2004 WL 3374163 (D.N.J.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. 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,
v.
WAL-MART STORES, INC., Defendant.

Civil Action No. 03-5309 (JAG).
May 14, 2004.

Memorandum of Law in Opposition to Plaintiffs' Motion for Facilitated Notice Pursuant to 29 U.S.C. § 216(b)

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Defendant Wal-Mart Stores, Inc. ("Wal-Mart") respectfully submits this memorandum of law in opposition to Plaintiffs' Motion for Facilitated Notice Pursuant to 29 U.S.C. § 216(b).

PRELIMINARY STATEMENT

Plaintiffs seek conditional certification of a putative nationwide class of undocumented and "recently documented" workers who were allegedly hired by "a changing web" of over 100 contractors and subcontractors to provide "janitorial" services at over 3,500 Wal-Mart and SAM's CLUB stores around the country. Plaintiffs' vaguely defined class does not satisfy the statutory prerequisites for collective action treatment under the Fair Labor Standards Act ("FLSA"). Nor could such an action, which would be unprecedented in its scope, size, and complexity, be properly managed by a single federal district court.

• *First,* Plaintiffs were not Wal-Mart employees and have admitted in prior pleadings that they were recruited, hired, supervised, and paid by independent contractors. Indeed, some of the Plaintiffs were themselves subcontractors who employed putative class members. These admissions refute any notion that Wal-Mart was their "joint employer." Plaintiffs thus lack standing and cannot assert any FLSA claims against Wal-Mart.

• *Second,* even if these prior admissions did not foreclose Plaintiffs' "joint employer" theory, this threshold standing question involves individualized questions of law and fact that would have to be decided on a worker-by-worker, store-by-store basis. As a consequence, Plaintiffs cannot make the congressionally-mandated preliminary showing that they are "similarly situated" to other Wal-Mart employees.

• *Third,* although the First Amended Complaint alleges a minimum wage violation, Plaintiffs now contend that they were denied unspecified amounts of overtime at different pay levels for varying hours of work at different stores in different geographic regions over widely divergent time periods. Such claims, on their face, do not arise from a central or common plan, but rather would result from decisions by hundreds of different contractors and supervisors on a store-by-store basis. And at trial, each Plaintiff would have to prove the amount of overtime work performed at each store. Such diverse wage claims are inappropriate for collective treatment and would further mire the Court in thousands of sub-trials.

• *Fourth,* Plaintiffs' ill-defined class would involve thousands of workers from around the country. Even if a small percentage of this putative class "opted-in" to the proposed action, the number of claims, potential witnesses, and different languages involved would be overwhelming and unmanageable.

• *Finally,* Plaintiffs' proposed collective action could not be conducted by a single court and jury consistent with due process. The individualized factual and legal issues presented both by Plaintiffs' "joint employer" theory and their disparate hour and wage allegations significantly limit -- if not eliminate -- the potential use of representative testimony and proof. And there are over 100 independent contractors and subcontractors who are implicated by Plaintiffs' "joint employer" theory. Yet none are named as a defendant and most are outside of this Court's jurisdiction. Wal-Mart would not have an adequate opportunity to defend itself under such circumstances.

In seeking conditional notice, it is incumbent upon Plaintiffs to propose a class that comports with the statutory prerequisites for collective treatment and that is sufficiently defined and manageable. Plaintiffs' Notice Motion does not satisfy these requirements and would unduly delay and complicate this litigation. The Notice Motion should be denied.

STATEMENT OF FACTS

Wal-Mart is the largest retailer and one of the largest private employers in the world. AC ¶ 28. In the United States, Wal-Mart employs approximately 1.2 million employees, who are referred to as "Wal-Mart Associates."[1] Ex. A ¶ 2. Wal-Mart's operations in the United States are comprised of two business segments: Wal-Mart Stores and SAM's CLUBs. *Id.* ¶ 3. There are Wal-Mart retail and warehouse facilities in all fifty states. *Id.* ¶ 2. Plaintiffs' proposed notice would encompass "present, past and future janitors" at all of these stores and facilities.

Wal-Mart Stores

Wal-Mart operates approximately 3,000 retail stores in the United States. *Id.* ¶ 4. Store operations are managed through an organizational structure of divisions, regions, districts and stores, roughly divided along geographic lines. *Id.* ¶ 8. There are six divisions comprised of approximately 500-600 stores each; six regions per division, each comprised of approximately 80-100 stores; and 466 local districts with an average of six to seven stores per district. *Id.* ¶ 9-11. Each Wal-Mart store is locally managed by a Store Manager, who reports to a District Manager *Id.* ¶ 12. The District Manager reports to a Regional Vice President, who reports to a Divisional Vice President. *Id.*

The Store Manager is generally responsible for the operation, management, profitability, staffing, maintenance and physical appearance of a Wal-Mart store. *Id.* The Store Manager is also generally responsible for the retention of any independent contractors who provide services to the store. *Id.* ¶ 14. It is Wal-Mart's policy that Store Managers comply with applicable federal, state and local laws and regulations, including wage, hour or employee benefits laws, in performing these various responsibilities. *Id.* ¶ 13.

Floor Cleaning Services at Wal-Mart Stores

Floor maintenance at Wal-Mart stores includes the cleaning and waxing of tile surfaces. *Id.* ¶ 14. Some Store Managers have used Wal-Mart Associates to perform these services, others have contracted with independent contractors to provide these services, and still others have at various times used either Wal-Mart Associates or independent contractors. *Id.* The decision to use Wal-Mart Associates or independent contractors for these services was generally made by the Store Manager, in some cases in consultation with a District Manager or Regional Vice President. *Id.* Decisions to terminate contracts with independent contractors, to switch from one independent contractor to another, or to bring floor cleaning services in-house were also traditionally made at the individual store or district level. *Id.* ¶ 16.

During the three year period preceding this lawsuit, over 100 independent contractors and subcontractors provided outside cleaning contract services to more than 1,000 Wal-Mart stores. *Id.* ¶ 17. The Store Manager was generally responsible for negotiating the amount and manner of payment for these services. Id. ¶ 15. These amounts varied by store and payments were made to the independent contractors, not to individual crew members. *E.g.,* Ex. E ¶ 11 (Spectrum paid $2,550 per week at Madison Heights); Ex. B ¶ 8 (Facilities Solutions paid $4,000 per week at Bricktown); RB Decl. Ex. 8 (Facilities Solutions paid $3,324.80 per week at Old Bridge).

The independent contractors and, in some cases, subcontractors were responsible for hiring, training, assigning, and paying their workers. Ex. B ¶¶ 8-12; Ex. C ¶¶ 7-10; Ex. D ¶¶ 8-10; Ex. E ¶¶ 8-11. The number of outside workers who provided floor cleaning services varied by store. Ex. B ¶ 9; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 11; Ex. F ¶ 5; Ex. G ¶ 5. Their hours and compensation were also determined by the independent contractors. Ex. B ¶¶ 8, 12; Ex. C ¶¶ 7, 10; Ex. D ¶¶ 7, 10; Ex. E ¶¶ 11, 13; RB Decl. Ex. 8 ¶ 8. Wal-Mart store managers did not control which crew members were assigned to a crew, did not exercise supervisory authority over crew members, and did not have the power to hire or fire crew members. Ex. B ¶¶ 9-11; Ex. C ¶¶ 11-12;Ex. D ¶ 8;Ex. E ¶¶ 12, 13; Ex. F ¶ 6; Ex. G ¶ 8; RB Decl. Ex. 8 ¶ 4.

Plaintiffs have admitted these material facts in prior pleadings.[2] For example, Plaintiffs at the Old Bridge and Piscataway, New Jersey stores alleged that Felipe Soto, an independent subcontractor:

acted as direct supervisor of the plaintiff. His responsibilities included making the payments to the plaintffs for their services, deal [sic] directly with any problems that arose with Wal-Mart supervisors, repair of machinery and all of their administrative duties relating to the servicing contracts.

RB Decl. Ex. 2 ¶ 12 (emphasis added); *id.* Ex. 1 ¶ 49. *See also id.* Ex. 2 ¶ 10 ("ultimate responsibility for payment and contracting rested with a company created by Kenneth Clancy ... [f]rom this company, all payments to the plaintiffs were made until August of 2003").

One of the Plaintiffs, Victor Zavala, Jr., was also given the opportunity to contract his own crews of workers at the Wal-Mart stores in Bricktown and Piscataway, New Jersey. *Id.* Ex. 1 ¶¶ 43-44; *id.* Ex. 2 ¶¶ 17-18. And his wife and co-Plaintiff, Eunice

Gomez, similarly became the "boss" of her own crew. *Id.* Ex. 4. As such, Mr. Zavala and Ms. Gomez were responsible for finding, hiring, supervising, and compensating their crew workers. *Id.* Ex. 1 ¶¶ 43-44; *id.* Ex. 2 ¶¶ 17-18; *id.* Ex. 4; *id.* Ex. 5. Mr. Zavala and Ms. Gomez would receive weekly lump sum payments, which they divided among themselves and their workers. *Id.* Ex. 4; *id.* Ex. 5. As Mr. Zavala explained shortly before this action was filed, he was encouraged by one contractor to create his own subcontracting company so that he could employ his friends, and each of his five-man cleaning crews were paid a weekly sum to split "*as they saw fit.*" *Id.* Ex. 5 (emphasis added). Notably, his father, Victor Zavala, Sr., reportedly stated that "[n]o one from Wal-Mart knew we were illegal." *Id.* Ex. 4.[3]

One of the opt-in declarants also claims that he was summarily "fired" by a Wal-Mart store manager, but later admits that he returned to the floor cleaning crew at the *same* store and subsequently worked on outside crews for other Wal-Mart stores. Skubal Decl. ¶¶ 2, 7. This confirms that the power to hire and lire Plaintiffs rested with the independent contractors, not Wal-Mart. RB Decl. Ex. 8 ¶ 4.[4]

SAM'S CLUBs

SAM's CLUB operations are managed separately from Wal-Mart Stores. Ex. A ¶ 20. There are more than 500 SAM's CLUB locations in the United States. *Id.* ¶ 19. SAM's CLUB locations are typically warehouse-type facilities. *Id.* ¶ 21. Each has cement flooring that does not require waxing or buffing. *Id.* SAM's CLUB locations have no need for the type of floor cleaning services allegedly provided by the Plaintiffs, and have not had contracts with independent contractors for such services. *Id.* No Plaintiff alleges that he or she worked at any SAM's CLUB. Indeed, none of the pleadings even mention SAM's CLUB.

Plaintiffs' Disparate Wage And Hour Claims

Plaintiffs allegedly worked for thirty-three different floor cleaning contractors or subcontractors at nineteen different Wal-Mart stores in eight states. Their wages ranged from $500 per week to $325 per week; and they allegedly worked anywhere between 48 hours to more than 70 hours per week. AC ¶¶ 7-27. Some of the Plaintiffs were subcontractors; others were "crew bosses"; and others moved from crew to crew in multiple states. *Id.* ¶¶ 20-21, 23-24, 41. *See also* E. Macak Decl. ¶¶ 2, 6; Skubal Decl. ¶¶ 2, 6.

New Jersey Plaintiffs - Nine Plaintiffs allege that they worked in four Wal-Mart stores in New Jersey. AC ¶¶ 7-15. The New Jersey Plaintiffs were employed by at least six contractors and subcontractors owned or controlled by Kenneth Clancy, including Facilities Solutions, Inc. *Id.* ¶ 16. As noted, at least two New Jersey Plaintiffs, Victor Zavala and Eunice Gomez, were subcontractors who recruited, hired, and paid their own crews. Zavala and Gomez earned $500 per week. *Id.* ¶¶ 7-8. The other New Jersey Plaintiffs claim that they earned between $400 and $350 per week. *Id.* ¶¶ 9-15.

San Antonio Plaintiffs - Two Plaintiffs allege that they worked in a Wal-Mart store in San Antonio, Texas. *Id.* ¶¶ 17-18. Luis Gutierrez, who also claims to have worked in four other Wal-Mart stores in Texas, allegedly earned a weekly wage of $500 for a 48 hour week. Daniel Antonio Cruz allegedly earned a weekly wage of $325 for a 60 hour week. *Id.* The San Antonio Plaintiffs allegedly worked through Alamo National Service and Alamo Cleaning Services, Inc., two contractors owned or controlled by Tom Parker. *Id.* ¶ 19.

Transient Plaintiffs - Plaintiffs Petr Zednik and Teresa Jaros allege that they worked in Wal-Mart stores in Bristol, Connecticut, Alma, Michigan, and Monroe, Georgia. *Id.* ¶¶ 20-21. They identify at least six contractors and subcontractors, and four individuals, for whom they worked. *Id.* ¶ 22; Zednik Decl. ¶ 6; Jaros Decl. ¶ 6. Both allege that they were paid a monthly wage of $1,500, sometimes in cash and sometimes by check, for a 70 hour work week. AC ¶ 20-21; Zednik Decl. ¶ 5; Jaros Decl. ¶ 5. They allege that, on one occasion, a paycheck bounced -- but do not identify which contractor or subcontractor was involved. Zednik Decl. ¶¶ 5-6; Jaros Decl. ¶¶ 5-6.

Plaintiffs Jiri Pfauscr and Hana Pfauserova allege that they worked in Wal-Mart stores in Starkville, Mississippi and West Palm Beach, Florida. AC ¶¶ 23-24. They identify an individual named Walter Budniak as the person who employed them, *id.* ¶ 25, but do not allege that Mr. Budniak was affiliated with Wal-Mart. They also allege that they were required to pay a

security deposit of $500 "to ensure that [they] did not leave [their] work at Wal-Mart without permission," and were never repaid the deposit, *id.* ¶¶ 23-24.

Plaintiff Martin Macak claims to have worked in Wal-Mart stores in Winchester, Alexandria, and Sterling, Virginia at intermittent times since 1996. M. Macak Decl. ¶ 2. He identifies no fewer than five contractors and subcontractors for whom he allegedly worked. These contractors were located in Chicago, Tennessee, Virginia, and Maryland. *Id.* ¶ 6. He claims to have been paid between $1,300 to $2,000 per month for 56 hour work weeks, AC ¶¶ 26, but does not specify the wages paid to him per contractor or store.

Plaintiff Pavel Kunc claims to have worked in the Wal-Mart store in Madison Heights, Virginia since February 2003. *Id.* ¶ 27. He allegedly came to the United States in response to media advertisements in the Czech Republic promising employment in the United States for a fee of $1,500, *id.* 44, but does not allege that the advertisements were placed by or on behalf of Wal-Mart. He does not identify to whom he paid the fee. Mr. Kunc claims that upon his arrival in the United States, he was met at the airport, taken to Virginia, and housed by a person only identified as Patrick, who is not identified as a Wal-Mart Associate. *Id.* Mr. Kunc alleges that he was promised $1,500 per month and worked 70 hours per week. *Id.* ¶¶ 27, 44. He also claims to have not received any pay for as much as one month's work. *Id.* ¶ 27.

RELEVANT LEGAL STANDARDS

The FLSA provides an eligible "employee" with a private right of action against an "employer" that fails to pay minimum wage or required overtime premiums. 29 U.S.C. §§ 203, 206, 207. Unlike other claims that may be brought as a class action under Fed. R. Civ. P. 23, the FLSA only authorizes an aggrieved employee to bring a "collective action" on behalf of "similarly situated" employees who affirmatively opt into the lawsuit. *Id.* § 216(b). Congress imposed this restriction to ensure that representative FLSA actions are limited to plaintiffs who have been similarly affected by the same policy or practice of an employer, thus permitting efficient resolution of legal and factual questions common to each plaintiff in one proceeding. *Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165, 170-73 (1989); *Morisky v. Public Serv. Elec. & Gas Co.,* 111 F. Supp. 2d 493, 499 (D.N.J. 2000).

Courts have discretion under Section 216(b) of the FLSA to facilitate notice to potential opt-in plaintiff. But "the power to authorize notice must be exercised with discretion and only in appropriate cases." *Harper v. Lovett's Buffet, Inc.,* 185 F.R.D. 358, 361 (M.D. Ala. 1999). "Automatic preliminary class certification is at odds ... with the congressional intent behind FLSA's opt-in requirement, which was designed to limit the potentially enormous size of FLSA representative actions." *Smith v. Sovereign Bancorp, Inc.,* No. 03-2420, 2003 WL 22701017, at *2 (E.D. Pa. Nov. 13, 2003). "If district courts do not take basic steps to ensure that opt-in notices are sent only to potential plaintiffs who 'have a personal interest' in the employer's challenged policy, the congressionally-mandated line between representative actions under FLSA and class actions under Rule 23 will be substantially blurred." *Id.* Indeed, as one court observed, "[i]t would be a waste of the Court's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated." *Freeman v. Wal-Mart Stores, Inc.* 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003). Courts must likewise be satisfied that conditionally certifying a proposed class "will partake of the economy of scale envisioned by the FLSA collective action procedure." *White v. Osmose, Inc.,* 204 F. Supp. 2d 1309, 1318 (M.D. Ala. 2002).

In requesting facilitated notice, therefore, a plaintiff must make a preliminary showing that the statutory prerequisites for collective action treatment are satisfied. *Smith,* 2003 WL 22701017, at *1; *Harper,* 185 F.R.D. at 361-62. Unsubstantiated assertions that these conditions are met "will not suffice; some factual evidence is necessary." *Bernard v. Household Int'l, Inc.,* 231 F. Supp. 2d 433, 435 (E.D. Va. 2002). *See also Freeman,* 256 F. Supp. 2d at 945.[5] A plaintiff is also required to propose a collective action that is sufficiently defined and manageable from the outset. *Id.* (denying proposed notice to potentially thousands of current and former employees around country); *Smith,* 2003 WL 22701017, at *3 (denying proposed notice to all of an employer's estimated 7,500 hourly employees).

ARGUMENT

Plaintiffs cannot satisfy the prerequisites for conditional certification under Section 216(b). The huge, poorly-defined class that Plaintiffs allege would also be unmanageable on its face. Authorizing the requested notice, therefore, would be improper and a monumental waste of time and resources for the Court and the parties.

I. PLAINTIFFS' "JOINT EMPLOYER" THEORY CANNOT BE PROPERLY TRIED AS A COLLECTIVE ACTION.

Plaintiffs' Notice Motion improperly blurs the congressionally-mandated line between class actions under Rule 23 and collective actions under Section 216(b) of the FLSA. To maintain a collective action under the FLSA, it is not enough for Plaintiffs to allege that their claims as undocumented workers are typical of the claims of other undocumented or "recently documented" workers who might have provided "janitorial" services at a Wal-Mart store somewhere in the country. Plaintiffs instead must make a preliminary showing that (1) they were Wal-Mart employees with standing to assert FLSA claims; and (2) other "similarly situated" Wal-Mart employees were subjected to the same challenged compensation practice, raising common questions of fact and law. *See, e.g., Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 682 (1946) ("similarly situated" requirement met where representative plaintiffs and other "piece work" employees at a single pottery plant were all compensated based on same working time calculation of their direct employer). These requirements cannot be met here.

Plaintiffs admit that they were not Wal-Mart employees but were hired by a "changing web" of independent contractors and subcontractors. Plaintiffs' FLSA claims against Wal-Mart are thus premised on the theory that Wal-Mart was their "joint employer." AC ¶¶ 52-53; Notice Motion at 18-22. Plaintiffs further contend that they are "similarly situated" to other putative class members because Wal-Mart treated them all as "non-employees." Notice Motion at 17. Rather than supporting a Section 216(b) action, these allegations only demonstrate that Plaintiffs' FLSA claims are *inappropriate* for collective treatment.

As Plaintiffs are forced to acknowledge, determining whether Wal-Mart was a "joint employer" of any particular worker depends on "multiple factors" and "objective facts." *Id.* at 19-20. Indeed, Plaintiffs have already admitted facts that *disprove* a joint employer relationship with Wal-Mart. Their pleadings make clear that they were recruited, hired, trained, supervised, and paid by independent contractors, including some of their co-Plaintiffs. They also admit that they moved freely from one outside crew to another at different locations and stores, were responsible for providing and/or maintaining their floor cleaning equipment, and that the independent contractors -- not Wal-Mart -- had the power to terminate them. The declarations submitted by Wal-Mart fully confirm these material facts.

Taken together, the undisputed evidence refutes Plaintiffs' bald assertion that Wal-Mart was their "joint employer." Plaintiffs were not Wal-Mart employees and thus lack standing to assert any FLSA claims against Wal-Mart, let alone to serve as representatives of a collective action. *See Pfohl v. Farmers Ins. Group,* No. 03-3080, 2004 U.S. Dist. LEXIS 6447, at *11 (C.D. Cal. Mar. 1, 2004) ("Independent contractors are not covered by the FLSA; that is, there must be an employer-employee relationship for liability to accrue for alleged unpaid overtime.").

But even if the present record were not dispositive, the question whether Wal-Mart was a "joint employer" of any Plaintiff or putative class member would have to he determined on a store-by-store, worker-by-worker basis. These individual questions would require testimony, proof, and analysis of multiple factors based on the facts and circumstances of each store.

A threshold question would be whether some of the Plaintiffs and putative class members, such as Mr. Zavala and Ms. Gomez, were *themselves* employers of other putative class members and responsible for their wages and hours. This analysis would turn on a variety of factors, including: (1) whether and to what extent the contractor can control the manner in which the work is performed; (2) the contractor's opportunity for profit or loss; (3) the contractor's investment in equipment, or his or her employment of helpers; (4) whether the work requires special skill; (5) the degree of permanence of the working relationship; and (6) whether the service is an integral part of the contractor's alleged business. *Donovan v. DialAmerica Mktg.,* 757 F.2d 1376, 1382 (3d Cir. 1985).

The relationship between the putative class and Wal-Mart would require separate analysis of similarly diverse factors, including: (1) the degree of control exercised over the Case 2:03-cv-05309-JAG-GDH Document 24-1 Filed 05/17/2004 Page 18 of 36 worker; (2) the power to hire and fire the worker and modify the conditions of employment; (3) whether special

training or skill is involved; (4) whether a worker could refuse to work for the alleged employer and choose to work for others; and (5) where the employment occurred. No one factor controls and other factors may be relevant in a particular case. *See Maldonado v. Lucca,* 629 F. Supp. 483, 487-88 (D.N.J. 1986). *See also Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947) (A court must look at "the circumstances of the whole activity" to determine whether, as a matter of economic reality, an employment relationship exists.).

These threshold standing questions would necessarily involve individualized questions of Fact and law involving particular workers and stores. For example, a San Antonio Plaintiff, Luis Gutierrez, allegedly served as a "crew leader" for Alamo National Service and Alamo Cleaning Service at five different stores in Texas, earning the crew leader's salary of $500 per week. AC ¶¶ 17, 19, 41. As a crew leader, he may have been a subcontractor who -- like Mr. Zavala and Ms. Gomez -- recruited, hired, and paid his own crew. Resolving Mr. Gutierrez's "joint employer" claim would require testimony from store managers, assistant managers, night managers, and perhaps other Wal-Mart Associates from at least five different stores. Attempts would also have to be made to locate potential witnesses from the two independent contractors involved, although it is far from clear whether their appearance at trial could be compelled. And this would be apart from any witnesses Plaintiffs might proffer on behalf of Mr. Gutierrez.

Another Plaintiff, Martin Macak, alleges that he worked at three Virginia stores for five different independent contractors located in four different states. M. Macak Decl. ¶ 6. And opt-in declarant Teresa Szczesiak allegedly worked for nine outside firms at Wal-Mart stores in Cobleskill, Amsterdam and Rotterdam, New York. Szczesiak Decl. ¶¶ 2, 3, 7.

As just these three examples demonstrate, resolution of each Plaintiff's and potential plaintiff's "joint employer" claim would involve dozens of different witnesses, independent contractors, stores, and locations. However, until such individual determinations are made, it cannot be shown that a particular Plaintiff was a Wal-Mart employee at any store, let alone that he or she is "similarly situated" to other Wal-Mart employees. Plaintiffs' case theory is thus incompatible with the congressional objectives of a Section 216(b) collective action.

Plaintiffs cite two cases in support of their argument that Wal-Mart's alleged treatment of them as "non-employees" satisfies Section 216(b)'s "similarly situated" requirement. Notice Motion at 17 (citing *Kane v. Gage Merch. Servs., Inc.,* 138 F. Supp. 2d 212 (D. Mass. 2001) and *Moss v. Crawford & Co.,* 201 F.R.D. 398 (W.D. Pa. 2000)). Neither decision supports any such proposition. Both cases involved direct employees challenging a common policy of the defendants to treat the relevant employment positions as exempt under the FLSA. The threshold standing question raised by Plaintiffs' "joint employer" theory was not presented or considered in either case.

The more relevant case is *Pfohl,* where the district court was presented with a similar "joint employer" theory and refused to certify a collective action on the same grounds urged by Wal-Mart. 2004 U.S. Dist. LEXIS 6447, at *7-*20. The defendant, Farmers Insurance Group ("Farmers"), had contracted with four outside personnel and adjusting companies to provide additional insurance adjusters on a full-time temporary basis. *Id.* at *9-*10. The plaintiff was hired by one of the outside companies, but alleged that Farmers was his "joint employer." *Id.* at * 12. He further alleged that Farmers had failed to pay overtime wages in violation of the FLSA, and sought to represent all other "similarly situated" workers who had been employed as temporary full-time adjusters. *Id.* at *3, *10. As here, the preliminary evidence raised significant questions whether a "joint employer" relationship could be proven. Among other things, the record showed that the plaintiff had been selected and assigned by the outside contractor, had supervised other outside adjusters on his team, and that the outside contractor determined the rate and method of his compensation. *Id.* at *11-*20. The court also noted that the plaintiff's proffer of evidence did not -- and could not -- establish whether the factors for "joint employment" existed in other offices or for employees of other outside contractors. For these reasons, the court held that the plaintiff had:

> failed to show that Farmers together with [the outside contractor] was his joint employer, and even if Plaintiff were able to establish this, he has failed to show that he is similarly situated to other members of the proposed collective group consisting of adjusters from [the three other outside contractors] with respect to the members' employment relationship with Farmers. On this basis alone, then, denial of certification of this action as a collective action is warranted. [*Id.* at *20.]

The case for denial of conditional certification is even stronger here. The undisputed facts -- including Plaintiffs' own admissions -- refute the proposition that Wal-Mart was their "joint employer." And even assuming *arguendo* that they could

surmount this hurdle, Plaintiffs have offered no evidence that the factors for "joint employment" existed in other Wal-Mart stores involving other independent contractors and their employees. Just as in *Pfohl,* therefore, Plaintiffs have not shown -- and cannot show -- that they are "similarly situated" to all other undocumented or "recently documented" workers who provided "janitorial" services to Wal-Mart stores. Indeed, in *Pfohl,* the plaintiff only proposed to represent employees of three other outside contractors. Here, Plaintiffs seek to represent employees of "a changing web" of over 100 independent contractors and subcontractors. Conditional certification of the class that Plaintiffs propose would violate Section 216(b) and offend the congressional purpose behind the "similarly situated" requirement.

Courts have similarly refused to certify conditional collective actions in analogous cases involving the administrative exemption to the FLSA. Like the "joint employer" issue, the administrative exemption depends on whether an employee's duties satisfy various regulatory factors. As one court explained, "[t]o determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities under the relevant statutory exemption criteria." *Morisky,* 111 F. Supp. 2d at 498. This threshold legal question -- like the "joint employer" question here -- precludes conditional certification of a large putative class. Such threshold questions make it impossible to establish, even on a preliminary basis, that a plaintiff is "similarly situated" to other putative class members.

In *Morisky,* for example, seven named plaintiffs and over 100 potential "opt-in" plaintiffs asserted that they were "similarly situated" to all other employees at a single power plant in New Jersey who had been treated by the defendant as "exempt" from the FLSA's overtime requirements *Id.* at 497. The district court denied certification, explaining as follows:

> The scope of the class is dependent upon the answer to the question that is at the heart of this case -- which employees are properly classified as exempt? .... Thus, plaintiffs are seeking to have this Court certify a class based upon their own belief as to which employees do not satisfy any of the exemption criteria -- the very issue to be litigated in this action. Furthermore, the Court finds that litigating this case as a collective action would be anything but efficient. The exempt or non-exempt status of potentially hundreds of employees would need to be determined on a job-by-job, or more likely, an employee-by-employee basis .... The individual nature of the inquiry required makes collective treatment improper in this case. [*Id.* at 499.]

See also Dean v. Priceline.com, Inc., No. 00-1273, 2001 U.S. Dist. LEXIS 24982, at *7-*8 (D. Conn. June 5, 2001) (denying conditional certification on similar grounds); *Pfahler v. Consultants for Architects, Inc.,* No. 99-6700, 2000 U.S. Dist. LEXIS 1772, at *4 (N.D. Ill. Feb. 8, 2000) (same).[6]

Collective treatment of Plaintiffs' FLSA claims would be improper for the same reasons. At bottom, Plaintiffs are asking this Court conditionally to certify a massive, nationwide class based upon their bare assertion that Wal-Mart was a "joint employer" of each putative member. Even if Plaintiffs had not admitted facts negating that claim, the scope of the class -- and the congressionally-mandated showing that class members are "similarly situated" to one another -- would be dependent upon the answer to the threshold question whether a "joint employment" relationship could be proven on a worker-by-worker basis. Just as in *Morisky,* the "extremely individual and fact-intensive" nature of this inquiry would make collective treatment of the question improper. Indeed, while *Morisky* only involved a putative class of approximately 150 workers at a single New Jersey plant, the required analysis here would involve potentially thousands of plaintiffs at over 1,000 stores in every state of the country. The reasoning of *Morisky* in denying collective action treatment is thus especially applicable here, in light of the scope and breadth of Plaintiffs' putative nationwide class.

Notably, Plaintiffs cite to a single case where allegations of "joint employment" were certified for collective treatment, *Ansoumana v. Gristede's Operating Corp.,* 255 F. Supp. 2d 184 (S.D.N.Y. 2003). But this decision does not help their cause. In *Ansoumana,* the court conditionally certified a collective action only after finding that the putative claimants were, in fact, "jointly" employed by a single employment agency and a local pharmacy chain. *Id.* at 193-96. It took two years of significant discovery and litigation for the court to resolve the "joint employer" question only as to this one outside agency. Here, in contrast, this Court would have to determine the same question for over 100 independent contractors and subcontractors operating in thousands of stores around the country. The *Ansoumana* case illustrates why litigating the kind of case Plaintiffs propose as a collective action would, as the courts in *Pfohl* and *Morisky* found, be improper and "anything but efficient." *Morisky,* 111 F. Supp. 2d at 499.[7]

II. PLAINTIFFS ARE NOT "SIMILARLY SITUATED" TO THE PROPOSED CLASS IN OTHER MATERIAL RESPECTS.

Even apart from the obstacles created by Plaintiffs' "joint employer" theory, there are additional reasons why collective treatment of their FLSA claims would be improper. Their proposed class includes all past, present, and future workers who perform "janitorial" services at over 3,500 facilities nationwide. Notice Motion, Proposed Notice to Plaintiff Class ¶ 3. The only limiting criteria are that such "janitors" were undocumented or recently documented immigrants. *Id.* This putative class does not qualify for conditional certification.

A. Plaintiffs Are Not "Similarly Situated" To Other "Janitors."

Plaintiffs have failed to identify the employment positions that are "janitorial" under their putative class definition, let alone to show that these positions involve the same job functions and pay provisions they allege for themselves. Maintenance or "janitorial" functions are provided by a wide range of Wal-Mart Associates at varying positions and pay levels. Ex. B 5; Ex. C ¶ 5; Ex. D ¶ 5; Ex. E ¶ 6. For example, many Wal-Mart store managers -- who are salaried and have general responsibilities for the day-to-day operations of an entire store -- are responsible for cleaning, vacuuming, and removing trash from their offices. *See* Ex. B ¶ 5; Ex. C ¶ 5; Ex. E. ¶ 6. SAM's CLUBs facilities, moreover, have concrete floors. Ex. A ¶ 21. These facilities have no need for the type of floor cleaning services allegedly provided by Plaintiffs. *Id.* Yet, Plaintiffs seek conditional certification of a putative class that would encompass an unknown number of undefined "janitors" at all of these stores and facilities across the country.

Courts have routinely declined to certify -- even conditionally -- such ill-defined classes. *See Freeman,* 256 F. Supp. 2d at 945 (refusing conditionally to certify class of "all salaried Wal-Mart employees below officer level"); *Smith,* 2003 WL 22701017, at *3 (refusing conditionally to certify class of all hourly employees); *Harper,* 185 F.R.D. at 363 (refusing conditionally to certify class of all hourly restaurant employees). *Cf. Morisky,* 111 F. Supp. 2d at 498. Plaintiffs' proposed class is overly broad on its face.[8]

B. Plaintiffs Were Not "Victims" Of A Common Practice Or Policy.

Plaintiffs also cannot show that they and other putative claimants were victims of a common policy or practice to deny them minimum wages and overtime. Plaintiffs' FLSA count in the First Amended Complaint alleges that, "[a]t all times relevant to this action, Wal-Mart failed and refused to pay plaintiffs minimum wage for all hours worked and failed and refused to pay plaintiffs the overtime premiums required by the FLSA ...." AC ¶ 86. However, Plaintiffs' own allegations show that most were paid at or *above* minimum wage plus overtime. *See* Wal-Mart's Memorandum of Law in Support of Motion to Dismiss at 32-33.

In their Notice Motion, Plaintiffs now contend that they were denied unidentified amounts of *overtime* at unspecified pay levels for varying hours worked at different stores. Notice Motion at 10-11. These contentions cannot amend or otherwise cure the deficiencies of their pleading. For present purposes, however, these contentions refute the notion that Plaintiffs were the victims of any corporate-wide policy or practice.

Indeed, the only "common" practice Plaintiffs allege is that Wal-Mart exploited their undocumented status to obtain cheap labor.[9] But there is no evidence that the weekly or monthly amounts paid by Wal-Mart to the independent contractors were insufficient to support lawful compensation to Plaintiffs or other potential class members (even with some overhead, administrative expenses, or profit to the contractor). To the contrary, Plaintiffs now concede that they were paid at or above minimum wage. All that remains, therefore, are individual claims of unpaid overtime Such disparate claims would not arise from any common practice or policy of Wal-Mart.

As shown, decisions to enter into contracts with independent contractors generally were made at the store level, and resulted in hundreds of different arrangements between individual stores and the independent contractors who allegedly hired Plaintiffs and other potential class members. Ex. A ¶¶ 14-17; Ex. B ¶¶ 6-14; Ex. C ¶¶ 6- 3; Ex. D ¶¶ 6-11; Ex. E ¶¶ 8-17. Any overtime violations would have occurred at the store level, involving the relevant independent contractor or subcontractor

and, at most, an individual Wal-Mart store manager.

In *Ray v. Motel 6 Operating, L.P.,* No. 95-828, 1996 U.S. Dist. LEXIS 22565 (D. Minn. Feb. 15, 1996), the district court denied conditional certification and facilitated notice where the evidence showed that the opt-in plaintiffs " 'performed different jobs at different geographic locations and were subject to different job actions ... at various times so as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis.' " *Id.* at *7-*8 (citation omitted). The court found that any labor violations would be the result of decentralized decisions by local managers, and not the result of any common or centralized corporate plan. *Id.* at *8-*9. In *Sheffield v. Orius Corp.,* 211 F.R.D. 411, 413 (D. Or. 2002), the court similarly denied conditional certification of a collective action where the alleged wage and hour violations would have resulted from individual actions by numerous parties. The court found that the putative plaintiffs were not "related as victims of a uniform, national policy," making collective treatment of their claims improper. *Id.* Likewise, in *Bernard,* the district court refused to authorize notice to defendant's employees in twenty different offices in fifteen states because the evidence was "insufficient to support allegations that defendant has a company-wide policy resulting in potential FLSA violations." 231 F. Supp. 2d at 435. At most, the incidents alleged in the complaint were based on "the acts of supervisors at the individual offices." *Id.*[10]

There is no evidence that any unpaid overtime claims of Plaintiffs resulted from a single, uniform Wal-Mart policy in this action. Indeed, Plaintiffs' own allegations demonstrate just the *opposite,* reflecting divergent compensation amounts, work schedules, and other conditions (*e.g.,* "security deposits," invalid checks, etc.) that were established on a contractor-by contractor basis. Even if any Plaintiffs could prove a "joint employer" relationship existed with Wal-Mart at any particular store, their wage claims would result from the practices of an independent contractor and, at most, a local store manager. Such disparate claims are inappropriate for collective treatment for the same reasons found by these many other district courts.

The primary case cited by Plaintiffs, *Lockhart v. Westinghouse Credit Corp.,* 879 F.2d 43 (3d Cir. 1989), is inapposite. The putative claimants there worked for the *same* manager at a discrete number of locations. Here, the named Plaintiffs alone allege that they worked for scores of different independent contractors at nineteen Wal-Mart stores managed by dozens of different Wal-Mart Associates in eight states. Far from supporting the vast nationwide class they propose, the *Lockhart* decision shows that the lack of any common decision-making authority makes Plaintiffs' disparate overtime claims inappropriate for conditional certification.

C. Plaintiffs' Wage And Hour Claims Are Dissimilar.

Because Plaintiffs were not the "victims" of a common plan or practice, their wage and hour claims lack sufficient commonality to justify a collective action. Some Plaintiffs, such as Mr. Zavala and Ms. Gomez, acted as subcontractors or crew leaders and allegedly took $500 per week for themselves, AC ¶¶ 7-8, before compensating other crew workers. RB Decl. Ex. 4; *id.* Ex. 5.[11] Plaintiff Gutierrez was allegedly paid $500 per week for a 48 hour week, AC ¶ 17, while Plaintiff Cruz allegedly received $325 for a 60 hour week, *id.* ¶ 18. Plaintiff Pfauser was allegedly paid $1,500 a month and worked 56 hours per week, *id.* ¶ 23, while Plaintiff Zednik received $1,500 a month for a 70 hour work week, *id.* ¶ 20. Plaintiff Macak, in contrast, claims that he received between $1,300 to $2,000 per month for a 56 hour work week. *Id.* ¶ 26. In addition, some Plaintiffs claim that they were required to pay security deposits to independent contractors that were not returned. *d.* ¶¶ 23-24. Other Plaintiffs allege that some independent contractors bounced paychecks and never made good on them, *id.* ¶¶ 20-21, or that they were made to repair broken equipment apparently without pay, Szczesiak Decl. ¶ 6.

The wide disparity in job requirements, pay provisions, and other employment conditions alleged by Plaintiffs further confirm that they are not "similarly situated" for FLSA purposes. Adjudicating these disparate claims would not involve common questions of fact and law, but rather would require "individualized proof" from each Plaintiff showing "that work was performed for which he or she was not properly compensated." *Ray,* 1996 WL 938231, at *2. *See also Sheffield,* 211 F.R.D. at 413 (finding that factual differences in plaintiffs' pay claims, payment structures, and work conditions at nine different job sites "would require extensive consideration of individualized issues of liability and damages"); *Harper,* 185 F.R.D. at 362 n.2 (finding that plaintiffs' overtime claims would "require proof of the exact amount due to each individual plaintiff, [making] individual issues ... predominate over class issues"); *Lusardi v. Xerox Corp.,* 122 F.R.D. 463, 466 (D.N.J. 1988) (finding that "individualized defenses" and employment situations "for each of more than [1,300] plaintiffs will ...

destroy any ... commonality"). And where class members moved from store to store -- as many of the named Plaintiffs allege -- these individualized disputes would involve multiple stores and witnesses. *See, e.g.,* AC ¶¶ 20-21, 23-24, 26. Such diverse claims are inappropriate for collective treatment.

III. THE PROPOSED NATIONWIDE CLASS WOULD BE UNMANAGEABLE.

As one court has observed, "[i]n seeking court-authorized notice, plaintiffs are in effect asking this court to assist in their efforts to locate potential plaintiffs and thereby expand the scope of this litigation. As a matter of sound case management, a court should, before offering such assistance, make a preliminary inquiry as to whether a manageable class exists." *Severtson v. Phillips Beverage Co.,* 137 F.R.D. 264, 266 (D. Minn. 1991). It is implausible that a single federal court could be expected to manage the type of nationwide collective action that Plaintiffs propose in this case. Nor could a single jury feasibly or properly decide all of the individualized claims, proffers, and defenses that would be involved.

As noted, Plaintiffs' proposed nationwide class would include "janitorial" workers at over 3,500 possible locations. Even if the putative class were limited to employees of independent floor cleaning contractors who allegedly worked at Wal-Mart stores, it would involve -- by Plaintiffs' own account -- "thousands" if not tens of thousands of potential members "who were or are to be employed in Wal-Mart stores" across the country. AC ¶ 30. The unprecedented scope of Plaintiffs' proposed collective action makes it inappropriate for conditional certification on manageability grounds alone. *See White,* 204 F. Supp. 2d at 1314 (refusing to authorize nationwide notice because of concerns about manageability and judicial economy); *Bayles v. American Med. Response of Colo.,* 950 F. Supp. 1053, 1065 (D. Colo. 1996) (collective action would be inefficient and prejudicial because individual questions of liability are too numerous and significant to allow the case to proceed efficiently); *Ray,* 1996 WL 938231, at *5 (the "significant manageability problems inherent in a trial of 1000 plus individuals demonstrate that it is inappropriate to pursue this case as a class action").

The manageability problems inherent in Plaintiffs' proposed nationwide class would be compounded by their "joint employer" and disparate wage and hour claims. As shown above, resolution of the "joint employer" dispute would require testimony and evidence on a worker-by-worker, contractor-by-contractor, and store-by-store basis. Most Plaintiffs allegedly worked at multiple stores for scores of different independent contractors, implicating potentially dozens of store managers, assistant managers, night managers and other Wal-Mart witnesses. Efforts would also have to be made to locate the independent contractors and subcontractors who employed each Plaintiff, although it is doubtful their presence at trial could be compelled in most cases. *See Pfohl,* 2004 U.S. Dist. LEXIS 6447, at *30 (court found collective action to be unmanageable where threshold joint employer question would need to be resolved for hundreds of putative class members and four outside contractors).

And even if a particular Plaintiff were able to prove a "joint employer" relationship with Wal-Mart at one or more stores, he or she would then have to prove the amount of overtime compensation allegedly due at each store. This inquiry would involve separate questions concerning the work performed by each Plaintiff, his or her normal hourly rate, the number of hours he or she worked per week per store, and any off-setting claims or defenses. Each of these liability "sub-trials" would again implicate potentially dozens of witnesses. *See Morisky,* 111 F. Supp. 2d at 499 (collective action unmanageable where potential liability "would need to be determined on a job-by-job, or more likely, an employee-by-employee basis" for over one hundred putative plaintiffs).

On top of these significant case management problems, Plaintiffs' submissions and allegations indicate an array of different languages and English-speaking skills. The provision of translation services for Plaintiffs' putative nationwide class would itself be an enormous undertaking, further complicating and delaying resolution of individual claims while greatly increasing the costs of the litigation. *Cf. id.* (judicial system does not benefit from protracted, costly collective actions); *Bayles,* 950 F. Supp. at 1065 (same).

In *Sheffield,* the district court denied conditional certification in a case involving a much smaller putative class and far less complicated legal and factual issues. 211 F.R.D. at 413. Even so, the court found that a collective action would not "lead to efficiency gains and uniform fact determinations that § 216(b) was designed to create. Rather, a collective action certified on the facts presented thus far would be mired in particularized determinations of liability and damages, rather than collective consideration of common questions of law and fact." *Id.*

The enormous, nationwide class that Plaintiffs propose here would quickly mire this Court in thousands of individualized sub-trials, involving scores of different witnesses and multiple languages. Rather than facilitating prompt and efficient resolution of any viable FLSA claims, Plaintiffs' proposed collective action would -- in the words of one court -- only become " 'a monster that no one can deal with.' " *EEOC v. MCI Int'l, Inc.,* 829 F. Supp. 1438, 1446 (D.N.J. 1993) (citation omitted).[12]

IV. THE PROPOSED COLLECTIVE ACTION WOULD NOT PROVIDE WAL-MART AN ADEQUATE OPPORTUNITY TO DEFEND ITSELF.

Collective treatment of the individual claims alleged by Plaintiffs would also create significant due process problems. Wal-Mart's ability to defend itself against Plaintiffs' FLSA claims is, as the Supreme Court has instructed, a "fundamental requirement of due process ... which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See also Lusardi v. Xerox Corp.,* 118 F.R.D. 351, 372 (D.N.J. 1987) (The FLSA provides for collective actions "only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend. Requiring less would ... amount to a deprivation of a property right in violation of the Due Process Clause."), *vacated in part on other grounds,* 122 F.R.D. 463 (D.N.J. 1988). The nationwide collective action that Plaintiffs propose would deprive Wal-Mart of these basic rights.

Besides disproving a "joint employer" relationship with Wal-Mart, Plaintiffs' own admissions reveal the extent to which Wal-Mart's ability to defend itself against such claims will depend on individual facts and circumstances. Wal-Mart would be entitled to try these questions on a plaintiff-by-plaintiff basis. *See Arch v. American Tobacco Co.,* 175 F.R.D. 469, 488 (E.D. Pa. 1997) (concluding that the use of questionnaires -- rather than individualized inquiries of each plaintiff -- to establish the elements of causation and injury, without cross examination or rebuttal evidence for each plaintiff, would violate defendants' due process rights); *In re Masonite Corp. Hardboard Siding Prod. Liab. Litig.,* 170 F.R.D. 417, 425 (E.D. La. 1997) (defendants "cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses").

Even if the Court could establish adequate safeguards to resolve the "joint employer" question on a contractor-by-contractor basis, these threshold disputes would potentially involve over 100 different independent contractors and subcontractors. *See Pfohl,* 2004 U.S. Dist. LEXIS 6447, at *14, *17, *18, *19-*20 (holding that representative plaintiffs' evidence concerning his outside contractor could not be used to establish a joint employer relationship between other putative plaintiffs and their outside contractors). Litigating these preliminary standing questions would take months -- if not years -- of costly, burdensome litigation. And that would still leave the putative Plaintiffs' individual claims for overtime. As shown, each Plaintiff would bear the burden of proving the amount of overtime compensation allegedly owed. *Ray,* 1996 WL 938231, at *2. But even assuming *arguendo* that the Court could fashion a constitutionally-sound manner of trying these claims on a store-by-store -- rather than plaintiff-by-plaintiff -- basis, the putative class would implicate more than 1,000 stores. *See, e.g., Reich v. Gateway Press, Inc.,* 13 F.3d 685, 701 (3d Cir. 1994) (in case involving direct employees of a single community newspaper publisher in Pittsburgh suburbs, court required testimony from representative reporters, editors, and other supervisors from five geographical groups on relevant patterns of conduct, hours worked, and hours paid). This would further delay and complicate the litigation, denying Wal-Mart of its fundamental right to defend against Plaintiffs' claims in "a meaningful time and in a meaningful manner." *Armstrong,* 380 U.S. at 552.

In addition, the independent contractors -- who Plaintiffs admit were their direct employers -- are critical, if not indispensable, to this action. Yet, none are named as defendants and most are outside of this Court's jurisdiction. Zednik Decl. ¶ 6; Jaros Decl. ¶ 6; M. Macak Decl. ¶ 6; Cruz Decl. ¶ 6; AC ¶¶ 49, 51. This would make it extremely difficult, if not impossible, for Wal-Mart to prepare for and defend itself at trial. Even if the appearance of these contractors could be compelled, moreover, it would be patently improper (and infeasible) to try all of these separate "joint employer" claims and defenses before a single jury. *See Bayles,* 950 F. Supp. at 1067 (diverse claims with individual defenses should not be decided by a single jury, because the jurors would hear evidence irrelevant and inadmissible to certain plaintiffs); *Burrell v. Crown Cent. Petroleum, Inc.,* 197 F.R.D. 284, 292 (E.D. Tex. 2000) (it is inappropriate to conduct multiple mini-trials on individual claims and defenses before the same jury).

Plaintiffs' proposed collective action, therefore, would deprive Wal-Mart of an adequate opportunity to defend itself. These due process problems constitute an additional ground for denying conditional certification of the proposed nationwide class.

V. PLAINTIFFS' PROPOSED NOTICE IS UNNECESSARY AND DEFECTIVE.

Plaintiffs have been actively engaged in efforts to publicize this action and to solicit potential plaintiffs. There have been multiple United States and international news articles about the case. Indeed, as Plaintiffs' counsel has described, when the action was originally filed against Wal-Mart "[i]t hit the roof ... and the whole world knew about it and all of a sudden [Plaintiffs] are on CNN and Fox News." *See, e.g.,* RB Decl. Ex. 7 at 13. Plaintiffs have also created two websites, <*www.walmartjanitors.com*> and <*www.walmartamerika.com*>, for potential claimants. Individuals are told that they "may have claims in a class action racketeering and labor law suit against Wal-Mart and Wal-Mart's cleaning contractors" (who, in fact, are not named in this action) and "may be eligible to receive back pay through this lawsuit." Individuals are invited to sign on as plaintiffs by filling out a questionnaire. The websites are available in seven different languages. And Plaintiffs' counsel has traveled to Prague in the Czech Republic to solicit potential plaintiffs. *Id.* Ex. 6. To date, consents have been filed by 111 individuals, primarily from individuals residing in Eastern Europe.[13]

Wal-Mart believes that Plaintiffs' Notice Motion should be denied for all of the reasons shown above. Even so, the international reporting on this case, coupled with Plaintiffs' solicitation efforts, make any Court-facilitated notice unnecessary.

Finally, should this Court decide to grant any part of the Notice Motion, Wal-Mart respectfully requests separate briefing and argument on the content and provision of any notice to putative class members. Such additional proceedings would be justified to address, among other things, the following defects in Plaintiffs' draft notice:

• The content of any such notice "to absent class members" must be accurate and must "avoid communicating any encouragement to join the suit on its merits." *Hoffmann-La Roche,* 493 U.S. at 169.

• The proposed notice is overbroad and would encompasses Wal-Mart Associates and workers in SAM's CLUBs, even though Plaintiffs were employed by independent floor cleaning contractors, were not Wal-Mart Associates, and did not perform any services in SAM's CLUBs.

• The proposed notice is not limited to claimants employed in the three years immediately preceding the filing of the lawsuit, which is the longest possible limitations period under the FLSA. 29 U.S.C. § 255.

• Placing notice of this lawsuit in 3,500 Wal-Mart facilities nationwide, as Plaintiffs suggest, would be unduly expensive, ineffective, and inappropriate.

• Allowing Plaintiffs to "leaflet" Wal-Mart stores with their notices, and to sponsor radio announcements in the United States and other countries, would be improper and only " 'stir[] up ... litigation through unwarranted solicitation.' " *Freeman,* 256 F. Supp. 2d at 944 (citation omitted).

• The proposed notice fails to inform putative plaintiffs of the potential adverse consequences participation in the suit could entail, given their admitted undocumented status. *See* 8 U.S.C. §§ 1225 *et seq.*

• The proposed notice does not establish a reasonable deadline for opt-ins. *Hoffmann-La Roche,* 493 U.S. at 169.

CONCLUSION

For the foregoing reasons, Wal-Mart respectfully requests that Plaintiffs' Motion for Facilitated Notice Pursuant to 29 U.S.C. § 216(b) be denied in its entirety.

Footnotes

[1] Wal-Mart submits declarations from the following Wal-Mart Associates: Jared Bowen ("Ex. A"); Michael Hardy ("Ex. B"); Clinton Miller ("Ex. C"); Chuck Richards ("Ex. D"); Tim Wamsley ("Ex. E"); Douglas Campbell ("Ex. F"); and Chris Rutter ("Ex. G"). All other exhibits are attached to the Declaration of Randy Branitsky and will be referenced as ("RB Decl. Ex. _").

[2] Allegations from prior pleadings are deemed admissions by the party-declarant. Fed. R. Evid. 801(d)(2)(A). *First Bank of Marietta v. Hogge,* 161 F.3d 506, 510 (8th Cir. 1998) (statements from superseded pleadings are admissible evidence); *Dweck v. Pacificorp Capital, Inc.,* No. 91-2095, 1998 WL 88742, at *7 (S.D.N.Y. Mar. 2, 1998) (same).

[3] These and other statements by Plaintiffs tell a far different story from the slavery-like conditions alleged in the First Amended Complaint. For instance, a week before this action was filed, Mr. Zavala told the Philadelphia Inquirer, "I know I'm illegal, but I was so proud when 1 came out of the store each morning. The floors, they were so shiny, we did such a good job. Who's going to pay me now?" RB Decl. Ex. 5. His father echoed these sentiments, telling NJ Biz magazine that Plaintiffs wanted these jobs "because we were making a living. We were looking for the American way of living, the American dream." *Id.* Ex. 6 at 13.

[4] Independent contractors provided the same types of services to retailers other than Wal-Mart. For example, Horizon National Commercial Service, which provided floor cleaning services to fifteen Wal-Mart stores, reportedly provided the same services to Target, Office Max, Home Depot, Rite-Aid and other national retailers. RB Decl. Ex. 5; *<http://biz.yahoo.com/-ic/125/125603.html>* (Horizon National Contract Services, LLC Company Profile). Spartak Cleaning, Inc. provided crews to K-Mart, Target and Farm Fresh stores. Linscy Decl. Ex. G (*Woman Admits She Hired Illegal Immigrants,* The Virginian-Pilot, June 7, 2001).

[5] Plaintiffs' reliance on *Pirrone v. North Hotel Associates,* 108 F.R.D. 78 (E.D. Pa. 1985), a *pre-Hoffman-La Roche* case, is misplaced. *See* Notice Motion at 13. Although the court authorized notice, it did so without analysis of the "similarly situated" requirement and limited notice to particular employees at one geographic location. *Pirrone,* 108 F.R.D. at 82. The *Pirrone* court also expressed reservations about sanctioning the solicitation of litigation. *Id.*

[6] The *Kane* and *Moss* cases cited by Plaintiffs are again distinguishable. In *Kane,* the proposed class included only fifty putative members who held the same employment position for a single employer. Their claims arose from the employer's decision to treat the position as exempt under the FLSA, thus satisfying the "similarly situated" requirement. *Kane,* 138 F. Supp. 2d at 215. Similarly, in *Moss,* the plaintiff class was limited to seventy members who worked in discrete positions for the same employer on two projects. The plaintiffs' overtime claims were subject to the same exemption and statute of limitations defenses, and the court determined, "after careful deliberation," that resolution of the common defenses would not "make the opt-in class unmanageable." *Moss,* 201 F.R.D. at 410. These cases provide no authority for conditional certification of a nationwide collective action involving the type of threshold standing questions and manageability problems posed by Plaintiffs' case theory.

[7] For the same reasons, Plaintiffs are not "similarly situated" to any Wal-Mart Associates who might be encompassed by their ill-defined class. Most notably, Wal-Mart Associates would not face the threshold "joint employer" question in asserting any FLSA claims against Wal-Mart.

[8] Any attempt by Plaintiffs to redefine their proposed class in their reply papers would be improper. *See Reap v. Continental Cas. Co.,* 199 F.R.D. 536, 550 n.10 (D.N.J. 2001) (court refused to consider a request for alternative certification of a subclass because " 'it is improper for a party to present new arguments in his or her reply brief' ") (citation omitted).

[9] Even here, Plaintiffs do not allege that Wal-Mart actually knew they were illegal, but only state their "belief" that Wal-Mart knew based on isolated claims that unnamed Wal-Mart Associates were told or became aware of their status. Flores Decl. ¶ 8; Mendez Decl. ¶ 8; Zednik Decl. ¶ 8; Jaros Decl. ¶ 8; M. Macak Decl. ¶ 8; Cruz Decl. ¶ 8. No specific facts, names of Wal-Mart Associates, or other details are given to support these "belief" allegations. *See Bernard,* 231 F. Supp. 2d at 436 (rejecting similar unsupported "information and belief" allegations).

[10] *See also Briggs v. United States,* 54 Fed. Cl. 205, 206-07 (Ct. Cl. 2002) (denying a "national notice of action" for overtime claims); *Mielke v. Laidlaw Transit, Inc.,* No. 00-669, 2004 WL 443985, at *4 (N.D. Ill. Mar. 4, 2004) (denying certification where alleged overtime violations varied from store to store and were not based upon a uniform policy); *Marsh v. Butler County School Sys.,* 242 F. Supp. 2d 1086, 1094 (M.D. Ala. 2003) (denying certification of proposed collective action that would have included "custodians," "janitors," "maintenance workers," and other putative class members with disparate pay levels and working conditions at multiple locations); *Harper,* 185 F.R.D. at 363 (district court declined to certify or authorize notice to putative class of hourly employees at defendant's restaurants in six states, where seven named plaintiffs had not presented sufficient evidence beyond their single restaurant of a uniform overtime policy); *Mertz v. Treetop Enters.,* No. 96-1208, 1999 U.S. Dist. LEXIS 18386, at *5-*6, *9 (N.D. Ala. Mar. 2, 1999) (collective treatment inappropriate where the approximately 800 plaintiffs worked in

different positions and different locations and "were supervised by numerous different unit managers during their employment").

[11] Besides demonstrating a lack of similarity among Plaintiffs, the supervisory roles of Mr. Zavala, Ms. Gomez, and others who acted as subcontractors create potential conflicts that would preclude them from representing other putative members. *See Pfohl,* 2004 U.S. Dist. LEXIS 6447, at *25-*26 (noting such potential conflicts but denying certification on other grounds).

[12] Ironically, Plaintiffs assert that each putative claimant should be given "a reasonable and timely opportunity to present [his or her FLSA] claim in the existing litigation." Notice Motion at 16. The collective action Plaintiffs propose, however, is so large and unwieldy that it would only delay and complicate the resolution of such claims.

[13] These form consents provide no information whatsoever about the nature or basis of any individual's FLSA claim or other claims (if any) against Wal-Mart.