

**UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN**

Primitivo Garcia-Andrade et al.,

Plaintiffs,

v.

Madra's Café Corp. et al.,

Defendants.

Case No. 04-71024

Hon. Julian Abele Cook

**PLAINTIFF'S MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER**

I. STATEMENT OF FACTS

This is a civil action brought on behalf of the Plaintiffs, former employees of the Defendants, and all similarly situated current and former employees of the Defendants who were employed at various times from 1999 to 2003. The Plaintiffs worked for the Defendants at various times between January 2001 and November 2003 as cooks and/or general laborers performing such tasks as clearing tables, washing dishes and food preparation. Plaintiffs complain that the Defendants violated their rights under the Fair Labor Standards Act (FLSA), 28 U.S.C. §201 et seq., along with causing them to suffer damages due to Breach of Contract and Unjust Enrichment due to the Defendant's failure to pay the Plaintiffs, and all similarly situated individuals, the minimum wage and overtime compensation as required by law. The Plaintiffs, through their counsel, have attempted to obtain a stipulation regarding the limiting of discovery to those matters directly related to the issues of compensation for work performed and to prohibit the discovery of any matters or information relating to the immigration status of the Plaintiffs. The Defendants, through their counsel, declined to stipulate and indicated that they would be

opposing any motion for a protective order. Since the Defendants are unwilling to stipulate to limiting discovery to only those issues relevant to the subject of this action, then it can be assumed that Defendants will be seeking to conduct discovery with regard to the Plaintiff's immigration status. If the defendants are permitted to explore these sensitive areas without limit, they will succeeded only in harassing and intimidating the plaintiffs, many of whom are currently employed by defendants and are undocumented and who, therefore, already face significant barriers to asserting their rights. Plaintiffs with this motion seek a protective order pursuant to Fed. R. Civ. P. 26(c) and Rule 30(d) prohibiting the defendants from inquiring into the plaintiffs' immigration status or any other information that could lead to the discovery of their immigration status as said information is irrelevant for determining Plaintiff's rights to recover wages for work already performed. The resolution of this matter regarding the scope of discovery will further the purposes of the underlying minimum wage laws, by protecting vulnerable plaintiffs from intimidation, thereby ensuring that the merits of their claims can be heard by this Court in a timely and efficient manner without the need for further litigation with regard to this one irrelevant issue.

II. ARGUMENT

A. PLAINTIFFS ARE ENTITLED TO A PROTECTIVE ORDER TO LIMIT THE DEFENDANTS' INTERROGATION AROUND HIGHLY SENSITIVE AND POTENTIALLY PREJUDICIAL INFORMATION.

Rule 26 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) permits a court to issue a protective order limiting the scope of discovery upon a showing of good cause by the party seeking the protective order. Rule 30 (d) permits a party to seek to limit the scope of questioning in a deposition upon a showing that the examination is being conducted in an oppressive manner.

Courts are permitted to impose limits on discovery in order to prevent injury, harassment or abuse of the court's processes. Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944-45 (2d Cir. 1983). Here, the Plaintiffs are recent immigrants who have been exploited by the defendants. Many of them worked for years for less than the minimum wage because they did not know they had rights in this country. Coming forward was a difficult and potentially dangerous action for these three workers, and they should not be harassed and intimidated for attempting to assert their rights. The putative class is comprised of mostly undocumented workers or recent immigrants who were taken advantage of by the defendants who paid them grossly substandard wages.

As the NLRB notes in A.P.R.A. v. Fuel Oil Buyers Group, 320 NLRB No. 53 (1995), aff'd, NLRB v. A.P.R.A., 134 F.3d 50 (2d Cir. 1997), "undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charged with enforcing workplace standards for fear that they will lose their jobs or risk detection and ultimately deportation by the INS."

Further, it is well-settled that undocumented workers have the same rights to be paid the minimum wage and overtime as documented workers. E.g., Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Even though a majority of the named plaintiffs, opt-in plaintiffs and the putative class members are undocumented, this has no legal bearing on their rights under the FLSA. To permit the type of intrusive questions into highly sensitive and potentially incriminating areas such as the Plaintiff's immigration status will send a strong message to the Plaintiffs and the potential class that they face danger if they try to assert their rights to be paid the minimum wage and overtime pay.

Finally, a holding by this Court that the information sought by the defendants is relevant at the class certification stage effectively prohibits the large numbers of undocumented workers toiling in the restaurants, fields, resorts and landscaping companies from fully exercising their rights under the FLSA. If undocumented workers cannot represent a class of other undocumented workers *because they are undocumented*, this also rewards the employers who underpay them, encouraging them to hire and underpay the undocumented, thereby promoting unfair competition. This is contrary to the letter and spirit of both the labor and immigration laws.

1. The Plaintiffs Can Show The Requirements for A Narrowly-Tailored Protective Order.

The Plaintiffs can show good cause for this Court to issue a protective order prohibiting the Defendants from inquiring into the immigration status of the plaintiffs under the requirements of Fed. R. Civ. Proc. 26(c) and 30 (d).

Rule 26(c) provides in relevant part that “. . . the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (4) that certain matter may not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters[.]”

“Rule 26(c) is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment or abuse of the court’s processes.” Bridge C.A.T. Scan Assocs., 710 F.2d at 944-45.

“Rule 30(d) protects a deponent from bad faith questioning, or questioning in such a

manner as may unreasonably annoy, embarrass, or oppress. There may be times when that rule also deserves a liberal interpretation to curb abuse.” Eggleston v. Chicago Journeymen Plumbers’ Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981).

The fear felt by the workers is not a theoretical one. In Contreras v. Corinthian Vigor Ins. Brokerage Inc. 25 F. Supp.2d 1053 (N.D. Cal. 1998), the court found that the plaintiff stated a claim for retaliation under the FLSA when it was alleged that her employer called the INS after the plaintiff made a claim for unpaid wages. *Id.* at 1058. See also, John Dory Boat Works, Inc., 229 NLRB 844, 848 (1977)(employer intimidated complaining workers by seeking immigration papers and travel documents in order to prevent them from testifying); Ideal Dyeing & Finishing Co., NLRB No. 21- CA-25307 (1988)(ALJ blocked employer’s effort to inquire into witnesses’ immigration status at unfair labor practice hearing). In addition, in Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004); *cert denied* NIBCO, Inc. v. Rivera, 2005 U.S. LEXIS 2264, 73 U.S.L.W. 3529 (U.S. Mar. 7, 2005), the court acknowledged that,

“[w]hile documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.”

Courts have also noted “that abuse of discovery ‘may seriously implicate privacy interests of litigants,’ and [have] concluded that ‘although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.’” Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2208 & n. 21 (1984). The immigration status and Social Security information sought by the defendants is highly private. See Burger v. Litton Indus., Inc., 1994 WL 669505 at *1 (S.D.N.Y. Nov. 29, 1994)(the party seeking discovery of tax returns must establish that the returns are

relevant and that there is a compelling need); S.E.C. v. Cymaticolor Corp., 106 F.R.D. 545 (S.D.N.Y. 1985); Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., Inc., 96 F.R.D. 147 (E.D. Va. 1982). Without a showing of relevancy, questions relating to immigration status act to intimidate and coerce the Plaintiffs and, by association, the putative class members.

Once the Plaintiffs show good cause for issuance of a protective order, the court must then determine whether the Defendants will be prejudiced by issuance of the order. New Castle County v. West Hartford Accident and Indem. Co., 8 Fed. R. Serv. 3d (Callaghan) 506 (1987). If this Court holds that the information is irrelevant at the class certification stage, the Defendants will not be prejudiced. See A. 1., *infra*.

a. The Plaintiffs' Immigration Status is Not Relevant for Purposes of the FLSA.

In determining motions to limit discovery, the Court conducts a balancing test, weighing the need for discovery by the requesting party and the relevance of the discovery to the case against the harm, prejudice or burden to the other party. Baker v. F&F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Ross v. Bolton, 106 F.R.D. 22 (S.D.N.Y. 1985). See also NIBCO, Inc. v. Rivera 364 F.3d at 1063 and Rivera v NIBCO, Inc. 204 FRD 647 (E.D. Cal. 2001). Whether or not the plaintiffs are lawfully present or authorized to work in this country and whether they have valid social security numbers has no bearing on their rights to recover unpaid wages.

It is well-settled that a Plaintiff's status as an illegal immigrant does not bar that Plaintiff from bringing a civil action in federal court. Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 204 (E.D.N.Y. 1996)(citing case law from various jurisdictions).

In In re Margarito Reyes, 814 F.2d 168 (5th Cir. 1987), the court granted the Plaintiffs' petition for a writ of mandamus seeking to overturn the district court's discovery ruling and found that the citizenship or immigration status of plaintiffs suing under the Migrant and Seasonal Agricultural Workers Protection Act (AWPA) and the FLSA was irrelevant to any issue that might arise in the case. Discovery of these matters, moreover, "could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case." 814 F.2d at 170.

An undocumented Plaintiff was found to fall under the FLSA's definition of an employee because he was "any individual employed by an employer" and did not fall under an enumerated exception. Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988). As the Patel court notes:

The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers-their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under IRCA. 846 F.2d at 704

It is important to note that the court's conclusion was strongly supported by the legislative intent and the mission behind the Fair Labor Standards Act and the Immigration Reform and Control Act (IRCA). In fact, Congress listed several exceptions and exemptions in the Fair Labor Standards Act to clarify the meaning of "employee" and none of them infers or mentions

immigration status.¹ Congress enacted the IRCA “. . . to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.” Patel, 846 F.2d at 704. Congress enacted the FLSA to eliminate substandard working conditions. Patel, 846 F.2d at 702. ²

In Flores v. Amigon, 233 F. Supp. 2d 462 (E.D. NY 2002), an employee sued her employer seeking unpaid wages under the Fair Labor Standards Act. The employee claimed that she was entitled to overtime premium pay and that her former employer wrongfully denied her this pay. The employee sought a protective order preventing the employer from obtaining the employee’s immigration documents and the employee’s documents leading or related to the employee’s immigration status, such as a social security number and a passport. Upon granting the protective order, the Flores court stated that “the distinction between undocumented workers seeking backpay for wages actually earned and those seeking backpay for work not performed has been recognized by courts.” Flores, 233 F. Supp. 2d at 463.

¹ See 29 U.S.C. § 203(e)(2) governs which employees of public agencies are covered by the act. 29 U.S.C. § 203(e)(3) covers a limited exception for the immediate family members of employers engaged in agriculture. 29 U.S.C. § 203 (e)(4) exempts from coverage a narrow group of state and local government workers. Also, see specific exemptions listed in section 13 of the FLSA. 29 U.S.C. § 213

² Undocumented workers are also covered under other labor and employment laws. See e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984)(“If undocumented alien employees were excluded [from the NLRA] . . ., there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.”); Escobar v. Baker, 814 F. Supp. 1491 (W.D. Wash. 1993)(court concludes that the AWPAs offers protections to both documented and undocumented workers); EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D. Cal. 1991)(Title VII covers undocumented workers).

The Flores court recognized that immigration documents, social security numbers, and passports were related to the employee's immigration status and determined that, for work already performed, "the plaintiff's immigration status was irrelevant and posed a serious risk of injury to the plaintiff, outweighing any need for disclosure." Discovery of the employee's immigration status creates "the danger of intimidation, the danger of destroying the cause of action[,] and would inhibit [employees] in pursuing their rights." Flores, 233 F. Supp. 2d at 464. The court concluded that the employee's immigration status was not relevant to the case and that in the alternative, "even if it were, the potential for prejudice far outweighs whatever minimal probative value such information would have." "If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action." Flores, 233 F. Supp. 2d at 464, 465.

There is no question that the Plaintiffs' immigration status and any information related to immigration status is irrelevant for the Plaintiffs' claims under the FLSA and Michigan Law.³

The Plaintiffs in this case, like the Plaintiff in Flores, seek unpaid wages under the Fair Labor Standards Act. Furthermore, they seek unpaid wages for work already performed. Since the public policy behind the Fair Labor Standards Act is to deter employers from employing undocumented aliens and imposing substandard working conditions to all employees, the Defendant should not be allowed to assert the doctrine of unclean hands in this case.

Applying the Flores court's reasoning to this case, forcing the Plaintiffs to disclose the

³ The Michigan Court of Appeals recently reversed an order by the trial court compelling discovery of a Plaintiff's social security number in case where the issues involved violation of the Fair Labor Standards Act similar to the case at hand. Cabrera v. Ekema, 2005 Mich. App. LEXIS 616.

information regarding their immigration status will create the danger of intimidation and cause them to withdraw their claims.

b. The Information Sought By the Defendants is Highly Confidential and Potentially Incriminating.

Even if this Court were to find that the requested information is discoverable in a wage claim, the Plaintiff may assert the privilege against self-incrimination under the 5th Amendment to the United States Constitution. The Plaintiff is willing to fully answer all appropriate questions which do not impinge upon this privilege.

If required to respond to questions relating to their immigration status, some of the Plaintiffs will assert their Fifth Amendment right against self-incrimination. See, e.g. Escobar v. Baker, 814 F. Supp. 1491 (W.D. Wash. 1993)(plaintiffs asserted their Fifth Amendment right against self-incrimination in response to interrogatories concerning whether they were authorized to be employed by the INS at the time they applied for work on the defendant's farms). The plaintiffs theoretically could be convicted of falsely representing a Social Security number (see, e.g., Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000)(plaintiff convicted of falsely using a Social Security number was not guilty of a crime of moral turpitude). In fact the U.S. Supreme Court in Hoffman Plastic Compounds, Inc. v. NLRA, noted that "Aliens who use or attempt to use such documents are subject to fines and criminal prosecution." 535 U.S. 137, 147-148.

Since Rule 26(a) provides that discovery may be had of any matter, "not privileged," the discovery rules cannot reach information that is protected by the privilege against self-incrimination. XXX v. Gerrans, 592 F.2d 1054 (9th Cir. 1979); Gatoil v. Forest Hill State Bank, 104 F.R.D. 580, 581 (D.C. Md. 1985); Wright and Miller, Civil § 2018. It is well-established

that the privilege applies in civil, as well as criminal actions. See e.g. Maness v. Myers, 95 S.Ct. 584 (1975); U.S. v. Kordel, 90 S.Ct. 763 (1970); McCarthy v. Arndstein, 45 S.Ct. 16 (1924). As the U.S. Supreme Court stated,

The privilege [against self-incrimination] is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. Maness, supra, at 594.

The privilege is available even if the risk of criminal prosecution is remote. In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979). Courts have thus repeatedly held that the privilege against self-incrimination justified a person in refusing to answer questions at a deposition, or to respond to interrogatories, requests for admission, or to produce documents. See e.g. Wright and Miller, Civil § 2018. In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979); Wehling v. Columbia Broadcasting System, 608 F.2d 1084, (5th Cir. 1979), *rehearing denied* 611 F.2d 1026 (5th Cir. 1980); In re Master Key Litigation, 507 F.2d 292 (9th Cir. 1974) (depositions); Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578 (D.C. Cir. 1970) (interrogatories).

If the claim is asserted, in certain circumstances the court can make an adverse inference from the assertion of the claim. In re Grand Jury Subpoena (Under Seal), 836 F.2d 1468 (4th Cir. 1987), *petition for rehearing denied*, 1988; Doe v. Rudy-Glanzer, 2000 U.S. App. LEXIS 29340 (9th Cir. 2000). However, while a court can draw an adverse inference from assertion of the 5th amendment privilege in a civil case, such an adverse inference can only be drawn where there is independent evidence of the fact to which the party refuses to answer. See e.g. LeSalle Bank

Lake View v. Seguban, 54 F.3d 387 (7th Cir. 1995); Peiffer v. Lebanon Sch. Dist. , 848 F.2d 44 (3rd Cir. 1988).

Even a protective order may not protect Plaintiffs' rights if they are compelled to respond to questions that may incriminate them. In Andover Data Servs. v. Statistical Tabulating Corp., 876 F.2d 1080 (2d Cir. 1989), the Second Circuit found that a protective order, "no matter how broad its reach, provides no guarantee that compelled testimony will somehow find its way into the government's hands for use in a subsequent criminal prosecution," Id. at 1083, and found "that a non-consenting witness may not be forced to answer potentially incriminating questions in reliance upon such an order, no matter how carefully crafted the order may be." Id. at 1084. See, e.g., In re Agent Orange Prod. Liab. Litig., 821 F.2d 139 (2d Cir. 1987)(discovery sealed pursuant to two protective orders of the district court later unsealed).

"[W]hen conditions for the assertion of a privilege have been met, courts have imposed a higher standard of relevancy than would ordinarily be required on the party seeking discovery." Flynn v. Goldman, Sachs & Co., 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993), citing Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163 (E.D.N.Y. 1988), aff'd, 870 F.2d 642 (2d Cir. 1989)(court granted non-party's motion to quash a subpoena when it invoked the common-law privilege for self-critical analysis and thereby showed harm). The court in Goldman, Sachs noted:

[W]here a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate its need for the information, and the harm it would suffer from the denial of such information would outweigh the injury that disclosure would cause the other party or the interests cited by it. Goldman, Sachs, supra, at * 1, citing Apex Oil Co. v. DiMauro, 110 F.R.D. 490, 496 (S.D.N.Y. 1985).

The irrelevant and harassing questions regarding immigration status are by their very nature intimidating. The Plaintiffs brought their case despite significant reluctance and fear of retaliation. As described below at B, social policy dictates that the Plaintiffs should not be required to endure this humiliation and potential self-incrimination.

In the instant case, the Plaintiffs may assert the claimed privilege. Without conceding that the Plaintiffs have or are currently working without appropriate immigration and employment documentation, the Plaintiff notes that the use of false documents *in the past* is a felony. See e.g. 18 U.S.C. §§ 1421-1429; §§1541-1545; and § 1546. The Plaintiff asserts this privilege to protect against any such prosecution. Additionally, criminal penalties may apply in the context of individual Plaintiffs who have filed or failed to file income tax returns with the I.R.S. The Plaintiffs assert their privilege to protect against any such prosecution. Additionally, there are state laws, including forgery and fraud statutes, which may be implicated through such disclosure, and the Plaintiffs asserts their privilege to protect against any such prosecution. If the information sought in the discovery would furnish “a link in the chain” of evidence needed to prosecute for a crime, it cannot be had by discovery in a civil action. Wright and Miller, Civil § 2018, Malloy v. Hogan, 84 S.Ct. 1489, 1495-1496 (1964). In this civil action for unpaid wages the Plaintiffs cannot be compelled to testify or produce documents that would impinge upon that privilege.

2. The Information Sought By the Defendants is Irrelevant for Purposes of Class Certification.

Rule 23(a) requires that the “representative parties . . . fairly and adequately protect the interests of the class.” This inquiry focuses on two factors: (1) the qualifications, experience and conduct of plaintiffs’ counsel and (2) class members must not have interests that are

“antagonistic” to one another. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3rd Cir. 1975); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Rodriguez v. Berrybrook Farms, Inc., 672 F. Supp. 1009 (W.D.Mich. 1987); Roman v. Korson, 152 F.R.D. 101 (W.D.Mich. 1993).

“The proper analysis of adequacy of representation focuses on whether the class representatives’ interests are antagonistic to those of the class, such that the rights of other class members will be harmed by having their interests put forward by the class representatives.” Walters v. Reno, 1996 WL 897662 at *7 (W.D.Wash. Mar. 13, 1996). “Certification of a class on the grounds of antagonism should be denied only if that antagonism goes to the subject matter of the litigation.” Thomas v. City of Chicago, 1984 WL 946 at *9 (N.D.Ill. Aug. 30, 1984). And it is the defendants’ burden to show that the plaintiffs are inadequate representatives. Lewis v. Curtis, 671 F.2d 779, 788 (3rd Cir. 1982), cert. denied, 459 U.S. 880 (1982). Questions relating to immigration status do not relate to any possible antagonism vis-à-vis the other named Plaintiffs or the class members that goes to the subject matter of the litigation, and are therefore irrelevant.

First, questions relating to the Plaintiffs’ immigration status are wholly irrelevant. Numerous courts have certified classes of undocumented workers seeking to assert their employment rights. In Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990), the class consisted of 1,349 undocumented Mexican workers who sued their employer for failure to comply with the requirements of Farm Labor Contractor Registration Act. In Montelongo v. Meese, 803 F.2d 1341 (5th Cir. 1986), the Fifth Circuit found there was no abuse in the district court’s restructuring of the class to include undocumented class members.

In Montelongo, the district court in the case also barred inquiry into the immigration status of the putative class members. Id. at 1352 n. 17. See e.g., Haywood v. Barnes, 109 F.R.D. 568 (E.D.N.C. 1986)(AWPA class certified for migrant farmworkers seeking to assert their rights under the AWPA and the FLSA); Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983)(court certified a class of undocumented aliens seeking to stop workplace raids by the INS).

Like the workers in Six Mexican Workers and Montelongo, the Plaintiffs in this case are seeking to represent a group of immigrant workers, most of whom are likely to be undocumented. Just as the farmworkers in the Six Mexican Workers and Montelongo cases were permitted to represent their co-workers in a class action, so should the Plaintiffs in this case be allowed to represent their grossly underpaid past and present co-workers.

Similarly, questions relating to the Plaintiffs' false use of Social Security numbers and other documents to obtain employment are not relevant. Neither criminal records nor the use of false documentation to obtain employment will render plaintiffs inadequate class representatives. Haywood, 109 F.R.D. at 579; see also, Dean v. Coughlin, 107 F.R.D. 331 (S.D.N.Y. 1985)(incarcerated felons certified as class representatives); Walters, *7 (“Th[e] reference to the fact that some members of the class entered the United States without inspection and used false documentation to obtain employment is, again, an unfair attack”); Leyva v. Buley, 125 F.R.D. 512, 515 (E.D. Wash. 1989)(“Character attacks made by opponents to a class certification motion and not combined with a showing of a conflict of interest have generally not been sympathetically received in this district.” (cites omitted)).

In Haywood, a class action brought on behalf of undocumented migrant farmworkers, the Defendants challenged the Plaintiffs' adequacy on several grounds, including asserting that any of the Plaintiffs with criminal records were inadequate and that the Plaintiffs' migratory nature made them unfit to represent the class. The court found that the "[p]laintiffs' adequacy must be assessed in light of their conduct in this or previous litigation, not based on a subjective evaluation of their personal qualifications as allegedly and tenuously evidenced by their prior criminal record." *Id.* at 579. On the migratory nature of the Plaintiffs, the court further held that "[t]aking defendants' assertion to its logical conclusion, it would effectively eliminate class actions as a device to aid migrant farmworkers in the protection of their rights. By definition, all migrant farmworkers are transient. . ." *Id.* at 580.

The Plaintiffs in this case and the class they seek to represent are recent immigrants, many of whom are conceded to be undocumented. All of them have worked for one or more of the Defendants. Thus, many of them can be presumed to have presented false papers, including false Social Security numbers, to secure employment. These actions, taken by immigrant workers seeking to better themselves economically, cannot form the basis for a ruling that they are unable to represent themselves and others in a class action lawsuit. See Walters v. Reno, 1996 WL 897662 (W.D. Wash. Mar. 13, 1996).

In Walters, the Plaintiffs admitted in depositions under grants of immunity by the government that they used false documents. *Id.* at *6. The Defendant INS argued that the Plaintiffs were inappropriate class representatives because they used false documents, because of their "obvious willingness to disregard the law," and because they were not credible. *Id.* at *6.

The district court rejected all of the Defendants' adequacy arguments, and found the Plaintiffs to be proper class representatives.

Because the defendants have not and cannot proffer any tenable argument as to the relevancy of the information they seek, the Plaintiffs' interest in not being oppressed and harassed must trump the Defendants' otherwise broad ability to seek information for their case. In a putative class action where Defendants asked harassing and irrelevant questions about the putative class representatives' race and national origin, the court noted that "irrelevant questions, however, may unnecessarily touch sensitive areas or go beyond reasonable limits as did some of the race questions propounded to Eggleston. In such an event, refusing to answer may be justified." Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130 657 F.2d 890 (7th Cir. 1981).

The Eggleston court went further, and stated that "[m]embers of the putative class, knowing of this present ordeal, could not but be discouraged from instituting similar individual undertakings against these defendants." Id. at 904. This is precisely the danger faced by the Plaintiffs and the putative class in this case: if the Defendants are permitted to ask the irrelevant and potentially incriminating questions before and during the notice period, potential opt-in plaintiffs and the putative class members will not want to risk coming forward to recover unpaid wages.

B. A DENIAL OF A PROTECTIVE ORDER FOR THE PLAINTIFFS RESULTS IN A DENIAL OF THE PLAINTIFFS' RIGHT TO FULLY ENFORCE THEIR RIGHTS UNDER THE FLSA AND MICHIGAN LAW.

If the defendants are permitted to inquire into irrelevant areas of the Plaintiffs' lives concerning their immigration status and improper use of false documents and/or social security

numbers, the message will be clear: undocumented immigrant workers who are otherwise entitled to enforce their rights to be paid the minimum wage and overtime will be scrutinized closely with respect to highly sensitive and confidential areas of their lives. This creates a disincentive for undocumented workers to come forward and unfairly burdens those who need the law's protection the most. As the U.S. Supreme Court in Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 292 (1960), stated, “[p]lainly, effective enforcement [of the FLSA] could only be expected if employees felt free to approach officials with their grievances It needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”

The Patel court noted,

“We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to his country to gain the protection of our labor laws. Rather it is the hope of getting a job – at any wage – that prompts most illegal aliens to cross our borders.” Patel, 846 F.2d at 704.

Affording undocumented workers a level playing field vis-à-vis their documented counterparts fulfills the goals of labor laws and immigration laws. The two federal agencies charged with enforcing the nation's immigration and labor laws agree that enforcement of labor and employment laws is congruent with and in fact advances the goals of the immigration laws. The Memorandum of Understanding Between the Immigration and Naturalization Service and the U.S. Department of Labor, Nov. 23, 1998⁴ (“MOU”), states in part, “The goals of this MOU are to . . . avoid the victimization of unauthorized workers employed in the U.S. by employers

⁴ <http://www.dol.gov/dol/esa/public/whatsnew/whd/mou/nov98mou.html>.

which may seek to use the enforcement powers of the signatory agencies to intimidate or punish these workers[.]” MOU at p. 5.

“If [labor laws] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative labor practices . . . “
Contreras v. Corinthian Vigor Ins. Brokerage , Inc. , 25 F. Supp. 2d at 1056, quoting NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979)(Kennedy, J., concurring). “Nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA’s coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it.” Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988).⁵

C. PROTECTIVE ORDER IS NECESSARY WHEN IMMIGRATION STATUS IS A COLLATERAL ISSUE TO CLAIMS PRESENTED AND PLAINTIFFS’ INTIMIDATION AND DETERRENCE OR WITHDRAWAL OF CLAIMS IS GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER.

In Topo v. Dhir, 210 F.R.D. 76 (S.D. NY 2002), an immigrant who was formerly employed as a domestic servant sued her former employers under the Alien Tort Claims Act. The Topo court granted a protective order in favor of the Plaintiff banning the employer from inquiring into the former employee’s immigration status because it was “a collateral issue, not relevant to any material aspect of the case.” In determining whether good cause for the protective order existed, the court stated that “[p]laintiff’s fears of her immigration status deterring further prosecution of her claims are well-founded.” Thus “allowing parties to inquire about the

⁵ The two federal agencies charged with enforcing the nation’s immigration and labor laws agree that enforcement of labor and employment laws is congruent with and in fact advances the goals of the immigration laws.

immigration status of other parties, when not relevant, would present a ‘danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.’ Topo, 210 F.R.D. at 78.

Therefore, the court noted that “when the question of a party’s immigration status only goes to a collateral issue, the protective order becomes necessary as it is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face . . . potential deportation.” Topo, 210 F.R.D. at 78.

In this case, the Plaintiffs are suing the Defendants to recover damages for unpaid wages for work already performed. Like the employee’s immigration status in Topo, here the Plaintiffs’ immigration status is a collateral issue and is not relevant to any material aspect of the case and any element or defense to the counts alleged in the complaint. Regardless of their immigration status, the Plaintiffs are entitled to payment of their wages for work already performed. If the discovery of documents related to the Plaintiffs’ immigration status is permitted, there is a real possibility that Plaintiffs and/or the putative class will become intimidated and oppressed and will not participate in this lawsuit. When this occurs, the Plaintiffs will be denied the opportunity to pursue their legal rights to the money owed them under the Fair Labor Standards Act and the other counts alleged in the complaint.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant plaintiffs’ motion for a protective order.

Dated: _____

Michigan Migrant Legal Assistance Project, Inc.
By: Robert A. Alvarez (P66954)
Attorneys for Plaintiffs