SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
--X
THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Index No. ______________

Petitioner,

-against-

DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, DOMINO'S PIZZA FRANCHISING, LLC, ANTHONY MAESTRI, HI-RISE PIZZA, INC., HUDSON RIVER PIZZA, LLC, UPPER WEST HARLEM PIZZA, INC., NORTH BEDFORD AVENUE PIZZA, INC., UPTOWN PIZZA, INC., NORTHERN WESTCHESTER PIZZA, LLC, SHUEB AHMED, NADER INC., SUPER DUPER PIZZA INC., MATTHEW J. DENMAN, and DENMAN ENTERPRISES, INC.,

Respondents.
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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

The People of the State of New York, through the Office of the Attorney General (the "OAG") bring this special proceeding to seek redress for and to stop widespread and systematic violations of the New York Labor Law by Domino's Pizza LLC ("Domino's") and three of its franchisees (the "Franchisee Respondents" or the "Three Franchisees") that currently collectively operate seven Domino's stores, and previously operated ten. Domino's is the largest pizza delivery company in the United States, and it retained and exercised the authority to actively manage employee relations at the Three Franchisees, playing a key role in hiring, discipline, recordkeeping, and other employer functions. Yet all the while, the hardworking people who deliver the pizzas — the linchpin of the company's business — were being underpaid, in large part because Domino's encouraged franchisees to rely on Domino's own software system that, among other things, generated payroll reports that systematically under-calculated gross wages owed under law.

The Franchisee Respondents, as the workers' front-line employers, are liable for the numerous violations they committed at their ten stores. The indisputable facts show the Franchisee Respondents failed to pay their delivery workers the legal minimum wage and overtime rates; failed to pay additional wages that were legally required when these workers worked beyond a ten-hour shift; and/or failed to reimburse them for job-related delivery expenses. The Three Franchisees owe over $567,000 in back wages and underpayments to their workers, plus liquidated damages and interest.

Along with the Franchisee Respondents, Domino's is also liable as an employer because of its unusually high level of control over employee conditions at its franchisee stores and its role in causing the wage violations. Under settled New York Labor Law precedent, employees can have more than one legal employer when each of the joint employers exerts sufficient control over the employees and their work conditions. To make that determination, courts evaluate the "economic realities" of the employer's level of control, examining whether the putative joint employer (1) had the power to hire, discipline, and fire workers; (2) controlled work schedules and conditions of employment; (3) affected wages or the rate of pay; or (4) maintained employment records. Courts also may examine a number of "functional" factors, beyond explicit control, that address the economic realities of the employment relationship in practice; for example, the extent to which the putative employer supervises employees' work performance, and whether the work is a key, integral aspect of the putative joint employer's business. Importantly, to be held jointly liable, an employer need not actually exert such control; the ability to exert such control is sufficient to support a finding of joint employment. Lastly, and particularly relevant to the facts here, the extent to which a putative employer's acts and omissions caused the Labor Law violations is highly probative of joint employer liability.

All of these factors are present in this case, indisputably demonstrating that with respect to the Franchisee Respondents, Domino's has converted itself into a joint employer responsible for their violations of the Labor Law. Evidence from the OAG's investigations of the Three Franchisees, as well as from its investigation of twelve other Domino's franchisees who have already settled cases with the OAG (the "Settling Franchisees"), shows that Domino's was directly responsible for significant Labor Law violations committed by the Franchisee Respondents. Domino's knew since at least 2010 that the online software system it has required all franchisees to use (known as PULSE) under-calculated gross wages in at least four ways, and yet it encouraged franchisees, including the Three Franchisees, to use a "Payroll Report" function in PULSE that calculated gross wages, without advising franchisees in any meaningful way that these calculations were not in compliance with applicable legal requirements. As a direct result of Domino's conduct, the Three Franchisees underpaid hundreds of workers by many thousands of dollars.

The evidence goes further, demonstrating Domino's key role in many aspects of franchisees' operations, and control over critical areas of operations and employee relations. Among other examples,

- Domino's has required a franchisee to hire a manager (and supplied the candidate ultimately hired).

- Domino's has required franchisees to discipline employees, report back on that discipline, and terminate employees.

- Domino's representatives inspect stores in person several times a year, often unannounced and without the franchisee present. In such visits, Domino's representatives have given orders directly to employees at a franchisee's store, with one representative stating bluntly, "I'm your boss."

- Domino's has obliged franchisees purchasing corporate stores to keep a substantial number of <u>Domino's</u> own prior employees, with substantially similar jobs and substantially similar wages and benefits in the same or similarly located stores.

- Domino's mandates that its franchisees, use one of four background check agencies selected by Domino's when hiring employees; Domino's sets the criteria such agencies must use; and Domino's requires the agencies to produce a "yes/no" answer regarding the applicant's employability, thereby usurping franchisees' ability to make their own hiring decisions.

- When franchisees report union activity to the company, Domino's imposes its own view of management-employee relations on its franchisees by providing "union avoidance" literature to the franchisees and has sent Domino's officials on site to thwart any such organizing campaign.

- A franchisee's decision not to bend to Domino's will could have and has had serious consequences, because Domino's possesses and not infrequently uses the power to issue a "default" and ultimately to terminate a franchise agreement.

- Domino's possesses contemporaneous time records for all franchisee employees, not only the legally required time records showing hours worked, but more detailed records showing each employee's minute-by-minute actions each day, through the PULSE system, to which Domino's requires that it be given 24/7 access.

This action does not seek to upend the franchise business model in which franchisors enter into contracts which allow the franchisor to protect the franchisor's trademarks and intellectual property. That model is consistent with franchisees independently controlling their employees, which is why in a number of cases, courts have refrained from holding a franchisor jointly liable for a franchisee's wage-and-hour violations. However, in this case, while Domino's purports to disclaim control over the employees at franchisee stores, Domino's has the power to assert, and has asserted, significant control affecting employment conditions at its franchisees' restaurants. In practice, this power, and Domino's assertion of control over franchisees' employment relationships, including its causation of Labor Law violations through PULSE, goes beyond the facts identified in many court decisions that have addressed the franchisor/franchisee relationship in wage-and-hour cases.

Indeed, the Three Franchisees are not outliers and are not unrepresentative of Domino's franchisees statewide; rather, they are among the majority of Domino's franchisees in New York who have not complied with the most basic labor laws protecting the most vulnerable workers. Documents which Domino's produced from its PULSE system containing franchisee-reported wage rates statewide for a nearly two-year period — information readily and continuously available to Domino's — showed that over 78% of franchisees in New York State listed instances where wage rates fell below the lowest possible state minimum wage and showed that over 85% of franchisees listed instances where wage rates fell below the lowest possible overtime wage for delivery workers during that time period.

The unique facts in this case thus compel the finding that Domino's is a joint employer with the Franchisee Respondents, a finding consistent with the broad remedial purposes of New York's Labor Law. See infra Section I.

In addition to New York Labor Law infractions described above, Domino's failure to advise franchisees in any affirmative way of — or to remedy — known flaws in the PULSE system violates the anti-fraud provision of New York Executive Law Section 63(12). Domino's actions and inaction with respect to its mandatory PULSE software system affirmatively misled franchisees to rely on a flawed payroll reporting system resulting in franchisees violating the New York Labor Law. See infra Section II. Such facts also demonstrate that Domino's violated New York's Franchise Sales Act and its anti-fraud provision (General Business Law §687), as Domino's made material misstatements and omitted material facts about the PULSE software system in the financial disclosure documents that franchisors are legally required to provide to prospective franchisees. See infra Section III. Domino's misrepresentations about PULSE and its failure to remedy or disclose PULSE's flaws harmed underpaid workers in New York and exposed franchisees to substantial liability, including in some cases lawsuits or government investigations. When a sophisticated company like Domino's fails to remedy or disclose software flaws — known to it for years — that harm multitudes of people, that company must be held responsible.

In this special proceeding, the Court will find that the documentary evidence and testimony provided to the OAG by Domino's, the Franchisee Respondents and others are indisputable. The Court, accordingly, should grant the OAG's Petition and issue an Order which, among other things, (a) requires that Domino's remedy the PULSE flaws and notify franchisees in writing of PULSE's flaws and limitations, barring the use of that system until these remedies are in place; (b) awards restitution from Domino's for underpayments to workers due to the PULSE flaws; (c) directs disgorgement of monies paid by franchisees to Domino's for its defective software; (d) enjoins all Respondents from continued violations of the law, including the New York Labor Law and Franchise Sales Act; (c) finds Domino's and the Franchisee Respondents jointly and severally liable for restitution and damages to their employees; (d) requires all Respondents to implement comprehensive policies and practices to assure ongoing compliance, such as appointing an independent monitor; (e) directs an accounting by Domino's and the Franchisee Respondents of all underpayments to franchise employees; (f) finds that Domino's FDD is materially misleading concerning the use of PULSE, orders corrective disclosure, and enjoins the issuance of its FDD until corrective disclosure is made; (g) awards liquidated damages, prejudgment interest, and the OAG's attorneys' fees and costs; and (h) grants such other relief as the Court may deem just and proper. <u>See</u> <u>infra</u> Section IV.

PARTIES AND JURISDICTION

Petitioner Eric T. Schneiderman is the Attorney General of the State of New York. The OAG has authority under New York Executive Law Section 63(12) to bring this special proceeding for violations of the New York Labor Law, Chapter 31 of the Consolidated Laws of New York (McKinney's 2015) and the rules and regulations promulgated thereunder ("Labor Law") and for fraud.

Respondent Domino's Pizza, Inc. ("DPI") is a Delaware corporation with its headquarters in Michigan. According to its 2015 Annual Report on Form 10-K filed with the Securities and Exchange Commission on or about February 25, 2016, DPI is "the second largest pizza company in the world" and is "the number one pizza delivery company in the United States with a 28% share of pizza delivery based on reported consumer spending." Gerstein Aff. ¶5; Ex. 1 (2015 Form 10-K, at 7).[1] DPI operates through wholly owned subsidiaries, including Respondent

[1] References herein to "Gerstein Aff." refer to the Affirmation of Terri Gerstein in Support of Verified Petition, sworn to by Assistant Attorney General Terri Gerstein, dated May 23, 2016, filed contemporaneously with this Memorandum of Law. References to "Ex. __" refer to the individual exhibits cited in the Gerstein Affirmation and contained in Petitioner's Appendix of Exhibits, filed contemporaneously with this Memorandum. These exhibits are

Domino's Pizza LLC, a Michigan limited liability company, and Respondent Domino's Pizza Franchising, LLC, a Delaware limited liability company created in 2007 for the primary purpose of franchising Domino's stores. Gerstein Aff. ¶5; Ex. 2 (2016 FDD, at 1, 3). Respondents DPI, Domino's Pizza LLC and Domino's Pizza Franchising LLC are collectively referred to herein as "Domino's."

Throughout the United States, Domino's fast food stores specialize in the delivery of pizza and beverages to customers. Domino's directly owns some of these stores, but the vast majority (4,888 of the 5,273 Domino's stores in the United States at the end of fiscal year 2015) are owned and operated by franchisees that pay Domino's a royalty calculated as a percentage of sales revenue, plus an advertising fee, for the use of the Domino's trademark and products. Gersetin Aff. ¶18; Ex. 2 (2016 FDD, at cover, 5 and 18). For the fiscal year ended January 3, 2016, Domino's collected approximately $272.8 million in revenue from United States franchisees. Gerstein Aff. ¶18; Ex. 1 (2015 Form 10-K, at 43). In New York State, as reported in its April 2016 FDD, Domino's operates a total of 190 stores, 54 of which are corporate-owned and 136 of which are owned by 38 franchisees. Gerstein Aff. ¶19; Ex. 2 (2016 FDD, at 83, 91, and Ex. B at B-003 - B-007). As of May 2013 Domino's did business in New York County through nineteen franchisee-owned stores. Gerstein Aff. ¶19; Ex. 5 (DP000000585-587). Together, these stores employ many hundreds of individuals in New York State. Gerstein Aff. ¶19.

Franchisee Respondent Anthony Maestri ("Maestri") currently owns and operates three New York Domino's stores, and until November 2013 owned and operated six stores in New York and Westchester Counties, through Franchisee Respondents Hi-Rise Pizza, Inc.; Hudson

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true and correct copies of documents produced by Respondents and other non-parties during the OAG's investigation, transcripts of Subpoena Hearings before the OAG; and affidavits and other documents from the OAG's investigative file, all of which are relied upon by the OAG in this special proceeding.

River Pizza, LLC; Upper West Harlem Pizza, Inc.; North Bedford Avenue Pizza, Inc.; Uptown Pizza, Inc.; and Northern Westchester Pizza, LLC (collectively with Mr. Maestri, the "Maestri Respondents"). Gerstein Aff. ¶¶6-12.

Franchisee Respondent Shueb Ahmed ("Ahmed") owns and operates two New York Domino's stores through Franchisee Respondents Nader Inc., and Super Duper Pizza, Inc., which are located in Nassau and New York Counties (collectively with Mr. Ahmed, the "Ahmed Respondents"). Gerstein Aff. ¶¶13-15.

Franchisee Respondent Matthew Denman ("Denman") owns and operates two New York Domino's stores in Montgomery County through Franchisee Respondent Denman Enterprises, Inc. (collectively with Mr. Denman, the "Denman Respondents"). Gerstein Aff. ¶¶16-17.[2]

STATUTORY AND LEGAL FRAMEWORK

A. New York Executive Law Section 63(12)

New York Executive Law Section 63(12) provides that "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, [and] directing restitution and damages." Exec. L. §63(12).[3] In

[2] Venue in New York County is appropriate (i) because Domino's and the Maestri and Ahmed Respondents operate in New York County (see CPLR §503(a) ("the place of trial shall be in the county in which one of the parties resided when it was commenced")); and (ii) because the Attorney General's Labor Bureau is located in this county. See CPLR §505(a) ("the place of trial of an action by . . . a public authority . . . shall be in the county in which the authority has its principal office or where it has facilities involved in the action"); see e.g., Koppell ex rel. People v. Long Island Soc'y for the Prevention of Cruelty to Children, 163 Misc. 2d 654 (Sup. Ct. N.Y. Cty. 1994) (venue properly in New York County where Charities Bureau of Attorney General located, 120 Broadway, New York, N.Y.).

[3] Section 63(12) gives the OAG the authority "to take proof and make a determination of the relevant facts and to issue subpoenas" in connection with OAG investigations of fraudulent or illegal acts committed in the course of a business activity. Exec. L. §63(12).

connection with the offer, sale or purchase of a New York franchise, New York's Franchise Sales Act prohibits the making of any untrue statement of a material fact or the omission of a material fact necessary to make a statement not misleading. Gen. Bus. L. §687(2)(b). Violations of the Labor Law and the Franchise Sales Act constitute fraudulent or illegal acts properly brought in a Section 63(12) proceeding. See, e.g., People v. Trump Entrepreneur Initiative LLC, 137 A.D.3d 409 (1st Dep't Mar. 1, 2016); People v. Frink Am., Inc., 2 A.D.3d 1379, 1380 (4th Dep't 2003).

Section 63(12) proceedings are special proceedings. See e.g., People v. Telehublink Corp., 301 A.D.2d 1006 (3d Dep't 2003); State v. Daro Chartours, Inc., 72 A.D.2d 872 (3d Dep't 1979). C.P.L.R. Section 409(b) provides that in a special proceeding "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders [that would be] permitted on a motion for summary judgment." Accordingly, "a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment." Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008) (internal citations omitted).

On summary judgment, the movant must tender evidence sufficient to establish the cause of action and warrant the court as a matter of law in directing judgment. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) (citing C.P.L.R. §3212 (b)). The burden then shifts to the party opposing the motion to demonstrate the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to so do. Id. at 562. "[B]are allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion." Matter of Fin. Guar. Ins. Co., 39 Misc. 3d 208, 210 (Sup. Ct. N.Y. Cty. 2013) (citing Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978)). In a special proceeding, an evidentiary hearing is unnecessary where the party opposing the motion does not submit evidence sufficient to raise a material issue of fact. See id. at 210-11.

B. The Labor Law

New York's Labor Law governs minimum wage, overtime, and other key wage protections for workers. New York's Minimum Wage Act, codified in the Labor Law, is a remedial statute, seeking to safeguard the "health and wellbeing of the people of this state" and protect New Yorkers from "wages insufficient to provide adequate maintenance for themselves and their families." Labor Law §650 ("Statement of Public Policy").

1. Minimum Wage Requirements, the "80/20" Rule and Tip Credits

New York's minimum wage is set by statute, Labor Law Section 652(1), with more detailed requirements laid out in regulations known as Wage Orders. Restaurants are currently subject to the Hospitality Industry Wage Order, 12 N.Y.C.R.R. §146 et seq. ("Hospitality Wage Order"), which in January 2011 replaced the Minimum Wage Order for the Restaurant Industry ("Restaurant Wage Order"), 12 N.Y.C.R.R. §137 et seq. (The Hospitality Wage Order and Restaurant Wage Order are hereinafter referred to as the "Wage Orders.") [4]

Under the Wage Orders, workers who receive tips may be paid rates below the minimum wage, with the employer claiming what is known as a "tip credit" towards that otherwise-required minimum wage. But this is only permitted in certain circumstances: the employer must

[4] The discussion herein of the legal requirements under the Wage Orders is applicable to all claims of violations prior to December 31, 2015. An amendment to 12 N.Y.C.R.R. Part 146, the "Fast Food Wage Order," became effective December 31, 2015. For "fast food employees" working in New York City, the minimum wage increased to $10.50 per hour, annually increasing to $15 by 2018; for those outside of New York City, the minimum wage increased to $9.75 per hour, annually increasing to $15 by 2021. Ex. 29 (N.Y. Dep't of Labor Summary). Under these regulations, a "Fast Food Employee" includes any person employed at or for a Fast Food Establishment whose duties include customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance. 12 N.Y.C.R.R. §146-3.13(a). A "Fast Food Establishment" is a business that primarily serves food or drinks, offers limited service, where customers order and pay before eating, and is part of a chain of 30 or more locations. 12 N.Y.C.R.R. §146-3.13(b). Thus, this rule change applies to all Domino's workers in New York.

advise the worker about the tip credit in an initial written notice and on weekly pay stubs, and the worker's must receive a threshold average tip amount; moreover, employers must verify this, and maintain records allowing them to verify this. 12 N.Y.C.R.R. §§146-1.3, -2.2, -2.3; §137-1.4. Also, under the Hospitality Wage Order, employers may not claim the tip credit for any workday in which an employee works at a non-tipped occupation for more than two hours or 20% of his or her shift, whichever is less. 12 N.Y.C.R.R. §146-2.9. This requirement, referred to herein as the "80/20 rule," ensures that an employer does not take a tip credit for time when an employee has no opportunity to receive tips.[5]

Under the Wage Orders, there are two categories of tipped employees: "service employees" and "food service workers." Food service workers include waiters, bartenders, captains, and bussing personnel, but delivery workers are explicitly excluded from the definition of "food service workers." 12 N.Y.C.R.R. §146-3.4. Instead, fast food delivery workers, such as Domino's delivery workers, are considered "service employees" if they receive the threshold amount of tips set by the Wage Orders. 12 N.Y.C.R.R. §§146-3.3, -3.4(a), §137-3.3. From July 2008 until December 30, 2015, the lowest hourly wage an employer could legally pay a tipped "service employee" (hereinafter referred to as the "tipped rate") ranged from $4.85 to $5.65 per hour.[6]

[5] While the earlier Restaurant Wage Order did not include the 80/20 rule specifically, it would be unreasonable to interpret the Restaurant Wage Order as permitting an employer to claim a tip allowance for all hours worked by an employee regardless how much time he or she actually spends on tipped work. By way of analogy, federal law, which also uses the "tip credit" concept, states: "the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a 'tipped employee.'" 29 C.F.R. §531.59(b).

[6] The lowest hourly "tipped rates" during this time period were as follows: $4.85 per hour from January 1, 2007 to July 24, 2009; $4.90 per hour from July 24, 2009 to Dec. 31, 2010; and $5.65 per hour from Jan. 1, 2011 to December 30, 2015. 12 N.Y.C.R.R. §137-1.4(a)(4) to (a)(5)); 12 N.Y.C.R.R. §146-1.3(a); see Ex. 29 (N.Y. Dep't of Labor Summary).

2. Overtime Pay Requirements

The Wage Orders require employers to pay overtime at one-and-one-half times the employee's regular rate for hours worked in excess of 40 hours in one workweek. 12 N.Y.C.R.R. §§146-1.4, §137-1.3. For employees who are paid the tipped rate, the Hospitality Wage Order clearly directs that the required overtime rate is the worker's regular rate "before subtracting any tip credit, multiplied by 1.5, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one-half." 12 N.Y.C.R.R. §146-1.4 (emphasis added).[7] If the employer simply multiplies the tipped rate by 1.5, this in effect multiplies the tip credit by 1.5, which is not permissible. Because the regular rate from which an overtime rate is calculated must be at least the basic minimum wage rate, what can be called the tipped employee minimum overtime rate was $10.03 per hour during 2015 (the 2015 basic minimum wage rate of $8.75 times 1.5 less the maximum available tip credit of $3.10). Doing the calculation the wrong way — simply multiplying the tipped rate by 1.5 — would result in an improperly depressed overtime rate of $8.48 in 2015 (2015 delivery worker tipped rate of $5.65 times 1.5), a difference of $1.55 per overtime hour.[8]

Additionally under the Wage Orders, an employer must pay an employee overtime pay for all work in excess of 40 hours for the employer, even if that work occurs in more than one

[7] While the earlier Restaurant Wage Order did not expressly explain this, it also defined a tip allowance to be claimed against the otherwise applicable overtime wage. 12 N.Y.C.R.R. §§137-1.3, 137-1.5. Again, federal law takes a similar approach. See 29 C.F.R. §531.60 (providing that a tipped employee's "regular rate," which must be multiplied by 1.5 to arrive at the required overtime rate, "includes the amount of tip credit taken by the employer"). Other states follow this rule. See e.g., Massachusetts Department of Labor Standards, 454 Mass. Code Regs. §27.03(3) ("The overtime rate for a tipped employee receiving the service rate shall be computed at one and one half times the basic minimum wage, except where exempted by M.G.L. c. 151, §1A.")

[8] Under the Wage Orders, the minimum tipped overtime rates during the Relevant Period were as follows: $8.43 per hour from January 1, 2007 until July 24, 2009 (minimum wage of $7.15 per hour times 1.5 less $2.30 maximum tip credit); $8.53 per hour from July 24, 2009 until December 31, 2010 (minimum wage of $7.25 times 1.5 less $2.35 maximum tip credit); $9.28 per hour from Jan. 1, 2011 until December 30, 2013 ($7.25 times 1.5 less $1.60 maximum tip credit); $9.65 from December 31, 2013 until December 30, 2014 ($8.00 times 1.5 less $2.35 maximum tip credit); and $10.03 from December 31, 2014 until December 30, 2015 ($8.75 times 1.5 less $3.10 maximum tip credit). 12 N.Y.C.R.R. §137-1.4(a)(4), (5); 12 N.Y.C.R.R. §146-1.3(a)(1) to (4).

location. If an employer has multiple locations and an employee works 30 hours at one location and 30 hours at another, the employee worked a total of 60 hours that week and is entitled to 20 hours of overtime pay. See Juarez v. 449 Rest., Inc., 29 F. Supp. 3d 363, 368 (S.D.N.Y. 2014) (components of an integrated enterprise responsible for hours "worked for the whole enterprise, and not just at their individual diners")

3. "Spread of Hours" and Expense Reimbursement Requirements

Under the Wage Orders, employers must pay employees one additional hour of pay at the basic minimum wage rate on each day when the length of the interval between the beginning and end of an employee's workday exceeds ten hours (known as "spread of hours" pay). 12 N.Y.C.R.R. §§146-1.6, 137-1.7.

In addition, the Labor Law defines "wages" to include "reimbursement for expenses" (Labor Law §§190(1), 198-c(2)), and prohibits unlawful deductions from wages (§193). See §198-b; 12 N.Y.C.R.R. §§146-1.8, 146-2.7, 137-1.8, 137-2.5(b). The prohibition extends to failure to reimburse restaurant employees, such as Domino's pizza delivery employees, for the "cost of buying and maintaining bicycles used to deliver food to customers" (Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 245, 257-258 (S.D.N.Y. 2008)) or the cost of automobiles required for the same purpose. See e.g., Morangelli v. Chemed Corp., 922 F. Supp. 2d 278, 300 (E.D.N.Y. 2013).

STATEMENT OF FACTS

The accompanying Affirmation in Support of the Verified Petition ("Gerstein Aff.") includes a full statement of all relevant facts. A summary is given here.

A. The OAG's Investigation into Multiple Labor Law Violations Committed by Domino's Franchisees

Beginning in 2012, the OAG received complaints about and began investigating minimum wage and overtime violations at a number of Domino's franchisees across New York

State. The OAG interviewed employees, including many who delivered food to Domino's customers ("delivery workers" or "delivery employees"); subpoenaed documents, including payroll records; and took sworn testimony from witnesses, including from franchise owners. The documents and testimony revealed widespread and systemic Labor Law violations during the Relevant Period by at least 15 different Domino's franchisees, including the Franchisee Respondents. Gerstein Aff. ¶28.[9]

1. The OAG's Settlements with 12 Franchisees

In 2014 and 2015, the OAG reached settlement with twelve Domino's franchisees (the "Settling Franchisees") who admitted significant Labor Law violations in signed Assurances of Discontinuance ("AODs"). Gerstein Aff. ¶¶29, 35.[10] These 12 settlements totaled approximately $1.5 million in monetary restitution for hundreds of workers. In the AODs, the Settling Franchisees admitted to various and multiple Labor Law violations concerning (i) the minimum wage, (ii) overtime, (iii) spread of hours pay, and (iv) reimbursement of delivery bicycle and/or automobile expenses. Gerstein Aff. ¶¶28-30, 35-36, 38-45. Seven franchisees stated that failure to pay overtime properly was partially caused by PULSE's miscalculation of such pay, and several of those also noted PULSE's inability to calculate spread of hours. Gerstein Aff. ¶30 & nn.12, 13. At the time of their settlements, the Settling Franchisees

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[9] The "Relevant Period" is defined herein as: (1) from July 17, 2008 to the present, as to the Franchisee Respondents with respect to their alleged wage-and-hour violations; and (2) from May 23, 2010 to the present, as to Domino's for its liability as a joint employer of the workers at the franchise stores and for the PULSE-related claims set forth herein. The Franchisee Respondents entered tolling agreements with the OAG, tolling the statute of limitations from July 17, 2014 to the termination of that agreement by either side. Ex. 43 (Tolling Agreements). The Tolling Agreements were terminated by written notice from the OAG dated May 23, 2016. Ex. 44 (Termination Notices). The restitution the OAG currently seeks for the wage-and-hour violations set forth herein is based on violations of the Restaurant Wage Order and the Hospitality Wage Order ("Wage Orders"), in effect from July 17, 2008 through December 30, 2015. Any violations of the wage-and-hour laws that subsequently may be discovered that post-date December 30, 2015 would be subject to the Hospitality Wage Order, 12 N.Y.C.R.R Part 146, as amended effective December 31, 2015.

[10] Pursuant to Exec. Law §63(15), the OAG may accept an Assurance of Discontinuance (similar to a settlement agreement) in lieu of bringing a civil action or proceeding to enforce laws within the OAG's jurisdiction.

collectively owned 61 Domino's stores in 14 counties, which comprised approximately 45% of all franchisee stores then operating in New York State. Gerstein Aff. ¶38.[11]

2. The Franchisee Respondents' Violations

The Maestri Respondents failed to pay the legal minimum wage because they took a tip credit for all hours worked even though delivery workers spent over 20% of their time performing non-tipped work; they also failed to satisfy other requirements for taking the tip credit. Gerstein Aff. ¶¶46-48; Ex. 3 (Maestri Tr. 369:13 - 370:6, 419:18 - 422:3, 346:9 - 349:9); Ex. 52 (Bonkoungou Aff. ¶3); Ex. 53 (Diaz Aff. ¶5); Ex. 54 (Hassane Aff. ¶4); Ex. 55 (Kafando Aff. ¶4); Ex. 56 (Sam Aff. ¶4); Ex. 57 (O. Sawadogo Aff. ¶5); Ex. 58 (Yacouba Aff. ¶4) (former worker affidavits). The Maestri Respondents did not comply with overtime laws because they calculated overtime based on unlawfully low tipped regular rates, and they did not combine hours worked at all stores. Gerstein Aff. ¶¶49, 51; Ex. 3 (Maestri Tr. 280:4 - 281:22, 283:21 - 284:2, 356:21 - 358:6). In addition, the Maestri Respondents did not pay spread of hours pay or fully reimburse employees' bicycle-related delivery expenses. Gerstein Aff. ¶¶50, 52. The estimated resulting underpayments total at least $178,000, plus liquidated damages and interest. Gerstein Aff. ¶¶53-59; Ex.62 (Henriquez Aff. ¶18).

The Ahmed Respondents violated the minimum wage requirement by paying delivery workers as little as $5.00 per hour, less than the then-applicable $5.65 tipped rate. See 12 N.Y.C.R.R. §§146-1.3; Gerstein Aff. ¶60. The Ahmed Respondents paid employees 1.5 times their low (and illegal) regular wage rate for overtime hours, which necessarily resulted in an unlawfully low overtime rate. Gerstein Aff. ¶60. Finally, the Ahmed Respondents did not pay spread of hours pay or fully reimburse employees' bicycle-related delivery expenses. Gerstein

[11] See Gerstein Aff. ¶¶28-30, 35-36, 38-45 for a summary of the facts underlying the wage-and-hour violations admitted by the Settling Franchisees.

Aff. ¶¶61-62.[12] The estimated resulting underpayments total at least $156,000, plus liquidated damages and interest. Gerstein Aff. ¶¶63-69; Ex. 62 (Henriquez Aff. ¶41).

The Denman Respondents failed to pay the legal minimum wage during part of the relevant period, because they claimed the tip credit even though delivery workers routinely performed too much non-tipped work for the employer to claim a tip credit. Gerstein Aff. ¶¶70-73. The Denman Respondents also failed to adequately reimburse delivery drivers for automobile expenses related to making deliveries. Gerstein Aff. ¶¶76-86; Ex. 67 (Rodriquez Aff. ¶¶5-6). The estimated resulting underpayments total at least $233,000, plus liquidated damages and interest. Gerstein Aff. ¶¶74-87; Ex. 66 (Lynch Aff. ¶50).

The underpayment estimates for the Maestri, Ahmed and Denman Respondents are very conservative and a full accounting is needed to determine the entire scope of violations. See Gerstein Aff. ¶¶59, 69, 87; Ex. 62 (Henriquez Aff. ¶¶6, 29); Ex. 66 (Lynch Aff. ¶6, 25).

B. The OAG's Investigation of Domino's

In the midst of its investigation of numerous Domino's franchisees, and based on the initial widespread violations found among them, the OAG issued subpoenas to Domino's. The subpoenas sought documents and testimony concerning Domino's relationship with New York State franchisees, as well as a particular subset of payroll data extracted from Domino's proprietary software, PULSE. Gerstein Aff. ¶31.

Pursuant to Section 63(12), the OAG took the sworn testimony of five Domino's officials, including the top official responsible for relations with franchisees in Domino's East

[12] The Maestri and Ahmed Respondents required employees who performed deliveries to purchase bicycles and to pay for all bicycle maintenance and necessary safety equipment, and did not reimburse employees for these expenses. These expenses were not for the benefit of employees at Ahmed's and Maestri's stores, were not authorized in writing, and were not on the list of permissible deductions under Labor Law §193(1). And to the extent that an employee's expenses brought the employee's wage below the required minimum wage, such unreimbursed expenses constitute a violation of 12 N.Y.C.R.R. §146-2.7(c).

Coast region, which includes New York State, and a vice president and senior information technology official responsible for maintaining Domino's PULSE software. Gerstein Aff. ¶¶31-33, 111.

The OAG also obtained documents and testimony from a company Domino's hired to estimate vehicle expenses of delivery workers for Domino's stores in New York State, and documents from two credit reporting agencies retained by Domino's to investigate job applicants seeking work at Domino's franchisees. Gerstein Aff. ¶37.

C. Domino's Relationship with Its Franchisees

Before the offer and sale of a franchise to a prospective franchisee, New York law (as well as federal law), requires a franchisor to provide a prospective franchisee with a detailed offering prospectus, also known as a "Franchise Disclosure Document" or "FDD." Gen. Bus. L. §683(8); see also 16 C.F.R §436.2. The franchise disclosure regulations itemize 23 separate disclosures that must be contained in the FDD. See 13 N.Y.C.R.R. §200.2.

Once a prospective franchisee purchases a Domino's franchise, the relationship between Domino's and the franchisee is governed by a Standard Franchise Agreement ("Franchise Agreement" or "SFA") drafted by Domino's, which is attached as Exhibit E to Domino's FDD and is not negotiable by the franchisees. Gerstein Aff. ¶¶ 20-21; Ex. 18 (SFA); Ex. 3 (Maestri Tr. 76:10-14, 93:22-24); Ex. 19 (Ridge Tr. 136:5-18); Ex. 14 (Denman Tr. 44:13-15). The Franchise Agreement imposes detailed requirements on franchisee-owned stores:

- Requiring franchisees "to fully comply with all specifications, standards and operating procedures and rules from time to time prescribed for the operation of a Domino's Pizza Store";
- Setting the fees that franchisees must pay Domino's;
- Requiring franchisees to follow Domino's operational requirements (including compliance with all applicable laws, ordinances and regulations);

- Requiring franchisees to purchase, install and continuously use the PULSE hardware and software system (and, by so requiring, de facto mandating that franchisees track employees' hours and ongoing work activities on PULSE);
- Requiring franchisees to pay a yearly license fee for use of PULSE;
- Granting Domino's unrestricted access to franchisees' PULSE data and physical access to franchisee-owned stores to conduct inspections;
- Granting Domino's the unilateral right to terminate any franchisee that fails to comply with Domino's requirements;
- Requiring Domino's prior approval of all lease agreements; and
- Requiring franchisee supervision at all times, while restricting the ability of franchisees to work at or own other businesses.

Gerstein Aff. ¶¶20, 22(a)-(g), 23.

Domino's supervises and controls its New York State franchisees primarily through Domino's Franchise Operations team; its PeopleFirst human resources department, which in practice performs human resources-related functions for franchisees; and its Information Technology Department, which provides updates and support for PULSE. Gerstein Aff. ¶¶25-27.

D. Domino's FDD and Other Evidence Shows the Domino's- Required PULSE Computer System Is More than a "Point of Sale" System

The OAG's investigation revealed that by mid-2008, Domino's required all stores to install the PULSE system, which franchisees had to purchase. PULSE consists of hardware as well as software that performs a number of tasks, including performing point-of-sale (i.e., cash register) functions, tracking pizza delivery information, maintaining store-specific data such as personnel data or product prices, acting as a timekeeping system in which employees clock in and clock out using individual employee codes, tracking employee work tasks continuously, recording tips, and generating reports (e.g., sales, revenue, payroll). Gerstein Aff. ¶¶88-89.

Domino's receives considerable income from PULSE-related sales and services.[13]

PULSE is more than simply a "point of sale" system, although it has that function. A worker at a franchise store cannot perform any work-related function (e.g., take an order) without first logging in to PULSE. Gerstein Aff. ¶95. For example, to enter an order in PULSE, the software requires a store to assign the order a code for a "team member" (Domino's term for an employee). From the moment the order is placed, a timer starts, and PULSE tracks minute-by-minute all subsequent actions until the order is fulfilled, including which employee performs each task related to the order. Gerstein Aff. ¶¶95, 184.

PULSE also generates various types of reports, including one called "Payroll Report." Domino's "PULSE Management Reports Guide" ("the PULSE Reports Guide") identifies "Payroll Reports" among "frequently used reports," and describes this report as a "listing of all team members and their total hours and pay" for any specified date range. Ex. 75 (DP000075398); Gerstein Aff. ¶¶91, 94. The PULSE payroll report (referred to herein as the "Payroll Report") calculates gross wages due based on an employee's clock-in and -out times on PULSE and on the employee's wage rate entered by a store owner or manager. Gerstein Aff. ¶¶91-92, 94, 197. The "Payroll Report" is labeled "Payroll" at the top of each page and contains columns separately listing each employee's daily hours worked, pay rate, regular hours, "Overtime 1.5," "Tips," and "Total Pay," among other things. A sample of the Payroll Report, from Franchisee Respondent Ahmed's payroll records, follows:

[13] Gerstein Aff. ¶90. Domino's estimate in its FDD is that the cost per store to acquire the hardware and software required to run PULSE is $15,000 to $25,000 and estimated costs per store for required maintenance and support contracts, license fees, upgrades or updates to the PULSE software average up to $4,500.00 annually. Ex. 2 (2016 FDD, at 24).

NADER 00000020

Payroll

Team Member: [redacted]

3682 Location

Begin Date: 7/4/2011
End Date: 7/10/2011

System Date	Time In	Time Out		Shift	Total Pay	Pay Rate	Regular Hours	Overtime 1.5	Overtime 2.0	Overtime 2.5	Bonus Pay	Excess Mileage	Tips
Team Member Code	Team Member Name	Payroll Number	Government ID	Home									
7/4/2011	4:49 PM 7/4/2011	6:43 PM 7/4/2011		2	$8.55	$4.50	1.90	0.00	0.00	0.00	$0.00	$0.00	$5.00
7/4/2011	7:34 PM 7/4/2011	1:00 AM 7/5/2011		3	$24.48	$4.50	5.44	0.00	0.00	0.00	$0.00	$0.00	$2.31
7/6/2011	11:44 AM 7/6/2011	1:56 PM 7/6/2011		1	$9.95	$4.50	2.21	0.00	0.00	0.00	$0.00	$0.00	$0.00
7/6/2011	2:54 PM 7/6/2011	8:36 PM 7/6/2011		2	$25.61	$4.50	5.69	0.00	0.00	0.00	$0.00	$0.00	$9.00
7/8/2011	11:07 AM 7/8/2011	3:18 PM 7/8/2011		1	$18.86	$4.50	4.19	0.00	0.00	0.00	$0.00	$0.00	$13.00
7/8/2011	4:13 PM 7/8/2011	9:37 PM 7/8/2011		2	$24.26	$4.50	5.39	0.00	0.00	0.00	$0.00	$0.00	$19.55
7/8/2011	9:52 PM 7/8/2011	10:25 PM 7/8/2011		3	$2.48	$4.50	0.55	0.00	0.00	0.00	$0.00	$0.00	$0.00
7/9/2011	10:01 AM 7/9/2011	3:09 PM 7/9/2011		1	$23.13	$4.50	5.14	0.00	0.00	0.00	$0.00	$0.00	$2.00
7/10/2011	11:38 AM 7/10/2011	3:15 PM 7/10/2011		1	$16.34	$4.50	3.63	0.00	0.00	0.00	$0.00	$0.00	$8.00
7/10/2011	5:03 PM 7/10/2011	7:34 PM 7/10/2011		2	$14.06	$4.50 2.67	1.34	1.19	0.00	0.00	$0.00	$0.00	$9.00
5267	[redacted]	0	[redacted]	3682	$188.03		40.00	1.19	0.00	0.00	$0.00	$0.00	$74.86
7/6/2011	10:49 AM 7/6/2011	2:24 PM 7/6/2011		1	$17.95	$5.00	3.59	0.00	0.00	0.00	$0.00	$0.00	$4.00
7/6/2011	3:27 PM 7/6/2011	8:00 PM 7/6/2011		2	$22.75	$5.00	4.55	0.00	0.00	0.00	$0.00	$0.00	$6.00
7/7/2011	10:57 AM 7/7/2011	3:16 PM 7/7/2011		1	$21.55	$5.00	4.31	0.00	0.00	0.00	$0.00	$0.00	$0.00
7/7/2011	4:30 PM 7/7/2011	9:12 PM 7/7/2011		2	$23.55	$5.00	4.71	0.00	0.00	0.00	$0.00	$0.00	$15.00
7/8/2011	11:19 AM 7/8/2011	4:13 PM 7/8/2011		1	$24.55	$5.00	4.91	0.00	0.00	0.00	$0.00	$0.00	$7.00
7/8/2011	5:15 PM 7/8/2011	10:26 PM 7/8/2011		2	$25.85	$5.00	5.17	0.00	0.00	0.00	$0.00	$0.00	$19.20
7/9/2011	11:12 AM 7/9/2011	4:38 PM 7/9/2011		1	$27.15	$5.00	5.43	0.00	0.00	0.00	$0.00	$0.00	$4.00
7/9/2011	5:30 PM 7/9/2011	8:20 PM 7/9/2011		2	$14.10	$5.00 2.28	2.82	0.00	0.00	0.00	$0.00	$0.00	$0.00
5504	[redacted]		[redacted]	3682	$177.45		35.49	0.00	0.00	0.00	$0.00	$0.00	$55.20
7/6/2011	6:35 PM 7/6/2011	9:56 PM 7/6/2011		1	$15.08	$4.50	3.35	0.00	0.00	0.00	$0.00	$0.00	$8.00
7/9/2011	1:38 PM 7/9/2011	7:13 PM 7/9/2011		1	$25.07	$4.50	5.57	0.00	0.00	0.00	$0.00	$0.00	$10.64
7/10/2011	12:39 PM 7/10/2011	2:29 PM 7/10/2011		1	$8.28	$4.50	1.84	0.00	0.00	0.00	$0.00	$0.00	$0.00
7/10/2011	5:14 PM 7/10/2011	9:30 PM 7/10/2011		2	$19.17	$4.50	4.26	0.00	0.00	0.00	$0.00	$0.00	$7.45
~~1507~~	[redacted]		[redacted]	3682	$67.59		15.02	0.00	0.00	0.00	$0.00	~~$0.00~~	~~$26.09~~

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Ex. 80; Gerstein Aff. ¶92. Once a store manager or owner enters an employee wage rate, PULSE automatically calculates "Total Pay" for each employee for each pay period, combining regular and overtime pay owed to each employee, based on the hours recorded in PULSE, and shows this "Total Pay" in the Payroll Report. Gerstein Aff. ¶¶92, 94, 197; Ex. 27 (Pederson Tr. 164:8 - 166:5, 168:4 - 170:14).

The PULSE Reports Guide describes "typical uses" of the PULSE Payroll Report as "viewing payroll information, including clock-in and clock-out times . . . [and] generating payroll information to give to your accountant or payroll service." Ex. 75 (DP000075398); Gerstein Aff. ¶91. The IT official whom Domino's designated to testify about PULSE, Vice President Wayne Pederson, conceded that PULSE performed nearly all functions of a payroll service, such as calculation of gross wages; the only payroll service functions he identified that

PULSE could not perform were calculation of tax deductions and handling multiple wage rates for employees performing tipped and non-tipped work during the same pay period. Gerstein Aff. ¶92; Ex. 27 (Pederson Tr. 247:22 - 248:8).

Domino's thus effectively made PULSE a part of its franchisees' payroll system. It automatically records employees' hours worked, making it highly unlikely a franchisee would expend time and money on a completely separate timekeeping system. The Payroll Report generated by PULSE is clearly marked as "Payroll" and provides a calculation of "Total Pay," which gives every appearance of being a calculation of gross wages. Gerstein Aff. ¶94.

As a result, the franchisees did, in fact, use the PULSE Payroll Report to calculate gross wages. At least seven of the Franchisee Respondents and Settling Franchisees testified that they routinely used the "Total Pay" column for calculating gross wages, and conveyed information from the PULSE report to their accountants and payroll services for the discrete task of performing the final step of the payroll process: computing employees' net earnings by making applicable deductions and processing paychecks. Gerstein Aff. ¶96; see, e.g., Ex. 3 (Maestri Tr. 269:19 - 271:12, 286:5-20); Ex. 78 (Webster Tr. 204:2-12, 206:11-16); Ex. 11 (Ahmed Tr. 36:19 - 37:16); Ex. 23 (Gaisser Aff. ¶13); Ex. 22 (Lee Aff. ¶11); Ex. 51 (Sharma Aff. ¶7); Ex. 21 (Cookston Aff. ¶21).

Domino's knew that its New York franchisees were using Payroll Reports to calculate employees' gross wages. Gerstein Aff. ¶97.

The New York franchisee payroll data produced by Domino's from its PULSE system presents a startling picture of system-wide underpayment of wages. The records showed that during a time period from 2011 to 2013, over 78% of franchisees operating in New York State (33 of the 42) reported instances of wage rates in PULSE below the lowest legal minimum wage for delivery workers, even assuming the employer was entitled to the full tip credit. Over 85% (36 of the 42) of New York franchisees reported instances of overtime wage rates on PULSE below the lawful rate for delivery workers, again even assuming the employer was entitled to the full tip credit. Finally, every single franchisee reported instances in PULSE where one or more employees were paid less than $7.25 per hour, even though no tips at all were reported for such employees. See Gerstein Aff. ¶¶33-34 & n.18.[14]

E. Domino's Disclosures About PULSE in Its FDD

There were no warnings or qualifications about PULSE in the FDD that Domino's was, and is, required to provide to its franchisees. Rather, over the past six years, Domino's FDD stated that PULSE should be used and its payroll function could be relied upon.[15] Among other things, Domino's FDD states that PULSE has the "capability to interface with a payroll company or a commercial accounting package." Ex. 2 (2016 FDD, at 46). The FDD also states that Domino's-provided software would function in accordance with "applicable user documentation," such as its "PULSE Management Reports Guide," which identifies Payroll Reports as among "frequently used reports" and states that typical uses include "generating payroll information to give to your accountant or payroll service." Ex. 2 (2016 FDD, Ex. M, ¶5.1); Ex. 75 (PULSE Management Reports Guide, at DP00075398); Gerstein Aff. ¶128. The FDD further notes Domino's obligation to correct any software errors, as the company says it will "use reasonable efforts to correct any Software error, and . . . provide to [Franchisee] any error corrections, enhancements and updates to the Software." Ex. 2 (2016 FDD, Ex. M, Att. B,

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[14] The OAG's investigation also revealed that in June 2009, Domino's had conducted a survey collecting information from franchisees, including responses from at least two franchisees in New York State, showing that they were paying employees $4.60 per hour, lower than any then-permissible wage rate. Gerstein Aff. ¶123.

[15] The disclosures identified here are from Domino's April 2016 FDD. They have not changed from those made in earlier Domino's FDDs, for example, the FDD dated July 2009 which was in effect at the beginning of the Relevant Period as to Domino's (May 12, 2010). Gerstein Aff. ¶128 n.46 (comparing 2009 and 2016 disclosures); Ex. 2 (excerpts from 2016 FDD); Ex. 96 (excerpts from 2009 FDD).

¶1.1(b)); Gerstein Aff. ¶128. However, as described below, these representations in the FDD were either materially misleading or omitted material information that should have been disclosed.

F. Domino's Failure to Advise Franchisees of Known PULSE Flaws, Resulting in the Under-Calculation of Employee Pay

Unbeknownst to its franchisees, Domino's had serious problems with PULSE that it never revealed, much less addressed. The evidence shows that for years, Domino's has been aware of, but failed to inform franchisees about, four flaws in its Payroll Report and PULSE's calculation of gross employee earnings that did not comply with the requirements of New York's Labor Law: (1) PULSE fails to combine hours worked in multiple stores for the same employer for purposes of overtime pay; (2) PULSE calculates overtime at an illegally low rate for tipped workers; (3) PULSE fails to limit the use of the tip credit when an employee performs too much non-tipped work; and (4) PULSE fails to calculate "spread of hours" pay. Domino's own emails and its sworn testimony show that it has known about two of these flaws since at least 2007 and the other two since at least 2010. Despite its knowledge of the flaws in PULSE, and the continued use of PULSE by its franchisees for payroll purposes, from May 2010 until the present (other than a small change made in May 2015 to its Manager's Guide, see Gerstein Aff. ¶94 n.37), Domino's never advised its franchisees not to use PULSE as a payroll system, nor did the Payroll Report itself contain any such disclaimer or warning. Gerstein Aff. ¶94; Ex. 27 (Pederson Tr.123:7 - 124:11, 248:15 - 249:19); Ex. 23 (Gaisser Aff. ¶13); Ex. 21 (Cookston Aff. ¶25).

1. Failing To Count Overtime Hours Accumulated at Multiple Stores

PULSE's first systemic flaw is that the software cannot capture and combine hours from more than one store location in the same Payroll Report. See Gerstein Aff. ¶99; Ex. 80 (Sample page of PULSE Payroll Report). This flaw resulted in underpayment of overtime to employees in the Maestri Respondents' stores and other stores. See Gerstein Aff. ¶¶46-51, describing the violations at the Maestri franchises; Gerstein Aff. ¶99; Ex. 51 (Sharma Aff. ¶¶12-13).[16]

These underpayments could have been avoided altogether, because Domino's knew about this flaw in PULSE at least as early as 2010, when Domino's IT and HR officials discussed by email a proposal to remedy this flaw. Gerstein Aff. ¶100; Ex. 81 (DP00086333-335 and attachment). Vice President Pederson testified in 2014 that he was aware of this flaw but it had yet to be addressed, not because a fix was impossible but because it was "nothing that we [can] do very easily." Gerstein Aff. ¶100; Ex. 27 (Pederson Tr. 253:3 - 255:5). Pederson also testified that Domino's uses a software program called PeopleSoft for its corporate-owned stores which properly calculates overtime for employees who work at multiple locations in a workweek. Gerstein Aff. ¶100; Ex. 27 (Pederson Tr. 533:16 - 534:18, 370:13-18).

2. Under-Calculating Overtime for Tipped Employees

PULSE's second flaw is that it uses the wrong formula to calculate overtime wages owed to delivery employees who are paid a tipped rate. When an employee is paid a tipped rate, PULSE calculates overtime pay at 1.5 times the employee's tipped rate, which is expressly prohibited under the Hospitality Wage Order, as discussed supra at 12, as this systematically understates overtime wages owed to tipped employees. (This PULSE flaw will be referred to

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[16] Domino's franchisee Yash Sharma, one of the Settling Franchisees, admitted underpaying overtime owed to employees who worked in more than one store during a single pay period because PULSE does not combine these hours when computing overtime. Gerstein Aff. ¶99; Ex. 51 (Sharma Aff. ¶¶12-14).

herein as the "Tipped Rate Overtime Flaw"). Gerstein Aff. ¶¶101-106. The Maestri and Ahmed Respondents, as well as nine of the investigated franchisees, regularly underpaid their delivery workers because they relied on PULSE and its "Total Pay" column, and they were unaware of PULSE's Tipped Rate Overtime Flaw. Gerstein Aff. ¶¶102, 105.

Domino's knew about this flaw at least as early as 2007. In a 2007 email chain, five Domino's officials, including senior IT and HR professionals, discussed the under-calculation of overtime for tipped delivery employees in detail; Vice President Pederson noted that because of this PULSE flaw, franchisees "could end up under-paying in most cases of overtime," and he provided a specific example of miscalculation, ultimately concluding that Domino's "will need to address this with release 3.3" of the PULSE software. Gerstein Aff. ¶¶103-104. An HR representative on the email chain also acknowledged the problem and the need for a fix. Gerstein Aff. ¶104; Ex. 82 (DP00088350). Remarkably, Domino's took no affirmative action to correct this flaw, year after year. Pederson testified that Domino's informed him that the issue was a "low priority" so neither he nor Domino's fixed the flaw. Gerstein Aff. ¶104; Ex. 27 (Pederson Tr. 235:24 - 236:8).[17] Nor did Domino's systematically alert all of its franchisees that this flaw existed and that they needed to take additional measures to ensure proper payment of overtime to tipped delivery workers, even when several franchisees brought this flaw to Domino's attention in approximately 2011. Gerstein Aff. ¶106; Ex. 3 (Maestri Tr. 281:23 - 283:5); Ex. 78 (Webster Tr. 259:2-10); Ex. 51 (Sharma Aff. ¶14). Thus, despite consistent and extensive ongoing communication between Domino's and its New York franchisees, including twice annual written PULSE updates and multiple annual on-site visits by Domino's

[17] Despite the recommendation to correct this flaw in version 3.3 of PULSE, this flaw (and the other flaws described here), remained uncorrected in the numerous, regularly updated versions of PULSE Domino's has released since May 2007, when Domino's was preparing to release PULSE version 3.3. At least as of August 2015, Domino's was using PULSE version 3.81. Gerstein Aff. ¶104 n.40.

representatives (Gerstein Aff. ¶¶114, 168, 180-182), Domino's failed to disclose this material information in any systematic way to its franchisees, thereby knowingly allowing wage underpayments to occur.

3. Improperly Applying the "Tip Credit" Rules

The third flaw in PULSE is that the program does not allow entry of more than one wage rate for the same employee, thus leading franchisees with tipped delivery workers, such as the Franchisee Respondents, to underpay those employees when they performed non-tipped work for over 20% of their shift. Gerstein Aff. ¶107. (This PULSE flaw will be referred to herein as the "80/20 Flaw.") And even though PULSE tracks employees' hours worked, it does not alert franchisee stores when employees perform delivery work for less than 80% of their shift and, therefore, are ineligible for a "tip credit" wage rate. Gerstein Aff. ¶107; Ex. 27 (Pederson Tr. 177:23 - 178:9, 229:11 - 230:19).

Here, too, Domino's knew about this PULSE flaw at least as early as 2007 — and about the resulting violations — but chose to do nothing. In a 2007 email, a Domino's HR official, Julie Wigley, stated: "I'm told the Pulse system does not currently function to pay a driver a different rate of pay in the same shift and <u>therefore franchisees are just paying the tip wage for the entire shift which is not following the law.</u>" Gerstein Aff. ¶109; Ex. 82 (DP00088351-352) (emphasis added). Two years later, emailing a New York franchisee (who was later sued by employees for, among other things, paying the tipped rate for work time including too much non-tipped work), Wigley noted, "[T]here are a lot of franchisees who are not doing tip credit correctly." Gerstein Aff. ¶109; Ex. 86 (DP00088368).[18] In 2011, in response to an inquiry about

[18] That lawsuit was <u>Cano v. DPNY, Inc.</u>, 287 F.R.D. 251, 255 (S.D.N.Y. 2012), and involved the claim that franchisee Melton and other defendants "applied tipped wage calculations even when the plaintiffs performed tasks for which tips were not available." The court granted plaintiffs' motion to amend the complaint to add Domino's as a joint employer (over Domino's opposition); later, the case settled.

highly sought-after modifications to PULSE, Vice President Pederson responded that Domino's would not configure PULSE to accommodate multiple wage rates, and recommended instead an approach that plainly violates the Labor Law: that franchisees should "use a blended rate by . . . tak[ing] the gross pay divided by the number of hours over a few month period." Gerstein Aff. ¶110; Ex. 88 (DP00072817-818). In 2014, Pederson testified that PULSE still did not permit two rates, tipped and non-tipped, to be entered for the same employee. Gerstein Aff. ¶111; Ex. 27 (Pederson Tr. 175:12-14).

Domino's compounded this PULSE flaw by directing franchisees to "cross-train" their delivery employees because "[a]ll of your Team Members should be able to perform all of the tasks in your store" (<u>i.e.</u>, non-tipped work such as cooking, boxing pizzas, or taking orders when they are not making deliveries). Gerstein Aff. ¶108; Ex. 85 (Asst. Manager Training Guide, at DP00007688); Ex. 19 (Ridge Tr. 296:16 - 299:22); <u>see also</u> Ex. 3 (Maestri Tr. 135:2 - 136:2); Ex. 51 (Sharma Aff. ¶19). Domino's encouraged deployment of workers in a manner that violated the Labor Law, even as the company knowingly failed to program PULSE to lawfully compensate employees performing this "cross-training" work.

4. Omitting the Required "Spread of Hours" Calculation

PULSE's fourth flaw is that it does not allow a franchisee to calculate additional wages due when an employee works over ten hours in a day, and thus fails to account for the "spread of hours" requirement. Gerstein Aff. ¶112; Ex. 27 (Pederson Tr. 171:7-10). The Franchisee Respondents and many of the Settling Franchisees systematically underpaid employees for significant time periods as a result of this PULSE deficiency. Gerstein Aff. ¶¶ 44, 50, 55, 61; Ex. 3 (Maestri Tr. 358:7 - 359:2, 418:7 - 419:17). Although a Domino's official informed several franchisees who happened to attend particular meetings in 2012 or 2013 about a commercially-available software program called Wizard which corrected PULSE's failure to include spread of hours pay in the Payroll Reports, Domino's never advised all of its New York franchisees about either the flaw or any available fix, nor did Domino's identify the other flaws. Gerstein Aff. ¶¶113, 116, 202. Domino's awareness of this PULSE flaw is further highlighted by its own practice of using a workaround in PeopleSoft, the software used in Domino's corporate stores, to properly calculate and pay spread of hours to employees at Domino's own corporate-owned store locations. Gerstein Aff. ¶113; Ex. 17 (Gayden Tr. 159:5 - 160:2).

G. Domino's Ongoing Failure to Notify Franchisees of PULSE's Known Flaws or Address Known Wage- and-Hour Violations Despite Full Knowledge of the Same

Despite Domino's full knowledge and an ongoing commitment to update PULSE, Domino's failed systematically to inform all New York State franchisees about the PULSE flaws and shortcomings described above. Domino's also failed to advise franchisees at any time during the Relevant Period not to use PULSE as a payroll system, not to calculate gross wages, or not to rely on the accuracy of the calculations underlying the "Total Pay" column in PULSE's payroll reports. Gerstein Aff. ¶114; Ex. 21 (Cookston Aff. ¶25). Domino's only informed some of the franchisees about certain of the flaws described above on an ad hoc basis, typically only when contacted by a franchisee first. Gerstein Aff. ¶114; Ex. 27 (Pederson Tr. 248:19-20). Pederson, for example, testified that in response to a franchisee inquiry about PULSE limitations, he would inform the franchisee of the problems, but could not name any specific franchisee with whom he had had such a conversation and could not in fact recall speaking to more than one franchisee. Nor did he have any knowledge of Domino's systematically informing franchisees of these flaws in writing or by any other means. Gerstein Aff. ¶114; Ex. 27 (Pederson Tr. 248:19 - 249:12, 294:11 - 295:6). Thus, except in the rare ad hoc case when a franchisee specifically asked, Domino's never communicated that there was any problem with PULSE. And although Domino's maintained in testimony before the OAG that PULSE was not a payroll service for franchisees (Gerstein Aff. ¶93; Ex. 27 (Pederson Tr. 120:9 - 121:23)), during the Relevant Period, Domino's never communicated this position in writing, or in any other meaningful or systematic manner, to franchisees.[19]

Many franchisees only learned of flaws in their PULSE-generated Payroll Reports — if at all — when a payroll service or accountant stumbled upon the problem or, more drastically, when the franchisee was investigated by a law enforcement agency or was sued, often years after violations occurred. Gerstein Aff. ¶115. And when franchisees who relied on PULSE's Payroll Reports learned of the PULSE flaws, they typically changed their practices to comply with the law. Gerstein Aff. ¶117. However, absent a lawsuit or enforcement action, this compliance was generally prospective only, with no payment of back wages. See, e.g., Gerstein Aff. ¶117; Ex. 78 (Webster Tr. 279:23 - 280:24).

Domino's failure to fix the flaws in PULSE resulted in hundreds of thousands of dollars in underpayments by the Franchisee Respondents. Gerstein Aff. ¶¶114-118. But in addition to its knowledge of the PULSE flaws (and failure to fix or disclose them), Domino's also knew since at least 2009 that its franchisees were violating the wage-and-hour laws. Gerstein Aff. ¶122. Domino's knew that many franchises were not properly claiming the tip credit (id. ¶122); and Domino's had other information, such as tip credit and compensation surveys and incoming

[19] Only in May 2015 (after the OAG had been engaged with Domino's in this investigation) did Domino's add two sentences to Section 12 of its Manager's Reference Guide regarding the uses of PULSE as a payroll system, stating: "The Domino's Pizza Pulse system is a point-of-sale system and is neither intended nor able to be utilized as a payroll system or human resources information system. Franchisees should consider utilizing a third-party vendor solution and/or an accountant to perform such services." Gerstein Aff. ¶94 n.37; Ex. 76. However, in no way do these statements, buried as they are in the Section 12 Operating Standards of the approximately 800-page Manager's Reference Guide, give any notice to franchisees of the flaws in PULSE or of violations they were committing by relying on PULSE.

complaints, which provided Domino's abundant evidence of serious wage-and-hour violations at its New York franchisee stores. Id. ¶¶123-125.

Indeed, as discussed above, the PULSE records for all New York franchisees provided by Domino's to the OAG for a sample period from October 2011 through June 2013 confirm that the vast majority of franchisees during this time period reported delivery workers' wage rates in PULSE that fell below the lowest permissible tipped minimum (78%) and overtime (85%) wage rates. Gerstein Aff. ¶¶34, 121.

Domino's actions and knowing omissions cannot be characterized as simply an unfortunate programming glitch: the company knew about the flaws; it knew about the impact on franchisees and workers; it made many other fixes and changes to PULSE and communicated those updates to franchisees. But year after year, Domino's failed to address the PULSE programming flaws outlined in the Gerstein Affirmation, despite knowing these very flaws significantly reduced the wages of the already low-wage workers who delivered its pizzas.

ARGUMENT

I. DOMINO'S AND THE FRANCHISEE RESPONDENTS ARE JOINTLY LIABLE FOR NUMEROUS VIOLATIONS OF THE LABOR LAW

The indisputable facts uncovered in the OAG's investigation demonstrate that during the Relevant Period the Franchisee Respondents committed widespread violations of the Labor Law: failing to pay the legal minimum wage; failing to pay legal overtime wages; failing to pay spread of hours pay; and/or failing to adequately reimburse for delivery expenses.[20] These violations were committed with the knowledge and participation of their principal officers (Maestri, Ahmed

[20] All claims in this proceeding, including the claims under the Labor Law, are subject to a six-year limitations period. See Labor Law §663(3) (claims under the Minimum Wage Act); State v. Cortelle Corp., 38 N.Y.2d 83 (1975) (fraud claims brought by Attorney General under Executive Law §63(12)). As a result of the tolling agreements the Franchisee Respondents entered into with the OAG, the limitations period is extended to July 2008. See supra, n.9 (tolling agreements with Franchisee Respondents).

and Denman), who are thus jointly liable for these violations.[21] See supra at 10-13, 15-16; Gerstein Aff. ¶¶6, 13, 16, 46-52, 60-62, 70-73.

Domino's is jointly liable for these Labor Law violations. Under settled New York Labor Law, employees can have more than one employer. To determine whether an entity is, in fact, a joint employer, courts examine the economic realities of the situation, including the control exerted by the putative joint employer in several key areas. Domino's meets these criteria and, therefore, is jointly and severally liable with the Franchisee Respondents for their wage-and-hour violations of the New York Labor Law because of the extensive control it both exerts, and reserves to itself, over the franchisees' employment relationships.[22]

A. The "Economic Realities" Test Applies to the Question of Whether Domino's Is a Joint Employer

The New York Labor Law, like the federal Fair Labor Standards Act ("FLSA"), is a remedial statute designed to protect the wages of workers. Sukhnandan v. Royal Health Care of Long Island LLC, No. 12cv4216 (RLE), 2014 U.S. Dist. LEXIS 105596, at *39 (S.D.N.Y. July 31, 2014). As a result, the term "employer" is to be broadly construed. Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 188 (S.D.N.Y. 2003). Under the Labor Law, the term "employer" includes "any individual, partnership, association, corporation . . . or any organized group of persons acting as employer"; "employed" includes "permitted or suffered to

[21] The principals of corporate entities are liable for violating the law together with the corporate entities without the need to pierce the corporate veil where they personally participated in or knew of the illegality or fraud. See People v. Frink Am. Inc., 2 A.D.3d 1379, 1381-82 (4th Dep't 2003) (Executive Law §63(12) allows the Attorney General to seek relief against "any person," including corporate officers, where it is established they personally participated in or had actual knowledge of the fraud or illegality).

[22] The OAG's wage-and-hour claims against the Respondents are brought under Labor Law Article 6 (§190 et seq.) and Article 19 (§650 et seq.), and the rules and regulations promulgated thereunder, and are not brought under federal law, common law, or under a tort theory. A joint employer under the Labor Law is jointly and severally liable for all underpayments in violation of the Labor Law, whether or not that joint employer facilitated or caused the particular violation. See, e.g., Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 186 (S.D.N.Y. 2003) (finding both Duane Reade and the individual defendants "joint employers" under the FLSA and the New York Labor Law and thus "jointly and severally obligated for underpayments of minimum wage and overtime").

work." Labor Law §§651(6), 2(7). This "suffer or permit to work" definition — later incorporated into the FLSA at 29 U.S.C. §203(g) — was "developed to assign responsibility to [putative employers] that did not directly supervise putative employees."[23] It is "the broadest definition [of 'employ'] that has ever been included in any one act," encompassing relationships that "were not deemed to fall within an employer-employee category" at common law. Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (quotations omitted). The broad definition extends to situations where a worker is employed by multiple entities or individuals that under settled law can be treated as "joint employers."[24]

Because the Labor Law and FLSA definitions of "employed" are the same, the weight of authority among New York state courts and federal courts operating within the Second Circuit have recognized that the same standard for determining joint employer status applies under both: specifically, that the test examining the economic reality of the employment relationship (the "economic realities" test) originally articulated and refined in FLSA decisions applies in construing the Labor Law as well. As a result, courts within New York State, whether state or federal courts, have applied the economic realities test as it has been articulated and applied by federal courts within the Second Circuit, principally, Herman v. RSR Security Services, Ltd., 172 F.3d 132 (2d Cir. 1999), Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003), Barfield v. New York City Health & Hospitals, 537 F.3d 132, 142-43 (2d Cir. 2008), and Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013).

[23] See Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996) (citing the New York Court of Appeals' seminal decision under the Labor Law in People ex rel. Price v. Sheffield Farms, 225 N.Y. 25 (1918) (Cardozo, J.)).

[24] See, e.g., Cordova v. SCCF, Inc., No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, *8-9 n.5 (S.D.N.Y. July 16, 2014); Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 264 n.48 (S.D.N.Y. 2008); Ansoumana, 255 F. Supp. 2d at 188-189; Lopez v. Silverman, 14 F. Supp. 2d 405, 411 n.4 (S.D.N.Y. 1998); Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013), vacated on other grounds, 791 F.3d 376 (2d Cir. 2015).

The New York Court of Appeals has recognized the concept of joint employment, drawing upon the factors examined in federal caselaw without explicitly adopting a specific test. See Ovadia v. Office of Indus. Bd. of Appeals, 19 N.Y.3d 138, 145 (2012) (declining to find joint employment where facts at issue were typical for a construction contractor/subcontractor relationship; also eschewing the need to resort to federal precedent to resolve the joint employment issue).

But while the Court of Appeals has not specifically ruled whether the economic realities test as used in the FLSA context applies in construing the Labor Law's definition of employer, the weight of state authority in New York has found that the economic realities test applies, citing to the various cases articulating this test within the Second Circuit. See, e.g., Exceed Contracting Corp. v. Indus. Bd. of Appeals, 126 A.D.3d 575, 576 (1st Dep't 2015) (citing Zheng); see also, Yick Wing Chan v. Indus. Bd. of Appeals, 120 A.D.3d 1120, 1121 (1st Dep't 2014) (citing Herman); Bonito v. Avalon Partners, Inc., 106 A.D.3d 625, 626 (1st Dep't 2013) (citing Herman); Ponce v. Lajaunie, 2015 N.Y. Slip Op. 31216(U), 2015 N.Y. Misc. LEXIS 2522, at *4-5 (Sup. Ct. N.Y. Cty. July 15, 2015) (citing Herman, Irizarry, Barfield); David Birnbaum LLC v. Park, 2013 N.Y. Slip. Op. 33372(U), 2013 N.Y. Misc. LEXIS 6210, at *27-28 (Sup. Ct. N.Y. Cty. Jan. 25, 2013) (citing Herman).

Federal courts with jurisdiction over New York State have also recognized that the economic realities test applies under both the FLSA and New York Labor Law. In Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201 (S.D.N.Y. 2014), for example, the court determined that "[c]ourts in this District have regularly applied the same tests to determine, under the FLSA and N.Y.L.L., whether entities were joint employers." Id. at 206 (citing Spicer v. Pier Sixty LLC, 269 F.R.D. 321, 335 n.13 (S.D.N.Y. 2010); Glatt v. Fox Searchlight Pictures Inc., 293

F.R.D. 516, 525-27 (S.D.N.Y. 2013) (collecting cases), vacated on other grounds, 791 F.3d 376 (2d Cir. 2015). Thus, the Olvera court, following "the weight of authority among district courts in this Circuit," applied the economic realities analysis to both plaintiff's FLSA and Labor Law claims. 73 F. Supp. 3d at 206; see also Cano v. DPNY, Inc., 287 F.R.D. 251, 260 n.2 (S.D.N.Y. 2012).

Accordingly, based on the foregoing authority, Petitioner here relies on and applies the economic realities test in assessing the extent to which Domino's is a joint employer.

The economic realities test is the same whether a putative joint employer is an individual person, like a manager or owner (see generally Herman, 172 F.3d 132; Bonito, 106 A.D.3d at 626), or a corporation, like Domino's. See generally Zheng, 355 F.3d at 69; Cano, 287 F.R.D. at 260; Antenor, 88 F.3d at 932-33; Ansoumana, 255 F. Supp. 2d at 412; and Lopez, 14 F. Supp. 2d at 412. In either case, the "overarching concern" in deciding whether liability as a joint employer exists

> is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts . . . . [T]he 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive. Since economic reality is determined based upon all the circumstances, any relevant evidence may be examined.

Herman, 172 F.3d at 139 (emphasis in original).

In refining the analysis, the courts have looked both to "formal" and "functional" indicia of control. In applying the economic reality test, this Court must first evaluate whether the alleged joint employer exercised formal control over a plaintiff's employment. In Herman, the Second Circuit, relying on earlier precedent, recognized a four-factor joint-employer test to establish formal control, which asks whether an employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. 172 F.3d at 139 (citing Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984)).

In Zheng, the Second Circuit expanded and elaborated upon the "formal control" analysis, when the Court recognized that "Carter did not hold . . . that those [four] factors are necessary to establish an employment relationship." Zheng, 355 F.3d at 71 (emphasis omitted). The Zheng court identified a number of other factors that could establish a putative employer's "functional" control over a worker's employment sufficient to be held liable as a joint employer. Under the "functional control" test adopted in Zheng, these factors are: (1) whether the putative joint employer's premises and equipment were used for the employees' work; (2) whether the front-line employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which employees performed a discrete line-job that was integral to the putative joint employer's process of production; (4) whether responsibility under the contracts between the direct and putative joint employer could pass from one entity to another without material changes; (5) the degree to which the putative joint employer or its agents supervised employees' work; and (6) whether employees worked exclusively or predominantly for the putative joint employer. Id. at 72.

As the Second Circuit has further recognized, the tests in Herman and Zheng do not state "rigid rule[s]" but instead "provide a nonexclusive and overlapping set of factors to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible" and therefore gives "proper effect" to the broad language of the wage-and-hour laws. Barfield v. N.Y.C. Health & Hosps., 537 F.3d 132, 143 (2d Cir. 2008). Moreover, the Second Circuit recognized that a plaintiff need not satisfy all of the factors to demonstrate that a particular defendant is a joint employer and that "the court is also free to consider any other factors it deems relevant to its assessment of the economic realities." Zheng, 355 F.3d at 71-72.

These basic principles have been applied to a variety of corporate employers, including franchisors, under New York Labor Law and the FLSA. See Cano, 287 F.R.D. at 259-60 (granting motion to amend complaint asserting Labor Law and FLSA claims against Domino's as a joint employer along with a New York franchisee); Bareburger, 73 F. Supp. 3d at 207 (denying a motion to dismiss, permitting claims to be asserted against franchisor as a joint employer liable for Labor Law and FLSA violations); Ansoumana, 255 F. Supp. 2d at 193-96 (denying motion to dismiss claim that a drug store chain was a joint employer along with the direct employer of its delivery workers). Courts have also either found FLSA and/or state labor law joint employer liability or refused to dismiss joint employer claims against companies, like Domino's, whose product was manufactured or processed for sale, or whose service was performed, by direct employees of an intermediary. Examples include a company whose manufacturing work was done by direct employees of contractors (Zheng, 355 F.3d at 73; Lopez, 14 F. Supp. 2d at 420-23); growers whose crops were picked by direct employees of contractors (Antenor, 88 F.3d at 937-38; Torres-Lopez v. May, 111 F.3d 633, 642-44 (9th Cir. 1997)); a state agency together with the welfare recipients who directly hired and negotiated with home attendants (Bonnette v. Cal. Health & Welfare Agency, 525 F. Supp. 2d 128, 135 (N.D. Cal. 1981)); and Yale University together with the bus company that directly hired and paid its shuttle bus drivers. Velez v. New Haven Bus Serv., Inc., No. 3:13cv19 (JBA), 2015 U.S. Dist. LEXIS 1275, at *15-19 (D. Conn. Jan. 26, 2015).

Notably, joint employment "does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control. . . . Control may be restricted, or exercised only occasionally . . . since such limitations on control 'do[] not diminish the significance of its existence.'" Herman, 172 F.3d at 139 (emphasis added) (citations omitted).[25]

Under the statutory definition of "employed," the significant question is not whether control over employees was exercised constantly or uniformly or directly, but simply that control "existed." Herman, 172 F.3d at 139; see also, e.g., Donovan v. Janitorial Servs., Inc., 672 F.2d 528, 531 (5th Cir. 1982) (that authority was "latent" and "exercised . . . only occasionally . . . does not diminish the significance of its existence"); Hart v. Rick's Cabaret Int'l Inc., 967 F. Supp. 2d 901, 917-18 (S.D.N.Y. 2013) (irrelevant that putative employer ultimately removed fines; "[t]he mere threat of imposition of such a fine" evidenced control); Cano, 287 F.R.D. at 258. For enforcement of statutory wage standards, Domino's power to control franchisees' labor relations — even if only occasionally exercised — is still highly significant evidence of control.

The "object of the economic reality test in the joint employment context is not to determine whether the workers at issue are more economically dependent on" the immediate or the putatively joint employer, but rather "whether the totality of the evidence . . . demonstrates the economic dependence of the [workers] on both of those employers." Lopez, 14 F. Supp. 2d at 423 (emphasis in original) (quotations omitted).[26] "Courts may take cognizance of who benefits from the work performed and look behind the formal structure to determine whether a

[25] Not only is it clear under the Labor Law's (and FLSA's) definition of "employed" that limits on control "do not diminish the significance of its existence," it is likely even true at common law. The National Labor Relations Board ("NLRB") recently found that the common law does not require constant exercise of control and that either the "right to control" or "actual exercise of control, whether direct or indirect" can prove joint employer status. Browning-Ferris Indus. of Cal., Inc., Case 32-RC-109684, 2015 NLRB LEXIS 672, at *63, *70 (Aug. 27, 2015). While Browning-Ferris did not specifically involve a franchisor-franchisee relationship, the NLRB is currently considering the issue of whether McDonald's is a joint employer together with McDonald's franchisees in a consolidated matter pending before it. See NLRB docket at https://www.nlrb.gov/case/02-CA-093893) (last visited May 5, 2016).

[26] Cf., e.g., Antenor, 88 F.3d at 932; Torres-Lopez, 111 F.3d at 641; Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 513-14 (5th Cir. 1969); Velez, 2015 U.S. Dist. LEXIS 1275, at *15 (FLSA cases).

party is impermissibly attempting to avoid responsibility as an employer." Bonnette, 525 F. Supp. 2d at 135 n.6.

The Second Circuit also has emphasized that since a determination must be based on all the circumstances, courts may examine "any relevant evidence . . . so as to avoid having the test confined to a narrow legalistic definition." Herman, 172 F.3d at 139; see also Zheng, 355 F.3d at 72. It is not enough to "slice and dice Plaintiff's allegations separately, instead of evaluating the totality of the circumstances . . . . [A]rguments that any particular allegation . . . is insufficient, on its own, to establish a joint-employer relationship" do not disprove the claim. Flemming v. REM Conn. Cmty. Servs. Inc., No. 3:11cv689 (JBA), 2012 U.S. Dist. LEXIS 180678, at *12 (D. Conn. Dec. 21, 2012). Indeed, Zheng specifically states that a summary finding of joint employer status might be made "even when isolated factors point against imposing joint liability." 355 F.3d at 77 (emphasis added).

B. Domino's Is Liable as a Joint Employer Because, as a Factual Matter, Its Acts and Omissions in Relation to PULSE's "Payroll Reports" Caused Many of the Wage-and-Hour Violations

In this case, Domino's satisfies the traditional factors courts rely on to support a joint employer finding, because, as the discussion of these facts will show, the economic reality is that Domino's has the power to exercise, and has exercised, authority in key aspects of hiring, firing, discipline, maintenance of payroll records, and the setting of important working conditions and employee relations. Equally important, Domino's forcefully inserted itself into its franchisees' payroll practices — by leading franchisees to rely on PULSE Payroll Reports without correcting or disclosing known flaws — and thereby caused many of these wage violations.

Caselaw confirms that directly causing or facilitating violations — direct involvement that sets this case apart from the wage-and-hour caselaw analyzing a franchisor's liability as a joint employer — strongly supports a joint employer finding here.[27] Where evidence of direct involvement exists, as in the present case, courts have found it highly probative.

In Flemming, the plaintiff sought a joint employer finding under FLSA and Connecticut state law as to more than one company, including the employee's direct employer. 2012 U.S. Dist. LEXIS 180678, at *6-7. The companies claimed that the allegations of control were conclusory and/or individually insufficient for joint employer status. The court not only rejected attempts to "slice and dice Plaintiff's allegations separately, instead of evaluating the totality of the circumstances" (id. at *12), but gave special weight to the plaintiffs' claim that the putative joint employers "caused the alleged FLSA violation by improperly designating all Program Managers as exempt from overtime." Id. at *17 (citing, inter alia, Lanzetta v. Florio's Enters., 763 F. Supp. 2d 615, 627 (S.D.N.Y. 2011)) (stating that courts within the Second Circuit "have recognized facilitation of the alleged violation as a significant factor in the joint-employer analysis"). Similarly, Domino's actions led directly to the underpayments complained of here: Domino's requires franchisees to install, and encourages them to use for payroll purposes, a

[27] It is important to clarify here that the Attorney General is not arguing that Domino's is a joint employer simply because it is a franchisor. Generic features of a franchise relationship such as a standard franchise agreement and uniform operational guidelines, lacking any other evidence of control or economic dependence, will not automatically establish a joint employer relationship, and courts have declined to find joint employment for such reasons alone. See, e.g., Ping Chen v. Domino's Pizza, Inc., No. 09-107 (JAP), 2009 U.S. Dist. LEXIS 96362, at *13 (D.N.J. Oct. 16, 2009) (dismissing complaint against Domino's on a joint employer theory that "fails to make any specific allegations against Domino's" beyond the "conclusory statement that Domino's is an employer" within FLSA's ambit); Owens-Presley v. MCD Pizza, Inc., C.A. No. 14-6002, 2015 U.S. Dist. LEXIS 104644, at *10-21 (E.D. Pa. Aug. 10, 2015) (granting summary judgment to Domino's in franchisee employee's Title VII claim for plaintiff's failure to exhaust administrative remedies, but failing to rule on Domino's status as employer of franchisee employee); Patterson v. Domino's Pizza LLC, 60 Cal. 4th 474, 481, 503 (2014) (finding Domino's not liable as employer of franchisee employee for sexual harassment claim, based on a limited factual record). In sharp contrast, the OAG has developed evidence that Domino's acts and omissions led to numerous violations at issue here, as well as compelling evidence of Domino's control over franchisee employee hiring, firing and disciplinary standards, and its supervision and involvement in other personnel matters like unionization. This case thus presents irrefutable evidence of Domino's formal and functional control beyond those facts typically present in the cases that have dealt with the franchisor/franchisee relationship in the wage-and-hour context.

PULSE system that Domino's knew improperly calculated overtime and other pay, a fact Domino's did not disclose to them.

In Liu v. Donna Karan Int'l, Inc., No. 00-Civ.-4221 (WK), 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. Jan. 2, 2001), plaintiffs who "were technically employed by" garment-industry contractors alleged that clothing company Donna Karan shared liability for underpayment under FLSA and the New York Minimum Wage Act, because "Donna Karan dictated the prices of the garments and the production requirements, which in turn dictated the hours plaintiffs worked" and "controlled wages and hours of the workers through setting low prices and making large output demands." Id. at *3, 9. Even without any claims of a direct Donna Karan interest in the contractors, or claims that Donna Karan directly supervised plaintiffs' work (unlike the present case where, as discussed below, Domino's did directly exercise supervision over employees at a franchisee's store), the court found this type of alleged control sufficient under the economic realities test to defeat a motion to dismiss. Donna Karan, as did Domino's here, created the situation that led to or caused the violations.[28]

In Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240 (S.D.N.Y. 2008), the court found, after trial, joint employer liability under the FLSA and the New York Minimum Wage Act on the part of the husband and wife owners of two restaurants (because both had the power to hire, fire, schedule, set wages for and pay delivery employees), and on the part of the manager of the restaurants (because he "lent himself to" or "facilitated" the violations). Id. at 265. Although the manager's actions were more infrequent (he neither set pay nor scheduled work, though he did influence hiring and firing, assign some work, and maintain records), the court concluded that he "understood the conditions under which plaintiffs were working, including their wages, and

[28] Donna Karan subsequently settled the case. See Liu v. Jen Chu Fashion Corp., No. 00-Civ.-4221 (RJH) (AJP), 2004 U.S. Dist. LEXIS 35, at *1 n.1 (S.D.N.Y. Jan. 7, 2004).

readily lent himself to, and facilitated, a system under which they were denied their rights," and the "economic realities suggest that he was an employer within the meaning of the FLSA and state law." Id. at 264-65; see also, e.g., Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983) (affirming that company president was a joint employer partly because he "was personally responsible for allowing the company's workers' compensation insurance to lapse"); Lanzetta, 763 F. Supp. 2d at 627 (court finds after trial that general manager "had a role in facilitating the violations at issue, which has also been considered significant in the economic reality inquiry"); Dole v. Simpson, 784 F. Supp. 538, 545 (S.D. Ind. 1991) (identifying the issue in FLSA cases as whether or not the putative joint employer "had control over the alleged violation of the Act") (citation omitted).

In Herman, the joint employer's omissions were so egregious that the Second Circuit, in affirming the district court's decision after trial, found not only that the defendant was jointly liable as an employer but also found the defendant liable for willful violations where the joint employer failed proactively to ascertain the co-employer's compliance with the FLSA given knowledge of that employer's prior FLSA violations. Herman, 172 F.3d 132 at 141-42.

Similarly here, Domino's should be held liable as a joint employer because the company caused or otherwise facilitated a number of the violations by encouraging franchisees to use PULSE Payroll Reports without fixing or disclosing PULSE flaws of which Domino's was well aware.

C. Domino's Status as a Joint Employer Is Further Established By Evidence of Control Under the *Herman* and *Zheng* Factors

Domino's joint employer status is also evidenced by its ongoing and extensive control, and ability to control, Franchisee Respondents' operations, consistent with the four formal control Herman factors and the six functional control Zheng factors.

In assessing the following indisputable facts that establish Domino's joint employer status as to the Franchisee Respondents, evidence concerning other New York franchisees, including the Settling Franchisees, is relevant to determining Domino's joint employer status. See, e.g., Glatt, 293 F.R.D. at 526 n.26 (a studio's power to hire at "other films with similar Production Agreements" was relevant to its status as a joint employer — with the direct employer a corporation formed for one film — since it was undisputed that "rights with respect to the films did not differ materially"). In noting the relevance of facts concerning other relationships the joint employer had with other similarly-situated entities, the court in Glatt also relied on Herman's holding that, since the economic realities test "is based on all the circumstances, any relevant evidence may be examined." Id. (citing Herman, 172 F.3d at 139).[29]

1. Evidence of Formal Control Consistent with the Herman Factors

a. First Herman Factor: Domino's Power to Hire, Fire, and Discipline Franchisees' Employees

i. Hiring

The first Herman factor examines whether the alleged joint employer had the power to hire and fire the employees. Herman, 172 F.3d at 139. In Herman, the party ultimately found to be a joint employer "participated in" hiring and recruiting "some" employees. Id. at 137. In Torres v. Gristede's Operating Corp., 04-Civ.-3316 (PAC), 2011 U.S. Dist. LEXIS 114209, at *7

[29] It is the economic reality of Domino's relationship with the workers for the Franchisee Respondents, and the other New York franchisees, that renders it a joint employer with the Franchisee Respondents, and self-serving claims in its Franchise Agreement do not alter this reality. See, e.g., Cano, 287 F.R.D. at 259-60 (rejecting Domino's claim that it could not possibly be a joint employer of franchise employees); see also Torres v. Gristede's Operating Corp., 04-Civ.-3316 (PAC), 2011 U.S. Dist. LEXIS 114209, at *8 (S.D.N.Y. Sept. 9, 2011) ("[W]e should be careful about accepting the [putative joint employer]'s characterization of limitations on his power."), aff'd in part sub nom. Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013). When courts reject claims of franchisor joint liability, they do so based on the totality of the evidence, not based simply on a franchise agreement's language. See, e.g., Singh v. 7-Eleven, Inc., No. C-05-04534 RMW, 2007 U.S. Dist. LEXIS 16677, *10-11 (N.D. Cal. Mar. 8, 2007) (noting the language of the Franchise Agreement "does not establish the nature of the employment relationship as a matter of law"; finding that a franchisor was not a joint employer based on the "economic reality" test and the totality of circumstances).

(S.D.N.Y.), aff'd in part sub nom. Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013), the joint employer hired managerial employees, but no line employees. Indeed, courts have held that even without hiring rank-and-file employees, the ability to hire managerial staff is relevant in weighing the first Herman factor. See, e.g., Glatt, 293 F.R.D. at 526 (ability to hire is enough to satisfy first Herman factor).[30] The level of "participation" under Herman's first factor thus can include, as in Antenor, the power to veto hiring decisions (as opposed to affirmatively making hiring selections) (88 F.3d at 935), or providing guidance to franchisees on "how to hire and train employees." See Bareburger, 73 F. Supp. 3d at 207 (quotation omitted) (relying on, among other things, the fact the franchisor "guided franchisees on 'how to hire and train employees'" in denying franchisor/putative joint employer's motion to dismiss).[31] "Participation" may also include involvement in a background check/employee screening requirement beyond simply requiring that one be done. See, e.g., Cano, 287 F.R.D. at 260 (finding that allegations that Domino's "developed and implemented hiring policies such as systems for screening, interviewing, and assessing applicants for employment at all of their stores including the defendants' stores" was, with other factors, sufficient to grant motion to add Domino's as a joint employer in an amended complaint).

Consistent with such caselaw, Domino's exercises control over hiring at franchisee stores, including in at least one instance requiring a franchisee to hire managerial staff, providing

[30] See Torres, 2011 U.S. Dist. LEXIS 114209, at *7 ("[there is]no evidence that Mr. Catsimatidis hired any class member, but there does not have to be. It stands uncontradicted that he hired managerial employees").

[31] Even if the "general practice" may be for a direct employer to handle hiring issues, with a joint employer intervening only if it finds the direct employer "unable or unwilling to do so," this does not negate a finding of joint employer status. On the contrary, in Bonnette, the court found that a putative joint employer county agency typically arrived at a "mutually agreeable determination of needed hours and services" on the part of social service workers. 525 F. Supp. at 137. However, "when mutuality was not forthcoming," the agency "exercised its considerable authority in making a final decision" leading to a finding of joint employment under FLSA. Id. at 134-35.

the candidate ultimately hired, and meeting with the new supervisor and the franchisee in order to outline the supervisor's required job functions. Gerstein Aff. ¶¶133-146.

Domino's also exercised control over hiring decisions of certain non-managerial employees at franchisee locations. Gerstein Aff. ¶135. For example, in the sale of several corporate-owned stores in Staten Island to a franchisee, Domino's required the franchisee — as a condition of the sale and in the sales contract — "to offer substantially similar jobs with substantially similar wages and benefits in the same or similarly located stores to a substantial number of qualified persons employed in the Stores just prior to [the sale]." Gerstein Aff. ¶135.[32] As a result of this requirement, the purchasing franchisee did as directed; he offered substantially the same staff their prior positions, and at the same wage. He did so without conducting a single interview or background check. Gerstein Aff. ¶135.[33]

Domino's also controls hiring practices at the Franchisee Respondents by mandating the process and the vendors that franchisees must use to conduct Domino's-required criminal background checks for all prospective employees and, once hired, at every third anniversary thereafter. Indeed, a candidate cannot be employed by a franchisee if a check reveals a conviction for a crime that Domino's determines could, among other things, harm the Domino's reputation or brand. Gerstein Aff. ¶137; Ex. 24 (DP00000593) (Manager's Guide §12, at 6). While imposing a background check requirement in itself may not give rise to joint employment,

[32] Domino's employees testifying about this sale noted that wholesale retention of employees was "common" in such sales from Domino's to a franchisee. Gerstein Aff. ¶135; Ex. 17 (Gayden Tr. 124:15-25); see also Ex. 20 (Ridge Tr. 314:9-15).

[33] Although employees' own subjective understanding of who employs them has not been articulated as a factor in the joint employment analysis, it is instructive to consider this transaction from the point of view of the affected employees, who did not have to undergo job interviews or apply for their "new" jobs, and who continued doing the same work in the same location under exactly the same working conditions. Gerstein Aff. ¶135.

the manner in which Domino's implemented its requirement usurped certain key aspects of the hiring process:

- Domino's mandates which vendors may perform the background checks (i.e., the "Reporting Agencies") and solely determines the criteria used to approve or reject applicants. Gerstein Aff. ¶¶138, 139, 142, 146.

- Franchisees described a lack of knowledge and understanding about the criteria used. Gerstein Aff. ¶143; Ex. 78 (Webster Tr. 186:10-19); see also Gerstein Aff. ¶144; Ex. 22 (Lee Aff. ¶17); Ex. 23 (Gaisser Aff. ¶21); Ex. 21 (Cookston Aff. ¶43).

- Domino's regularly monitors franchisee compliance with its background check and motor vehicle requirements by soliciting information directly from the Reporting Agencies. Gerstein Aff. ¶¶144-145.

- The Reporting Agencies give clear "meets/does not meet" results for job seekers, precluding consideration by franchisees of certain individualized factors (required by law) such as an ex-offender job applicant's rehabilitation. Id. ¶¶142-144.[34]

Beyond the impact on hiring, Domino's supervision of franchisee background and motor vehicle checks impacts employees' continued ability to work for franchisees: PULSE stores and Domino's monitors the results of these checks, as well as driver's license and insurance information. If a delivery worker's driver's license or insurance has lapsed, that employee cannot clock in to PULSE, and cannot work until updated information has been entered into PULSE. Gerstein Aff. ¶146.

Domino's role in the hiring process was considerably more involved than mere "participation" in hiring decisions. See, e.g., Herman, 172 F.3d at 137 (joint employer "participated in" hiring and recruiting "some" employees). Domino's reserved for itself the

[34] With respect to the Domino's hiring actions described above, the Attorney General does not mean to suggest that background checks are unwarranted, nor that requiring retention of employees when selling a corporate store should be avoided. When it requires a purchasing franchisee to retain employees who worked in a store formerly owned by Domino's, the company protects those employees' job stability and security. Similarly, when it prohibits franchisees from hiring or retaining a delivery employee who poses risks of a vehicle accident or crime against a customer, Domino's seeks to protect public safety. The point is not that Domino's control over franchisee hiring and firing was wielded wisely or unwisely, or that Domino's did or did not do the "right thing"; the point simply is that Domino's exercised such control and, having done so, cannot also assert that it is completely separate from franchisee hiring and firing decisions.

power to require, enforce, and dictate the process for its background check requirement, and the power over hiring of employees (whether managerial or otherwise). These facts are more than sufficient to establish that, with respect to the "power to hire," Domino's possessed and/or exercised that power over the Franchisee Respondents and the employees who worked at their stores.

ii. Firing and Discipline

Under Herman's first factor, as with hiring decisions, a putative joint employer's control of firing or discipline is also evidence of joint employer status even if "restricted, or exercised only occasionally . . . since such limitations on control do[] not diminish the significance of its existence." Herman, 172 F.3d at 139 (quotation omitted). For example, in Herman, an employer's role regarding a complaint involving employees was a factor in finding joint employment; the joint employer there merely "resolved a complaint about a work-related problem." Id. at 137.

Domino's exerts significant control over the firing and discipline of employees at a franchisee's store. Gerstein Aff. ¶¶147-157. Notwithstanding numerous disclaimers in its Franchise Agreement of any employment relationship between Domino's and the franchisees' stores (see, e.g., Gerstein Aff. ¶147), the manner in which Domino's invokes the Franchise Agreement in its oversight of the Franchisee Respondents (and other franchisees supervised by the same Domino's Franchise Operations officials in New York State) exceeds the scope and even contradicts these disclaimers in the Franchise Agreement. Gerstein Aff. ¶148. In practice, Domino's reserves for itself the authority to compel the termination and discipline of workers at its franchisees, and the record shows that Domino's has exercised this authority on a number of occasions. Gerstein Aff. ¶¶148-157. Respondent Denman reported that, under threat of terminating his franchise, Domino's forced him to discharge a "very good" employee — who was hired before the background check requirements were in place — but who had a conviction that Domino's later discovered. Gerstein Aff. ¶¶149-150; Ex. 14 (Denman Tr. 47:17-21); see also Ex. 106 (DENMAN000011). Additionally, Respondent Maestri was required to immediately come to one of his stores when a Domino's inspection discovered illegal drugs and alcohol in the back, and, despite firing the employees involved, Maestri still received from Domino's a "Notice of Default," a disciplinary step that ultimately can lead to termination of a franchise. Gerstein Aff. ¶151.

Again, as discussed above (see supra, note 34), the OAG is not suggesting that employment actions are not appropriate when taken to address public safety concerns. The point is that whatever the motivation, such examples show that Domino's had the power to, and did, exercise control over franchisee employment decisions.

Domino's also instructs franchisees on the need to, and how to, discipline workers short of termination. Domino's Franchise Operations Director Mark Rudd, for example, instructed the Maestri Respondents to discipline an employee in response to a complaint Domino's received about a manager at one of the Maestri Respondents' stores using foul language. Gerstein Aff. ¶152; Ex. 109 (DP00079863-864).[35] When asked about the discipline and other employment-related instructions he provided to the Maestri Respondents and other franchisees about their employees, Rudd tried to characterize each case as a "suggestion, not a request," explaining that the difference between a suggestion and a request from Domino's was "manners," i.e., saying "please" as opposed to "go do." Gerstein Aff. ¶157.

[35] Rudd issued similar instructions to New York franchisees about their employees following complaints by employees and customers. Gerstein Aff. ¶¶153, 155; Ex. 114 (DP00079208). Domino's not only sets the time frame (five days) for franchisees to resolve the complaints it receives at its Customer Care Center, but Domino's Franchise Operations personnel also monitor the adequacy of franchisee responses to complaints. Gerstein Aff. ¶154. Such complaints are received not only from customers but also Domino's employees. Gerstein Aff. ¶¶153-54.

In another example, a Settling Franchisee, Cookston, was directed by Domino's Chief Executive Officer to take specific disciplinary action against certain employees, even though Cookston thought this was unfair. In 2009, Cookston's store made food for Fox Business News as part of an early morning live interview with Domino's Chairman and CEO David Brandon. Gerstein Aff. ¶156; Ex. 21 (Cookston Aff. ¶56); Ex. 115 (DP00173791-792) (Oct. 14, 2009 email from Brandon). After the broadcast, Domino's was displeased with the food's appearance ("the pizzas had large bubbles"), and Brandon, along with Domino's VP of Franchise Operations, demanded discipline for the responsible employees. Gerstein Aff. ¶156; Ex. 21 (Cookston Aff. ¶56) (describing Brandon demanding action instead of a mere apology; Ridge demanding something "had to be done"). Cookston felt he had "no choice" but to discipline the employee (who eventually resigned). Gerstein Aff. ¶156; Ex. 21 (Cookston Aff. ¶ 59). Even after taking disciplinary action and implementing remedial measures, within a week, Cookston was placed in default of the Franchise Agreement solely based on this incident, and remained in default for almost two months. Gerstein Aff. ¶156; Ex. 116 (DP00173775-777) (Oct. 15, 2009 email); Ex. 118 (DP00173817).

Consistent with the caselaw, this evidence shows that even if "restricted, or exercised only occasionally," Domino's had the power, and/or exercised the power, to fire and exercise disciplinary authority over the Franchisee Respondents, further satisfying the first Herman factor.

b. Second Herman Factor: Domino's Supervision and Control of Schedules and Working Conditions

Domino's also satisfies the second Herman factor because it exerts supervision and control of (i) employee schedules, or (ii) conditions of employment. Herman, 172 F.3d at 139.

i. **Domino's Control over Scheduling**

Where a putative joint employer effectively dictates an overall work schedule, it can satisfy the second Herman factor, even where that employer does not dictate particular employees' individual shifts or schedules. See Velez, 2015 U.S. Dist. LEXIS 1275, at *18 ("Yale may have exerted control over hiring, firing, and work assignments of bus drivers by setting the bus routes, schedules, and stops."). In Torres-Lopez, farmworkers brought claims under the FLSA and Migrant and Seasonal Agricultural Workers Protection Act ("AWPA"), seeking to hold the grower liable as a joint employer. 111 F.3d 633. The Ninth Circuit reversed a grant of summary judgment, and held the grower to be a joint employer. Id. As the AWPA has the same definition of "employ" as the FLSA, the court considered as a factor that the farms "controlled the overall harvest schedule" including deciding that certain days were unsuitable for farming, and controlled "the number of workers needed for harvesting." Id. at 642. The court was unmoved by a dissenting judge's comment that the company "did not exercise control over any individual [workers]," or determine "specific days or hours" or "specify which workers would do the picking." Id. at 647 (Aldisert, J., dissenting); see also Antenor, 88 F.3d at 934 (growers told the direct employer how many farmworkers to bring each day, "determined the precise moment" when work would begin each day, and dictated the workers' hours in other ways).

The record evidence here demonstrates that Domino's has and exerts control over the scheduling of employees at franchisees' stores. Section 12 of the Domino's Manager's Reference Guide ("Manager's Guide") sets mandatory minimum scheduling and staffing rules for all franchisee-owned stores which, effectively, determine scheduling of those stores' employees. The Manager's Guide is a nearly 800-page manual of standards which all Domino's stores must follow, and which one court described as a "veritable bible for overseeing a Domino's operation . . . that literally leaves nothing to chance." Parker v. Domino's Pizza, Inc., 629 So. 2d 1026, 1028-29 (Fla. Dist. Ct. App. 1993). To deviate from anything in the Manager's Guide, including these scheduling rules, franchisees must apply to Domino's for a "variance," which according to franchisees' testimony is rarely granted. Gerstein Aff. ¶¶159-160. Respondent Denman, for example, testified he "fought tooth and nail" — to no avail — for approval of a variance to open on weekdays at 4:00 p.m. rather than 11:00 a.m. since his stores were "a dinner business, predominantly" and opening for lunch was "a waste of labor hours." Gerstein Aff. ¶160; Ex. 14 (Denman Tr. 109:16 - 110:14).[36]

Domino's personnel have also repeatedly provided written instructions to franchisees, including the Franchisee Respondents, concerning employee scheduling and staffing levels; one Domino's official provided all franchisees in his area, including Respondents Ahmed and Maestri, with detailed scheduling instructions, including directives to cross-train delivery employees and to schedule employees in 15-minute increments. Gerstein Aff. ¶161; see also Ex. 123 (DP00072456) (directing scheduling of employees for marketing activities).

Domino's involvement in dictating overall scheduling and staffing levels evidences the requisite level of control under Herman, and a level of control comparable to or greater than that displayed in Torres-Lopez and Antenor.

ii. Domino's Supervision and Control of Working Conditions

Domino's exercise of control over employee working conditions at the Franchisee Respondents' stores satisfies Herman's second factor in five significant ways: (a) Domino's sets various employee standards and enforces these standards by in-person inspections throughout the

[36] Denman testified that "all variances were shot down after a certain period," with requests approved only if Domino's was "doing a test market on a product in a region, and then there was a variance granted for that during the test market." Gerstein Aff. ¶160 n.51; Ex. 14 (Denman Tr. 102:11-20).

year; (b) Domino's exerts supervisory control through on-site visits and instructions provided by Domino's Franchise Operations personnel; (c) Domino's monitors employee performance via PULSE; (d) Domino's promotes and implements an anti-union management policy; and (e) Domino's directly involves itself with customer and employee complaints at its franchise stores.

(a) Domino's Inspections and Standards for Franchise Employees

The caselaw recognizes that inspections and enforcement of standards are probative of the second Herman factor. In Antenor, the joint employer growers' representatives walked around the job site, spoke directly to the direct employer's employees, and brought problems to the direct employer's attention. 88 F.3d at 934-35. In Lopez, the court found a garment manufacturer to be a joint employer of its subcontractor's employees because the manufacturer directly monitored the quality of the product (i.e., garments) and conducted frequent on-site quality control inspections, notwithstanding the fact that the manufacturer "did not hire or fire the [subcontractors' workers], set their hours or rates of pay, or handle their payroll or employment records." 14 F. Supp. 2d at 421.

In Bareburger, the court denied the franchisor's motion to dismiss, finding that the facts satisfied both the Herman and the Zheng tests for joint employer liability under the New York Labor Law and the FLSA, based on pleaded facts establishing that, among other things, the franchisor "set and enforced requirements for the operation of franchises," "monitored employee performance," "specified the methods and procedures used by those employees to prepare customer orders," and "exercised control, directly or indirectly, over the work of employees." 73 F. Supp. 3d at 207. The court also considered the franchisor's "right to inspect the facilities and operations of franchises, to audit any franchise's financial records, and to terminate the franchise agreement." Id.; see also Torres-Lopez, 111 F.3d at 642 (finding "significant control over the farmworkers' working conditions" in the right to inspect and the frequent presence of a company official).

Domino's exerted control over the franchise workplace under Herman through providing training materials; imposing comprehensive standards; conducting site inspections of franchisee-owned stores; and taking enforcement action against franchisees through issuing Notices of Default.

Through its training materials, Domino's exerts supervision and control over franchisee employees, from their first day on the job. Franchisee employees must be trained via Domino's training module (also required in corporate stores) in order to begin working. Gerstein Aff. ¶165; Ex. 20 (Ridge Tr. at 291:3-10). Training materials for franchisees and management cover personnel matters, including training to use the "labor scheduler" function in PULSE to lower labor expenses, training on how to avoid unions, and how to cross-train and use delivery employees to perform in-store non-tipped tasks (e.g., pizza making) between deliveries. Franchisee Respondents Maestri and Denman, and others, adopted these personnel practices. Gerstein Aff. ¶166; Ex. 14 (Denman Tr. 82:5-15); Ex. 3 (Maestri Tr. 134:22 - 136:2).

Domino's supervises and controls employees at franchisee stores by enforcing the standards contained in its Manager's Guide, which prescribes, among other things, exacting criteria for franchisee employee appearance and grooming, as well as rules for employee conduct and procedures both when working in-store and when making deliveries. Gerstein Aff. ¶¶163-164.[37]

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[37] The Manager's Guide, in addition to, and going far beyond, a mere uniform requirement, mandates daily shaving, permissible hair length, allowable piercings, the type and number of earrings allowed, the covering of tattoos (specifying also which types of tattoos — i.e., military-related — may be left uncovered), and sock and undershirt colors, as well as other rules. For example, Domino's mandates that delivery employees, including those at franchisee-owned stores, may not have more than $20 with them during deliveries. Gerstein Aff. ¶164. Domino's rigorously enforces these employee conditions, once placing a franchisee in default because a Domino's inspector found a delivery employee had more than $20 with him. Gerstein Aff. ¶178 n.73. Given such exacting standards,

Domino's enforces these standards through its Area Leaders and the application of a wide-ranging evaluation program, with unannounced on-site inspections (scored on a range of 1 to 100) at least three times a year, often conducted when the franchise owner is not present or available. Gerstein Aff. ¶¶167-169.[38] Points are deducted for non-compliance with employee rules and standards, including attire, grooming and conduct rules. Gerstein Aff. ¶169.

Domino's sends franchisees who receive bad evaluations a Notice of Default detailing specific steps the franchisee must take to prevent Domino's from terminating the Franchise Agreement. Domino's produced to the OAG almost 800 Notices of Default to New York franchisees from May 4, 2007 to May 7, 2012; these included multiple Notices of Default to each of the three Franchisee Respondents for, among other things, defaults dealing with criminal background check standards, employee uniform standards, grooming standards and with employees having more than $20 in their possession. Gerstein Aff. ¶¶176-178.[39]

Three Notices of Default resulting from Evaluations within a 12-month period can mean termination of a franchise, "whether or not such failure to comply is corrected." Gerstein Aff. ¶¶168, 172; Ex. 18 (SFA, at DP00000321-322).[40] Domino's threats of termination were not merely theoretical. In 2014 testimony, a Domino's official estimated there had been five terminations of franchisees in 2012 and 2013. Ex. 20 (Ridge Tr. 374:18 - 376:10). She also

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franchisees have applied to Domino's for variances; however, as noted previously, franchisee testimony shows that such variance applications are rarely, if ever, granted. Gerstein Aff. ¶160 & n.51.

[38] Franchisees also must conduct regular "Self Evaluations" and report the results to Domino's via PULSE. Gerstein Aff. ¶172.

[39] Franchisees who receive a Notice of Default must submit an "action plan" to Domino's indicating how they will cure the default, and Domino's officials follow up with one or more evaluation visits, as well as unannounced visits, to make sure the condition that caused the default has been corrected. Gerstein Aff. ¶175.

[40] Domino's produced approximately 50 Notices of Termination to New York franchisees from June 26, 2007 to September 6, 2011, which included at least 10 that dealt with violations of the uniform, grooming and minimum cash standards. Gerstein Aff. ¶176.

testified that allowing the franchisee to sell the franchise before vacating might be, but was not always, considered. Ex. 20 (Ridge Tr. 378:13-19). Whether or not Domino's permitted a terminated franchisee to sell the franchise, that franchisee would be exposed not only to the potential loss of some or all of his or her investment (depending on the ultimate sales price), but also the loss of a job and livelihood in the immediate area, given, for example, the non-competition/non-solicitation provisions in the Domino's Franchise Agreement that survive a termination. Ex. 18 (SFA §20.2, at DP00000328) (one year prohibition against competing business within 10 miles and solicitation of current employees).

Domino's continuous involvement in inspections and enforcement support a joint employment finding. Domino's was extensively and constantly involved in assessing on-site conditions and speaking directly with employees (as in Antenor) and in implementing a comprehensive inspection regime (as in Bareburger and Torres-Lopez). Indeed, the Domino's inspection regime is even more intensive than, for example, in Torres-Lopez, where the joint employer had the right to inspect, but did not directly interact with employees. 111 F.3d at 642-43 (citing Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 238 (5th Cir. 1973)) ("The fact that [the grower] effected the supervision by speaking to the crew leaders, who in turn spoke to the harvest workers, rather than speaking directly to the harvest workers does not negate a degree of apparent on-the-job control over the harvest workers.").

(b) Domino's Visits to Franchise Stores and Instructions to Franchisees

Supervision that goes beyond "run-of-the-mill" supervision provides an additional basis to satisfy the second Herman factor. See generally Zheng, 355 F.3d at 74-75 ("run-of-the-mill subcontracting relationships" include "supervision with respect to contractual warranties of quality and time of delivery"). Domino's engaged in extensive supervision that ultimately amounted to co-supervision or co-management of everyday store operations and employee activities.

As noted above, a Domino's official provided written directives to franchisees — including the Franchisee Respondents — concerning detailed aspects of employee scheduling. Gerstein Aff. ¶161; Ex. 122 (DP00073197-198); Ex. 25 (Rudd Tr. 85:9-23, 86:19 - 88:6). Another Domino's official informed two franchisees that despite their managers' belief that "they can't afford to schedule" employees for marketing, "the team at the stores must be involved," two marketing activities "every week . . . need to be on the schedule," and "you must schedule more team members to accomplish this." Gerstein Aff. ¶161; Ex 123 (DP00072456).

Franchisees received emails, texts, telephone calls, and/or visits from Domino's officials numerous times a week. Denman received daily emails and/or text messages concerning his stores from his Domino's Area Leader and other Domino's personnel about operations, promotions, sales, and other matters. Gerstein Aff. ¶26; Ex. 14 (Denman Tr. 65:14 - 66:21). Maestri had contact with his Area Director three to four times a week, in addition to contact with that person's superiors. Gerstein Aff. ¶26; Ex. 3 (Maestri Tr. 101:5 - 102:12).

One Domino's official, upstate New York Area Leader Edward DuPont ("DuPont"), who oversaw Denman as well as other franchisees, regularly conducted in-person supervision by visiting at least two Settling Franchisees' stores unannounced and outside of the franchisees' presence. In one case, DuPont spoke with employees and followed up with text messages directly to the franchisee's employees (supervisors and managers) to make sure they addressed operational problems that he had found. Gerstein Aff. ¶182; Ex. 23 (Gaisser Aff. ¶26). In another, DuPont spoke directly with employees at a franchisee's store, threatened to close the store down "because I can"; and warned the employees that if they did not heed his directive, they would lose their jobs, telling them, "I'm your boss." Gerstein Aff. ¶182; Ex. 22 (Lee Aff. ¶16).[41]

Domino's Franchise Operations personnel's written instructions to all three Franchisee Respondents, DuPont's "I'm your boss" daily supervision of franchisees in his area (including Denman) and other Domino's officials' daily communications with franchisees in their area (including Maestri), went far beyond mere "run-of-the-mill" supervision, providing an additional basis to conclude that the second Herman factor has been established. Such actions show a degree of control comparable to, or greater than, other cases in which courts have found a joint employment relationship. See, e.g., Herman, 172 F.3d at 140 (joint employment found despite only "occasion[al]" supervision); Antenor, 88 F.3d at 934-35 (joint employer conducted quality control inspections and monitored employees' productivity); Lopez, 14 F. Supp. 2d at 421 (joint employment shown where putative joint employer engaged in frequent quality control inspections).

(c) Domino's Monitoring of Franchisee Workers and Job Performance via PULSE

The monitoring of franchisee workers' job performance through the PULSE system also adds to the totality of the evidence satisfying the second Herman factor. In Cano, in rejecting Domino's opposition to being added to plaintiffs' complaint as a joint employer, the court focused on, among other things, plaintiffs' allegation that Domino's "PULSE system . . . included a system of tracking hours and wages and retaining payroll records." 287 F.R.D. at 260. Through such records retained in PULSE, to which Domino's has unfettered, 24/7 access, Domino's exerted supervision and control over its franchisees' working conditions.

[41] Again, as noted in footnote 33, supra, it is instructive to consider the subjective experience of employees who have been told "I'm your boss" by a Domino's corporate representative.

Domino's did not merely collect and store data through PULSE; rather, Domino's actively used this employee data when evaluating the Franchisee Respondents' stores. By accessing a store's Service Time Reports for the prior 28 days, Domino's examined information such as how long each employee function took within a franchisee's store (e.g., taking orders, making pizzas, dispatching, delivering). Gerstein Aff. ¶186; Ex. 14 (Denman Tr. 128:3-11). Franchisee Respondent Maestri testified that PULSE "keeps data of all of our employees," including tracking how long an employee takes to input a customer's telephone order, as well as delivery departure and return times. Gerstein Aff. ¶185; Ex. 3 (Maestri Tr. 264:20 - 265:5).

Domino's placed Maestri in default partially because of the Service Time Report data a Domino's inspector obtained from PULSE during an Evaluation inspection in 2012. Gerstein Aff. ¶187. At that time, a Maestri store received a score of 53, in part because of PULSE data showing that only 68% of orders were delivered "on time" (within a half hour), resulting in zero points for that section. Gerstein Aff. ¶187; Ex. 129 (DP00173999-4000). The Notice of Default advised Maestri that he needed "operating assistance" and required him and his managers to attend a training on how to meet Domino's operational guidelines. Ex. 129 (DP00174002-004). Delivery times are directly linked to employee performance, as the data used in Domino's evaluations were the actual departure and return times for each individual delivery worker as recorded in PULSE.

Monitoring of employees' moment-by-moment actions and use of such data to evaluate performance and suggest improvements are the kinds of activities which in a prior era could only have been done in person by a front-line manager on-site personally watching employees' job performance. New technology allows for detailed monitoring, evaluation and management even without being physically present. However, managing remotely is still front-line managing when a company knows about every action taken by each worker on a given day and gives direction for improvement based on that information.

(d) Domino's Anti-Union Policy

Domino's actions in opposition to unionization by employees of franchisee-owned stores demonstrate further control over working conditions, and belie any attempt to portray the franchisees as totally independent employers over whose labor relations Domino's has no supervision or control. In light of Domino's previously discussed close supervision of franchisees, including its power to terminate franchises, anti-union directions from Domino's inevitably carried great, if not overpowering, weight with franchisees. Domino's implemented its opposition to unionization at franchisee-owned stores in several ways.

The Domino's official who from 2004 to 2011 was responsible for "union avoidance" in Domino's corporate stores also provided myriad "union avoidance" materials to franchisees who reached out to her about union activity in their stores. These union avoidance materials contained information and advice about preventing union activity, including, for example, "things to look for to suspect union activity." Gerstein Aff. ¶190; Ex. 26 (Wigley Tr. 84:18 - 86:3, 87:11-20, 90:19-25, 92:3-9).[42] This official also recommended a specific labor management attorney specializing in opposing union campaigns. Gerstein Aff. ¶190.[43]

After hearing that union organizers might be contacting franchisees in New York City, Domino's sent union avoidance literature to ten New York franchisees, including Respondent Maestri, and asked them to inform Domino's of any union activity. Gerstein Aff. ¶193; Ex. 144

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[42] The official in question, Julie Wigley, said franchisees contacted her anywhere from 10 to 25 times from 2004 to approximately 2011. Gerstein Aff. ¶190. Wigley sent the anti-union literature to Domino's Area Leaders to be distributed to all franchisees through the Area Leader's electronic newsletter that they regularly sent their franchisees. Gerstein Aff. ¶190; Ex. 139 (DP00077754); Ex. 26 (Wigley Tr. 197:11 - 199:21, 200:5-7).

[43] According to his firm's website, the attorney "has successfully run many union avoidance campaigns." See Ex. 138 (http://www.laborlawyers.com/jtighe) (last visited May 9, 2016); Gerstein Aff. ¶190 n.74.

(DP00061349). Such literature included the question "How does the company [Domino's] feel about the union organizing drive?" and the answer "There is no union at Domino's, and the company does not want a union here. We will do everything legally possible to keep a union out." Gerstein Aff. ¶193; Ex. 127 (DP00101158).

In one instance, a new franchisee in New York State received papers from the NLRB and contacted a Domino's Area Leader, who then contacted Domino's Vice President Ridge. Domino's sent John Martinez — "PeopleFirst Director for Team USA," that is, Domino's own <u>director of human resources</u> — to meet in person with the franchisee and provide him with assistance. Gerstein Aff. ¶191; Ex. 20 (Ridge Tr. 309:6 - 312:14). In emails, Martinez demonstrated his direction to the franchisee to "push" an anti-union position "openly and blatantly," and instructed, "Let's play up the fact that this union could care less about [the workers'] desires . . . . However we play it, we need drivers pissed and mad at the union . . . . GET EM!!!!" Gerstein Aff. ¶192; Ex. 142 (DP00078398-399). Domino's effort succeeded; in Ridge's words, "A union never happened." Gerstein Aff. ¶192; Ex. 20 (Ridge Tr. 313:22 - 314:8). Ridge praised Domino's Martinez ("or should I say 'bulldog' Martinez") and urged continuing "efforts to educate and inform our franchisees and their GMs [general managers] about unions." Gerstein Aff. ¶¶192-193; Ex. 143 (DP00078404). Both Respondent Denman and Respondent Maestri testified to either meeting with Domino's or receiving communications warning against union infiltration or requesting that Domino's personnel be alerted of any such union recruitment activity. Gerstein Aff. ¶193; Ex. 14 (Denman Tr. 75:6 - 76:8); Ex. 144 (DP00061349).

Domino's vigilance against possible union campaigns at franchisee-owned stores, including direct intervention by Domino's own head of HR, shows control over franchisee labor relations. Courts enforcing NLRB rulings have recognized that intervention by one business to oppose unionization at another points towards control by the first business and shared liability for labor law violations. See, e.g., Majestic Molded Prods., Inc. v. NLRB, 330 F.2d 603, 607 (2d Cir. 1964) (finding an integrated enterprise and joint liability in part because "the two affiliated companies had adopted a common policy and front for labor matters designed to serve joint rather than separate interests"); NLRB v. Gibraltar Indus., Inc., 307 F.2d 428, 430-31 (4th Cir. 1962) (NLRB properly treated "active participation" in an anti-union campaign by a putative joint employer's owner as evidence of that employer's "almost complete control" and joint liability, regardless of whether such control was necessary to protect the putative joint employer's investment). As in the case of Domino's requirement that franchisees run background checks, the point is not that it was unlawful for Domino's to oppose unions at franchisee stores, but simply that Domino's, not franchisees independently, made and executed this important decision. The presence of a union affects many key aspects of employees' working conditions, such as wages, work schedules, job security, and benefits. Thus, Domino's active imposition upon franchisees of its own anti-union position went to the very core of the employer/employee relationship and further reflects the economic reality that Domino's was a joint employer.

(e) Domino's Direct Involvement in Customer and Employee Complaints

Domino's also exerted supervision and control through monitoring and resolving customer and employee complaints arising from franchisee stores. Handling of customer and employee complaints is an indicator of joint employment. See, e.g., Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013) (that employer dealt with customer complaints "'only occasionally' does not mean that these actions are irrelevant . . . especially when considered in the context of his overall control of the company") (citing Herman, 172 F.3d at 139). Domino's Customer Care Center allows customers and store employees (franchisee and corporate-owned) to report complaints directly to Domino's, and Domino's officials monitor the adequacy of the response as well as the timing (there is a five-day deadline). Gerstein Aff. ¶¶153-154. Some years, a considerable number of these complaints have concerned "pay issues" on which Domino's provided direction to franchisees. Gerstein Aff. ¶124; Ex. 26 (Wigley Tr. 178:1-14); Ex. 92 (DP00122607-609); see also Ex. 93 (DP00122850). In one instance, a complaint from a worker at a franchisee store about meal periods led Domino's officials to ask an Area Leader "to make sure [the franchisee] is running her store legally compliant [sic]." The Area Leader reported that he "told [the franchisee] . . . that she needs to follow New York Labor laws on breaks . . . . [The franchisee] assures me that other employees will get proper breaks going forward." Ex. 94 (DP00077749-751).

c. Third Herman Factor: Domino's Role in the Determination of Rate and Method of Payment

Satisfaction of Herman's third factor — determining the rate and method of payment of employees at franchisee stores — only needs evidence of "participation" in the payment of employees or that "some power" was exercised. In Herman, for example, the court found the third factor satisfied, in part, because the putative employer "participate[d] in the method of payment" by ordering a stop to an illegal pay practice. 172 F.3d at 141. In Torres-Lopez, 111 F.3d at 643, the court found a grower to be a joint employer, along with a farm labor contractor, largely because the grower increased payment explicitly to enable the contractor to pay sufficient wages during a crucial and difficult period in the harvest cycle. The court found that the grower, who did not directly set workers' wages, "exercised some power in determining the pay rates." Id. at 643 (emphasis added).

Similarly here, while Domino's did not determine franchisees' employees' hourly wages, it did influence many workers' rates and methods of payment. First, Domino's had a significant influence on worker pay through the miscalculations and flaws of the PULSE Payroll Report that it allowed to stand undisclosed and uncorrected. Also, Domino's affected worker pay by prohibiting tip jars in franchisee-owned stores, justifying the policy by claiming "[o]ur system and pricing is established with margins to provide adequate wages to our team members." Gerstein Aff. ¶204; Ex. 24 (DP00000605); Ex. 125 (DP00043439) (emphasis added). In these ways, Domino's exercised "some power" over the rate and method of payment of employees at the franchisee stores, satisfying the third Herman factor.

d. Fourth Herman Factor: Domino's Maintenance of Employment Records

Finally, the indisputable evidence satisfies the fourth Herman factor, the maintenance of employment records by Domino's. Herman, 172 F.3d at 139. The Second Circuit has found joint employment, in part, through the maintenance of "employment records," including time records. See Barfield, 537 F.3d at 144 (finding that putative joint employer's record of shifts worked by employees left "no question that [the joint employer] maintained employment records" on the matter most relevant to overtime obligations under FLSA, "the hours worked"). Other cases recognize the maintenance of employment records through PULSE or a similar system as one piece of evidence, among many, supporting a joint employment finding. In Bareburger, the court cited similar recordkeeping functions as a factor in denying the putative joint employer's motion to dismiss. 73 F. Supp. 3d at 207; see also Cordova, 2014 U.S. Dist. LEXIS 97388, at *17-18 (discussing franchisor's alleged requirement of "certain record keeping systems, including systems for tracking hours and wages and for retaining payroll records"); Cano, 287 F.R.D. at 260 (weighing heavily the fact that PULSE "included a system of tracking hours and wages and retaining payroll records").

As described above, the PULSE data are the franchisees' employment records. Through PULSE, Domino's maintains franchisee store records containing all employees' clock-in identifications, first and last names, and all timekeeping data for hours worked and tasks performed. PULSE also stores wage rates for employees, tips reported by drivers, and mileage calculations used to reimburse delivery expenses. Gerstein Aff. ¶¶205-206; Ex. 27 (Pederson Tr. 268:9-25); Ex. 75 (DP00075398-400). Domino's has unfettered access to PULSE data and accesses it daily for various purposes. Gerstein Aff. ¶89. Domino's requires unrestricted 24/7 access, either remotely or on-site, to all franchisee records and information including payroll documents and W-2 and I-9 forms. Gerstein Aff. ¶207; Ex. 18 (DP00000310) (SFA §14.1); Ex. 24 (DP00000634); Ex. 51 (Sharma Aff. ¶37). Moreover, when the OAG subpoenaed records reflecting wage rates paid by franchisee-owned stores that fell below stated dollar amounts, Domino's extracted that information from PULSE, demonstrating Domino's ready access to and maintenance of franchisee payroll data. Gerstein Aff. ¶¶32-33.

* * * * *

In sum, the record evidence demonstrates Domino's "direct control" as joint employer with the Franchisee Respondents under the four <u>Herman</u> factors:

1. <u>Domino's possessed and/or used the power to control hiring, firing and discipline</u>:

    - Domino's strictly limited Maestri, Ahmed and Denman's discretion in the hiring of their employees based on a background check process that Domino's imposes, over which the Respondents had no control or input. Gerstein Aff. ¶¶137-146.

    - A Domino's official forced Maestri to hire a supervisor to manage his stores, and supplied Maestri with the candidate ultimately hired. Gerstein Aff. ¶¶133-134. Given that the Franchisee Respondents were all under this official's area, this invocation of authority as to Maestri demonstrates Domino's reserved authority over Ahmed and Denman as well.

- Domino's reserves for itself the right to require, and has required, that franchisees retain substantially the same employees on the same terms when franchisees purchase corporate stores from Domino's. Gerstein Aff. ¶135. Domino's reservation of this right would affect any potential purchase of a formerly corporate store by the Franchisee Respondents.

- Domino's directed both Maestri and Denman to discipline and/or terminate specific employees. Gerstein Aff. ¶¶148-152.

2. Domino's possessed and/or used the power to supervise and control employee work schedules and other conditions of employment:

- Domino's dictates staffing requirements for franchisee stores and store hours and Denman, Maestri and the other franchisees have little power to vary these hours of operation. Gerstein Aff. ¶¶159-160.

- Domino's directs store scheduling, instructing Respondents Ahmed and Maestri, and other franchisees, to adjust employee scheduling each week based on PULSE reports of the previous days' delivery times, directing that franchisees "cross-train" delivery employees, and imposing other scheduling conditions. Gerstein Aff. ¶161.

- Domino's controls working conditions through the exacting requirements set forth in the Manager's Guide for attire, appearance, grooming and conduct of franchisee-owned store employees, including those working at the Franchisee Respondents. Domino's enforces these standards through an inspection regime resulting in multiple Notices of Default sent to each of the three Franchisee Respondents. Gerstein Aff. ¶164.

- Domino's put Maestri Respondents in default of the Franchise Agreement based, in part, upon data obtained from PULSE that monitored the timeliness of deliveries by individual delivery workers. Gerstein Aff. ¶187.

- Domino's pushed an anti-union policy upon its franchisees, and Denman and Maestri either attended meetings set up by Domino's to discuss union infiltration or otherwise received materials from Domino's warning against such activity. Gerstein Aff. ¶¶190-193.

3. Domino's possessed and/or used its power to determine the rate and method of payment of employees at franchisee stores:

- The four flaws in Domino's PULSE software caused the Payroll Reports it generates to under-calculate wages owed to workers at the Franchisee Respondents, resulting in these franchisee workers receiving payment lower than the law permits. Gerstein Aff. ¶¶98-113; See supra at 23-30.

- Domino's prohibits in-store collection of tips through the use of tip jars. Gerstein Aff. ¶204.

4. Domino's maintained franchisee employment records:

- Through its PULSE system, Domino's maintains, and has 24-hour unrestricted access to, all franchisee store records containing all employees' timekeeping data, including, hours worked, employee wage rates, reported tips, and mileage calculations. Gerstein Aff. ¶¶205-206; Ex. 27 (Pederson Tr. 268:9-25); Ex. 75 (DP00075398-400).

2. The Evidence of Domino's Functional Control Under the Zheng Factors

The facts also establish Domino's joint employer status under the Zheng "functional control" factors. The Second Circuit recognized that not all joint employment relationships will exhibit "formal" control characteristics and thus established that some degree of "functional" control confers joint employment status. Zheng, 355 F.3d at 71. These factors are: (1) whether the putative joint employer's "premises and equipment" were used for the employees' work; (2) whether the direct employer's business "could or did shift as a unit from one putative joint employer to another"; (3) the extent to which employees "performed a discrete line-job that was integral to the [putative joint employer's] process of production"; (4) the degree to which the direct employer's responsibilities under the applicable contracts towards the putative joint employer could pass to a different direct employer without material change; (5) the degree to which the putative joint employer supervised employees' work; and (6) whether the employees worked "exclusively or predominantly" for the putative joint employer. See Zheng, 355 F.3d at 69-76; Bareburger, 73 F. Supp. 3d at 206-07 (denying franchisor's motion to dismiss as the pleaded facts established joint employment under both the Herman and Zheng tests). No one factor is dispositive and not all the factors need be present to establish joint employment under Zheng. Grenawalt v. AT&T Mobility LLC, No. 15-949, 2016 U.S. App. LEXIS 4612, at *10 (2d Cir. Mar. 14, 2016) (summary order) (court notes it has sustained jury verdicts of joint employment "when as many as three Zheng factors weighed against joint employment as a matter of law"; reversing District Court award of summary judgment); Cordova, 2014 U.S. Dist. LEXIS 97388, at *11, 16 (denying motion to dismiss by franchisor although putative employees conceded that the first and fourth Zheng factors weighed in franchisor's favor).

The totality of the evidence demonstrates the existence of every functional control factor set forth in Zheng, corroborating Domino's joint employer status independently compelled under the Herman test.

Domino's "premises and equipment" were and are used for employees' work (the first Zheng factor), in that franchisees were required to get Domino's approval of all leases (Ex. 18, SFA §7.4, at DP00000302)), and franchisees were required to purchase equipment (including PULSE hardware and software) from Domino's or an approved vendor. Gerstein Aff. ¶¶22, 24; Zheng, 355 F.3d at 72.

The Franchisee Respondents' business could not and did not shift to any other joint employer other than Domino's (the second Zheng factor). No Domino's franchisee had the ability to operate a pizza business for anyone but Domino's; the Franchise Agreement requires the franchisee to devote "full time and efforts" to manage his or her store, and franchisees could not engage in any other business without Domino's consent. Gerstein Aff. ¶24; Ex. 18 (SFA §15.6); see, e.g., Cordova, 2014 U.S. Dist. LEXIS 97388, at *16.

The workers at the franchisee stores performed a job integral to Domino's process of production (the third Zheng factor). The "process of production" of a fast food franchisor such as Domino's consists of providing food to customers through franchisee-and corporate-owned stores, and these employees perform a discrete line-item job that is integral to Domino's process of production. In fact, as a pizza delivery company, Domino's could hardly argue that delivery workers do not perform an integral task in their process of production. See, e.g., Cordova, 2014

U.S. Dist. LEXIS 97388, at *17 (in denying franchisor's motion to dismiss plaintiffs' claim, Court stated that "because SCCF is a chain restaurant . . . their work within this model at Franchise Restaurants constitutes an 'essential step' in the production of the service for which SCCF is in business").[44] Moreover, the recruiting portion of Domino's own website states that "[o]ur corporate and franchise store team members make up the engine that drives a quality product," and notes the "major role. . . in the brand's success" played by such employees.[45] The delivery workers for the Franchisee Respondents surely perform a more integral part of Domino's core business (pizza delivery to residences and other off-site locations) than the facts alleged about delivery workers in Ansoumana. See 255 F. Supp. 2d at 195. There, the court denied a motion to dismiss a claim that a drug store chain was a joint employer, along with the direct employer of delivery workers, where the Ansoumana workers performed deliveries for a brick and mortar drug store chain with considerable in-store sales traffic, which was presumably less reliant than Domino's on delivery sales for its overall business success.

The responsibilities of the workers at the Franchisee Respondents vis-à-vis Domino's would be materially the same if they worked for a different Domino's franchisee, or even for a Domino's corporate store (the fourth Zheng factor). Domino's requires workers at franchise stores to adhere to Domino's practices, policies and standards, including exacting uniform, attire, appearance, grooming and conduct standards. See, e.g., Gerstein Aff. ¶¶163-164. Domino's required a new franchisee to retain a substantial number of employees at several previously corporate stores, including maintaining substantially the same job responsibilities and wages. Gerstein Aff. ¶135; Ex. 16 (Domino's-Khan Agreement, ¶XXVIII, at MSK000240); see, e.g.,

[44] See also Lopez, 14 F. Supp. 2d at 420 (in finding a joint employer relationship, court held there was "no question" that production work by direct employees of contractors was vital to garment jobber's business; "Renaissance depended entirely on outside sewing contractors to perform this aspect of its operations").

[45] See Ex. 145 (Domino's website, https://jobs.dominos.com/dominos-careers/opportunities/in-store) (last visited March 16, 2016) (emphasis added).

Velez, 2015 U.S. Dist. LEXIS 1275, at *12 (holding that fourth Zheng factor is intended to get at whether the plaintiffs are "tied to [a putative employer] rather than to an ostensible direct employer" which favors finding a joint employment relationship where, as here, "the same employees [c]ould continue to do the same work in the same place" (citing Zheng) (emphasis in original)). Similarly here, the employees who continued to work for Domino's after the sale of the Staten Island corporate stores to the new franchisee did the same work in the same place.

The degree of supervision exercised by Domino's (the fifth Zheng factor) is also probative of the joint employment relationship with employees at the franchisees' stores. The evidence developed by the OAG relevant to the Herman factors, see supra at 41-65, demonstrating Domino's supervision of employees at franchisee stores, is equally applicable here in the Zheng analysis.[46]

Finally, at the Domino's franchisee stores, the employees are essentially working "exclusively or predominantly" for Domino's (the sixth Zheng factor). Zheng, 355 F.3d at 72. Domino's Franchise Agreement requires that franchisees must work full time to manage their franchise, and cannot own any other business without Domino's consent. The Franchisee Respondents thus are principally dependent upon Domino's for their livelihood, and the employees at the franchisee stores are similarly dependent on Domino's. As explained in Lopez, 14 F. Supp. 2d at 421, where a garment contractor "depended nearly entirely" on a jobber for work, "it also is evident that the [contractor's] workers were as much dependent on [the jobber] .

[46] In Cordova, the court reviewed allegations related to the functional control test in the context of a Cuban sandwich shop franchisor and franchisee; many of the factors which the court considered relevant in denying the franchisor's motion to dismiss were the same as those present here: as to facts supporting the fifth Zheng factor, the court credited the allegations that the franchisor "created management and operation policies and practices by providing materials for use in training store managers and employees and monitoring employee performance . . . [and] had the right to visit the facilities . . . to determine if they were in compliance with those policies and practices." 2014 U.S. Dist. LEXIS 97388, at *17. The franchisor also required the franchisee to use certain recordkeeping systems for tracking hours and wages and retaining payroll records. Id. The court denied the defendant's motion to dismiss, determining that these factors were sufficiently suggestive of joint employment.

. . . These circumstances plainly indicate that the plaintiffs were jointly employed by both entities." Cordova applied similar reasoning in a franchisor-franchisee context, crediting contentions that employees did not work for other competing businesses. 2014 U.S. Dist. LEXIS 97388, at *18. Here, perhaps even more than in Lopez, the Franchisee Respondents were required to depend, and did depend, entirely upon Domino's for work, and the employees at Franchisee Respondents' stores, when they are on the job at the franchisee stores, were similarly working exclusively for Domino's.

In sum, the indisputable record evidence demonstrates Domino's "functional control" as joint employer with the Franchisee Respondents under the Zheng factors.

* * * * *

The incontrovertible facts demonstrate the "economic reality" of Domino's formal and functional control, conclusively supporting a finding by this Court that Domino's is a joint employer of the employees at the Franchisee Respondents' stores and is thus jointly liable for the Franchisee Respondents' violations of the Labor Law.

II. DOMINO'S SALE OF, AND ENCOURAGEMENT TO FRANCHISEES TO USE, DEFECTIVE SOFTWARE VIOLATED EXECUTIVE LAW SECTION 63(12)'S PROHIBITION AGAINST FRAUD

Domino's sale of its flawed, proprietary PULSE software product to all franchisees in New York State (not just the Franchisee Respondents named in this action), and its subsequent actions and inaction with regard to PULSE, constitute a persistent fraud in violation of Executive Law Section 63(12). As described previously (see supra, at 18-21, 23, 28-30), Domino's required all franchisees to purchase PULSE, encouraged them to submit PULSE "Payroll Reports" to their accountants or payroll services for payroll purposes, but did not disclose flaws within PULSE, well known to Domino's, that resulted in under-calculations of pay owed to workers. Domino's actions and knowing omissions with regard to PULSE's functions and capabilities not only led to worker underpayments, but also had the potential to, and did, materially mislead, deceive, and injure the franchisees required to purchase PULSE and encouraged to use the software to produce Payroll Reports. Even now, Domino's has made no targeted, affirmative effort to advise all franchisees about PULSE's flaws, or to remedy the problems. The sole action Domino's has taken to date consists of two sentences, added in May 2015 to a section embedded within the nearly 800-page Manager's Guide, advising franchisees that PULSE is not a payroll system.

A. Legal Standards for Section 63(12) Fraud

Section 63(12) defines fraud as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." This expansive definition affords "protection from deceptive and misleading practices," and in furtherance of this purpose, the "definition of fraud in such cases is very broad and includes those acts which can be characterized as dishonest or misleading" or "contrary to the plain rules of common honesty."[47] Thus, courts have adopted a "potential to deceive" standard to assess the merit of a Section 63(12) claim, that is, if an act has the "capacity or tendency to deceive, or creates an atmosphere conducive to fraud," such an act constitutes fraud under Section 63(12).[48] The traditional elements of common law fraud such as reliance, actual deception, knowledge of deception and intent to deceive are not required to

[47] People v. Greenberg, 95 A.D.3d 474, 483 (1st Dep't 2012) (observing that the "terms 'fraud' and 'fraudulent practices' [are] to be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty," quoting People v. Lexington Sixty-First Assoc., 38 N.Y.2d 588, 595 (1976)); People v. 21st Century Leisure Spa Int'l, Ltd., 153 Misc. 2d 938, 943-44 (Sup. Ct. N.Y. Cty. 1991) (dishonest or misleading standard, citing Allstate Ins. Co. v. Foschio, 93 A.D.2d 328, 331-32 (2d Dep't 1983)).

[48] People v. First Am. Corp., No. 07-civ-10397 (LTS) (HP), 2008 U.S. Dist. LEXIS 51790, at *10 (S.D.N.Y. July 8, 2008) (citing People v. Gen. Elec. Co., 302 A.D.2d 314, 314 (1st Dep't 2003)); accord FTC v. Crescent Publ'g Grp., Inc., 129 F. Supp. 2d 311, 319-20 (S.D.N.Y. 2001) ("fraud has been interpreted broadly requiring only a showing that the action has a potential to deceive"); People v. Applied Card Sys., Inc., 27 A.D.3d 104, 107 (3d Dep't 2005), aff'd on other grounds, 11 N.Y.3d 105 (2008); see also State v. E.F.G. Baby Prods. Co., 40 A.D.2d 364, 368 (3d Dep't 1973).

establish liability.[49] Section 63(12) fraud includes misrepresentations, omissions, and the failure to act. See, e.g., People v. Empire Prop. Solutions, LLC, No. 09-017767, 2012 N.Y. Misc. LEXIS 1845 (Sup. Ct. Nassau Cty. Apr. 10, 2012).

Section 63(12) is broadly construed to apply to virtually "all business activity" (New York v. Feldman, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002), and is not limited to consumer protection actions. Id. at 300 (antitrust action). Indeed, the OAG has repeatedly used Section 63(12) to secure relief for people who are not consumers and for business activity beyond traditional consumer activities. See, e.g., People v. First Am. Corp., 18 N.Y.3d 173, 176 (2011) (action arising out of defendants' alleged fraudulent real estate appraisals which operated to the detriment of borrowers and investors purchasing mortgaged-backed securities). The deceived persons can be, as in this case, both individuals and business entities. See, e.g., Feldman, 210 F. Supp. 2d at 297 (action by the OAG to redress losses of both individual sellers and auction houses); People v. Frink Am., Inc., 2 A.D.3d 1379, 1380 (4th Dep't 2003) (OAG properly brought §63(12) action where employer owed vacation pay to 41 employees under Labor Law Article 6, §§191-c and 198).

1. Domino's Is Liable Under Section 63(12)

Domino's is liable for fraud under Section 63(12). Domino's made a number of misrepresentations and omitted information concerning PULSE to its franchisees. Domino's told its franchisees that PULSE could be used for the generation of Payroll Reports which could be given to franchisees' payroll services (Ex. 2 (2016 FDD, at 46); Ex. 75 (PULSE Management Reports Guide, at DP00075398)); and that Domino's would correct any errors in PULSE. Ex. 2

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[49] See Greenberg, 95 A.D.3d at 483; People v. Coventry First LLC, 52 A.D.3d 345, 346 (1st Dep't 2008), aff'd, 13 N.Y.3d 108 (2009); State v. Apple Health & Sports Clubs, Ltd., 206 A.D.2d 266, 267 (1st Dep't 1994), appeal denied, 84 N.Y.2d 1004 (1994); State v. Ford Motor Co., 136 A.D.2d 154, 158 (3d Dep't 1988), aff'd, 74 N.Y.2d 495 (1989); People v. First Am. Corp., No. 406796/2007, 2011 N.Y. Misc. LEXIS 5581, at *5 (Sup. Ct. N.Y. Cty. Nov. 18, 2011).

(2016 FDD, Ex. M, Att. B, ¶1.1(b)); see supra at 22-23; Gerstein Aff. ¶128. Domino's knew that software flaws in PULSE did not comply with New York law and systematically under-calculated gross wages, but failed to disclose these flaws and failed to take any targeted, affirmative steps to correct them. This fraud was repeated and persistent, in that it affected all franchisees in New York State, as well as many of their employees. Domino's misrepresentations and omissions constitute acts that have "the capacity or tendency to deceive, or create[d] an atmosphere conducive to fraud." Gen. Elec., 302 A.D.2d at 314; Greenberg, 95 A.D.3d at 483. Furthermore, Domino's misrepresentations and omission about PULSE not only had the potential or capacity to deceive, but did in fact deceive franchisees in New York State — including the Franchisee Respondents and numerous Settling Franchisees — about the accuracy of the software product they were required to purchase from Domino's, and the Payroll Reports it produced. See Crescent Publ'g Grp., 129 F. Supp. 2d at 319-20.

Despite the fact that, in the first instance, Domino's "alone possesses material information" about flaws in its own proprietary software (Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995)), Domino's never affirmatively informed its New York State franchisees of these PULSE flaws. The significance of Domino's unique informational advantage over franchisees concerning PULSE was noted by one Settling Franchisee who observed that it was "impossible to know that PULSE calculates overtime incorrectly without checking the calculations manually" because PULSE Payroll Reports do not show underlying calculations and, instead, only show gross regular and overtime wages for a pay period. Gerstein Aff. ¶197; Ex. 21 (Cookston Aff. ¶23). Only when franchisees learned of the flaws (typically through inadvertent discovery themselves or through an accountant or similar consultant), did they — not Domino's — generally act to comply, and then only prospectively, suggesting that if Domino's had disclosed the flaws, these underpayments would likely not have occurred. Gerstein Aff. ¶117.

Domino's failure to disclose PULSE flaws to franchisees is especially egregious for three reasons. First, for years Domino's officials from various departments — IT, Human Resources, Franchise Operations — repeatedly discussed these flaws via email, at times walking through mathematical examples of how specific flaws in PULSE would under-calculate employee wages. See supra at 23-28; Gerstein Aff. ¶¶100, 103-104, 109, 113. Yet Domino's chose again and again not to remedy the flaws or inform its network of franchisees about them. Only in testimony before the OAG did Domino's claim that PULSE was not a payroll service, but only a mere timekeeping function (Gerstein Aff. ¶93; Ex. 27 (Pederson Tr. 120:9 - 121:23)); notably Domino's never communicated this position to franchisees. Second, Domino's officials knew about, and extensively discussed PULSE flaws in 2007, at least a year before the company mandated that all franchisees in New York State (and nationwide) purchase and install a known flawed product in 2008. See Gerstein Aff. ¶¶88, 103, 109. Third, Domino's instructed its franchisees to "cross-train" employees even as the company knew that PULSE would likely under-calculate gross wages in precisely that scenario. Gerstein Aff. ¶¶108, 166.

Domino's misrepresentations and omissions concerning PULSE flaws caused actual financial injury, most critically to the workers who were underpaid for years, but also to numerous franchisees in New York State. These franchisees had to hire counsel and ultimately pay restitution to resolve government investigations or private litigation, and incurred substantial costs to purchase PULSE for each store and in yearly licensing and other fees for the use of PULSE. Gerstein Aff. ¶¶90, 115.

III. DOMINO'S MATERIAL MISSTATEMENTS AND OMISSIONS IN ITS FRANCHISE DISCLOSURE DOCUMENTS CONCERNING PULSE VIOLATED SECTION 687 OF THE FRANCHISE SALES ACT

Domino's material misstatements and omissions about the PULSE software product in the offering materials provided to all potential franchisees also violate the anti-fraud provision of New York's Franchise Sales Act.

The New York Franchise Sales Act ("Franchise Act") was enacted to prevent franchise sales abuse — by requiring presale disclosure through a registered prospectus — and to remedy such abuse through certain measures. Gen. Bus. L. §§680-695; Retail Software Servs., Inc. v. Lashlee, 854 F.2d 18, 21 (2d Cir. 1988). The Franchise Act is remedial in nature, and therefore, to be liberally construed. A.J. Temple Marble & Tile v. Union Carbide Marble Care, 162 Misc. 2d 941, 951 (Sup. Ct. N.Y. Cty. 1994), aff'd, 214 A.D.2d 473 (1st Dep't 1994), modified, 87 N.Y.2d 574 (1996) (citing McKinney's Consol. Laws of N.Y., Book 1, Statutes §341). The Franchise Act contains comprehensive disclosure and registration requirements and an expansive antifraud provision, and it vests the OAG with broad investigatory and enforcement powers. A.J. Temple, 87 N.Y.2d at 579 (citing Gen. Bus. L. §§688, 689, 692).

Before the offer and sale of a franchise, the Franchise Act requires franchisors to provide a prospective franchisee with a detailed offering prospectus, its "Franchise Disclosure Document" or "FDD." Gen. Bus. L. §683(8). The franchise disclosure regulations itemize 23 separate disclosures that must be contained in the FDD. See 13 N.Y.C.R.R. §200.2. These disclosure requirements apply not just to franchise offerings, agreements and fees themselves, but to "all written or oral arrangements . . . in connection with" a franchising offer, "including, but not limited to . . . sales of goods or services . . . and all other arrangements in which the franchisor or subfranchisor has an interest." Gen. Bus. L. §682. The FDD provides material information to prospective franchisees deciding whether or not to invest. The disclosure requirements are designed to protect prospective franchisees from the financial hardships that can arise when they purchase franchises.

Disclosures in the FDD are subject to the antifraud provision of the Franchise Act, specifically Section 687(2)(b), which states, in pertinent part, that it is "unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly: . . . (b) [m]ake any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Gen. Bus. L. §687(2)(b).

The Franchise Act empowers the Attorney General to bring an action against any person he believes "has engaged in or is engaged in or is about to engage in any practice or transaction" which is an unlawful or fraudulent practice. Gen. Bus. L. §689(1).[50]

A. Domino's Made Untrue and Misleading Statements of Material Fact, and Omitted Material Facts, in Connection with the Sale of Franchises

Domino's disclosures about PULSE in its FDD were materially misleading or failed to disclose information that would have made the statements not misleading:

- In Item 11 Domino's represented that PULSE included "Capability to interface with a payroll company or a commercial accounting package." Ex. 2 (2016 FDD, at 46).
- Domino's represented it would provide "operating assistance [that] will include . . . "administrative, accounting, inventory control, and general operating procedures." Ex. 2 (2016 FDD, at 41) (emphasis added).
- In the "applicable user documentation" that is distributed to all franchisees in connection with their purchase of a Domino's franchise, e.g., the "PULSE

[50] This language of Section 689(1) tracks the language of the Martin Act (Gen. Bus. L. §§351-359), the 1921 law enacted to deter fraud in the sale of securities and commodities. Section 353(1) of the Martin Act states that "[w]henever the attorney-general shall believe from evidence satisfactory to him that any person . . . has engaged in, is engaged or is about to engage in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, he may bring an action in the name and on behalf of the people of the state of New York."

Management Reports Guide, Domino's identifies Payroll Reports as among "frequently used reports" and states that typical uses include "viewing payroll information . . . [and] generating payroll information to give to your accountant or payroll service." Ex. 75 (PULSE Management Reports Guide, at DP00075398).

- In Paragraph 5.1 of Domino's PULSE Software License Agreement, Domino's represented that "Software as delivered by [Domino's] will perform in all material respects in accordance with the then current applicable user documentation delivered by [Domino's]" and that Domino's would "replace or correct the Software so that it will perform in substantial conformance with the applicable user documentation." Ex. 2 (2016 FDD, Ex. M, ¶5.1).

- In Attachment B to the PULSE Software License Agreement, paragraph 1.1.(b), Domino's also represented it would "use reasonable efforts to correct any Software error, and will provide to [Franchisee] any error corrections, enhancements and updates to the Software which are developed and published by [Domino's] and made generally available to other licensees of the Software at no additional cost. Error corrections will remedy any documented failure of the Software to perform in substantial conformance with the then-applicable user documentation." Ex. 2 (2016 FDD, Ex. M, Att. B, ¶1.1(b)) (emphasis added).

The record shows that PULSE's Payroll Reports contained four flaws which resulted in systematic under-calculation of gross wages for employees. See supra at 23-28. Accordingly, Domino's representations about PULSE were materially misleading: certain "accounting assistance" Domino's provided to its franchisees (through the PULSE software) was fundamentally flawed; PULSE was unable "to perform in all material respects in accordance with the then current applicable user documentation"; and PULSE was incapable of providing a legitimate "interface" with a payroll service or accountant.

Moreover, despite its representations that it would correct all software errors, Domino's failed to fix PULSE's flaws, despite the company's knowledge of certain flaws since 2007. See supra at 23-28. Domino's made no effort, much less a "reasonable effort," to alert its franchisees about PULSE's problems or limitations, and nowhere in its FDD or other documents provided to prospective franchisees did Domino's inform franchisees of these flaws. See supra at 28-30. As a result, Domino's statements about the PULSE software were misleading and operated to deceive Domino's New York franchisees.

The PULSE miscalculations for employee payroll also likely led to overstatements of projected franchisee profitability disclosed in Item 19 of Domino's FDD. Projected franchisee profitability is calculated based on numerous underlying data points, including, among other things, franchisee variable labor costs. See Ex. 2 (2016 FDD, Item 19, at 71-72); Gerstein Aff. ¶131. Given that a significant number of New York franchisees underpaid employees during the Relevant Period, the labor costs reported to Domino's by such franchisees under-report what the true labor costs would be for a legally compliant franchisee. Therefore, Domino's Item 19 disclosure of projected franchisee profitability, which relies on franchisees reported labor costs, is likely to have been misleading.

B. Domino's Misstatements and Omissions in its Franchisee Disclosure Documents Concerning PULSE Were Material and Violated Section 687 of the Franchise Sales Act

The misrepresentations made by Domino's in the FDD and related documents, and the omission of the PULSE flaws, were material under the Franchise Sales Act's anti-fraud provision. A fact is material when there is a "'substantial likelihood' that a reasonable investor would have viewed inclusion of the omitted fact as 'significantly alter[ing] the total mix' of information available." Coraud LLC v. Kidville Franchise Co., 121 F. Supp. 3d 387, 394 n.3 (S.D.N.Y. 2015) (quoting State v. Rachmani Corp., 71 N.Y.2d 718, 726 (1988)). A representation is immaterial where it is "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." Ganino v. Citizens Utils. Co., 228 F.3d 154, 162 (2d Cir. 2000) (quoting Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)).

There can be little doubt of the materiality of the representations made by Domino's about PULSE's capabilities, and its omissions of facts about PULSE to Domino's franchisees. Franchisees paid significant — and required — upfront and on-going costs for PULSE. See supra at 18 n.13 (estimated per store upfront and annual PULSE costs). Domino's false and misleading statements and omissions regarding PULSE failed to alert franchisees that PULSE's calculations of gross wages were inaccurate and unsuitable for use by accountants or payroll services as indicated by Domino's. The misstatements and nondisclosure of the PULSE flaws caused Labor Law violations by the Franchisee Respondents, and also exposed New York franchisees using PULSE to continuing liability for wage-and-hour violations.[51] There can be no question then that Domino's misstatements and omissions about PULSE in its FDD were material.[52]

IV. SUMMARY JUDGMENT IS APPROPRIATE AND RELIEF SHOULD BE GRANTED WITHOUT DISCOVERY OR A TRIAL

New York Executive Law §63(12) permits this Court to order injunctive relief, restitution, disgorgement and other damages upon a showing by the OAG in a special proceeding of "any separate and distinct fraudulent or illegal conduct or acts which affects more than one

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[51] Ten franchisees admitted they applied improper wage rates in PULSE. Seven franchisees admitted that the failure to pay overtime properly was partially caused by PULSE miscalculation of such pay. Four noted PULSE failed to calculate spread of hours. Gerstein Aff. ¶30 & nn.12, 13; ¶35.

[52] Private plaintiffs seeking to enforce a claim under the Franchise Act, in addition to pleading an untrue or misleading statement of material fact, must also plead reasonable reliance and damages. See, e.g., Emfore Corp. v. Blimpie Assocs., Ltd., 51 A.D.3d 434, 435 (2d Dep't 2008). However, the requirement of pleading reliance and damages is not imposed on the Attorney General for Martin Act claims; and since the courts construe the Martin Act and the Franchise Act consistently with each other, there should equally be no requirement here that the Attorney General show reliance and damages to establish its Franchise Act claim. See, e.g., State v. Danny's Franchise Sys., Inc., 131 A.D.2d 746, 747 (2d Dep't 1987). In Danny's, the court recognized that the Franchise Act was patterned after and parallels the Martin Act in scope, remedial purpose and imposition of penalties, and therefore should be construed in conformity with the parallel provisions of the Martin Act. The court then applied the Martin Act's six-year statute of limitations to actions brought by the Attorney General to enforce the requirements of the Franchise Act, as opposed to a three year period for private actions. Even though the OAG is not required to show reliance and damages, the evidence developed in the OAG's investigation, as referred to herein, plainly shows proof of both in the franchisees' use of PULSE and the underpayment of workers due to the uncorrected flaws in PULSE and the substantial costs incurred by franchisees in using PULSE.

person." State v. Solil Mgmt. Corp., 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cty. 1985), aff'd without opinion, 114 A.D.2d 1057 (1st Dep't 1985) (injunction, restitution and damages remedies available); People v. Ernst & Young LLP, 114 A.D.2d 569 (1st Dep't 2014) (availability of disgorgement remedy). The OAG meets this standard here, as the evidence on which the OAG relies to establish Respondents' violations of the Labor Law and Executive Law §63(12) consists almost entirely of admissions by Domino's through its designated and subpoenaed witnesses; admissions by the Franchisee Respondents; payroll, time and other business records provided by Respondents; and corroborating evidence in the form of affidavits and Assurances of Discontinuance from the Settling Franchisees and affidavits from employees of Respondents.

Under these circumstances, Section 63(12) allows the OAG to seek injunctive relief, as well as restitution, disgorgement and damages. Pursuant to this authority the OAG requests a summary award of injunctive relief, as well as restitution after a full accounting of owed restitution and damages. See Matter of Fin. Guar. Ins. Co., 39 Misc. 3d at 210-11 (evidentiary hearing unnecessary, and summary relief appropriate, where parties opposing the motion failed to raise any genuine material issues of fact); State v. Waterfine Water Conditioning Co., 87 Misc. 2d 18, 19-20 (Sup. Ct. Albany Cty. 1975) (awarding the injunctive relief and restitution the OAG sought without a hearing where the respondent failed to raise a material dispute of fact in answer).

A. Injunctive Relief Is Warranted

Pursuant to Executive Law §63(12), courts are empowered to grant wide-ranging equitable relief to redress fraudulent or illegal conduct and enjoin future improper conduct. See People v. Apple Health & Sports Club, Ltd., 80 N.Y.2d 803 (1992) (special proceeding to, inter alia, enjoin health club from entering new contracts until it posted a bond); People v. Court Reporting Inst., Inc., 240 A.D.2d 413, 414 (2d Dep't 1997) (affirming temporary restraining order prohibiting school from enrolling new students); People v. Abortion Info. Agency, 69 Misc. 2d 825, 830 (Sup. Ct. N.Y. Cty. 1971), aff'd, 37 A.D.2d 142 (1st Dep't 1972) (among other relief, appointing receiver). The Court's injunctive powers under § 63(12) are also extremely broad, and "[a]n application by the Attorney-General for remedial orders under [Section 63(12)] is addressed to the sound judicial discretion of the court." State v. Princess Prestige Co., 42 N.Y.2d 104, 108 (1977); see also State v. Mgmt. Transition Res., Inc., 115 Misc. 2d 489 (Sup. Ct. N.Y. Cty. 1982) (granting restitution and injunctive relief against illegal employment agency). Moreover, the power of the Court to grant, and the standing of the OAG to seek, broad remedial relief is not simply a matter of statutory authority under Executive Law Section 63(12), but is grounded in general equitable principles. Once the equitable jurisdiction of the Court is invoked, the full range of equitable remedies becomes available to the Court. Where the public interest is served, the Court's powers are even broader than in private litigation. See Porter v. Warner Co., 328 U.S. 395, 398 (1946).

Here, because Domino's still has not remedied the PULSE flaws or disclosed them to all franchisees almost a decade after learning of these problems, injunctive relief is not only appropriate but essential to fully remedy the violations. This Court should issue an Order: enjoining all of the Respondents from violating the law; requiring Domino's to take immediate steps to fix the PULSE flaws; and requiring Domino's to notify all franchisees immediately about all the flaws in PULSE, including the limitations of the Payroll Report, and the means of fixing the problem. Given (1) Domino's role in facilitating systemic Labor Law violations; (2) the fact that Domino's franchisees owning nearly half of the Domino's stores operating in

New York State have admitted serious violations of the Labor Law; (3) the fact that Domino's own PULSE records showed that over 78% and 85% of New York State franchisees reported wage rates below New York's required minimum wage and overtime rates during a sample period; and (4) the extent of Domino's overwhelming control over employment relations of its franchisees, this Court should also order, as a remedial measure, that Domino's take affirmative steps to ensure that franchisees in New York State comply with the law, including training, notification and monitoring compliance with the law.

Accordingly, the Court should exercise its extensive equitable powers to order both Domino's and the Franchisee Respondents to remedy the admitted, widespread violations of the Labor Law throughout New York State. To avoid the inevitable outlay of additional government resources to investigate all Domino's franchisees in New York State, the Court should hold Domino's liable for all costs incurred to ensure its franchisees' compliance, including most importantly, requiring Domino's to implement training and notification procedures and to pay for an independent monitor to oversee Labor Law compliance in its New York State franchisee stores. The Court should also enter a permanent injunction requiring Respondents to comply with the law prospectively.

B. Accounting, Restitution and Disgorgement Should Be Ordered

Franchisee Respondents plainly violated the Labor Law and employees at the Franchisee Respondents' stores should recover restitution for the resulting underpayments. See Labor Law §191; 12 N.Y.C.R.R. §§146-1.4, 137-1.3 (overtime must be paid for each workweek); see also Frink Am., Inc., 2 A.D.3d at 1380 (§63(12) relief awarded for vacation pay owed pursuant to Labor Law §§191-c, 198); State v. Midland Equities of N.Y., Inc., 117 Misc. 2d 203, 208 (Sup. Ct. N.Y. Cty. 1982) (ordering restitution); State v. Hotel Waldorf-Astoria Corp., 67 Misc. 2d 90, 92 (Sup. Ct. N.Y. Cty. 1971) (same). As a joint employer, Domino's is jointly and severally liable for this restitution. See, e.g., Ansoumana, 255 F. Supp. 2d at 196 (joint employers under the FLSA and the New York Labor Law are "jointly and severally obligated for underpayments of minimum wage and overtime" violations).

Upon finding Respondents liable for the Labor Law violations, this Court should order full restitution. Specifically the Court should order an accounting of the monetary restitution that Respondents owe to employees for the Relevant Period under the New York Labor Law, including, but not limited to, restitution for minimum wage, overtime, tip credit, spread of hours, and bicycle and automobile reimbursement underpayments to employees. Telehublink Corp., 301 A.D.2d at 1007, 1009-10 (affirming order directing accounting and restitution to in-state and out-of-state consumers affected by fraudulent practices); People v. 21st Century Leisure Spa Intl. Ltd., 153 Misc. 2d 938, 944-45 (Sup. Ct. N.Y. Cty. 1991) (same). While the OAG has been able so far to identify some of the workers who were underpaid and calculated estimates of total wage underpayment (see Ex. 62 (Henriquez Aff.) and Ex. 66 (Lynch Aff.)), those estimates are based on samples because the Franchisee Respondents failed to maintain accurate and complete records, and are otherwise extremely conservative in a number of ways. Gerstein Aff. ¶¶59, 69, 87; Ex. 62 (Henriquez Aff. ¶¶6, 29); Ex. 66 (Lynch Aff. ¶¶6, 25). Thus, a thorough accounting is necessary to accurately assess the full scope of violations and restitution due. People v. Lipsitz, 663 N.Y.S.2d 468, 476-77 (Sup. Ct. N.Y. Cty. 1997) (ordering accounting and restitution).[53]

[53] The OAG estimates that employees in the Franchisee Respondents' stores have been underpaid during the period from July 2008 until December 30, 2015 as follows: in the Maestri Respondents' stores, approximately (1) $18,000.00 in underpaid minimum wages and overtime wages; (2) $52,000.00 in unpaid spread of hours pay; and (3) $108,000.00 in owed reimbursement for bicycle delivery expenses (Gerstein Aff. ¶¶54-59; Ex. 62); in the Ahmed Respondents' stores, approximately (1) $79,000.00 in underpaid minimum and overtime wages; (2) $50,000.00 in unpaid spread of hours pay; and (3) $27,000.00 in owed reimbursement for bicycle delivery expenses (Gerstein Aff. ¶¶64-69; Ex. 62); and in the Denman Respondents' stores, approximately (1) $54,000.00 in underpaid

In addition to its joint employer liability for wage-and-hour violations, Domino's is also liable for PULSE-related violations: specifically, for underpayments to employees at franchisee stores throughout New York State, and for monies paid by franchisees for PULSE, because of its deceptive and misleading practices related to PULSE under Executive Law Section 63(12). Accordingly, this Court should order Domino's to provide an accounting of underpayments to employees at franchisee stores in New York State that were facilitated or caused by the four flaws identified in PULSE; an accounting of the amounts paid for PULSE by franchisees during the Relevant Period; and that Domino's disgorge the amount of such PULSE payments it received from its franchisees.[54]

After the requested accountings have been submitted, the Court should order Domino's, under the supervision of an independent monitor, to create a "restitution fund" and "disgorgement fund" in an amount to be determined by the Court.[55]

C. Respondents Are Liable for Six Years of Wages, Liquidated Damages, Interest and Attorneys' Fees

In addition to restitution for back wages owed, Respondents are jointly and severally liable for liquidated damages under the Labor Law. Labor Law §§198(3), 663(3). Labor Law §198(1-a) also authorizes prejudgment interest "as required under the civil practice law and rules." See Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999) (awarding

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minimum and overtime wages due to improper use of the tip credit; and (2) $179,000.00 in owed reimbursement for car delivery expenses. Gerstein Aff. ¶¶74-87; Ex. 66. Each Respondent is jointly and severally liable for violations towards those it (or he) employed, whether as a direct or as a joint employer.

[54] As per Domino's own disclosed cost estimate, franchisees are subject to initial costs per store to acquire PULSE hardware and software of between $15,000 to $25,000, with per store maintenance and support, license fees, upgrades or updates averaging up to $4,500.00 annually. Ex. 2 (2016 FDD, at 24).

[55] See Midland Equities, 117 Misc. 2d at 208 (ordering the creation of a "restitution fund" in an amount to be determined by the court); State by Lefkowitz v. Bevis Indus. Inc., 63 Misc. 2d 1088, 1092 (Sup. Ct. N.Y. Cty. 1970) (same); Hotel Waldorf-Astoria Corp., 67 Misc. 2d at 92 (same); People v. Applied Card Sys. Inc., 41 A.D.3d 4, 8 n.2 (3d Dep't 2007) (recognizing authority to establish disgorgement fund).

wages, liquidated damages under Labor Law, and prejudgment interest). Finally, Respondents are also liable for attorneys' fees in an amount to be determined by the Court. Labor Law §§663, 198.

D. For Domino's Franchise Sales Act Violation, an Injunction, Corrective Disclosure, and Damages Are Warranted

The Franchise Act also provides a number of remedies for Franchise Act violations. Pursuant to Section 689, injunctive relief is warranted upon "evidence satisfactory to [the OAG] that any person has engaged in or is engaged in or is about to engage in any practice or transaction . . . declared to be an unlawful or a fraudulent practice"; the OAG thus is empowered to bring an action . . . to enjoin such person or persons from continuing such unlawful and fraudulent practice or engaging therein or doing any act or acts in furtherance thereof." Gen. Bus. L. §689(1). Pursuant to Section 691(1), a person who violates the anti-fraud rule (section 687) is liable for damages to the person purchasing the franchise. In addition, "the court may award to the plaintiff a sum not in excess of ten thousand dollars for each defendant as an additional allowance." Gen. Bus. L. §689(1). Further, pursuant to Section 692, the OAG is entitled to seek an order "direct[ing] restitution of any moneys or property obtained directly or indirectly by any such fraudulent practice." Gen. Bus. L. §692(2).

For its violation of the anti-fraud provision of the Franchise Act, the Court should issue an order enjoining Domino's from continuing to make material misrepresentations about the utility of its PULSE hardware and software, directing corrective disclosure from Domino's about PULSE in its FDD to be provided to prospective New York franchisees; directing corrective disclosure about PULSE to all current franchisees in New York State; and assessing an appropriate award of damages.

CONCLUSION

As set forth herein, the material facts are incontrovertible and compelling. As a matter of law and equity, judgment should be entered in favor of the People of the State of New York on behalf of the hundreds of employees at Domino's franchise restaurants in New York who have been unjustly deprived of the wages and reimbursements to which they are entitled. The Franchisee Respondents, as the workers' front-line employers, have violated the New York Labor Law and are clearly liable to these workers for an estimated $567,000 in back wages and underpayments, exclusive of liquidated damages and interest. Due to its unusually high level of control over the conditions of employment at the franchisee stores and its egregious conduct facilitating the wage violations at the Franchisee Respondents' stores, Domino's is equally liable as a joint employer for the back wages and underpayments owed to the employees at the Franchisee Respondents' stores. Moreover, Domino's inexplicable failure to advise franchisees of, or to remedy, known flaws in the PULSE system violated the anti-fraud provision of New York Executive Law Section 63(12), as well as the anti-fraud provision of the Franchise Act. As a result, this Court should use the full panoply of its legal and equitable powers to remedy the considerable violations of law that have occurred here: an accounting, restitution, damages, injunctive relief, corrective disclosures, and the appointment of an independent monitor are clearly warranted here. The OAG respectfully asks this Court to grant its Petition in all respects.

Dated: New York, New York
May 23, 2016

Respectfully submitted,

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