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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR ZAVALA, EUNICE GOMEZ, ANTONIO FLORES, OCTAVIO DENISIO, HIPOLITO PALACIOS, CARLOS ALBERTO TELLO, MAXIMILIANO MENDEZ, ARTURO ZAVALA, FELIPE CONDADO, LUIS GUTIERREZ, DANIEL ANTONIO CRUZ, PETR ZEDNEK, TERESA JAROS, JIRI PFAUSER, HANA PFAUSEROVA, PAVEL KUNC and MARTIN MACAK, on behalf of themselves and all others similarly situated, Plaintiffs, -against- WAL-MART STORES, INC., Defendant.	**CIVIL ACTION NO.: 03-5309 (JAG)** **WAL-MART STORES, INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS WITH PREJUDICE COUNTS ONE AND TWO OF PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND**

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Wal-Mart Stores, Inc. ("Wal-Mart") submits this Reply Memorandum of Law in Further Support of its Motion to Dismiss with Prejudice Counts One and Two of Plaintiffs' Second Amended Class Action Complaint and Jury Demand ("Second Amended Complaint" or "SAC").

ARGUMENT

Wal-Mart's Opening Brief ("W-M Opening Br.") demonstrated that Plaintiffs have failed to plead viable predicate acts of racketeering, lack RICO standing, have not adequately alleged the enterprise and control elements of their RICO claims, and have failed to state a RICO conspiracy. Plaintiffs have not countered any of these arguments, each of which provides an independent basis for dismissal of Plaintiffs' amended RICO claims with prejudice.

More specifically, Plaintiffs do not dispute that their amended RICO claims are based on the same (often *verbatim*) allegations that this Court has already considered and rejected. See Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 335 (D.N.J. 2005). Nor do Plaintiffs seriously attempt to defend the fatal deficiencies in their RICO standing or enterprise and control allegations -- which are again the same (often *verbatim*), but which the Court did not reach in its prior ruling. Plaintiffs instead try to recast their RICO theory as primarily involving money laundering violations, by alleging new predicate offenses in their Opposition Brief ("Opp'n") and attaching extraneous "evidence" to it.

Plaintiffs' attempt to amend their pleading through argument is improper and should be rejected. Equally fundamental, Plaintiffs' shift away from the alleged immigration law offenses (which have nothing to do with their claimed injury (unpaid overtime and some minimum wage) and in which Plaintiffs themselves were complicit) to alleged money laundering offenses only further confirms that the amended RICO claims should be dismissed with prejudice. The Second Amended Complaint does not allege viable money laundering offenses by Wal-Mart; and even

assuming *arguendo* that Plaintiffs ever could allege them, such predicates again would not have caused Plaintiffs' claimed injury. The Fair Labor Standards Act ("FLSA") affords the remedy for alleged overtime and minimum wage violations. The FLSA is not a RICO predicate and this is not a proper RICO case.

Finally, the Opposition Brief contains numerous other legal errors and misstatements. For example, Plaintiffs assert that the *in pari delicto* defense is not available in RICO cases. In fact, as the Eleventh Circuit Court of Appeals recently confirmed, *in pari delicto* is a viable defense to RICO claims because it prevents complicit parties from misusing and undermining the RICO statute. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1149-56 (11th Cir.) ("Edwards"), petition for certiorari filed, No. 05-1335 (U.S. Apr. 14, 2006). The Eleventh Circuit's reasoning is consistent with prior Third Circuit precedent. Because Plaintiffs' own pleadings show that they are complicit in the alleged immigration predicates, cf. Zavala, 393 F. Supp. 2d at 320, the *in pari delicto* defense provides yet another basis for dismissal of the Second Amended Complaint with prejudice.

I. PREDICATE ACTS

In their Opposition Brief, Plaintiffs assert direct money laundering predicates not alleged in the Second Amended Complaint and resort to an extraneous and unauthenticated document in an effort to supplement their deficient pleading. These "amendments" by argument are improper. See Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988) ("legal theories" in opposition brief "are helpful only to the extent that they find support in the allegations set forth in the complaint"); P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 142 F. Supp. 2d 589, 613-14 (D.N.J. 2001) (plaintiff may not amend complaint by briefs or affidavits filed in opposition to motion to dismiss). Moreover, Plaintiffs' opposition arguments only underscore the fatal deficiencies of their RICO theory.

A. Plaintiffs' Money Laundering Predicate Fails.

Having originally staked their RICO case on the alleged immigration law predicates, Plaintiffs now argue that "*[m]ost notably*, Wal-Mart knowingly engaged in money laundering through the shell companies it had its contractors create." Opp'n at 1-2 (emphasis added). Plaintiffs' new focus on money laundering represents a fundamental shift in their case theory. During argument on Wal-Mart's first Motion to Dismiss, the Court asked Plaintiffs' counsel to identify his "best predicate acts that clearly would get past this motion . . . ." Tr. of Mot. to Dismiss Hr'g at 115:1-4, Oct. 20, 2004 ("Tr.") (relevant excerpts attached as Exhibit 1). In response, counsel identified "aiding and abetting" the harboring, transporting, and encouraging of illegal aliens. Id. at 115:5-116:11. Counsel did not mention money laundering, much less identify it as the key offense alleged against Wal-Mart. Id. Nonetheless, Plaintiffs now contend -- in their Opposition Brief -- that money laundering is the crux of their amended RICO claims. Opp'n at 1-2. They specifically argue that Wal-Mart "directly" violated the money laundering statute, id. at 24-26, and that Wal-Mart "conspired" with outside contractors to launder funds, id. at 27-28.

The direct money laundering arguments in Plaintiffs' opposition papers lack, in one court's words, any "support in the allegations set forth in the complaint." Pennsylvania ex rel. Zimmerman, 836 F.2d at 181. But even if such money laundering offenses had been alleged in the Second Amended Complaint, they would still fail as a matter of law.

1. Plaintiffs Do Not Plead Direct Money Laundering Predicates In The Second Amended Complaint.

A "direct" money laundering offense refers to conduct that violates 18 U.S.C. § 1956(a). Plaintiffs do not plead any direct money laundering predicates against Wal-Mart in the Second Amended Complaint; rather, they attempt to plead *conspiracy* to commit money laundering. See

SAC ¶¶ 68, 128 (listing only conspiracy to launder funds in violation of 18 U.S.C. § 1956(h) among the RICO predicates asserted against Wal-Mart). Although the Second Amended Complaint recounts some of the direct money laundering allegations that the government levied against *outside contractors* in the Forfeiture Action, id. ¶¶ 93, 96, it does not assert any of those direct money laundering offenses as RICO predicates against Wal-Mart, id. ¶¶ 68, 128.

Notably, in their First Amended Complaint ("AC") and Revised Amended Complaint ("RAC"), Plaintiffs alleged several direct (and equally baseless) money laundering offenses against Wal-Mart under 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). See AC ¶¶ 37, 67; RAC ¶¶ 37, 67. This Court dismissed each of these predicates for failure to state a claim, Zavala, 393 F. Supp. 2d at 315-16, and Plaintiffs do not reallege them in the Second Amended Complaint. Plaintiffs' attempt to add direct money laundering predicates through their Opposition Brief is improper and should be rejected. See P. Schoenfeld, 142 F. Supp. 2d at 613-14.

Because Plaintiffs do not allege direct money laundering predicates against Wal-Mart, their reliance on United States v. Caruso, 948 F. Supp. 382 (D.N.J. 1996), Tilli v. Aamco Transmissions, Inc., No. 91-1058, 1992 WL 38405 (E.D. Pa. Feb. 24, 1992), and O'Keefe v. Aamco Transmissions, Inc., No. 91-2506, 1992 WL 38441 (E.D. Pa. Feb. 24, 1992) is also misplaced. In those cases, the government and plaintiffs respectively alleged that the defendants laundered funds in direct violation of 18 U.S.C. § 1956. The Second Amended Complaint, in contrast, contains no such allegations against Wal-Mart.

2. Plaintiffs Cannot Satisfy The Requisite Elements Of A Direct Money Laundering Offense Against Wal-Mart.

Even if Plaintiffs' direct money laundering claims were properly before the Court -- and they are not -- such allegations would still fail to state a viable RICO predicate. Plaintiffs do not

identify the specific money laundering offenses that Wal-Mart allegedly committed, much less plead the elements of any such offenses. See 18 U.S.C. § 1956(a) (listing offenses and their elements).

Nor do Plaintiffs explain how any of Wal-Mart's conduct involved the "proceeds" of unlawful activity. To state any money laundering offense under Section 1956(a), Plaintiffs must allege that the money Wal-Mart paid to the contractors "represents the proceeds of some form of unlawful activity." Id. To qualify as "proceeds" under Third Circuit law, the money at issue must be the product of a *completed* crime. As explained by the Third Circuit, "[a]lthough the money laundering statute does not define when money becomes 'proceeds,' it is obvious to us that proceeds are derived from an already completed offense, or a completed phase of an ongoing offense, before they can be laundered." United States v. Conley, 37 F.3d 970, 980 (3d Cir. 1994); United States. v. Omoruyi, 260 F.3d 291, 295 (3d Cir. 2001) (same); United States v. Morelli, 169 F.3d 798, 804 (3d Cir. 1999) (same). "There is nothing in the legislative history or in the case law suggesting that Congress intended to criminalize monetary transactions occurring *before* that money was paid to the person committing the underlying unlawful act." United States v. LaBrunerie, 914 F. Supp. 340, 347 (W.D. Mo. 1995) (emphasis added).

Plaintiffs assert that Wal-Mart paid the contractors for the floor-cleaning services they rendered. Opp'n at 25-26. But the Second Amended Complaint contains no allegation that the money Wal-Mart paid to the contractors derived from a crime, and there is no basis for drawing any such inference. The only reasonable inference is that Wal-Mart paid the contractors out of the sales revenues it earned from running its stores. Such payments do not constitute unlawful "proceeds" under the money laundering statute as a matter of law. Conley, 37 F.3d at 980 (money must be derived from the commission of a crime).

Moreover, even if Wal-Mart knew that the outside contractors hired undocumented workers, as Plaintiffs wrongly allege, Wal-Mart's floor-cleaning payments to the contractors still would not constitute unlawful proceeds. See Opp'n at 24. The alleged act of paying for an illegal service is the very antithesis of money laundering because that act does not "launder" the funds, but instead makes them "dirty." See LaBrunerie, 914 F. Supp. at 347 ("Again, the common meaning of the word 'launder' is 'to wash,' which obviously means to make clean. The defendant correctly points out that the acts alleged by the indictment make the money dirty, not clean."). The allegation that Wal-Mart "saved" money by contracting with companies that hired undocumented workers is equally insufficient. Saving money by violating federal wage-and-hour requirements is not money laundering. See Anderson v. Smithfield Foods, Inc., 209 F. Supp. 2d 1270, 1275 (M.D. Fla. 2002) ("Saving money as a result of [alleged violations of environmental laws] does not make the money illegally obtained for the purposes of the money laundering statute."), aff'd, 353 F.3d 912 (11th Cir. 2003).

3. Plaintiffs Fail To Allege A Viable Money Laundering Conspiracy.

Plaintiffs' attempt to assert a money laundering conspiracy involving Wal-Mart likewise fails. A money laundering conspiracy consists of (1) an agreement to launder funds, (2) knowledge of the agreement and a deliberate decision to join the conspiracy, and (3) overt conduct in furtherance of the unlawful goal. Conley, 37 F.3d at 976-77. Even assuming *arguendo* that Wal-Mart knew that the contractors intended to "launder" the payments they received, Opp'n at 23-24, such knowledge does not suffice to establish conspiracy to launder funds, cf. Zavala, 393 F. Supp. 2d at 317 (holding that Wal-Mart's knowledge of illegal conduct could not give rise to an inference that "Wal-Mart agreed with co-conspirators to the commission, by co-conspirators and others, of RICO predicate acts, in furtherance of an unlawful enterprise"). Plaintiffs have not alleged any money laundering agreement between Wal-Mart

and its outside contractors. Nor do they describe any overt acts that Wal-Mart undertook in furtherance of the so-called conspiracy. The allegation that a single Wal-Mart employee, nearly ten years ago, suggested that a single contractor do business through multiple companies, even if true, does not give rise to a money laundering conspiracy predicate, much less provide the basis for a *nationwide* conspiracy claim against Wal-Mart. Opp'n at 27-28.

And Plaintiffs are still unable to describe any financial transactions that supposedly "laundered" the floor-cleaning payments, despite this Court's holding that they must do so in order to state a viable money laundering predicate. Zavala, 393 F. Supp. 2d at 315-16 (dismissing money laundering predicate because Plaintiffs "do not identify the relevant financial transactions or conduct by Wal-Mart, or describe more particularly the contractors' 'money laundering activities' that allegedly involved banks, accountants, attorneys, and others"). They instead recycle the Forfeiture Action in a futile effort to give substance to their conspiracy claim. Opp'n at 26-27; see also SAC ¶¶ 93-97, 117. This Court has already held that the money laundering allegations against the contractors in the Forfeiture Action do not state a money laundering predicate offense against Wal-Mart. Zavala, 393 F. Supp. 2d at 315-16.

Accordingly, Plaintiffs' new-found emphasis on money laundering fails on multiple grounds and should be dismissed with prejudice.

B. Plaintiffs' Immigration Predicates Fail.

Plaintiffs cannot remedy their defective immigration predicates, so they instead suggest that "guilty pleas" entered by outside contractors to immigration offenses somehow operate as *res judicata* against Wal-Mart. Opp'n at 2, 10. *Res judicata* does not operate against non-parties and this contention is baseless. See General Elec. Co. v. Deutz AG, 270 F.3d 144, 158 (3d Cir. 2001). It also ignores the outcome of the federal government's investigation of Wal-Mart's use of outside contractors. That investigation resulted in a *court-ordered* Consent Decree finding

that there was no basis to pursue criminal charges -- including the same immigration charges that Plaintiffs allege here -- against Wal-Mart. See W-M Opening Br. at Exhibits 2-4.

Moreover, as Wal-Mart's Opening Brief showed, Plaintiffs' immigration predicates are fatally flawed in numerous respects. W-M Opening Br. at 9-18. Plaintiffs' Opposition Brief only confirms these problems.

1. Plaintiffs' Conspiracy And Aiding And Abetting Theories Fail.

Plaintiffs effectively concede that they cannot plead direct immigration predicates against Wal-Mart. Opp'n at 28-34. They instead try to implicate Wal-Mart under conspiracy and aiding and abetting theories. Id. at 28-31. Neither theory is viable.

To plead conspiracy to harbor, transport, or encourage illegal aliens under 8 U.S.C. § 1324(a)(1)(A)(v)(I), Plaintiffs must allege an agreement to commit those offenses *and* an overt act in furtherance of the unlawful goal. Zavala, 393 F. Supp. 2d at 304 n.7. Similarly, to plead aiding and abetting under 8 U.S.C. § 1324(a)(1)(A)(v)(II), Plaintiffs must allege that Wal-Mart actively participated in the illegal harboring, transporting, or encouraging through "affirmative conduct designed to aid the venture." Id. at 304 n.6. The Second Amended Complaint alleges that *outside contractors* committed or pleaded guilty to various immigration offenses, but again does not allege any participation by Wal-Mart in such conduct. SAC ¶¶ 49-50, 67, 87-89, 92, 113 (alleging that *contractors* pleaded guilty to harboring and arranged housing for undocumented workers); ¶¶ 67, 87-89 (alleging that *contractors* transported undocumented workers); ¶¶ 87-88 (alleging that *contractors* encouraged undocumented workers). This Court has already held that identical allegations against outside contractors, including the government's allegations in the Forfeiture Action, do not state immigration conspiracy or aiding and abetting predicates against Wal-Mart. Zavala, 393 F. Supp. 2d at 305-08.

The legal arguments that Plaintiffs raise in support of their conspiracy and aiding and abetting theories also lack merit. They cite no support for their contention that Wal-Mart's payments for floor-cleaning services constitute affirmative "participation" in the contractors' alleged harboring, transporting, or encouraging. SAC ¶ 112. Compare Zavala, 393 F. Supp. 2d at 306 (describing conduct that might rise to the level of affirmative participation in immigration offenses). Nor do they explain how Wal-Mart's alleged requests for replacement floor-cleaning crews amount to an act in furtherance of any illegal immigration activity. SAC ¶¶ 114-116. Even assuming *arguendo* that Wal-Mart knew that, in response to requests for new crews, contractors "would, and did, cause undocumented migrants to be transported across state lines to the Wal-Mart stores," Opp'n at 30, such knowledge cannot support a conspiracy or aiding and abetting predicate. Moving illegal aliens from one location to a place of employment does not constitute illegal transporting, harboring or encouraging as a matter of law. Zavala, 393 F. Supp. 2d at 305.

Finally, Plaintiffs' assertion that, nearly ten years ago, a Wal-Mart employee suggested that a single contractor use multiple companies to avoid being disqualified from doing business with Wal-Mart does not state a predicate for conspiracy to harbor, or aiding and abetting the harboring of, illegal aliens. Opp'n at 31. Even if this alleged conversation occurred, Plaintiffs still have not alleged that Wal-Mart actively helped conceal *illegal workers* from law enforcement. Zavala, 393 F. Supp. 2d at 307.

2. Plaintiffs' Harboring Predicate Fails.

Plaintiffs do not even discuss the direct "transporting" and "encouraging" predicates they reallege against Wal-Mart in the Second Amended Complaint. See Opp'n at 28-34. They instead focus exclusively on their direct "harboring" predicate under 18 U.S.C. § 1324(a)(1)(A)(iii), tacitly conceding that their other immigration predicates are untenable.

Plaintiffs wrongly attempt to cure their deficient harboring allegations by introducing extrinsic "evidence"; namely, a purported invoice from an outside contractor to Wal-Mart supposedly showing that the contractor billed Wal-Mart for temporary "crew accommodations" due to a change in the crew's "start date." Decl. of James L. Linsey at Ex. B; Opp'n at 33. This attempt to supplement the Second Amended Complaint should not only be rejected as improper, Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir.) (reversing where district court improperly took notice of extrinsic document), cert. denied, 543 U.S. 918 (2004), but also underscores Plaintiffs' misunderstanding of the harboring offense they allege. There is no allegation that the crew at issue consisted of undocumented workers, or that Wal-Mart paid to house these workers in order to hide them from law enforcement authorities. To the contrary, Plaintiffs' own document shows that Wal-Mart allegedly paid for temporary accommodations because the crew's start day was postponed -- not to conceal them from detection. Opp'n at 33. Thus, even giving Plaintiffs the benefit of all reasonable inferences, this nearly seven-year old invoice provides no support for a harboring predicate. (Of course, Plaintiffs are not entitled to draw any inferences from this document because it is not properly before the Court. Lum, 361 F.3d at 221 n.3.)

Finally, Plaintiffs do not and cannot allege that Wal-Mart allowed a crew of "Bulgarian janitors" in Kansas City to "reside" in the store for the purpose of hiding them from federal authorities. Opp'n at 33. The most that can be inferred is that individual crew members stored items and occasionally slept in a backroom between shifts, *in plain sight*. SAC Ex. E at 86. These facts do not rise to the level of harboring, cf. Zavala, 393 F. Supp. 2d at 307, and distinguish this case from United States v. Zheng, 306 F.3d 1080 (11th Cir. 2002) and United States v. Singh, 261 F.3d 530 (5th Cir. 2001). In both of those cases, the illegal aliens resided

and worked full time on the defendant's premises *in hiding*. See Zavala, 393 F. Supp. 2d at 307 (distinguishing Plaintiffs' deficient harboring allegations from allegations in Zheng and Singh). Here, all of the Wal-Mart stores were open to the public and many Plaintiffs, by their own account, worked in plain sight of shoppers -- and even immigration enforcement officials -- in stores that were open 24 hours a day, seven days a week. See SAC ¶¶ 21-22; id. Ex E at 31-37.

C. Plaintiffs' Involuntary Servitude Predicate Fails.

The Second Amended Complaint reasserts, virtually *verbatim*, the defective involuntary servitude allegations that this Court previously dismissed. SAC ¶¶ 118-120. Plaintiffs again admit that this case is about alleged unpaid overtime -- not slavery. See Opp'n at 2-3. Plaintiffs have not identified a single new allegation in support of their claim, but instead simply reargue the exact same points this Court already rejected. Compare Opp'n at 34-36 (arguing that threats of deportation and alleged physical abuse constitute involuntary servitude), with Zavala, 393 F. Supp. 2d at 309-11 (dismissing involuntary servitude predicate based on alleged threats of deportation and vague abuse allegations).

Plaintiffs' recycled allegations that economic pressure -- such as alleged threats of eviction -- amount to involuntary servitude still fail as a matter of law. United States v. Kozminski, 487 U.S. 931, 952 (1988) (requiring compulsory labor through physical restraint, law, or legal process); Kaveney v. Miller, No. 93-0128, 1993 WL 298718, at *2 (E.D. Pa. July 30, 1993) (economic pressure does not suffice). As do Plaintiffs' recycled "lock-in" allegations: By Plaintiffs' own admission, crew members joined and left crews of their own volition. SAC ¶¶ 21-22, 102; see also W-M Opening Br. at 21. And there is no allegation that Plaintiffs were ever forced to come to work against their will, or that they were physically restrained from leaving "locked" stores if they requested or otherwise attempted to do so. See SAC ¶¶ 118-120.

Finally, as this Court held, alleged threats of deportation if they exited a "locked" store are "insufficient." Zavala, 393 F. Supp. 2d at 311.

Plaintiffs' near-*verbatim* reiteration of these allegations is, as the Second Circuit warned, a blatant attempt to use the involuntary servitude statute as a "tool for blackmail and other serious abuse." United States v. Shackney, 333 F.2d 475, 487 (2d Cir. 1964). This predicate should be dismissed with prejudice, and Plaintiffs should be sanctioned for reasserting it.

II. STANDING

A. Plaintiffs Cannot Plead Proximate Causation And, Therefore, They Lack Standing to Pursue RICO Claims Against Wal-Mart.

Plaintiffs must plead both "but for" and "proximate" causation to establish RICO standing. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265-70 (1992). The proximate cause requirement is "interpreted narrowly" in RICO cases. Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 483 (D.N.J. 1998).

Plaintiffs' Opposition only confirms that they lack standing to pursue RICO claims against Wal-Mart. They have again admitted that the only harm alleged in this case is the denial of overtime compensation and, in some instances, minimum wage: "The predicate acts of racketeering were intended to and did result in Wal-Mart's janitors being underpaid - denied overtime and (in come cases) minimum wage (or, at times, any wages at all), denied workmen's compensation and denied other employment benefits." Opp'n at 2-3. These injuries flow, if at all, from non-compliance with the Fair Labor Standards Act, and not directly and proximately from any of the predicate acts alleged against Wal-Mart. Moreover, Plaintiffs' suggestion that they were denied workmen's compensation and other employee benefits is yet another improper attempt to expand their pleading by argument. Plaintiffs have not alleged, and could not allege, a claim to recover these benefits from Wal-Mart. See SAC ¶¶ 145-150.

Tellingly, Plaintiffs do not cite a single case for the proposition that a party has standing to sue under RICO to recover for FLSA violations. Nor could they. Courts have repeatedly recognized that FLSA violations are not predicate acts of racketeering under RICO. See Livingston v. Shore Slurry Seal, Inc., 98 F. Supp. 2d 594, 600 (D.N.J. 2000); Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 383 (2d Cir. 2001); Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1228-29 (D.C. Cir. 1991). Thus, the FLSA violations alleged in this case cannot bestow RICO standing as a matter of law.

The cases that Plaintiffs do cite are inapposite because they all involve legal workers and businesses that allegedly suffered *direct* harm from an employer's hiring of undocumented workers. See, e.g., Commercial Cleaning, 271 F.3d at 383 (legal business); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1170 (9th Cir. 2002) (legal workers); Williams v. Mohawk Indus., 411 F.3d 1252 (11th Cir.) (legal workers), cert. granted in part, 126 S. Ct. 830 (2005); Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) (legal workers). Here, in contrast, Plaintiffs not only admit in their pleadings that they are undocumented, but also fail to allege an illegal hiring *predicate offense* against Wal-Mart.

In their Amended and Revised Amended Complaints, Plaintiffs unsuccessfully attempted to assert an illegal hiring predicate under 8 U.S.C. § 1324(a)(3)(A). See RAC ¶¶ 37, 67. The Court dismissed the hiring predicate for failure to state a claim, Zavala, 393 F. Supp. 2d at 308-09, and Plaintiffs do not reassert that offense in the Second Amended Complaint, see SAC ¶¶ 68, 128. This omission is critical because illegal hiring under Section 1324(a)(3)(A) is the only RICO predicate that even remotely resembles the offenses that conferred standing on legal workers and businesses in the cases Plaintiffs cite. Moreover, nothing in those cases suggests that undocumented workers would have RICO standing to seek redress for alleged FLSA

violations. To the contrary, in Commercial Cleaning, the Second Circuit expressly recognized that FLSA violations are *not* RICO predicates. 271 F.3d at 383. And the Ninth Circuit in Mendoza recognized the inherent contradiction of finding that undocumented workers have standing to enforce the very immigration laws they violated. 301 F.3d at 1170 (observing that illegal aliens could not be "'counted on to bring suit for the law's vindication'") (citation omitted).

Plaintiffs also overstate the holding in Choimbol v. Fairfield Resorts, Inc., No. 05-463, 2006 WL 521763 (E.D. Va. Mar. 2, 2006). They claim that the Choimbol plaintiffs were "undocumented migrant labor[ers]" or "undocumented janitors." Opp'n at 25, 39. In fact, the court's opinion only states that the plaintiffs were immigrant laborers provided by regional and national recruiters. Choimbol, 2006 WL 521763, at *1. Nothing in the opinion suggests that the Choimbol plaintiffs entered this country illegally, overstayed their visas, or worked without proper authorization. Instead, the opinion refers to the provision of laborers under the "H2b Visa Program," which expressly permits domestic employers to hire temporary foreign workers. Id. at *2. The court never even considered whether undocumented workers, who are complicit in the misconduct they allege, have standing to pursue RICO claims.

And unlike Wal-Mart, the defendant in Choimbol did *not* move to dismiss for lack of standing. Id. at *4 (defendant moved to dismiss for failure to plead (1) viable predicate acts of racketeering, (2) fraud with particularity, and (3) a pattern of racketeering activity). While the Choimbol court briefly discussed RICO standing principles, its analysis was cursory and is *dicta*. Id. at *6. In all events, the discussion is irrelevant: The Choimbol court did not consider whether (much less find that) the plaintiffs' injuries were proximately caused by the alleged money laundering activity. Id. The court merely determined that the plaintiffs were harmed by

mail and wire fraud offenses, id. -- predicate offenses that Plaintiffs do not allege in the Second Amended Complaint, SAC ¶¶ 68, 128. Plaintiffs tried to allege mail and wire fraud in their Amended and Revised Amended Complaints, see AC ¶ 67; RAC ¶ 67, but this Court dismissed those predicates for lack of particularity, Zavala, 393 F. Supp. 2d at 313-14. Plaintiffs did not even attempt to reassert such claims in the Second Amended Complaint. See SAC ¶¶ 68, 128. Finally, the bare bones money laundering allegations approved in Choimbol would never pass muster in the Third Circuit, as this Court's prior opinion makes clear. Zavala, 393 F. Supp. 2d at 315-16 (rejecting vague and conclusory money laundering allegations that merely parroted the statutory language).

B. Plaintiffs' Own Conduct Broke The Causal Chain.

As Wal-Mart demonstrated in its Opening Brief, Plaintiffs voluntarily participated in and benefited from the predicate offenses that they allege against Wal-Mart. W-M Opening Br. at 29-30. Because Plaintiffs are complicit in the alleged RICO offenses, and could have avoided their purported harm by choosing not to break the law, their own conduct severed the "but for" causal chain alleged in the Second Amended Complaint. Id.

Plaintiffs try to overcome this problem by asserting that the *in pari delicto* defense is not available in RICO cases. Opp'n at 3, 40-42. Plaintiffs are again wrong on the law. As the Eleventh Circuit recently confirmed, the *in pari delicto* defense is available because it advances the purposes underlying RICO. See Edwards, 437 F.3d at 1149-56. In Edwards, the Eleventh Circuit applied the Supreme Court's two-factor test to determine whether *in pari delicto* should apply in RICO cases. Id. at 1154-55. That test looks at (1) the plaintiffs' active participation in the alleged violation, and (2) the policy goals underlying the federal statute at issue. Id. The Supreme Court articulated these factors in the antitrust and securities law contexts. See Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968); Bateman Eichler, Hill Richards, Inc.

v. Berner, 472 U.S. 299 (1985); see also Pinter v. Dahl, 486 U.S. 622, 632-33 (1988). On the facts of Bateman Eichler and Perma Life, the Supreme Court held that *in pari delicto* did not apply; however, the Court expressly acknowledged that the defense might be available under different factual circumstances and in other contexts. Perma Life, 392 U.S. at 140 (holding that defense did not apply because defendants were passive antitrust violators, but reserving judgment as to whether greater involvement in violation might bar claim); Bateman Eichler, 472 U.S. at 308-09 (holding that defense did not apply because defendants were not active participants in securities law violation, but recognizing that defenses based on plaintiff's fault should be applied in appropriate cases). Thus, contrary to Plaintiffs' suggestion, the Supreme Court did not "eliminate[] *in pari delicto* as a defense to antitrust actions a generation ago," Opp'n at 40-41 n.56, and the Court has never suggested that the defense should be unavailable in RICO cases. As the Eleventh Circuit explained in Edwards, the Supreme Court's precedents actually *favor* application of the defense in RICO actions to prevent complicit parties from abusing the statute. Edwards, 437 F.3d at 1154-56.

In particular, applying the first factor, the Eleventh Circuit found that the plaintiff's own allegations in Edwards showed that the plaintiff actively participated in the alleged misconduct. Id. at 1155. The same is true here. This Court has already held that "Plaintiffs' status as 'recent immigrants' or as 'undocumented workers,' and the concomitant political and social isolation that they encounter is, at least in part, the result of their own voluntary conduct. While they *now* may not be able to regularize their status, such that their undocumented status is immutable, this is traceable to their decision, at the outset, to enter and remain unlawfully in the United States." Zavala, 393 F. Supp. 2d at 320 (emphasis original); see also Plyler v. Doe, 457 U.S. 202, 219-20 (1982) (holding that entry into class of undocumented aliens is itself a crime). The Second

Amended Complaint and its attachments again show that Plaintiffs are complicit in the immigration and money laundering predicates they allege because they admittedly entered this country illegally or unlawfully overstayed their visas, worked without authorization, and knowingly accepted "laundered" payments from their contractors. SAC ¶¶ 7-28, 78-98, Ex. A at 18-19, Ex. E at 43-44, Tr. at 99:16-22. Accordingly, the first factor weighs in favor of applying the *in pari delicto* defense. See Edwards, 437 F.3d at 1155 (plaintiff's participation in misconduct favored application of *in pari delicto*).

Applying the second factor in Edwards, the Eleventh Circuit held that the policies underlying RICO likewise weigh in favor of recognizing the *in pari delicto* defense. Id. The court explained that "[i]t would be anomalous, to say the least, for the RICO statute to make racketeering unlawful in one provision, yet award the violator with treble damages in another provision of the same statute." Id. "Congress intended RICO's civil remedies to help eradicate 'organized crime from the social fabric' by divesting 'the association of the fruits of ill-gotten gains.'" Id. (quoting Genty v. Resolution Trust Corp., 937 F.2d 899, 910 (3d Cir. 1991) (quoting United States v. Turkette, 452 U.S. 576, 585 (1981)); see also 116 Cong. Rec. H35346-47 (Oct. 7, 1970) (statements of Rep. Steiger) (explaining that RICO's purpose is "to see that *innocent parties* who are the victims of organized crime have a right to obtain proper redress") (emphasis added). Allowing a complicit party to recover under RICO "would not divest RICO violators of their ill-gotten gains; it would result in a wealth transfer among similarly situated conspirators." Edwards, 437 F.3d at 1155. Accordingly, the Eleventh Circuit held that policy considerations favored application of the *in pari delicto* defense in RICO cases. Id. at 1156.

The Eleventh Circuit's policy analysis applies with extra force in this case because allowing Plaintiffs to bring RICO claims would not only undermine the RICO statute, but would

also subvert the Immigration Reform and Control Act ("IRCA"). IRCA reflects a federal immigration policy that prohibits illegal aliens from obtaining legal employment in the United States. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002). Civil remedies that would undermine IRCA are not available to undocumented workers. Id. at 151-52 (holding that illegal aliens cannot recover back pay for unlawful termination because such a remedy "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as express in IRCA"). Thus, under Hoffman, any remedy that would affirmatively encourage illegal aliens to seek unlawful employment in the United States is prohibited. Id. at 150-51.

Allowing undocumented workers to seek *treble* damages under RICO, based on alleged unlawful conduct that they participated in, would undermine IRCA and run afoul of Hoffman by creating a financial incentive for such individuals to seek unlawful employment in the United States. The prospect of an *enhanced* recovery against their employer -- above and beyond whatever remedies may be available under the FLSA -- would only encourage undocumented workers to risk working in this country unlawfully, secure in the knowledge that, if apprehended, they will be able to sue for treble damages under RICO. Id. at 151-52. In contrast, denying undocumented workers the ability to sue under RICO "does not mean that the employer gets off scot-free." Id. at 152. To the contrary, as the Supreme Court recognized, the employer still faces the prospect of sanctions and "traditional remedies" under applicable federal laws. Id. Therefore, in this case -- as in Edwards -- the policy factor weighs heavily in favor of applying the *in pari delicto* defense. 437 F.3d at 1155.

The Eleventh Circuit's reasoning in Edwards is consonant with Third Circuit precedent. In Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173 (3d Cir. 2000), for example, the Third Circuit held that a plaintiff who voluntarily engages in misconduct that results in the

claimed injury lacks standing to pursue RICO claims because the harm is "self-inflicted." Id. at 188. Although the Third Circuit did not use the terms *in pari delicto*, the principle underlying the court's decision is exactly the same: a culpable party cannot sue under RICO for alleged acts in which the party is complicit. See also Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1353-55 (3d Cir. 1989) (analyzing "unclean hands" doctrine in RICO case, but finding that the facts did not warrant its application); Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *80-*81 (D.N.J. Sept. 29, 1986) (holding that *in pari delicto* may apply to RICO claims under two-factor test articulated in Bateman Eichler). This Court has already recognized that Plaintiffs could have avoided the harm they decry by choosing not to enter, remain and work in this country illegally. Zavala, 393 F. Supp. 2d at 320. Having voluntarily chosen to break the law, they are complicit in the alleged offenses and thus lack RICO standing.

Courts outside the Third Circuit have likewise applied the *in pari delicto* defense in RICO cases. See Banco Industrial de Venezuela, C.A. v. Credit Suisse, 99 F.3d 1045, 1048-50 (11th Cir. 1996) (upholding determination that the *in pari delicto* defense applied to RICO claims); Nasr v. Geary, No. 94-8288, 2003 U.S. Dist. LEXIS 13887, at *74 (C.D. Cal. June 9, 2003) (RICO claims barred by the *in pari delicto* doctrine); see also In re MasterCard Int'l Inc., 313 F.3d 257, 264 (5th Cir. 2002) (no RICO standing where plaintiffs knowingly and voluntarily engage in conduct that caused harm); Sikes v. Teleline, Inc., 281 F.3d 1350, 1366 n.41 (11th Cir. 2002) (unclean hands may be a defense in RICO cases); Green v. Aztar Corp., No. 02-3514, 2003 WL 22012205, at *3 (N.D. Ill. Aug. 22, 2003) (plaintiffs' voluntary participation in RICO activities that caused harm severed the causal chain). Plaintiffs either do not cite or make no serious attempt to distinguish any of these precedents. In marked contrast, the Eleventh Circuit

in Edwards distinguished the *in pari delicto* cases that Plaintiffs cite in their Opposition. Compare Opp'n at 40-41 n.56, with Edwards, 437 F.3d at 1155-56.

Because the allegations in the Second Amended Complaint establish that the *in pari delicto* doctrine applies here, Plaintiffs' amended RICO claims should be dismissed with prejudice on this additional ground.

C. Plaintiffs Ignore The Third Circuit's Steamfitters Test.

Plaintiffs have not even attempted to rebut Wal-Mart's argument that they lack standing under the test the Third Circuit articulated in Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 924 (3d Cir. 1999). W-M Opening Br. at 30-33. This omission is telling because the Steamfitters factors further confirm that Plaintiffs lack RICO standing:

- The alleged causal connection is, as shown, too remote. Plaintiffs' injuries stem, if at all, from non-compliance with the FLSA, a non-predicate statute; moreover, Plaintiffs' own conduct severed whatever causal link may have existed.
- Wal-Mart's intention was, by Plaintiffs' own admission, to lower cleaning costs, SAC ¶¶ 29, 52, and not to harm any specific crew member.
- The only claimed injury in this case is alleged wage underpayment, Opp'n at 2-3, which is at most violation of the FLSA. The FLSA is not a RICO predicate statute and Plaintiffs' alleged harm is not the kind that Congress intended to be covered under RICO.
- Mechanisms other than RICO exist principally to redress wage-and-hour injuries, including private FLSA litigation and state and federal DOL enforcement mechanisms.
- The damages in this case are speculative for standing purposes because Plaintiffs' claims would require the trier-of-fact to allocate damages between the non-party contractors that employed Plaintiffs, Wal-Mart, and Plaintiffs, who chose to enter and remain in this country illegally and to work without proper authorization.
- The speculative nature of Plaintiffs' damages increases the complexity of this case, which is already judicially unmanageable given the disparate and fact-specific nature of the FLSA issues in question. Moreover, because the parties most directly responsible for Plaintiffs' alleged wage harm -- the contractors who employed them -- are not present in this case, there is a substantial risk of duplicative litigation and inconsistent outcomes.

See Anderson v. Ayling, 396 F.3d 265, 270-72 (3d Cir. 2005) (affirming dismissal of RICO claims with prejudice for failure to establish standing under Steamfitters factors).

III. ENTERPRISE AND CONTROL

A. Plaintiffs Fail To Allege A Distinct RICO Enterprise.

Plaintiffs continue to misapprehend the enterprise element of RICO. They allege an "enterprise" consisting of an association-in-fact between Wal-Mart and outside floor-cleaning contractors functioning as Wal-Mart's "agents." SAC ¶ 41. The Seventh Circuit rejected an identical enterprise theory in Baker v. IBP, Inc., 357 F.3d 685, 691-92 (7th Cir. 2004), holding that an employer-defendant and its alleged recruiter-agents could not form a distinct and cognizable enterprise. See also W-M Opening Br. at 34-35 (discussing distinctiveness requirement).

Recognizing that their "agency" enterprise theory is fatally flawed, Plaintiffs again attempt to amend their pleading through argument. They assert in their Opposition Brief that each contractor is "undeniably a separate corporate entity, legally distinct from the enterprise." Opp'n at 15. While this is a true statement, it is also a *non sequitur*. Plaintiffs have consistently pleaded that the independent contractors acted as Wal-Mart's agents, SAC ¶ 41, RAC ¶¶ 31(d), 36, AC ¶¶ 31(d), 36, which, as the Seventh Circuit correctly observed, is a RICO enterprise theory that "won't fly," Baker, 357 F.3d at 691.

Plaintiffs' reliance on Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) is also misplaced. Opp'n at 14-16. The defendant in King was the president and sole shareholder of a closely held corporation. 533 U.S. at 160. He allegedly conducted the corporation's affairs through a pattern of racketeering. In other words, he infiltrated and dominated the corporation's affairs in the way that RICO is designed to prevent. The Supreme Court held that the association of two distinct entities -- person and corporation -- constituted a viable enterprise. Id. at 166.

Here, unlike in King, Plaintiffs do not and cannot allege that anyone has infiltrated Wal-Mart or that Wal-Mart has infiltrated its contractors. To the contrary, Plaintiffs have admitted that Wal-Mart did *not* take over its contractors. Opp'n at 15. Instead, they allege that the contractors acted as Wal-Mart's agents, which is tantamount to saying that Wal-Mart operated itself illegally through the conduct of contractor-agents. This is precisely the fact pattern rejected in Baker. 357 F.3d at 691. And in King the Supreme Court expressly noted that its holding did not expand RICO liability to corporate defendants for the acts of agents under ordinary respondeat superior principles. 533 U.S. at 166.

B. Plaintiffs Fail To Allege A Common Purpose.

Plaintiffs' enterprise theory is also flawed because, as their own pleadings show, Wal-Mart and the contractors that make up the so-called enterprise lack a "common purpose." See W-M Opening Br. at 35-36. Plaintiffs first attempt to avoid dismissal on this ground by arguing that the Third Circuit has not recognized a common purpose requirement. Opp'n at 18. In fact, the Third Circuit has long required that RICO enterprise allegations establish a common purpose. See Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1198 (3d Cir. 1989) ("On appeal, this court affirmed the dismissal of the RICO claim, holding that Averbach could not claim that the court system was an enterprise for purposes of RICO because the court personnel and litigants lacked a common purpose.") (citing Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1018-20 (3d Cir. 1987)).

Plaintiffs next argue that the Second Amended Complaint satisfies the common purpose requirement because "both [Wal-Mart] and the contractors shared the mutual goal of profiting off the labor of the undocumented janitors." Opp'n at 18-19 (citing SAC ¶¶ 41-42). This assertion not only fails as a matter of law, but is also negated by Plaintiffs' own pleadings. A broad statement that members of an illegal enterprise share a general goal of making money does not satisfy the common purpose requirement. See Starfish Inv. Corp. v. Hansen, 370 F. Supp. 2d

759, 771 (N.D. Ill. 2005). Moreover, the Second Amended Complaint and its attachments show that Wal-Mart and its contractors had *conflicting* economic goals: Wal-Mart sought to reduce its floor-cleaning costs, while the contractors wanted to maximize their profits by charging Wal-Mart the highest possible rate for such services. See, e.g., SAC ¶¶ 29, 52, 106, Ex. A at 42-43, Ex. E at 63. Even Plaintiffs' so-called "star" informant openly complained about Wal-Mart's constant demands for lower prices and other concessions. Id. Ex. A at 43. These conflicting interests preclude a finding of "common purpose." See Baker, 357 F.3d at 691-92 (divergent economic goals between employer-defendant and recruiter-agents precluded finding of common purpose); Banco Del Atlantico, S.A. v. Stauder, No. 03-1342, 2005 WL 1925830, at *9 (S.D. Ind. Aug. 11, 2005) (no enterprise because constituents had diverging economic interests); Starfish, 370 F. Supp. 2d at 771 (no enterprise because each constituent was out to promote its own economic interests).

Plaintiffs next wrongly argue that the obvious "self-interest" of the members of the alleged enterprise is "immaterial to the common purpose of the enterprise: exploiting undocumented labor for profit." Opp'n at 20 n.42. They mistakenly cite Emcore Corp. v. PricewaterhouseCoopers LLP, 102 F. Supp. 2d 237, 263-64 (D.N.J. 2000) for this proposition. The court in Emcore rejected the argument that the defendants' "inherently contradictory goals" negated the existence of a RICO enterprise. Id. at 264. But the court did not find that there is no common purpose requirement. Rather, the court rejected the defendants' common purpose argument there because it was based on "superseded pleadings" and non-binding case law. Id. Here, in contrast, Plaintiffs' own amended RICO pleadings again show that Wal-Mart and its contractors did not share the requisite common purpose. The controlling Third Circuit precedent

thus mandates dismissal of Plaintiffs' enterprise claim. See Averbach, 879 F.2d at 1198 (citing Averbach, 809 F.2d at 1018-20).

C. Plaintiffs Fail To Allege That Wal-Mart Controlled The Enterprise.

Plaintiffs contend that Wal-Mart was the "kingpin" of the alleged enterprise because it selected the contractors with whom it did business, controlled the terms of floor-cleaning contracts, made payments for floor-cleaning services, and profited from the contractors' use of undocumented workers. Opp'n at 21-22 (citing SAC ¶¶ 44, 47, 48, 52, 62, 63, 67, 94). Plaintiffs further argue that because a single Wal-Mart employee suggested that a single contractor do business through multiple companies, nearly ten years ago, Wal-Mart somehow controlled the purported enterprise. Id.

None of these allegations satisfies the "control" element of a RICO enterprise claim. To satisfy this element, Plaintiffs must allege that Wal-Mart conducted the enterprise's affairs by directing the *racketeering activity* itself. See University of Md. at Baltimore v. Peat Marwick, Main & Co., 996 F.2d 1534, 1538-39 (3d Cir. 1993). The Second Amended Complaint does not allege that Wal-Mart directed any of the predicate acts of racketeering. At most, Plaintiffs suggest that Wal-Mart created the opportunity for the contractors' actions by awarding floor-cleaning contracts and then benefited from those actions by obtaining a service at below market price. The Third Circuit has held that condoning and benefiting from RICO violations does not constitute sufficient control of the enterprise's affairs. Id. Accordingly, the Second Amended Complaint fails on this additional independent ground, as well.

IV. RICO CONSPIRACY

In their Opposition Brief, Plaintiffs assert that "Wal-Mart does not contest that plaintiffs have sufficiently cured their RICO conspiracy pleading deficiencies." Opp'n at 44. That assertion is false. Wal-Mart has shown that Plaintiffs' RICO conspiracy claim fails and should

be dismissed with prejudice because Plaintiffs (1) fail to plead a viable enterprise claim, (2) fail to plead the conspiracy with specificity, and (3) lack standing to pursue a RICO conspiracy claim. W-M Opening Br. at 38-39.

"Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993). As Wal-Mart has demonstrated, Plaintiffs' underlying RICO enterprise claim is deficient and must be dismissed. As such, Plaintiffs' RICO conspiracy claim is untenable. It would constitute legal error to hold (as Plaintiffs urge this Court to do) that Wal-Mart violated RICO by conspiring to commit alleged acts which, as shown, do not constitute predicate acts of racketeering and do not violate RICO's enterprise provision. See Lum, 361 F.3d at 227 n.5 (affirming dismissal of § 1962(d) conspiracy claim where plaintiff failed to plead a viable § 1962(c) enterprise claim).

Moreover, Plaintiffs have not pleaded the alleged conspiracy with the requisite level of specificity. As this Court previously held, although Plaintiffs allege that Wal-Mart knew of and benefited from the contractors' illegal conduct, they have still "not alleged other than in conclusory fashion, adequate *facts* for this Court to reasonably infer that Wal-Mart agreed with co-conspirators to the commission, by co-conspirators and others, of RICO predicates, in furtherance of an unlawful enterprise." Zavala, 393 F. Supp. 2d at 317 (emphasis added).

Finally, Plaintiffs lack standing to pursue their RICO conspiracy claim because the only alleged harm, by their own admission, is the purported denial of overtime compensation and, in some instances, minimum wage. Opp'n at 2-3. These injuries arose, if at all, from non-compliance with the FLSA, a non-predicate statute. The Supreme Court has definitively ruled that, in such cases, "a person may not bring suit under § 1964(c) predicated on a violation of

§ 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." Beck v. Prupis, 529 U.S. 494, 507 (2000). Therefore, Plaintiffs' allegation that Wal-Mart and its contractors conspired to engage in a scheme that was "intended to and did result in Wal-Mart's janitors being underpaid," Opp'n at 2, does not and cannot confer standing to pursue a RICO conspiracy claim as a matter of law, Beck, 529 U.S. at 507.

CONCLUSION

Plaintiffs cannot allege viable predicate acts of racketeering, establish standing to sue or plead the requisite elements of a RICO enterprise and conspiracy. Their Second Amended Complaint is largely redundant of their prior rejected RICO pleading and only confirms that this is not a proper RICO action. Granting Plaintiffs leave to re-plead their RICO claims would be a futile exercise and only further burden the Court and Wal-Mart with needless motion practice. The Third Circuit recently confirmed that dismissal with prejudice is appropriate under such circumstances. In Anderson, 396 F.3d at 270-72, the Third Circuit upheld dismissal of RICO claims with prejudice for lack of standing, holding that the claimed injury -- wrongful termination of employment -- was not directly caused by the alleged RICO predicate acts. Id. Because the alleged RICO predicate acts were too remote from the claimed injury, the Third Circuit also held that it would be futile to grant plaintiffs leave to amend. Id. at 271-72. As in Anderson, Plaintiffs' only claimed injury here -- the purported denial of minimum wage or overtime compensation -- was not directly and proximately caused by any RICO predicate acts alleged against Wal-Mart. Such injury arose, if at all, as a result of contractor non-compliance with the FLSA -- a non-predicate statute. Moreover, even assuming Plaintiffs could ever allege viable immigration and money laundering offenses against Wal-Mart, such claims would be "too attenuated" to have caused Plaintiffs' alleged wage injuries. And, in all events, Plaintiffs would

have participated in and benefited from such predicate acts, severing any possible causal link. Thus, the grounds for dismissing Plaintiffs' amended RICO claims with prejudice are even stronger here than in Anderson.

For all of these reasons, Wal-Mart respectfully requests that the Court dismiss with prejudice Counts One and Two of Plaintiffs' Second Amended Complaint.

Dated: May 5, 2006

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 03-5309

VICTOR ZAVALA; ARTURO ZAVALA; EUNICE GOMEZ; MAXIMILIANO MENDEZ; CARLOS ALBERTO TELLO; ANTONIO FLORES; HIPOLITO PALACIOS; OCTAVIO DENISIO; MARTIN MACAK; PAVEL KUNC; HANA PFAUSEROVA; JIRI PFAUSER; TERESA JAROS; PETR ZEDNEK; DANIEL ANTONIO CRUZ; LUIS GUTIERREZ; FILIPE CONDADO; ROLANDO ROMERO; ADIEL ROMERO RUIZ, on behalf of themselves and all other simularly situated,

Plaintiffs,

v.

WAL-MART CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

MOTION

Newark, New Jersey
October 20, 2004

B E F O R E:

THE HONORABLE JOSEPH A. GREENAWAY, JR., U.S.D.J.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

THOMAS F. BRAZAITIS, C.S.R., Official Court Reporter

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And all we have to show is that Wal-Mart, through its conduct, aided and abetted the contractors in doing these things that they're accussed of in a verified, sworn complaint by federal and state government officials.

Now, we not only believe that we can obviously show that they aided and abetted all of these charges, but they, in fact, committed them themselves, and that's what we charged them with in the complaint.

Now, counsel also said -- and focusing for a second on the hiring of 10 or more undocumented workers, counsel is correct, he's correct in the -- in his reference to the Second Circuit case. Commercial Cleaning Services did say that, in order to prove that particular predicate act, you did need to show that the person came over the border with the intent to be hired and that the employer knew it.

Whether or not we can prove that in this case is premature at this stage. We believe that we can in good faith allege that they knew precisely that; that they knew that many of these undocumented workers walked over the border from Mexico or came in through irregular means, not through Dulles Airport, or whatever. But, again, that's one particular offense, one particular predicate act in a whole litany.

Now, counsel also said that somehow it's a requirement -- or somehow that all of the cases that we cite, including the Ninth Circuit case in Zircle Fruit, were where the

THE COURT: If you had to rank -- well, rank as far as legal sufficiency, not what you like or what -- your two and three best predicate acts that clearly would get past this motion, what are they?

MR. LINSEY: Aiding and abetting as a general thing, aiding and abetting harboring, because we know we allege -- certainly the contractors harbored. There's a sworn government complaint against the contractors for harboring. And we allege that Wal-Mart aided or abetted in that harboring. Aiding and abetting transporting. And we allege that specifically. And the transporting is, again, alleged against the contractors in the sworn government complaint. And we have facts of that.

We have facts of Wal-Mart knowing where these people live. Wal-Mart -- for instance, Professor McGoffin in 1999, she and the Wal-Mart manager went to the apartment where these Russian citizens were living. They were sleeping on the floor, whatever, in terrible conditions. And Mr. Taylor, the Wal-Mart manager, went there, and then Greta McGraff wrote to the CEO of Wal-Mart, David Glass, and told him exactly what was going on, where they were being harbored.

Then what did Mr. Taylor do? He didn't want these people back in the store. He, in essence, discharged them. He said, you're not coming back in my store. Then he picked up the telephone and called Stan Kostek, or his successor up in New York, and ordered up another five Russians to come down.

We believe it's transporting undocumented workers. So that's a substantive offense, but at the very least it's aiding and abetting. So those would be amongst the strongest, your Honor.

And also, obviously, encouraging to remain in the United States unlawfully. And it's basically the litany of offenses at the last pages of the forfeiture complaint. We say the very easiest thing we have to do is show that Wal-Mart aided and abetted those criminal actions that the contractors are charged with. And we believe that we can also prove the substantive offenses as well.

THE COURT: Okay.

MR. LINSEY: Thank you.

MR. MURRAY: Your Honor, I'll try to keep this very brief.

The injury that's alleged here is overtime. You have to have an employment relationship. They can't make out the elements of that.

And this reliance on the aiding and abetting, I would simply point out, if you go back to page 132 of the forfeiture action where they do list the offenses, they don't have romanette one, which is the smuggling. There's something that's taken out. There's ellipsis there. What is taken out if you compare to statutory terms is has come to or entered.

So even there, your Honor, what the contractors are