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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

----- X  
VICTOR ZAVALA, EUNICE GOMEZ, :  
ANTONIO FLORES, OCTAVIO DENISIO, :  
HIPOLITO PALACIOS, CARLOS ALBERTO :  
TELLO, MAXIMILIANO MENDEZ, ARTURO :  
ZAVALA, FILIPE CONDADO, LUIS : Civil Action No.  
GUTIERREZ, DANIEL ANTONIO CRUS, PETR : 03-Civ.-5309 (JAG)  
ZEDNEK, TERESA JAROS, JURI PFAUSER, :  
HANA PFAUSEROVA, PAVEL KUNC and :  
MARTIN MACAK, on behalf of themselves and :  
all others similarly situated, :  
: :  
Plaintiffs, :  
: :  
- against - :  
: :  
WAL-MART STORES, INC., :  
: :  
Defendant. :  
----- X

**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR CLASS CERTIFICATION**

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## PRELIMINARY STATEMENT

On December 29, 2004, this Court conditionally certified this action as a collective action under Section 6 of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b), allowing all undocumented or recently documented immigrants who were at any time since January 2000 employed as contract janitors to clean Wal-Mart stores across the United States to opt-in to the action. Thereafter, over 200 such persons timely opted into the action, although as discussed below some were subsequently dismissed from the action. Plaintiffs now move for final certification of this case as a collective action.

As demonstrated below, Wal-Mart’s janitors, both named plaintiffs and opt-in plaintiffs, performed substantially the same job duties under the direction and supervision of Wal-Mart management at Wal-Mart stores across the United States under materially identical terms and conditions of employment. Because of the pivotal importance of store maintenance to its retail operation, Wal-Mart centrally managed its contracting of janitorial services and dictated uniform tasks and methods of cleaning. Under these circumstances certification is appropriate and should be granted.

As detailed in the accompanying declaration of Christopher Walters dated August 26, 2009 (“Walters Decl.”), Wal-Mart’s largest contractor of janitorial services at all relevant times<sup>1</sup>, the cleaning of Wal-Mart’s stores was integral to Wal-Mart’s retail operations. Wal-Mart insisted that its stores be maintained to uniform standards and because of the commonality of store construction and lay-out janitorial work was uniform across Wal-Mart’s stores nationwide.

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<sup>1</sup> As detailed in his declaration, Walters at relevant times provided janitorial service in Wal-Mart Stores across two thirds of the United States. The complete Walters Declaration is filed under seal because small portions of it are embraced by a Protective Order. Redacted copies of both the Walters declaration and this brief are filed publicly. The Walters Declaration and exhibits thereto are filed herewith at Appendix (“App.”) 1, pp.1-104.

Janitors were uniformly responsible for (1) cleaning the floors, including vacuuming carpeted floors, sweeping, stripping and waxing hard surfaced floors, (2) cleaning restrooms and employee break rooms and (3) emptying trash receptacles and cleaning doors and windows. These duties were uniform regardless of store size or location, as Walters attests and the evidence provided by janitors in discovery corroborates.

Walters' declaration, the named plaintiffs' and others' depositions and the Questionnaires filled out by each opt-in plaintiff, all confirm that Wal-Mart imposed substantially similar terms and conditions of employment. Janitors were each: (1) paid in cash or personal checks without appropriate withholding of payroll taxes; (2) obligated to work hours well in excess of 40 each week; (3) obligated to work seven days per week; (4) not paid for overtime work as required by law; (5) not given time off; and (6) not provided with workers' compensation benefits, health insurance, sick leave, meal or break time, notwithstanding state law protections. The terms of employment and amounts paid (or promised) to plaintiffs were consistent nationwide and over the past years. Plaintiffs worked in crews of from two to seven janitors, depending on the size of the store to be cleaned. Crew members were paid between \$325 and \$350 per week with others receiving slightly more, approximately \$500 per week. As the government of the Czech Republic noted in an amicus filing [Docket no. 33], janitors worked under conditions akin to involuntary servitude.<sup>2</sup>

Because the opt-in plaintiffs and named plaintiffs performed the same job subject to the same standards and terms and conditions of employment, this class should be certified as a collective action. The Court should proceed to schedule a trial date to resolve this action which has now been pending for over six years.

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<sup>2</sup> See also; amicus filing of the government of Mexico. [Docket No. 38]

## FACTS

### Parties

#### The Janitors

Victor Zavala, Eunice Gomez, Antonio Flores, Octavio Denisio, Hipolito Palacios, Carlos Alberto Tello, Maximino Mendez, Arturo Zavala, Filipe Condado, Luis Gutierrez, Daniel Antonio Cruz, Petr Zednek, Teresa Jaros, Jiri Pfauser, Hana Pfauserova, Pavel Kunc and Martin Macak are foreign nationals who worked as contract janitors at Wal-Mart stores located throughout the United States at various times from January 2000 through 2003. SAC ¶¶7-28. A total of 214 individuals, including 16 named plaintiffs, filed consents to join in this action under the collective action provisions of 29 U.S.C. §216(b). By opinion dated September 25, 2008 [Docket no. 191] and reaffirmed on June 8, 2009 [Docket no. 195] the Court limited the case to 114 janitors.

#### Wal-Mart

Wal-Mart is a Delaware corporation with principal corporate offices in Bentonville, Arkansas. SAC ¶29. Wal-Mart has aggressively followed a low-cost, labor-hostile, high-volume sales strategy that has led it to become the largest employer in the United States and the largest retailer in the world. *Id.* Wal-Mart operates thousands of stores in all fifty states, including locations where class representatives and opt-in claimants were employed. *Id.* Wal-Mart's Supercenter stores put sales of groceries and general merchandise under one roof and are generally open 24 hours a day. Wal-Mart's Neighborhood Markets are much smaller and sell grocery items and a limited selection of general merchandise.

## Janitorial Maintenance at Wal-Mart Stores

Janitorial maintenance is critical to Wal-Mart's retail operations. Walters' Decl. ¶8.<sup>3</sup> Stores must be maintained to high cleanliness standards to attract and retain customers. *Id.* Indeed, Wal-Mart executives repeatedly emphasized to its janitorial contractors how integral janitorial maintenance and store cleanliness is to Wal-Mart's overall business success. *Id.*

Janitorial work is labor intensive and the largest cost component of providing janitorial services is labor. *Id.* Labor costs are especially sensitive in the case of Wal-Mart's Supercenters which operate seven days a week and oftentimes 24 hours a day. *Id.* The volume of Wal-Mart's operations requires continuous on-going maintenance. *Id.* As a practical matter, Wal-Mart's stores have to be cleaned each night, when the stores are either closed or typically experience reduced sales volume. *Id.*

Each store, no matter what its particular size, requires a common set of janitorial tasks. Wal-Mart stores feature both hard-surfaced waxed tiled floors and carpeted areas. *Id.* and ¶9. Each store has restrooms available to shoppers and employees. *Id.* All stores have multiple trash receptacles and doors and windows. *Id.* All of these require routine janitorial service. *Id.* On a nightly basis janitors dust mop and sweep hard surfaced floors. *Id.*; Gomez Tr. at 10-11<sup>4</sup>. Janitors scrub and burnish these floors using machinery. Periodically, janitors strip and re wax

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<sup>3</sup> Walters has decades of experience providing janitorial maintenance services to the retail industry and for many years was the largest contractor providing such services to Wal-Mart, having provided janitorial services to several hundred Wal-Mart stores across the United States through 2002. Walters Decl. ¶1. At that time firms Walters controlled were the largest such provider of janitorial services to Wal-Mart. *Id.* As such Walters has personal knowledge concerning the work performed by contract janitors at Wal-Mart stores across the nation, the terms and conditions of their employment as well as how Wal-Mart centrally procured, organized and structured the janitorial services necessary to its retail operations. Walters Decl. ¶1.

<sup>4</sup> Deposition transcripts of the named plaintiffs are referred to as "[name of plaintiff] Tr. at \_\_\_" and are filed herewith in their entirety at App. 2-9, pp. 105-697 with all exhibits thereto at App. 9, pp. 698-873.

these surfaces. Walters Decl. ¶9; Victor Torres Tr. at 28. On a nightly basis carpeted areas are vacuumed, spot cleaned, periodically cleaned using an extractor, and shampooed. Walters Decl. ¶9; Octavio Denicia Tr. at 12. Trash receptacles are emptied, bathrooms cleaned, and front doors and windows cleaned as well. Walters Decl. ¶9; Carlos Rueda Tr. at 14, 20; Octavio Denicio Tr. at 12; Victor Torres Tr. at 11-13.

These tasks were uniform at Wal-Mart regardless of the type of store – Supercenter or Neighborhood Markets – or the location of the operation. Walters Decl. ¶9. Not only are the tasks to be performed the same regardless of the store involved, at relevant times Wal-Mart insisted upon a common set of methods and procedures for all janitorial work throughout the chain as described below. Walters Decl. ¶9.

Executives at Wal-Mart’s headquarters in Bentonville, Arkansas controlled and awarded nearly all of the janitorial contracts. *Id.* at ¶10. In 1996, Wal-Mart promulgated a single uniform contract for janitorial service contracts at its Supercenter and Hypermarket stores. A copy of a memo from Wal-Mart management to Store Directors that Walters obtained is attached as Exhibit A to the Walters Declaration. *Id.* The contract mandates (in paragraph 4) that the work performed “must meet the approval of Wal-Mart and shall be subject to Wal-Mart’s general right of inspection and supervision[.]” *Id.* at Exh. A.

Wal-Mart exercised that right. Wal-Mart management supervised all of the janitorial work which was subject to Wal-Mart review and approval. Walters Decl. ¶10; Gomez Tr. at 22-23 (assistant manager would review the janitorial work at the end of each shift);<sup>5</sup> V.M. Zavala Tr. at 111-12 (same); Julio Zavala Tr. at 41-42 (same); M. Mendez Decl. ¶7 (same).<sup>6</sup> The

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<sup>5</sup> The declarations of janitors cited in this brief are collected at App. 10-19.

<sup>6</sup> *See also* Skubal Dec. ¶7 (work at stores in Tennessee and Virginia overseen and directed by Wal-Mart assistant managers, plaintiff fired by Wal-Mart store manager); E. Macak Decl. ¶7

contract also provides (in paragraph 7) that all members of the assigned crews are subject to Wal-Mart's approval. Wal-Mart exercised that authority as well. *Id.* The store managers or assistant store managers often insisted on approving newly-hired janitors before they could begin work. Gomez Tr. at 9-10 ("Q. Did anyone else need to approve you to start working? A. Yes, of course. Q. Who was that? A. The assistant manager.").

At Wal-Mart's headquarters in Bentonville, Wal-Mart Regional Vice President Bill Dilahay was responsible for awarding contracts and supervising contractors' performance until 1993. Walters Decl. ¶11. Thereafter, janitorial contracts and performance were awarded and supervised by Wal-Mart Divisional Vice President Leroy Schuetz in Bentonville. *Id.* Additionally, Steve Bertschy, Wal-Mart's Vice-President of Floor Maintenance Programs for all Wal-Mart Stores and Supercenters, also was responsible for contract awards and performance. *Id.*

Wal-Mart senior management directed all janitorial contractors to perform to overall Wal-Mart cleaning standards, including compliance with Wal-Mart's Maintenance Manual, a copy of which is attached to the Walters Decl. as Exhibit B, App. pp. 23-75. The Maintenance Manual, which was translated into foreign languages such as Polish and provided to subcontractors, *see* Walters Decl. ¶21 and Exh. D, App. pp. 77-103, contains detailed instructions for maintenance of hard surface floors, carpeted areas and restrooms, in other words, for all janitorial tasks which would need to be performed. Walters Decl. Exh. B. For example, daily maintenance of hard surfaced flooring is outlined, and the Maintenance Manual spells out

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(work at stores in Tennessee and Virginia overseen and directed by Wal-Mart assistant managers); M. Macak Decl. ¶7 (same); Jaros Decl. ¶7 (Wal-Mart assistant managers at stores in Connecticut, Michigan and Georgia "told us what to do and when to do it"); Zednik Decl. ¶7; (same) Flores Decl. ¶7 (multiple locations in New Jersey); Mendez Decl. ¶7 (same); San Juan Decl. ¶7 (directions given by bi-lingual store manager at store in San Antonio, Texas); Cruz Decl. ¶7.

how and where floors are to be dustmopped and procedures for scrubbing and burnishing tiled areas. *Id.* at App. p. 33 and pp. 34-38. Similarly detailed instructions are provided for all other tasks up to and including detailed instructions for the method of placement of urinal cakes in mens' rooms. *Id.* at p. 61, *see also* pp. 58-67.

Because Wal-Mart had an exclusive supply arrangement with Johnson's Wax, it ordered its products in all Wal-Mart Stores and Supercenters and directed the janitorial crews to use only Johnsons' Wax products. Walters Decl. ¶13. The janitors received the Johnsons' Wax products from the Wal-Mart assistant managers. *Id.*; Gomez Tr. at 56-57, V.M. Zavala Tr. at 111; Julio Zavala Tr. at 82; Victor Torres Tr. at 77-78, 141. The Maintenance Manual specified particular Johnsons' Wax products to be used for all necessary applications. App. p. 26. Wal-Mart used a separate accounting department code to track these expenses (Department 99) and each approved product carried its own separate code number. In this way the use and cost of janitorial supplies could be monitored and analyzed by Wal-Mart management.

A June 1, 2001 memo from Don Harris of Wal-Mart to Wal-Mart's maintenance employees and its Floor Service contractors that accompanied the Maintenance Manual emphasizes the importance of janitorial services to Wal-Mart's retail operations and uses that connection to explain why Wal-Mart's maintenance directives had to be uniformly applied whether by Wal-Mart employees or contractors:

The appearance of our store is the #1 reason why we get repeat customers . . . The Wal-Mart Maintenance Program is a mandatory program to be followed by all stores including Wal-Mart SuperCenters, Wal-Mart Division I stores, and Wal-Mart Neighborhood Markets. . . Wal-Mart Associates and Floor Care Maintenance Contractors must use only the approved products and follow the specific procedures detailed in this program.

Walters Decl., Exh. C, App. p. 76 [emphasis in original].

The janitorial maintenance work at all of the Wal-Mart stores was virtually identical throughout the country, no matter which of the several store layouts (generally from 100,000 to 188,000 square feet) was involved. Walters Decl. ¶15. At the store level, all of the janitorial work was coordinated with and subject to review and inspection by either the store manager or an assistant manager. *See supra* pp. 6-7.

As noted above, members of the cleaning crews worked every night of the week, generally reporting at 11 p.m. Walters Decl. ¶15; Gomez Tr. at 14; V.M. Zavala at Tr. 14, 29; Julio Zavala Tr. at 40; Felipe Condado Tr. at 20; Carlos Rueda Tr. at 16, 49; Octavio Denicia Tr. at 21; Victor Torres Tr. at 17, 29. Store management was almost always present whenever cleaning crews worked at a Wal-Mart store. Walters Decl. ¶15; Gomez Tr. at 22-23 (assistant manager would review the janitorial work at the end of each shift); V.M. Zavala Tr. at 111-12 (same); Julio Zavala Tr. at 41-42 (same); M. Mendez Decl. ¶7 (same).

The Maintenance Manual emphasizes the need for coordination between crews and Wal-Mart management. Walters Decl. Exh. B. Crews were instructed to “Review your [nightly cleaning] game plan with the Night Manager to insure cooperation between floor maintenance and night stocking crews. You must work together as a team to insure the floors get cleaned and the shelves get stocked every night.” *Id*, App. p. 32. As the janitors performed their work during the night, store managers and assistant managers would routinely direct their work, *e.g.* ordering them to steer clear of aisles where restocking was going on, ordering them immediately to mop up hazardous spills and to get bubble gum wads up off of the tiles. As named plaintiff Eunice Gomez testified,

A. [t]he assistant manager would tell us to strip a certain area because there weren't any workers in that area that night or on a particular night, might say that it has to be very very clean, and just tell us where we would be stripping and waxing.

Q. Did the assistant manager tell you not to work in areas where the Wal-Mart employees were working?

A. Yes.

Gomez Tr. at 21; *see also id.* at 15 (assistant managers “were directing the personnel that were stocking the shelves, and they were directing [the janitors] to let us know what we had to do.”); V.M. Zavala Tr. at 15 (assistant managers would instruct janitors “where to start stripping and waxing,” “where to start cleaning the carpets” and when to clean the bathrooms), 29 (assistant managers would tell crew where Wal-Mart associates were restocking shelves so that crew members could avoid those aisles); 94 (assistant managers would send janitorial crews to empty areas of the store); Victor Torres Tr. at 74 (same); Octavio Denicio Tr. at 17 (assistant managers would direct janitorial crews to clean certain aisles); Julio Zavala Tr. at 12 (manager would direct crews to which areas needed to be cleaned); Felipe Condado Tr. at 19 (same); Carlos Rueda Tr. at 37 (assistant managers would direct work); Declaration of Stanislav Skubal dated March 3, 2004 [Docket no. 13] (“Skubal Decl.”) ¶7; *see also supra* n. 6.

In some stores the work was so closely monitored by Wal-Mart managers and assistant managers that the managers would create a schedule for the janitors dictating on which days certain aisles needed to be stripped and waxed. V.M. Zavala Tr. at 91-93 and Plaintiffs’ Exhibit 1, App. p. 698. In this regard, working for Wal-Mart was starkly atypical of commercial cleaning contracts which do not involve such strict on-site monitoring of contract employees. Walters Decl. ¶15.

At approximately 7 a.m. the following morning, the Wal-Mart store manager or assistant manager would walk the store to verify that required tasks had been performed to the expected standards. *Id.* at ¶16; Felipe Condado Tr. at 57; Carlos Rueda Tr. at 14, 16, 64; Victor Torres Tr. at 17-18. Wal-Mart required that janitors perform all necessary tasks to the

satisfaction of the local store manager or assistant manager. Walters Decl. ¶16; Gomez Tr. at 22-23; Julio Zavala Tr. at 41-42, 59; Felipe Condado Tr. at 57; Carlos Rueda Tr. at 14; Mendez Decl. ¶7.

If the manager or assistant manager was not satisfied, they would order areas of the stores revisited and more and better work performed by the janitors. Julio Zavala Tr. at 41-42; Victor Torres Tr. at 17-18 (crews could not leave until the assistant manager was satisfied). This occurred on a routine basis.

The extra work by the janitors would invariably involve them staying and working more time after having already completed an 8 hour shift. Gomez Tr. at 22-23 (“A. We had to work eight hours, but at the end of our shift, if the assistant manager wanted us to do something, then we would have to finish and do it until we were done. Q. How often did that happen? A. Two or three times a week.”); Julio Zavala Tr. at 9 (“the job would be from 11:00 at night until 7:00 in the morning and you would have to work extra hours”); Felipe Condado Tr. at 57 (“Q. Did you ever work past 7:00 in the morning? A. Yes . . . the manager would check the bathrooms . . . if it was dirty, and then we had to sweep again or inside of the store the workers that were organizing things, they would trash things and then we had to clean again until the last pallet. . . [the assistant manager] wanted that the store would be clean; otherwise we couldn’t leave”); Carlos Rueda Tr. at 64 (“Q. Did you ever stay later than 7:00 in the morning? A. . . . if [the assistant manager] made us return because if it was something that they considered dirty, they would make us come back and clean it”); Victor Torres Tr. at 145-46 (crews required to work past 7:00 a.m. “three or four times a week” based on assistant managers direction), 18 (assistant managers would authorize crews to leave in the morning); *see also* Octavio Denicia Tr. at 21-22, 28 (if assistant manager unhappy with work, crews had to stay late).

Wal-Mart did not maintain time records for the janitorial crews. Walters Decl.

¶16.

If an assistant store manager was not happy with the crews' work, he or she had the authority to fire the crew (and sometimes did so). V.M. Zavala Tr. at 25-26. This authority was expressly reserved under the form contracts Wal-Mart used with its maintenance contractors. Walters Decl. ¶10 and Exh. A thereto ¶7, App. p. 20. Wal-Mart exercised that authority. Stanislav Skubal, a Slovak national, worked as a janitor at Wal-Mart stores in Tennessee and Virginia at times from 1995 through the Operation Rollback raid in 2003. Skubal Decl. ¶2. In 1999 he was summarily fired by Chuck Richards, the Wal-Mart store manager in Winchester, Virginia, on account of alleged misconduct. Richards ordered Skubal to stop work immediately and permanently leave the Wal-Mart store and parking lot in 60 seconds' time. Skubal Decl. ¶7.

Janitors worked in crews of from four to seven, depending on the size of the store to be cleaned.<sup>7</sup> Walters Decl. ¶17; Victor Torres Tr. at 28; V.M. Zavala Tr. at 19; Carlos Rueda Tr. at 24; Julio Zavala Tr. at 16. Each crew was responsible for their assigned store. Walters Decl. ¶17. The contractors would determine the size of the crew needed based on the square footage of the particular stores and they assumed that that same crew would clean the store on each day. Walters Decl. ¶17. Exhibit C to the Linsey Declaration is a document Wal-Mart produced in discovery to plaintiffs that lists the weekly costs for stores cleaned by Southern Cleaning Services, Inc. App. p 2603. As that document notes stores in the 100,000 square foot range could be cleaned with a crew of 3, while a store of 200,000 square feet required a 6 person crew. *Id.*

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<sup>7</sup> See also Flores Decl. ¶3; Mendez Decl. ¶3; M. Macak Decl. ¶3; E. Macak Decl. ¶3; Skubal Decl. ¶3; Szczesiak Decl. ¶4.

Because most Wal-Mart stores were closed only on Christmas Day, each crew member typically worked 364 days a year. Walters Decl. ¶17. Each janitor thus worked seven days a week and no fewer than 8 hours each day plus whatever extra hours would be required by local Wal-Mart management. Gomez Tr. at 22- 23; Skubal Decl. ¶3; *see also supra* pp. 7-12.

Crew members were paid a fixed amount no matter how many hours worked, usually between \$325 and \$350 per week with crew leaders receiving slightly more, approximately \$500 per week. Gomez Tr. at 11-12, 20; V.M. Zavala Tr. at 27-28; Julio Zavala Tr. at 16; Felipe Mata Tr. at 13, 25-26; Skubal Decl. ¶5.<sup>8</sup>

The most experienced crew members would typically be responsible for the operation of machinery necessary to scrub, strip and re wax tiled floors and deep clean carpets. Walters Decl. ¶18; Gomez Tr. at 21; Victor Torres Tr. at 12. Others tasks would involve use of brooms, dust and rag mops, buckets, brushes, cleaning cloths along with various cleaning solvents, Felipe Condado Tr. at 21, which were generally provided by Wal-Mart. Walters Decl. ¶18; Julio Zavala Tr. at 14-15, 22-23; Octavio Denicia Tr. at 37. At times crews would replenish such cleaning supplies from store shelves with the approval of store management. Walters Decl. ¶18; V.M. Zavala Tr. at 110-11; Julio Zavala Tr. at 82-83; Victor Torres Tr. at 77-78, 142.

In some cases, Wal-Mart provided the buffing, scrubbing and extracting machines and vacuum cleaners as well. Walters Decl. ¶18; V.M. Zavala Tr. at 110-11; Julio Zavala Tr. at 58; Felipe Condado Tr. at 33. Crew leaders typically received a single check from which all members of their crew were paid. Walters' Decl. ¶18; Gomez Tr. at 34; V.M. Zavala Tr. at 53;

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<sup>8</sup> *See also* Flores Decl. ¶5; Mendez Decl. ¶5; Jaros Decl. ¶5; M. Macak Decl. ¶5; E. Macak Decl. ¶5; Skubal Decl. ¶5; Cruz Decl. ¶5; San Juan Decl. ¶5; Zednik Decl. ¶5; Szczesiak Decl. ¶6.

Julio Zavala Tr. at 21; Felipe Mata Tr. at 25-26; Octavio Denicia Tr. at 20; Victor Torres Tr. at 20.

Communal lodging was in many cases arranged for migrants by the contractors and in some cases paid by Wal-Mart. Walters' Decl. ¶23. Attached as Exhibit E to the Walters Declaration is an IMC Billing Change Form maintained in the ordinary course of IMC's business App. 1, p. 104. It reflects that IMC would bill Wal-Mart a one time charge of \$705.00 for accommodations for the cleaning crew at its store 1472 in Winston-Salem, North Carolina, because the start date for the crew was delayed a week. As reflected in the document, this charge was approved by Wal-Mart.

Wal-Mart Supercenter and Store Managers knew that the individuals working as janitors in its Stores and Supercenters were migrants with little or no skills in the English language and had reason to know that they were undocumented, *i.e.* without proper authorization to work in the United States. These migrant workers generally worked at the Wal-Mart Stores seven days a week, nearly every day of the year, and sometimes even lived in the back areas of Wal-Mart properties. Walters Decl., ¶22; Skubal Decl. ¶3.

#### The Federal Government's Investigation into Wal-Mart's Illegal Employment Practices

In 2003 the U.S. government announced that it was targeting Wal-Mart in a continuing federal law enforcement investigation dubbed "Operation Rollback." As part of "Operation Rollback," on October 23, 2003, US ICE officers simultaneously raided 61 retail stores owned and operated by Wal-Mart in 21 states across the country, arresting hundreds of janitors for alleged immigration violations. SAC ¶¶8-18, 19, 27-28. Those arrested in Operation Rollback are allegedly undocumented immigrants from countries including Mexico, the Czech Republic, Mongolia, Brazil, Uzbekistan, Poland, Russia, Georgia, and Lithuania. *Id.* Among those arrested are the named plaintiffs Victor Zavala, Arturo Zavala, Eunice Gomez, Maximino

Mendez, Carlos Alberto Tello, Antonio Flores, Hipolito Palacios, Octavio Denasio, Luis Gutierrez, Daniel Antonio Cruz, Pavel Kunc and Martin Macak. *Id.*

Wal-Mart settled the federal criminal investigation in 2005 by paying the United States \$11 million and agreeing to a five-year permanent injunction to avoid indictment by a federal grand jury investigating its pattern and practice of employing undocumented janitorial labor through numerous immigration predicate acts. March 15, 2005, Consent Decree and Order, *USA v. Wal-Mart Stores, Inc.*, 05-CV-0525 (M.D. PA. 2005).

#### Prior Proceedings

On November 10, 2003, following one of the largest immigration law enforcement actions in American history, in which the Government empanelled a federal grand jury for many months to weigh felony charges against Wal-Mart stores nationwide, plaintiffs commenced this action on behalf of themselves and other migrants who worked under exploitative conditions at Wal-Mart through various maintenance contractors. Plaintiffs thereafter filed a First Amended Complaint (“FAC”) on February 2, 2004. [Docket no. 6]

#### A. The First Amended Complaint

Plaintiffs’ FAC pleaded five causes of action against Wal-Mart. Count I alleged that Wal-Mart and various maintenance contractors created an association-in-fact enterprise to exploit the labor of undocumented janitors which was run through a pattern of racketeering activity -- namely immigration crimes, money laundering and involuntary servitude -- in violation of RICO Section 1962(c). Count II alleged that Wal-Mart engaged in a RICO conspiracy in violation of Section 1962(d) by knowingly agreeing to facilitate the operation of the association-in-fact enterprise alleged in Count I. Count III alleged that Wal-Mart conspired with the contractors to violate the civil rights of the janitors in violation of 42 U.S.C. § 1985(3). Count IV alleged that Wal-Mart suffered or permitted the employment of the janitors at its stores

nation-wide under materially identical terms and thereby is liable for the failure to pay the janitors overtime and, in some cases, the minimum wage under the FLSA. Count V alleged common law false imprisonment based on Wal-Mart's systematic practice of locking janitors in its stores during their overnight shifts.

On March 19, 2004, Wal-Mart filed an omnibus motion to dismiss. The motion was fully briefed by June 1, 2004, and oral argument was heard on the motion on October 20, 2004.

By Opinion and Order dated October 7, 2005 [Docket nos. 63 and 64],<sup>9</sup> this Court denied Wal-Mart's motion to dismiss the FLSA and false imprisonment claims. The Court dismissed, with prejudice, plaintiffs' Civil Rights Act claim. On the RICO claims, the Court granted the motion with leave to amend. Addressing only Wal-Mart's contention that the FAC failed to properly allege predicate acts of racketeering by Wal-Mart, the Court dismissed Counts I and II with leave to replead. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 302-17 (D.N.J. 2005). The Court did not address Wal-Mart's other contentions, *inter alia*, that plaintiffs failed to properly plead a RICO enterprise or that there were legally insufficient allegations of proximate causation.

B. The Second Amended Complaint

Following the Court's decision, plaintiffs filed a motion with the U.S. District Court for the Eastern District of Arkansas to unseal the affidavits of federal law enforcement agents that were the predicates for search warrants issued in connection with the federal criminal investigation of Wal-Mart. Based on evidence revealed in warrant applications and federal law

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<sup>9</sup> 393 F.Supp.2d 295 (D.N.J. 2005).

enforcement affidavits and pursuant to this Court's order, plaintiffs filed their Second Amended Complaint ("SAC") on November 21, 2005 [Docket no. 75].

The SAC again alleged that Wal-Mart and various maintenance contractors created an association-in-fact enterprise (the "Wal-Mart Enterprise") to exploit the labor of undocumented janitors which was run through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c), and that Wal-Mart engaged in a RICO conspiracy in violation of Section 1962(d) by knowingly agreeing to facilitate the operation of the association-in-fact enterprise. SAC ¶¶41, 117, 125.

Specifically, with respect to the RICO claims, plaintiffs alleged that to avoid and evade responsibility under federal immigration law and to profit from illegal activity, Wal-Mart formed the Wal-Mart Enterprise and conspired with and directed various cleaning contractors to establish shell corporations knowing the contractors would provide janitors who were not legally authorized to work in the United States and who had been, at Wal-Mart's direction, unlawfully transported, harbored or encouraged to remain in the United States and who could be paid below legal minima with impunity because of their status. SAC ¶¶3, 41, 128. In particular, based on evidence unsealed in the federal criminal investigation of Wal-Mart, plaintiffs specifically alleged that Wal-Mart senior management directed its largest maintenance contractor (following federal immigration raids) to establish shell corporations to supply undocumented labor because Wal-Mart "like[d] those Pollocks." SAC ¶47, 51.

Plaintiffs alleged that Wal-Mart engaged in multiple predicate acts of racketeering, including systematic violation of federal immigration law, SAC ¶75, 128, money laundering, SAC ¶¶85, 94-97, 117, and involuntary servitude, SAC ¶120, 128. Further, the allegations of the SAC detailed the harm caused to plaintiffs by the activities of the enterprise: as

a result of Wal-Mart's participation in the Wal-Mart Enterprise, plaintiffs were paid below levels mandated by the FLSA's minimum wage and overtime requirements and Wal-Mart (and the contractors who joined it in the Wal-Mart Enterprise) reaped substantial profits from its ability to exploit undocumented migrant labor. SAC ¶121, 130.

1. Wal-Mart's Renewed Motion to Dismiss

On January 20, 2006, Wal-Mart filed a renewed motion to dismiss the RICO claims (*i.e.*, Counts I and II) of the SAC. The motion was fully briefed on May 5, 2006, and the Court declined to hear oral argument.

On August 28, 2006, this Court granted the renewed motion and dismissed plaintiffs' RICO claims with prejudice. 447 F.Supp.2d 379, (D. N.J. 2006). [Docket nos. 115 and 116] In particular, the Court concluded that plaintiffs failed to properly allege that Wal-Mart was distinct from the alleged RICO enterprise and that there were insufficient allegations of proximate causation. *Id.* at 386-389. The Court did not address Wal-Mart's renewed argument that the SAC failed to allege predicate acts of racketeering by Wal-Mart. Concluding that the failure to plead a substantive RICO violation defeats the RICO conspiracy claim in Count II of the SAC, the Court dismissed that claim as well.<sup>10</sup>

2. Motion for Certification

On March 11, 2004, plaintiffs moved to conditionally certify this action as a collective action under Section 216(b) of the FLSA. On December 29, 2004, this Court conditionally certified this action as a collective action allowing all undocumented or recently

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<sup>10</sup> On September 19, 2006 plaintiffs' moved for leave to appeal dismissal of their RICO claims. [Docket no. 117]. That motion was denied by order dated April 13, 2007 [Docket no. 156].

documented immigrants who were at any time since January 2000 employed as contract janitors to clean Wal-Mart stores across the United States to opt-in to the action. [Docket no. 41].

Thereafter, 114 opt-in plaintiffs timely completed the court-ordered FLSA Questionnaire, which detailed plaintiffs' working conditions while employed as janitors at Wal-Mart stores across the country, and Wal-Mart took depositions of eight named plaintiffs.

Following Court-supervised settlement negotiations, the Court directed briefing and determined two issues (1) whether individuals who failed to submit a response to the court ordered FLSA Questionnaire (but who may have submitted much more extensive or substantially equivalent information) should be permanently excluded from any recovery in a collective action; and (2) what is the proper method for computing overtime for hours over 40 in accordance with the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* On September 25, 2008, the Court answered both questions in favor of the defendant. *See* Opinion, Sept. 25, 2008 [Docket no. 191]. As a result, the collective action was limited to 114 janitors.

Plaintiffs now move to finally certify this action.

### **ARGUMENT**

#### II. This Action is Properly Certified as a Collective Action

Section 216(b) of the FLSA provides that

[a]n action [under the FLSA] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. §216(b).

To certify a collective action asserting FLSA or ADEA claims under 29 § 216(b), therefore, only two conditions must be met: (1) the plaintiffs must be similarly situated and (2)

each individual must file a written consent to join the action. *See Sperling v. Hoffman La Roche, Inc.*, 862 F.2d 439, 444 (3d Cir. 1988) *aff'd and remanded*, 493 U.S. 165 (1989); *Aquilino v. Home Depot, Inc.*, No. 04-CV-4100, 2006 WL 2583563, at \*1 (D.N.J. Sept 7, 2006). Nothing else is required for participation in a collective action under the FLSA which “has been construed liberally to apply to the furthest reaches consistent with congressional direction.” *Kelley v. Alamo*, 964 F.2d 747, 750 (8th Cir. 1992) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 385 U.S. 207, 211 (1959)).

District courts in the Third Circuit follow a two-step process to determine whether a prospective class is similarly situated and accordingly, whether the class will proceed as a collective action. During the first tier, or the “notice stage,” the court examines pleadings and affidavits in the record to determine whether notice should be given to potential class members.

On December 29, 2004, after plaintiffs moved for an order conditionally certifying the class, this Court found that plaintiffs were similarly situated and conditionally certified the action as a 216(b) collective action allowing all undocumented or recently documented immigrants who were at any time since January 2000 employed as contract janitors to clean Wal-Mart stores across the United States to opt-in to the action. December 29, 2004 Order [Docket No. 41].

Once discovery is complete, the court moves to the second tier – a determination of whether the class will remain certified. At this stage, the court looks at the evidence to analyze whether the opt-in class is similarly situated to the named plaintiffs. *See id.*; *see also Goldman v. Radioshack Corp.*, 2003 WL 21250571 (E.D. Pa. April 16, 2003); *Asencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 663 (E.D. Pa. 2001).

As shown below, the deposition testimony and affidavits of the named plaintiffs, together with the declaration of Walters, Wal-Mart's leading maintenance contractor and the detailed FLSA questionnaires from 114 opt-in plaintiffs easily demonstrate that plaintiffs are similarly situated for collective action certification purposes and an order should issue certifying the class of 114 plaintiffs.

A. The Lenient Similarly Situated Standard.

The FLSA does not define the term "similarly situated," and courts do not require prospective class members to be in identical circumstances. *See Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000) (collecting cases). "[P]laintiffs need show only 'that their positions are similar, not identical,' to the positions held by the putative class members." *Sperling v. Hoffman-La Roche*, 118 F.R.D. 392, 407 (D.N.J.1988), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir.1988), *aff'd*, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989))

The "similarly situated" standard under Section 216(b) is thus far less stringent than the requirement under Fed.R.Civ.P. 23(b)(3) that common questions of law or fact predominate over questions affecting only individual members. *Bradford v. Bed Bath & Beyond, Inc.*, 184 F.Supp.2d 1342, 1345 (N.D. Ga. 2002) (the "similarly situated standard is less stringent than Rule 20(a)'s 'same transaction or occurrence' requirement for joinder and than Rule 23(b)(3)'s requirement that a class may only be certified if 'common questions predominate'"); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D. Cal. 1991); *see also Wertheim v. State of Ariz.*, 1993 WL 603552, \*1 (D. Ariz. Sept. 30, 1993) ("[t]he requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure"). In fact, the Eleventh Circuit has held that the similarly situated requirement is more flexible than the requirements of Rules

20 (joinder) or 42 (severance). *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

In *Moss* the district court denied defendant's motion to decertify the class, finding that plaintiffs were similarly situated despite "differences in plaintiffs' job duties, geographic locations and hourly billing rates." 201 F.R.D. at 411. In that case, plaintiffs were employed as members of defendant's Catastrophe Division ("CAT"), which responded to natural and man-made disasters by assisting insurance companies with liability claims and clean-up programs. Plaintiffs were classified by defendant as either "core members" or "non-core employees." Both core members and non-core employees worked at catastrophic sites on short and long term assignments and performed their work at a variety of locations including branch and temporary offices, insurance company offices, law firms, hotel rooms and leased facilities. Core members were permanent employees who received health and pension benefits and also received a monthly draw against their future earnings when not employed on a CAT project. Non-core employees were assigned to projects on an as needed basis and were not provided with benefits or a draw.

Although plaintiffs had differences with respect to certain job duties, geographic assignments and hourly billing rates, the court found that they "assert a common claims: *i.e.*, that [defendant] violated the FLSA by failing to compensate them overtime wages for their work during the Ashland and Exxon Valdez oil spill projects." *Id.* at 410. The court also noted that variations in the plaintiffs' duties, geographic assignments and hourly billing rates did not differentiate the class to the extent that it defeated the purposes of a §216(b) action. *Id.*

Similarly, in *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261 (D. Conn. 2002), the court denied defendant's motion to decertify the FLSA collective action, rejecting defendant's

argument that it should not remain certified because the manner in which each plaintiff spent his or her time at work and “on call” varied and could not be determined by general proof. 210 F.R.D. at 264. Because plaintiffs had similar job descriptions, “in general” worked on computer platforms to support customers and were all classified as exempt by defendant, the Court held this satisfied the similarly situated requirement. *Id.* at 265. *See also Kelley v. SBC*, No. 97-CV-2729 CW, 1998 WL 928302 (N.D. Cal.1998) (finding sufficient commonality among employees with different job functions to support class certification); *Moss*, 201 F.R.D. at 398 (holding that differences among class members’ job duties, geographic assignments, and hourly billing rates did not warrant de-certification); *Gregory v. Home Depot U.S.A., Inc.*, 3:01CV372 (AWT) (slip op. D. Conn. July 3, 2001) (holding that “although there are differences among the situations of the members of the proposed class,” the defendant’s failure to pay overtime “is common to all of the members of the proposed class and dominates each of their claims”) (alteration in original) (internal quotations omitted).

In *Bradford* the court denied defendant’s motion to decertify a conditionally certified class of retail managers finding that “[p]laintiffs’ job duties, while not identical, were very similar,” where plaintiffs uniformly testified that their main duties were unpacking freight and putting items on the shelves and assisting customers. 184 F. Supp. 2d at 1347. *See also Bishop v. AT & T Corp.*, 256 F.R.D. 503, 508 (W.D. Pa. 2009) (plaintiffs and potential class members were similarly situated where the proposed plaintiffs (1) shared similar work duties; (2) advanced similar claims; and (3) sought substantially the same form of relief); *Realite v. Ark Rests. Corp.*, 7 F.Supp.2d 303, 306 (S.D.N.Y. 1998) (plaintiffs can show that potential class members are similarly situated “by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the

law.”); *Wertheim*, 1993 WL 603552 at \*1 (“All that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA”).

Here, the evidence reveals that all contract janitors performed a common set of tasks under Wal-Mart’s direction no matter where they worked.

1. The Named Plaintiffs and Opt-In Plaintiffs are Similarly Situated: Plaintiffs’ Terms and Conditions of Employment and Job Duties Were Nearly Identical

Here, the named plaintiffs and opt-in plaintiffs performed the same janitorial job pursuant to the same Wal-Mart Maintenance Manual standards at Wal-Mart stores across the country. Wal-Mart insisted upon a common set of methods and procedures for all janitorial work throughout the chain, resulting in a continuity of janitorial job duties throughout the country. *See* Walters Decl. ¶9 and Exh. A thereto.

The janitors’ substantive duties were thus materially the same. As detailed in the Wal-Mart Maintenance Manual, each night plaintiff and opt-in plaintiff janitors cleaned the floors of each Wal-Mart store where they were employed. They dust mopped, swept and scrubbed hard surfaced floors. They vacuumed, shampooed, spot cleaned and periodically cleaned carpeted areas using an extractor. They periodically stripped and rewaxed waxed floor surfaces. Every night they emptied trash receptacles, cleaned the bathrooms and cleaned the stores’ front doors and windows. *See* Walters Decl. ¶9. Exhibit A to the Linsey Declaration at App. 20, pp. 932-942 is a chart which summarizes information supplied by janitors who executed the court-ordered questionnaire in this matter.<sup>11</sup> This chart outlines for each janitor

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<sup>11</sup> Copies of each of these questionnaires were previously filed in this matter with Docket no. 193 and are filed again herewith at App. 20, pp. 945-2602.

their respective job duties, hours of work and compensation while working at Wal-Mart. Each of these janitors performed one or more of the central janitorial functions outlined in the Wal-Mart Maintenance Manual and the Walters Declaration.

Not only was the work materially identical, it was performed to Wal-Mart's standard specifications. This is confirmed by the form contract Wal-Mart uses for its maintenance contractors. Wal-Mart's form contract requires contractors to meet the standards Wal-Mart set, gives Wal-Mart "general right of inspection and supervision to serve the[ir] satisfactory completion" and, should it so choose, terminate the contract. Walters Decl. Exh. A at ¶4. The necessary tasks were uniform regardless of the type of store or the location of the operation.

And the tasks were directed and overseen by Wal-Mart managers and assistant managers. Wal-Mart managers would tell the janitors where and when to clean certain aisles and they routinely inspected the janitors' work before the janitors were allowed to leave. Wal-Mart management dictated standards of cleanliness and exercised oversight over how work was performed, regardless of the identity of the contractor who ostensibly employed the janitors or where the janitor was employed. *E.g.*, Walters Decl. ¶15; Victor Zavala Tr. at 91-93 and Plaintiffs Exhibit 1.

That plaintiffs were employed at different Wal-Mart stores across the country does not defeat a finding that they are similarly situated. That is because no matter where plaintiffs worked, Wal-Mart management centrally dictated the duties to be performed and the standard to which plaintiffs' work would be held, and these duties and standards were uniform. Walters Decl. ¶15.

Given the uniformity in the work to be done and the standards under which it was performed, the janitors' working conditions were nearly identical throughout the country. Janitors worked seven days a week in crews from four to seven, depending on the size of the store. They worked from approximately 11:00 p.m. until Wal-Mart management determined that the stores had been cleaned to Wal-Mart's standards, always in excess of 8 hours per night. They were paid between \$325 and \$350 per week with crew leaders receiving approximately \$500 per week. The crew leaders were generally paid by check which they cashed to pay the remaining crew members. *E.g.*, Victor Torres Tr. at 18, 20, 145-46; Octavio Denisio Tr. at 21-22, 28.

Under these circumstances, proceeding under 29 U.S.C. Section 216(b) is appropriate. In *Bishop*, for example, after discovery, the district court found that the proposed plaintiffs were similarly situated where they worked in different geographic locations and for different divisions of the employer. There, as here, the court found that because there was no distinction among the work performed at the various facilities, the fact that plaintiffs were employed in different geographic locations was of no moment. *Bishop*, 256 F.R.D. at 508; *see also Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52 n.10 (3d Cir. 1989) (affirming district court's finding that plaintiffs who worked at different branch locations were similarly situated for collective action purposes).

As shown above, the named plaintiffs and opt-in plaintiffs were all subject to the same scheme by Wal-Mart to avoid paying them overtime in accordance with the mandates of the FLSA. This action should be certified as a collective action and allowed to proceed to trial.

**CONCLUSION**

For the foregoing reasons, this Court should certify the opt-in class to include 114 plaintiffs.

Dated: November 13, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that on this 13th day of November 2009, a true copy of Plaintiffs' Notice of Motion and Motion for Class Certification, and Memorandum of Law and Appendix in support thereof, and (Proposed) Temporary Order for Seal was served on counsel of record for defendant Wal-Mart Stores, Inc., by Federal Express and by Electronic Filing with the Court.

/s/ James L. Linsey \_\_\_\_\_  
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