

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

VICTOR ZAVALA, <i>et al</i> , on behalf of themselves and all others similarly situated,	x	Civil Action No.
	:	03-Civ.-5309 (JAG)
	:	
Plaintiffs,	:	
- against -	:	Oral Argument Requested
	:	Argument Date: April 12, 2004
WAL-MART STORES, INC.,	:	Argument Time: 9:30 a.m.
	:	
Defendant.	:	
	x	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF  
PLAINTIFFS VICTOR ZAVALA, *ET AL.*, FOR FACILITATED  
NOTICE PURSUANT TO 29 U.S.C. §216(b)**

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## PRELIMINARY STATEMENT

On February 25, 2004, plaintiffs' counsel was advised by federal law enforcement authorities in the Middle District of Pennsylvania conducting an on-going grand jury investigation targeting Wal-Mart Stores, Inc. ("Wal-Mart"), that Wal-Mart asked the United States to produce for interviews janitors arrested by U.S. Customs and Immigration Enforcement ("USICE") in its "Operation Rollback" raid of October 23, 2003, including named plaintiffs in this action and others who have filed consents to join this case. Wal-Mart's refusal to commit to go through plaintiffs' counsel to interview janitors and its refusal to provide appropriate notice of this action to anyone it spoke to – together with Wal-Mart's history of pre-trial abuse – compel this motion for an order permitting this case to proceed as a collective action and requiring Wal-Mart to provide notice of the pendency of this action under Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b).

This action was brought on November 10, 2003 after Operation Rollback exposed yet again Wal-Mart's systematic exploitation of immigrant janitorial labor. As outlined below, Wal-Mart – acting through ostensibly independent maintenance contractors – systematically exploits immigrant labor drawn from the four corners of the earth to clean its thousands of stores in this country, working janitors seven days a week almost every day of the year. The janitors work well in excess of 40 hours a week without overtime and (in some cases) at pay rates below the minimum wage. Plaintiffs assert claims under the FLSA, 29 U.S.C. §201 *et seq.*, the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §1985(3), and common law to seek redress for damages caused by Wal-Mart's exploitative employment practices.

As shown below, the Supreme Court has held that it is consistent with sound pre-

trial planning for trial courts to require prompt notice of the pendency of an FLSA action to similarly situated employees. Wal-Mart's immigrant janitors worked under materially identical terms and conditions of employment as is shown by the ten declarations filed herewith of Wal-Mart immigrant janitors from Mexico, Poland, Slovakia and the Czech Republic who were employed in Wal-Mart stores in 8 states over the past 9 years. Of course, the work of stripping and waxing floors and cleaning restrooms is substantially identical nationwide but so, too, are the janitor's terms and conditions of employment: 60 hour weeks with no days off and minimal compensation without the benefit of legal employment protections such as workmen's compensation or Social Security. And, while Wal-Mart has yet to answer the First Amended Complaint, its expected defense – that its contractors actually employed the janitors and that it remained somehow ignorant of their rampant exploitation – also turns on similar facts. Those facts are that the janitors worked under Wal-Mart's supervision and that, as a matter of economic and practical reality, their employment was directed and controlled by Wal-Mart.

For these reasons, this case should be permitted to proceed as a collective action under the FLSA. Plaintiffs also request that Wal-Mart be directed to (1) post in its workplaces a Court-approved notice substantially similar to that set out in Exhibit A to this brief, (2) produce all known names, addresses and nationalities of its contract janitors since 1996 and all copies of all janitorial contracts and contact information for all current and former contractors who supplied janitorial labor since 1996 to enable plaintiffs' counsel to subpoena records concerning janitors' identities and current whereabouts, (3) permit plaintiffs' counsel to be present and provide Court-approved notice of this litigation to janitors to be interviewed by defense counsel preparing for grand jury proceedings against Wal-Mart in the United States District Court for the

Middle District of Pennsylvania.

Plaintiffs also seek leave of court to notify class members of this litigation through mailing notices to janitors' last known addresses once those addresses can be ascertained, leafleting Wal-Mart stores, and providing public service announcements for broadcast on the radio in this country and in other countries where current and former Wal-Mart janitors are known to reside.

### **STATEMENT OF FACTS**

#### **Wal-Mart Seeks to Interrogate Plaintiff Janitors**

Assistant United States Attorney Wayne Samuelson of the Middle District of Pennsylvania advised plaintiffs' counsel on February 26, 2004, that Wal-Mart requested the United States produce the janitors arrested by USICE in Operation Rollback. Upon learning of Wal-Mart's effort to contact clients and other members of the class, plaintiffs' counsel advised Wal-Mart's counsel that Wal-Mart can not interrogate clients without going through their attorneys and demanded that Wal-Mart provide notice of this action to those janitors it attempts to question. Declaration of James L. Linsey, dated March 10, 2004 ("Linsey Decl.") filed herewith, ¶2 and Exhibit A thereto.

In response, Wal-Mart did not deny that it was seeking to interview plaintiff class members. Nor did Wal-Mart agree to advise those it spoke with of the existence of this action or that those janitors might have a right to recover unpaid overtime from Wal-Mart. Instead, Wal-Mart admonished plaintiffs' counsel to restrict personal contact with contract janitors and avoid the creation of unjustified expectations for plaintiffs. Linsey Decl. ¶3 and Exhibit B thereto.

## **Operation Rollback**

Operation Rollback is a coordinated law enforcement action by USICE that involved the arrest of hundreds of janitors at 61 Wal-Mart stores in 21 states across the country on October 23, 2003. *See* Exhibit D to the Linsey Decl. (list of the states and some of the locations raided by USICE in Operation Rollback). At the same time, on information and belief, federal agents acting pursuant to search warrants issued in the U.S. District Court for the Middle District of Pennsylvania seized documents from Wal-Mart's Bentonville, Arkansas headquarters. Wal-Mart spokesmen have conceded that the company is the target of a federal grand jury investigation in the Middle District of Pennsylvania. Linsey Decl. ¶5.

Those arrested in Operation Rollback were allegedly undocumented immigrants from countries including Mexico, the Czech Republic, Mongolia, Brazil, Uzbekistan, Poland, Russia, Georgia, and Lithuania. Linsey Decl. ¶6 and Exhibit E. Among those arrested were the named plaintiffs Victor Zavala, Arturo Zavala, Eunice Gomez, Maximino Mendez, Carlos Alberto Tello, Antonio Flores, Hipolito Palacios, Octavio Denisio, Luis Gutierrez, Daniel Antonio Cruz, Pavel Kunc and Martin Macak. In addition, at least a dozen others who were also arrested in Operation Rollback have filed consents to join in this action and are represented by plaintiffs' counsel. Linsey Decl. ¶6.

## **The First Amended Complaint**

This case grows out of the exploitative scheme being laid bare by Operation Rollback. In this class action plaintiffs seek redress for damages directly caused by the criminal enterprise operated by Wal-Mart who, acting in combination with its various janitorial contractors, systematically violated immigration and protective wage and hour laws and other

laws for its own profit and benefit. This action was commenced on November 10, 2003, and a First Amended Complaint was filed on February 2, 2004. By stipulation Wal-Mart has until March 19 to answer the First Amended Complaint. A copy of the First Amended Complaint is attached to the Linsey Decl. as Exhibit C.<sup>1</sup>

As there alleged, Wal-Mart and various maintenance contractors identified in the First Amended Complaint and others presently unknown to plaintiffs have created, engaged in, and profited from a nationwide criminal enterprise which exploits the plaintiff class through wide-scale violation of protective federal and state labor and employment laws. Linsey Decl., Ex. C., ¶36. This enterprise, secured and maintained by illegal means, profits from the labor of easily-exploitable immigrant janitors. *Id.* Wal-Mart and the contractors target immigrants who speak little or no English, and have little or no money or mobility to escape work at Wal-Mart. *Id.* ¶39. These workers come from across the globe and present a ready pool of easily exploited labor. *Id.* Driven by poverty and the lack of economic opportunities at home, they enter the United States where they become part of a labor force Wal-Mart has fostered and from which it benefits. *Id.* ¶39.

As outlined in the First Amended Complaint, the parties who make up the enterprise participate in its affairs through the commission of widespread and systematic violations of the FLSA and multiple criminal acts, including, but not limited to, transporting undocumented aliens, in violation of 8 U.S.C. §1324(a)(1)(A)(ii); harboring undocumented

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<sup>1</sup>By correspondence dated March 1, 2004 Wal-Mart sought, and thereafter obtained, an adjournment of the initial pre-trial conference in this matter on the basis that it intends to file a motion to dismiss. As outlined below, plaintiffs request that limited discovery to facilitate notice to the janitors proceed notwithstanding any motion that Wal-Mart may file.

aliens in violation of 8 U.S.C. §1324(a)(1)(A)(iii); encouraging undocumented aliens to reside in the United States in violation of 8 U.S.C. §1324(a)(1)(A)(iv); conspiring to transport, harbor and encourage illegal aliens to reside in the United States in violation of 8 U.S.C.

§1324(a)(1)(A)(v)(I); aiding and abetting the transportation, harboring and encouraging of illegal aliens to reside in the United States in violation of 8 U.S.C. §1324(a)(1)(A)(v)(II); committing the above offenses for financial gain in violation of 8 U.S.C. §1324(a)(1)(B)(i); engaging in a pattern and practice of hiring and employing illegal aliens in violation of 8 U.S.C. §1324(a)(1)(A); involuntary servitude in violation of 18 U.S.C. §1594; and (a)(2) and money laundering (within the meaning of 18 U.S.C. §§1956(a)(1)(A)(i), 1956(a)(1)(B)(i), 1956(a)(1)(B)(ii), 1956(a)(3)(A), 1956(a)(3)(B), and 1956(a)(3)(C)) of the proceeds of the aforesaid criminal acts, as well as mail and wire fraud under 18 U.S.C. §§1341 and 1343.

Linsey Decl., Ex. C, ¶37. As discussed below, these allegations are identical to claims made by the United States against over a dozen Wal-Mart maintenance contractors over a year before Operation Rollback.

### **Federal Law Enforcement Actions Directed At Wal-Mart's Employment Practices**

Operation Rollback is but the latest in a series of federal law enforcement actions targeting Wal-Mart's exploitative use of immigrant janitorial labor. As set forth in sworn statements of federal and state law enforcement agents in the action known as *United States v. Express Corporate Servs., Inc., et al.*, No. 3:CV-02-982 (M.D. Pa. June 7, 2002) (the "*Forfeiture Action*") (Linsey Decl. Ex. F), federal law enforcement agencies raided Wal-Mart stores in multiple locations on numerous occasions throughout 2001, as follows: East Stroudsburg, Pennsylvania, March 20 and October 30, 2001; Honesdale, Pennsylvania, March 20 and October

30, 2001; Mount Pocono, Pennsylvania, October 30, 2001; Chambersburg, Pennsylvania, October 30, 2001; Ticonderoga, New York, November 1, 2001; East Gate Square Drive, Cincinnati, Ohio, November 6, 2001; Fields Ertel Road, Cincinnati, Ohio, November 6, 2001; Greenville, Ohio, November 6, 2001; Springfield, Ohio, November 6, 2001; Desloge, Missouri, November 14, 2001; O'Fallen, Missouri, November 14, 2001; St. Ann, Missouri, November 14, 2001; Lee's Summit, Missouri, November 14, 2001; Kansas City, Missouri, November 14, 2001; Columbia, Missouri, November 14, 2001. These raids led to the arrests of approximately 80 allegedly undocumented janitors from Uzbekistan, Georgia, Armenia, Estonia, Russia, Bulgaria, Mongolia, Lithuania, Poland, and the Czech Republic. Linsey Decl. ¶7 and Exhibit F thereto.

The United States identified a number of corporations and other entities which provided undocumented immigrant janitorial labor to Wal-Mart in the *Forfeiture Action*. These entities are: Express Corporate Services, Inc.; Cleanmax International, Inc.; Cleanmax International Associates, Inc.; Cleanmax Associates, Inc.; IMC Associates, Inc.; IMC Maintenance; Intensive Maintenance Associates; IMC Systems Associates, Inc.; Intensive Maintenance Care, Inc.; National Cleaning Management Inc.; National Floor Management, Inc.; American Floor Care Associates, Inc.; American Cleaning Services; Pinnacle Management, Inc.; Pinnacle Floor Cares Associates, Inc.; Pinnacle Floor Care System, Inc.; Atlas Building Services, Inc.; Precision Cleaning Inc.; Comet Floor Care Associates Inc.; Comet, Inc.; Ironman Maintenance Associates Inc.; Ironman Maintenance; Ironman Maintenance, Inc.; Champion Floor Care Associates Inc.; Allied Floor Care Services Inc.; World Clean Associates Inc.; World Clean Inc.; Mercury Floor Care Associates; Mercury Floor Maintenance Inc.; Florida Floor

Care, Inc.; DJR Cleaning Enterprises, Inc.; CMS of Queensbury, Inc., and Drjak Cleaning Services, Inc. A number of these corporations and entities were owned or controlled by Vincent Romano or Christopher Walters and were operated as shells and fronts as part of the scheme. Linsey Decl., Ex. F, pp. 4, 5, 12.

Plaintiffs worked for contractors identified in the *Forfeiture Action*. Martin Macek, Ervin Macek and Stanislav Skubal, for example, worked through IMC at Wal-Mart stores. Declaration of Martin Macak, dated March 3, 2004 and submitted herewith (“M. Macak Decl.”), ¶¶2, 6; Declaration of Ervin Macak, dated March 3, 2004 and submitted herewith (“E. Macak”), ¶¶2, 6; Declaration of Stanislav Skubal, dated March 3, 2004 and submitted herewith (“Skubal Decl.”), ¶¶2, 6. IMC supplied Mongolian janitors arrested in the Chambersburg, Pennsylvania raid in October 2001, Linsey Decl., Ex. F, p. 60. The IMC entities – IMC, Inc., IMC Associates, IMC Maintenance, and IMC Systems Associates – were owned, managed or controlled by Christopher Walters. *Id.* at p. 98. Walters also owned, managed or controlled other maintenance contractors identified as employing undocumented janitorial labor at Wal-Mart stores in the *Forfeiture Action*: Comet Floor Care, Inc.; Comet Floor Care Associates; Comet, Inc.; Ironman Maintenance, Ironman Maintenance, Inc.; Precision Cleaning Champion Floor Care Associates, Inc.; Champion Floor Services, Inc.; National Clearing Management, Inc.; and National Floor Management, Inc. *Id.* at pp. 98-99. The IMC entities alone were paid over \$26 million by Wal-Mart between 1999 and 2001 for janitorial services. *Id.* at p. 100.

In the *Forfeiture Action*, the United States alleges that Wal-Mart maintenance contractors, including Walters and his various firms, engaged in money laundering; transporting, harboring and encouraging undocumented aliens to reside in the United States for profit (and a

conspiracy to do so), and engaging in a pattern and practice of hiring and employing illegal aliens. Linsey Decl. ¶8 and Exhibit F at pp. 137-39.

A year before the *Forfeiture Action* was filed, on June 4, 2001, Miriam Klackova Facemyer, a maintenance contractor who provided undocumented aliens (most from the Czech Republic, Slovakia and Poland) to work as janitors for Wal-Mart, plead guilty in the U.S. District Court for the Eastern District of Virginia to harboring illegal aliens and related offenses. Facemyer was sentenced to seven months' imprisonment and/or two years of supervised release, and was required to pay a \$100 special assessment and a \$2,000 fine. Linsey Decl. ¶9 and Exhibit G.

The government's prosecution of Facemyer itself followed earlier raids of Wal-Mart stores. Upon information and belief, in 1997 and 1998 federal law enforcement authorities raided Wal-Mart stores in St. Louis, Missouri and arrested a number of janitors alleged to be undocumented. Linsey Decl. ¶7. Thus, Wal-Mart's employment practices for janitorial labor have been the subject of federal criminal investigations for a full five years before Operation Rollback and the filing of this action.

The crude economics of Wal-Mart's scheme have been the subject of widespread analysis and attention. An article entitled "See No Evil, Hear No Evil" in the November 24, 2003 issue of *Forbes* reviewed the economics of Wal-Mart's janitorial contracting practices. A copy of the article is attached to the Linsey Decl. as Exhibit H. As outlined there, the strategy of layering contractors is designed to provide Wal-Mart plausible deniability of knowledge of the undocumented immigrant labor used to drive down labor costs below legally mandated levels. *Id.* Wal-Mart's abusive labor practices for its contract janitors and other employees has been the

subject of front-page news articles and editorials throughout the United States and the world.

Linsey Decl. ¶11 and Exhibits I-O thereto.

### **Wal-Mart Janitors Are Employed Under Materially Identical Terms and Conditions**

While Wal-Mart uses a number of maintenance contractors as part of the scheme, Wal-Mart's janitors endure substantially similar terms and conditions of employment. Wal-Mart's janitors are: (1) paid in cash or personal checks without appropriate withholding of payroll taxes;<sup>2</sup> (2) obligated to work hours well in excess of 40 each week;<sup>3</sup> (3) obligated to work seven days per week;<sup>4</sup> (4) not paid for overtime work as required by law;<sup>5</sup> (5) not given time off;<sup>6</sup> and (6) not provided with workers' compensation benefits, health insurance, sick leave,

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<sup>2</sup>See Declaration of Antonio Flores, dated March 5, 2004 and submitted herewith ("Flores Decl."), ¶5; Declaration of Maximino Mendez, dated March 5, 2004 and submitted herewith ("Mendez Decl."), ¶5; Declaration of Teresa Jaros, dated March 6, 2004 and submitted herewith ("Jaros Decl."), ¶5; M. Macak Decl., ¶5; E. Macak Decl., ¶5; Skubal Decl., ¶5; Declaration of Daniel Antonio Cruz, dated March 5, 2004 and submitted herewith ("Cruz Decl."), ¶5; Declaration of Ernesto San Juan dated March 5, 2004 and submitted herewith ("San Juan Decl."), ¶5; Declaration of Petr Zednik, dated March 6, 2004 ("Zednick Decl."), ¶5; Declaration of Teresa Szczesiak, dated March 4, 2003 and submitted herewith ("Szczesiak Decl."), ¶6.

<sup>3</sup>See Flores Decl. ¶3; Mendez Decl., ¶3; Jaros Decl., ¶3; M. Macak Decl., ¶3; E. Macak Decl., ¶3; Skubal Decl., ¶3; Cruz Decl., ¶3; San Juan Decl., ¶3; Zednik Decl. ¶3; Szczesiak Decl., ¶4.

<sup>4</sup>See Flores Decl. ¶3; Mendez Decl., ¶3; Jaros Decl., ¶3; M. Macak Decl., ¶3; E. Macak Decl., ¶3; Skubal Decl., ¶3; Cruz Decl., ¶3; San Juan Decl., ¶3; Zednik Decl. ¶3; Szczesiak Decl., ¶4.

<sup>5</sup>See Flores Decl. ¶3; Mendez Decl., ¶3; Jaros Decl., ¶3; M. Macak Decl., ¶3; E. Macak Decl., ¶3; Skubal Decl., ¶3; Cruz Decl., ¶3; San Juan Decl., ¶3; Zednik Decl. ¶3; Szczesiak Decl., ¶4.

<sup>6</sup>See Flores Decl. ¶3; Mendez Decl., ¶3; Jaros Decl., ¶3; M. Macak Decl. ¶3; E. Macak Decl. ¶3; Skubal Decl. ¶3; Cruz Decl. ¶3; San Juan Decl. ¶3; Zednik Decl. ¶3; Szczesiak Decl. ¶4.

meal or break time, notwithstanding state law protections.<sup>7</sup> The terms of employment and amounts paid (or promised) to plaintiffs were consistent nationwide and over the past several years. Plaintiffs worked in crews of from two to seven janitors, depending on the size of the store to be cleaned.<sup>8</sup> Crew members were paid between \$325 and \$350 per week with others receiving slightly more, approximately \$500 per week.<sup>9</sup>

## ARGUMENT

### **I. THE COURT SHOULD ORDER WAL-MART TO PROVIDE NOTICE OF THIS ACTION TO AFFECTED JANITORS**

#### **A. The District Court is Authorized to Issue Notice to the Potential Opt-Ins**

The FLSA permits employees who are “similarly situated” to sue collectively for unpaid minimum wages or overtime. 29 U.S.C. § 216(b); *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001). “The evident purpose of the [FLSA] is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other.” *Shain v. Armour & Co.*, 40 F.Supp. 488, 490 (W.D. Ky. 1941). Collective actions permit the “efficient resolution in one proceeding of common issues of law and fact.” *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S.

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<sup>7</sup>See Flores Decl. ¶4; Mendez Decl. ¶4; Jaros Decl. ¶4; M. Macak Decl. ¶4; E. Macak Decl. ¶3; Skubal Decl. ¶4; Cruz Decl. ¶4; San Juan Decl. ¶4; Zednik Decl. ¶4; Szczesiak Decl. ¶5.

<sup>8</sup>See Flores Decl. ¶3; Mendez Decl. ¶3; M. Macak Decl. ¶3; E. Macak Decl. ¶3; Skubal Decl. ¶3; Szczesiak Decl. ¶4.

<sup>9</sup>See 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.

165, 170 (1989). Further, a collective action provides plaintiffs the opportunity to “lower individual costs to vindicate rights by the pooling of resources.” *Hoffmann-La Roche*, 493 U.S. at 170.

Unlike a class action under Federal Rule of Civil Procedure 23, in which individuals are members of a class until they affirmatively “opt-out,” each individual member of an FLSA collective action must affirmatively “opt-in” to this case by filing a written consent to become a party plaintiff. 29 U.S.C. §§ 216(b), 256(b). Accordingly, prompt notice to individual janitors is critical to preserving and protecting their rights under the FLSA.

District courts have wide discretion in managing joinder of parties and notice to parties in collective actions. *See Hoffmann-La Roche*, 493 U.S. 170-72 (urging early trial court management of the notice process in §216(b) opt-in actions to ensure that parties are made aware of the action’s benefits and to avoid multiple lawsuits); *Goldman v. Radioshack Corp.*, 2003 WL 21250571, at \*6 (E.D. Pa. Apr. 16, 2003); *De Asencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 662 (E.D. Pa. 2001). In *Hoffmann-La Roche*, this Court (Ackerman, *D.J.*) held – and the Supreme Court affirmed – that in a collective action<sup>10</sup> the named plaintiffs are entitled to discover the identity of all similarly situated individuals with potential claims, and to have notice sent to those potential plaintiffs informing them of the pendency of the lawsuit. *Sperling v. Hoffmann-La Roche Inc.*, 118 F.R.D. 392 (D.N.J.), *aff’d* 862 F.2d 439 (3d Cir. 1988), *aff’d*

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<sup>10</sup>*Hoffmann-La Roche* was brought under the Age Discrimination in Employment Act (“ADEA”). Because the ADEA expressly incorporates the enforcement provisions of Section 216 of FLSA, *Hoffmann-La Roche* applies equally here as well. *See Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 147 n.5 (4th Cir. 1992) (“[S]ince the ADEA incorporates § 16(b) of the FLSA into its enforcement scheme, the same rules govern judicial management of class actions under both statutes”).

493 U.S. 165 (1989). As the Court held, the benefits of a collective proceeding:

depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate. Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure.

493 U.S. at 170. Moreover, court-authorized notice at the outset protects against “misleading communications” by the parties, and it resolves disputes regarding the content of any notice. *Id.* at 170-72; *Garner v. G.D. Searle Pharm.*, 802 F.Supp. 419, 422 (M.D. Ala. 1991).

For these reasons, court-approved notice is routinely ordered in FLSA cases. In *Pirrone v. North Hotel Associates*, 108 F.R.D. 78, 82 (E.D. Pa. 1985), for example, the court held that notice to all similarly-situated employees was appropriate “in light of the broad remedial purpose of the FLSA, the explicit provision in the Act for representative actions, the practical realities of management of class actions, and the courts’ interest in avoiding multiplicity of lawsuits . . . .” In so holding, the court recognized that “the FLSA was enacted to protect employees . . . . The class action procedure [of the FLSA], however, would have little or no significance if notice was not permitted in some form.” *Id.*, 108 F.R.D. at 82; *see also Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999).

Here, notice is critical at this juncture because Wal-Mart intends to interview plaintiffs and scores of other immigrant janitors detained in Operation Rollback. Linsey Decl. ¶2. Wal-Mart has refused to provide these janitors with notice of the action and has (wrongly) chided plaintiff’s counsel concerning communications with the janitor group. Court-approved notice of the action is needed to alert janitors of their rights before they are interrogated by Wal-

Mart and to eliminate any potential disputes covering the form of notice to the plaintiff class.

Early court supervision of the notice and discovery process is especially warranted here because “nefarious conduct is all too common in lawsuits in which Wal-Mart is a party.” *Wilson v. Wal-Mart Stores, Inc.*, 199 F.R.D. 207, 208 (S.D. Texas 2001) (collecting cases showing a history of discovery abuses); *see, e.g., GTFM, Inc. v. Wal-Mart Stores, Inc.*, 2000 WL 335558, at \* 2-3 (S.D.N.Y. 2000); *Empire Inc. v. Wal-Mart Stores, Inc.*, 188 F.R.D. 478, 481-82 (E.D.Ky. 1999); *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 46-47 (Tex.App. 1998) (affirming \$120,000 discovery sanction); *see also Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711, 716 (1<sup>st</sup> Cir. 1999) (affirming judgment for Wal-Mart’s use of hidden recording devices to tape private employee conversations).

In sum, the prophylactic purposes of the FLSA support early court-approved notice of this action to protect the rights of Wal-Mart’s immigrant janitors. That need is heightened here by Wal-Mart’s repeated pattern of pretrial litigation abuse.

**B. The Terms and Conditions of Janitorial Employment Are Materially Identical at Wal-Mart Nationwide**

Neither the FLSA nor its implementing regulations define the §216(b) requirement that plaintiffs in a collective action be “similarly situated.” Courts do not, however, require prospective class members to be identical. *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000); *Bunnion v. Consolidated Rail Corp.*, 1998 WL 372644, at \*17 (E.D. Pa. May 14, 1998). Rather “[b]ecause the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in ‘conditional certification’ of a representative class.” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995)

(internal footnote omitted).

Plaintiffs can meet their threshold burden for court-ordered notice by making only a “modest factual showing” or a showing “sufficient to demonstrate that they and potential plaintiff together were victims of a common policy or plan that violated the law.” *Foster v. Food Emporium*, 2000 WL 1737858, at \*1 (S.D.N.Y. Apr. 26, 2000); *see also Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51 & 52 n.10 (3d Cir. 1989), *overruled on other grounds as recognized by Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099 n.10 (3d Cir. 1995) (rejecting employer’s argument that plaintiffs were not “similarly situated” because they were employed in different geographic locations); *Jackson v. New York Tel. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995).

The standard for collective action notice thus “is a ‘lenient one.’” *Mooney*, 54 F.3d at 1213-14. It “is considerably less stringent” than the proof required pursuant to Federal Rule of Civil Procedure 20(a) for joinder or Federal Rule of Civil Procedure 23 for class certification. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) (internal quotation marks omitted); *see also Church v. Consolidated Freightways*, 137 F.R.D. 294, 306 (N.D. Cal. 1991) (rejecting Rule 23 requirements in a §16(b) ADEA action); *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’”). An employee need only show that he is suing his employer for himself and for other “similarly situated” employees to warrant FLSA collective action treatment. *Grayson*, 79 F.3d at 1096.

To demonstrate that potential FLSA claimants are “similarly situated,” plaintiffs merely need some evidence that other workers, in addition to plaintiffs, were likely subjected to the same employment practices that give rise to plaintiffs’ allegations under the FLSA. Identical treatment, or proof of a single, overarching, uniformly-applied policy, is not required. The goal is simply to identify others who might logically have a “similar” claim, and to provide those workers a reasonable and timely opportunity to present that claim in the existing litigation. *See ABA Section of Labor and Employment Law, Fair Labor Standards Act* 1166-67 (Ellen C. Kearns, ed. 1999) (footnotes omitted); *see also Vazquez v. Tri-State Management Co. Inc.*, 2002 WL 58718, at \*2 (N.D. Ill. Jan. 14, 2002); *Ballaris v. Wacker Siltronic Corp.*, 2001 WL 1335809, at \*2\*3 (D. Or. August 24, 2001); *Krieg v. Pell’s Inc.*, 2001WL 548394, at \*1 (S.D. Ind. May 29, 2001); *Garza v. Chicago Transit Authority*, 2001 WL 503036, at \*2 (N.D. Ill. May 11, 2001).

Thus, notice here can be based on the detailed allegations of plaintiffs’ complaint and the affidavits showing that the named plaintiffs and other Wal-Mart janitors were victims of a common policy or plan. *See, e.g., Ballaris*, 2001 WL 1335809, at \*2 (allegations in complaint and two affidavits sufficient); *Zhao v. Benihana*, 2001 WL 84500, at \*2 (S.D.N.Y. May 7, 2001) (one affidavit based on plaintiff’s “best knowledge” sufficient); *Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 307 (S.D.N.Y. 1998) (allegations in complaint and plaintiffs’ affidavits sufficient); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 442-45 (N.D. Ill. 1982) (allegations in complaint sufficient).

The complaint and declarations submitted with this motion amply show that Wal-Mart’s janitors are similarly situated for notice purposes. First, the First Amended Complaint

alleges that Wal-Mart's employment of janitors through maintenance contractors in violation of the safeguards of the FLSA is part of a nation-wide scheme designed to exploit vulnerable immigrant labor. Linsey Decl., Ex. C, ¶36. That allegation is, in turn, premised on: the similarity in terms and conditions of employment of the named plaintiffs who work in Wal-Mart stores in 8 states over the past several years through a variety of different maintenance contractors, Wal-Mart's knowledge that its stores were cleaned by immigrant labor and allegations of the United States in the *Forfeiture Action* that reveal Wal-Mart's enduring practice of employing immigrant labor through maintenance contractors despite repeated arrests and raids by law enforcement.

The similarity in terms and conditions of employment is confirmed by the declarations of 10 Wal-Mart janitors submitted with this motion. These janitors, who are citizens of Mexico, Poland, Slovakia and the Czech Republic, tell the same story: janitorial labor seven days and far more than 40 hours a week at similar wage rates without the benefit of overtime or other prophylactic labor legislation. *See supra* at pp. 10-11. Wal-Mart's policy of treating a discrete class of employees as non-employees, without recourse to FLSA protections alone is sufficient to find that plaintiffs are similarly situated for purposes of authorizing notice. *See Kane v. Gage Merchandising Services, Inc.*, 138 F.Supp.2d 212, 215 (D. Mass. 2001).

Wal-Mart can be expected to point to differences in the particulars of how the plaintiff class was exploited – different store managers, different contractors, regional differences in what janitors were required to do. But the evidence that Wal-Mart management treated them all as non-employees and therefore entitled to no protection from Wal-Mart under the FLSA, is sufficient proof that the plaintiffs are similarly situated vis-a-vis other janitors to

allow a case to proceed as a collective action under the FLSA. *See Moss* at 410-411.<sup>11</sup>

**C. Plaintiffs Are Similarly Situated With Respect To The Factors Relevant to Joint Employment**

Even at this pre-discovery stage, it is plain that plaintiffs and other Wal-Mart janitors are similarly situated with respect to the facts material to the determination of Wal-Mart's liability under a joint employment theory. *See Mooney*, 54 F.2d 1207, 1213-16.

The FLSA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The statute in turn defines "employ" as "to suffer or permit to work," *id.*, §203(g), and "employer" to include "any person acting directly or indirectly in the interest of an employer." *Id.* §203(d). The employment relationship is defined with "striking breadth" so as to "stretch . . . the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

"[O]f all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of 'employee'." *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985); *also see Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *see also Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988). The statutory definitions "are necessarily broad to effectuate

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<sup>11</sup>Wal-Mart management knew of the immigration status of the janitors. Janitors told Wal-Mart management and employees that they were undocumented. *See Zednik Decl.* ¶8; *Flores Decl.* ¶8; *Mendez Decl.* ¶8. Of course, the janitors worked in the presence of Wal-Mart managers who could not fail to notice they spoke little or no English and worked 7 days a week. *Flores Decl.* ¶8; *Mendez Decl.* ¶8; *Szczesiak Decl.* ¶9; *Zednik Decl.* ¶8. *Jaros Decl.* ¶8; *M. Macak Decl.* ¶8; *E. Macak Decl.* ¶8; *Skubal Decl.* ¶8; *San Juan Decl.* ¶8; *Cruz Decl.* ¶8.

the remedial purposes of their act.” *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991).

The “striking breadth” of the definition of employment under the FLSA derives from the fact that a firm is an employer for FLSA purposes if it suffers or permits a person to be employed. *Darden*, 503 U.S. at 326; *accord U.S. v. Rosenwasser*, 323 U.S. 360, 362 (1945) (“A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7<sup>th</sup> Cir. 1987) (“The definition, written in the passive, sweeps in almost any work done on the employer’s premises, potentially any work done for the employer’s benefit or with the employer’s acquiescence.”) (Easterbrook, J., concurring). That definition itself is derived from decades of prophylactic child-labor legislation which antedated the FLSA. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & 729 n.7 (1947); *see generally* Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering The Statutory Definition of Employment*, 46 U.C.L.A. Law Rev. 983 (1999).

The Department of Labor’s regulations implementing the FLSA thus contemplate that an employee may have more than one employer. *See* 29 C.F.R. §791.2(a) (“a single individual may stand in the relation of an employee to two or more employers at the same time” under the FLSA). Such “joint employment” arises when the employee “performs work which simultaneously benefits two or more employers” and “one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee.” 29 C.F.R. § 791.2(b).

Wal-Mart is likely to contend that it is not the janitors’ employer. But employer

status is a legal conclusion based on objective facts, not a matter of employer fiat. “An employer's characterization of an employee is not controlling, . . . for otherwise there could be no enforcement of any minimum wage or overtime law.” *Ansoumana v. Gristede’s Operating Corp.*, 255 F.Supp.2d 184, 190 (S.D.N.Y. 2003); *Lauritzen*, 835 F.2d at 1545 (“The FLSA is designed to defeat rather than implement contractual arrangements,” referring to agreements to treat employees as independent contractors).

Courts applying the definition of employment in the FLSA thus look beyond labels to the economic reality of the relationship between the putative employer and employee. *See generally McComb*, 331 U.S. at 730. Analysis focuses on six factors: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the investment, if any, of the employee in materials or equipment (4) the degree of investment the purported employee has made in skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business. *See, e.g., Selker Bros.* 949 F.2d at 1293; *DialAmerica*, 767 F.2d at 1382. No one factor is dispositive; the ultimate concern is whether, as a matter of economic reality, the workers depend upon the business to which they render service. *Selker Bros.*, 949 F.2d at 1293; *DialAmerica*, 767 F.2d at 1382.

Wal-Mart suffers or permits the immigrant janitors to be employed at its stores. The First Amended Complaint and the declarations submitted with this motion establish that the janitors worked on Wal-Mart’s premises – indeed, some were locked-in the stores during their

overnight shifts<sup>12</sup> – for Wal-Mart’s benefit and with Wal-Mart’s knowledge and acquiescence. Basic janitorial work – cleaning floors and restrooms – is essential to any retail operation. Wal-Mart managers directed where and how this necessary work was to be performed by the janitors. *See, e.g.*, Flores Decl. ¶7; Mendez Decl. ¶7. Wal-Mart thus suffered or permitted the janitors to be employed and is liable for overtime under the FLSA.

This conclusion is confirmed by consideration of the factors traditionally reviewed under the economic reality test for employment. The First Amended Complaint and plaintiffs’ declarations submitted with this motion show that the potential plaintiffs are similarly situated with regard to the first factor: the control Wal-Mart exercised over their work. 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.<sup>13</sup> Oversight was heightened when store-level management faced visits from senior management personnel.<sup>14</sup> While “an employer does not need to look over his workers’ shoulders every day in order to exercise control” under the FLSA, *Brock*, 840

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<sup>12</sup>Flores Decl. ¶7; Mendez Decl. ¶7 ; Zednik Decl. ¶7; Jaros Decl. ¶7; M. Macak Decl. ¶7; E. Macak Decl. ¶7; Cruz Decl. ¶7; Skubal Decl. ¶7; San Juan Decl. ¶7; Szczesiak Decl. ¶8.

<sup>13</sup>*See* 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 (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.

<sup>14</sup>*See* Cruz Decl. ¶7; Mendez Decl. ¶7; Flores Decl. ¶7; E. Macak Decl. ¶7; M. Macak Decl. ¶7; Skubal Dec. ¶7.

F.2d at 1060; *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 140 (2d Cir. 1999), Wal-Mart management did..

The second factor – opportunity for investment, and profit or loss – also weighs heavily in favor of an employment relationship. *Brock*, 840 F.2d at 1059. Plaintiffs do not expect Wal-Mart to contest that the investment made by the plaintiffs in their janitorial business was nil.

The third and fourth employment factors, investment and individual skill and independent initiative, are also absent, as Wal-Mart must concede. Janitorial work is unskilled and requires little initiative. *Cf. Gustafson v. Bell Atl. Corp.*, 171 F.Supp.2d 311, 326 (S.D.N.Y. 2001) (stating that chauffeur duties “required no specialized skill or initiative, suggesting that plaintiff was an employee rather than an independent contractor”). There is no indication that janitors themselves supplied necessary tools or equipment.

The fifth factor, the permanence and duration of the plaintiffs’ working relationship, is also established here. The declarants worked as janitors in Wal-Mart stores for periods ranging from 1995 to 2003. *See* Flores Decl. ¶2; Mendez Decl. ¶2; Zednik Decl. ¶2; Jaros Decl. ¶2; M. Macak Decl. ¶2; E. Macak Decl. ¶2; Cruz Decl. ¶2; Skubal Decl. ¶2; San Juan Decl. ¶2; Szczesiak Decl. ¶2. They were not day laborers, or persons hired strictly on a temporary basis. While they did not work for identical periods of time, they were hired on a permanent basis and are similarly situated with respect to the fourth indicia of employment.

The sixth employment factor, the extent to which the work is integral to the business, strongly indicates an employment relationship here. No retail store the size of a Wal-Mart could operate without janitorial services and a clean environment for shoppers is a high

priority. Members of the potential class are similarly situated with regard to this factor as well.

In sum, the evidence is that Wal-Mart's immigrant janitors are similarly situated for purposes of evaluating Wal-Mart's likely contention that it was not the employer of the plaintiff janitors.

**D. The Proposed Notice is Fair and Adequate**

A collective action depends "on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170. A notice that has been approved by the Court can prevent "misleading communications." *Id.*, at 172; *Garner*, 802 F.Supp. at 422.

The proposed notice (Exhibit A) is largely drawn from that approved by this Court in *Hoffman*. It advises plaintiffs of the pendency of the action, of Wal-Mart's denial of liability, it provides information on how a janitor may join the suit and it accurately states the prohibition against retaliation or discrimination for participation in an FLSA action, *see* 29 U.S.C. §215(a)(3); *Reich v. Davis*, 50 F.3d 962, 964 (11th Cir. 1995). The proposed notice is thus "timely, accurate, and informative." *Hoffmann-La Roche*, 493 U.S. at 172.

Plaintiffs propose that the notice be provided through three methods. First, as an efficient way to reach all current janitors, the Court should order Wal-Mart to post a notice in appropriate languages, along with consent forms, in each workplace where janitors are employed. The notices should be ordered posted in the janitors' supply closets, on employee bulletin boards, and in each rest room.

Second, plaintiffs should be permitted to mail notice and consent forms to all

janitors who can be identified through records maintained by Wal-Mart maintenance contractors. Wal-Mart should be ordered to produce to plaintiffs copies of all maintenance contracts in existence from 1995 to the present, and a list of the names, addresses, telephone numbers and owners of all such entities. *See Hoffmann-La Roche*, 493 U.S. at 170; *Grayson*, 79 F.3d at 1111. Indeed, such a mailing list is essential to the “timely” notice contemplated by *Hoffmann-La Roche*. *Id.* at 170. Using this information, plaintiffs will issue appropriate subpoenas to gain the necessary information. This limited discovery should proceed despite Wal-Mart’s announced intention to move to dismiss this case.

Third, Wal-Mart has requested to meet with the janitors who were arrested in Operation Rollback. The Court should order that no such interview may take place in the absence of plaintiffs’ counsel, that each janitor be provided the opportunity to confer with plaintiffs’ counsel prior to any such interview, and that each such janitor be provided a copy of the Court-approved notice, in his or her native language, prior to any such interview.

**CONCLUSION**

For the foregoing reasons, this Court should issue an order (1) authorizing this matter to proceed as a collective action; (2) authorizing notice in the form attached hereto as Exhibit A; (3) ordering production of the names, addresses and nationalities of all contract janitors since 1996 and all relevant Wal-Mart maintenance contracts and contact information for contractors since 1996 and authorizing plaintiffs to send the Court-approved notice with an appropriate cover letter to all janitors identified through records subpoenaed from such contractors; (4) ordering Wal-Mart to post the Court-approved notice in all of its facilities; (5) requiring that Wal-Mart refrain from interviewing potential class members in the absence of plaintiffs' counsel and that such individuals be provided the opportunity to consult with plaintiffs' counsel and review a copy of the Court-approved notice in their native language prior to being interviewed by Wal-Mart's attorneys.

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Respectfully submitted,

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