Westlaw Download Summary Report for CHAN,MILES 6071404

Date/Time of Request:	Monday, June 18, 2007 12:11:00 Central
Client Identifier:	MILES CHAN
Database:	FED-FILING-NJ
Citation Text:	2006 WL 381605
Lines:	1455
Documents:	1
Images:	0

For Opinion See 2007 WL 1134110, 447 F.Supp.2d 379, 393 F.Supp.2d 295

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).
January 20, 2006.

Wal-Mart Stores, Inc.'s Memorandum of Law in Support of Its Motion to Dismiss With Prejudice Counts One and Two of Plaintiffs' Second Amended Class Action Complaint and Jury Demand

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Civil Rules 7.1 and 7.2, Defendant Wal-Mart Stores, Inc. (“Wal-Mart”) submits this memorandum of law in support of its Motion to Dismiss With Prejudice Counts One and Two of Plaintiffs' Second Amended Class Action Complaint and Jury Demand (“Second Amended Complaint” or “SAC”).

PRELIMINARY STATEMENT

Plaintiff's purport to represent a nationwide class of undocumented workers who were allegedly hired by outside contractors to provide floor-cleaning services in certain Wal-Mart stores. SAC „„ 7-28, 30-36. Plaintiff's claim that they did not receive overtime pay and, in some cases, minimum wage for their work on the floor-cleaning crews. *Id.* „„ 1-3, 7-16, 18-19, 21-22, 24-25, 27-28, 30,40-42, 119, 121, 125, 146-150. Although Plaintiff's were allegedly recruited and employed by outside contractors, *id.* „ 21-23, 70-76, 78-98, Plaintiff's have not joined a single contractor as a defendant in this case. Their Second Amended Complaint attempts to replead claims exclusively against Wal-Mart under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968.

Plaintiffs' latest pleading is little more than a recitation (often *verbatim)* of the same allegations that this Court has already considered and rejected. *See* *Zavala v. Wal-Mart Stores,* Inc., 393 F. Supp. 2d 295, 335 (D.N.J. 2005) (dismissing RICO claims). None of the Plaintiff's -- or the 187 potential opt-in plaintiff's -- has alleged a single additional fact to support the amended RICO claims. Instead, the only new “facts” asserted are based on selective and misleading references to a search warrant affidavit from the federal government's investigation of Wal-Mart. The affidavit, which was itself based on multiple hearsay, contains no allegations that support any RICO offense by Wal-Mart. To the contrary, following a thorough investigation, the federal government determined that there was no basis to pursue any criminal charges against Wal-Mart or any of its employees (“Associates”). The investigation was settled, as a civil action, without any admission of wrongdoing by Wal-Mart. As part of the settlement, Wal-Mart agreed to a five year injunction against the knowing hiring of *contractors* who employ undocumented workers. The injunction is based on 8 U.S.C. § 1324a, which -- as this Court has already observed -- is not a RICO predicate offense. *Id.* at 308 n.11, 309.

The Second Amended Complaint suffers from the same pleading deficiencies previously identified by the Court, as well as other fatal problems that the Court did not reach in its prior decision. These deficient allegations confirm that Plaintiff's cannot plead viable RICO claims against Wal-Mart and that any further attempt to do so would be futile. Accordingly, Plaintiffs' amended RICO claims should be dismissed with prejudice.

STATEMENT OF THE CASE

Plaintiff's allege that Wal-Mart contracted with outside companies to provide floor-cleaning services to stores located in New Jersey and several other states. SAC „„ 7-28. Plaintiff's claim that they worked on floor-cleaning crews for several contractors, but admit that they were in the United States unlawfully and not authorized to hold employment here. *Id.* On October 23, 2003, federal authorities conducted enforcement operations in several Wal-Mart stores and arrested the Plaintiff's. *Id.* „„ 8-16, 18-19, 27-28. Shortly after their arrests, and only after their undocumented status was uncovered, Plaintiff's filed this putative class action. Many have since returned to their home countries or are subject to deportation. *Id.* „„ 8-16, 18-19, 21-22, 24-25, 27-28.

Plaintiff's initially brought suit in state court against Wal-Mart and several contractors for alleged wage violations and employment discrimination. Plaintiff's refiled their suit in this Court on November 10, 2003, naming Wal-Mart and ten outside contractors as defendants. On February 2, 2004, Plaintiff's amended their pleading (“First Amended Complaint” or “AC”) and dropped the contractor-defendants from the case.

The First Amended Complaint asserted five counts against Wal-Mart. Counts One and Two alleged RICO enterprise and conspiracy claims based primarily on the federal government's civil forfeiture action against several floor-cleaning contractors (“Forfeiture Action”). In the *Forfeiture Action,* the government accused the contractors, *not* Wal-Mart, of committing immigration and money laundering crimes. Narcotics Agent Abel Rios investigated the contractors and provided the government's allegations (“Rios Affidavit”). *See, e.g.,* SAC Ex. E at 3-8. Although the *Forfeiture Action* did not implicate Wal-Mart, Plaintiff's used the *Forfeiture* Action complaint and Rios Affidavit as the template for their original RICO claims. AC „„ 42, 57-58; *see also* Tr. of Mot. to Dismiss Hr'g at 8:18-9:18, 54:2-55:4, 88:3-90:11, 113:1-114:25, Oct. 20, 2004 (“Tr.”) (annexed as Exhibit 1). In addition to alleging RICO violations, the Amended Complaint accused Wal-Mart of conspiring to violate Plaintiffs' civil rights under 42 U.S.C. § 1985(3) (Count Three); violating the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 206-207 (Count Four); and false imprisonment (Count Five).

On March 19, 2004, Wal-Mart moved to dismiss the First Amended Complaint in its entirety.[FN1] The Court granted in part and denied in part Wal-Mart's motion to dismiss. *Zavala,* 393 F. Supp. 2d at 335. Because Plaintiff's failed to plead a single viable predicate act of racketeering against Wal-Mart, the Court dismissed Counts One and Two and granted Plaintiffs forty-five days' leave to amend their RICO

claims. *Id.* at 316. The Court also dismissed with prejudice Plaintiffs' civil rights claim under 42 U.S.C. § 1985(3), holding that Plaintiff's could not show they suffered discrimination on the basis of an immutable trait. *Id.* at 320. Recognizing that Plaintiffs' undocumented status was the result of "their own voluntary conduct," the Court observed that "[w]hile they *now* may not be able to regularize their status, such that their undocumented status is immutable, this is traceable to their decision, at the outset, to enter and remain unlawfully in the United States." *Id.* (emphasis in original). Finally, the Court denied Wal-Mart's motion to dismiss Plaintiffs' FLSA and false imprisonment claims. *Id.* at 335.

> FN1. During argument on the motion, the Court directed Plaintiff's to correct errors in their pleading. *See* Tr. at 110:2-24; *Zavala,* 393 F. Supp. 2d at 300 n. 1. Plaintiff's filed a Revised Amended Complaint ("RAC") on October 28, 2004.

On November 22, 2005, Plaintiff's filed their Second Amended Complaint reasserting two RICO claims against Wal-Mart. Plaintiffs' chief complaint remains that the contractors failed to pay overtime and, in some cases, minimum wage, SAC „„ 3, 30, and neglected to withhold taxes or provide employment benefits, *id.* „„ 8-16, 18-19, 21-22, 24-25, 27-28. Yet, Plaintiff's have not joined a single contractor, not even the contractors that pleaded guilty to immigration offenses and forfeited assets to the government. *Id.* „„ 80-85, 92. Plaintiff's instead allege that the contractors acted as Wal-Mart's agents and co-conspirators in a scheme to deny Plaintiff's fair wages. *Id.* „ 41.

Plaintiffs' amended RICO case theory is also unchanged; namely, that "Wal-Mart's maintenance contractors operating as part of the Wal-Mart Enterprise systematically violated federal criminal provisions by encouraging unauthorized aliens to enter the United States and then harboring or transporting them once here." *Id.* „ 86. In alleging this theory, Plaintiff's again rely on the *Forfeiture Action,* the fact that several contractors pled guilty to immigration and money laundering crimes, and the government's investigation of Wal-Mart. *See, e.g., id.* „„ 7-8, 80-85, 92. The same (in many cases identical) allegations were contained in the dismissed RICO counts of the First Amended Complaint. *See Zavala,* 393 F. Supp. 2d at 300-01 (dismissing RICO claims despite allegations that (1) a Wal-Mart contractor pleaded guilty to harboring illegal aliens, and that other Wal-Mart contractors forfeited $4 million because they hired unauthorized workers; (2) the government initiated the *Forfeiture Action* against Wal-Mart contractors based on immigration and money laundering offenses; (3) the government raided Wal-Mart stores on multiple occasions between 1997 and 2003; and (4) Wal-Mart had been under investigation by federal authorities for over five years). Plaintiff's also repeat their allegation that a letter from Professor Greta McCaughrin, concerning the 1999 arrest of undocumented workers in Lexington, Virginia, put Wal-Mart on notice that its contractors were employing illegal labor. SAC „„ 49-50, Ex. B.

The only "new" allegations in the Second Amended Complaint relate to the Affidavit of Special Agent Patricia Mullin ("Mullin Affidavit"). The government submitted the Mullin Affidavit to a Magistrate Judge in Arkansas to secure a warrant to search Wal-Mart's corporate headquarters. *See, e.g.,* SAC „ 46, Ex. A. The Mullin Affidavit

is not based on personal knowledge, but on multiple levels of hearsay. *Id.* Ex. A at 2-3. Moreover, there is little "new" in the Mullin Affidavit. The vast majority of the information contained in the affidavit was derived directly from the *Forfeiture Action.* As explained by the government, the Mullin Affidavit "is based on information and evidence relayed to [Agent Mullin] by Special Agent Julio C. Santana of the United States Immigration and Customs Enforcement ('ICE') (Legacy INS)." *Id.* Agent Santana, in turn, obtained the majority of his information from Narcotics Agent Abel Rios in the *Forfeiture Action. Id.* Ex. E at 3-8.

While the Mullin Affidavit largely recounts allegations levied against contractors in the *Forfeiture Action,* it also contains excerpts of alleged conversations involving contractors, undercover law enforcement personnel, and two Wal-Mart corporate employees, Leroy Scheutts and Steven Bertschy. Plaintiff's quote selectively from these excerpts, *see* SAC „„ 47-48, 61-65, and emphasize an alleged conversation -- in March of 1997 -- during which Scheutts supposedly made an off-color remark about Polish workers and then told a contractor to create different floor-cleaning companies so that he could continue doing business with Wal-Mart if his crews were found to be employing undocumented workers, *id.* „ 47. Plaintiff's also quote selected statements allegedly made by Bertschy that, according to Plaintiff's, show an awareness that some outside contractors were using undocumented workers on certain crews and under-compensating them. *Id.* „„ 61-62. Bertschy also stated that Wal-Mart was trying to get the individual stores to end their relationships with outside contractors and to bring floor-cleaning services "in house." *Id.* Ex. A at 58.

Although the Mullin Affidavit helped launch the federal government's investigation, the government ultimately concluded that "Wal-Mart did not have knowledge, at the time the independent contractors were initially hired, that the independent contractors knowingly hired, recruited, or employed unauthorized aliens ...." Stipulation in Compromise at 3, *United States* v. Wal-Mart Stores, Inc., 1:CV-05-0525 (M.D. Pa. filed Mar. 14, 2005) (annexed as Exhibit 2). The government further stated that "following a thorough investigation, the United States concluded that federal criminal proceedings involving Wal-Mart, its directors, officers, or employees would not be appropriate." *Id.* at 4. Instead of bringing a criminal case, the government filed a civil action under 8 U.S.C. § 1324a to "enjoin, prevent and deter the employment of unauthorized aliens *by contractors* employed by the defendant, Wal-Mart Stores, Inc." *See* Complaint at 1, *United States v. Wal-Mart,* 1:CV-05-0525 (M.D. Pa. filed Mar. 14, 2005) (emphasis added) (annexed as Exhibit 3). The parties simultaneously entered into a Consent Decree resolving the civil action without any finding or admission of wrongdoing. *See* Consent Decree, *United States v. Wal-Mart Stores, Inc.,* 1:CV-05-0525 (M.D. Pa. filed Mar. 15, 2005) (annexed as Exhibit 4). In the Consent Decree, the government again acknowledged that it found no basis for pursuing criminal charges against Wal-Mart. *Id.* at 3 „ 9.

ARGUMENT

Count One of the Second Amended Complaint alleges that "Wal-Mart and its contractors formed an association-in-fact enterprise for the purpose of profiting from a systematic violation of immigration and labor, wage and hour laws and other laws," in vi-

olation of 18 U.S.C. § 1962(c) ("RICO enterprise claim"). SAC „ 125. Count Two alleges that Wal-Mart conspired with outside contractors to violate § 1962(c) in derogation of 18 U.S.C. § 1962(d) ("RICO conspiracy claim"). *Id.* „ 139. Both Counts should be dismissed for the same reasons articulated in this Court's prior opinion and in Wal-Mart's initial motion to dismiss.

I. STANDARD OF REVIEW

In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pled allegations and must draw all reasonable inferences in the plaintiff's favor. *Zavala,* 393 F. Supp. 2d at 301-02. The burden is on the plaintiff, in the first instance, to "set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist." *Id.* at 302. The court "will not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of actual allegations." *Id.* A motion to dismiss should be granted where the plaintiff cannot prove any set of facts that would justify relief. *Id.* at 301-02. Dismissal with prejudice is warranted where, as here, the complaint fails to state a claim and repleading would be futile. *See* *Anderson v.* Ayling, 396 F.3d 265, 271-72 (3d Cir. 2005) (affirming dismissal of RICO claims with prejudice where proposed amendment was futile); *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1435 (3d Cir. 1997) (affirming dismissal with prejudice based on futility of further amendments).

When adjudicating a motion to dismiss, the court may consider documents attached to or referenced in the complaint, as well as matters of public record. *Zavala,* 393 F. Supp. 2d at 302. The plaintiff "cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." *Id.* (quoting *In re Burlington,* 114 F.3d at 1426). When the plaintiff has relied extensively on documents attached to the complaint, the court may also consider related documents and public records attached to the defendant's motion that refute the plaintiff's claims. *See* *Pension Benefit Guar. Corp. v. White Consol.* Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Id.*

II. PLAINTIFFS' RICO ENTERPRISE CLAIM SHOULD BE DISMISSED WITH PREJUDICE.

To state a RICO enterprise claim, Plaintiff's must plead that Wal-Mart (1) conducted, (2) an enterprise, (3) through a pattern, (4) of racketeering activity. *See* 18 U.S.C. § 1962(c); *Zavala,* 393 F. Supp. 2d at 303 (citing *Lum v. Bank of Am.,* 361 F.3d 217, 223 (3d Cir.), *cert.* denied, 125 S. Ct. 271 (2004)). Plaintiff's must also establish that they have standing to sue, which requires a direct and proximate nexus between their injury and the alleged predicate acts of racketeering. *Holmes v. Securities Investor Prot. Corp.,* 503 U.S. 258, 265-70 (1992); *Anderson,* 396 F.3d at 267.

Plaintiff cannot satisfy these elements. They have again failed to plead any viable predicate acts of racketeering against Wal-Mart. Nor can Plaintiff's show that their alleged injury -- denial of overtime and, in some cases, minimum wage -- was proxim-

ately caused by any of the predicate acts asserted against Wal-Mart. Plaintiff's thus lack standing to sue under RICO. Plaintiff's have also failed to plead an adequate RICO enterprise, and have not sufficiently alleged that Wal-Mart controlled the "operation or management" of the so-called enterprise.

A. Plaintiff's Have Not Alleged A Single Viable Predicate Act of Racketeering Against Wal-Mart.

The predicate acts alleged in the Second Amended Complaint fall into three categories: (1) immigration offenses under 8 U.S.C. § 1324; (2) involuntary servitude under 18 U.S.C. § 1584; and (3) money laundering under 18 U.S.C. § 1956. SAC „„ 68, 128. Plaintiff's have not attempted to reallege that Wal-Mart hired undocumented workers in violation of 8 U.S.C. § 1324(a)(3)(A), or mail and wire fraud. *Compare* RAC „ 67 (alleging violation of 8 U.S.C. § 1324(a)(3)(A) and mail and wire fraud under 18 U.S.C. §§ 1341 and 1343), *with* SAC „„ 68, 128 (omitting such allegations).

1. Plaintiffs' Immigration Predicates Fail.

Plaintiff's continue to allege that Wal-Mart "exploits the plaintiff's and those similarly-situated through wide-scale violation of protective federal and state labor and employment laws." SAC „ 41. The purpose of this scheme is to " 'enrich Wal-Mart' at Plaintiffs' expense." *Zavala,* 393 F. Supp. 2d at 302 (citation omitted). Even assuming this theory were true, Wal-Mart's conduct did not violate any of the alleged immigration offenses.

8 U.S.C. § 1324a - *Hiring Undocumented Workers:* As this Court previously held, the hiring and underpayment of undocumented workers does not violate 8 U.S.C. § 1324. *See* Zavala, 393 F. Supp. 2d at 317 ("[E]ven though Plaintiff's have alleged that Wal-Mart hired undocumented workers, and in many instances, knew that these workers were not authorized to work, these allegations are insufficient not only to state a predicate act of racketeering, but also for purposes of claiming that Wal-Mart agreed to the commission of predicate acts of racketeering."). Section 1324 targets conduct like human trafficking and concealment. *See* United States v. Moreno-Duque, 718 F. Supp. 254, 259 (D. Vt. 1989); *System Mgmt., Inc. v. Loiselle,* 91 F. Supp. 2d 401, 409 (D. Mass. 2000). A different statute, 8 U.S.C. § 1324a, prohibits the employment of illegal aliens (and, as noted, was the basis of the civil injunction agreed to by Wal-Mart in the government investigation).

Plaintiffs' refiled RICO claims confirm that this case is -- at most -- about alleged employment practices in violation of Section 1324a. SAC „ 121 (alleged harm flows from illegal "hiring" and denial of "proper compensation"). This is fatal because Section 1324a is not a RICO predicate offense. *Zavala,* 393 F. Supp. 2d at 308 n. 1, 309; *see also System Mgmt.,* 91 F. Supp. 2d at 409. Plaintiffs' repeated references to the hearsay statements attributed to two Wal-Mart corporate employees in the Mullin Affidavit only prove the point. The First Amended Complaint already alleged, more generally, that Wal-Mart "knew" that outside contractors were using undocumented workers on the floor-cleaning crews. AC „„ 3, 36-39, 43-44, 50, 54, 56-57. The "new" alleged statements in the Second Amended Complaint, even assuming *arguendo* they were true, only show that two Wal-Mart corporate employees were aware

that some outside contractors might be using undocumented workers on some of their crews. Although such knowledge might be relevant to a potential Section 1324a offense, it does not give rise to a RICO claim. *See* *Zavala, 393 F. Supp. 2d at 317* (holding that knowledge of contractors' use of undocumented workers did not state RICO enterprise or conspiracy claims). As in *System Management,* this Court should reject Plaintiffs' continuing attempt "to fit the alleged employment activity into a statute related to bringing in and harboring aliens." 91 F. Supp. 2d at 409.

Even apart from this overarching defect, Plaintiff's have not pled the requisite elements of the immigration predicates that are reasserted in the Second Amended Complaint.

8 U.S.C. § 1324(a)(1)(A)(ii) - *Transporting:* Plaintiff's have again failed to plead at least two of the elements necessary to state a transporting claim: (1) that Wal-Mart knowingly transported or attempted to transport an illegal alien; and (2) that the transportation was done in furtherance of the alien's illegal presence in the United States. *Zavala, 393 F. Supp. 2d at 305; United States v. Romero-Cruz, 201 F.3d 374, 378 (5th Cir. 2000)*; *United States v. Diaz, 936 F.2d 786, 788 (5th Cir. 1991)*; *United States v. Parmelee, 42 F.3d 387, 390 (7th Cir. 1994)*. With respect to the first element, Plaintiff's do not allege that *Wal-Mart* transported anyone. Rather, they allege that *contractors* transported workers to and from different cleaning jobs. SAC „„ 67, 87-89. And with respect to the second element, Plaintiff's have not pled that the alleged transporting was done "in furtherance" of an illegal presence. "Furthering an illegal presence, for purposes of stating the predicate act of transporting, involves more than transporting the undocumented worker to his or her place of employment." *Zavala, 393 F. Supp. 2d at 305; see* also System Mgmt., 91 F. Supp. 2d at 411; *Moreno-Duque, 718 F. Supp. at 258-59; United* States v. Chavez-Palacios, 30 F.3d 1290, 1294 (10th Cir. 1994).

Plaintiff's inexplicably recite the single specific account of alleged "transporting" that the Court already considered and rejected in dismissing the First Amended Complaint; namely, that an outside contractor met Plaintiff Kunc at the airport and drove him to a location in Virginia, where he began work at a Wal-Mart store. *Compare* AC „ 44, *with* SAC „ 88. These allegations fail to state a transporting claim for the reasons the Court articulated in its prior opinion. *Zavala, 393 F. Supp. 2d at 305-06*. By Plaintiffs' own admission, Plaintiff Kunc entered this country *legally* on a tourist visa. SAC „ 88. Thus, at the time he was allegedly transported, Kunc was not an illegal alien and driving him from the airport to a Wal-Mart store was not a crime, let alone an act of transporting under 8 U.S.C. § 1324(a)(1)(A)(ii).

Conspiracy to Transport: Plaintiff's have also failed to plead conspiracy to transport illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). A conspiracy consists of an agreement to commit a crime, an intent to achieve or knowledge of the unlawful purpose of the agreement, and overt conduct in furtherance of the unlawful purpose. *Zavala, 393 F. Supp. 2d at 305 n.7* (citing *United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975)*). Plaintiffs' conspiracy theory fails because they have not pled an agreement between Wal-Mart and its contractors to violate the transporting

statute; they have not alleged that Wal-Mart intended or knew that the contractors would transport aliens in furtherance of their illegal presence; and they do not allege any overt conduct or involvement by Wal-Mart, such as directing the contractors to move undocumented workers from a point of unlawful entry to another place in the United States for the purpose of avoiding detection. The only "facts" that Plaintiff's plead in support of their conspiracy claim -- *viz.,* that Wal-Mart used contractors interchangeably to avoid detection and made payments to contractors for floor-cleaning services, SAC „„ 99-100, 112, -- have nothing to do with an alleged act of transporting within the meaning of 8 U.S.C. § 1324(a)(1)(A)(ii).

Aiding and Abetting Transporting: Plaintiffs' aiding and abetting claim under 8 U.S.C. § 1324(a)(1)(A)(v)(II) is likewise flawed. To plead aiding and abetting, Plaintiff's must (1) allege facts that, if proven, would state a transporting offense, *United States v. Green,* 25 F.3d 206, 209 (3d Cir. 1994); and (2) allege that Wal-Mart participated in the offense through "affirmative conduct" intended to aid the criminal venture, *Zavala,* 393 F. Supp. 2d at 306. Plaintiff's contend that Wal-Mart aided and abetted the transportation of illegal aliens by requesting replacement cleaning crews. SAC „„ 114-116. But there is no claim that Wal-Mart requested "replacement" crews of illegal aliens. And even if Wal-Mart knew that undocumented workers would be moved from one store to another, such knowledge does not give rise to an aiding and abetting claim because transporting undocumented workers from one place of employment to another does not constitute transporting. *Zavala,* 393 F. Supp. 2d at 305. By Plaintiffs' own account, the "replacement" crews were allegedly being transported by the contractors to work in other Wal-Mart stores, not to "further" any worker's illegal presence in the United States within the meaning of 8 U.S.C. § 1324(a)(1)(A)(ii). Moreover, requesting replacement" workers does not constitute "affirmative conduct" intended to facilitate the commission of a transporting offense. *Compare* *Zavala,* 393 F. Supp. 2d at 306 (describing acts that might rise to the level of "affirmative conduct" in the context of a transporting claim).

8 U.S.C. § 1324(A)(1)(A)(iii) - *Harboring:* To plead harboring, Plaintiff's must allege that Wal-Mart (1) knew of or recklessly disregarded Plaintiffs' illegal presence in the United States; and (2) concealed, harbored, or shielded Plaintiff's from detection or attempted to do so. *Zavala,* 393 F. Supp. 2d at 306. Plaintiff's repeat, again virtually *verbatim,* the defective harboring allegations from the First Amended Complaint. They assert that a Wal-Mart contractor pled guilty to a harboring crime and that other contractors arranged housing near Wal-Mart stores for undocumented workers, such as Plaintiff Kunc. SAC „„ 49-50, 67, 87-89, 92, 113. The Court dismissed these identical claims in the First Amended Complaint, holding that "[a] contractor's 'lodging' of an undocumented worker and 'putting him to work' falls short of alleging that Wal-Mart sheltered undocumented aliens for the purpose of concealing them and avoiding their detection by immigration authorities." *Zavala,* 393 F. Supp. 2d at 308.

Plaintiff's also reiterate their allegation that some contractors urged individuals to obtain false identification documents. SAC „ 21-22, 91. But they do not allege that Wal-Mart was involved in any such conduct, thus barring their harboring claim. *Zavala,* 393 F. Supp. 2d at 308 (failure to allege that Wal-Mart was "involved dir-

ectly" in the alleged harboring was fatal to Plaintiffs' harboring predicate).

Plaintiff's also allege that a single Wal-Mart store sometimes allowed undocumented workers to sleep in a back room between shifts and to keep their personal belongings there while working. SAC „ 110. This claim (which again is not new but drawn directly from the Rios Affidavit) fails to state a viable harboring predicate. There is no allegation that Wal-Mart knew the immigration status of these "replacement" workers -- indeed, even the federal government did not know. *Id.* Ex. E at 86 (acknowledging that worker's immigration status was "not known"). Nor can Plaintiff's show that Wal-Mart allowed these workers to "live" in the store for purposes of shielding them from detection by immigration authorities. *See* *Zavala, 393 F. Supp. 2d at 307* (harboring may occur when the defendant allows undocumented workers to reside in the store); *United States v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002)*; *United States v. Singh, 261 F.3d 530, 533 (5th Cir. 2001)*. In both *Zheng* and *Singh,* for example, the illegal aliens did more than nap and store their things on the defendant's premises -- they lived and worked there full time. Here, in contrast, the alleged "replacement crew" worked in plain sight of the public when cleaning the floors and, by Plaintiffs' own account, were freely observed by Wal-Mart Associates and others when in the "back room." *See* SAC Ex. E at 86 (crew members *"sometimes* seen sleeping in the back room where they keep their personal belongings") (emphasis added).

Finally, Plaintiff's allege that Wal-Mart's "regular and systematic" practice of locking stores during non-business hours shielded illegal aliens from detection. SAC „ 109. But this allegation cannot be reconciled with the fact that hundreds of Wal-Mart stores, including many of the stores where Plaintiff's allegedly worked, were -- by Plaintiffs' own admission -- open to the public twenty-four hours per day. *Id.* „„ 21-22. Indeed, Wal-Mart kept most of its stores open around the clock during the busiest shopping seasons, when all Plaintiff's would have worked in plain view of the public. *Id.* Tellingly, the attachments to the Second Amended Complaint confirm that, by merely locking some store doors at night, Wal-Mart did not engage in harboring within the meaning of 8 U.S.C. § 1324(A)(1)(A)(iii). Federal agents conducted surveillance of cleaning crews as they regularly entered and exited Wal-Mart stores *in plain sight;* and some agents freely entered stores during overnight shifts to observe and report on the crews working there. *See, e.g., id.* Ex. E at 31-37. Moreover, Wal-Mart cooperated with the government investigation and even advised law enforcement authorities when it suspected that undocumented workers were cleaning its stores. *Id.* „ 115. Thus, Plaintiffs' own allegations and pleading attachments negate any plausible inference that Wal-Mart locked its doors to shield undocumented workers from detection by immigration authorities or anyone else.

Conspiracy to Harbor: Plaintiff's similarly fail to state a harboring conspiracy. They reallege that Wal-Mart knew of its contractors' illegal hiring practices but nonetheless continued associating with them. *See, e.g.,* SAC „„ 48-49. These allegations are insufficient for the same reasons previously found by the Court. *Zavala, 393 F. Supp. 2d at 307* (knowledge and continued association are insufficient to state a conspiracy to harbor predicate). Plaintiffs' suggestion that Wal-Mart conspired to harbor undocumented workers by directing its contractors to use multiple

shell corporations also falls short. SAC „ 47. Plaintiff's must allege conduct intended to conceal undocumented *workers* from detection by immigration authorities, *Zavala, 393 F. Supp. 2d at 307,* and not conduct that, at most, was intended to conceal the identity of some of the contractors from Wal-Mart store managers.

Aiding and Abetting Harboring: Plaintiffs' aiding and abetting theory is equally flawed. They allege that Wal-Mart aided and abetted illegal harboring by paying the contractors for their services. SAC „ 112. This claim fails because Plaintiff's cannot allege that Wal-Mart paid the contractors for housing undocumented workers with a shared intent to conceal them from immigration authorities. *See* *Zavala, 393 F. Supp. 2d at 304-05 n.6* (noting that the defendant must share the criminal intent of the principal to be held liable under an aiding and abetting theory). Simply paying the contractors for their floor-cleaning services does not constitute an aiding and abetting offense under 8 U.S.C. § 1324(A)(l)(A)(iii).

8 U.S.C. § 1324(a)(1)(A)(iv) - *Encouraging:* Plaintiff's wrongly accuse Wal-Mart of criminally encouraging illegal aliens, which consists of (1) inducing an alien to come to, or remain in, the United States, and (2) knowing or recklessly disregarding the fact that the alien's arrival or continued presence in the United States would be illegal. *Zavala, 393 F. Supp. 2d at 307-08*. Merely offering an undocumented worker employment does not suffice. *Id.* at 308; *United States v. Oloyede, 982 F.2d 133, 136-37 (4th Cir. 1992)*; *United States v. Bafitri, No. 99-47, 2000 WL 34030830, at *1 (N.D. Iowa Apr. 11, 2000)*.

Plaintiffs' own allegations negate their encouragement claim. The Second Amended Complaint alleges that Plaintiff's were “[d]riven by poverty and the lack of economic opportunities at home,” to enter the United States illegally for the purpose of seeking unlawful employment. SAC „ 42. This admission refutes any assertion that Plaintiff's were lured to this country by independent contractors -- let alone Wal-Mart.

Instead of alleging any direct acts of “encouragement” by Wal-Mart, Plaintiff's repackage the same deficient encouraging allegations they levied against the contractors in the First Amended Complaint. *Id.* „„ 87-88. Again, the only specific example of “encouraging” that Plaintiff's provide -- and which this Court already rejected -- involves Plaintiff Kunc. Plaintiffs reallege that a contractor placed an advertisement in the Czech Republic promising employment in the United States. *Id.* „ 88. Plaintiff Kunc allegedly responded to the listing and subsequently traveled to the United States *legally* on a tourist visa. *Id.* These allegations do not state an encouraging claim against anyone, much less Wal-Mart, because Plaintiff's cannot allege that the advertisement sought illegal workers or that it was placed with the intent of attracting illegal aliens. Plaintiff's do not even allege that the advertisement promised employment in Wal-Mart stores. And finally, Plaintiff Kunc arrived in this country legally, but overstayed his visa -- like other individuals comprising the putative plaintiff class. *Id.; see, e.g., id.* Ex. A at 18-19, Ex. E at 44. Plaintiff's cannot, as a matter of law, state an encouraging claim based on the arrival of such individuals in the United States. The most Plaintiff's allege is that Wal-Mart provided, through its relationship with outside contractors, a prospect of

employment once Plaintiff's chose to stay in the country illegally. Such claims do not constitute an encouraging offense, for the same reasons stated in *Zavala,* 393 F. Supp. 2d at 308.

Conspiracy/Aiding and Abetting Encouragement: The Second Amended Complaint contains no new allegations to support a claim that Wal-Mart conspired to encourage illegal aliens or aided and abetted an encouraging offense. Plaintiff's have not alleged -- and cannot allege -- any specific agreement by Wal-Mart to encourage aliens to enter or remain in the United States illegally or any other affirmative conduct by Wal-Mart designed to achieve that specific goal. Indeed, as Plaintiff's well know, they entered this country of their own volition, and not through any specific attempt by Wal-Mart to bring them here illegally. Again, all that Plaintiff's can allege is that Wal-Mart compensated the contractors for their floor-cleaning services. SAC „ 100. As the Court already held, this claim "fails to allege, as it must, that Wal-Mart took affirmative steps to assist Plaintiff's to enter into or remain unlawfully in the United States." *Zavala,* 393 F. Supp. 2d at 308. Accordingly, Plaintiff's have failed to allege viable encouraging conspiracy or aiding and abetting predicates against Wal-Mart.

8 U.S.C. § 1324(a)(1)(B)(i) - *Financial Gain:* Plaintiff's inexplicably reallege 8 U.S.C. § 1324(a)(1)(B)(i) as a predicate offense, SAC „„ 68, 128, despite this Court's prior holding that it is not. As the Court observed, the "financial gain" provision in Section 1324(a)(1)(B)(i) is "not a separate predicate act, but rather a penalty provision, derivative of the other immigration predicates enumerated at Section 1324." *Zavala,* 393 F. Supp. 2d at 304 n.5. Plaintiffs' refiled claim is frivolous.

2. Plaintiffs' Involuntary Servitude Predicate Fails.

Plaintiff's reallege that they were subjected to "forced labor" in violation of 18 U.S.C. § 1584. SAC „„ 68, 118-120, 128. This claim is frivolous. To plead a Section 1584 violation, Plaintiff's must show that Wal-Mart "knowingly and willfully" held them in a condition of "involuntary servitude." 18 U.S.C. § 1584. Involuntary servitude is "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United* States v. Kozminski, 487 U.S. 931, 952 (1988). The defendant must exert "superior and overpowering force," which convinces the plaintiff that there is no way to avoid continued labor or confinement. *United States v. Shackney,* 333 F.2d 475, 486 (2d Cir. 1964).

Plaintiff's do not -- and cannot -- allege that Wal-Mart "knowingly and willfully" compelled them to work against their will. They instead claim that *"[c]ontractor* used or threatened to use coercion (including physical coercion) which caused undocumented plaintiffs and other class members reasonably to believe that, given their vulnerable status, they had no alternative but to continue to work at Wal-Mart." SAC „ 118 (emphasis added). Plaintiffs further allege that unspecified *contractors* "at times refused to pay class members anything at all for their work;" required plaintiff's to pay "security deposits" as a condition of their employment; and "used

the threat of deportation to frighten undocumented janitors into acquiescence." *Id.* „„ 119-120.

This Court has heard these claims before and rightly rejected them. Plaintiffs' vague allegations of "physical" coercion and abuse do not implicate Wal-Mart; indeed, Plaintiff's again fail to "identify who was directing or perpetrating the abuse, or the nature of the abuse that some of these plaintiff's may have endured." *Zavala,* 393 F. Supp. 2d at 311 (dismissing involuntary servitude predicate based on the same vague abuse allegations). And Plaintiffs' "economic coercion" allegations, which also do not involve Wal-Mart, fail as a matter of law because an involuntary servitude predicate cannot be based on financial pressure. *See Kozminski,* 487 U.S. at 952 (involuntary servitude requires compulsion through physical restraint, law or legal process); *Kaveney v. Miller,* No. 93-0218, 1993 WL 298718, at *2 (E.D. Pa. July 30, 1993) (economic pressure did not constitute involuntary servitude). Finally, this Court has already held that threats of deportation are "insufficient" to state an involuntary servitude predicate. *Zavala,* 393 F. Supp. 2d at 311. Plaintiffs' wholesale reiteration of this claim in the face of this Court's decision is, as the *Shackney* court warned, an attempt to use Section 1584 as a "tool for blackmail and other serious abuse." 333 F.2d at 487.

Besides failing to rise to the level of involuntary servitude, Plaintiffs' vague claims against the contractors cannot be attributed to Wal-Mart under "conspiracy" or "aiding and abetting" theories. Unlike some other predicate statutes, Section 1584 does not contain a conspiracy or aiding and abetting provision. *Compare* 18 U.S.C. § 1584, *with* 8 U.S.C. § 1324(a)(1)(A)(v)(I)-(II). Moreover, the RICO statute itself does not have a general conspiracy or aiding and abetting predicate that would enable Plaintiff's to state a Section 1584 offense against Wal-Mart based on the conduct of outside contractors. *See* 18 U.S.C. § 1961(1); *Pennsylvania Ass'n of Edwards Heirs v. Rightenour,* 235 F.3d 839, 840 (3d Cir. 2000); *see also* Tr. at 89:17-90:3.

Plaintiffs' only direct allegation against Wal-Mart itself is baseless. Plaintiff's assert that Wal-Mart "compelled the labor of its janitors through its widespread and systematic practice of intentionally locking these vulnerable workers into its stores during their shifts." SAC „ 118. This accusation does not come close to pleading involuntary servitude -- an offense that requires egregious conduct tantamount to slavery. *See, e.g., United States v. Harris,* 701 F.2d 1095, 1098 (4th Cir. 1983) (victims were deceived, kidnapped, beaten, threatened, guarded and jailed if they tried to escape and one victim died of abuse); *United States v. Bibbs,* 564 F.2d 1165, 1167-68 (5th Cir. 1977) (victims were lured from home under false pretenses, compelled to work, physically prevented from escaping at gunpoint, threatened with death, and beaten if they tried to escape); *United States v. Lewis,* 644 F. Supp. 1391, 1402 (W.D. Mich. 1986) (children were severely beaten and were forced to watch beatings of their parents, school teacher and other adults), *aff'd sub nom. United States v. King,* 840 F.2d 1276 (6th Cir. 1988). In stark contrast to these involuntary servitude cases, Plaintiffs' only complaint here is that *some* Wal-Mart stores locked their doors during overnight shifts -- when those stores were closed to the public -- and that some Plaintiff's could not leave the stores "unless

and until a Wal-Mart manager appeared with a key." SAC „„ 8-16, 21-22. These claims do not allege any unlawful or abusive conduct by Wal-Mart, let alone conduct "tantamount to slavery." Nor can Plaintiff's plausibly allege that Wal-Mart used "overpowering force" to enslave them when, by their own admission, they returned to work night after night, month after month to the same stores, only to be "locked in" each time against their will. Plaintiff's do not assert that Wal-Mart personnel restrained them from leaving the stores when their shifts were over, or that emergency exits were unavailable if they wanted to depart at any time. Indeed, they do not even allege that a *single* Plaintiff ever asked to leave a store but was unlawfully restrained by Wal-Mart through the use of force.

The few facts that Plaintiff's do allege *refute* any notion that Wal-Mart used "overwhelming force" to prevent them from quitting. For example, Plaintiff's Zednek and Jaros affirmatively assert that they changed store locations of their own volition because they felt cheated by a contractor. SAC „„ 21-22, 102. Another opt-in Plaintiff, Teresa Szczesiak, affirmatively asserts that she "quit" working on a crew at a Wal-Mart store when she grew dissatisfied with the "working conditions." Decl. of Teresa Szczesiak (annexed as Exhibit 5). As these and other similar admissions show, and as this Court previously found, "Plaintiff's have not alleged that they did not have any way to avoid 'continued service or confinement.' " *Zavala, 393 F. Supp. 2d at 311*.

The "involuntary servitude" claims in the Second Amended Complaint again lack any basis in fact and are contradicted by Plaintiffs' own allegations. Plaintiff's should be sanctioned for repleading such frivolous claims against Wal-Mart.

3. Plaintiffs' Money Laundering Predicate Fails.

Plaintiff's next allege that Wal-Mart conspired to commit money laundering in violation of 18 U.S.C. § 1956(h) by instructing a single contractor to create "corporate fronts" and "shell companies" in order to hide his profits from detection. SAC „„ 47, 117, 128. Plaintiff's further allege, on information and belief, that Wal-Mart entered into similar conspiracies with other contractors. *Id.* „ 117. This Court held that virtually identical allegations concerning the use of corporate shells were too "vague and insufficient" to state RICO predicates against Wal-Mart because Plaintiff's did not "identify the relevant financial transactions or conduct by Wal-Mart, or describe more particularly the contractors' 'money laundering activities' that allegedly involved banks, accountants, attorneys, and others." *Zavala, 393 F. Supp. 2d at 315*. The same conclusion is warranted here.

The only "new" money laundering allegation in the Second Amended Complaint is that Leroy Scheutts, a former Wal-Mart corporate employee, directed a contractor, nearly ten years ago, to establish multiple floor-cleaning companies so that the contractor could continue providing floor-cleaning services if one of his companies was found to be employing undocumented workers. SAC „„ 47, 117. This claim is based on the Mullin Affidavit, which recounts an alleged conversation between Christopher Walters, a former Wal-Mart contractor, and Scheutts. *Id.* „ 47, Ex. A at 42-43. The suggestion that Scheutts directed Walters to establish corporate fronts for the purpose

of laundering funds reflects a deliberate misreading of the Mullin Affidavit. The Mullin Affidavit makes clear that Wal-Mart fired Walters for employing undocumented workers on one of his crews; at the same time, Walters claims that Scheutts recognized that it might be difficult for Walters to ensure that none of his crews were employing unauthorized laborers. *Id.* Ex. A at 42-43. Even assuming this third-hand hearsay were true, which Wal-Mart denies, the alleged statement by Scheutts only suggests that the contractor use different companies so that he would not be disqualified from doing future business with Wal-Mart if, for some reason, undocumented workers were found on another one of his crews. While this may establish an attempt to evade *Wal-Mart's* policies, the alleged statement does not support any claim that Scheutts instructed the contractor to construct corporate shells for the purpose of laundering funds. Indeed, the Mullin Affidavit itself did not even attempt to allege probable cause to investigate Wal-Mart for any alleged money laundering activity. *Id.* at 1.

Besides misrepresenting the alleged Scheutts statement, Plaintiff's have failed to pled a viable money laundering predicate against Wal-Mart for myriad other reasons. For example, Plaintiff's do not explain how payments made to the contractors for their services constitute the "proceeds of the illegal activity." *Id.* „ 117. The most that can be discerned from Plaintiffs' vague allegations is that Wal-Mart saved money by contracting with companies that underpaid illegal workers. Saving money by violating a wage-and-hour law does not constitute money laundering. *Cf.* *Anderson v. Smithfield Foods, Inc.*, 209 F. Supp. 2d 1270, 1275 (M.D. Fla. 2002) ("Saving money as a result of [alleged violations of environmental law] does not make the money illegally obtained for the purposes of the money laundering statute."), *aff'd,* 353 F.3d 912 (11th Cir. 2003).

Nor have Plaintiff's described Wal-Mart's conduct in furtherance of the alleged conspiracy. There are no allegations that Wal-Mart paid an unrelated third-party who, in turn, surreptitiously transferred funds to the contractors. And there are no allegations that Wal-Mart "structured" its financial transactions with the contractors to avoid statutory reporting requirements. *Compare* SAC Ex. E at 97-99.

In lieu of such allegations against Wal-Mart, Plaintiff's reincorporate the *Forfeiture* Action and Rios Affidavit to show that the government accused some *contractors* of laundering the proceeds of criminal acts. SAC „„ 93-97, 117. But neither the *Forfeiture Action* nor the Rios Affidavit implicated Wal-Mart, and this Court already rejected Plaintiffs' reliance on the *Forfeiture Action* when it dismissed the original money laundering predicates. *Zavala,* 393 F. Supp. 2d at 315 (noting that the *Forfeiture Action* involved "maintenance or janitorial contractors ostensibly not implicated in this action at this time"). Plaintiffs' conclusory money laundering claims against Wal-Mart in the Second Amended Complaint should be rejected for the same reasons.

B. Plaintiff's Lack Standing To Pursue A RICO Enterprise Claim Against Wal-Mart.

Even assuming *arguendo* that Plaintiff's had asserted a viable RICO predicate act against Wal-Mart, the amended RICO claims would still fail. To pursue a RICO enter-

prise claim, Plaintiff's must establish standing to sue. *Anderson,* 396 F.3d at 269; *Balthazar v. Atlantic City* Med. Ctr., 279 F. Supp. 2d 574, 588 (D.N.J. 2003), *aff'd,* 137 Fed. Appx. 482 (3d Cir. 2005). Standing exists only if Plaintiff's have suffered an injury to their business or property "by reason of" the RICO violation. 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496-97 (1985). Plaintiff's must thus demonstrate that Wal-Mart's alleged RICO violation was both a "but for" cause of their injury and the proximate cause of their injury. *See Holmes,* 503 U.S. at 265-70; *Anderson,* 396 F.3d at 269.

"Proximate cause is interpreted narrowly in RICO claims." *Eli Lilly & Co. v. Roussel* Corp., 23 F. Supp. 2d 460, 483 (D.N.J. 1998). The alleged injury must be directly and substantially caused by a RICO predicate act, *id.,* "and not merely by a non-racketeering act in furtherance of a broader RICO conspiracy," *Anderson,* 396 F.3d at 269. If the causal connection is indirect or remote, *Callahan v. A.E.V., Inc.,* 182 F.3d 237, 260-61 (3d Cir. 1999), or if an intervening act has severed the causal chain, *Anderson,* 396 F.3d at 270, then proximate causation does not exist and a RICO enterprise claim must be dismissed for lack of standing, *see,* e.g., Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1167-68 (3d Cir. 1989) (dismissing RICO enterprise claim for lack of standing because the alleged harm was not caused by a predicate act), *overruled on other grounds, Beck v. Prupis,* 529 U.S. 494 (2000); *Eli Lilly,* 23 F. Supp. 2d at 485 (finding that "intervening acts" negated plaintiff's RICO standing).

1. Plaintiff's Cannot Show Proximate Causation.

Plaintiffs' case theory -- both in their original pleadings and in the Second Amended Complaint -- is based on the allegation that they were exploited as cheap labor due to their illegal status. SAC „„ 1-3, 7-16, 18-19, 21-22, 24-25, 27-28, 30, 40-42, 119, 121, 125, 146-150; Tr. at 102:17-20, 106:3-7; *see also* RAC „„ 7-18, 20-21, 23-24, 26-27, 32, 36, 39, 41, 54, 57, 64, 84-90. Plaintiffs' claimed injury -- wage underpayment -- was not proximately caused by any of the predicate acts of racketeering alleged against Wal-Mart, but rather would have resulted from violations of the FLSA. Because the FLSA is not a RICO predicate statute, injuries arising from wage and overtime violations cannot support a claim for RICO liability. *See* 18 U.S.C. § 1961(1); *Livingston v. Shore Slurry Seal, Inc.,* 98 F. Supp. 2d 594, 600 (D.N.J. 2000) ("[A] violation of a state or federal prevailing wage statute is not a predicate act for purposes of RICO liability."); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.,* 271 F.3d 374, 383 (2d Cir. 2001) ("[P]aying workers less than the prevailing wage and failing to withhold payroll taxes are not RICO predicate acts."); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.,* 941 F.2d 1220, 1228-29 (D.C. Cir. 1991) (remedy for wage dispute was under federal wage statute, not RICO).

Plaintiff's attempt to bootstrap RICO standing by arguing that the alleged predicate acts were the "necessary cause" of their harm. SAC „ 121. This is nothing more than "but for" causation, which does not suffice as a matter of law. *See Holmes,* 503 U.S. at 268 (RICO standing requires "but for" *and* proximate causation); *Callahan,* 182 F.3d at 260 ("A causal connection *simpliciter* between the defendants' actions and

the plaintiffs' injuries is insufficient to give rise to a RICO claim; the plaintiff must show that that connection is proximate, i.e., not too remote.”). Plaintiff's cannot establish the direct and substantial nexus required to create RICO standing for their alleged wage injuries.

Immigration Predicates: Even if Plaintiff's could somehow connect Wal-Mart to the alleged acts of transporting, harboring, and encouraging illegal aliens, none of these offenses directly or substantially caused Plaintiff's any RICO harm. To the contrary, Plaintiff's were complicit in and benefited from the alleged offenses. By Plaintiffs' own admission, these acts enabled them to obtain jobs and compensation to which they were not entitled by law. SAC „„ 7-28.

Furthermore, all that Plaintiff's assert is that, “but for” the alleged immigration predicates, they would not have obtained jobs cleaning Wal-Mart stores and Wal-Mart and its contractors would not have underpaid them. *Id.* „ 121 (immigration predicates were the “necessary means through which plaintiff's were denied proper compensation,” as well as the “necessary means for participants in the enterprise to profit as they did from exploiting plaintiffs”). The alleged immigration offenses were, at most, remote links in a causal chain that ultimately resulted in the claimed denial of overtime and, in some instances, minimum wage. Such attenuated offenses do confer RICO standing on Plaintiff's. *See Anderson,* 396 F.3d 269-70; *Callahan,* 182 F.3d at 260; *Rehkop v. Berwick Healthcare Corp.,* 95 F.3d 285, 287 (3d Cir. 1996); *Eli Lilly,* 23 F. Supp. 2d at 484-85.

Notably, Plaintiff's have not attempted to replead the only RICO predicate offense that even relates to the employment of undocumented workers. This Court dismissed Plaintiffs' original employment allegations under 8 U.S.C. § 1324(a)(3)(A) for failure to state a claim. The Court deemed Plaintiffs' allegations insufficient because Plaintiff's did not allege that Wal-Mart knew that putative class members were illegal aliens who were brought into the United States illegally for the purpose of obtaining unlawful employment. *Zavala,* 393 F. Supp. 2d at 309. To the contrary, Plaintiff's and other putative class members entered the country legally and overstayed their visas, SAC „ 88, Ex. A at 18-19, Ex. E at 44, or simply “walked over the border” of their own volition, Tr. at 99:16-22. These admissions preclude Plaintiff's from asserting a violation of Section 1324(a)(3)(A), which requires both illegal entry and proof that the aliens were “brought” into the country to work for the defendant-employer. *Zavala,* 393 F. Supp. 2d at 309; *System Mgmt.,* 91 F. Supp. 2d at 408.

Plaintiffs' inability to plead a Section 1324(a)(3)(A) offense distinguishes this case from *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1166 (9th Cir. 2002) and *Commercial Cleaning,* 271 F.3d at 378-79, on which Plaintiff's mistakenly rely. In *Mendoza* and *Commercial Cleaning,* the courts held that lawful workers and a legal domestic business, respectively, had standing to pursue RICO claims against defendants who had allegedly violated Section 1324(a)(3)(A) by employing illegal aliens at their facilities. The harm alleged in those cases (depressed wages and lost business) flowed directly from the defendants' alleged violations of Section 1324(a)(3)(A), which is a RICO predicate. Here, in contrast, Plaintiff's and other potential class

members admittedly entered the United States lawfully but overstayed to take advantage of better (but unlawful) employment opportunities here, or entered on their own, via "irregular means," without Wal-Mart's knowledge. SAC „ 88, Ex. A at 18-19, Ex. E at 44; Tr. at 99:16-22; *see also* „„ 7-16, 18-19, 21-22, 24-25, 27-28 (recounting Plaintiffs' undocumented status). Thus, unlike the plaintiff's in *Mendoza* and *Commercial Cleaning,* who were the alleged victims of a viable RICO predicate offense (Section 1324(a)(3)(A)), Plaintiff's cannot claim any injury flowing from their alleged immigration law violations here (transporting, harboring, encouraging). Rather, Plaintiff's would only have benefited from such alleged violations, which enabled them to remain illegally in the United States and, by their own account, to escape "the lack of economic opportunities at home," SAC „ 42.

Involuntary Servitude Predicate: As noted, the Second Amended Complaint realleges that Plaintiff's were not paid overtime or, in a few instances, minimum wage. *See, e.g.,* SAC „„ 21-22. This alleged injury arises directly from non-compliance with the FLSA, not from any conduct that even remotely resembles slavery. *See* *Martinez v. Bohls Bearing Equip. Co.,* 361 F. Supp. 2d 608, 614 (W.D. Tex. 2005) (involuntary servitude encompasses forced labor akin to slavery, not claims that plaintiff was not paid enough).

Money Laundering Predicate: Plaintiff's claim that they were harmed by the alleged money laundering offenses because these acts "shielded the enterprise from detection and thereby continued its existence." SAC „ 121. This -- again -- is at most "but for" causation *(i.e.,* but for the money laundering, the contractors might have been discovered and thus unable to employ the undocumented workers at lower wages). To the extent that the contractors laundered funds, their conduct was directed at the government and was intended to conceal the flow of cash payments. *Id.* „„ 93-97, 117. Plaintiff's do not -- and cannot -- allege that such money laundering activity had any direct connection to their alleged wage injuries, which would have resulted from violations of the FLSA. *See Callahan,* 182 F.3d at 261 (no proximate cause where illegal conduct was directed at the government); *see also* *Eli Lilly,* 23 F. Supp. 2d at 483-85 (dismissing RICO claim for lack of standing where misrepresentations to government were not proximate cause of plaintiff's losses). Thus, even if it could be shown that the contractors' money laundering activities perpetuated their unlawful employment scheme (as opposed to concealing cash payments), it still would be insufficient to establish RICO standing because such conduct did not proximately cause Plaintiffs' alleged wage claims. *See* *Williams v. Waldron,* 14 F. Supp. 2d 1334, 1339 (N.D. Ga. 1998) (money laundering and fraud may have enabled the illegal scheme to persist, but those offenses did not proximately cause the plaintiff's injuries), *aff'd sub nom.* *United States v. Richardson,* 248 F.3d 1180 (11th Cir. 2001).

2. Plaintiffs' Own Conduct Breaks The Causal Chain.

Intervening acts may attenuate the causal chain and negate RICO standing. *Anderson,* 396 F.3d at 270; *Eli Lilly,* 23 F. Supp. 2d at 485. For example, a plaintiff's own conduct may sever causation and preclude RICO claims. "At least two circuits have found that a plaintiff cannot establish proximate cause where the plaintiff voluntarily and knowingly engages in the very RICO activities from which it later claims

injury." *Green v. Aztar Corp.*, No. 02-3514, 2003 WL 22012205, at *3 (N.D. Ill. Aug. 22, 2003); *Doug Grant, Inc. v. Greate Bay Casino* Corp., 232 F.3d 173, 188 (3d Cir. 2000) (voluntary participation precludes RICO standing because injury is "self-inflicted"); *In re Mastercard Int'l Inc.*, 313 F.3d 257, 264 (5th Cir. 2002) (no RICO standing where plaintiff's knowingly and voluntarily chose to engage in conduct that resulted in alleged harm). These same principles apply here.

By their own account, Plaintiff's and the putative class members knowingly and voluntarily entered this country by "irregular means," or unlawfully overstayed their visa authorizations, for the *express* purpose of obtaining illegal employment. SAC „ 88, Ex. A at 18-19, Ex. E at 44; Tr. at 99:16-22; *see also* „„ 7-16, 18-19, 21-22, 24-25, 27-28. Plaintiffs' "vulnerable" immigration status is, as the Supreme Court recognized, "the result of the alien's own actions." *Zavala*, 393 F. Supp. 2d at 319 (citing *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982)). Indeed, their membership in the putative class alleged in the Second Amended Complaint "is itself a crime." *Plyler*, 457 U.S. at 219 n.19; *see also Zavala*, 393 F. Supp. 2d at 320 (even assuming Plaintiff's "comprise a socially, culturally, linguistically and politically isolated group," this status "is traceable to their decision, at the outset, to enter and remain unlawfully in the United States").

Plaintiff's could have avoided their alleged wage harms by choosing not to remain in the United States unlawfully to work without proper authorization. Having chosen to break these laws, however, Plaintiff's cannot now seek to use the same violations that they knowingly and voluntarily committed to pursue RICO claims against Wal-Mart. Their own conduct broke any causal connection between Wal-Mart's alleged acts and Plaintiffs' claimed wage injuries. *See* Doug Grant, 232 F.3d at 188 (plaintiff's who could have avoided injury but chose not to lack RICO standing because their injury is self-inflicted); *In re Mastercard*, 313 F.3d at 264 (plaintiffs who knowingly and voluntarily engaged in a course of conduct lack standing to pursue RICO claims based on injuries arising out of that conduct); *Green*, 2003 WL 22012205, at *3 (plaintiff's knowing and voluntary conduct "interrupted" the causal chain between defendants' acts and the alleged harm and therefore negated standing).

3. Plaintiff's Lack Standing Even Under The Broader *Steamfitters* Proximate Cause Analysis.

The Third Circuit recently suggested that the proximate cause analysis employed in antitrust cases may be useful in evaluating a RICO plaintiff's standing. *Anderson*, 396 F.3d at 270. The court noted that the six-factor antitrust test articulated in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 924 (3d Cir. 1999), may help "more fully explore the RICO proximate causation requirement" in some cases. *Anderson*, 396 F.3d at 270. The six *Steamfitters* factors are: (1) the causal connection between the defendant's acts and the plaintiff's harm; (2) whether the defendant specifically intended to harm the plaintiff; (3) the nature of the plaintiff's injury; (4) the directness or indirectness of the plaintiff's injury; (5) whether damages are speculative; and (6) judicial manageability. Because Plaintiffs' alleged injuries here would have flowed directly from violations of the FLSA, there is no need for the Court to conduct such an extended

analysis. But even if the Court undertook this broader inquiry, each of the *Steamfitters* factors further negates RICO standing.

Causal Connection: As shown, there is no direct connection between the alleged RICO predicates and Plaintiff's claimed wage injuries. Plaintiff's essentially concede that they can only plead "but for" causation, SAC „ 121, which does not suffice as a matter of law. The RICO predicates must be the direct and proximate cause of Plaintiffs' harm. Here, the proximate cause of the claimed injury is the alleged failure to pay FLSA-mandated wages and overtime. Such injury, which arises directly from violations of the FLSA, cannot support RICO claims. *Livingston,* 98 F. Supp. 2d at 600.

Specific Intent: Wal-Mart's alleged intent was to lower its costs for floor-cleaning services to maximize profits. *See, e.g.,* SAC „„ 29, 52, 106; *Zavala,* 393 F. Supp. 2d at 302. Because no specific criminal intent to harm these individual Plaintiff's is (or can be) alleged, this factor again cuts against standing. *See Anderson,* 396 F.3d at 270 (no RICO standing where there was no showing that defendants specifically intended to harm plaintiffs).

Nature of the Injury: The alleged injury in this case -- denial of overtime and, in some instances, minimum wage -- is the subject of the FLSA, a comprehensive statutory scheme. RICO is not intended to redress such injuries, as demonstrated by the fact that Congress chose not to make a violation of the FLSA a RICO predicate offense. *Livingston,* 98 F. Supp. 2d at 600; *Commercial Cleaning,* 271 F.3d at 383. Rather, RICO is concerned with ensuring that legitimate businesses are not infiltrated and controlled by organized crime. *See Mehling v. New* York Life Ins. Co., No. 99-5417, 2005 WL 1655882, at *5-*6 (E.D. Pa. July 13, 2005). Plaintiff's do not -- and cannot -- allege that Wal-Mart has been overtaken by organized criminal elements, or that Wal-Mart infiltrated and took over the outside contractors, for the purpose of engaging in racketeering. This factor also weighs against standing. *Id.*

Directness of the Injury: "[A]nother important consideration in the directness inquiry is the extent to which there are other means available to vindicate RICO's interest in deterring unlawful conduct." *Id.* at *7. The FLSA provides comprehensive mechanisms for redressing wage-and-hour claims, including the Department of Labor's enforcement mechanisms and private litigation. Moreover, allowing undocumented workers who benefited from and were complicit in the alleged RICO violations to sue under RICO for overtime and minimum wage claims would defeat the public policies underlying RICO and the Immigration Reform and Control Act. *Cf. Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 151-52 (2002) (remedy was not available to undocumented workers because it would have trivialized IRCA). This factor again cuts heavily against standing. *See Mehling,* 2005 WL 1655882, at *7 (holding that standing was absent where another statutory scheme, ERISA, provided a superior method for redressing the alleged RICO harm); *Callahan,* 182 F.3d at 267 (availability of other forms of deterrence cuts against proximate cause); *Bona v. Barasch,* No. 01-2289, 2003 WL 1395932, at *29 (S.D.N.Y. Mar. 20, 2003) (alleged RICO injuries were indirect because ERISA claims were available).

Speculative Damages: While Plaintiffs' overtime claims may not be difficult to quantify, monetarily, they are nonetheless speculative for proximate cause purposes. It would be extremely difficult -- if not impossible -- for a trier-of-fact to determine what portion of Plaintiffs' alleged wage claims, if any, is attributable to Wal-Mart's conduct (in contracting with outside companies for the floor-cleaning services) as opposed to Plaintiffs' own conduct (since they voluntarily chose to stay in the United States to work on the crews illegally) and the conduct of the third-party contractors who actually employed and paid Plaintiff's (since the contractors were in a position to provide lawful wages notwithstanding Plaintiffs' illegal status). *See* Anderson, 396 F.3d at 271 (“the damages claim is not speculative insofar as plaintiff's claim lost wages, but it would be difficult to determine to what extent plaintiffs' job loss was due to the alleged RICO acts and to what extent it was due to intervening factors”); *Mehling, 2005 WL 1655882, at *7* (holding that proximate cause was lacking because at least some of the plaintiffs losses were attributable to factors other than the defendant's conduct).

Judicial Manageability: This final factor addresses issues like the difficulty of apportioning damages and the risk of duplicative or inconsistent litigation. *Anderson, 396 F.3d at 271*. As shown, allocating RICO damages would be extremely difficult because, among other reasons, Plaintiff's are complicit in the alleged predicate acts. There is also the risk of duplicative or inconsistent litigation, given that the parties most directly responsible for any alleged wage violations *(i.e.,* the outside contractors who employed and paid Plaintiffs) are not present in this case.

Because all of these factors weigh against proximate causation, the extended *Steamfitters* analysis further confirms that Plaintiff's lack RICO standing.

C. Plaintiff's Have Not Alleged A Viable RICO Enterprise.

Plaintiff's have not attempted to fix their defective enterprise allegations in refiling the RICO claims. RICO makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering or collection of unlawful debt.” 18 U.S.C. § 1962(c).

1. Plaintiff's Have Not Alleged A Distinct Enterprise.

As the only defendant in this case, Wal-Mart is necessarily the “person” that ran the alleged enterprise. *See Baker v. IBP, Inc., 357 F.3d 685, 691 (7th Cir. 2004)* (“The ‘person’ must be IBP, the only defendant.”), *cert. denied,* 125 S. Ct. 412 (2004). However, Plaintiff's also allege that the “enterprise” is Wal-Mart and the contractors who acted as “agents of Wal-Mart.” SAC „ 41. Each contractor allegedly conspired with Wal-Mart to secure and exploit illegal immigrant labor and, in doing so, “act[ed] within the scope of its agency.” *Id.*

These allegations are virtually identical to those in the Amended Complaint. *Compare* SAC „ 41, *with* RAC „„ 31 (d), 36. They again fail to state a viable RICO enterprise because Wal-Mart cannot operate *itself* as an unlawful enterprise. Section 1962(c)

requires that the "person" and the "enterprise" be distinct. *See* *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 263 (3d Cir. 1995); *Baker*, 357 F.3d at 691-92; *Feinberg v. Katz*, No. 99-0045 *et al.*, 2005 WL 2990633, at *7 (S.D.N.Y. Nov. 7, 2005). RICO's distinctiveness requirement "may not be circumvented 'by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant ....' " *Feinberg*, 2005 WL 2990633, at *7 (citation omitted).

In *Baker*, the Seventh Circuit dismissed substantively similar RICO claims for failure to plead a viable enterprise. The plaintiff's alleged that the defendant used agents to recruit illegal aliens for employment. *Baker*, 357 F.3d at 691-92. The court observed that an enterprise consisting of the defendant/person and its agents/employees could not sustain a Section 1962(c) claim. *Id.* "Without a difference between the defendant and the 'enterprise' there can be no violation of RICO." *Id.* at 692. The Second Amended Complaint suffers from this same defect. In alleging the RICO enterprise here, Plaintiff's claim that Wal-Mart assembled a network of agents to find and employ undocumented workers. This is equivalent to saying that Wal-Mart operated itself as an unlawful enterprise, which is "a theory that won't fly." *Id.* at 691; *see also* Feinberg, 2005 WL 2990633, at *7 (observing that corporation and corporate agents acting within the scope of their authority do not form a viable RICO enterprise).

2. Plaintiff's Have Not Alleged A Common Purpose.

To plead an "association-in-fact" enterprise under Section 1962(c), Plaintiff's must show that the various constituents had a "common purpose." *United States v. Turkette*, 452 U.S. 576, 583 (1981); *Baker*, 357 F.3d at 691. Should Plaintiff's attempt to argue that the contractors acted as independent members of the enterprise, and not as Wal-Mart's agents, Plaintiff's cannot show the "essential ingredient" of a common purpose. *Baker*, 357 F.3d at 691.

As Plaintiff's themselves allege, Wal-Mart and its independent contractors had conflicting goals: Wal-Mart wanted to incur the lowest possible cost for floor-cleaning services, while the contractors wanted to maximize their profits by charging Wal-Mart the highest possible rate for such services. The Second Amended Complaint, and its attachments, are rife with allegations that Wal-Mart and its contractors had competing economic and other interests. *See, e.g.*, SAC „„ 29, 52, 106, Ex. A at 42-43, Ex. E at 63 (describing price and other pressures Wal-Mart placed on contractors). Indeed, Plaintiffs' "star" informant, contractor Christopher Walters, openly complained about Wal-Mart's alleged demands for lower cost services and other concessions. *See id.* Ex. A at 43. Faced with similar facts, the Seventh Circuit in *Baker* held that the such "divergent goals" barred plaintiff's from pleading a viable enterprise. 357 F.3d at 691-92 (no enterprise because defendant wanted to pay illegal workers less and recruiters wanted to charge defendant more); *see also* *Banco Del Atlantico, S.A. v. Stauder*, No. 03-1342, 2005 WL 1925830, at *9 (S.D. Ind. Aug. 11, 2005) (enterprise deficient because defendants' economic interests were not aligned). This Court should do the same.

Finally, any attempt by Plaintiff's to assert that the alleged enterprise had a "common purpose" of making money should be likewise rejected. *See* Tr. at 102:12-20 (responding to Court's enterprise inquiry by arguing that the "common purpose" is to save money). Broad, generalized claims of a "common purpose" are insufficient to support a viable RICO enterprise claim. *See* *Starfish Inv. Corp v. Hansen*, 370 F. Supp. 2d 759, 771 (N.D. Ill. 2005) (rejecting general allegation that the enterprise existed to make money and acquire property for all participants and holding that no enterprise existed where each alleged member was out to promote its own economic agenda).

D. Plaintiff's Have Not Adequately Alleged That Wal-Mart Controlled The RICO Enterprise's Affairs.

Even assuming *arguendo* that Plaintiff's could state a viable enterprise, they cannot show that Wal-Mart controlled the enterprise's activities. RICO liability does not extend to every entity that associates with an enterprise, but is limited to defendants who participate in the "operation or management" of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). The "operation or management" standard requires that each defendant must have a role in directing the enterprise's affairs. *Id.* at 179. "Under this test, not even action involving some degree of decisionmaking constitutes participation in the affairs of an enterprise." *University of* Md. at Baltimore v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1538-39 (3d Cir. 1993). To be held liable under § 1962(c), a defendant must actually direct the racketeering activity. *Id.* at 1539.

Plaintiff's fail to describe how Wal-Mart directed the alleged enterprise's unlawful conduct. Instead, they merely parrot the statutory language in § 1962(c): "[a]t all relevant times, each of the conspirators associated with this enterprise conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a 'pattern of racketeering activity' within the meaning of RICO, 18 U.S.C. § 1961(5), in violation of § 1962(c)." SAC „ 127. This Court has already cautioned Plaintiff's that it will not accept such "unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of actual allegations." *Zavala*, 393 F. Supp. 2d at 302.

Apart from parroting § 1962(c), the Second Amended Complaint only refers to a few alleged communications between Wal-Mart and its contractors. SAC „„ 29, 43, 47-48, 52, 61-63, 106. These alleged communications, even if true, do not run afoul of RICO. Demanding price concessions from contractors or requesting replacement floor-cleaning crews are not RICO violations; nor do such communications reflect sufficient control over the "operation or management" of the enterprise to justify RICO liability. And the single alleged suggestion by one former Wal-Mart corporate employee, nearly ten years ago, that a contractor should form different corporations does not establish "management or control" of that contractor, let alone an enterprise comprised of "hundreds" of outside contractors. Read in proper context, the alleged statement at most indicates an attempt to evade Wal-Mart's policies by enabling the contractor -- who was fired by one Wal-Mart store manager for using undocumented workers -- to regain employment at other Wal-Mart stores through the use

of different corporate names.

At bottom, all that Plaintiff's can allege is that, by outsourcing some of its floor-cleaning requirements, Wal-Mart created an opportunity for some contractors to hire illegal workers and then benefited from that activity by obtaining lower cost floor-cleaning services. Condoning and benefiting from the employment of undocumented workers does not constitute "operation and management" of the alleged enterprise's affairs. *Cf.* *Zavala, 393 F. Supp. 2d at 316-17* (holding that mere association with contractors, and knowledge of Plaintiffs' undocumented status, was not enough to state RICO enterprise or conspiracy claims). Because the Second Amended Complaint contains no allegations linking Wal-Mart to the alleged acts of racketeering, much less showing that Wal-Mart *directed* those acts, Plaintiff's have again failed to state a RICO enterprise claim. *See* *Gilmore v. Berg, 820 F. Supp. 179, 183 (D.N.J. 1993)* (dismissing RICO enterprise claim on "operation or management" grounds where plaintiff alleged no facts showing that defendant directed the claimed racketeering activity).

III. PLAINTIFFS' RICO CONSPIRACY CLAIM SHOULD BE DISMISSED WITH PREJUDICE.

A. Plaintiff's Have Not Alleged A Viable RICO Conspiracy.

Plaintiff's allege that Wal-Mart conspired with unnamed contractors to violate RICO in derogation of 18 U.S.C. § 1962(d). Because Plaintiff's have failed to plead a viable RICO enterprise claim under Section 1962(c), their RICO conspiracy claim should be dismissed. *See* Lum, 361 F.3d at 227 n.5 (affirming dismissal of Section 1962(d) conspiracy claim where plaintiff failed to plead a Section 1962(c) enterprise claim). "Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient." *Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993)*. It would be incongruous to hold that Wal-Mart violated RICO by conspiring to commit acts that, as shown, do not constitute predicate acts of racketeering.

In addition, the Second Amended Complaint does not describe the alleged conspiracy with sufficient clarity. Specificity and detail are required to plead conspiracy in the Third Circuit. *Shearin, 885 F.2d at 1166-67; A-Valey Eng'rs, Inc. v. Board of Chosen Freeholders of* County of Camden, 106 F. Supp. 2d 711, 718 (D.N.J. 2000). Most fundamentally, Plaintiffs neglect to plead facts showing that Wal-Mart and its contractors reached an agreement to commit the alleged predicate acts of racketeering. *Zavala, 393 F. Supp. 2d at 317*. Viewed in the light most favorable to Plaintiff's, the Second Amended Complaint merely alleges that the contractors committed wrongful acts and that Wal-Mart knew of and benefited from those acts. *Id.* This is insufficient to state a RICO conspiracy claim. *Id.* (dismissing RICO conspiracy claim for failure to plead an agreement to commit the alleged predicate acts). Nor does Plaintiffs' conclusory repetition of the word "conspiracy," coupled with their regurgitation of the statutory language in Section 1962(d), satisfy this Circuit's specific conspiracy pleading requirements.

B. Plaintiff's Lack Standing To Pursue A RICO Conspiracy Claim Against Wal-Mart.

To establish standing to bring a RICO conspiracy claim under Section 1962(d), Plaintiffs must demonstrate that their injuries flowed directly and substantially from the predicate acts giving rise to their RICO enterprise claim. *See* *Smith v. Berg,* 247 F.3d 532, 539 (3d Cir. 2001) (to pursue a RICO conspiracy claim, plaintiff must allege injury "aris[ing] out of wrongful conduct proscribed by the substantive provisions of section 1962 (i.e., in the context of a section 1962(c) violation, the injury must arise out of the predicate acts)."). Because Plaintiffs' injuries -- the alleged deprivation of overtime and, in a few instances, minimum wage -- flow from violations of the FLSA, and not from any of the predicate acts of racketeering re-cited in the Second Amended Complaint, Plaintiff's lack standing to maintain a RICO conspiracy claim against Wal-Mart. As the Supreme Court held in *Beck,* "[a] person may not bring suit under § 1964(c) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." 529 U.S. at 507.

CONCLUSION

Plaintiff's have again failed to plead a single viable predicate act of racketeering against Wal-Mart. Their predicate act allegations suffer from the same flaws this Court identified in its prior opinion. In most instances, the refiled allegations are *verbatim* or substantively the same claims that this Court already dismissed. It is inexcusable that Plaintiff's would put the Court and Wal-Mart through the effort and expense of addressing the same deficient allegations twice. It is also clear that these flaws cannot be cured through further repleading. And even if Plaintiffs could state a viable predicate offense, their amended RICO claims are still fatally flawed because Plaintiff's lack standing to pursue them, cannot plead a cognizable RICO enterprise, and have not alleged that Wal-Mart exerted sufficient control over the so-called enterprise's affairs. These too are deficiencies that cannot be cured through repleading. Under these circumstances, allowing Plaintiff's to amend their RICO allegations again would be a futile exercise. Accordingly, Wal-Mart respectfully requests that the Court dismiss with prejudice Counts One and Two of Plaintiffs' Second Amended Complaint. *See* *Anderson,* 396 F.3d at 271-72 (Third Circuit affirmed dismissal of RICO claims with prejudice where further amendment would be futile); *In re Burlington,* 114 F.3d at 1435 (affirming dismissal with prejudice on futility grounds).

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.
2006 WL 381605 (D.N.J.)

END OF DOCUMENT