



Plaintiffs and engaged in an active and ongoing malicious effort to hide evidence.

2. The blatant discovery abuse involves two categories of documents : 1) Documents related to a geotechnical investigation of the subject incident in which Wal-Mart hired Intertek-PSI (herein after “Intertek”) to conduct soil testing of the subsurface where the crane’s outrigger punched through the ground in Wal-Mart’s parking lot; and 2) Documents related to the Master Agreement between Wal-Mart and Intertek for soil testing services.

3. As it relates to this heinous discovery abuse Wal-Mart intentionally withheld these documents and claimed that they did not exist and failed to timely produce them to the Plaintiffs as required by the Texas Rules of Civil Procedure.

4. Wal-Mart’s actions constitute flagrant discovery abuse which require sanctions.

5. Accordingly, Plaintiffs respectfully move for this Court to enter an order sanctioning Wal-Mart by:

- a. Strike Wal-Mart’s Answer; and
- b. Award monetary damages in amount of \$15,000,000.00; and
- c. Award reasonable and necessary attorneys’ and expenses; and
- d. Awarding Plaintiffs their reasonable expenses in retaining a third-party to conduct the requested forensic examination; and
- e. Allow specific jury instructions which would permit the jury to draw negative inferences from Wal-Mart’s conduct; and
- f. For any other such relief as the Court deems appropriate.

## **I. INTRODUCTION**

6. On March 23, 2017, at approximately 10:00 p.m., Plaintiff, Robert Faircloth, was operating a crane at the Wal-Mart store located at 1821 S. Padre Island Drive, Corpus Christi, Texas 78416, when the ground beneath one of the crane’s outriggers collapsed causing the crane

to tip over. Mr. Faircloth sustained debilitating and permanent injuries as a result of the incident including paraplegia.

7. Plaintiffs sued Wal-Mart alleging negligence, gross negligence, and premises liability. Plaintiffs further allege that Wal-Mart knew of the hazardous conditions of the subsurface where the crane was operating and further knew that it could not support the weight of the subject crane. As a result of the incident.

8. Discovery in this suit is governed by a Level 3 discovery-control plan. The Court has set this case for a jury trial to be held on November 18, 2019.

## **II. BACKGROUND**

9. On March 22, 2019, Plaintiffs served their third set of Requests for Production on Defendant Wal-Mart Stores Texas, LLC. Defendant Wal-Mart Stores Texas, LLC responded to these requests on May 13, 2019. The documents, the subject of this Motion for Sanctions should have been produced in response to Plaintiffs' Discovery Requests. *See* Exhibit A, Relevant Discovery Requests to Walmart Texas Stores, LLC.

10. Similarly, on June 23, 2019, Plaintiffs served their First Set of Discovery Requests to Wal-Mart Real Estate Business Trust. Defendant Wal-Mart Real Estate Business Trust responded to those requests on August 5, 2019 and also failed to produce the discoverable documents the subject of this motion. *See* Exhibit B, Relevant Discovery Requests to Wal-Mart Real Estate Business Trust.

### **A. Documents Related to Soil Testing**

11. The first area of blatant discovery abuse involves documents related to soil testing conducted by Wal-Mart's geo-technical consulting engineers in the area where the crane tipped over. Specifically, Wal-Mart hired Intertek to conduct this geotechnical investigation.

12. On April 13, 2017, in response to Wal-Mart's request for a geotechnical

investigation, Intertek's National Client Manager, Johnathon Grant, sent, via email, a subsurface soil investigation letter (hereinafter referred to as the "April 12, 2017 Letter") to Wal-Mart's Senior Construction Manager, Jack Magnini, and Wal-Mart's Quality Assurance Manager, Lindsay McBurnett. *See Exhibit C - Email and attached letter.*

13. In direct and flagrant violation of the discovery rules Wal-Mart failed to produce Exhibit C in response to any of Plaintiffs' Requests for Production. The Plaintiffs, intuitively believing that Wal-Mart would have conducted soil testing on the affected ground, issued a subpoena to Wal-Mart's geotechnical engineers on the remodel of store #470.

14. On May 17, 2019 Intertek produced documents in response to the subpoena which included Ex C.

15. On June 20, 2019, following receipt from Intertek of the highly relevant and discoverable document that Plaintiffs knew was in the possession of Wal-Mart and had not been produced, Plaintiffs initiated corresponded with Wal-Mart through their attorneys to obtain these relevant documents.

16. On June 20, 2019 at 10:01 am Plaintiffs advised Wal-Mart that it was their belief that Wal-Mart had intentionally failed to produce discoverable documents from Intertek. *See Exhibit D – Email string dated June 20, 2019.*

17. On June 20, 2019 at 10:52 am, Mr. Drabek on behalf of Wal-Mart stated in part, "I have no idea what you're talking about." He continued, "...we gave you everything we had. We're not hiding a thing." *See id.*

18. On June 20, 2019 at 11:02 am, the Plaintiffs provided Mr. Drabek with the April 12, 2017 Letter from Intertek to Wal-Mart's Senior Construction Manager, Jack Magnini, and Wal-Mart's Quality Assurance Manager, Lindsay McBurnett. The Plaintiffs reiterated that Wal-Mart was "hiding relevant discoverable documents" and again asked them to comply with their

discovery responsibilities and duties. *See id.*

19. On June 20, 2019 at 12:10 pm, Rudy Gonzales asked Mr. Drabek "...why did Wal-Mart fail to produce this document in the first place...and why have they not produced it even as of this time." *See id.*

20. On June 20, 2019 at 12:58 pm, Mr. Drabek responding for Wal-Mart saying, among other things, "we had never seen it before" and concluded his email with, "In short, you have the letter and used it. We hid nothing." *See id.*

21. On June 20, 2019 at 3:08 pm Rudy Gonzales responded, in part, "Why didn't Walmart's Litigation Support team give these documents to you when they were asked for? Why shouldn't I be concerned about other documents Walmart has not produced? I want Walmart to produce those documents primarily because they are required to under the TRCP and I want to prove they received it. Please produce." Mr. Gonzales further asked, "By the way, how does Walmart search for Intertek documents and not get Intertek documents?" *See id.*

22. On June 20, 2019 at 3:22 pm Mr. Drabek, on behalf of Wal-Mart, responded " I produced every Intertek related document, including emails that i (sic) received. It begs credulity to infer that i would withhold a letter like that supports WM's position so thoroughly. If i had it, i would have wrapped a ribbon around it before sending it to you. Geez!" *See id.*

23. On June 20, 2019 at 5:00 pm Rudy Gonzales responded in part on behalf of the Plaintiffs, "...you did not produce and you have not produced the letter from Bacon to Magnini dated April 12, 2017. The question is why? If you don't produce it we will have the Court review the issue." *See id.*

24. On June 20, 2019 at 6:14 pm Mr. Drabek responded, "I will ask my client to reinstate a second search. Fair enough?" *See id.*

25. On June 22, 2019 at 11:07 am Rudy Gonzales responded in part on behalf of the

Plaintiffs, "Please have Walmart complete their "second search" by noon on Monday regarding documents responsive to our RFP's and specifically the letter from Bacon to Magnini dated April 12, 2017 which for some mysterious reason they can't seem to locate." *See id.*

26. In response, Wal-Mart never produce the April 12, 2017 after presumably searching for it a second time.

27. Nearly 90 days later the deposition of Wal-Mart's Senior Construction Manager, Jack Magnini was taken. Jack Magnini was one of the two recipients of the April 12, 2017 Letter. Mr. Magnini stated in his deposition:

(Exhibit No. 11 marked.)

Q. (By Mr. Gonzales) Your testimony to the jury, Mr. Magnini, is you do not recall receiving this letter Exhibit Number 11 by email transmission to you from Intertek dated April the 12th, 2017?

A. **That is correct. I could not find it in my email response.**

Q. And why do you think you would not be able to find it?

A. **It may not have ever come to me or it may have accidentally been deleted. I don't know.**

Q. And the email address on the -- on the on the email is correct, at least it says Jack Magnini. It's in a series. It is possible you deleted this email?

A. **Would have been by accident, because I rarely delete anything.**

*See* Exhibit E at 156:12 - 157:6. Thus, the Plaintiffs have the sworn testimony of Wal-Mart's corporate representative that he may have "accidentally" deleted the April 13<sup>th</sup> email containing the April 12, 2017 Letter.

28. After repeated requests for the April 12, 2017 Letter, and after repeated denial from Wal-Mart and their attorneys that they did not have this important letter, on September the 24, 2019 at 2:10 pm, Rudy Gonzales on behalf of the Plaintiffs requested that Wal-Mart voluntarily submit to a forensic examination of both Mr. Magnini's computer and Wal-Mart's integrated

workplace system, Evoco. *See* Exhibit F – email string between counsel from September 24, 2019-September 27, 2019.

29. On September the 25, 2019 at 9:05 am, Rudy Gonzales, on behalf of the Plaintiffs emailed Wal-Mart’s counsel stating, “we need to take the deposition of Lindsay McBurnett. As you know, she also received the April 12, 2017 geotechnical investigation report.” *See id.*

30. On September the 26, 2019 at 4:21 pm, over 120 days after Wal-Mart was required to answer discovery and specifically produce the April 12, 2017 Letter and after months of denying that they had the letter, Wal-Mart finally said “Lindsay still had the emails and the April 12th letter. We are supplementing momentarily.” *See id.*

31. Incredibly, Lindsey McBurnett was a recipient of the April 12, 2017 Letter from Intertek and presumable always had the email. Wal-Mart, even if they had performed a cursory document search, much less an extensive one, would have discovered this important document. It was only after the Plaintiffs threatened a forensic examination of Walmart’s computer system and specifically advised Walmart that they would depose McBurnett, that all of a sudden and without explanation, the elusive document finally appeared in Wal-Mart’s files.

32. Wal-Mart’s adamant and consistently untruthful representation that they did not possess this document when in fact it *was* in their possession, is proof positive that they were participants in nefarious conduct meant to undermine the rules of discovery and engage in egregious and blatant discovery abuse.

33. The Court should be reminded of Mr. Drabek’s email of June 20<sup>th</sup> “If i (sic) had it, i (sic) would have wrapped a ribbon around it before sending it to you. Geez!” *See* Exhibit D.

34. The April 12, 2017 Letter is of critical importance to the Plaintiffs’ case. First, it is the soil investigation of the exact location of the ground failure. It identifies the soil as “fat sandy clay.” It also identifies the fact that the soil has a high moister content. If further advises Wal-Mart

to inform the crane company that the allowable bearing capacity for the ground is 20,000 pounds per square foot. This information is critical to the crane company because they need that information to design their supporting mats.

**B. Documents Related to The Master Agreement Between PSI and Wal-Mart.**

35. On August 28, 2019 at 11:25 am Plaintiffs communicated with Jaime Drabek, attorney for Wal-Mart, noting "...in the attached PSI Letter for July 27, 2017, there is a reference to the "Agreement for Services" between PSI and Wal-Mart" and counsel for Plaintiffs asks that the document be produced. *See Exhibit G – Email string dated August 28, 2019.*

36. After several confusing emails on the subject, on August 28, 2017 at 1:21 pm, the Plaintiffs' attorney Alex Hilliard clarified to Mr. Drabek, "...I'm talking about the proposal letter outlining the scope of services PSI will provide for this remodel project. We need that letter."

37. On August 28, 2017 at 1:30 pm, Mr. Drabek responded, "I have [never] seen such a letter nor has PSI Intertek produced one either. This vendor was used on the rack house and the post-accident thing. That's all I know about."

38. Six minutes later, Rudy Gonzales, on behalf of the Plaintiffs stated, "Jamie, PSI was the geotechnical engineers hired by Walmart for the remodel job. Where is their "Agreement of Services" as referred to in PSI's letter of June 12,2017? This really is not difficult stuff."

39. On August 28, 2017 at 1:41 pm, Mr. Drabek, on behalf of Wal-Mart responded, saying, among other things, "Second, neither PSI nor WM has any such agreement covering the entire project. If there was one, as I stated before, I would produce it."

40. On August 28, 2017 at 2:20 pm, Plaintiffs' counsel Rudy Gonzales responded in part, saying, "Jaime, one of us is very confused (and I'll leave open a slight possibility that it's me). Some type of written document had to control the relationship between Walmart and PSI BEFORE the accident on work performed by PSI on the remodel job, whether it's a general



document or a specific one. What and where are those documents?”

41. On August 28, 2017 at 2:37 pm, Mr. Drabek, on behalf of WM responded “PSI doesn’t have any global agreement for store 470 nor does WM.”

42. On August 28, 2017 at 3:23 pm, Rudy Gonzales stated “Ok, produce all documents related to all “tasks” performed by PSI including the “proposal” before and after the accident related to the remodel.”

43. On August 28, 2017 at 3:27 pm, Mr. Drabek, “Rudy – both PSI and WM have produced every document they had in their respective possessions relative to this remodel and their interaction. There are no others.”

44. After having cancelled the deposition of Mr. Magnini because Wal-Mart had not produced the agreement, at 4:02 pm Mr. Drabek again stated “As I have tried to explain repeatedly, there is no global agreement between PSI and WM with regard to the #470 remodel. It was tasked based and you have those documents.”

45. On August 29, 2019 at 9:27 am Mr. Gonzales stated “Jaime, somehow we’re not communicating. I’m asking that by noon today you produce the documents we have requested.”

46. On August 29, 2019 at 9:34 am Mr. Drabek responded in part “I said I would look into your claims and I will.”

47. Predictably on September 4, 2019 at 10:51 am Jaime Drabek, on behalf of Wal-Mart stated, “At your request I had WM initiate another search for any agreements with PSI Intertek. **Much to my surprise (and I now stand corrected)** there does exist a Master Agreement for Construction Materials Testing Services. So, we will be supplementing with this agreement today as soon as we can Bate Stamp it and watermark it.” *Emphasis added.*

48. Wal-Mart’s cavalier and patently false statements that they did not have a document which they knew they did in fact possess is nothing short of intentional and deliberate attempt to

abuse the discovery process. At no time did Wal-Mart ever provide an explanation for their egregious conduct.

49. Wal-Mart's actions unequivocally demonstrate a well-orchestrated campaign to frustrate and obstruct Plaintiffs' legitimate and carefully designed discovery program. Wal-Mart intentionally decided to engage in discovery abuse instead of providing honest disclosures to properly propounded discovery. As such, they openly flouted their "hide-and-seek" approach to proper discovery requests and only fully disclosed relevant discoverable documents when they were trapped and could not escape accountability.

50. This document is of critical importance because it establishes that Wal-Mart and Wal-Mart alone is responsible for soil-testing. This agreement establishes that Wal-Mart retained a geotechnical consulting firm and in particular used this geotechnical consulting firm on the remodel project for store 470, there this incident took place. Thus, Wal-Mart undertook the responsibility for soil testing for the remodel project, in fact, they use this geotechnical consulting firm for other soil testing for this project but regrettably, failed to do soil testing on the ground where crane was operating at the time of the incident.

### **III. ARGUMENT & AUTHORITIES**

51. The purpose of discovery is to seek the truth, so disputes may be decided by what facts are revealed, not by what facts are concealed. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990). The purpose of sanctions is to secure compliance with the rules, to deter future violation of the rules, and to punish parties that violate the rules. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

52. A court can impose sanctions when a party gives evasive or incomplete answers during discovery. Tex. R. Civ. P. 215.1(c). The Court should impose death penalty sanctions against Defendant Wal-Mart because Wal-Mart has engaged in flagrant discovery abuse by hiding

documents and evading legitimate discovery requests. In fact, Wal-Mart provided dishonest and untruthful answers to Plaintiffs' Requests for Production 13, 34, 45, 53, 77, 82 and 83.

53. A court can also impose sanctions for a general pattern of discovery abuse. *Vela c. Wagner & Brown, LTD.*, S.W.3d 37, 59 (Tex. App.—San Antonio 2006 no pet.). The Court should impose sanctions against Wal-Mart because it has engaged in a systemic pattern of discovery abuse throughout this case.

54. When considering sanctions, a court should ensure that the punishment fits the crime. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). When a court decides to sanction, the sanctions must have a direct relationship to the offensive conduct, measured by a direct nexus among the conduct, the offender, and the sanctions imposed. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581,583 (Tex. 2006); *Spohn Hosp. v. Mayer*, 104 S.W.3d 878,882 (Tex. 2003); *TransAmerican*, 811 S.W.2d at 917.

### **Plaintiffs' Request for Sanctions**

55. Plaintiffs ask the Court to impose death penalty sanctions against Wal-Mart. Death Penalty sanctions are uniquely appropriate in this case based the egregious and flagrant conduct of Wal-Mart. Here is the game that Wal-Mart plays:

- A. Hide the documents and do not produce them. Nearly 99% of the time the Plaintiff will never discover that Wal-Mart hid the documents. Wal-Mart will sit back and celebrate their nefarious behavior and congratulate themselves on being smarter and craftier than the other side. In their view they succeeded, yet again because they were "better lawyers" than their lazy opponents.
- B. Wal-Mart gets caught. Wal-Mart's response: "So you got the documents from another source, what are you complaining about?" or "Okay, you squeezed the documents out of us, what are you complaining about?"

56. Wal-Mart's conduct is sanctionable because unless this Court matches Wal-Mart's egregious discovery abuse with equal and corresponding sanctions Wal-Mart will continue to engage in their nefarious game of hide-and-seek. Wal-Mart's discovery abuse in this case is a direct assault and affront on the orderly and time-honored function of proper and legitimate discovery. The assault is not merely an assault on the Plaintiffs but is an assault on the judicial process itself and this Court's ability to ensure that the parties have a fair and honest discovery process.

57. Tellingly, Wal-Mart has engaged in discovery abuses in the past and has been sanctioned for such conduct. For instance, in *Wal-Mart Stores, Inc. v. Lynch*, 981 S.W.2d 353, 354 (Tex. App.—Texarkana, 1998), the court held that “Wal-Mart had exhibited a continual pattern of abuse of the discovery process” and sanctioned Wal-Mart. The Court in *Wal-Mart Stores, Inc. v. Christ*, 2001 WL 1782611 \*3 (Tex. App.—Beaumont Feb. 21, 2002), recognized that “Wal-Mart failed to produce important evidence despite repeated discovery requests, producing instead a contradictory document far more favorable to Wal-Mart.” The Court further held:

There was no explanation for the initial failure to produce the yellow sheet. Later, Wal-Mart continued to represent that its customer incident report was the only document in its possession relevant to the discovery requests, although the people responsible for gathering the evidence were aware that the store's file was missing. The trial court did not abuse its discretion by ordering monetary sanctions.

*Id.*

58. In *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 46 (Tex. App.—Austin 1998), the Court noted that the lower court was so frustrated with Wal-Mart's abusive discovery practices that it warned the company, “Don't screw up anymore because I am at the end of my mercy.” Judge Davis vigorously admonished Wal-Mart: “I have what I refer to as my ‘one bite at the apple rule.’ Wal-Mart, it seems to me, has had several bites at the apple so far, but not before me.” *Id.* at

47. The district court went on:

I'm telling Wal-Mart that we're not going to play games with discovery in this lawsuit anymore. We're not going to play trick questions. We're not going to play trick responses

We're not going to say that somebody is going to testify about something and then have that person who appears not know anything about it. We're not going to drag our feet. We're going to get on with the business as it ought to be gotten on with in order to get this case resolved.

If you don't, additional and more serious sanctions will be assessed. It's time to stop the gamesmanship.

*Id.* In June 1996, Judge Davis signed an order sanctioning Wal-Mart for attorney's fees, costs, and expenses.

59. In sum, Wal-Mart's abusive conduct here is merely another flagrant violation in a long line of violations that typifies Wal-Mart's conduct in Texas Courts.

60. To borrow a phrase of one of Wal-Mart's lawyers it "begs credulity" to suggest to Wal-Mart did not know what they were doing in orchestrating this dishonest and continual discovery abuse.

#### **IV. PRAYER**

61. WHEREFORE PREMISES CONSIDERED Plaintiffs respectfully pray that the Court enter an order

- a. Strike Wal-Mart's Answer; and
- b. Award monetary damages in amount of \$15,000,000.00; and
- c. Award reasonable and necessary attorneys' and expenses; and
- d. Awarding Plaintiffs their reasonable expenses in retaining a third-party to conduct the requested forensic examination; and
- e. Allow specific jury instructions which would permit the jury to draw negative inferences from Wal-Mart's conduct; and

f. For any other such relief as the Court deems appropriate.

Respectfully submitted,

By: /s/ Rudy Gonzales, Jr.

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record, pursuant to the Texas Rules of Civil Procedure on this 25th day of October 2019.

/s/ Rudy Gonzales, Jr.  
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# ***Exhibit “A”***



## EXHIBIT A

### WAL-MART'S REPSONSES TO PLAITNIFFS' RELEVANT REQUESTS FOR PRODUCTION

#### **REQUEST FOR PRODUCTION NO. 13:**

Please produce all documents and communications relating to any soil boring logs of the subject premises from January 1, 2014 until present.

#### **RESPONSE:**

Defendant objects to this request as it is vague, overly broad, unduly burdensome, not reasonably limited in time and scope and is a "fishing expedition", as written. The request as written encompasses information which is not relevant to the subject matter of this lawsuit and which does not appear reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a) & 192.4(a)-(b). Furthermore, Defendant objects to this request on the grounds that it is unreasonably duplicative and/or cumulative. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant refers Plaintiffs to the recent soil sampling/testing documents done in connection with Store #470's remodel, previously produced exhibits WM002091-WM002123.

#### **REQUEST FOR PRODUCTION NO. 34:**

Please produce all documents and communications relating to the subject Wal-Mart Store that were received, reviewed, addressed to, or created by Intertek-PSI between the time period of January 1, 2017 until August 1, 2017.

#### **RESPONSE:**

Intertek-PSI is an independently owned certified testing lab to perform testing services during Store #470's remodel. Defendant objects to this request as it is vague, overly broad, unduly burdensome, and is a "fishing expedition", as written. Defendant also specifically objects to this request as written, as written, invades the protected personal and constitutional rights of a third party, Intertek-PSI is outside of Defendant's control, specifically, the request seeks to invade the constitutionally protected right of privacy for information that does not appear reasonable calculated to lead to the discovery or admissible evidence nor relevant to this case. Furthermore, Defendant objects to this request because the information has been previously provided to Plaintiff in another form. Subject to and without waiving the foregoing objections, reasonably limited from January 1, 2017 to August 1, 2017 focusing only on Intertek-PSI's actions concerning the remodel of Store #470, Defendant responds as follows: To the best of Defendant's knowledge all non-privileged documents responsive to this request have already been produced with Defendant's Objections and Responses to Plaintiff's Second Set of Request for Production, and any supplement thereof. Defendant also refers Plaintiffs to the testing reports performed by Intertek PSI in connection with the remodel of Store #470 previously produced exhibits WM002091-WM002123.

**REQUEST FOR PRODUCTION NO. 45:**

Please produce all documents and communications relating to any testing and observation reports performed by Intertek-PSI and the results issued for the subject premises from January 1, 2010 until present.

**RESPONSE:**

Intertek-PSI is an independently owned certified testing lab to perform testing services during Store #470's remodel. Defendant objects to this request as it is vague, overly broad, unduly burdensome, and is a "fishing expedition", as written. Defendant also specifically objects to this request as written, as written, invades the protected personal and constitutional rights of a third party, Intertek-PSI is outside of Defendant's control, specifically, the request seeks to invade the constitutionally protected right of privacy for information that does not appear reasonable calculated to lead to the discovery or admissible evidence nor relevant to this case. Furthermore, Defendant objects to this request because the information has been previously provided to Plaintiff in another form. Subject to and without waiving the foregoing objections, reasonably limited from January 1, 2017 to August 1, 2017 focusing only on Intertek-PSI's actions concerning the remodel of Store #470, Defendant responds as follows: To the best of Defendant's knowledge all non-privileged documents responsive to this request have already been produced with Defendant's Objections and Responses to Plaintiff's Second Set of Request for Production, and any supplement thereof. Defendant also refers Plaintiffs to the testing reports performed by Intertek PSI in connection with the remodel of Store #470 previously produced exhibits WM002091-WM002123.

**REQUEST FOR PRODUCTION NO. 53:**

Please produce all documents and communications relating to the subject Wal-Mart Store that were received, reviewed, addressed to, or created by Jack Magnini between the time period of January 1, 2017 until August 1, 2017.

**RESPONSE:**

Mr. Jack Magnini is a Senior Construction Manager with Wal-Mart. Reasonably limited from January 1, 2017 to August 1, 2017 focusing only on Mr. Jack Magnini's communications concerning the remodel of Store #470, Defendant responds as follows: To the best of Defendant's knowledge all non-privileged documents responsive to this request have already been produced with Defendant's Objections and Responses to Plaintiff's Second Set of Request for Production, and any supplement thereof. Defendant also refers Plaintiffs to exhibits bates stamped WM002801 – WM003168.

**REQUEST FOR PRODUCTION NO. 77:**

Please produce all documents used to determine the condition of the subject parking lot/sidewalk after the subject incident.

**RESPONSE:**

Defendant objects to this request as it is overly broad, unduly burdensome, not

reasonably limited in time and scope and is a “fishing expedition”, as written. Defendant objects to this request as it is vague, unclear, lacks specificity and fails to advise or adequately describe with reasonable clarity and/or particularity what information it is requesting and/or which documents are requested to be produced, due to vagueness of “inspecting ground conditions” The request as written encompasses information which is not relevant to the subject matter of this lawsuit and which does not appear reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a) & 192.4(a)-(b). Furthermore, Defendant objects as the requested information is protected by Trade Secret.

**REQUEST FOR PRODUCTION NO. 82:**

Please produce all documents and communications relating to any testing performed on parking lot/sidewalk surface and/or the ground beneath the parking lot/sidewalk surface, including any core samples of the ground beneath the parking lot/sidewalk taken prior to or after the subject incident.

**RESPONSE:**

Defendant objects to this request as it is vague, overly broad, unduly burdensome, not reasonably limited in time and scope and is a “fishing expedition”, as written. The request as written encompasses information which is not relevant to the subject matter of this lawsuit and which does not appear reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a) & 192.4(a)-(b). Furthermore, Defendant objects to this request on the grounds that it is unreasonably duplicative and/or cumulative. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant refers Plaintiffs to the testing reports performed by Intertek PSI in connection with the remodel of Store #470 previously produced exhibits WM002091-WM002123.

**REQUEST FOR PRODUCTION NO. 83:**

Please produce all documents and communications relating to inspection(s), repair(s), and/or maintenance, performed on the parking lot/sidewalk at the subject premises after the subject incident.

**RESPONSE:**

Defendant objects to this request as it is vague, overly broad, unduly burdensome, not reasonably limited in time and scope and is a “fishing expedition”, as written. The request as written encompasses information which is not relevant to the subject matter of this lawsuit and which does not appear reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a) & 192.4(a)-(b). Subject to and without waiving the foregoing objections, reasonably limited to maintenance and repairs records of Store #470’s parking lot and sidewalks, four years prior to the day of incident and six months after the incident, Defendant responds as follows: Defendant refers Plaintiffs to previously produced exhibits FAIRCLOTHr000002 to FAIRCLOTHr000070 and WM001976 to WM002090.

# ***Exhibit “B”***

**EXHIBIT B**

**WAL-MART REAL ESTATE BUSINESS TRUST OBJECTIONS AND  
RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR  
PRODUCTION**

**REQUEST FOR PRODUCTION NO. 13:**

Please produce all documents and communications relating to any soil boring logs of the subject premises from January 1, 2014 until present.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 34:**

Please produce all documents and communications relating to the subject Wal-Mart Store that were received, reviewed, addressed to, or created by Intertek-PSI between the time period of January 1, 2017 until August 1, 2017.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 45:**

Please produce all documents and communications relating to any testing and observation reports performed by Intertek-PSI and the results issued for the subject premises from January 1, 2010 until present.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 53:**

Please produce all documents and communications relating to the subject Wal-Mart Store that were received, reviewed, addressed to, or created by Jack Magnini between the time period of January 1, 2017 until August 1, 2017.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 77:**

Please produce all documents used to determine the condition of the subject parking lot/sidewalk after the subject incident.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 82:**

Please produce all documents and communications relating to any testing performed on parking lot/sidewalk surface and/or the ground beneath the parking lot/sidewalk surface, including any core samples of the ground beneath the parking lot/sidewalk taken prior to or after the subject incident.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

**REQUEST FOR PRODUCTION NO. 83:**

Please produce all documents and communications relating to inspection(s), repair(s), and/or maintenance, performed on the parking lot/sidewalk at the subject premises after the subject incident.

**RESPONSE:**

**Defendant has no documents responsive to this request in their possession, custody and control. The property is leased to and operated by Wal-Mart Stores Texas, LLC and its parent Walmart Inc. Please refer to Wal-Mart Stores Texas, LLC's responses to Plaintiffs' discovery requests.**

# ***Exhibit “C”***

**From:** Johnathon Grant  
**To:** [Jack Magnini](#); [Lindsay McBurnett](#)  
**Subject:** EXT: RE: 470-222 Corpus Christi, TX  
**Date:** Thursday, April 13, 2017 8:00:52 AM  
**Attachments:** [image001.png](#)  
[image002.jpg](#)  
[Walmart Subsurface Soil Investigation Letter.pdf](#)

---

Jack,

Attached is the geotechnical investigation report for the boring that was completed. The area looks to be made up of fatty clays with pretty high moisture contents. As per WM standards we have provided no recommendations for soil treatment. This is simply a lab data analysis of the soil in the location.

We will include this report in our uploads to workspace as well.

Please don't hesitate if you have any questions.

**Johnathon Grant**

**National Client Manager**

**Building & Construction**

**Intertek-PSI**

Direct 678-354-3018

Mobile 470-585-6458

Office 770-424-6200 Ext. 3018

Email [johnathon.grant@psiusa.com](mailto:johnathon.grant@psiusa.com)

[www.intertek.com/building](http://www.intertek.com/building)



Intertek-PSI

95 Chastain Road

Suite 301

Kennesaw, GA 30144

---

**From:** Jack Magnini [mailto:[Jack.Magnini@walmart.com](mailto:Jack.Magnini@walmart.com)]

**Sent:** Monday, March 27, 2017 6:52 PM

**To:** Johnathon Grant <[johnathon.grant@psiusa.com](mailto:johnathon.grant@psiusa.com)>; Lindsay McBurnett <[Lindsay.Goodwin@walmart.com](mailto:Lindsay.Goodwin@walmart.com)>

**Subject:** RE: 470-222 Corpus Christi, TX

Jonathan,

We are okay with the boring for the new location. If you have not tested the existing crater, do not, I was instructed on how to fix.

Thank you,



**Jack Magnini**

**Senior Construction Manager**

**Walmart Realty Construction**

**TX**

UNREDACTED WM003991



**Walmart, Sam's Club, and  
Neighborhood Markets**  
**Phone: 479.419.0008**  
**Fax: 479.277.2554**  
[jack.magnini@walmart.com](mailto:jack.magnini@walmart.com)

Walmart Stores Inc.  
2001 S.E. 10th Street  
Bentonville, AR. 72716

**Save Money Live Better**

---

**From:** Johnathon Grant [<mailto:johnathon.grant@psiusa.com>]

**Sent:** Friday, March 24, 2017 12:54 PM

**To:** Jack Magnini; Lindsay McBurnett

**Subject:** RE: 470-222 Corpus Christi, TX

Jack,

After seeing some site photos, we'll also need to core a few concrete samples and run compressive strength tests.

**Johnathon Grant**

**National Client Manager**

**Building & Construction**

**Intertek-PSI**

Direct 678-354-3018

Mobile 470-585-6458

Office 770-424-6200 Ext. 3018

Email [johnathon.grant@psiusa.com](mailto:johnathon.grant@psiusa.com)

[www.intertek.com/building](http://www.intertek.com/building)



Intertek-PSI

95 Chastain Road

Suite 301

Kennesaw, GA 30144

---

**From:** Johnathon Grant

**Sent:** Friday, March 24, 2017 12:24 PM

**To:** 'Jack Magnini' <[Jack.Magnini@walmart.com](mailto:Jack.Magnini@walmart.com)>; Lindsay McBurnett

<[Lindsay.Goodwin@walmart.com](mailto:Lindsay.Goodwin@walmart.com)>

**Subject:** RE: 470-222 Corpus Christi, TX

Jack,

We are working to get technicians to the site now and I've engaged our Branch Manager as well as Construction Services Manager.

We'll run a complete package to include soil proctor sampling to establish Atterberg limits, moisture content and dry density. We'll also shoot nuclear density readings to establish compaction percentages. We'll core the asphalt and run the samples through lab analysis for density and compaction as well.

We'll turn these as expedites of course and report back ASAP.

**Johnathon Grant**

**National Client Manager**  
**Building & Construction**  
**Intertek-PSI**

Direct 678-354-3018  
Mobile 470-585-6458  
Office 770-424-6200 Ext. 3018  
Email [johnathon.grant@psiusa.com](mailto:johnathon.grant@psiusa.com)  
[www.intertek.com/building](http://www.intertek.com/building)



Intertek-PSI  
95 Chastain Road  
Suite 301  
Kennesaw, GA 30144

**From:** Jack Magnini [<mailto:Jack.Magnini@walmart.com>]

**Sent:** Friday, March 24, 2017 12:01 PM

**To:** Lindsay McBurnett <[Lindsay.Goodwin@walmart.com](mailto:Lindsay.Goodwin@walmart.com)>; Johnathon Grant <[johnathon.grant@psiusa.com](mailto:johnathon.grant@psiusa.com)>

**Subject:** RE: 470-222 Corpus Christi, TX

Jonathon,

This is sort of a priority today. I need someone on site as quickly as possible.

Thank you,



**Jack Magnini**  
**Senior Construction Manager**

**Walmart Realty Construction**  
**TX**  
**Walmart, Sam's Club, and**  
**Neighborhood Markets**  
**Phone: 479.419.0008**  
**Fax: 479.277.2554**  
**[jack.magnini@walmart.com](mailto:jack.magnini@walmart.com)**

Walmart Stores Inc.  
2001 S.E. 10th Street  
Bentonville, AR. 72716  
**Save Money Live Better**

**From:** Lindsay McBurnett  
**Sent:** Friday, March 24, 2017 10:15 AM  
**To:** Johnathon Grant  
**Cc:** Jack Magnini  
**Subject:** 470-222 Corpus Christi, TX  
Johnathon,

I need you to please get in touch with Jack about this project.

He has some testing you need to do.

[Lindsay McBurnett](#) Quality Assurance Manager

Phone 479.204.1269 Mobile 501-412-7479

[Lindsay.Goodwin@walmart.com](mailto:Lindsay.Goodwin@walmart.com)

Walmart Stores, Inc.

2001 SE 10th Street

Bentonville, AR 72716-0550

[Save Money. Live Better.](#)

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April 12, 2017

**Walmart Stores, Inc.**  
2001 S.E. 10<sup>th</sup> Street  
Bentonville, AR 72715

Attn: Mr. Jack Magnini, Senior Construction Manager

Re: Geotechnical Subsurface Soil Investigation  
**Walmart Supercenter (WM 0470-222)**  
**1821 South Padre Island Drive**  
**Corpus Christi, TX 78416**  
PSI Project No. 0325-1014

Dear Mr. Magnini:

On March 24, 2017, one of the outrigger jacks of a large rubber-tired crane broke through the existing concrete sidewalk and penetrated the subgrade soils while the crane operator was maneuvering the crane's boom into position for the lifting of an AC unit onto the roof of the referenced Walmart Supercenter. This letter presents the results of our geotechnical investigation to evaluate the subsurface soil conditions at the site and determine the recommended allowable soil bearing capacity of the near-surface soil as needed by the crane company for the use of large rubber-tired cranes for their crane lift design requirements for future lifting operations at the site. A Site Vicinity Map of the project location is shown on the attached Plate 1.

Field exploration consisted of drilling one (1) 10-foot boring using a truck-mounted drilling rig with continuous-flight augers. The location of the boring was determined by the General Contractor (Better Built Enterprises). The approximate boring location is shown on the Boring Location Map, Plate 2. Continuous sampling of the soils was performed with a split-spoon sampler using applicable ASTM procedures. During the field activities, the encountered subsurface conditions were observed, logged, and visually classified. Field notes were maintained to summarize soil types and descriptions, water levels, changes in subsurface conditions, and drilling conditions. The samples were transport to PSI's laboratory for testing.

The soils encountered in the boring consisted of 3 inches of limestone base course fill underlain by stiff to very stiff, dark grey to tan natural clay soil to the total depth drilled of 10 feet. Laboratory testing consisted of moisture contents (ASTM D2216), Atterberg Limits (ASTM D4318), and percent of silt and clay-sized particles (fines) passing the No. 200 Sieve (ASTM D1140). The clay soil had moisture contents ranging from 24 to 27 percent, Plasticity Indices (PI) of 39 and 44 percent, and 69 percent of fines. Based upon laboratory test results, the clay soil is classified as a Sandy Fat Clay (CH) using the Unified Soil Classification System (ASTM 2487). Standard Penetration Tests (SPT) were performed throughout the boring depth with N-values ranging from 14 to 20 blows per foot. Laboratory test results are presented on the Log of Boring, Plate 3.

Based on the results of our field exploration and laboratory test results, PSI recommends an allowable bearing capacity for the existing clay soils of **2,000 psf**. This design value should be used

by the crane company to determine the size of the outrigger footings and mats required based upon the loads anticipated during crane lifting operations.

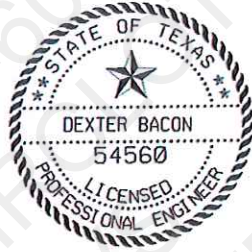
**Closing**

We appreciate the opportunity to offer professional services for this project. If there are any questions, please feel free to contact our Intertek-PSI office.

Respectfully submitted,  
**Intertek-Professional Service Industries, Inc.**



Henry Galindo, P.E.  
Branch Manager



4/12/2017



Dexter Bacon, P.E.  
Chief Engineer

Attachments: Site Vicinity Map, Plate 1  
Boring Location Map, Plate 2  
Log of Boring, Plate 3



WM003997

**psi** Information  
To Build On  
Engineering • Consulting • Testing

810 South Padre Island Drive  
Corpus Christi, Texas 78416-2506  
(361) 854-4801 FAX (361) 854-6049

### Site Vicinity Map

WM 0470-222 Walmart Supercenter  
Corpus Christi, Texas  
PSI Project No.: 0325-1014

NOT TO SCALE  
PLATE 1



WM003998



**psi** Information  
Engineering • Consulting • Testing  
*To Build On*

810 South Padre Island Drive  
Corpus Christi, Texas 78416-2506  
(361) 854-4801 FAX (361) 854-6049

## Boring Location Map

WM 0470-222 Walmart Supercenter  
Corpus Christi, Texas  
PSI Project No.: 0325-1014

NOT TO SCALE  
PLATE 2







# ***Exhibit “D”***

**Subject:** Re: [EXTERNAL] Re: Faircloth v Wal-Mart

**Date:** Saturday, June 22, 2019 at 11:07:45 AM Central Daylight Time

**From:** Rudy Gonzales

**To:** Jaime Drabek, Alex Hilliard

**CC:** Darrell Barger (dbarger@hartlinebarger.com), ASHLEY CEDILLO, Jennifer Garcia, RICARDO BENAVIDES, Willie Ben Daw, II, Faircloth\_HMG, Bob Hilliard, Catherine Hilliard

Jaime, you can call off the search: Walmart has no "current requirement for using a crane on Walmart property" as the Sr. Professional Engineer told us yesterday. She just thought they certainly would have one but nope.

Regarding this earlier e-mail:

" Well Jaime, all I can say is you better do some reading up on acceptable moisture content levels to make sure those support WM's position. If so, please don't have anyone for WM change that position during their depositions.

Ok, now back to the point: you did not produce and you have not produced the letter from Bacon to Magnini dated April 12, 2017. The question is why? If you don't produce it we will have the Court review the issue.

Thanks."

I guess the acceptable moisture content levels issue woke up some Walmart folks because the senior professional engineer for Walmart told us yesterday she just "didn't feel comfortable" talking about it and was instructed by Walmart's lawyer to not answer questions on that topic. We're going to ask the judge to allow Ms. Osterbeek to get out of her comfort zone on that issue.

Please have Walmart complete their "second search" by noon on Monday regarding documents responsive to our RFP's and specifically the letter from Bacon to Magnini dated April 12, 2017 which for some mysterious reason they can't seem to locate.

Thanks.

--

Rudy Gonzales, Jr.  
Board Certified in Personal Injury Trial Law  
Hilliard Martinez Gonzales LLP  
719 S. Shoreline, Ste. 500  
Corpus Christi, Tx. 78401  
361.882.1612  
361.882.3015(fax)  
email: [rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)  
[www.hmglawfirm.com](http://www.hmglawfirm.com) <<http://www.hmglawfirm.com/>>

On 6/21/19, 9:15 AM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)> wrote:

If and when i get it i will send it to you. You didnt ask for it until last night

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>

Date: 6/21/19 9:00 AM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, Rudy Gonzales <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, JENNIFER GARCIA <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>, RICARDO BENAVIDES <[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "WILLIE BEN DAW, III" <[WBDAW@dawray.com](mailto:WBDAW@dawray.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

Jamie,

Please immediately produce the "current requirements for using a crane on Walmart property" as referenced in Oosterbeek's e-mail to Magnini of March 30, 2017 (bates WM002932).

Alex

--

ALEX HILLIARD

HILLIARD MARTINEZ GONZALES LLP

719 S. Shoreline Blvd.

Corpus Christi, Texas 78401

Direct: 361.877.2297

Web: [https://urldefense.proofpoint.com/v2/url?u=http-](https://urldefense.proofpoint.com/v2/url?u=http-3A_hmglawfirm.com&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=x5K3EacNelDgRg0F1Fz5Xmir-DBvDaHg4mFxDfmnnlg&s=GghO2NbnMeIR0IS07rHpxcw0McmKLaGFasOK7Y2f7Vo&e=<https://urldefense.proofpoint.com/v2/url?u=http-3A_hmglawfirm.com_&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=x5K3EacNelDgRg0F1Fz5Xmir-DBvDaHg4mFxDfmnnlg&s=Ea-usOgE2HORysze5e5KQAtIruEPEl6tdqyO5s8_wfQ&e=>)

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On 6/20/19, 6:56 PM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)> wrote:

That is not possible on demand like that. Ive asked. Hopefully in the morning

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Rudy Gonzales <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>

Date: 6/20/19 6:47 PM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>, Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, JENNIFER GARCIA <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>, RICARDO BENAVIDES <[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "WILLIE BEN DAW, III" <[WBDAW@dawray.com](mailto:WBDAW@dawray.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

Produce it electronically tonight please.

--

Rudy Gonzales, Jr.

Board Certified in Personal Injury Trial Law

Hilliard Martinez Gonzales LLP

719 S. Shoreline, Ste. 500

Corpus Christi, Tx. 78401

361.882.1612

361.882.3015(fax)

email: [rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)

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[<https://urldefense.proofpoint.com/v2/url?u=http-](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.hmglawfirm.com_&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=_OokpFxiqQdB82O2g0sXCg2Lj5MEUb_SWxpeJ7zG45M&s=PENLc8fjeSwYzqU99BY3okFEcOKdvPdJUUnGN5dCyX0&e=>)

[3A\\_www.hmglawfirm.com\\_&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=\\_OokpFxiqQdB82O2g0sXCg2Lj5MEUb\\_SWxpeJ7zG45M&s=PENLc8fjeSwYzqU99BY3okFEcOKdvPdJUUnGN5dCyX0&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.hmglawfirm.com_&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=_OokpFxiqQdB82O2g0sXCg2Lj5MEUb_SWxpeJ7zG45M&s=PENLc8fjeSwYzqU99BY3okFEcOKdvPdJUUnGN5dCyX0&e=>)

On 6/20/19, 6:44 PM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)> wrote:

I have asked for a printed version.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Rudy Gonzales <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>

Date: 6/20/19 6:25 PM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>, Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, JENNIFER GARCIA <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>, RICARDO BENAVIDES <[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "WILLIE BEN DAW, III" <[WBDAW@dawray.com](mailto:WBDAW@dawray.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

.....and for tomorrow, will you please ask Walmart to give you the "current requirements for using a crane on

Walmart property" as referenced in Oosterbeek's e-mail to Magnini of March 30, 2017 (bates WM002932).

Thanks.

--

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On 6/20/19, 6:14 PM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)> wrote:

I will ask my client to reinitiate a second search. Fair enough?

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Rudy Gonzales <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>

Date: 6/20/19 5:00 PM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>, Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>, Faircloth\_HMG  
<[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, ASHLEY CEDILLO  
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<[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "WILLIE BEN DAW, III" <[WBDRAW@dawray.com](mailto:WBDRAW@dawray.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

Well Jaime, all I can say is you better do some reading up on acceptable moisture content levels to make sure those support WM's position. If so, please don't have anyone for WM change that position during their depositions.

Ok, now back to the point: you did not produce and you have not produced the letter from Bacon to Magnini dated April 12, 2017. The question is why? If you don't produce it we will have the Court review the issue.

Thanks.

--

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On 6/20/19, 3:22 PM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)> wrote:

I produced every Intertek related document, including emails that i received. It begs credulity to infer that i would withhold a letter like that supports WM's position so thoroughly. If i had it, i would have wrapped a ribbon around it before sending it to you. Geez!

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Rudy Gonzales <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>

Date: 6/20/19 3:08 PM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>, Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, JENNIFER GARCIA <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>, RICARDO BENAVIDES <[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "WILLIE BEN DAW, III" <[WBDRAW@dawray.com](mailto:WBDRAW@dawray.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

Jaime, your explanation really sounds bad to me.

You're thinking, 'well, even though my client didn't produce a document we were supposed to produce a year earlier, we don't need to produce it now because those sneaky plaintiff lawyers subpoenaed the documents from a third party so they already have the documents we were trying to hide'? What kind of legal reasoning is that? Why didn't Walmart's Litigation Support team give these documents to you when they were asked for? Why shouldn't I be concerned about other documents Walmart has not produced? I want Walmart to produce those documents primarily because they are required to under the TRCP and I want to prove they received it. Please

produce.

I'm asking Alex to file a Motion to Compel on your "objections" so that I'm sure we have everything.

So, now that you have established that you're using the wrong search terms to search for relevant documents, what changes has your Litigation Support team made to ensure you're getting everything. If you receive an inadequate response from Walmart I'll be happy to depose the person in charge. By the way, how does Walmart search for Intertek documents and not get Intertek documents?

In short, produce the letter as you're required to do under the Rules and any other documents you have not produced. In the meantime, let's have a hearing on your objections so we can get that out of the way.

Thanks.

--

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[/Users/rudyg/Library/Containers/com.microsoft.Outlook/Data/Library/Caches/Signatures/signature\_663133927]

From: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)>

Date: Thursday, June 20, 2019 at 12:58 PM

To: Rudy Gonzalez <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>, Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>

Cc: "Darrell Barger ([dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com))" <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, Jennifer Garcia <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>, RICARDO BENAVIDES <[RBENAVIDES@dawray.com](mailto:RBENAVIDES@dawray.com)>, "Willie Ben Daw, II" <[wbdaw@dawray.com](mailto:wbdaw@dawray.com)>

Subject: RE: [EXTERNAL] Re: Faircloth v Wal-Mart

This is relatively straightforward and understandable. First, Alex subpoenaed all Intertek documents from the company itself. Second, on May 13th we produced Intertek documents that turned up in a general search by Wal-Mart Litigation Support. We also objected to producing documents from a 3rd party vendor and conducting an ESI search since you already had them under subpoena. On May 14th Alex sent us a partial portion of the docs turned over by Intertek. The letter wasn't in that group of docs. On May 17th Alex sent us the rest of the docs

produced pursuant to his subpoena. The letter was in this group. We had never seen it before. Rather than complain to us that we are hiding things, Alex then went and took the depositions of Felix Ovalle and Dexter Bacon, PE. The letter was marked Exhibit 3 to the Ovalle depo and was used by Alex to conduct direct examinations of these 2 witnesses. The examination of Bacon, who wrote the letter, starts at page 19.

Last week Alex jumped all over us for allegedly failing to provide or hiding the utility site plans to the store when it was originally built. I pointed out that all he had to do was read what we had already sent him. Twice. You can also find it attached to emails produced in response to communications with Tom Richards.

In short, you have the letter and used it. We hid nothing.

Jaime A. Drabek  
Partner

Daw & Ray, L.L.P.

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McAllen, TX 78501

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(956) 686-3188 | fax

[Daw & Ray, L.L.P.]<[https://urldefense.proofpoint.com/v2/url?u=http-3A\\_www.dawray.com\\_&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=YhVslOvP\\_ZuG2EWpTGfzByuwvzxvIBKQ\\_igiOCHfsUU&s=aCn7PRo3onu5vStWdSOTBmLoM6Rma5zJEWdgyrAO1KU&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.dawray.com_&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=YhVslOvP_ZuG2EWpTGfzByuwvzxvIBKQ_igiOCHfsUU&s=aCn7PRo3onu5vStWdSOTBmLoM6Rma5zJEWdgyrAO1KU&e=>)

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From: Rudy Gonzales [<mailto:rudyg@hmglawfirm.com>]

Sent: Thursday, June 20, 2019 12:10 PM

To: Darrell Barger; Alex Hilliard

Cc: JAIME A. DRABEK; Bob Hilliard; Catherine Hilliard; Faircloth\_HMG; Casey Batchelor; ASHLEY CEDILLO;

JENNIFER GARCIA

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

You're right.

So, here is what I would like to know: why did Walmart fail to produce this correspondence in the first place (Letter from PSI to Jack Magnini, Sr. Construction Manager for Walmart) and why have they not produced it even as of this time. That's two questions and I would like for both to be answered separately.....civilly.

In other words, the comment from Jaime that, "Before that we gave you everything we had.", does not appear to be accurate.

Explanation?

--

Rudy Gonzales, Jr.

Board Certified in Personal Injury Trial Law

Hilliard Martinez Gonzales LLP

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From: Darrell Barger <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>

Date: Thursday, June 20, 2019 at 12:04 PM

To: Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)>

Cc: Jaime Drabek <[jdrabek@dawray.com](mailto:jdrabek@dawray.com)>, Bob Hilliard <[bobh@hmglawfirm.com](mailto:bobh@hmglawfirm.com)>, Catherine Hilliard <[catherine@hmglawfirm.com](mailto:catherine@hmglawfirm.com)>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>, Casey Batchelor <[CBatchelor@hartlinebarger.com](mailto:CBatchelor@hartlinebarger.com)>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)>, Jennifer Garcia <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)>

Subject: Re: [EXTERNAL] Re: Faircloth v Wal-Mart

Guys let's get to the bottom of this civilly without accusations.

Darrell L. Barger | Hartline Barger LLP

800 N. Shoreline Blvd., Suite 2000, N Tower | Corpus Christi, TX 78401

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[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)<<mailto:dbarger@hdbdlaw.com>>

| [www.hartlinebarger.com](http://www.hartlinebarger.com)<[https://urldefense.proofpoint.com/v2/url?u=http-3A\\_www.hdbdlaw.com\\_&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=lruPo96pTck\\_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=JghD7QH6xAtojrm0iXrVX3H5Nt-OTauoNKBgH6DyH8&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_www.hdbdlaw.com_&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=lruPo96pTck_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=JghD7QH6xAtojrm0iXrVX3H5Nt-OTauoNKBgH6DyH8&e=>)>

On Jun 20, 2019, at 11:02 AM, Alex Hilliard <[alex@hmgllawfirm.com](mailto:alex@hmgllawfirm.com)<<mailto:alex@hmgllawfirm.com>>>  
wrote:

Jamie,

That is not true. Wal-Mart did not produce to us the letter from PSI to Mr. Magnini dated April 12, 2017 (see attached copy). This document is responsive to Plaintiffs' Third Set of Request for Production Nos. 30, 34, 45, and 51.

So, Wal-Mart is hiding relevant discoverable documents.

Again, we are asking that you produce all relevant documents in the next 10 minutes so we can avoid court intervention in what obviously is discovery abuse.

Alex

--

ALEX HILLIARD

HILLIARD MARTINEZ GONZALES LLP

719 S. Shoreline Blvd.

Corpus Christi, Texas 78401

Direct: 361.877.2297

Web: [https://urldefense.proofpoint.com/v2/url?u=http-3A\\_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=G4N\\_EznL21eGnWRnFy7bLGqNnylxqa1YS5FsQnQFSIE&s=TPmXUzswUJ4uShZNE32WNWnjo9ydu4clO9xGOQkCvg&e=<https://urldefense.proofpoint.com/v2/url?u=http-3A\\_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=lruPo96pTck\\_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=Gg7Bs8A6fcUb-6xn9qkkpRQHInILZODCa\\_SRubKKOXU&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=G4N_EznL21eGnWRnFy7bLGqNnylxqa1YS5FsQnQFSIE&s=TPmXUzswUJ4uShZNE32WNWnjo9ydu4clO9xGOQkCvg&e=<https://urldefense.proofpoint.com/v2/url?u=http-3A_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=lruPo96pTck_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=Gg7Bs8A6fcUb-6xn9qkkpRQHInILZODCa_SRubKKOXU&e=>)

[https://urldefense.proofpoint.com/v2/url?u=http-3A\\_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=G4N\\_EznL21eGnWRnFy7bLGqNnylxqa1YS5FsQnQFSIE&s=TPmXUzswUJ4uShZNE32WNWnjo9ydu4clO9xGOQkCvg&e=<https://urldefense.proofpoint.com/v2/url?u=http-3A\\_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_CdpgnVfiiMM&r=dStXofYZajeid\\_xCbEO28HzuU3\\_eervynERjGJPwdD8&m=lruPo96pTck\\_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=Gg7Bs8A6fcUb-6xn9qkkpRQHInILZODCa\\_SRubKKOXU&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=G4N_EznL21eGnWRnFy7bLGqNnylxqa1YS5FsQnQFSIE&s=TPmXUzswUJ4uShZNE32WNWnjo9ydu4clO9xGOQkCvg&e=<https://urldefense.proofpoint.com/v2/url?u=http-3A_hmgllawfirm.com&d=DwMGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=dStXofYZajeid_xCbEO28HzuU3_eervynERjGJPwdD8&m=lruPo96pTck_K--xvFyEhBcR4RMh11Mv5JrpDbmdeH4&s=Gg7Bs8A6fcUb-6xn9qkkpRQHInILZODCa_SRubKKOXU&e=>)

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On 6/20/19, 10:52 AM, "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)<<mailto:JDRABEK@dawray.com>>>  
wrote:

I have no idea what you are talking about. You served a subpoena on Intertek for all their docs on this project and then you took their depositions. Before that we gave you everything we had. We are not hiding a thing.

Sent from my Verizon Samsung Galaxy smartphone

sent from my verizon, samsung galaxy smartphone

----- Original message -----

From: Alex Hilliard <[alex@hmglawfirm.com](mailto:alex@hmglawfirm.com)<<mailto:alex@hmglawfirm.com>>>

Date: 6/20/19 10:01 AM (GMT-06:00)

To: "JAIME A. DRABEK" <[JDRABEK@dawray.com](mailto:JDRABEK@dawray.com)<<mailto:JDRABEK@dawray.com>>>

Cc: [dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)<<mailto:dbarger@hartlinebarger.com>>, Bob Hilliard <[bobh@hmglawfirm.com](mailto:bobh@hmglawfirm.com)<<mailto:bobh@hmglawfirm.com>>>, Catherine Hilliard <[catherine@hmglawfirm.com](mailto:catherine@hmglawfirm.com)<<mailto:catherine@hmglawfirm.com>>>, Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)<[mailto:Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>>, CBatchelor@hartlinebarger.com<<mailto:CBatchelor@hartlinebarger.com>>, ASHLEY CEDILLO <[ACEDILLO@dawray.com](mailto:ACEDILLO@dawray.com)<<mailto:ACEDILLO@dawray.com>>>, JENNIFER GARCIA <[jgarcia@dawray.com](mailto:jgarcia@dawray.com)<<mailto:jgarcia@dawray.com>>>

Subject: Faircloth v Wal-Mart

Jamie,

It is apparent to us that Wal-Mart has intentionally failed to produce discoverable documents from Intertek-P.S.I. It is our belief that this failure is an abuse of discovery. Given the important depositions that are schedule tomorrow and Monday we are asking that by noon today you fully and completely comply with our request for production of documents and specifically Intertek-P.S.I. documents.

Thanks,

Alex

--

ALEX HILLIARD

HILLIARD MARTINEZ GONZALES LLP

719 S. Shoreline Blvd.

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Direct: 361.877.2297

Web:

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<Walmart Subsurface Soil Investigation Letter.pdf>



# ***Exhibit “E”***

CAUSE NO. 2018CCV-60016-4

ROBERT FAIRCLOTH AND ) IN THE DISTRICT COURT  
 SHERRY LYNN FAIRCLOTH )  
 )  
 )  
 VS. ) AT LAW NUMBER 4  
 )  
 )  
 WAL-MART STORES TEXAS, )  
 LLC, BETTER BUILT )  
 ENTERPRISES, INC., AND )  
 A/C TECHNICAL SERVICES, )  
 LLC ) NUECES COUNTY, TEXAS

\*\*\*\*\*

ORAL AND VIDEOTAPED DEPOSITION OF JACK MAGNINI

SEPTEMBER 28, 2019

Volume 2

\*\*\*\*\*

ORAL AND VIDEOTAPED DEPOSITION OF JACK MAGNINI,  
 produced as a witness at the instance of the Plaintiffs  
 and duly sworn, was taken in the above-styled and  
 numbered cause on the 28th day of September, 2019, from  
 9:40 a.m. to 4:28 p.m., before Misty Fondren Clements,  
 CSR in and for the State of Texas, reported by machine  
 shorthand, at the Law Offices of Hartline, Dacus, Barger  
 & Dreyer, LLP, 800 N. Shoreline Boulevard, Suite 2000,  
 Corpus Christi, Texas 78401, pursuant to the Texas Rules  
 of Civil Procedure and/or the provisions stated on the  
 record or attached hereto.

1           A. I don't recall having it.

2           Q. So it's your testimony to the jury that this  
3 exhibit --

4                       MR. GONZALES: Have we marked it, Alex?  
5 April 12th?

6                       MR. HILLIARD: I thought it was an exhibit  
7 from the previous deposition.

8                       MR. GONZALES: Let's mark it for this one  
9 also just so we -- what number are we on?

10                      THE REPORTER: 11.

11                      MR. GONZALES: 11.

12                               (Exhibit No. 11 marked.)

13           Q. (By Mr. Gonzales) Your testimony to the jury,  
14 Mr. Magnini, is you do not recall receiving this letter,  
15 Exhibit Number 11, by email transmission to you from  
16 Intertek, dated April the 12th, 2017?

17           A. That is correct. I could not find it in my  
18 email response.

19           Q. And -- and why do -- and why do you think you  
20 would not be able to find it?

21           A. It may not have ever come to me or it may have  
22 accidentally been deleted. I don't know.

23           Q. There is references that you received it by  
24 email.

25           A. Okay.

1 Q. And the email address on the -- on the -- on  
2 the email is correct, at least it says, "Jack Magnini."  
3 It's in a -- in a series. Is it possible you deleted  
4 this email?

5 A. It would have been by accident because I rarely  
6 delete anything.

7 Q. Okay. So let's go back to this. So -- so did  
8 you ever -- is it your testimony that even though you  
9 gave permission for Intertek to conduct the testing  
10 behind the store that they never did it? Is that your  
11 testimony?

12 A. No. I don't know if they ever did -- I assume  
13 they didn't because I don't have a report on it.

14 Q. And did you ever ask them why they did not do  
15 it?

16 A. I did not.

17 Q. And why didn't you ask them why they did not do  
18 it?

19 A. That was one detail in a lot. There's  
20 probably -- it fell through the cracks.

21 Q. Could it be that the reason you didn't ask is  
22 because Wal-Mart didn't want to pay for it?

23 A. No. That would never be the reason. It was --  
24 I would assume that they had the information and because  
25 the crane sat up somewhere else and finished the job, I



1 occurred.

2 Certified to by me this \_\_\_\_\_ of

3 \_\_\_\_\_, 2019.

4

5

6

*Misty Sandren Clements*



Misty Sandren Clements  
Texas CSR No. 4026  
Expiration Date: 12-31-19  
Infinity Reporting Group, LLC  
Firm Registration No. 782  
11251 Richmond Ave, Suite F100A  
Houston, Texas 77082  
(832) 930-4484

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# ***Exhibit “F”***

**Subject:** Re: Faircloth v. Walmart et. al.  
**Date:** Friday, September 27, 2019 at 7:05:44 AM Central Daylight Time  
**From:** Rudy Gonzales  
**To:** Jaime Drabek, Darrell Barger  
**CC:** Faircloth\_HMG, Bob Hilliard, Catherine Hilliard  
**Attachments:** image003.png, image004.png, image005.png

Ok, thank you. What is the reason Walmart did not produce her e mail?

Pleas advise if you are agreeing to our forensic examination?

Rudy Gonzales, Jr.  
Board Certified in Personal Injury Trial Law  
Hilliard Martinez Gonzales LLP  
719 S. Shoreline, Ste. 500  
Corpus Christi, Tx. 78401  
361.882.1612  
361.882.3015(fax)  
email: rudyg@hmglawfirm.com  
www.hmglawfirm.com

---

**From:** JAIME A. DRABEK <JDRABEK@dawray.com>  
**Sent:** Thursday, September 26, 2019 4:21:59 PM  
**To:** Rudy Gonzales <rudyg@hmglawfirm.com>; Darrell Barger <dbarger@hartlinebarger.com>  
**Cc:** Faircloth\_HMG <Faircloth\_HMG@hmglawfirm.com>; Bob Hilliard <bobh@hmglawfirm.com>; Catherine Hilliard <catherine@hmglawfirm.com>  
**Subject:** RE: Faircloth v. Walmart et. al.

Lindsay still had the emails and the April 12<sup>th</sup> letter. We are supplementing momentarily.

**Jaime A. Drabek**  
*Partner*  
Daw & Ray, L.L.P.  
3900 N. 10th Street | Suite 950  
McAllen, TX 78501  
(956) 687-3121 | phone  
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---

**From:** Rudy Gonzales [mailto:[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)]  
**Sent:** Wednesday, September 25, 2019 9:01 AM  
**To:** JAIME A. DRABEK; Darrell Barger  
**Cc:** Faircloth\_HMG; Bob Hilliard; Catherine Hilliard  
**Subject:** Re: Faircloth v. Walmart et. al.

Jaime, we need to take the deposition of Lindsay McBurnett. As you know, she also received the April 12, 2017 geotechnical investigation report. We want to know if she also deleted the Grant e-mail of April 13, 2017 at 7:58 am and perhaps a few other areas of inquiry.

Please provide dates asap.

Thanks.

--

**Rudy Gonzales, Jr.**  
*Board Certified in Personal Injury Trial Law*  
Hilliard Martinez Gonzales LLP  
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361.882.3015(fax)  
email: [rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)  
[www.hmglawfirm.com](http://www.hmglawfirm.com)



---

**From:** Rudy Gonzalez <[rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)>  
**Date:** Tuesday, September 24, 2019 at 2:10 PM  
**To:** Jaime Drabek <[jdabek@dawray.com](mailto:jdabek@dawray.com)>, Darrell Barger <[dbarger@hartlinebarger.com](mailto:dbarger@hartlinebarger.com)>  
**Cc:** Faircloth\_HMG <[Faircloth\\_HMG@hmglawfirm.com](mailto:Faircloth_HMG@hmglawfirm.com)>, Bob Hilliard <[bobh@hmglawfirm.com](mailto:bobh@hmglawfirm.com)>, Catherine Hilliard <[catherine@hmglawfirm.com](mailto:catherine@hmglawfirm.com)>  
**Subject:** Faircloth v. Walmart et. al.

Jaime, yesterday Mr. Magnini testified that he may have “accidentally” deleted the April 13, 2017 (7:58 AM) e-mail from Jonathan Grant (Intertek/PSI) to Jack Magnini and Lindsay McBurnett. This e-mail attached the April

12, 2017 geotechnical investigation report for the relevant boring. In e-mails between you and I and Alex, you have assured us that these documents do not exist in Walmart's possession. Only yesterday did we find out that your corporate representative believes he may have deleted this critical evidence in this case. Further, in the e-mail from Grant he also stated that "We will include this report in our update to workspace as well". Of course, Walmart would have searched their Evoco workspace system as well when searching for this evidence.

Jaime, before asking the Court to order Walmart to allow us to conduct forensic examinations of both Magnini's and Walmart's computers and integrated workplace management system (Evoco) we are first asking Walmart to voluntarily agree to this examination. We want information on when Magnini deleted this e-mail, and any others related to this case and responsive to our discovery requests as well as the Evoco system since Mr. Grant said he would have uploaded the report to that system.

Please let us know by noon tomorrow whether you will voluntarily allow this forensic examination. As you must know, this matter is of critical importance since it could involve the possible spoliation of evidence by your client and thus requires careful examination and review before we seek Court involvement. Your prompt reply would be appreciated.

Thanks.

--

**Rudy Gonzales, Jr.**

*Board Certified in Personal Injury Trial Law*

Hilliard Martinez Gonzales LLP

719 S. Shoreline, Ste. 500

Corpus Christi, Tx. 78401

361.882.1612

361.882.3015(fax)

email: [rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)

[www.hmglawfirm.com](http://www.hmglawfirm.com)



# ***Exhibit “G”***

**Subject:** FW: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart  
**Date:** Monday, October 21, 2019 at 7:17:57 AM Central Daylight Time  
**From:** Rudy Gonzales  
**To:** Jessi Pritchett, Lauren Gonzales, Brenda Silva  
**Attachments:** image001.png, image002.png, image003.png, image004.png, image005.png, image006.png, image007.png

--

**Rudy Gonzales, Jr.**

*Board Certified in Personal Injury Trial Law*

Hilliard Martinez Gonzales LLP

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Corpus Christi, Tx. 78401

361.882.1612

361.882.3015(fax)

email: [rudyg@hmglawfirm.com](mailto:rudyg@hmglawfirm.com)

[www.hmglawfirm.com](http://www.hmglawfirm.com)



---

**From:** "JAIME A. DRABEK" <JDRABEK@dawray.com>

**Date:** Wednesday, September 4, 2019 at 10:51 AM

**To:** Rudy Gonzalez <rudyg@hmglawfirm.com>, Alex Hilliard <alex@hmglawfirm.com>

**Cc:** Darrell Barger <dbarger@hdbdlaw.com>, ASHLEY CEDILLO <ACEDILLO@dawray.com>, Bob Hilliard <bobh@hmglawfirm.com>

**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

At your request I had WM initiate another search for any agreements with PSI Intertek. Much to my surprise (and I now stand corrected) there does exist a Master Agreement for Construction Materials Testing Services. So, we will be supplementing with this agreement today as soon as we can Bate Stamp it and watermark it.

**Jaime A. Drabek**

*Partner*

Daw & Ray, L.L.P.

3900 N. 10th Street | Suite 950

McAllen, TX 78501

(956) 687-3121 | phone

(956) 686-3188 | fax



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---

**From:** JAIME A. DRABEK  
**Sent:** Thursday, August 29, 2019 9:34 AM  
**To:** 'Rudy Gonzales'; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

The communication is garbled on your end. First you demand the "Agreement of Services" with deadlines and threats to cancel an already scheduled and agreed to deposition. When you finally understood that there is no such creature, you began demanding other documents for services performed by PSI I don't even recognize. Then you cancel Magnini's deposition. Then this morning you have a change of heart and say let's depose him this afternoon. Or Friday. This is crazy.

I said I would look into your claims and I will. We will produce Magnini on an agreed upon date so you can complete the deposition but this time it will be in Arkansas.

**Jaime A. Drabek**  
*Partner*

Daw & Ray, L.L.P.  
3900 N. 10th Street | Suite 950  
McAllen, TX 78501  
(956) 687-3121 | phone  
(956) 686-3188 | fax



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---

**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]  
**Sent:** Thursday, August 29, 2019 9:27 AM  
**To:** JAIME A. DRABEK; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jaime, somehow we're not communicating. I'm asking that by noon today you produce the documents we have requested.

Let me know if you will do so.

Thanks.

Get [Outlook for iOS](#)



---

**From:** JAIME A. DRABEK <JDRABEK@dawray.com>  
**Sent:** Thursday, August 29, 2019 9:21:41 AM  
**To:** Rudy Gonzales <rudyg@hmglawfirm.com>; Alex Hilliard <alex@hmglawfirm.com>  
**Cc:** Darrell Barger <dbarger@hdbdlaw.com>; ASHLEY CEDILLO <ACEDILLO@dawray.com>; Bob Hilliard <bobh@hmglawfirm.com>  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Mr. Magnini was on the first plane out of CC this morning. I said I would look into it and I will. You can also ask Galindo about your issue with this on the 12<sup>th</sup>.

**Jaime A. Drabek**

*Partner*

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3900 N. 10th Street | Suite 950  
McAllen, TX 78501  
(956) 687-3121 | phone  
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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]  
**Sent:** Thursday, August 29, 2019 8:08 AM  
**To:** JAIME A. DRABEK; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jamie, if you can get me the documents by this morning we can take Magnani this afternoon assuming that better built can get here. We can also depose him tomorrow after our hearing. Do you have the documents?

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**From:** JAIME A. DRABEK <jdrabek@dawray.com>  
**Sent:** Wednesday, August 28, 2019 4:10 PM  
**To:** Rudy Gonzales; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

I don't know what you are talking about. Nevertheless, I will go back and look AGAIN. The only soil testing done by PSI of which I am aware was the rack house and after the crane accident. If there are other docs, why didn't you question PSI about it when you had them under oath 3 months ago?

**Jaime A. Drabek**

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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]  
**Sent:** Wednesday, August 28, 2019 4:07 PM  
**To:** JAIME A. DRABEK; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jamie, why aren't you focusing on getting me the documents that you owe and have owed for all this time! Where is the proposal and task documents for the rack work? You said Walmart has thwm, where are they? Produce them. Also produce the task and proposal documents for the lift conducted at the back of the store to lift the rest of the RTU's to the roof. This soil testing work was requested by Better Built according to PSI.

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**From:** JAIME A. DRABEK <jdrabek@dawray.com>  
**Sent:** Wednesday, August 28, 2019 4:02 PM  
**To:** Rudy Gonzales; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

So, let me see if I understand this:

1. This is a date you insisted upon and we said, "ok".
2. Mr. Magnini arrives in Corpus Christi after 4 pm this evening to comply with your request.
3. This date was agreed upon and noticed August 23<sup>rd</sup>.
4. Mr. Magnini rearranged his entire schedule to accommodate you.
5. At no time before 11:25 a.m. today did you make the demand for a document, the production of which is contingent upon the deposition going forward.
6. As I have tried to explain repeatedly, there is no global agreement between PSI and WM with regard to the #470 remodel. It was tasked based and you have those documents.
7. Ovalle and Bacon were deposed on May 29<sup>th</sup>. PSI responded to your subpoena before that. Did you ask them about the alleged existence of such a document? No.

This is all incredibly unfair to Mr. Magnini. I realize you may not care but it bears pointing out.

**Jaime A. Drabek**

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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]  
**Sent:** Wednesday, August 28, 2019 3:34 PM  
**To:** JAIME A. DRABEK; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Wrong.

The deposition for tomorrow is cancelled.

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**From:** JAIME A. DRABEK <jdrabek@dawray.com>  
**Sent:** Wednesday, August 28, 2019 3:27 PM  
**To:** Rudy Gonzales; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Rudy – both PSI and WM have produced every document they had in their respective possessions relative to this remodel and their interaction. There are no others.

**Jaime A. Drabek**

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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]  
**Sent:** Wednesday, August 28, 2019 3:23 PM  
**To:** JAIME A. DRABEK; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Ok, produce all documents related to all “tasks” performed by PSI including the “proposal” before and after the accident related to the remodel.

Let me have those docs by 4:30. Thanks.

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**From:** JAIME A. DRABEK <jdrabek@dawray.com>  
**Sent:** Wednesday, August 28, 2019 2:37 PM  
**To:** Rudy Gonzales; Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

What he is referring to is by task, not some global agreement that covers everything. Each task had a proposal. Each proposal contained the conditions under which they would operate to perform that task. The scope of work is specified in each proposal for each task. PSI doesn't have any global agreement for store 470 nor does WM.

If this was a concern of yours why wasn't it explored in the Ovalle/Bacon depositions or complained about when PSI produced its documents pursuant to your subpoena?

**Jaime A. Drabek**

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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]

**Sent:** Wednesday, August 28, 2019 2:20 PM

**To:** JAIME A. DRABEK; Alex Hilliard

**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard

**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jaime, one of us is very confused (and I'll leave open a slight possibility that it's me). Some type of written document had to control the relationship between Walmart and PSI BEFORE the accident on work performed by PSI on the remodel job, whether it's a general document or a specific one. . What and where are those documents? Please refer to them by a complete date including month, day and year ( and bates number).

AFTER the accident of March 23, 2017, by letter dated July 12,2017, Galindo said, "PSI was requested to perform construction materials and testing services for the above referenced project by Better Built Enterprises from January 27 to June 2, 2017". He also stated: ".....PSI certifies that our services were performed in accordance with our "Agreement for Services"....".

So, PSI was on this project long before the accident. Where are the documents that specified their scope of work? Please provide now if you want the deposition to go forward tomorrow. I do, but I must have those documents.

Thanks.

--

**Rudy Gonzales, Jr.**

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---

**From:** "JAIME A. DRABEK" <JDRABEK@dawray.com>

**Date:** Wednesday, August 28, 2019 at 1:41 PM

**To:** Rudy Gonzalez <rudyg@hmglawfirm.com>, Alex Hilliard <alex@hmglawfirm.com>

**Cc:** Darrell Barger <dbarger@hdbdlaw.com>, ASHLEY CEDILLO <ACEDILLO@dawray.com>, Bob Hilliard <bobh@hmglawfirm.com>

**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

First of all, there is no evidence that PSI was hired for the entire remodel job. They performed isolated tasks. Second, neither PSI nor WM has any such agreement covering the entire project. If there was one, as I stated before, I would produce it. This is not new construction. The "agreement of services" referred to in the June 12<sup>th</sup> letter is Galindo's proposal of March 28<sup>th</sup>.

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**From:** Rudy Gonzales [mailto:rudyg@hmglawfirm.com]

**Sent:** Wednesday, August 28, 2019 1:36 PM

**To:** JAIME A. DRABEK; Alex Hilliard

**Cc:** Darrell Barger; ASHLEY CEDILLO; Bob Hilliard

**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jamie, PSI was the geotechnical engineers hired by Walmart for the remodel job. Where is their "Agreement of Services" as referred to in PSI's letter of June 12, 2017? This really is not difficult stuff.

--

**Rudy Gonzales, Jr.**

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---

**From:** "JAIME A. DRABEK" <JDRABEK@dawray.com>

**Date:** Wednesday, August 28, 2019 at 1:30 PM

**To:** Alex Hilliard <alex@hmglawfirm.com>

**Cc:** Darrell Barger <dbarger@hdbdlaw.com>, ASHLEY CEDILLO <ACEDILLO@dawray.com>, Rudy Gonzalez <rudyg@hmglawfirm.com>, Bob Hilliard <bobh@hmglawfirm.com>

**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

I have seen such a letter nor has PSI Intertek produced one either. This vendor was used on the rack house and the post-accident thing. That's all I know about.

**Jaime A. Drabek**

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**From:** Alex Hilliard [mailto:alex@hmglawfirm.com]  
**Sent:** Wednesday, August 28, 2019 1:21 PM  
**To:** JAIME A. DRABEK  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Rudy Gonzales; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

No - you are talking about a letter that is only related to the investigation after the crane incident. I'm talking about the proposal letter outlining the scope of services PSI will provide for this remodel project.

We need that letter.

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**From:** JAIME A. DRABEK <JDRABEK@dawray.com>  
**Sent:** Wednesday, August 28, 2019 12:45 PM  
**To:** Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Rudy Gonzales; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

PSI Intertek produced the proposal letter in response to your subpoena. That's how we got it. WM does not have it otherwise we would have produced it long ago.

**Jaime A. Drabek**

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**From:** Alex Hilliard [mailto:alex@hmgllawfirm.com]  
**Sent:** Wednesday, August 28, 2019 12:41 PM  
**To:** JAIME A. DRABEK  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Rudy Gonzales; Bob Hilliard  
**Subject:** Re: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Exactly so please produce the PSI proposal letter for this remodel project.

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---

**From:** JAIME A. DRABEK <JDRABEK@dawray.com>  
**Sent:** Wednesday, August 28, 2019 12:13 PM  
**To:** Alex Hilliard  
**Cc:** Darrell Barger; ASHLEY CEDILLO; Rudy Gonzales; Bob Hilliard  
**Subject:** RE: Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Mr. Magnini is already in route. There is no document labeled "Agreement of Services". What happens is that a "proposal letter" would include the project understanding, scope of services, field exploration, lab testing, schedule and general conditions. This is what PSI Intertek considers an "Agreement of Services". The "proposal for subsurface soil investigations" letter was created and printed on March 28, 2017 by Henry Galindo. If you don't believe me, call PSI yourself to verify. It is too late to be calling off this deposition.

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**From:** Alex Hilliard [mailto:alex@hmgllawfirm.com]

**Sent:** Wednesday, August 28, 2019 11:25 AM

**To:** JAIME A. DRABEK

**Cc:** Darrell Barger; ASHLEY CEDILLO; Rudy Gonzales; Bob Hilliard

**Subject:** Faircloth - Need the "Agreement for Services" between PSI and Wal-Mart

Jamie,

In the attached PSI Letter of July 12, 2017, there is a reference to the "Agreement for Services" between PSI and Wal-Mart. Can you produce this document today? Rudy has advised that we will need to postpone the deposition of Magnini if this document is not produced prior to deposition.

Thanks,

Alex

--

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