No. 11-4035-cv

In the United States Court of Appeals for the Second Circuit

CARLOS TORRES, on behalf of himself and all others similarly situated, LEWIS CHEWNING,
Plaintiffs-Counter-Defendants-Appellees,

RAYMOND ALLEN, LLANOS BLAS, NABIL ELFIKY, MOHAMMED DABASH, CARLOS MARTINEZ, LUIS MORALES, STEVE GROSSMAN, FRANKLYN COLLADO, DAVID ADLER, DINO A. ZAINO, PATRICK LABELLA, ROBERT MASTRONICOLA, ANTHONY BROOKS, VICTOR BENNETT, CANDIDO MOREL, JOSE MARTINEZ, WAYNE HENDRICKS, HAROLD HORN, TROY MILLER, OUSMANE DIATTA, ELLIOT STONE, TINA RODRIGUEZ, GABRIEL KARAMANIAN,
Plaintiffs,

(*Caption continues on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York
Case No. 04 Civ. 3316 (PAC)

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Plaintiffs-Appellees,

v.

GRISTEDE'S OPERATING CORP., GRISTEDE'S FOODS NY, INC., NAMDOR, INC., GRISTEDE'S FOODS, INC., CITY PRODUCE OPERATING CORP.,

Defendants-Counter-Claimants,

GALLO BALSECA, JAMES MONOS,

Defendants,

JOHN CATSIMATIDIS,

Defendant-Appellant.

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INTRODUCTION

The Fair Labor Standards Act (FLSA) includes the "broadest definition" of the employment relationship "that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n.3 (1945). It defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," and "employ" as "to suffer or permit to work." 29 U.S.C. § 203(d), (g). Based on this language, "[t]he overwhelming weight of authority" holds that "a corporate officer with *operational control* of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (emphasis added).

If anyone can be said to have "operational control" over a company, it is the defendant in this case, John Catsimatidis. Catsimatidis is the sole owner, President, CEO, and Chairman of the Board of Gristede's Foods, and with that authority maintains, as the district court put it, "absolute control of Gristede's, and all of its operations." SA-50. He considers himself the "boss" of the company, his employees recognize that he is the "head honcho," and he stated in open court that he is "their employer." Catsimatidis's position gives him authority to manage the company's finances, open and close stores, hire and fire employees, borrow money, buy and sell property, and even declare bankruptcy—all on his own initiative. As

the district court concluded, "it is pellucidly clear that [Catsimatidis] is the one person who is in charge of the corporate defendant." SA-53.

Although Catsimatidis disputes some peripheral aspects of his authority, he does not deny that, as Gristede's sole owner, he possesses broad power over the company's operations. To the contrary, he admitted in the district court that he personally controls the company's finances and property, and told the district judge that he could shut down the business if he desired. Catsimatidis instead tries to downplay his involvement in the company's day-to-day operations, arguing that he is less involved than he once was and that he was not "personally responsible" for the FLSA violations committed by his subordinates.

Catsimatidis's argument misconstrues both the record below and this Court's decisions interpreting the FLSA. First, Catsimatidis's characterization of himself as a figurehead divorced from the company's day-to-day operations flies in the face of the undisputed record evidence. That evidence establishes that Catsimatidis shares an office with the company's executive vice president and other top management, from which he "generally presides over the day to day operations of the company." SA-52. And Catsimatidis uses his authority to make decisions at all levels of company policy—from whether to open a new store or hire a high-level executive, to how best to display potato chips or what varieties of fish to sell at a particular store. Based on this record, the district court concluded that "there is no aspect of

Gristede's operations from top to bottom and side to side which is beyond Mr. Catsimatidis' reach." SA-53.

Second, Catsimatidis's argument that he is not liable for the decisions he delegates to others is foreclosed by this Court's decision in *Herman v. RSR Security Services*, 172 F.3d 132 (2d Cir. 1999). *RSR* held that the relevant question under the FLSA is not whether a corporate officer exercised "direct control" over the plaintiff employees, as Catsimatidis contends, but whether the officer "possessed the *power* to control" them. *Id.* at 139, 140 (emphasis added). Whether Catsimatidis chose to exercise his power directly or by delegation is beside the point, because the fact that authority is "exercised only occasionally … do[es] not diminish the significance of its existence." *Id.* at 139 (internal quotation marks omitted). Indeed, the FLSA's coverage was designed to prevent employers from evading responsibility for FLSA violations by delegation to third parties—precisely the evasion that Catsimatidis seeks to achieve here.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 over the plaintiffs' federal claim under the FLSA, 29 U.S.C. §§ 201 et seq. The district court had supplemental jurisdiction under 28 U.S.C. §§ 1332 and 1367 over the plaintiffs' state-law claim under the New York Labor Law Article 6, §§ 190 et seq. and Article 19, §§ 650 et seq.

Catsimatidis timely filed a notice of appeal on September 27, 2011 and an amended notice of appeal on November 4, 2011. In an order dated June 13, 2012, this Court concluded that it Court has jurisdiction under 28 U.S.C. § 1291 over the district court's October 6, 2011 judgment concerning Catsimatidis's liability.

STATEMENT OF THE ISSUES

1. Do the undisputed facts support the district court's conclusion that John Catsimatidis is an "employer" under the Fair Labor Standards Act?

2. Do the same undisputed facts support Catsimatidis's liability as an "employer" under the New York Labor Law?

STATEMENT OF THE CASE AND OF THE FACTS

The district court in this case (Crotty, *J.*) granted summary judgment to the plaintiffs on their Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) claims against Gristede's, holding that the company had eliminated hours that employees recorded on their timesheets, misclassified them as exempt employees, illegally withheld overtime hours that had not been preapproved, and illegally retaliated against two named plaintiffs with "completely baseless" counterclaims. *Torres v. Gristede's Operating Corp.* (*Torres II*), 628 F. Supp. 2d 447, 461-63, 473 (S.D.N.Y. 2008).

In this appeal, Catsimatidis challenges a separate decision by the district court granting summary judgment against him on his liability as an "employer"

under the FLSA and NYLL. The court concluded that Catsimatidis, as Gristede's sole owner, President, CEO, and Chairman of the Board, had "operational control" over Gristede's, and was thus an "employer" as that term is used in the FLSA. SA-49, 53. That holding rests on the FLSA's definition of "employer" and on undisputed evidence of Catsimatidis's authority over his company's operations.

I. Statutory Background

Congress enacted the FLSA to "eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation." *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946). To accomplish that goal, Congress required a statute with "sufficiently broad coverage to eliminate … the competitive advantage accruing from savings in costs based upon substandard labor conditions." *Id.* at 670. A narrow definition of covered employment based on common-law concepts of agency could be easily circumvented, and thus would not only be "ineffective" but would "penalize those who practice fair labor standards as against those who do not." *Id.*

Congress therefore adopted a statutory definition of employment that stretches the term's meaning well beyond its traditional common-law bounds. *See Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992). The FLSA accomplishes this in two ways. First, the statute defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an

employee." 29 U.S.C. § 203(d). Second, it defines "employ" to mean "to suffer or permit to work." *Id.* § 203(g). Congress modeled this language on child-labor statutes requiring individual owners to seek out and end such practices even when traditional employer-liability principles would have allowed them to escape liability. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); Bruce Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983 (1999) (examining the history of child-labor statutes and the evidence that Congress intended to adopt them in the FLSA).

Under the FLSA's definition of employment, an individual officer's liability does not turn on "technical concepts" derived from agency law, but on the "economic reality" of the officer's relationship to the company. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961). The statute thus covers "working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947).

Like the FLSA, the New York Labor Law (NYLL) defines employment broadly. The term "employer" includes "any person … employing any individual in any occupation, industry, trade, business, or service" or "any individual … acting as employer." N.Y. Lab. Law §§ 190(3), 651(6).

II. Facts and Proceedings Below

A. Catsimatidis and Gristede's

Catsimatidis is the sole owner, President, CEO, and Chairman of the Board of Gristede's, and "made his fortune" building and running the Gristede's and Red Apple grocery chains. SA-50 (Order); JA-1016 (Catsimatidis Decl. ¶ 1-3). Catsimatidis considers himself the "boss" of the company, JA-1823 (Catsimatidis Dep.), and refers to its employees as "my employees," JA-3619 (Trial Tr.). Although Catsimatidis "defers" some decisions that "he could make" to subordinates, he retains the power to make "ultimate decisions as to how the company is run." JA-1329, 1359 (Zorn Dep.). The executive vice president of the Red Apple Group (Gristede's parent corporation), reports directly to Catsimatidis and testified that he has "no reason to believe that if [Catsimatidis] chose to make a decision anybody there has the power to override him." JA-1329.

Catsimatidis exercises his authority over company decisionmaking in several important ways.

1. Financial Authority

Catsimatidis is 100% owner of Gristede's, directly controls the company's banking and real estate, and signs checks on behalf of the company. SA-50-51 (Order). He told the district court that "he could shut down the business, declare

bankruptcy, as well as provide the personal signature necessary for a bank letter of credit to be issued in favor of Gristede's" if he chose. SA-50.

Catsimatidis also closely monitors the company's finances. He "routinely reviews" the company's financial reports, including weekly margins reports and quarterly profit-and-loss statements, which break down profitability on a store-by-store basis. SA-52 (Order); JA-1848-50 (Catsimatidis Dep.). Catsimatidis discusses these reports with others in management to identify "problems, competitive openings, merchandising problems, why sales are up, [and] why sales are down," and considers this process part of "the normal course of business" for a company's CEO. JA-1850 (Catsimatidis Dep.).

2. Operational Authority

Catsimatidis is deeply involved in Gristede's day-to-day operations. He works at Gristede's headquarters, where he "shares an office" with the manager responsible for running Gristede's operations, Executive Vice President Charles Criscuolo. JA-802 (Catsimatidis Dep.); JA-438-39 (Criscuolo Dep.); JA-774 (Zorn Dep.). Catsimatidis is in the office "for part of the day, at least … four to five days a week" and talks to Criscuolo on a daily basis. JA-802 (Catsimatidis Dep.); JA-1334 (Zorn Dep.). The company's weekly merchandising and operations meetings also take place in his office, where Catsimatidis can listen to the discussion and "yell out" merchandising and sales instructions to the participants. JA-1798, 1816-17

(Catsimatidis Dep.). Criscuolo testified that Gristede's has a "hands on" culture: "You are dealing with the chairman, you are dealing with the president, you are dealing with the person who makes the decisions, you don't need to write 27 reports and go to 27 levels to get an answer on whether or not you can move something from A to B." JA-438; *see also* JA-1800 (Catsimatidis Dep.) ("I'm there every day if there is a problem.").

Catsimatidis's operational authority includes the power to "open, close and reopen stores." SA-50 (Order); JA-1370 (Zorn Dep.). He decided whether Gristede's supermarkets should have pharmacies, JA-1815 (Catsimatidis Dep.), and decided to launch, on his own initiative, an "experimental" store that differed from the chain's "regular model" and that he named, after himself, "Gristede's Trader John's." JA-3751-52 (Catsimatidis Decl. ¶¶ 2, 4). Catsimatidis also "set[s] prices for goods offered for sale," SA-50 (Order); JA-417-18 (Lang Dep.), "deals with vendors," JA-1815 (Catsimatidis Dep.), and makes merchandising decisions—such as whether to push Coca-Cola or Pepsi, or whether to sell "Perdue chickens, or … a cheaper brand," *id.* His instructions to subordinates include strategies to "drive sales, drive product, [and] get more sales out of the stores." JA-1818-19. For example, he might order managers "to put potato chips on the front end display" on the 4th of July "because that's going to sell." JA-1820. He once emailed various Gristede's managers to complain about the type of fish a particular supermarket

offered with the intention that "the supervisor or merchandisers would fix it." JA-1882-83.

3. Authority Over Wages and Working Conditions

Catsimatidis electronically signs the paychecks of Gristede's store employees. JA-1019 (Catsimatidis Decl. ¶ 20). According to Catsimatidis, Gristede's policy is that employees should be paid for the time they work. JA-855, 862 (Catsimatidis Dep.). Gristede's director of payroll, whom Catsimatidis promoted to the position, testified that this policy "comes from the top down," and that "Catsimatidis's rules are if somebody works, they get paid." JA-469 (Clusan Dep.). When asked whether Catsimatidis would have the power to stop payroll from doctoring records to avoid paying overtime, Criscuolo testified: "Mr. Catsimatidis owns the company. I guess he could do whatever he wanted." JA-383.

Catsimatidis receives a weekly report detailing payroll expenses and sales, and reviews profit-and-loss statements, which include payroll information, at the end of each quarter. JA-993-94 (Lang Dep.); JA-1834, 1838-39 (Catsimatidis Dep.). Catsimatidis also has knowledge of the company's wage structure from signing collective bargaining agreements with unions. Catsimatidis personally signed at least three collective bargaining agreements establishing employee wages, overtime premiums, and benefits. JA-496-520 (Local 338 CBA); JA-522-537 (Local 1500 CBA); JA-539-581 (Local 342 CBA). Catsimatidis testified that he knew employees

were paid correctly because "[t]he unions would call" if there were a problem. JA-879, 882.

4. Authority to Hire and Fire Employees

Catsimatidis has undisputed authority to hire company employees. He directly hired Robert Zorn, Red Apple Group's executive vice president, and promoted other company managers to the positions of vice president of operations and director of payroll and human resources. JA-247-48 (Balseca Dep.); JA-475-76 (Clusan Dep.); JA-1016 (Catsimatidis Decl. ¶ 5). He has also been directly involved in hiring or promoting store managers. JA-1341-42 (Zorn Dep.); JA-1486 (2008 Email from Catsimatidis); JA-1412-15 (Moore Dep.).

Although Catsimatidis denies having authority to fire employees, that limitation is self-imposed. Zorn testified that Catsimatidis "obviously" would have authority to make hiring and firing decisions, JA-1337-38, adding that if Catsimatidis demoted him to "chief cook and bottle washer," he "would respect that decision." JA-1364. Zorn also testified that if Catsimatidis told him not to fire a long-time employee, he would follow that instruction because "he's my boss, and he owns the company." JA-1348. Other managers agreed that Catsimatidis, as "the owner of the company," would have authority to fire employees. JA-1425 (Moore Dep.); JA-986 (Lang Dep.).

B. The Underlying Action

Plaintiffs in this case—employees of Gristede's—filed a class action against Gristede's and its corporate subsidiary under the FLSA and the NYLL, claiming they were denied overtime compensation while employed at the stores. JA-610 (Complaint). Plaintiffs amended the complaint several times to add named plaintiffs, causes of action for fraud and retaliation, and individual defendants, including defendant Catsimatidis. See JA-627 (First Amended Complaint); JA-647 (Second Amended Complaint); JA-684 (Third Amended Complaint); JA-3624 (Fourth Amended Complaint).

The district court certified an FLSA collective action and Rule 23 class action of "[a]ll persons employed by defendants as Department Managers or Co-Managers who were not paid proper overtime premium compensation for all hours that they worked in excess of forty in a workweek any time between April 30, 1998 and the date of final judgment in this matter." *Torres v. Gristede's Operating Corp.* (*Torres I*), 2006 WL 2819730, at *11, *17 (S.D.N.Y. Sept. 29, 2006). The court relied in part on store managers' testimony that "upper management exerted significant pressure on them and other store managers to meet payroll budgets," and that "Gristede's central management [had] eliminated overtime hours for hourly workers by making edits to employees' time records." *Id.* at *5.

The district court then granted partial summary judgment to the plaintiffs. *Torres II*, 628 F. Supp. 2d 447. The court concluded that Gristede's had misclassified employees as exempt employees, *id.* at 461-62, illegally withheld overtime from department managers when overtime hours were not preapproved, *id.* at 462-63, and illegally retaliated against two named plaintiffs by filing counterclaims that were "completely baseless," *id.* at 473, and that its violations of the FLSA were willful, *id.* at 465. Because Gristede's could not prove a reasonable, good faith belief that the company's conduct was lawful, the court held that plaintiffs were entitled to liquidated damages, but left the amount of damages to be determined through further proceedings. *Id.* at 462 n.14, 464.

Following the summary judgment order, the parties reached a settlement agreement, which the district court approved. When the corporate defendants defaulted on their payment obligations under the settlement, plaintiffs moved for summary judgment on Catsimatidis's liability as an "employer" under the FLSA and NYLL. Under the terms of the settlement agreement, a judgment against Catsimatidis would make him personally liable for the balance of the settlement. JA-3006 (Settlement Agreement § 3.1(H), "Summary Judgment on Individual Liability.").

While plaintiffs' motion for summary judgment was pending, the corporate defendants appeared before the district court and sought permission to modify the

settlement. JA-3588 (Trial Tr.). Catsimatidis attended the hearing and asked to make a statement in support of the request. He said that he was speaking on behalf of Gristede's 1,700 current employees, which prompted the following exchange with the court:

> THE COURT: [Those employees] are represented in the class. They have a representative here. You're not the representative. You're the employer.
>
> MR. CATSIMATIDIS: I represent the 1,700 current employees.
>
> THE COURT: You do? You're their employer.
>
> MR. CATSIMATIDIS: Yes.
>
> THE COURT: I don't think employers represent employees.
>
> MR. CATSIMATIDIS: I'm their employer, but I also represent them, sir.

JA-3595 (Trial Tr.).

After the court permitted him to make a statement, Catsimatidis warned that he could decide to put Gristede's into bankruptcy should the court decline to modify the settlement. JA-3620 (Trial Tr.). "My current 1,700 employees," he explained, would lose their jobs were this to happen. JA-3619. He also stressed that Gristede's would be able to satisfy its payment obligations if only it had more time: "I'm willing to pay … I just wanted time." JA-3620. The district court did not modify the settlement.

C. The District Court's Decision on Catsimatidis's Liability

The district court granted summary judgment to plaintiffs against Catsimatidis, holding him liable as an "employer" under the FLSA and NYLL. SA-49. The court began by identifying the relevant test for determining whether an individual officer is an "employer." SA-50. Under that test, the relevant question is the "economic reality" of the officer's relationship to the company based on the "*all* the circumstances" in the case. *Id.* As the district court recognized, the test does not turn on a "narrow legalistic definition" of employment, but on the officer's "operational control" over employment matters, SA-50, 52—or, as this Court has also put it, "authority over management, supervision, and oversight of [the company's] affairs in general." *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 140 (2d Cir. 1999). No one factor is dispositive of that question. *Id.* at 139. Rather, courts look to the "totality of the circumstances" to determine "whether the alleged employer possessed the *power* to control the workers in question." *Id.* (emphasis added).

After considering the undisputed record evidence the district court found it "pellucidly clear that [Catsimatidis] is the one person who is in charge of the corporate defendant" and was thus an "employer" under the FLSA and NYLL. SA-53. Recognizing the importance of "*all* the circumstances," SA-50, the district court based its decision on several undisputed facts demonstrating Catsimatidis's authority to exercise control over Gristede's:

- Catsimatidis is the sole owner of Gristede's and its parent company, and "admits that he controls Gristede's banking and real estate matters." SA-50, 52. He stated "in open Court … that he could shut down the business, declare bankruptcy, as well as provide the personal signature necessary for a bank letter of credit to be issued in favor of Gristede's." SA-50.
- Catsimatidis admitted in a declaration, filed in an earlier case, that he is the President and CEO of Gristede's. *Id.* He "routinely reviews financial reports, works at his office in Gristede's corporate office and generally presides over the day to day operations of the company." SA-52. He also admitted that he has "authority to open, close, and reopen stores," "set prices for goods offered for sale," "select the décor for the stores," and "control any store's signage and advertising." SA-50. Moreover, his "employees recognize that he is in charge." SA-52.
- The paychecks of Gristede's store employees bear Catsimatidis's electronic signature. SA-51.
- The evidence was "uncontradicted" that Catsimatidis had the power to hire employees. *Id.* That evidence included the testimony of "key managerial employees at Gristede's," who "concede[d] that Mr. Catsimatidis hired them." SA-52. Although Catsimatidis denied having authority to fire

employees, he "d[id] not deny" the testimony of his managers "acknowledg[ing] his power to close or sell Gristede's stores." *Id.*

The district court considered Catsimatidis's admission of authority to shut down Gristede's and declare bankruptcy to be sufficient, even standing alone, to establish Catsimatidis's "absolute control of Gristede's, and all of its operations." SA-50. Taken together with his day-to-day management of the company, the court found that "there is no aspect of Gristede's operations from top to bottom and side to side which is beyond Mr. Catsimatidis' reach." SA-53. The court thus concluded that Catsimatidis "had operational control and, as such, he may be held to be an employer." *Id.*

SUMMARY OF ARGUMENT

I.A. The Fair Labor Standards Act (FLSA) adopts a unique and strikingly broad definition of "employer," which federal courts have unanimously interpreted as subjecting individual corporate officers to joint liability for violations of the law. As this Court explained in *Herman v. RSR Security Services*, 172 F.3d 132, 139 (2d Cir. 1999), that definition encompasses officers with the "power to control" the company's employees. Based on the undisputed evidence below, Catsimatidis easily satisfies that test. As Gristede's President and CEO, he is the ultimate authority on all aspects of the company's operations. Catsimatidis considers himself the "boss" and works every day in an office that serves as the company's operational hub,

where he makes decisions, both important and trivial, on a broad range of corporate policies. On top of that, he is also the company's sole owner, with exclusive control over its finances and the power to unilaterally declare bankruptcy and shut down the company.

Taken together, the undisputed evidence that Catsimatidis exercises ultimate control over the company's operations, combined with his complete control, makes him a prototypical "employer" under the FLSA. In *RSR*, this Court found the individual defendant to be an "employer" under the FLSA where he was only a 50% shareholder, worked in a satellite office, and only occasionally made decisions regarding the corporation's business. It follows *a fortiori* that Catsimatidis is an employee because the evidence here is much stronger.

B. Catsimatidis does not deny this evidence, but instead engages in what the district court characterized as an "extended quibble about [its] legal significance." SA-52. He argues that the evidence is irrelevant because it demonstrates only his *general* authority over the company's affairs, rather than *direct* control over the employee plaintiffs. This Court, however, already considered and rejected that identical argument in *RSR*, 172 F.3d at 139. There, the Court held that a corporate officer need not *directly* monitor employees to be an "employer" under the FLSA. To ignore the defendant's authority over the company as a whole, the Court wrote, would be to ignore relevant evidence of the defendant's authority under all the

circumstances of the case. This Court's conclusion that employers may exercise indirect control flows directly from the FLSA's definition of "employer," which encompasses "any person acting *directly or indirectly* in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (emphasis added). As the Supreme Court and this Court have interpreted it, the statute's uniquely broad definition of the employment relationship prevents employers from shielding themselves from liability simply by delegating responsibility to someone else.

C. In support of his position that only direct control is relevant under the FLSA, Catsimatidis argues that the district court should have limited its consideration to four factors this Court found relevant to the defendant's status as an employer in *Carter v. Dutchess Community College*: whether the alleged 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. 735 F.2d 8, 12 (2d Cir. 1984). Once again, that precise argument was made and rejected in *RSR*. The Court in *RSR* held that the inquiry is not limited to technical definitions of employment, but requires consideration of *all* evidence bearing on the employer's operational authority. Thus, although satisfying the four *Carter* factors may be *sufficient* to satisfy the test, it is not *necessary* to do so. Indeed, under this Court's precedent, the district court would have committed reversible error if it had

artificially limited its inquiry in the way that Catsimatidis demands. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 78-79 (2d Cir. 2003).

In any event, the undisputed evidence establishes that Catsimatidis is an employer even under his proposed approach—that is, even if only the four *Carter* factors are considered. There is no dispute that Catsimatidis had authority not only to hire and fire individual employees, but to open and close entire stores or even the company as a whole. Catsimatidis signed union contracts setting employee wages and his signature appears on every employee paycheck. Moreover, Catsimatidis selected and supervises the company's payroll director. As to each of the *Carter* factors, this evidence is stronger than the evidence this Court found sufficient in *RSR* to satisfy the test. Thus, although it would make no sense to evaluate Catsimatidis's power to control employees without considering his ownership and ultimate authority over all aspects of company policy, doing so would not change the result in this case.

II. Because Catsimatidis is an employer under the FLSA, there is no need for this Court to reach the secondary question of whether he is an employer under the New York Labor Law because the answer would not affect Catsimatidis's liability in this case. But if this Court were to reach the question, Catsimatidis's argument under state law would fare no better than his arguments under federal law. Catsimatidis's reliance on cases holding that corporate officers were not liable

for damages misses the point. Those decisions concerned individual officers who were not also "employers." But whether Catsimatidis is an "employer" is the question in this case, and on that question New York law applies the same test as the FLSA. For the same reasons he is liable under federal law, New York law does not protect him from liability.

Ultimately, there is no way to reconcile settled state and federal labor law with Catsimatidis's quest to hide behind the veil of his corporate entity. Invoking ordinary corporate law, he suggests that affirming the district court will drag this Court down a slippery slope to personal liability for all corporate shareholders. But the facts here do not remotely present that scenario. And even New York corporate law has long rejected Catsimatidis's preferred policy of blanket immunity for those who fail to pay their workers. The decision below should be affirmed.

STANDARD OF REVIEW

A plaintiff is entitled to summary judgment when the facts, considered in the light most favorable to the defendant, entitle the plaintiff to judgment as a matter of law. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 (2d Cir. 2003). Because "the ultimate decision as to whether a party is an employer" under the FLSA "is a legal conclusion that is reviewed *de novo,*" summary judgment for plaintiffs is appropriate when "the record as a whole compel[s] the conclusion" that the defendant is an employer even if "isolated factors point against [it]." *Id.* at 76-77; *see Rutherford*, 331

U.S. at 730 (holding as a matter of law that purported independent contractors were employees under the FLSA); *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 143-44 (2d Cir. 2008) (acknowledging "fact-intensive character of a determination of joint employment," but holding that summary judgment for plaintiffs is appropriate where the defendant's status as an employer "is established as a matter of law"); *Antenor v. D & S Farms,* 88 F.3d 925, 937-38 (11th Cir. 1996) (growers are employers as a matter of law even though middleman rather than growers exercised some employer prerogatives). In particular, summary judgment is appropriately granted to the plaintiff when the undisputed facts establish that an individual defendant has an ownership interest in the company and "operational control of significant aspects of the corporation's day to day functions." *Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 966 (6th Cir. 1991) (emphasis removed) (internal quotation marks omitted).

ARGUMENT

In the FLSA, Congress adopted a statutory definition of employment "striking" in its breadth. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). As this Court has interpreted the statutory language, an individual corporate officer is an "employer" when the officer "possesse[s] the power to control the workers in question." *Herman v. RSR Security Services*, 172 F.3d 132, 139 (2d Cir. 1999). In applying that test, courts are not restricted "to a narrow legalistic definition" of

employment. *Id.* Rather, the test requires examination of the "economic reality" of the case "based upon *all* the circumstances." *Id.* Here, Catsimatidis is the sole owner, President, and CEO of Gristede's, and described himself in open court as the plaintiffs' "employer." JA-1329, 1359 (Zorn Dep.); JA-3595 (Trial Tr.). He has authority to make "ultimate decisions as to how the company is run," and he uses that authority to involve himself directly in a wide range of company decisions. JA-1329, 1359 (Zorn Dep.). Catsimatidis's "power to control" Gristede's and its employees is not a close question.

Catsimatidis's arguments to the contrary run headlong into this Court's precedent at every turn. *First*, he argues that the evidence of his sole ownership and management of corporate affairs as Gristede's President, CEO, and Chairman of the Board is insufficient to establish his "operational control" of the company. This Court in *RSR*, however, held that a 50% owner and chairman of the board had "operational control" based on far less day-to-day involvement. *Second*, Catsimatidis argues that "the district court erred in focusing on [his] *general* control over the company, rather than inquiring into his *personal control* over the employees in question." Appellant's Br. 22 (emphasis added). Again, *RSR* rejected that argument, holding that evidence of general operational control is relevant even if that control is "restricted, or exercised only occasionally." 172 F.3d at 139. *Third*, he argues that *he* is entitled to summary judgment because the evidence of his

control, in his view, fails to satisfy four factors this Court has found relevant in past cases. Appellant's Br. 39-40. In *Zheng v. Liberty Apparel Co.*, however, this Court held that a district court's "mechanical" reliance on those precise factors would constitute reversible error. 355 F.3d 61, 79 & n.8 (2d Cir. 2003). And, in any event, the undisputed evidence on each of the four factors in this case is stronger than evidence *RSR* held sufficient to satisfy those factors. Because the district court's decision was not only correct, but compelled by this Court's precedent, its decision should be affirmed.

I. CATSIMATIDIS HAS ULTIMATE AUTHORITY OVER GRISTEDE'S, AND IS THEREFORE AN "EMPLOYER" UNDER THE FAIR LABOR STANDARDS ACT.

A. Catsimatidis Owns the Company And Has Ultimate Control Over Its Operations.

1. Central to the question whether an individual defendant is an "employer" under the FLSA is the defendant's "operational control of significant aspects of the corporation's day to day functions." *Elliott Travel*, 942 F.2d at 966 (emphasis removed) (internal quotation marks omitted); *see RSR*, 172 F.3d at 140 (relying on evidence of the defendant's "authority over management, supervision, and oversight of RSR's affairs in general"). The undisputed evidence in the district court established that Catsimatidis has such "operational control" here. Catsimatidis admitted that he is the company's President, CEO, and Chairman of the Board. In those positions, Catsimatidis occupies the position at the top of the

company's organizational chart, to which all the company's managers and employees either directly or indirectly report. Doc. 301-22 (Catsimatidis Dep. Ex. 3) (Catsimatidis's hand-drawn organizational chart, with himself at the top). He is thus the one Gristede's official with authority to make "ultimate decisions as to how the company is run." JA-1329, 1359 (Zorn Dep.).

Catsimatidis exercises his authority to control even the most trivial of company decisions, like how best to display potato chips and what kinds of fish to sell in a particular store. JA-1820, 1882-83 (Catsimatidis Dep.). But he also makes significant decisions about important company policies, like whether to hire a manager or whether to "open, close and reopen stores." SA-50 (Order). As his executive vice president explained, "when you get into the significant company-wide decisions ... ultimately, it would fall on Catsimatidis' desk, as it should." SOF ¶ 57. Catsimatidis's authority is so extensive that he independently made the decision to launch a new "experimental" brand of store, which he chose to name "Gristede's Trader John's," after himself. JA-3751-52 (Catsimatidis Decl. ¶¶ 2-4).[1]

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[1] Complaining of "substantial due process issues," Catsimatidis challenges the district court's reliance on an affidavit from another case in which he discussed his decision to open Gristede's Trader John's, and argues that the court "surprised" him with it at oral argument. Br. 19 n.3. Even assuming that Catsimatidis's "due process" rights could be violated by being confronted with his own affidavit, he waived that argument by neither objecting in the district court nor requesting the opportunity to file a response. *See* SA-19-39. His suggestion that the affidavit should (continued…)

The evidence of Catsimatidis's control is even stronger than the evidence on which this Court in *RSR* relied in concluding that the defendant there was an "employer" under the FLSA. Like Catsimatidis, the defendant in *RSR* was the Chairman of the Board, *RSR*, 172 F.3d at 135, but lacked Catsimatidis's titles of President and CEO. Working in a satellite office, away from the company's central operations, the defendant monitored corporate activities mainly through forwarded copies of company reports and customer complaints. *Id.* at 137. He exercised his control over company operations through instructions issued to other managers. *Id.* "Because of his participation in company business," the defendant was seen by others as the "boss," and he encouraged this view "by allowing his name to be used in sales literature" and "representing to potential clients that he was a principal" in the company. *Id.*

Similarly, Catsimatidis refers to himself as the company's "boss," and his employees—whom he refers to as "my employees"—call him "the boss" or "head honcho." JA-1823 (Catsimatidis Dep.); JA-3619 (Trial Tr.); JA-456 (Squiciarini Dep.). Like the defendant in *RSR*, Catsimatidis "encourages this view" by serving as the company's "public face" in its advertising, public relations, and store openings. JA-776-779 (Zorn Dep.); JA-1017 (Catsimatidis Decl. ¶ 10). Catsimatidis

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not have been considered because he filed it in a "*trademark* case that had nothing to do with the FLSA," Br. 19, is likewise waived.

regularly receives reports on company operations, including customer complaints and weekly, monthly, and quarterly reports on the company's financial health. JA-993 (Lang Dep.); JA-1848-50 (Catsimatidis Dep.). But rather than working in a satellite office as in *RSR*, Catsimatidis works every day at the company's headquarters, where he occupies an office that serves as the hub of Gristede's corporate operations. Catsimatidis shares the office with the company's executive vice president—also the company's chief operations officer—who reports directly to Catsimatidis and with whom Catsimatidis interacts on a daily basis. JA-438-39 (Criscuolo Dep.); JA-774 (Zorn Dep.). And Catsimatidis's office is also the site of the company's weekly merchandising and operations meetings, allowing him to hear the discussions from his desk and "yell out" instructions whenever he wants. JA-1798, 1816-17 (Catsimatidis Dep.).

Catsimatidis disputes one aspect his authority over company operations, claiming that he lacks the power the fire employees other than the executives who report directly to him. To the extent that this is true, it is a self-imposed limitation. As he explained in his deposition: "We have a table of organization. Unless I wanted to run the entire company myself, then the table of organization wouldn't work, so that's why I leave it up to all the people responsible for doing their jobs." Doc. 334 at 6-7. Catsimatidis, in other words, does not *want* to run the company himself, so he *chooses* to abide by an organizational chart. But as owner, President,

and CEO of Gristede's, no legal principle would prevent him from changing or bypassing the corporate hierarchy if it suited his purposes.

While admitting that he is CEO and President of Gristede's, with final authority over all decisions affecting the company, Catsimatidis again seeks to minimize the significance of these facts by describing his positions as "honorary." Appellant's Br. 1, 7. Catsimatidis does not explain the significance of this self-conferred honorific, but it is clear from the record that it has no practical significance. Honorary or otherwise, Catsimatidis *is* the company's President and CEO; nobody else holds those positions. There is thus no serious question here that Catsimatidis has "operational control over significant aspects" of Gristede's operations. The "economic reality" is that Catsimatidis is the "top man" at Gristede's, and thus an "employer" under the FLSA. *See Elliott Travel*, 942 F.2d at 966 (holding that the "top man" of a corporation was an FLSA "employer"); *see also Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984).

2. Even if Catsimatidis were not the sole owner of Gristede's, the authority he exercised as the company's President and CEO would be sufficient to make him an "employer" under the FLSA. *See Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) ("[T]he FLSA's definition of employer is sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration[.]" (internal

quotation marks omitted)). But although the FLSA does not *require* ownership, a defendant's "control over the purse strings" can nevertheless serve as strong evidence of operational control. *See Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (holding that the defendants' "power over the employment relationship by virtue of their control over the purse strings was substantial"), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see also Elliott Travel*, 942 F.2d at 966 (holding that the defendant was an employer where he had a "significant ownership interest" and thus "the corporation functioned for his profit"); *Grim Hotel Co.,* 747 F.2d at 972 (holding that the defendant was an employer for a family-owned hotel chain where "the hotels, speaking pragmatically, were [the defendant's] and functioned for the profit of his family").

Here, Catsimatidis admitted in the district court that he is 100% owner of Gristede's. SA-50. As the company's sole owner, Catsimatidis personally controls its finances, including "banking and real estate matters," and has exclusive authority to borrow money on the company's behalf, buy and sell property, and file and settle lawsuits. SA-50, 52. Catsimatidis could also, as he told the district court, declare bankruptcy and shut down the business if he chose. SA-50.

Again, the evidence of financial control here exceeds what this Court relied on in *RSR* as "evidencing [the defendant's] control over [company] employees."

RSR, 172 F.3d at 140. As opposed to Catsimatidis's sole ownership of Gristede's, the defendant in *RSR* owned only a 50% share of the corporation. *Id.* at 136. Like Catsimatidis, however, the defendant was "the only principal who had bank credit" and thus "exercised financial control over the company." *Id.* The defendant's "financial activities included the signing of [company] loans, approving purchases, and leasing vehicles for [company] employees on his personal credit." *Id.* Especially significant to the Court was the fact that the defendant, like Catsimatidis, "could have dissolved the company" if he wished. *Id.* at 140.

Rather than disputing the evidence of his authority, Catsimatidis again tries to minimize its importance by characterizing his ownership as "indirect[]." Appellant's Br. 4. That is technically true, because rather than owning Gristede's directly, he owns 100% of two parent corporations that in turn own 100% of Gristede's. JA-276-79 (Catsimatidis Dep.). But whether Catsimatidis owns the company directly or indirectly does not change the fact that he is its sole owner. The test for employment under the FLSA turns on "economic reality," not "technical concepts." *Goldberg,* 366 U.S. at 33 (1961). Here, Catsimatidis's control is as economically real as it gets—he had the power to "shut down the business" entirely. SA-50; *see RSR*, 172 F.3d at 140; *see also Chambers Constr. Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956) (holding that an individual defendant was an

"employer" where the corporation, "in practical effect, [was] subject to termination at his pleasure") (internal quotation marks omitted).

3. Taken together with evidence that he "was involved with the business operations of the corporation," the evidence of his "significant ownership interest" establishes that he is an "employer" under the FLSA. *Elliott Travel*, 942 F.2d at 966. To be sure, this Court in *RSR* acknowledged (without adopting) the conclusion of the divided Eighth Circuit panel in *Wirtz v. Pure Ice Co.,* 322 F.2d 259, 262-63 (8th Cir. 1963), that ownership of company stock was not "in and of itself" sufficient to establish that a defendant was an FLSA "employer." *RSR*, 172 F.3d at 141. But assuming that sole ownership of a corporation is insufficient standing alone, ownership *combined* with management authority and control of the company's operations is plainly sufficient. *See RSR*, 172 F.3d at 141 (noting that the defendant was "not only a 50 percent stockowner," but was also "generally involved" in the company's operations). Indeed *Wirtz* itself, although rejecting liability based *solely* on ownership of company shares, also held that liability would be "well supported" by evidence of "a combination of stock ownership, management, direction and the right to hire and fire employees." 322 F.2d at 263.

All the elements identified by *Wirtz* are amply present here. Like the defendant the Sixth Circuit held to be an employer in *Elliott Travel*, Catsimatidis is both the "top man" of the corporation and "control[s] its purse strings." *Elliott*

Travel, 942 F.2d at 966. That combination of full ownership and total authority over corporate affairs makes Gristede's purely "his creature, subject to termination at his pleasure." *Chambers Constr.,* 233 F.2d at 724. Because he has the ultimate "power to control" the company and its employees, *RSR*, 172 F.3d at 139, Catsimatidis is a prototypical FLSA "employer."

B. Catsimatidis Is An "Employer" Under the FLSA Regardless of Whether He Directly Exerts His Authority Over the Plaintiffs.

Catsimatidis's primary argument on appeal is that any evidence of his ownership and executive control of Gristede's is irrelevant to the question whether he is an "employer" under the FLSA. Appellant's Br. 20. He argues that such evidence shows only "his *general* control over the company," and that the district court thus erred in relying on it "rather than inquiring into his *personal control over the employees in question*." *Id.* at 22.

That argument, however, is identical to the one advanced by the defendant—and rejected by this Court—in *RSR*, 172 F.3d at 139. The defendant there was a corporate owner and officer who "exercised broad authority over [company] operations," but "was not directly involved in the daily supervision" of the plaintiff employees. *Id.* at 136. Like Catsimatidis, he argued that "evidence showing his authority over management, supervision, and oversight of [the

company's] affairs *in general* is irrelevant, and that only evidence indicating his *direct control over the [plaintiffs]* should be considered." *Id.* at 140.

This Court disagreed, holding that the defendant's argument "ignore[d] the relevance of the totality of the circumstances." *Id.* As the Court explained, whether an individual defendant is an "employer" under the FLSA depends on whether, under "*all* the circumstances," the defendant "possessed the power to control the workers in question." *Id.* at 139. For a defendant to satisfy that standard "does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees." *Id.* Rather, "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence." *Id.* (internal quotation marks and alterations omitted).

Other courts have reached the same result. In *Elliott Travel & Tours, Inc.*, the Sixth Circuit held that a president and co-owner of a corporation was an "employer" based on his ownership interest in and high-level control over a corporation. *See* 942 F.2d at 966. As in *RSR*, the defendant in *Elliott Travel* claimed that he was not an "employer" because, "although he made major corporate decisions with respect to [the company], he did not have day-to-day control of specific operations." *Id.* The "details of computing hours were handled by a payroll

bookkeeper," "a general manager handled many of the day-to-day problems relating to operation of the corporation," and "managers of branch offices exercised control over hours worked by employees" there. *Id.* As in *RSR*, the court disagreed. That the defendant delegated "many of the day-to-day problems associated with operation of the corporation" to others, the court wrote, "does not preclude finding that [he] was an employer." *Id.* Rather, a defendant need only have "operational control of *significant aspects* of the corporation's day to day functions." *Id.* (emphasis added; internal quotation marks omitted); *see also Donovan v. Janitorial Servs., Inc.*, 672 F.2d 528, 531 (5th Cir. 1982) (holding that a defendant was an employer despite his delegation of "day-to-day management" of the company because his ownership interest gave him "ultimate, if latent, authority over its affairs").

The result reached in *RSR* and other decisions flows directly from the FLSA's "expansive[]" definition of "employer." *Id.* at 139 (quoting *Falk v. Brennan,* 414 U.S. 190, 195 (1973)); *see also Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir. 2008) (noting that the statute's language "sweep[s] broadly"). The statute defines the word to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). Noting the uniquely "broad" nature of this definition of the employment relationship, the Supreme Court in *Rutherford* rejected the defendant

slaughterhouse's argument that it was not an employer because it had delegated all supervision of employees to an independent contractor. 331 U.S. at 728. The statute, the Court held, is "comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Id.* at 729. Although the slaughterhouse did not *directly* supervise the employees, the employees' work was part of an "integrated unit of production" devoted to furthering the slaughterhouse's interest. *Id.* As this Court later explained, *Rutherford* "confirmed that the definition of 'employ' in the FLSA cannot be reduced to formal control over the physical performance of another's work." *Zheng*, 355 F.3d at 70.

If, as in *Rutherford*, delegation to a third-party contractor does not immunize a corporate officer from liability, delegation *within* a corporate hierarchy cannot either. As Judge Friendly explained for this Court in *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959), the FLSA does not permit employers to so easily shield themselves from liability. An employer "cannot discharge [his duties under the FLSA] by attempting to transfer his statutory burdens … of appropriate payment, to the employee." *Id.* Such an obvious escape route from the statute's coverage would gut the purpose of the FLSA's broad definitions—to prevent entities who are genuinely employers "from shielding themselves from responsibility for the acts of their agents," *Agnew*, 712 F.2d at 1513.

C. Exclusive Reliance on the Four *Carter* Factors Is Not Required to Demonstrate "Employer" Status, But They Are Satisfied Here In Any Event.

Despite the uncontested evidence of his absolute control over Gristede's, Catsimatidis argues that the district court's grant of summary judgment should be reversed—and indeed that summary judgment should be *granted to him*—because the plaintiffs, in his view, have not satisfied all four factors set forth by this Court in *Carter*: "whether the alleged 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." 735 F.2d at 12 (internal quotation marks omitted).

There are two key flaws with that argument. First, this Court has expressly held, in direct contradiction to Catsimatidis's position, that the four-factor test set forth in *Carter* is neither all-inclusive nor dispositive. Second, even assuming that plaintiffs were required to satisfy all of the *Carter* factors, they have done so here. Indeed, the evidence here is even stronger than it was in *RSR*, where this Court held the four factors satisfied.

1. The Four *Carter* Factors are Sufficient, But Not Necessary, to Show "Employer" Status.

Catsimatidis's argument that FLSA plaintiffs must satisfy the four *Carter* factors to prove an individual officer's liability as an employer was, once again, made and rejected in *RSR*. Like Catsimatidis here, the defendant in *RSR* argued

that he was not an employer because the four factors were not satisfied—he "did not hire or fire [the plaintiffs]; he did not control the methods of operation of RSR; he did not set the hourly wages of the security guards; and he did not control RSR's payroll." Appellant's Br. in *RSR*, 1998 WL 34104252, at *24 (filed Jan. 18, 1998); *compare* Appellant's Br. 13 (arguing that Catsimatidis has not "hired or fired Gristede's store employees," "controlled their conditions of employment or their pay," or "maintained any employment records").

As this Court explained in *Zheng*, the *Carter* factors—"hiring and firing, supervising schedules, determining rate and method of payment, and maintaining records"— "focus[] solely on the formal right to control the physical performance of another's work." 355 F.3d at 69. Because the right to control another's work "is central to the common-law employment relationship," the factors "approximate the common-law test for identifying joint employers." *Id.* (quoting *Restatement of Agency* § 220(1) (1933) ("A servant is … subject to the other's control or right to control.")). But an ostrich-like exclusive reliance on the four-factor test cannot be reconciled with the FLSA's broad language, "which necessarily reaches *beyond* traditional agency law." *Id.* (emphasis added). Thus, while establishing an agency relationship under the *Carter* factors "may be *sufficient* to establish joint employment under the FLSA, it is not *necessary* to establish joint employment." *Id.* at 79. Indeed, a district court's "mechanical" reliance on the four *Carter* factors to conclude that

an individual is not an FLSA "employer" would be reversible error in this Circuit. *Id.* at 79 n.8.

2. Even Under His Own Proposed Approach, Catsimatidis Is an "Employer" Under the FLSA

Even if the Court limited its analysis to the four *Carter* factors, as Catsimatidis demands, he would still be an "employer" under the FLSA. Plaintiffs' evidence on each one of the four factors is *stronger* in this case than it was in *RSR*, where the Court found the defendant to be an employer. Thus, if the defendant in *RSR* was an employer, it follows *a fortiori* that Catsimatidis is an employer too.

a. Power to hire and fire employees

This Court found the first *Carter* factor—the power to hire and fire employees—satisfied in *RSR* because the defendant there had hired a small number of "mainly managerial staff." *RSR*, 172 F.3d at 140. The undisputed evidence here shows the same thing: that Catsimatidis hired and promoted company managers, including the head of the company's payroll. Appellant's Br. 28; JA-475-46 (Clusan Dep.). As in *RSR*, this evidence demonstrates that Catsimatidis "had the *authority* to hire employees," and thus satisfies this portion of the test. 172 F.3d at 140 (emphasis added). In addition, the evidence was undisputed that Catsimatidis had authority to open and close stores, or even to shut down the company altogether. Thus, "[r]egardless of whether [he is] viewed as having had the power to hire and

fire, [his] power over the employment relationship by virtue of [his] control over the purse strings [is] substantial." *Bonnette*, 704 F.2d at 1470.

b. Supervised and controlled employee work schedules or conditions of employment

This Court in *RSR* found this element satisfied by evidence that the defendant, "on occasion, supervised and controlled employee work schedules and the conditions of employment." *RSR*, 172 F.3d at 140. As examples, the court noted that the defendant "was involved in the assignment of guards to some work locations" and on one occasion asked a lawyer to review the company's employment application forms. *Id.* The evidence of Catsimatidis's involvement in conditions of employment is far more extensive. More than just assigning employees to work locations, Catsimatidis has authority to open and close entire stores. Although there is no evidence in the record that he reviewed the company's employment application forms, he authorized an application for wage subsidies and tax credits on behalf of Gristede's employees. JA-482-83 (Clusan Dep.). More importantly, Catsimatidis signed at least three collective-bargaining agreements establishing employee wages and benefits. JA-513 (signature as "Employer"). And he has handled complaints from Gristede's workers' union representatives "every week for as long as I could remember." JA-1876 (Catsimatidis Dep.).

c. Determined the rate and method of payment

This Court in *RSR* found that "[l]ittle evidence suggests [the defendant] was involved with determining the rate of payment to the security guard employees." *RSR*, 172 F.3d at 140. But the Court nevertheless found this factor satisfied because the defendant had once ordered a stop to an illegal pay practice, and had signed payroll checks on at least three occasions. *Id.* Although the defendant argued that two of the three checks were signed before the relevant class period, the Court held "this contention [was] not a relevant consideration in determining his status as an employer" because "[t]he key question is whether [the defendant] had the *authority* to sign paychecks throughout the relevant period, and he did." *Id.* (emphasis added).

Here, Catsimatidis has personally set a companywide policy that "if somebody works, they get paid." JA-469 (Clusan Dep.). On at least one occasion, Catsimatidis set up a meeting between management and a payroll company. JA-1452-53 (Flores Dep.). And his signature appears on *all* employee payroll checks. JA-1019 (Catsimatidis Decl. ¶ 20). Catsimatidis does not dispute that it is his signature on the checks, but argues that his signature is electronic, and thus that he did not physically sign each one of the checks himself. But, as in *RSR*, that point is irrelevant—the signature, electronic or not, answers the "key question" by

demonstrating that Catsimatidis "had the *authority* to sign paychecks." *RSR*, 172 F.3d at 140 (emphasis added).

d. Maintained employment records

On the final factor, *RSR* found "no evidence that [the defendant] was involved in maintaining employment records," but held that the factor was "not dispositive." *RSR*, 172 F.3d at 140. Unlike the defendant in *RSR*, Catsimatidis works in the same office where employment records are kept, and he was responsible for promoting and supervising the head of the company's payroll. JA-475-76, 486 (Clusan Dep.). Thus, although this factor may still not be dispositive, plaintiffs' showing on this point is stronger than in *RSR*.

* * *

Although a mechanical application of the *Carter* factors alone would lead to the same result in this case, there is no basis for disregarding relevant evidence that fails to conform to a narrow, four-factor test. *See Zheng*, 355 F.3d at 71, 78-79 n.8. After all, a test of "operational control" can hardly be trusted to reach reasonable results if it fails to consider evidence that the defendant owns and runs the company.

II. CATSIMATIDIS IS LIKEWISE LIABLE AS AN "EMPLOYER" UNDER NEW YORK LABOR LAW.

Because Catsimatidis is an employer under the FLSA, there is no need to also establish his status as an employer under state law. Under the settlement

agreement in this case, he is personally liable "if the Court holds John Catsimatidis to be an employer"—period. JA-3006 (Settlement Agreement § 3.1(H), "Summary Judgment on Individual Liability").

In any event, Catsimatidis fares no better under state law than under federal law. He insists that he cannot be held liable under the New York Labor Law because "the NYLL does not impose personal liability against corporate officers." Appellant's Br. 43. But the question here, as under the FLSA, is whether defendants in Catsimatidis's shoes may be liable "not as corporate officers or shareholders, but *as employers*." *Chu Chung v. New Silver Palace Rest., Inc.*, 272 F. Supp. 2d 314, 318 (S.D.N.Y. 2003) (emphasis added). Echoing the FLSA, the NYLL defines "employer" expansively to include "any person … employing any individual in any occupation, industry, trade, business, or service" or "any individual … acting as employer." N.Y. Lab. Law §§ 190(3), 651(6).

"[T]he test for determining whether an entity or person is an 'employer' under New York Labor Law is the same as the test set forth in [*RSR*] for analyzing employer status under the Fair Labor Standards Act." *Chung*, 272 F. Supp. 2d at 318 & n.6 (citing *RSR*, 172 F.3d 132); *accord Ovadia v. Office of Indus. Bd. of Appeals*, 918 N.Y.S.2d 56, 57 (N.Y. App. Div. 2011) ("[T]he test for determining whether an entity or person is an 'employer' is the same under New York State and federal law.") (internal quotation marks omitted), *rev'd on other grounds*, 969 N.E.2d 202

(N.Y. 2012). As we have already shown, that test is more than satisfied here. Indeed, New York's Industrial Board of Appeals has held on multiple occasions that the test for "employer" status under the NYLL is the same as under federal law and, relying on this Court's decision in *RSR*, that individuals with "ultimate authority" over a corporation may be personally liable for its unpaid wages. *See, e.g.*, *Fenske v. Comm'r of Labor*, PR-07-031 (Dec. 14, 2011) (corporation's "owner and sole shareholder" was liable because he had "ultimate authority" over "management decisions," "even if that authority was never exercised"); *Matter of Franbilt*, PR-07-019 (July 30, 2008) (corporation's "owner and sole shareholder" was liable by virtue of his "ultimate authority"; his "failure to exercise this power is not evidence that he did not possess such power").[2]

Undeterred, Catsimatidis seeks refuge in two cases, *Stoganovic v. Dinolfo*, 461 N.Y.S.2d 121 (N.Y. App. Div. 1983), and *Patrowich v. Chemical Bank*, 473 N.E.2d 11 (N.Y. 1984). Neither one helps him. *Patrowich* held that a "corporate *employee*"—in that case, "one of approximately 800 vice-presidents of Chemical Bank"—could not be held personally liable for age and sex discrimination where "he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." 473 N.E. 2d at 12-13 (emphasis added). And *Stoganovic*

[2] The Board's decisions are available at www.labor.ny.gov/iba/decisions/pdf/pr-07-031.pdf *and* www.labor.ny.gov/iba/decisions/pdf/PR%2007-019.pdf, respectively.

declined to create an implied private right of action for civil liability based on two statutes allowing penal sanctions against corporate "officers and agents," not "employers." 461 N.Y.S.2d at 122-23.

Here, by contrast, the undisputed facts demonstrate that Catsimatidis "is not merely a corporate officer or shareholder, but an employer." *Chung*, 272 F. Supp. 2d at 318. "The distinction is critical because … the rule set forth in *Stoganovic* is limited only to claims for unpaid wages against officers or shareholders who do not qualify as employers under Section 190(3)." *Lauria v. Heffernan*, 607 F. Supp. 2d 403, 409 (E.D.N.Y. 2009) (emphasis added) (internal quotation marks omitted); *accord Vysovsky v. Glassman*, 2007 WL 3130562, at *17 (S.D.N.Y. Oct. 23, 2007); *Chung*, 272 F.Supp.2d at 318. The New York State Department of Labor has drawn the same distinction. *See* New York State Dep't of Labor, "Request for Legal Opinion: Definition of Employer (Corporate Officer)," No. RO-11-0002, Feb. 8, 2011 (distinguishing between "liability as an individual employer and liability as a corporate officer").[3] And the New York Appellate Division likewise recognized the distinction when it reversed the dismissal of claims for unpaid wages against individual shareholders of an insolvent corporation, allowing the former-employee plaintiffs to show that the defendants could be held liable "as employers within the

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[3] The State's opinion is available at http://www.labor.ny.gov/legal/counsel-opinion-letters.shtm ("Wage and Hour Law: Definition Clarifications for Wage and Hour Provisions: Employer").

definition of Labor Law § 190(3)." *Wong v. Yee*, 693 N.Y.S.2d 536, 538 (N.Y. App. Div. 1999). If the law were as Catsimatidis portrays it, that ruling would make no sense.

* * *

Despite established state and federal labor law to the contrary, John Catsimatidis seeks to hide behind the veil of his one-man corporation and shield himself from his responsibility to compensate his employees. To that end, his brief touts inapposite principles of corporate law and raises the unpalatable specter of sweeping personal liability for *all* corporate shareholders and officers. Given Catsimatidis's ultimate authority as the owner, President, CEO, and Chairman of Gristede's, this appeal does not remotely present that scenario. Indeed, not even corporate law supports Catsimatidis's preferred policy of sweeping immunity. *See* N.Y. Bus. Corp. Law § 630 (making the "ten largest shareholders" of a private New York corporation "personally liable for all … wages or salaries due and owing to any of its laborers, servants or employees"). Although not applicable here, this century-old statute highlights the law's solicitude for employees "to whom the hardship would be great if their wages or salaries were not promptly paid." *Bristor v. Smith*, 53 N.E. 42, 43 (N.Y. 1899). As if anticipating Catsimatidis's threats to declare bankruptcy rather than pay his workers, the law has long "provide[d] a safeguard for employees who would otherwise be left without recourse in the event

of the corporation's insolvency." *Sasso v. Vachris*, 484 N.E.2d 1359, 1360 (N.Y. 1985). Catsimatidis's position would turn that longstanding policy on its head.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 8,992 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

October 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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