

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICTOR ZAVALA, et al., Plaintiffs, v. WAL-MART STORES, INC., Defendant.

CIVIL ACTION NO. 03-CIV-05309 (GEB)
DOCUMENT ELECTRONICALLY FILED

**NOTICE OF JOINT MOTION
TO APPROVE SETTLEMENT AND DISMISS
CLAIMS OF OCTAVIO DENICIA**

PLEASE TAKE NOTICE that on April 18, 2011 at 9:00 a.m. or as soon thereafter as counsel may be heard, Willkie Farr & Gallagher LLP, attorneys for defendant Wal-Mart Stores, Inc., and Garcia and Kricko, attorneys for plaintiffs, will move before this Court, at the Clarkson S. Fisher Building and U.S. Courthouse in Trenton, New Jersey, for an Order approving settlement and dismissal of claims of Octavio Denicia.

IN SUPPORT of this motion, defendant and plaintiffs shall rely upon the supporting Memorandum of Law filed herewith. A proposed form of Order is also submitted.

Respectfully submitted,

By: _____

Gilberto Garcia
GARCIA AND KRICKO
Court Plaza South
West Wing, Suite 350
21 Main Street
Hackensack, NJ 07601

Attorneys for Plaintiffs

By: /s/ Thomas H. Golden
Thomas H. Golden

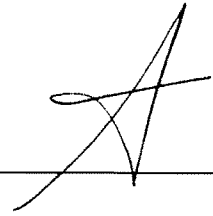
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

Of Counsel:

David P. Murray (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238

Attorneys for Defendant

Dated: March 25, 2011

By:  _____

Gilberto Garcia
GARCIA AND KRICKO
Court Plaza South
West Wing, Suite 350
21 Main Street
Hackensack, NJ 07601

Attorneys for Plaintiffs

Respectfully submitted,

By: /s/ Thomas H. Golden
Thomas H. Golden

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

Of Counsel:

David P. Murray (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238

Attorneys for Defendant

Dated: March __, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICTOR ZAVALA, et al.,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

CIVIL ACTION NO. 03-CIV-05309 (GEB)

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**MEMORANDUM IN SUPPORT OF JOINT
MOTION TO APPROVE SETTLEMENT AND
DISMISS CLAIMS OF OCTAVIO DENICIA**

Plaintiff Octavio Denicia and Defendant Wal-Mart Stores, Inc. (“Wal-Mart”) (together, “the Parties”), through counsel of record, respectfully submit this Memorandum in Support of their Joint Motion to Approve Settlement and Dismiss Claims of Octavio Denicia (“Second Joint Motion”). This Second Joint Motion is submitted as a supplement to the Joint Motion to Approve Settlement and Dismiss Claims of Felipe Condado, Eunice Gomez, Jiri Pfauser, Hana Pfauserova, Carlos Tello, and Victor Zavala Torres filed on March 11, 2011 (hereinafter referred to as the “First Joint Motion”), which is pending before the Court. Mr. Denicia executed the Settlement Agreement attached as Exhibit A hereto on March 24, 2011 (the “Settlement Agreement”).

For the same reasons set forth in the First Joint Motion, the Parties hereby jointly move for the Court to approve the settlement of any and all claims asserted by or on behalf of Mr. Denicia at any time in this proceeding, as embodied in the Settlement Agreement. The Settlement Agreement was reached through several months of settlement discussions under the Court’s supervision. The Settlement Agreement is a fair, reasonable, and adequate resolution of a bona fide dispute of claims arising from Mr. Denicia’s alleged work on third-party floor maintenance crews in Wal-Mart stores.

This Second Joint Motion incorporates by reference the facts set forth in the First Joint Motion. The Settlement Agreement provides for payment of a one-time Settlement Sum that

includes (1) a payment to Mr. Denicia in the amount of his alleged overtime damages (as documented in the offer letter provided to Mr. Denicia), and (2) a payment of \$20,000 as reasonable attorneys' fees and costs payable to Mr. Denicia's legal counsel, Garcia and Kricko. (As explained in the First Joint Motion, a single payment of \$20,000 is to be made to Garcia and Kricko for reasonable attorneys' fees and costs in this proceeding.) Wal-Mart will withhold taxes as appropriate and will issue any paperwork to the IRS as required under federal law.

The Settlement Agreement represents a fair and reasonable resolution of Mr. Denicia's claims in this proceeding. *See Lignore v. Hosp. of the Univ. of Pa.*, Civ. No. 04-5735, 2007 U.S. Dist. LEXIS 32169, at *13-14 (E.D. Pa. May 2, 2007) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982)). With respect to the Fair Labor Standards Act ("FLSA") claims, there is a bona fide dispute as to the amount of compensation due to Mr. Denicia and whether Wal-Mart was his joint employer. *See id.* Accordingly, the release of Mr. Denicia's claims under the FLSA is valid and enforceable.

For the reasons stated herein, the Parties respectfully request that the Court approve the Settlement Agreement and dismiss the claims of Mr. Denicia with prejudice.

Respectfully submitted,

By: _____

Gilberto Garcia
GARCIA AND KRICKO
Court Plaza South
West Wing, Suite 350
21 Main Street
Hackensack, NJ 07601

Attorneys for Plaintiffs

By: /s/ Thomas H. Golden
Thomas H. Golden

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

Of Counsel:

David P. Murray (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238

Attorneys for Defendant

Dated: March 25, 2011

Respectfully submitted,

By: _____


Gilberto Garcia
GARCIA AND KRICKO
Court Plaza South
West Wing, Suite 350
21 Main Street
Hackensack, NJ 07601

Attorneys for Plaintiffs

By: /s/ Thomas H. Golden
Thomas H. Golden

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

Of Counsel:

David P. Murray (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238

Attorneys for Defendant

Dated: March __, 2011

EXHIBIT A
to Memorandum in Support
of Motion to Approve
Settlement and Dismiss
Claims

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release ("AGREEMENT") is entered into by and between Octavio Denisio ("Plaintiff") and WAL-MART STORES, INC. ("WAL-MART") (collectively "Parties").

RECITALS

This AGREEMENT is made with reference to the following facts:

- A. **WHEREAS**, Plaintiff brought a Lawsuit against WAL-MART in the United States District Court for the District of New Jersey, that is designated as *Zavala, et al. v. Wal-Mart Stores, Inc.*, Case No. 03-5309 (the "Lawsuit"); and
- B. **WHEREAS**, WAL-MART denies the validity of Plaintiff's claims, denies that it was Plaintiff's employer, denies any obligation to pay Plaintiff wages or any other compensation, and denies that it is subject to any liability; and
- C. **WHEREAS**, all wages allegedly due to Plaintiff are disputed; and
- D. **WHEREAS**, the Parties wish to resolve their differences without resort to further litigation; and
- E. **WHEREAS**, WAL-MART is willing to provide Plaintiff with certain considerations described below, which it is not ordinarily required to, provided that Plaintiff release WAL-MART from any claims Plaintiff have made or might make arising out of the Lawsuit in accordance with the Release set forth in Paragraph 5, and agrees to comply with the other promises and conditions set forth in this AGREEMENT; and
- F. **WHEREAS**, the AGREEMENT resolves a bona fide dispute in furtherance of the purpose of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and is fair and reasonable to Plaintiff,

NOW THEREFORE, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties agree to be legally bound by the following terms and conditions, which constitute full settlement of any and all disputes between them:

1. **Recitals**: The Parties acknowledge that the "WHEREAS" clauses preceding paragraph 1 are true and correct, and are incorporated herein as material parts to this AGREEMENT.
2. **Definitions**: Throughout this AGREEMENT, the term "WAL-MART" shall be defined to include the following:

- (A) Wal-Mart Stores, Inc., as well as any subsidiary, parent company, affiliated entity, related entity, operating entity, franchise, or division of Wal-Mart Stores, Inc.; and
 - (B) Any officer, director, trustee, agent, employee, or insurer of an entity encompassed by subparagraph (a).
3. **Settlement Sum:** As consideration for signing this AGREEMENT and compliance with the promises made herein, WAL-MART agrees to pay the following sums, less deductions required by law:
- (A) A single payment of twenty thousand dollars (\$20,000.00) shall be made payable as reasonable attorney's fees and costs to Plaintiff's legal counsel: Garcia and Kricko (_____ (tax ID #)) (hereinafter "Plaintiff's Counsel"). A 1099 shall be issued to the extent appropriate; and
 - (B) An aggregate amount of Three thousand seven hundred DOLLARS (\$3,700.00), shall be made payable as damages based on claims of overtime pay allegedly due to Plaintiff and liquidated damages pursuant to the Fair Labor Standards Act. This amount is subject to federal and state tax withholding requirements, which will be deducted from this amount and paid to the government. A 1099 shall be issued to the extent appropriate.

WAL-MART shall provide the consideration identified in this paragraph 3 after receiving both (1) an original of this AGREEMENT appropriately signed and dated by Plaintiff, and (2) a Stipulation of Dismissal With Prejudice executed by Plaintiff's Counsel.

This AGREEMENT shall not become effective, therefore, and none of the benefits set forth in this paragraph will become due or payable, until after the Effective Date of this AGREEMENT (the "Effective Date" defined as the first day after WAL-MART has received from Plaintiff all of the items described in this paragraph).

4. **Consideration:** Plaintiff understands and agrees that he would not receive the monies and/or benefits specified in paragraph 3, above, but for his execution of this AGREEMENT and the fulfillment of the promises contained herein.
5. **General Release of Claims:** In exchange for, and in consideration of, the payments, benefits, and other commitments described above, which is being executed contemporaneously with this AGREEMENT, Plaintiff, for himself, and for each of his heirs, executors, administrators and assigns, hereby irrevocably releases, acquits, and forever discharges WAL-MART of and from any and all claims, rights, penalties, demands, damages, debts, accounts, duties, costs and expenses (other than those costs and expenses required to be paid pursuant to this AGREEMENT), liens, charges, complaints, causes of action, obligations, or liability that were asserted in the Lawsuit or that could have been asserted but were not asserted in the Lawsuit, whether known or unknown, on the basis of, connected with, arising out of, or related in whole or in part to any or all of the alleged acts, omissions, facts, matters, transactions, circumstances, and

occurrences that were directly or indirectly alleged, asserted, described, set forth or referred to in the Lawsuit, whether such allegations were or could have been based on common law or equity, or on any statute, rule, regulation, order, or law, whether federal, state, or local. The Released Claims include, but are not limited to, those arising under 42 U.S.C. § 1985(3) (civil rights); (2) 18 U.S.C. § 1962(c) (civil RICO), and 29 U.S.C. § 1962(d) (RICO conspiracy); (3) false imprisonment; and (4) 29 U.S.C. §§ 206-207 (Fair Labor Standards Act). This AGREEMENT also includes a release of all claims for attorneys' fees and costs incurred by Plaintiff or by Plaintiff's Counsel in connection with the Lawsuit and the Settlement of the Lawsuit.

6. **Tax Liability:** Plaintiff understands that WAL-MART shall issue an IRS Form 1099 for those portions of the payment specified in paragraph 3 of this AGREEMENT that are not subject to withholding. In paying the amount specified in paragraph 3, WAL-MART makes no representation regarding the tax consequences or liability arising from said payment, including whether WAL-MART was Plaintiff's employer during the relevant time period. Plaintiff understands and agrees that any and all tax liability that may be due or become due because of the payment referenced above is his sole responsibility, and that he will pay any such taxes that may be due or become due. WAL-MART has no monetary liability or obligation regarding payment whatsoever (other than delivering a valid check in the sum referenced in paragraph 3 of this AGREEMENT to Plaintiff). Plaintiff agrees to bear all tax consequences, if any, attendant upon the payment to him of the above-recited sums. Plaintiff further agrees to hold WAL-MART harmless from and against any tax or tax withholdings claims, amounts, interest, penalties, fines or assessments brought or sought by any taxing authority or governmental agency with regard to the above recited sums. In the event WAL-MART receives written notice that any claim or assessments for taxes, withholding obligations, penalties and/or interest arising out of this settlement are being or will be made against WAL-MART, WAL-MART shall promptly, after receipt of such written notice, notify Plaintiff by letter sent to Plaintiff's Counsel.
7. **Court Approval:** Plaintiff agrees and authorizes Plaintiff's Counsel to move jointly on Plaintiff's behalf for dismissal of any and all claims made by or on behalf of Plaintiff in the Lawsuit. The motion shall be made in substantially the same form as that in Exhibit A of this AGREEMENT.
8. **No Assignment:** The Parties represent and warrant that no person other than the signatories hereto had or has any interest in the matters referred to in this AGREEMENT, that the Parties have the sole right and exclusive authority to execute this AGREEMENT, and that the Parties have not sold, assigned, transferred, conveyed, or otherwise disposed of any claim, demand or legal right that is the subject of this AGREEMENT.
9. **Governing Law and Jurisdiction:** This AGREEMENT shall be governed and conformed in accordance with the laws of the state of New Jersey without regard to its conflict of laws provision. In the event Plaintiff or WAL-MART breaches any provision of this AGREEMENT, Plaintiff and WAL-MART affirm that either may institute an action to specifically enforce any term or terms of this AGREEMENT.

10. **No Admission of Liability:** The Parties agree that neither this AGREEMENT nor the furnishing of the consideration for this AGREEMENT shall be deemed or construed at anytime for any purpose as an admission by WAL-MART of any liability or unlawful conduct of any kind.
11. **Headings:** The headings of the provisions herein are intended for convenient reference only, and the same shall not be, nor be deemed to be, interpretative of the contents of such provision.
12. **Modification of Agreement:** This AGREEMENT may not be amended, revoked, changed, or modified in any way, except in writing executed by all Parties. Plaintiff agrees not to make any claim at any time or place that this AGREEMENT has been verbally modified in any respect whatsoever. No waiver of any provision of this AGREEMENT will be valid unless it is in writing and signed by the party against whom such waiver is charged. The Parties acknowledge that only the General Counsel of WAL-MART has the authority to modify this AGREEMENT on behalf of WAL-MART.
13. **Interpretation:** The language of all parts of this AGREEMENT shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties. This AGREEMENT has been negotiated by and between attorneys for the Parties and shall not be construed against the "drafter" of the AGREEMENT.
14. **Severability:** The parties explicitly acknowledge and agree that the provisions of this AGREEMENT are both reasonable and enforceable. However, if any portion or provision of this AGREEMENT (including, without implication of limitation, any portion or provision of any section of this AGREEMENT) is determined to be illegal, invalid, or unenforceable by any court of competent jurisdiction and cannot be modified to be legal, valid, or enforceable, the remainder of this AGREEMENT shall not be affected by such determination and shall be valid and enforceable to the fullest extent permitted by law, and said illegal, invalid, or unenforceable portion or provision shall be deemed not to be a part of this AGREEMENT. To the extent any provision herein that relates to the dismissal of Plaintiff's Lawsuit or the general release of claims described in paragraph 5 above is deemed to be illegal, invalid, or unenforceable, WAL-MART is not obligated to honor any of the terms set forth herein and Plaintiff shall return any amounts paid by WAL-MART.
15. **Binding Nature of Agreement:** This AGREEMENT shall be binding upon each of the Parties and upon their respective heirs, administrators, representatives, executors, successors, and assigns, and shall inure to the benefit of each party and to their respective heirs, administrators, representatives, executors, successors, and assigns.
16. **Entire Agreement:** This AGREEMENT sets forth the entire AGREEMENT between the parties hereto, and fully supersedes any prior obligation of WAL-MART to Plaintiff. The SETTLEMENT SUM described in paragraph 3 Plaintiff acknowledges that he has not relied on any representations, promises, or agreements of any kind made to him in

connection with his decision to accept this AGREEMENT, except for those set forth in this AGREEMENT.

PLAINTIFF IS HEREBY ADVISED THAT HE HAS A REASONABLE PERIOD OF TIME TO REVIEW AND CONSIDER THIS AGREEMENT.

PLAINTIFF AFFIRMS THAT HE IS AUTHORIZED TO SIGN THIS AGREEMENT AND HAS CONSULTED WITH AN ATTORNEY PRIOR TO EXECUTION OF THIS AGREEMENT.

HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH 3 ABOVE, PLAINTIFF FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE, AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST WAL-MART.

ACCEPTED AND AGREED:

By: Octavio Denisia 3/25/2011
OCTAVIO DENISIA Date

STATE OF New Jersey)
COUNTY OF Essex)

BEFORE ME, the undersigned authority on this 25 day of March 2011, personally appeared Octavio Denisia known to me to be the person whose name is subscribed to the foregoing instrument and signed in my presence and swore upon oath this AGREEMENT was executed for the purposes and consideration therein expressed.

SUBSCRIBED AND SWORN TO BEFORE ME on this 25 day of March 2011, to certify which witness my hand and seal of office.

Gilberto M. Garvin
NOTARY PUBLIC - STATE OF _____
(Printed Name of Notary)
Attorney At Law of
New Jersey.

My Commission Expires:

ON BEHALF OF WAL-MART:


David P. Murray
WILLKIE FARR & GALLAGHER LLP

UNITED STATES DISTRICT COURT
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Defendant.

CIVIL ACTION NO. 03-CIV-05309 (GEB)

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**[PROPOSED] ORDER TO APPROVE
SETTLEMENT AND DISMISS CLAIMS
OF OCTAVIO DENICIA**

THIS MATTER having been opened to the Court by Willkie Farr & Gallagher LLP (Thomas H. Golden and David P. Murray, Esq., admitted *pro hac vice*, appearing), attorneys for defendant Wal-Mart Stores, Inc. (“Wal-Mart”) and Garcia and Kricko (Gilberto M. Garcia appearing), attorneys for plaintiffs, by way of a Joint Motion to Approve Settlement and Dismiss Claims of Octavio Denicia, and the Court having considered the submissions of the parties and for good cause shown;

IT IS THIS ____ day of _____, 2011, **ORDERED** that the Joint Motion to Approve Settlement and Dismiss Claims of Octavio Denicia, be and hereby is granted; and it is further

ORDERED, that all claims having been asserted by Octavio Denicia in this proceeding are hereby dismissed with prejudice; and it is further

ORDERED, that a true copy of this Order be served upon all counsel within ____ days of the date hereof.

Hon. Garrett E. Brown Jr., U.S.D.J.

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Defendant.

CIVIL ACTION NO. 03-CIV-05309 (GEB)

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, I caused the foregoing Notice of Joint Motion to Approve Settlement and Dismiss Claims of Octavio Denicia, accompanying memorandum, exhibit, and proposed order to be served on plaintiffs via electronic filing to their counsel of record, as follows:

James L. Linsey
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, NY 10036

Gilberto M. Garcia
GARCIA AND KRICKO
Court Plaza South, West Wing, Suite 350
21 Main Street
Hackensack, NJ 07601

WILLKIE FARR & GALLAGHER LLP
Attorneys for Defendant Wal-Mart Stores, Inc.

By: /s/ Thomas H. Golden
Thomas H. Golden

787 Seventh Avenue
New York, NY 10019
tgolden@willkie.com

Of Counsel:

David P. Murray, Esq. (admitted *pro hac vice*)
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
dmurray@willkie.com

Dated: March 25, 2011