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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, MAXIMIMILIANO MENDEZ, ARTURO ZAVALA, FILIPE CONDADO, LUIS GUTIERREZ, DANIEL ANTONIO CRUS, PETR ZEDNEK, TERESA JAROS, JURI PFAUSER, HANA PFAUSEROVA, PAVEL KUNC and MARTIN MACAK, on behalf of themselves and all others similarly situated, Plaintiffs, - against - WAL-MART STORES, INC., Defendant.	Civil Action No. 03-Civ.-5309 (JAG)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO WAL-MART'S MOTION TO DISMISS

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FEDERAL STATUTES

PRELIMINARY STATEMENT

This action was filed on November 10, 2003. Since then plaintiffs have been precluded from taking any discovery on their claims under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq*. against Wal-Mart Stores, Inc. ("Wal-Mart"). In moving again to dismiss these claims, Wal-Mart would have this Court weigh in a vacuum the evidence that Wal-Mart created and sustained an association-in-fact criminal enterprise including various maintenance contractors which was designed to exploit the labor of undocumented janitors and which was operated through systemic violation of federal immigration, money laundering, and other criminal laws. Indeed, Wal-Mart expends much effort disputing the inferences that should be drawn from electronic surveillance evidence of top management gathered by federal investigators. Wal-Mart's motion is insupportable under the notice pleading standard of Rule 8 and the requirement of Rule 12 that all facts alleged in a complaint be taken as true and all inferences drawn in favor of plaintiffs in ruling – as a threshold matter – on whether a pleading states a claim.

We show below that plaintiffs amply allege that Wal-Mart formed an association-in-fact criminal enterprise with maintenance contractors to exploit undocumented migrants. Wal-Mart used separate contractors and sub-contractors in an effort to shield its role in the scheme and its liability as employer of its janitorial workforce. Wal-Mart established and directed this on-going enterprise, instructing contractors to set up multiple shell corporations to which it then funneled millions of dollars to disguise the recipients of the proceeds of the enterprise and avoid detection. Wal-Mart, of course, determined the scope of the enterprise by determining which contractors it would use as it set performance and other standards for the contractors to follow.

Plaintiffs allege that Wal-Mart participated in the affairs of the enterprise through the commission of multiple predicate acts of racketeering. Most notably, Wal-Mart knowingly

engaged in money laundering through the shell companies it had its contractors create. Those multiple transactions (that are itemized in documents referenced and incorporated in the pleading) all involved the proceeds of the contractors' criminal immigration violations and all furthered the scheme. Moreover, Wal-Mart conspired with the contractors to commit further acts of money laundering, since the elaborate corporate shell game Wal-Mart created would necessarily engender multiple further financial transactions among sub-contractors and principals involving the criminal proceeds. Nothing more is required to plead multiple predicate acts of racketeering sufficient to support plaintiffs' RICO claims.

In addition to money laundering, plaintiffs allege that Wal-Mart aided and abetted (as well as directly committed) multiple criminal immigration violations. The Second Amended Complaint ("SAC") is replete with allegations – based in part on *res judicata* criminal convictions and the affidavits of law enforcement agents – that Wal-Mart's contractors engaged in immigration crimes. Wal-Mart systematically supported these actions and helped to bring them about by hiring the contractors through corporate shells (to shelter the scheme from detection) and then paying janitors' wages and contractors' overhead and profits through those shells. In addition, in specific instances Wal-Mart management aided and facilitated multiple specific instances of harboring and transporting undocumented janitors. Finally, the SAC contains detailed allegations that Wal-Mart harbored undocumented aliens by providing lodging in its stores, among other violations.

These predicate acts of racketeering were intended to and did harm plaintiffs. The purpose of the criminal enterprise was to exploit undocumented labor. The predicate acts of racketeering were intended to and did result in Wal-Mart's janitors being underpaid - denied overtime and (in some cases) minimum wage (or, at times, any wages at all), denied workmen's

compensation and denied other employment benefits. In arguing that plaintiffs lack standing, Wal-Mart would have this Court ignore appellate decisions in cases involving materially identical claims which have concluded that the economic cost of depressed wages paid through such schemes can support a RICO claim. Wal-Mart's standing argument also would require this Court to, in effect, adopt an *in pari delicto* defense into RICO. Such a defense has not been accepted by the Third Circuit and is counter to well-established anti-trust law that is the basis of RICO standing jurisprudence. There is no reason to deny plaintiffs a recovery under RICO just because they worked for Wal-Mart under exploitative conditions.

Finally, plaintiffs have sufficiently alleged that Wal-Mart participated in a RICO conspiracy under 18 U.S.C. §1962(d). Wal-Mart pays scant attention to this claim, but plaintiffs plainly and amply allege that Wal-Mart conspired with the contractors who participated in the Wal-Mart enterprise with the knowledge and intent that the contractors would commit money laundering, multiple immigration violations and other crimes for which they have been convicted. Indeed, Wal-Mart contractors have admitted in a host of civil and criminal proceedings to having committed multiple crimes in connection with their procuring janitorial labor for Wal-Mart, and it is alleged that Wal-Mart directed its maintenance contractors to set up and function through multiple corporate shells to further the scheme. These allegations standing alone are sufficient – together with the substantive RICO allegations set out in the Second Amended Complaint – to make out a RICO conspiracy claim under 18 U.S.C. §1962(d).

Wal-Mart's renewed motion to dismiss plaintiffs' RICO claims should be denied.

STATEMENT OF THE CASE

A. Parties

1. Plaintiff Janitors

The 17 named plaintiffs are citizens of Mexico, the Czech Republic, Slovakia and Poland who worked for Wal-Mart and one or more of its joint-employer maintenance contractors as janitors at stores located throughout the United States at various times. SAC ¶¶7-28. Each of the 17 was at times an undocumented immigrant not entitled to work in the United States. *Id*.

The named plaintiffs seek relief on behalf of themselves and a class of thousands of undocumented and recently documented immigrants, currently, formerly, or in the future to be, employed as janitors to clean Wal-Mart stores. SAC ¶7. In addition, a total of 213 individuals have already filed consents to join in the FLSA claim under the collective action provisions of 29 U.S.C. §216(b).

2. Wal-Mart

Wal-Mart is a Delaware corporation with principal corporate offices in Bentonville, Arkansas. SAC ¶29. Wal-Mart has aggressively followed a low-cost, labor-hostile, high-volume sales strategy that has led it to become the largest employer in the United States and the largest retailer in the world. *Id*. Wal-Mart operates thousands of stores in all fifty states, including locations where class representatives and other members of the plaintiff class were employed. *Id*.

B. Course of Proceedings

On November 10, 2003 plaintiffs commenced this action. Plaintiffs thereafter filed a First Amended Complaint on February 2, 2004.

1. Wal-Mart's Motion to Dismiss the First Amended Complaint

Plaintiffs' First Amended Complaint pleaded five causes of action against Wal-Mart. Count I alleged that Wal-Mart and various maintenance contractors created an association-in-fact enterprise to exploit the labor of undocumented janitors which was run through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c). Count II alleged that Wal-Mart engaged in a RICO conspiracy in violation of Section 1962(d) by knowingly agreeing to facilitate the operation of the association-in-fact enterprise alleged in Count I. Count III alleged a civil rights conspiracy in violation of 42 U.S.C. §1985(3) with its maintenance contractors. Count IV alleged overtime and minimum wage violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*. Count V alleged common law false imprisonment based on Wal-Mart's systematic practice of locking janitors in its stores during their overnight shifts.

By stipulation of the parties entered by this Court, Wal-Mart was given until March 19, 2004 to answer or otherwise respond to the First Amended Complaint. On March 19, 2004, Wal-Mart filed an omnibus motion to dismiss. The motion was fully briefed by June 1, 2004, and oral argument was heard on the motion on October 20, 2004. Under Rule 16.1 of this Court's local rules, Wal-Mart's filing acted as a stay of discovery as no preliminary discovery conference would be scheduled until the motion to dismiss was ruled upon.

2. Decision on Motion to Dismiss

By Opinion and Order dated October 7, 2005,[1] this Court denied Wal-Mart's motion to dismiss the FLSA and false imprisonment claims. The Court dismissed, with

[1] 393 F.Supp.2d 295 (D.N.J. 2005).

prejudice, plaintiffs' Civil Rights Act claim. On the RICO claims, the Court granted the motion with leave to amend.

The Court concluded that the complaint did not specifically allege that Wal-Mart committed two predicate acts of racketeering. With respect to allegations concerning the transportation of undocumented aliens,[2] the Court concluded that plaintiffs failed to allege sufficiently that Wal-Mart knowingly transported or moved aliens or that this was done to further their presence in the United States, or that it conspired with or aided and abetted others to do so.[3] With respect to the harboring predicate, the Court found that while "providing housing and employment may constitute 'harboring' for 'financial gain,'" this was not specifically set out.[4] The Court found that, although the First Amended Complaint alleged that contractors encouraged undocumented aliens to enter the United States, there were no allegations that Wal-Mart "took affirmative steps to assist Plaintiffs to enter or remain unlawfully in the United States[.]"[5] With respect to the claim that Wal-Mart hired ten or more undocumented alien janitors, the Court concluded that plaintiffs were required but failed to allege that Wal-Mart knew that the "aliens were brought into the United States for the purpose of obtaining unlawful employment."[6] The Court concluded that plaintiffs' money laundering claims were "vague and insufficient to support a RICO claim."[7] In particular, the Court found that the First Amended Complaint did not "identify the relevant financial transactions or conduct by Wal-Mart[.]"[8]

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[2] 8 U.S.C.§1324(a)(1)(A)(ii).

[3] 393 F.Supp. 2d at 305-6.

[4] *Id*. at 307. In this regard the Court noted that, although plaintiffs argued that the lock-ins of janitors helped to conceal them from detection, "they actually do not allege these facts in their complaint." *Id*. at 307 n. 9.

[5] *Id*. at 308.

[6] *Id*. at 309.

[7] *Id*. at 315.

[8] *Id*.

The Court similarly concluded that plaintiffs' allegations of involuntary servitude and mail and wire fraud were insufficient.

With respect to the RICO conspiracy claim, the Court noted that 1962(d) imposes liability in cases where "conspirators agree to a plan in which some conspirators will commit crimes and others will provide support[.]"[9] Finding that the First Amended Complaint did not include sufficient allegations to support 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," the Court also dismissed the Section 1962(d) claim without prejudice to replead.[10]

The Court did not address Wal-Mart's arguments that plaintiffs had failed to allege a RICO enterprise separate or distinct from Wal-Mart itself, Wal-Mart's operation or management role in that enterprise or that plaintiffs were proximately harmed by the actions of the enterprise.

C. The Second Amended Complaint

Pursuant to this Court's order, plaintiffs filed the SAC on November 21, 2005. The allegations of the SAC relevant to plaintiffs' RICO claims are set out below.

The SAC alleges that to avoid and evade responsibility under federal immigration law and to profit from illegal activity, Wal-Mart created an association-in-fact criminal enterprise through which it conspired with various cleaning contractors whom it knew would provide janitors to clean its stores who were not legally authorized to work in the United States.[11] These migrants worked well in excess of 40 hours a week nearly every night of the year without

[9] *Id.* at 316.

[10] *Id.* at 317.

[11] SAC ¶3, 41.

overtime (and at times any) compensation. In response to law enforcement actions and to shield its reliance on undocumented labor, Wal-Mart instructed and encouraged contractors to create a web of shell corporations that facilitated Wal-Mart in exploiting the workers and allowed the migrant hiring scheme to flourish despite repeated law enforcement actions.[12] The contractors did so, associating with Wal-Mart in the enterprise.[13] Wal-Mart well knew and intended that maintenance contractors it relied upon routinely and systematically encouraged, harbored and transported unlawful migrant labor in violation of The Immigration Reform and Control Act of 1986 ("IRCA"), and Wal-Mart itself both aided and abetted the encouraging, transporting and harboring of undocumented workers by its contractors and committed certain such offenses as a principal as well.[14]

1. Creation of the Wal-Mart Enterprise

In particular, plaintiffs allege that no later than 1997, following law enforcement raids at various Wal-Mart stores, LeRoy Scheutz, the Divisional Vice President of Operations in the Wal-Mart Stores Division, created an association in fact enterprise with Christopher Walters, who owned and operated Wal-Mart's largest janitorial contractor, IMC, Inc. whose janitors had been targeted in the raids. Wal-Mart had determined sometime before 1997 that it would no longer verify the immigration bona fides of janitors employed through contractors. In conversations immediately following the raids, Scheutz told Walters that Wal-Mart would continue to use IMC only if Walters created and provided undocumented janitorial labor through multiple shell corporations so that if one firm were caught using undocumented labor, Wal-Mart could fire that company but Walters could continue to supply the undocumented migrants to

[12] SAC ¶47.

[13] SAC ¶51, 55.

[14] SAC ¶3.

Wal-Mart through other front companies.[15] Schuetz knew and intended that the use of the front companies would shield the scheme and its profits from detection by law enforcement authorities.[16] Wal-Mart also knew and intended that IMC and other contractors would encourage aliens to reside in the United States (so that they could work at Wal-Mart), harbor and transport aliens within the United States to further their presence here.[17] On information and belief, similar arrangements were made with other contractors.[18]

2. Money Laundering of the Proceeds of Immigration Crimes

Walters set up multiple shell companies as Scheutz directed.[19] Wal-Mart paid for janitorial labor through the shell companies,[20] with the knowledge that the monies provided were the proceeds of the illegal hiring, encouraging and transporting of undocumented migrant labor.[21] Specifically, between 1999 and 2001, Wal-Mart conducted multiple financial transactions through which a sub-set of Walters'-controlled firms were paid in excess of $77 million as the proceeds of the unlawful activities.[22] Wal-Mart also knew and intended that the payments to the various shell companies would engender still further financial transactions involving the proceeds among the contractors, their principals and various subcontractors.[23]

[15] SAC ¶47.

[16] SAC ¶47.

[17] SAC ¶47-54.

[18] SAC ¶55, 56.

[19] SAC ¶51.

[20] SAC ¶52.

[21] SAC ¶57, 58.

[22] SAC ¶95, Exhibit E at 100.

[23] SAC ¶53.

3. Commission of Immigration Crimes By Contractors and Wal-Mart

As outlined in the SAC, Wal-Mart's agreement with Walters constituted a conspiracy in violation of 8 U.S.C. §1324(a)(1)(A)(v)(I) to transport, harbor or encourage undocumented aliens to reside in the United States because Wal-Mart knew and intended that Walters and his associated sub-contractors would encourage undocumented aliens to enter the United States to work at Wal-Mart, would transport undocumented aliens within the United States and would harbor the undocumented aliens put to work at Wal-Mart.[24]

It is *res judicata* that numerous Wal-Mart contractors violated multiple federal immigration and other laws in connection with the migrant janitorial worker scheme. Specifically several Walters-controlled firms pleaded guilty on April 25, 2005 to a conspiracy to transport and encourage illegal aliens to reside in the United States between 1998 and 2002.[25] Walters subcontractor CMS of Queensbury ("CMS"), which Walters used to supply undocumented janitorial labor to Wal-Mart, pleaded guilty in 2003 to a similar conspiracy.[26] Wal-Mart subcontractor DJR Cleaning Enterprises ("DJR") admitted in October of 2005 that it had conspired with various Walters-controlled companies and its own sub-contractor CMS, to transport and encourage and induce aliens to reside in the United States.[27]

On June 22, 2005, Walter J. Truszkowski entered a guilty plea to a two-count federal indictment charging a conspiracy to conceal aliens and to encourage aliens to reside in the United States as well as to a conspiracy to launder the proceeds of those immigration offenses. Truszkowski created, owned and operated Crystal Clear Nationwide Management,

[24] SAC ¶75.

[25] SAC ¶80 and Exhibits C and D.

[26] SAC ¶81 and Exhibit F.

[27] SAC ¶82 and Exhibit G.

Inc., and DeLuxe Cleaning, Inc.[28] Through Vincent Romano, DJR's principal, Truszkowski obtained subcontracts to clean various Wal-Mart stores in Illinois and Indiana.[29] Plaintiffs allege that these actions were in furtherance of the conspiracy between Wal-Mart and Walters, as Walters' firm IMC used Romano and his affiliated contractors as corporate shells intended to shield Wal-Mart's employment of the undocumented migrant cleaning crews.[30]

Wal-Mart contractors recruited janitors to enter the United States through promises of employment, transported them when they arrived to various Wal-Mart locations and provided them with communal lodging and other support to facilitate and extend their presence in the United States and work at Wal-Mart.[31] For its own part, Wal-Mart systematically harbored undocumented alien janitors through its widespread practice of locking janitors in its stores at night. This practice further isolated the janitors, limiting the ability of law enforcement or others to detect their presence and thus facilitating their continued employment and presence in the United States.[32] Wal-Mart also provided certain undocumented janitors lodging in its stores, shielding them from detection.[33]

Wal-Mart aided and abetted the immigration crimes of the contractors. Wal-Mart knew that the janitorial labor its various contractors supplied was encouraged to travel to or remain in the United States, and transported and harbored by the contractors.[34] Wal-Mart assisted this activity by financing the operations of the contractors. Wal-Mart's millions of dollars in payments underwrote not only the labor of the janitors but the profit and overhead

[28] SAC ¶84.

[29] SAC ¶¶84.

[30] SAC ¶85.

[31] SAC ¶¶87-92, 103-04.

[32] SAC ¶109.

[33] SAC ¶44, 110.

[34] SAC ¶42, 52, 110.

costs and thus the criminal activity of the contractors, knowingly and intentionally making their crimes possible and helping to bring them about.[35] In addition to its general support of multiple immigration crimes, Wal-Mart aided and abetted the transportation and harboring of its contractors by engaging replacement crews from its contractors following enforcement actions, knowing that its actions would lead the contractors to transport crews to the affected Wal-Mart stores and house the janitors.[36]

4. Activities of the Enterprise Proximately Harmed Plaintiffs

Wal-Mart has an on-going and, indeed, permanent need for janitorial services in its thousands of retail stores. Were Wal-Mart to hire its maintenance staff directly, it, at a minimum, would be required to comply with the verification procedures of federal immigration law, as well as federal and state tax and labor laws. The irreducible costs of lawful employment, however, can be and were avoided through sham contracting arrangements and undocumented migrant labor.[37] The amounts that plaintiffs were paid for their labor were depressed below market levels and, indeed, below the levels mandated by the FLSA's minimum wage and overtime requirements. All of this was a foreseeable, direct and intended result of the operation of the Wal-Mart enterprise. Indeed, Wal-Mart and the contractors stood to gain if the enterprise delivered janitorial labor at a cost less than the legal minima. The immigration crimes and money laundering activities of participants in the enterprise were thus the necessary conditions for the exploitative labor conditions the janitors suffered and, by the same token, Wal-Mart's and its contractors' profits.[38]

[35] SAC ¶112.

[36] SAC ¶¶113-116.

[37] SAC ¶41-42.

[38] SAC ¶42, 79.

D. Wal-Mart's Renewed Motion to Dismiss

On January 20, 2006, Wal-Mart filed a renewed motion to dismiss the RICO claims (*i.e.*, Counts I and II) of the SAC raising the same arguments it made in connection with its initial motion to dismiss.

ARGUMENT

The Supreme Court has reaffirmed that "a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief' . . . 'giv[ing] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The notice pleading contemplated by Rule 8 "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues" rather than motion practice under Rule 12. *Swierkiewicz,* 534 U.S. at 512.

Thus, a "liberal standard" necessarily applies to review of the pleadings on a motion under Rule 12(b)(6). *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir. 1997). The court is "required to 'accept as true the facts alleged . . . and all inferences that can be drawn therefrom'" in plaintiff's favor. *Powell v. Ridge*, 189 F.3d 387, 392 (3d Cir. 1999) (quoting *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir. 1992) (en banc)) (*overruled on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001)); *see also* Fed. R. Civ. P. 8(f) (pleadings must be construed to do "substantial justice"). Further, a court "'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *NOW v. Scheidler*, 510 U.S. 249, 256 (1994)) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (upholding pleadings in RICO context).

In this connection, a court must not "confuse [ ]what must be pleaded with what must be proved." *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786,

790 (3d Cir. 1984) (reversing dismissal of RICO claim). "[It] is enough that a complaint put the defendant on notice of the claims against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action." *Id*.

As its motion makes clear, Wal-Mart would have this Court make findings of fact on allegations in the SAC. This is insupportable as a matter of law. When the proper standard under Rule 12 is applied to the detailed allegations of the SAC, Wal-Mart's motion must be denied.

I. WAL-MART'S MOTION TO DISMISS COUNTS I AND II OF THE SECOND AMENDED COMPLAINT SHOULD BE DENIED

A. Plaintiffs Allege a Viable Association-in-Fact RICO Enterprise Comprised of Wal-Mart and its Maintenance Contractors

1. The Enterprise is Sufficiently Distinct From Wal-Mart

To make out a RICO enterprise, plaintiffs must allege "an ongoing organization, [whether] formal or informal," which "function[s] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Console*, 13 F.3d 641, 651 (3d Cir. 1993). Under Section 1962(c), a RICO defendant must be a distinct entity from the enterprise it operates through a pattern of racketeering activity. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001); *Jaguar Cars Inc. v. Royal Oak Motor Car Co., Inc.*, 46 F.3d 258, 268 (3d Cir. 1995) (cited with approval in *King*, 533 U.S. at 161). While a plaintiff (or the government) must ultimately show proof of the *Turkette* factors, such specific elements need not be pleaded to defeat a motion under Rule 12(b)(6). *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 (3d Cir. 1984).

In *King*, the Supreme Court reversed the Second Circuit which had held that the sole shareholder of a boxing promotion company was not sufficiently distinct from the company itself to permit the shareholder to be sued under the theory that he operated the company as a

RICO enterprise. *King*, 533 U.S. at 160-61. In reversing the Second Circuit's restrictive construction of the distinctiveness requirement, the Court examined the broad statutory definitions of an enterprise under 18 U.S.C. §1962(c). *Id.* at 161-62. It held that a sole shareholder was distinct for purposes of RICO from the closely-held corporation he controls:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that.

King, 533 U.S. at 163. Thus, RICO's distinctiveness element requires only that the defendant be legally distinct from the enterprise, as a corporation is legally distinct from its officers or employees, although their acts may bind the corporation as a matter of law. *Id.* at 165; *see also Jaguar Cars*, 46 F.3d at 268.

Here, plaintiffs allege the association-in-fact enterprise is comprised of Wal-Mart and its maintenance contractors, SAC ¶¶3, 41, 67, each of which is undeniably a separate corporate entity, legally distinct from the enterprise, SAC ¶¶45, 51, 55, 84, 85. Wal-Mart's argument that plaintiffs allege that Wal-Mart conspired with itself, Mot. at 34-35, willfully ignores the substance of the scheme alleged in the pleadings. Rather, Wal-Mart chose to join with separate maintenance contractors to cover it from liability for immigration and employment law obligations connected with its janitorial labor force. SAC ¶47. Far from conspiring with itself, Wal-Mart created a separate enterprise with its contractors precisely so that it could point a finger at the contractors whenever criminal conduct was exposed. SAC ¶¶3, 44, 47.

In an effort to get around this, Wal-Mart urges that because its various contractors are said to be acting as its co-conspirators or agents in the operation of the enterprise, "[t]his is equivalent to saying that Wal-Mart operated itself as an unlawful enterprise." Mot. at 34-35. But it is axiomatic that co-conspirators act as mutual agents for one another, *Pinkerton v. United*

States, 328 U.S. 640, 646-47 (1946); *United States. v. Pungitore*, 910 F.2d 1084, 1147 (3d Cir. 1990), which does not – and cannot – shield Wal-Mart from liability here as RICO envisions that participants in an enterprise may conspire with one another. Indeed, conspiring to commit money laundering or immigration crimes are themselves RICO predicate offenses.

Wal-Mart's argument is nothing more than the claim rejected in *King*, that a corporate enterprise is not distinct from its agents for purposes of RICO. But as the Third Circuit has held, a corporation can be liable under Section 1962(c) "if *it* engages in racketeering activity as a 'person' in another distinct 'enterprise[.]'" *Jaguar Cars*, 46 F.3d at 268 (emphasis in original). As a result, a corporation can join with its agents as part of an association-in-fact RICO enterprise. *See e.g.*, *Hanrahan v. Britt*, No. CIV. A. 94-4615, 1995 WL 422840, at *5-7 (E.D. Pa. July 11, 1995). Here, Wal-Mart's association with other separate entities – the contractors – was an essential element of the scheme.

Wal-Mart's reliance on the Seventh Circuit's decision in *Baker v. IBP*, 357 F.3d 685, 691 (7th Cir. 2004), to support its notion that the enterprise alleged in the SAC is not distinct from Wal-Mart itself is misplaced. In *Baker*, where an employer was alleged to have created a criminal enterprise with immigrant aid associations, the Seventh Circuit found that the "nub of the complaint is that IBP operates *itself* unlawfully," in that IBP was the sole alleged employer of the undocumented immigrant workers. *Baker*, 357 F.3d at 691 (emphasis in original). In this connection, the court noted that the entire undocumented immigrant labor scheme involved in *Baker* was perpetrated by IBP. It was IBP "that supposedly hire[d], harbor[ed], and pa[id] the unlawful workers, for the purpose of reducing its payroll." *Id.* at 691. Thus the court found there was no distinction between IBP and the alleged enterprise. *Id.* at 692.

Here, the essence of the scheme is that Wal-Mart chose to do what IBP avoided: it relied on contractors to provide labor and act as the employer of the janitors. *See* SAC ¶¶42, 47, 51 56, 57, 59. The contractors hire, pay, and in multiple instances harbor, transport and encourage the undocumented labor provided to Wal-Mart. SAC ¶¶47, 48, 51, 55-58, 67. Wal-Mart used separate contractors to employ undocumented workers as a shield to avoid the scheme's detection by law enforcement. *See, e.g.,* SAC¶¶3, 44, 47, 52, 59, 62. Far from operating itself unlawfully, Wal-Mart relied on the contractors to provide the undocumented labor.[39]

Courts of Appeal in the Second, Ninth and Eleventh Circuits have found that association-in-fact enterprises comprised of an employer and labor contractors properly state a distinct association in fact RICO enterprise. *See Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1166 (9th Cir. 2002); *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005). Wal-Mart simply ignores this authority which dooms its distinctiveness argument.

In *Commercial Cleaning Services, L.L.C. v. Colin*, 271 F.3d 374, 378-79 (2d Cir. 2001), the Second Circuit upheld the district court's denial of defendant's motion to dismiss RICO claims where plaintiffs alleged an illegal immigrant hiring scheme was operated by an association-in-fact-enterprise comprised of a commercial janitorial services provider, and employment placement services, labor contractors and newspapers in which defendant advertised for laborers. *Id*. at 379. Similarly, in *Mendoza*, 301 F.3d at 1167, the Ninth Circuit reversed the district court's dismissal of plaintiffs' RICO claims where plaintiff alleged an association-in-fact enterprise comprised of the employer and an employment agency which supplied defendant with

[39] For these reasons, Wal-Mart's reliance on *Feinberg v. Katz*, No. 99-civ-045, 2005 WL 2990633, at *7 (S.D.N.Y. Nov. 7, 2005), is also misplaced. The *Feinberg* court reasoned there that because all defendants acted "within the scope of a single corporate structure, guided by a single corporate consciousness," there was not a sufficient distinction between the defendant and the corporate enterprise. *Id.* at *7. Here, Wal-Mart and its maintenance contractors are undeniably separate corporate entities.

undocumented migrant labor. There, as here, plaintiffs alleged that the employer used the separate contractor as a "front company" to perpetrate the scheme with the hope that it would be shielded from law enforcement detection. *Id.* at 1167. Noting that defendant and its employment agency were "separate compan[ies]," the court found the employer distinct from the alleged enterprise. 301 F.3d at 1167.

And in *Williams*, plaintiffs alleged an association-in-fact enterprise comprised of defendant Mohawk, a large carpet and rug manufacturer, and the employment recruiters which supplied Mohawk with undocumented migrant labor. *Williams*, 411 F.3d at 1254. Mohawk also challenged the alleged enterprise on distinctiveness grounds on motion under Rule 12. *Id.* at 1258. The court rejected Mohawk's argument, noting just that Mohawk and its employment recruiters were "distinct entities" engaged in a conspiracy to bring illegal workers into the United States for Mohawk's benefit. *Id.*

Because a corporation can be liable under Section 1962(c) "if *it* engages in racketeering activity as a 'person' in another distinct 'enterprise,'" *Jaguar Cars*, 46 F.3d at 268 (emphasis in original), there is no basis to dismiss Count I of the SAC on distinctiveness grounds.

2. Wal-Mart and Its Contractors Share a Common Purpose

Switching tacks, Wal-Mart also argues that it and its contractors do not share a common purpose sufficient to make out an association-in-fact enterprise. Mot. at 35-36. Wal-Mart cites to no Third Circuit precedent in support of its argument that entities making up an enterprise must have a single shared purpose but, even assuming, *arguendo*, that there were such a requirement, Wal-Mart just ignores those portions of the SAC which make it clear that both it

and the contractors shared the mutual goal of profiting off the labor of the undocumented janitors.[40]

Here, again Wal-Mart mistakenly relies on the Seventh Circuit's decision in *Baker* where the association-in-fact was made up of the employer of undocumented labor, recruiters of migrant workers, and immigrant-related social service agencies. The Seventh Circuit found that these entities could not form a sufficient association-in-fact enterprise because the employer had fundamentally different aims and goals from the other entities involved in the scheme. The immigrant-related social service agency sought to assist immigrants, while IBP sought to exploit them by employing them illegally, and compensating them less than mandated by law. *Baker*, 357 F.3d at 687, 691. Here, the contractors and Wal-Mart share the same purpose – profiting from undocumented labor.

The Eleventh Circuit's decision in *Williams* involves analysis of an enterprise far closer to that involved here. There, plaintiffs alleged that the participants in the enterprise (a carpet manufacturer and its employment recruiters) shared "the common purpose of obtaining illegal workers for employment at Mohawk" and that "[t]he acts of racketeering activity committed by Mohawk have the same or similar objective: the reduction of wages paid to Mohawk's hourly workforce." *Mohawk*, 411 F.2d at 1258.[41] The court found a common purpose because "[w]hat is clear from the complaint is that each member of the enterprise is

[40] "Wal-Mart and various maintenance contractors identified in this Second Amended Complaint . . . have created, engaged in and profited from a nationwide criminal enterprise which exploits the plaintiffs and those similarly situated through wide-scale violation of protective federal and state labor and employment laws." SAC ¶41; *see also* SAC ¶42 (Wal-Mart and contractors target and exploit migrants for mutual profit).

[41] *Cf.* SAC ¶¶3, 40, 41, 42, 61, 67, 77.

allegedly reaping a large economic benefit from Mohawk's employment of illegal workers." *Mohawk*, 411 F.2d at 1258. The same is true here.[42]

B. Wal-Mart Has Participated in the Affairs of the Enterprise Through a Pattern of Racketeering

1. Wal-Mart Directs the Affairs of the Enterprise

Section 1962(c) makes it unlawful for one to "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity...." 18 U.S.C. §1962(c). In *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), the Supreme Court held that:

> In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs. Of course, the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required.

(footnote omitted). *Reves* involved the issue of whether an outsider to the alleged enterprise – an accounting firm retained by the corporate enterprise – which prepared audit reports overstating the worth of the company could be said to participate in the affairs of its client. *Reves*, 507 U.S. at 174-75; *see also PricewaterhouseCoopers*, 102 F.Supp.2d at 262-63. The "operation or

[42] That the self-interest of the enterprise's participants may be divergent, see Mot. at 35, is immaterial to the common purpose of the enterprise: exploiting undocumented labor for profit. *See Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 263-64 (D.N.J. 2000) (rejecting argument that defendants' "inherently contradictory goals" negated enterprise participants' common purpose); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1999) (noting that a RICO enterprise can have diverse objects and goals). The enterprise's participants all profited from the scheme. How these profits were divided (payments to contractors, savings to Wal-Mart) is immaterial. Likewise, that Wal-Mart kept itself at a distance from the other participants to shield itself from law enforcement detection is immaterial to a finding that the participants shared a common purpose. *Cf. Mohawk*, 411 F.3d at 1258.

In any event, contrary to Wal-Mart's assertion that an enterprise cannot share a common purpose of profiting from illegal activity, Mot. at 36, proof of an association's "devotion to 'making money from repeated criminal activity'" alone shows a common purpose. *See U.S. v. Church*, 955 F.2d 688, 698 (11th Cir. 1992) *citing United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1982); *see also Williams*, 411 F.3d at 1258.

management" inquiry is thus designed to ensure that RICO does not reach "complete outsiders" who may assist the enterprise's affairs but who take no part in the conduct of the enterprise. *See PricewaterhouseCoopers LLP*, 102 F.Supp.2d at 262-63; *see also Jaguar Cars*, 46 F.3d at 265-66.

As the Third Circuit has held, RICO liability extends to "those 'plainly integral to carrying out' the enterprise's activities." *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998). The *Reves* "operation or management" standard requires that a defendant have a role in directing the enterprise's affairs. The allegations of the SAC support the inference that far from being a peripheral player, Wal-Mart was the kingpin of the enterprise, as it directed its affairs. *See e.g., United States v. Darden*, 70 F.3d 1507, 1516, 1542-43 (8th Cir. 1995); *United States v. Wong*, 40 F.3d 1347, 1373-75 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739, 743, 750-51 (1st Cir. 1994); *United States v. Grubb*, 11 F.3d 426, 438-39 (4th Cir. 1993).[43]

The SAC alleges the following specific instances of Wal-Mart's participation in the affairs of the enterprise. Wal-Mart: (1) established the enterprise by directing maintenance contractors to set up shell corporations in order to more effectively provide Wal-Mart with undocumented labor and shield the scheme from detection; (2) selected participants in the scheme by determining which contractors to use; (3) made routine and knowing use of undocumented labor; (4) supported the existence of the scheme by making payments to the shell companies for the undocumented labor from Wal-Mart's headquarters; (4) directed the standards of contractor performance; (5) switched shell contractors and replaced crews following federal

[43] For these reasons, Wal-Mart's reliance on *Gilmore v. Berg*, 820 F. Supp. 179, 183 (D.N.J. 1993) is inapposite. In *Berg*, the court dismissed plaintiff's RICO claims against an outsider defendant (an attorney providing professional services) on "operation or management" grounds where the defendant did not engage in any conduct which ran afoul of the RICO statute. *Id.* at 183. The defendant simply rendered professional services in the ordinary course of business and was not involved in any of the alleged predicate activities of the enterprise. *Id.* Here, as shown below, Wal-Mart has engaged in, and indeed directed, the affairs of the enterprise through commission of the predicate acts of money laundering and violation of immigration predicates.

raids of Wal-Mart stores; and (6) rejected contractors' offers to supply Wal-Mart with documented workers. SAC ¶¶44, 47, 48, 52, 62, 63, 67, 94.

As explicitly alleged in the SAC, the enterprise was directed by Divisional Vice Presidents within the Wal-Mart Stores Division with responsibility for in-store cleaning and procurement of services. SAC ¶44. Senior-level Wal-Mart executive Leroy Schuetz directed maintenance contractors to structure their business operations using multiple shell corporations to shield the employment of undocumented migrants from law enforcement detection. SAC ¶¶45, 47. Far from failing "to describe how Wal-Mart directed the alleged enterprise's unlawful conduct," Mot. at 36, plaintiffs specifically allege that during a conversation with Christopher Walters, the principle of various Wal-Mart maintenance providers, Schuetz threatened to end Wal-Mart's contract with Walters unless Walters formed and maintained different shell corporations to provide services to Wal-Mart. SAC ¶47; *see also* SAC ¶¶55, 56 (alleging same direction given to other contractors). Walters, of course, agreed, SAC ¶51, and Wal-Mart thereafter paid tens of millions of dollars to Walters' various shell companies to further the scheme. SAC ¶¶94, 95.

Wal-Mart managed the scheme through, among others, Schuetz and Steven Berschy, a Wal-Mart Divisional Vice President in charge of procurement for the Wal-Mart Stores Division. These senior Wal-Mart officials functioned in a supervisory capacity acting directly or through subordinate Regional and District management to manage and control the scheme. SAC ¶¶47, 52. By at least 1999, Wal-Mart's Chief Executive Officer David Glass was aware of the scheme and did nothing to curtail it. SAC ¶49.

These allegations, pleaded without the benefit of any formal discovery, go far beyond what is necessary under the lenient 12(b)(6) standard. *See Williams*, 411 F.3d at 1258-59

(holding that allegation that "[defendant] participates in the operation and management of the affairs of the enterprise," which included "some direction over" the defendant's supplier of undocumented labor, was sufficient to allege that the defendant was engaged in the operation or management of the enterprise).[44]

Wal-Mart argues that the complaint does not allege that Wal-Mart directed the commission of the predicate acts and that this means the requirements of *Reves* are not met. *See* Mot. at 38. But *Reves* requires only that Wal-Mart "have some part in directing those affairs" because "RICO liability is not limited to those with primary responsibility for the enterprise's affairs." *Reves*, 507 U.S. at 179. Here, plaintiffs allege that Wal-Mart directed its contractors to operate through shell companies and that this was done with the knowledge and intent that the contractors would continue to unlawfully encourage aliens to reside in the United States, transport them within the United States to work at various Wal-Mart stores and harbor them. SAC ¶75. Thus, plaintiffs clearly alleged that Wal-Mart has "some part in," *Reves*, 507 U.S. at 179, the commission of multiple predicate acts by the contractors.

Moreover, the SAC alleges that Wal-Mart itself engaged in systematic money laundering activities over multiple years through financial transactions amounting to tens of millions of dollars through the very shell corporations it directed the contractors to establish knowing full well that those transactions involved the proceeds of the contractors' immigration crimes. SAC ¶¶52, 57, 77, 85, 95, 100.[45]

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[44] Indeed, the complaint in *Williams*, attached as Exhibit A to the Declaration of James L. Linsey dated March 20, 2006 filed herewith, contains the conclusory allegation that "Mohawk participates in the operation and management of the affairs of the enterprise, which exists for Mohawk's benefit." Linsey Decl. Exhibit A ¶78.

[45] As shown above at pp. 9-12, the SAC also sets out allegations that Wal-Mart committed additional acts of racketeering in connection with the operation of the enterprise. *See* SAC ¶¶74, 99 (Wal-Mart engaged in a conspiracy to violate immigration predicates); ¶¶109, 110 (Wal-Mart harbors aliens in violation of immigration predicate); ¶¶111-16 (aiding and abetting the immigration crimes of contractors).

In sum, because RICO liability is not limited "to those with primary responsibility for the enterprise's affairs," so long as a defendant played "*some* part in directing the enterprise's affairs," *Reves*, 494 U.S. at 179, Wal-Mart's status as the sole source of lucrative maintenance contracts, its evident control over the terms of those arrangements, its direction to contractors to set up shell corporations to shield the enterprise from detection, and its sustained profit from the systematic use of undocumented immigrant labor in its stores, suffice to allege that it participated in the conduct of the enterprise's affairs.

C. Wal-Mart's Commission of the Predicate Acts

1. Money Laundering

To plead money laundering, a plaintiff must allege that (1) the defendant conducted or attempted to conduct a financial transaction, (2) which the defendant then knew involved the proceeds of unlawful activity, (3) with the intent to promote or further unlawful activity. *See United States v. Caruso*, 948 F.Supp. 382, 390 (D.N.J. 1996). So long as plaintiffs allege that Wal-Mart transferred money "knowing that the funds involved had been earned through a pattern of racketeering activity" and "with the intent to promote the carrying on of their racketeering activity," that is sufficient. *Tilli v. Aamco Transmissions, Inc.* No. 91-1058, 1992 WL 38405, at *3 n.3 (E.D. Pa. Feb. 24, 1992); *see also O'Keefe v. Aamco Transmissions, Inc.* No. 91-2506, 1992 WL 38441, at *l n.3 (E.D. Pa. Feb. 24, 1992). Here, plaintiffs plainly allege that Wal-Mart transferred funds that it knew represented the proceeds of its contractors' immigration crimes with the intent to promote or further that activity. Moreover, because Wal-Mart insisted – and its contractors agreed – to operate through corporate shells, it knew and intended that those contractors would further launder the proceeds of the scheme among themselves.

The SAC outlines these inter-related financial transactions in detail.[46] Plaintiffs allege that Wal-Mart paid the various front companies with checks drawn on Wal-Mart's bank located in Bentonville, Arkansas, with the knowledge that the monies paid constituted the proceeds of the illegal hiring, encouraging, harboring and transporting of undocumented migrant labor. SAC ¶58. Specifically, Wal-Mart paid in excess of $77 million to corporate shells established by Walters between 1999 and 2001 alone. SAC ¶95. Specifically, Wal-Mart paid $26 million to IMC, $14.5 million to Comet Floor Care, $21 million to Ironman Maintenance, $10 million to Precision Cleaning Services, $1.8 million to Champion Floor Care Services, $3.5 million to National Cleaning Management and $12.5 million to Pinnacle for cleaning services. SAC ¶95. These transactions are itemized in Exhibit E to the SAC at p. 100.

These allegations clearly state a violation of Section 1956. *See Choimbol v. Fairfield Resorts, Inc.*, No. Civ. A. 2:05 CV463, 2006 WL 521763 (E.D. Va. Mar. 2, 2006). In *Choimbol*, the court upheld plaintiffs' money laundering allegations in a materially identical scheme. There, Fairfield Resorts, a hotel chain, conspired with employment recruiters and subcontractors who provided Fairfield with undocumented migrant labor who, as here, were denied FLSA mandated wages. *Id.* at *1-2. Based on allegations that Fairfield's employment recruiter accepted payment from Fairfield for undocumented migrant labor and then paid its subcontractors from those proceeds with the intent to promote the scheme, the court found plaintiffs had properly stated RICO money laundering predicates against Fairfield. *Id.* at *2-6.

Wal-Mart's multiple payments to the contractors through shell corporations all knowingly involved the proceeds of illegal activity. As pleaded in the SAC, Wal-Mart's payments to the shell corporations for maintenance services provided by undocumented workers

[46] *Cf. Zavala*, 393 F. Supp.2d at 315-16.

constituted the proceeds of the illegal transporting, harboring or encouraging of migrants to allow them to labor at Wal-Mart stores. SAC ¶¶85, 94. Wal-Mart's contention that plaintiffs failed to allege how payments made to contractors constitute the "proceeds of illegal activity," *see* Mot. at 23, thus ignores the plain allegations in the SAC, which mirror those charged against Wal-Mart contractors by the federal government. *See* SAC ¶85; *see also* SAC Ex. I pp.6-7. [47]

The SAC further alleges that each of those payments were made in furtherance of the scheme. The payments covered not only the janitors' (sub-minima) wages but the overhead and profit to the contractors. SAC ¶¶77, 112. Wal-Mart's notion, Mot. at 23, that plaintiffs failed to allege that Wal-Mart acted in furtherance of the alleged scheme, is fanciful. Wal-Mart's payment through corporate shells it insisted its contractors create after massive immigration raids in 1997 minimized the risk of effective law enforcement action by allowing Wal-Mart to switch corporate shells after various raids. SAC ¶95. As outlined in the SAC, despite repeated law enforcement raids, Wal-Mart continued dealings with the contractors, switching companies and crews in response to law enforcement efforts. SAC ¶¶77, 100. Because plaintiffs clearly allege that Wal-Mart made multiple financial transactions involving the proceeds of the immigration crimes committed by its contractors, which it knew and intended would further the contractors' illegal practices, plaintiffs have properly pleaded multiple counts of money laundering sufficient alone to support Count I of the SAC.

[47] In *United States v. Truszkowski*, 05-cr-00454 (N.D. Ill 2005), the federal government indicted Truszkowski, a Wal-Mart maintenance contractor, for conspiracy to encourage illegal aliens to remain in the United States through subcontracting with shell corporations to shield the employment of undocumented migrants at Wal-Mart stores. SAC Ex. I, pp. 5-8. Truszkowski eventually pleaded guilty to money laundering and immigration offenses. In the plea agreement, the government specifically stated that "through and as a result of this conspiracy, Truszkowski ***was able to receive criminal proceeds in the form of Wal-Mart's payments, through an intermediate subcontractor . . . for the cleaning services provided*** . . .," and that Truszkowski thereafter laundered those criminal proceeds through the issuance of payroll checks and wire transfers to a Wal-Mart subcontractor who then paid the immigrant laborers. FAC ¶85 (emphasis added); *see also* SAC Ex. I, pp.6-7.

Further, plaintiffs have sufficiently alleged that Wal-Mart conspired with the contractors to commit money laundering. To plead conspiracy to launder money, a plaintiff must allege (1) an agreement between two or more people to commit money laundering, (2) an overt act taken to further the purpose of the agreement, and (3) defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose. *See e.g., United States v. Conley*, 37 F.3d 970, 976 (3d Cir. 1994). Wal-Mart knew and intended (because of the inter-relationship of the shell companies) that payments to the various corporate shells would necessarily result in multiple financial transactions between the shell corporations and their sub-contractors and principals. SAC ¶58. As outlined in Exhibit E to the SAC at pp. 100-105, Wal-Mart's payments to the contractors were in furtherance of the conspiracy to money launder as they engendered multiple transactions among the contractors and with sub-contractors.

Specifically, during the period 1999-2001, the shell corporations, many of which maintained accounts at Normandy Bank in St. Louis, conducted multiple transfers of funds between and among the companies which received payments from Wal-Mart (as well as with other Walters-controlled companies and subcontractors). SAC ¶95; SAC Ex. E, pp. 98-113. Specifically, Walters-controlled companies also transferred $3.5 million dollars by check, wire transfer and credit memo to DJR, Romano's company that provided undocumented migrant cleaning crews to Wal-Mart through Truszkowski, who pleaded guilty to money laundering of the proceeds of this scheme. SAC ¶95; SAC Ex. E, pp. 101-02. The exact amounts of these fraudulent transfers are set out in detail on pages 101 and 102 of the *Forfeiture Complaint*, attached as Exhibit E to the SAC.

Wal-Mart would have this Court discount the money laundering allegations by drawing a different interpretation from Scheutz's direction to Walters, arguing that the SAC

"reflects a deliberate misreading" of the affidavit of the federal law enforcement agent that is Exhibit A to the SAC. Mot. at 22.[48] But that, at best, confuses what the plaintiffs have to plead at the outset with what they will be required to prove after discovery. *See Seville Indus. Machinery*, 742 F.2d at 790. The allegations of the SAC are that senior Wal-Mart management directed Wal-Mart's leading maintenance contractor to set up shell corporations knowing that those contractors would engage in multiple and systematic immigration crimes and that Wal-Mart then paid those contractors tens of millions of dollars as the proceeds of those crimes and to support and further the scheme. That is all that must be pleaded to establish money laundering by Wal-Mart.

2. The Immigration Predicates

a. Aiding and Abetting Immigration Crimes of the Contractors

Wal-Mart used separate contractors to supply the undocumented labor to avoid having to verify the immigration status of the janitors itself. (Indeed, before it directed the contractors to set up shell companies, Wal-Mart discontinued its former practice of verifying the immigration status of contractor employees. SAC ¶47). The SAC is replete with allegations that Wal-Mart contractors harbored illegal aliens under 8 U.S.C. §1324(a)(1)(A)(iii),[49] transported illegal aliens under 8 U.S.C. §1324(a)(1)(A)(ii);[50] encouraged illegal aliens to reside in the

[48] As Wal-Mart sees it, Scheutz was only advising Walters how to circumvent Wal-Mart's own internal guidelines and avoid being fired. Mot. at 22. But far from "firing" Walters after law enforcement raids at Wal-Mart stores, Schuetz had Wal-Mart pay Walters tens of millions of dollars through shell companies to continue to supply the necessary labor. As Scheutz said, he "like[d] those Polocks" Walters supplied because they could be easily exploited. SAC Ex. A, pp. 41-42; SAC ¶47.

[49] Harboring requires that defendant: (1) knew or recklessly disregarded the fact that an alien is illegally in the country and (2) concealed, harbored, or shielded the alien from detection. *See e.g., United States v. Baftiri*, No. CR 99-47, 2000 WL 34030830 at *1-2 (N.D. Iowa, April 11, 2000) (harboring shown by defendant's employment of illegal aliens, provision of housing and transportation, and a pattern and practice of hiring family members of those unauthorized aliens already in his employ).

[50] Transporting requires that (1) the alien was not lawfully in the United States; (2) defendant knew or recklessly disregarded that fact; (3) defendant knowingly transported the alien, and (4) the transporting was done in furtherance of the alien's illegal presence in the United States. *See e.g., United States v. Guerra-Garcia*, 336 F.3d

United States under 8 U.S.C. §1324(a)(1)(A)(iv)[51] and engaged in conspiracies among themselves to do so. SAC ¶¶78-92.

Specifically, a number of Walters-controlled companies that supplied janitorial labor to Wal-Mart admitted to criminal conspiracies to transport and encourage illegal aliens to reside in the United States. SAC ¶80. Walters' subcontractors CMS of Queensbury, DJR and Truszkowski themselves pleaded guilty to similar immigration conspiracies, and Walters subcontractor Miroslaw Dryjack pleaded guilty to bringing in or harboring undocumented immigrants. SAC ¶¶81, 82, 83.

The SAC also alleges that Wal-Mart contractors encouraged undocumented janitors to enter the United States (with the promise of employment at Wal-Mart), SAC ¶¶87-88, harbored and transported undocumented janitors once here by working them in crews with relatives, providing them with communal lodging and false documentation and then transporting them across the United States as part of various work crews for Wal-Mart. SAC ¶¶89-92, 103-4, 113-14, 115-16.[52]

Wal-Mart knew and intended that its contractors would systematically engage in immigration crimes to supply it with undocumented janitorial labor. SAC ¶3, 47, 58, 63, 75. Plaintiffs allege that Wal-Mart aided and abetted, within the meaning of 8 U.S.C.

19, 23 (1st Cir. 2003) (inferring defendants' knowledge of alien's undocumented status where alien carried only a small bag, did not speak English, and agreed to ride on a bus where no passenger was released without full payment).

[51] A violation of §1324(a)(1)(A)(iv) requires that defendant (1) encouraged or induced an alien to come to or remain in the United States while (2) knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law. *United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (affirming conviction for encouraging based on inferences from circumstantial evidence); *see also United States v. Oloyede*, 982 F.2d 133, 137 (4th Cir. 1992) ("'encouraging' relates to actions taken to convince the illegal alien . . . to stay in this country").

[52] SAC Ex. E, pp. 16-18, 23, 45, 137-138.

§1324(a)(1)(A)(v)(II), the commission of the immigration predicates alleged in the complaint.[53] Specifically, the SAC alleges that Wal-Mart undertook the following affirmative steps to aid the criminal venture of the contractors and sub-contractors. First, by insisting that contractors operate through multiple corporate shells and then financing the unlawful activity through payment to the multiple contractors, Wal-Mart knowingly associated itself with the contractors' scheme, gave it the necessary support to succeed, and dulled the effectiveness of law enforcement efforts. SAC ¶112. The millions of dollars Wal-Mart paid to contractors underwrote not only the labor of the janitors but the contractors' overhead costs, making the contractors' crimes possible and helping to bring them about. SAC ¶112.[54] Aiding and abetting is "a term of breadth" that "comprehends all assistance rendered by words, acts, encouragement, support, or presence." *Reves*, 507 U.S. at 178. Wal-Mart clearly aided and abetted the contractors' commission of the immigration predicates by rendering assistance through its directions and its financial support of the scheme.

Indeed, as is outlined in the SAC, following raids at Wal-Mart stores, Wal-Mart managers requested maintenance contractors to immediately provide replacement crews. SAC ¶113-16. The managers knew that in response the contractors would, and did, cause undocumented migrants to be transported across state lines to the Wal-Mart stores. SAC ¶113-14. This affirmative conduct helped bring about the transporting offenses and furthered the presence of the janitors in the United States. *See United States v. Barajas-Chavez*, 162 F.3d

[53] In order to find a defendant liable for aiding and abetting, the plaintiff must prove: (1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. *United States v. Romero-Cruz*, 201 F.3d 374, 378 (5th Cir. 2000) (affirming defendant's conviction for aiding and abetting the transportation of illegal aliens). Knowledge and intent, of course, may be inferred from circumstantial evidence. *See, e.g.*, *United States v. Johnson*, 302 F.3d 139, 149 (3d Cir. 2002).

[54] *Cf.* SAC Ex. I, p. 7 (Wal-Mart contractor pled guilty to indictment charging that payments made to undocumented aliens for maintenance work at Wal-Mart stores encouraged undocumented aliens to remain and reside in the United States).

1285, 1289-90 (10th Cir. 1999) (defendant found guilty of transporting where he attempted to transport undocumented migrants from Arizona to Colorado so the aliens could look for work, noting that "[i]f their efforts had been successful, the benefits from finding employment undoubtedly would have assisted [the aliens] in remaining in the United States"); *see also United States v. Hernandez*, 327 F.3d 1110, 1112 (10th Cir. 2003) (same).

Taking all the foregoing as true as required by Rule 12(b)(6), the SAC adequately pleads that Wal-Mart knew of the systematic violation of immigration law by its contractors and that Wal-Mart supported and colluded with its contractors in these violations. That alone is sufficient to state a civil RICO claim based on aiding and abetting multiple immigration violations by the contractors and sub-contractors.

b. Conspiracy to commit immigration predicates

The allegations above also support an inference that Wal-Mart conspired with the contractors to harbor, transport, and encourage aliens in violation of 8 U.S.C. §1324(a)(1)(A)(v)(I)**.** To make out this predicate, plaintiff must show: (1) an agreement between two or more persons to commit the crime, (2) an overt act in furtherance of the agreement by one of the conspirators, and (3) that the conspirator knew of, intended to join and participated in the conspiracy. *See e.g., United States v. Avila-Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980).

The SAC specifically alleges that Wal-Mart, through Schuetz, agreed with its contractors that the contractors would commit immigration predicates in order to supply Wal-Mart with cheap labor. SAC ¶47. Schuetz, in directing Walters to set up various shell corporations, SAC ¶47, knew and intended that the contractors and their sub-contractors would (and, indeed, did) harbor, transport and encourage undocumented immigrant janitors. SAC ¶¶100-07. Indeed, Scheutz directed Walters to set up the separate companies after federal authorities raided Wal-Mart stores in 1997 and only after Wal-Mart discontinued its practice of

verifying the immigration status of contractors' employees. SAC ¶47. Wal-Mart then furthered the conspiracy by mailing checks payable to multiple shell corporations as profit for the contractors and compensation for the work performed by the undocumented migrant cleaning crews and by using Walters' firms interchangeably, switching contractors following law enforcement actions in order to continue the scheme. SAC ¶¶100, 107; *cf.* SAC Ex. I, ¶¶5-7.

The SAC contains ample allegations that Wal-Mart engaged in a conspiracy with its maintenance contractors to commit multiple immigration crimes.

c. Wal-Mart's Liability for Substantive Immigration Offenses

(i) Harboring

As noted above, the essence of harboring is that the defendant knowingly "concealed, harbored, or shielded" an undocumented alien from detection. In ruling on Wal-Mart's initial motion to dismiss, this Court noted that to "harbor" is to give shelter or refuge to or to be the home or habitat of; to "conceal" is to prevent disclosure or recognition of or to place out of sight; and to "shield" is to protect with or as if with a shield or provide with a protective cover or shelter or to cut off from observation or hide. *Zavala*, 393 F. Supp.2d at 307.

In *United States v. Zheng*, 306 F.3d 1080, 1086 (11th Cir. 2002) (cited with approval in *Zavala*, 393 F. Supp.2d at 306), the Eleventh Circuit affirmed a harboring conviction noting that there was evidence that the defendant provided the undocumented aliens with housing and employment, which facilitated the aliens' ability to remain in the United States. Similarly, in *U.S. v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975), the Second Circuit affirmed a harboring conviction where defendant provided housing to aliens, assisted the aliens in obtaining employment and transported them to and from their places of employment. The court held that these activities were meant to "facilitate the continued unlawful presence of the aliens in the US, which amounts to harboring." *Id.* at 441. Thus "providing housing and employment may

constitute 'harboring'" and that an employer's "provis[ion] [of the] back room of the store as a residence" may also constitute harboring. *Zavala*, 393 F. Supp.2d at 307; *see also United States v. Singh*, 261 F.3d 530, 532-33 (5th Cir. 2001).

In the SAC plaintiffs allege, with respect to a crew of four Bulgarian janitors who worked at a Wal-Mart store in Kansas City, Missouri, in 2001, that Wal-Mart permitted "the undocumented aliens to sleep in a back room in the store and to keep their personal belongings there knowing (or acting in reckless disregard of the fact) that they were undocumented aliens." SAC ¶110. That allegation alone sufficiently pleads multiple counts of harboring. *See Zheng*, 306 F.3d at 1086.

In response Wal-Mart argues that the SAC only supports an inference that these janitors did nothing more than "nap" in the store. Mot. at 14. But, again, that is an argument about what the evidence is, not about what has been pleaded. The SAC alleges that Wal-Mart knowingly harbored at least that crew of four janitors – that alone is sufficient to make Wal-Mart a proper RICO defendant under Count I.

Moreover, after the SAC was filed, plaintiffs learned that on at least one occasion Walters' company IMC reached an arrangement where Wal-Mart directly paid one of IMC's subcontractors to house a crew. *See* Linsey Decl. Ex. B. IMC billed Wal-Mart for crew accommodations when the particular store (store 2472 in Winston-Salem, NC) changed its service start date because, as recited on IMC's records, the "Sub agreed to keep crew there + ready to go if store paid apt. lease payment."[55]

Plaintiffs further allege that Wal-Mart made a regular and systematic practice of locking janitors whom it knew were undocumented in its stores overnight. SAC ¶109. By

[55] Linsey Decl. Ex. B.

locking the janitors into the store at night, Wal-Mart "limited the ability of federal law enforcement authorities (and others) to detect the janitors while they were at work," which in turn helped to facilitate the janitors' continued employment and presence in the United States. *See* SAC ¶109 (allegations made under section entitled "harboring"). Wal-Mart systematically committed additional multiple acts of harboring by locking undocumented janitors into its stores at night. SAC ¶109.

These allegations are sufficient to defeat a motion to dismiss. *See Mendoza*, 301 F.3d at 1168 (noting the "generous notice pleading standard," the court held complaint sufficient to survive a motion to dismiss where the plaintiff alleged "that defendants had knowledge of illegal harboring . . .").

3. Involuntary Servitude

The complaint sets out predicate acts of involuntary servitude under 18 U.S.C. §1584 sufficient to withstand Wal-Mart's motion to dismiss. To make out a claim of involuntary servitude a plaintiff must allege that "the victim [was] forced to work for the defendant by the use or threat of physical restraint or physical injury, *or* by the use of coercion through law or the legal process." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (emphasis added). In this connection, "other means of coercion . . . or of the victim's special vulnerabilities" should be considered. *Id.; see also United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002); *United States v. Alzanki*, 54 F.3d 994, 1004-5 (1st Cir. 1995) (upholding conviction for involuntary servitude involving threatened deportation of migrant); *Kimes v. United States*, 939 F.2d 776, 778 (9th Cir. 1991). The Supreme Court specifically noted in *Kozminski* that "threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to a[] . . .citizen . . .would be too implausible to produce involuntary servitude." *Kozminski*, 487 U.S. at 948.

In ruling on Wal-Mart's initial motion to dismiss, this Court dismissed plaintiffs' allegations of involuntary servitude, finding that plaintiffs failed to specifically allege the abuse suffered by plaintiffs at the hands of Wal-Mart's maintenance contractors. *Zavala*, 393 F.Supp.2d at 311. The SAC alleges that, as set out in the government's *Forfeiture Action*, SAC Ex. E, Wal-Mart contractors physically threatened and beat migrant janitors who worked at Wal-Mart. SAC ¶¶118, 121, Exhibit E (*Forfeiture Action*) pp. 43, 47.

In urging that there is no basis to the involuntary servitude predicate, Wal-Mart attempts to defend its practice of locking janitors into its stores during their shifts, and ignores that threats of deportation can amount to coercion under *Kozminski*. This failure is fatal to Wal-Mart's argument. Plaintiffs are undocumented migrants, speak little or no English and have little or no "money or mobility to escape work at Wal-Mart." SAC ¶42. In SAC ¶120, plaintiffs allege that class members were threatened with "deportation or other adverse legal action." This is based on specific incidents set out elsewhere, *e.g.*, threats of deportation by Wal-Mart's New Jersey contractor. *Id.* The same threat was made by a Czech contractor known at a Wal-Mart store in Bristol, Connecticut, to plaintiffs Zednek and Jaros. *Id.* at ¶120; *see also* SAC Exhibit E *(Forfeiture Action)* at p. 47.

The SAC also alleges that plaintiffs were also physically coerced or threatened with physical coercion causing them to reasonably believe that, given their vulnerable status, they had no choice to avoid continued service as janitors in Wal-Mart stores. SAC ¶118; Exhibit E *(Forfeiture Action)* pp. 43, 47 (Wal-Mart contractors physically threatened and beat migrant janitors who worked at Wal-Mart). In this connection janitors who complained that they were not being paid were threatened with eviction proceedings and ultimately evicted from their homes. SAC ¶91. All of this, taken with the widespread practice of intentionally locking these

vulnerable workers into its stores during their shifts, SAC ¶¶109, 118; *see also* SAC ¶¶8-16, 21-22, 30 (named plaintiffs confined to stores during nocturnal working hours), adequately pleads involuntary servitude by Wal-Mart and its contractors of plaintiff class members.

D. The Activities of the Enterprise Harmed Plaintiffs

1. The Racketeering Activity Proximately Caused Plaintiffs' Harm

Section 1964(c) provides a cause of action for a "person injured in his business or property by reason of a violation of Section 1962." 18 U.S.C. §1964(c). If the racketeering activity can be said to have proximately caused an economic harm, the injured party may maintain an action against a RICO defendant. *See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc*., 140 F.3d 494, 520 (3d Cir. 1998); *see generally Holmes v, Securities Investor Protection Corp*, 503 U.S. 258 (1992). In the RICO context, the Supreme Court has held that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Scheidler*, 510 U.S. at 256. Here plaintiffs easily exceed this lenient standard as the SAC alleges far more than simple "general factual" allegations of harm resulting from the conduct of the enterprise. *See e.g.,* SAC ¶121.

As noted in *Brokerage Concepts*, proximate cause under RICO draws on the common law of torts and, under *Holmes*, is primarily focused on the directness of the relationship between the plaintiff's injury and the defendant's conduct. *Brokerage Concepts*, 140 F.3d at 520. Thus, racketeering activity is said to have proximately caused an injury if the conduct is a "substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence." *Rodriguez v. McKinney,* 878 F.Supp. 744, 747 (E.D. Pa. 1995).

Here, the economic harm to the plaintiffs was a foreseeable and intended result of the various predicate acts of racketeering. In 1996, RICO was amended to include immigration crimes as predicate acts of racketeering. Pub L. 104-132 §433 (1996). Thus, "Congress contemplated the enforcement of the immigration laws through [civil RICO actions.]" *Mendoza*, 301 F.3d at 1170. The reason employers violate Section 1324(a) is "to take advantage of [undocumented immigrants'] diminished bargaining position, so as to employ a cheaper labor force and compete unfairly on the basis of lower labor costs." *Colin*, 271 F.3d at 383; *cf.* SAC ¶¶41-42. Plaintiffs suffered direct economic harm – among other things, deprivation of the FLSA-mandated overtime premiums and in some cases minimum wage – as a result of the violation of the immigration predicates. Wal-Mart and the contractors it conspired with could – and did – take advantage of their immigration status to exploit them economically.

The four courts of appeal to have considered the question of proximate causation in the context of a RICO enterprise involved in immigration crimes have all concluded that plaintiffs who allege economic harm due to the depressed labor costs made possible by use of undocumented labor may maintain RICO claims. In *Colin*, the Second Circuit reversed the trial court's dismissal of the case under the *Holmes* proximate cause standard. There plaintiffs were cleaning contractors who alleged that they lost contracts because defendant's "illegal hiring practices enabled it to lower its variable costs and thereby underbid competing firms." *Colin*, 271 F.3d at 378. The court of appeals held that while there may be factual disputes over whether plaintiffs lost business to defendants because of the immigration predicates or some other reason, they very well "may show that they lost contracts directly because of the cost savings defendant realized through its scheme to employ illegal workers." *Id.* at 382. In this connection the

Second Circuit rejected the defendant's argument – advanced by Wal-Mart here (Mot. 25) – that plaintiffs' injury was caused by low wages paid not their immigration status:

> Of course paying workers less than the prevailing wage and failing to withhold payroll taxes are not RICO predicate acts. Nonetheless, the purpose of the alleged violation of 8 U.S.C. §1324(a), the hiring of illegal alien workers, was to take advantage of their diminished bargaining position . . . [and] compete unfairly on the basis of [lower] labor costs.

Colin, 271 F.3d at 383.

The Ninth Circuit followed *Colin* in *Mendoza*. There plaintiffs were documented workers employed by fruitpackers who alleged that their employers "leveraged the hiring of undocumented immigrants in order to depress the[ir] wages." *Mendoza*, 301 F.3d at 1166. The court rejected the notion that employees whose wages are depressed as a result of the hiring of undocumented immigrants presented only a passed-on injury of the sort involved in *Holmes*. *Mendoza*, 301 F.3d at 1170. The Ninth Circuit held that that documented workers had RICO standing based on the immigration predicates in part because the undocumented immigrants could not be counted on to bring suit themselves. *Id*.

The Eleventh Circuit followed both *Colin* and *Mendoza* in *Williams*, an action similarly brought by documented workers alleging that they wage rates were depressed through the hiring of undocumented labor. There, too, the court held that defendant's "widespread scheme of hiring and harboring of illegal workers" resulted in depressed wages sufficient to make out proximate causation under *Holmes*. *Williams*, 411 F.3d at 1262. If anything, plaintiffs' harm there was more remote from the immigration predicates than plaintiffs allege here – participants in Wal-Mart's enterprise committed the predicate acts of racketeering so that they could directly exploit the janitors themselves.

Finally, the Sixth Circuit reversed a trial court dismissal of a similar RICO claim in *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). There, plaintiffs alleged that wages paid at a chicken processing plan were depressed by defendant's systematic use of undocumented migrant labor. The court, noting the Ninth Circuit's holding in *Mendoza*, held that plaintiffs had alleged sufficient facts to avoid dismissal, noting that although the facts could be disputed, that could not be grounds for dismissal as a threshold matter. *See id*. at 619. The Sixth Circuit reached that conclusion despite the fact that the employees there enjoyed union representation which could be expected to raise pay above market levels. *Id*.

The RICO theory advanced here has been recognized most recently in *Choimbol*. There, undocumented janitors alleged that they were proximately harmed by an association-in-fact RICO enterprise comprised of resort hotels (where they worked) and providers of undocumented immigrant labor. *Choimbol*, 2006 WL §21763, at *1-2. As here, the janitors in *Choimbol* alleged that the enterprise harmed them by paying them wages below the FLSA minima, through commission of wire and mail fraud and money laundering predicate acts. *Id.* at *4-8. The district court rejected arguments that the janitor's economic harm was too remote from the predicates alleged there denying the employer's motion to dismiss.

This authority is fatal to Wal-Mart's proximate cause argument. Here, plaintiffs were directly harmed by the immigration predicates because Wal-Mart could obtain janitorial labor at rates far below legally mandated levels only because it exploited the irregular immigration status of the janitors. Wal-Mart's contention that the immigration offenses were, "at most, remote links in a causal chain," Mot. at 26, that denied plaintiffs minimum wage and overtime must be rejected: participants in the enterprise committed the racketeering acts just so they could economically exploit plaintiffs. Under Wal-Mart's theory, it is difficult to imagine

what party would have standing to bring a civil RICO action based on criminal immigration violations. Wal-Mart and its contractors violated the immigration laws to gain access to a vulnerable labor pool. No more direct injury could be imagined from these RICO predicates.

E. Wal-Mart's Attempt to Rely on an *in Pari Delicto* Defense Fails

Wal-Mart's argument that plaintiffs and putative class members lack RICO standing because they worked in the United States illegally and thus their conduct "broke any causal connection" between Wal-Mart's exploitative practices and plaintiffs' injuries, Mot. p. 30, is nothing more than an invitation for this Court to erect an innocent party requirement upon plaintiffs seeking RICO. That invitation should be rejected as it is contrary to the language of the statute and without support in the case law.

There is nothing in the language of RICO that suggests that only innocent plaintiffs have a cause of action. Under Section 1964(c) "[a]ny person injured in his business or property by reason of a violation of Section 1962 . . ." has a claim under RICO without qualification. 18 U.S.C. §1964(c). The Supreme Court has consistently adhered to the language of the statute in interpreting its meaning and has rejected surplus requirements imposed by the lower courts but not found in the statute itself. *See Scheidler*, 510 U.S. 249 (rejecting requirement that defendants' racketeering have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (rejecting RICO injury requirement). "If the defendant engages in a pattern of racketeering activity . . . and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under §1964(c). There is no room in the statutory language for an additional . . . requirement." *Sedima*, 473 U.S. at 495.[56]

[56] Wal-Mart's argument is akin to the affirmative common-law defense of *in pari delicto*, which, where available, defeats a claim if (1) the plaintiff bears "substantially equal responsibility" for the alleged misdeeds, and (2) precluding plaintiff's suit would not significantly impair enforcement of the relevant laws. *Bateman Eichler, Hill Richards Inc. v. Berner*, 472 U.S. 299, 306, 310-11 (1985). Here, Wal-Mart's contention that "[h]aving chosen

Contrary to Wal-Mart's contention, Mot. at 29, the Third Circuit did not impose an innocent party requirement in *Doug Grant Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173 (3d Cir. 2000). There, blackjack players skilled at card counting and corporations that operated card-counting schools sued various casinos that took counter-measures to eliminate the card-counters advantage in blackjack. *Id.* at 177-78. The court sustained dismissal of plaintiffs' claims finding that plaintiffs had failed to plead the commission of any predicate act by any defendant because the counter-measures complained of were entirely legal. *Id.* at 187. The court further noted in *dicta* that plaintiffs brought the harm they complained of on themselves because their asserted losses were not caused by any illegal act of any defendant but as the result of their knowing decision to gamble. *Id*. at 188. As demonstrated above, the commission of the immigration predicates was the basis of plaintiffs' injuries here. At base, Wal-Mart's contention is nothing more than the Dickensian notion, not supported by any case law, that plaintiffs should not be able to recover economic damages because they chose to work as janitors at Wal-Mart, [57]

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to break these [immigration] laws . . . Plaintiff's cannot now seek to use the same violations that they knowingly and voluntarily committed to pursue RICO claims against Wal-Mart" Mot. at 30, is essentially an assertion of such an (unavailable) *in pari delicto* defense. *See also* Mot. at 26 (asserting that plaintiffs were "complicit in and benefited from" the commission of the immigration predicates and thus could not establish RICO standing). Wal-Mart's attempt to shift the blame for its own exploitative practices onto plaintiffs fails as the Third Circuit has not adopted *in pari delicto* as a bar to RICO standing. *In pari delicto* is generally not available in RICO actions. *See e.g., Biete, Co. v. Blomquist*, 848 F. Supp. 1446 (D. Minn. 1994); *In re National Mortgage Equity Corp.*, 636 F.Supp. 1138, 1156 (C.D. Cal. 1986). Indeed, such a requirement would be inconsistent with the language of the statute and with the Supreme Court's anti-trust standing jurisprudence which served as a model for RICO. *See Holmes*, 503 U.S. at 268; *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) ("antitrust standing principles apply equally to allegations of RICO violations"). The Supreme Court explicitly eliminated *in pari delicto* as a defense to anti-trust actions a generation ago. *See Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-40 (1968), *overruled on other grounds; Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *see also Pinter v. Dahl*, 486 U.S. 622, 632 (1988) (*in pari delicto* "is not appropriate in litigation arising under federal regulatory statutes").

[57] Of course nothing in 8 U.S.C. §1324(a)(1)(A) makes undocumented employment an immigration crime *of employees* and thus a predicate act of racketeering. Wal-Mart does not and cannot contend that plaintiffs themselves committed predicate acts of racketeering.

despite the exploitative conditions, a position this Court implicitly rejected in denying Wal-Mart's motion to dismiss plaintiffs' FLSA claims.[58]

In sum, the SAC contains sufficient allegations of standing; Wal-Mart's motion to dismiss Count I should be denied.

F. Plaintiffs State A Rico Conspiracy Claim Under Section 1962(d)

Even if Wal-Mart could somehow avoid liability for itself committing multiple predicate acts of racketeering it is still a proper RICO defendant under Section 1962(d). That section provides that "[i]t shall be unlawful for any person to conspire to violate [§1962(c)]." 18 U.S.C. §1962(d). A defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise. *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001). Facilitation of the scheme includes participation in the affairs of the enterprise with the knowledge and intent that other members of the conspiracy would commit two or more predicate offenses as a part of a pattern of racketeering activity. *Id.* at 537. But a Section 1962(d) defendant need not agree to personally commit two predicate acts, "it suffices that [defendant] adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States*, 522 U.S. 52, 65 (1997) (affirming conviction under 1962(d)). A violation of §1962(c) is therefore not a prerequisite for liability under §1962(d). *Zavala*, 393 F.Supp.2d at 316, (*quoting Smith*, 247 F.3d at 537). All that is necessary to establish liability for a RICO conspiracy is "that the conspirators share a common purpose." *Id.*; *see also Salinas*, §22 U.S. at 65.

Here, the Court initially dismissed plaintiffs' RICO conspiracy claim finding that (1) plaintiffs failed to allege the existence of an unlawful enterprise and (2) plaintiffs failed to

[58] 393 F.Supp.2d at 322-23.

allege Wal-Mart agreed with its co-conspirators to the commission of RICO predicates. *Zavala*, 393 F.Supp.2d at 317. The Court granted plaintiffs leave to amend their complaint, and the SAC clearly cures whatever pleading deficiencies there may have been.

First, the SAC alleges that Wal-Mart and its maintenance contractors formed an association-in-fact enterprise which was involved in a pattern of racketeering. *See* SAC ¶¶3, 41. Second, as shown above, *supra* pp. 24-34, Wal-Mart agreed with and indeed directed its maintenance contractors to commit predicate acts of money laundering and immigration violations to facilitate the scheme. *See* SAC ¶¶3, 41-48, 51-52, 58, 67, 74-76.

The SAC clearly alleges Wal-Mart engaged in a RICO conspiracy with its maintenance contractors. SAC ¶¶3 ("To avoid and evade responsibility under IRCA and to profit from illegal activity, Wal-Mart created an association-in-fact criminal enterprise, through which it conspired with various cleaning contractors who it knew would provide janitors to clean its stores who were not legally authorized to work in the United States."). Plaintiffs allege in detail that Wal-Mart established the scheme, SAC ¶43, directed the scheme, SAC ¶¶43, 44, conspired with contractors to establish shell corporations to further the scheme and shield it from detection through laundering the proceeds of the scheme. SAC ¶47, conspired with contractors to violate federal immigration laws to facilitate the scheme, SAC ¶¶74, 99, and profited from the operation of the scheme, SAC ¶¶41, 121. Multiple Wal-Mart contractors have been convicted of multiple predicate immigration and other crimes based on their providing undocumented migrant janitors to Wal-Mart. SAC ¶¶80-83. Based on these allegations, it is an understatement to say that Wal-Mart adopted the goal of the enterprise - Wal-Mart created the enterprise and operated it to achieve the goal, namely profiting from the exploitation of undocumented migrant labor.

Wal-Mart does not contest that plaintiffs have sufficiently cured their RICO conspiracy pleading deficiencies. Instead, Wal-Mart's only attack on plaintiffs' RICO conspiracy claim is the (incorrect) notion that plaintiffs lack standing to assert a violation of 1962(d) because, as Wal-Mart would have it, plaintiffs' injuries flow not from commission of the predicate acts, but from violations of the FLSA, Mot. at 39. As demonstrated *supra* pp. 35-39, plaintiffs' have adequately pleaded that their injuries stem from the racketeering conduct. Four courts of appeal concur.

Wal-Mart's motion to dismiss Count II of the SAC should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Wal-Mart's motion to dismiss.

Dated: March 20, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 20th day of March 2006, a true copy of the foregoing Declaration of James L. Linsey and Plaintiffs' Memorandum of Law in Opposition to Wal-Mart's Motion to Dismiss were served on counsel of record for defendant Wal-Mart Stores, Inc., by dispatching same via Federal Express, overnight mail, addressed as follows:

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