as Plan fiduciaries, Defendants should have investigated the allegations of wage and salary improprieties and insisted that the Company contribute all amounts due to the Plan.

67. Even though Defendants knew or should have known these facts, Defendants failed to take any meaningful ameliorative action to protect the Plan and its participants from the improper suppression of their retirement benefits as a result of Defendants' intentional miscalculation and suppression of Plan contributions.

68. As a result of the knowing and willful fraudulent concealment of illegal time shaving practices, Plaintiff asserts the tolling of the applicable statute of limitations with respect to any claims and rights of action by Plaintiff and the members of the Class.

VII. CLAIMS FOR RELIEF UNDER ERISA

69. Plaintiff seeks relief for Defendants' breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). ERISA § 502(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. ERISA § 409 further requires that "any person who is a fiduciary who breaches any of the duties imposed upon fiduciaries to make good to such plan any losses to the plan." ERISA § 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate."

70. Plaintiff also seeks relief, as an additional basis of liability, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes a plan participant to bring a civil action for breach of fiduciary duty against fiduciaries and certain non-fiduciaries for appropriate equitable relief.

71. ERISA imposes strict fiduciary duties upon plan fiduciaries. The fiduciary duties contained in ERISA § 404(a), 29 U.S.C. § 1104(a)(1)(A) and (B) are referred to as the duty of loyalty, exclusive purpose and prudence are the "highest known to law".

72. ERISA § 404(a)(1)(A) imposes upon a plan fiduciary the duty of loyalty – that is the duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ." The duty of loyalty entails a duty to avoid conflicts of interest and to resolve any potential conflicts of interest promptly when they occur. A fiduciary must always

administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor.

73. ERISA § 404(a)(1)(B) also imposes on a plan fiduciary the duty of prudence -- that is the duty "to discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."

74. A plan fiduciary's duties of loyalty and prudence include a duty to disclose and inform. This duty entails: (1) a duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries. These duties to disclose and inform recognize the disparity that may exist, and in this case did exist, between the training and knowledge of the fiduciaries, on the one hand, and the participants and beneficiaries, on the other.

75. The duty to inform must also be discharged in compliance with the regulatory requirements of the mandatory communications, the SPD and the Summary of Material Modifications ("SMM"):

> The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented

> without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-2(b).

76. With respect to a pension plan such as the Plan at issue here, the duties of loyalty and prudence also entail a duty to conduct an independent investigation into, and continually to monitor the administration of the Plan.

77. A fiduciary may not avoid his fiduciary responsibilities by relying solely on the language of the Plan's documents. While the basic structure of a plan may be specified, within limits, by the plan sponsor, the fiduciary may not blindly follow the Plan's document if to do so leads to an imprudent result. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

78. A fiduciary is liable not only for fiduciary breaches within the sphere of his own responsibility, but also as a co-fiduciary in certain circumstances. ERISA § 405(a), 29 U.S.C. § 1105(a), states, in relevant part, that:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or
>
> (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he

> makes reasonable efforts under the circumstances to remedy the breach.

79. Non-fiduciaries who knowingly participate in a fiduciary breach may themselves be liable for certain relief under ERISA § 502(a)(3), 29 U.S.C. § 1332(a)(3).

VIII. CLASS ACTION ALLEGATIONS

80. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and all persons similarly situated. The proposed class consists of:

> All participants and beneficiaries of the Wal-Mart Profit Sharing and 401(k) Plan (the "Plan"), sponsored by Wal-Mart Stores, Inc. (the "Company"), from February 1, 1997 through the present who received improperly depressed Plan contributions from the Company. Excluded from the Class are the Defendants and their family members.

81. This action is brought and may properly be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because there is a well defined community of interest in the litigation and the proposed class is easily ascertainable.

(a) Numerosity: Members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class Members is unknown to the Plaintiff at this time and the exact number of Class members is known only to Defendants and their agents, on information and belief, the Class numbers in the tens of thousands, is geographically dispersed across the United States, and thus is so numerous that joinder is impracticable. The number of Class members can readily be determined by appropriate discovery.

(b) Commonality: There are questions of law and fact common to the Plaintiffs and

the Class that predominate over any questions that affect only individual members of the Class. Among the questions of law and fact common to the Class are:

- Whether Defendants violated ERISA, as alleged herein;
- Whether and to what extent Defendants were fiduciaries of the Plan;
- Whether and to what extent Defendants breached fiduciary duties owed to the Plan, its participants and beneficiaries;
- Whether the Defendants breached their fiduciary duties by causing or permitting the Wal-Mart to underpay required contributions during the Class Period;
- Whether Wal-Mart wrongfully exercised and continues to cheat Plaintiff and the Class of monies owed to them for work performed;
- Whether Defendants breached fiduciary duties owed to the Plan and its participants by failing to act prudently and solely in the interest of the Plan and its participants and beneficiaries;
- Whether Wal-Mart breached its fiduciary duties by failing to disclose to and inform the Committee of all material matters which that Committee reasonably needed to know in order to fulfill their fiduciary duties to the participants and beneficiaries;
- Whether the Committee Defendants breached their fiduciary duties to avoid conflicts of interest;
- Whether Defendants are liable for knowingly participating in the breach of its co-fiduciaries;
- Whether the Plan and the members of the Class were injured by these breaches of Defendants' fiduciary duties;
- Whether the Plan sustained losses and, if so, the proper measure of such losses;
- Whether members of the Class are entitled to injunctive relief; and
- Whether members of the Class are entitled to attorney's fees.

(c) Typicality: Plaintiff's claims are typical of the claims of the Class.

Plaintiff and other members of the Class have sustained damages and were harmed because of the unlawful activities by Defendants as alleged herein.

(d) Adequacy of Representation: Plaintiff will fairly and adequately protect the interests of the Class members. The interests of the Plaintiff are not antagonistic to, or in conflict with, the interests of the Class as a whole, and he has engaged competent counsel experienced in ERISA class actions concerning employer securities in 401(k) plans, as well as in other class and complex litigation, to ensure protection of the interests of the Class as a whole.

(e) Superiority of Class Action: Class action treatment is superior to any alternatives to ensure the fair and efficient adjudication of the controversy alleged herein. Each Class Member has been damaged and is entitled to recovery as a result of Defendants' illegal and wrongful policies and/or practices of improperly calculating wages and, in turn, Company contributions to the Plan. Class action treatment will, therefore, allow those similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without duplication of effort and expense that numerous individual actions would entail. The Class members are readily identifiable from Plan and payroll records, time records and electronic databases.

82. Defendants' actions were uniformly applied to the entire Class as a whole. Without a class action, Defendants will retain the benefit of their wrongdoing and will continue a course of action, which will result in further damages to the Plaintiff and the Class. Prosecution of separate actions by individual members of the Class creates the risk of inconsistent or varying adjudications of the issues presented herein, which, in turn, would establish incompatible standards of conduct for Defendants. In addition, the cost of prosecuting a single action would

likely exceed the ultimate recovery.

83. Defendants' wrongful and unlawful conduct has been widespread, recurring and uniform. Defendants knew or should have known that Plan participants' benefits were not calculated accurately. Absent a class action, Defendants will likely continue its wrongdoing resulting in further damage to the Class.

84. This action is maintainable as a class action under each of the following provisions of Rule 23(b):

- Rule 23(b)(1)(A): The prosecution of separate actions by the members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual members of the Class, which would establish incompatible standards of conduct for Defendants.

- Rule 23(b)(1)(B): This ERISA breach of fiduciary duty action for plan-wide relief is a classic Rule 23(b)(1)(B) class action. The prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

- Rule 23(b)(2): Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

- Rule 23(b)(3): Questions of law and fact common to members of the Class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation would make it virtually impossible for the Class members to seek redress for the wrongful conduct alleged. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a class action.

IX. CAUSES OF ACTION

COUNT I
FAILURE PRUDENTLY AND LOYALLY TO MANAGE THE PLAN AND PLAN ASSETS

85. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

86. As alleged above, during the Class Period Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) , or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusivity of purpose and prudence.

87. Yet, contrary to their duties and obligations under the Plan's documents and ERISA, Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, these Defendants knew or should have known that Wal-Mart was not paying the required amount of Company contributions to the Plan because it was miscalculating Company Plan contributions based on improperly suppressed baseline worker wage amounts.

88. Defendants breached their fiduciary duties to the Plan to prudently manage the Plan's assets by failing to respond appropriately to the underpayment of Company Plan contributions.

89. As a consequence of Defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If the Defendants had discharged their fiduciary duties to loyally and prudently manage the Plan, significant losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged, the Plan lost millions of dollars of retirement savings.

90. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and

1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT II
BREACH OF DUTY TO PROVIDE COMPLETE AND ACCURATE INFORMATION TO PARTICIPANTS AND BENEFICIARIES

91. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

92. At all relevant times, Defendants were fiduciaries with the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

93. The scope of the Defendants' duties included disseminating Plan's documents and/or Plan related information to participants regarding the Plan and/or assets of the Plan.

94. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to participants, not to mislead them regrading the Plan or the Plan's assets, and to disclose information that participants need in order to exercise their rights and interests under the Plan. This duty to inform participants includes an obligation to provide participants and beneficiaries of the Plan with complete and accurate information, and to refrain from providing false information or from concealing information.

95. Defendants breached their ERISA duty to inform participants by failing to provide complete and accurate information regarding the Company contributions to the Plan and by generally conveying through statements and omissions inaccurate information regarding the Company's underpayments.

96. Upon information and belief, misleading and inaccurate communications concerning the Company's Plan contributions were made in the official Plan's documents

disseminated to Plaintiff and other Plan participants.

97. Defendants' failure to provide complete and accurate information regarding the Company's Plan contributions impacted all Plan participants the same in that none of the participants received crucial, material, information regarding miscalculations concerning the Company's Plan contributions.

98. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT III
CO-FIDUCIARY LIABILITY

99. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

100. ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary in addition to any liability which he or she may have under any other provision for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if (a) he or she participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (b) he or she fails to comply with 29 U.S.C. § 1104(a)(1) in the administration of his specific responsibilities which give rise to his or her status as a fiduciary, by enabling such other fiduciary to commit a breach; or (c) he or she has knowledge of a breach by such other fiduciary, unless he or she makes reasonable efforts under the circumstances to remedy the breach.

101. If contrary to the allegations asserted previously, any of the Defendants are held not to be Plan fiduciaries, Plaintiff alleges in the alternative that said Defendants are liable as

non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

i. That this Court certify this action as a class action under Fed. R. Civ. P. 23(a), (b)(1) and (b)(2);

ii. That this Court order that Defendants make good to the Plan its losses as a result of their breaches of their fiduciary duties;

iii. That this Court order declaratory and injunctive relief as necessary and appropriate, including restoring all losses to the Plan caused by the Defendants' breaches of fiduciary duty;

iv. That this Court order that each of the Defendants is liable for equitable relief in the form of money paid to the Plan and its participants and beneficiaries for violating their duties as fiduciaries and co-fiduciaries;

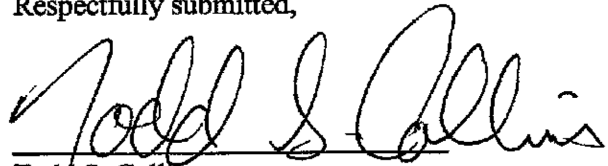
v. That this Court enjoin the Defendants from further violating the duties, responsibilities, and obligations imposed upon them as fiduciaries by ERISA and the Plan's documents with respect to the Plan;

vi. That this Court award to Plaintiff reasonable costs and attorney's fees as provided by the common fund doctrine, ERISA § 502(g), 29 U.S.C. § 1132(g), and other applicable law; and

vii. That this Court grant such other relief as may be just and proper, including taxable costs and interest, as provided by law.

Dated: April 13 , 2007

Respectfully submitted,



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