No. 13-__

IN THE
Supreme Court of the United States

JOHN CATSIMATIDIS,
Petitioner,

v.

BOBBY IRIZARRY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2008, the district court in this case found the supermarket chain Gristede's to be in violation of the mandatory overtime provisions of the Fair Labor Standards Act ("FLSA"). Petitioner John Catsimatidis—the Chief Executive Officer and stock holder of a professionally managed corporation whose subsidiary operates Gristede's—"was not personally responsible" for the company's violations, as the Second Circuit observed. Nonetheless, after expressly acknowledging a conflict in the circuits over the standard for establishing personal liability under the FLSA, the court held petitioner personally liable for over $2 million in backpay and penalties associated with the company's FLSA violations.

The question presented is:

Whether an individual may be held personally liable for a corporation's violation of the FLSA merely because the individual had general control over corporate affairs, but exercised no personal responsibility over the conduct that caused the violation.

PARTIES TO THE PROCEEDING

Petitioner is John Catsimatidis, appellant below.

Respondents Bobby Irizarry, Ruben Mora, Joselito Arocho, Joseph Crema, Alfred Croker, Frank Deleon, Mario Dipreta, William Helwig, Robert Misuraca, Robert Pastorino, Victor Phelps, Daniel Salegna, Gilberto Santiago, Carlos Torres, on behalf of himself and all others similarly situated, Lewis Chewning, 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, Brian Homola, Anna Garrett, Nelson Betancourt, Jose Delacruz, Yuri Lamarche, Michael Groseclose, Rodolfo Delemos, Pio Morel, Abigail Claudio, Malick Diouf, David Otto, Alejandro Morales, Victor Diaz, Paul Petrosino, Eduardo Gonzalez, Jr., Jose Bonilla-Reyes, Vincent Perez, Martin Gonzalez, Calvin Adams, William Fritz, Katherine Halpern, Christian Tejada, Edward Stokes, Plinio Medina, Towana Starks, Lawson Hopkins, Ruben M. Aleman, Eugene Rybacki, Earl Cross, Manolo Hiraldo, and Robert Hairston were appellees below.

Gristede's Operating Corp.; Gristede's Foods NY, Inc.; Namdor, Inc.; Gristede's Foods, Inc.; City Produce Operating Corp.; Gallo Balseca; and James Monos were parties in the district court but not the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Catsimatidis respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 722 F.3d 99, and is reprinted in the Appendix to the Petition ("App.") at 1a-40a. The decision of the district court is available at 2011 WL 4571792, and is reprinted at App. 48a-54a (decision), 44a-47a (oral findings).

JURISDICTION

The court of appeals issued its decision on July 9, 2013. App. 1a. On September 20, 2013, Justice Ginsburg extended the time for filing this petition to December 6, 2013. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App. 65a-71a.

INTRODUCTION

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). "Only under exceptional circumstances … can the difference" between the two "be disregarded," and liability imposed upon an individual for corporate debts. *Burnet v. Clark*, 287 U.S. 410, 415 (1932). It is also well established under "traditional

agency principles" that a corporation, and "not … its officers or owners," is vicariously liable "for the unlawful activity of the corporation's employee or agent." *Meyer v. Holley*, 537 U.S. 280, 282-83 (2003) (emphasis omitted).

In this case, however, the Second Circuit held petitioner John Catsimatidis—the Chief Executive Officer and indirect owner of stock of a corporation whose subsidiary runs Gristede's supermarkets—personally liable for over $2 million in backpay and penalties awarded in a settlement of the supermarkets' FLSA liabilities. The court held petitioner personally liable for the company's FLSA violations even though he "was *not* personally responsible for the FLSA violations." App. 37a (emphasis added). Petitioner instead was held personally liable merely because he "had functional control over the enterprise *as a whole*," and "authority over management, supervision, and oversight of [Gristede's] affairs *in general*." App. 25a, 35a (emphases added).

That holding implicates a direct conflict in the circuits over the important and recurring issue of whether, and under what circumstances, an individual may be held personally liable for a company's FLSA violations. The Second Circuit's opinion expressly acknowledges its conflict with a decision of the First Circuit holding that an individual may be personally liable under the FLSA only when the individual was himself personally responsible for the acts violating the statute. The Seventh, Eighth, and Eleventh Circuits agree with the First Circuit and limit personal liability to acts of personal responsibility. By contrast, the Fifth, Sixth, and Ninth Circuits agree with the Second Circuit and will hold

owners and officers personally liable so long as they merely possess general control over the company, even if they were not responsible for the violation at issue.

The rule applied by the latter circuits—and applied in the decision below—cannot be squared with the text of the FLSA, common-law principles of limited liability, or multiple precedents of this Court. And the court of appeals' error has significant consequences: the court's lax liability standard exposes virtually every corporate officer and controlling shareholder to personal liability for his or her company's acts, regardless whether those individuals played any role in—and thus bore any personal responsibility for—the employment decisions that violated the statute.

This case is an excellent vehicle for resolving the circuit conflict and restoring the law of personal liability under the FLSA to a path consistent with the text of the statute and long-settled principles of limited liability. The decision is based on the explicit premise—consistent with the summary judgment record viewed favorably to petitioner (the nonmovant)—that petitioner was *not* personally responsible for the FLSA violations for which he is now being held legally responsible. The decision thus squarely presents the question whether personal liability under such circumstances is permissible, or whether there must be a showing of more active involvement in the corporate decisions and acts that violate the statute. That question is not clouded by disputed facts or contestable inferences—on this record, there is simply the pure legal question whether an individual can be held personally liable for corpo-

rate conduct for which he was not personally responsible. To ask that question is to answer it. Certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory Background

The FLSA was enacted in 1938 to "set up a comprehensive legislative scheme for preventing the shipment in interstate commerce" of goods produced "under labor conditions … which fail to conform to [labor] standards set up by the Act." *United States v. Darby*, 312 U.S. 100, 109 (1941). Among other things, the Act prescribes the minimum wages employers must pay employees and the maximum hours employees are permitted to work without overtime pay. 29 U.S.C. §§ 206, 207. The Act authorizes criminal penalties for any "person who willfully violates" those limits. *Id.* § 216(a). The Act also provides that "[a]ny employer who violates th[ose] provisions shall … be liable to the employee or employees affected" for "the amount of their unpaid minimum wages, or their unpaid overtime compensation," and "an additional equal amount as liquidated damages." *Id.* § 216(b).

The Act provides that the term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). This Court has construed that provision to contemplate joint-employment situations, i.e., one employer acting in conjunction with another employer in relation to the same employee. *Falk v. Brennan*, 414 U.S. 190, 195 (1973). But the Court has never had occasion to consider whether, and under what circumstances, the provision author-

izes *individual liability* for a natural person who owns or manages an employer that is a corporate entity. The Court has, however, held that a similar definition of "employer" was meant simply to ensure that "courts would apply the tort rule of respondeat superior" to unfair labor practices, such that the corporate employer will be liable for the acts of natural persons acting on its behalf. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 489 (1947).

B. Factual Background And Procedural History

Because this case arises from an order granting summary judgment to plaintiffs on the issue of petitioner's personal liability, the record pertinent to that issue is reviewed in the light most favorable to petitioner. *See Groh v. Ramirez*, 540 U.S. 551, 562-63 (2004). That record establishes the following.

1. a. This case arises from a civil action in which plaintiffs, employees of Gristede's supermarkets, alleged violations of the FLSA's overtime provisions and New York labor law. Gristede's is a supermarket chain located in and around New York City that has 50 stores and approximately 1,700 employees. These supermarkets are operated by a corporation known as Namdor, Inc. Namdor, Inc. is in turn a subsidiary of Gristede's Foods, Inc. App. 59a. Gristede's Foods, Inc. is a professionally managed company whose stock is indirectly owned by petitioner. *Id.* Although petitioner has the titles of Chairman, President, and Chief Executive Officer of the company, the business is operated on a day-to-day basis by Executive Vice President Charles Criscuolo. *Id.*

As the court of appeals expressly recognized, petitioner "was not personally responsible for the FLSA violations that led to this lawsuit." App. 37a. Petitioner never "directly managed" or even "otherwise interacted with the plaintiffs in this case." App. 36a. Petitioner did not discuss payroll, wages, timekeeping, work schedules, or any similar matters with store employees. App. 60a-61a. Although petitioner occasionally visited Gristede's stores, those visits were focused on merchandising and product placement or public relations. *Id.*

b. Plaintiffs filed this suit as a collective action under the FLSA and a class action under New York law. In September 2006, the district court certified a class of "all 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.*, 2006 WL 2819730, at *11 (S.D.N.Y. 2006). On August 28, 2008, the district court granted, in part, plaintiffs' motion for summary judgment against Gristede's. *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447 (S.D.N.Y. 2008). The court rejected the company's arguments that plaintiffs fell within statutory exemptions to the FLSA's overtime requirements and held that the Gristede's policy governing overtime pay was unlawful. *See id.* at 461, 463.

The district court subsequently granted plaintiffs' request to file a motion for partial summary judgment seeking to establish petitioner's *personal* liability for any monetary judgment against Gristede's.

App. 6a. While that motion was pending, the district court entered an order approving a settlement agreement between the parties. *Id.* The court did not resolve the motion concerning petitioner's personal liability.

c. On August 24, 2011, after financial difficulties at the company prompted efforts to modify the settlement structure, plaintiffs sought to supplement their motion for partial summary judgment as to petitioner's individual liability. Thus prompted, the court granted the motion and held that petitioner was personally liable for the more than $2 million that remained to be paid on the settlement. App. 56a. The court rejected petitioner's argument that an individual cannot be held personally liable for a corporate FLSA violation unless there is "some connection between what the individual has done (in the exercise of his responsibility)" and the FLSA "wrong alleged in the complaint." App. 50a. Instead, the court held, it was sufficient that petitioner had "absolute control of Gristede's" as a general matter, even if he did not personally exercise that control. App. 49a.

3. The court of appeals affirmed. The court repeatedly acknowledged that petitioner "was not personally responsible for the FLSA violations that led to this lawsuit." App. 37a; *see* App. 36a ("there is no evidence that [petitioner] was responsible for the FLSA violations"). While recognizing that the First Circuit had held that an individual may be held personally liable for a company's FLSA violations only if he had "'personal responsibility for making decisions about the conduct of the business that contributed to the violations of the Act,'" App. 19a (quoting

Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 678 (1st Cir. 1998)), the court of appeals asserted that other circuits had not "gone as far as" the First Circuit in that regard, App. 20a. The court of appeals sided with the latter circuits, and thus held that personal liability can be imposed under the FLSA even absent any showing of personal responsibility for the corporate violation. *See* App. 35a-38a.

The court instead applied an "economic reality" test under which it evaluated "evidence showing [petitioner's] authority over management, supervision, and oversight of [Gristede's] affairs *in general*." App. 25a (quotation and citations omitted; emphasis added). The court believed "[t]here is no question that Gristede's was the plaintiffs' employer, and no question that Catsimatidis had functional control over the enterprise as a whole." App. 35a. The court also invoked the four-factor "framework" of *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), which an earlier Second Circuit panel had adopted to identify the circumstances under which one business entity could be held liable with another business entity as a plaintiff's joint employer. *See id.* at 12, 15 (considering whether prison inmates teaching classes at community college were joint employees of college as well as Department of Corrections). Under the *Carter* test, the court asks whether the alleged joint 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." App. 11a (quotation omitted).

The court of appeals recognized that petitioner did not meet either the second or fourth factors of the *Carter* test—he did not "supervise[] and control[] employee work schedules or conditions of employment" or "maintain[] employment records." App. 33a-34a, 35a. The court held, however, that the first and third factors were satisfied because of petitioner's general control over corporate affairs. Petitioner "possesses … the power to hire or fire anyone he chooses," but he "rarely exercises" that power. App. 32a. The court cited no evidence—and there is none—that petitioner ever hired or fired any member of the plaintiff class. The court also found the third *Carter* factor—whether the alleged joint employer "determined the rate and method of [employees'] payment"—to be satisfied because petitioner's "electronic signature appears on paychecks" and he "controlled the company financially." App. 34a. The court cited no evidence—and there is none—that petitioner personally made any decisions concerning the rate or method by which any member of the plaintiff class was paid.

Indeed, the court recognized that "there is no evidence that [petitioner] was responsible for the FLSA violations—or that he ever directly managed" or even "otherwise interacted with the plaintiffs in this case." App. 36a. The court also acknowledged that this was a "close case" even under its analysis, and it observed that no other court had held an owner who was not personally responsible for an FLSA violation liable for a business operation as large as Gristede's. *Id.* Petitioner nevertheless could be held liable, the court concluded, because there was "no question that [petitioner] had functional control over the enter-

prise as a whole." App. 35a; *see* App. 38a (personal liability based on petitioner's "active exercise of *overall control* over the company, his *ultimate* responsibility for the plaintiffs' wages, his supervision of *managerial* employees, and his [non-employment] actions in individual stores" (emphases added)).

REASONS FOR GRANTING THE PETITION

The decision below implicates an acknowledged, outcome-determinative conflict over the important and recurring issue of whether, and in what circumstances, an individual may be held personally liable for a corporation's FLSA violations. The court of appeals answered the question presented incorrectly, expressly divorcing personal liability from personal responsibility for the FLSA violation. This case presents an ideal vehicle for resolving the circuit conflict and clarifying the law on this important question. The Court should grant certiorari and reverse the judgment below.

I. THE COURTS OF APPEALS ARE IN CONFLICT OVER THE STANDARD FOR IMPOSING PERSONAL LIABILITY ON INDIVIDUALS FOR CORPORATE FLSA VIOLATIONS

As the court of appeals below recognized, App. 19a-21a, the circuits are divided over the correct test for imposing personal liability under the FLSA. The U.S. Department of Labor ("DOL") agrees, explicitly acknowledging the conflict in an amicus brief filed in the court of appeals. DOL C.A. Amicus Br. 17 n.4. As DOL's brief observed, the First Circuit has held that an individual cannot be held personally liable unless he was "personally involved in causing the

company to violate the FLSA." *Id.* Since that brief was filed, the Eleventh Circuit has issued a decision squarely endorsing the same rule, and the Seventh and Eighth Circuits had already taken the same position. *See infra* at 12-14. In conflict with those decisions, four other circuits—the Fifth, Sixth, and Ninth, now joined by the Second—hold that individual owners and officers may be personally liable under the FLSA based merely on their general control over a company, even when they are not personally responsible for the statutory violations. *See infra* at 14-16. Certiorari should be granted to resolve this broad and intractable circuit conflict.

A. The First, Seventh, Eighth, And Eleventh Circuits Hold That Personal Responsibility Is Required For Personal FLSA Liability

The decision below acknowledges its disagreement with the First Circuit's decision in *Baystate*, *see* App. 19a-20a, which holds that the test for personal FLSA liability "focuse[s] on the role played by the [individual] in causing the corporation to undercompensate employees." *Baystate*, 163 F.3d at 678. Under that test, the key question is whether an individual was "personal[ly] responsib[le] for making decisions about the conduct of the business that contributed to the violations of the Act." *Id.*

In *Baystate*, the First Circuit vacated a decision holding corporate officers and managers personally liable based on facts showing that they were "responsible for overall supervision of the office," "exercised some degree of supervisory control over the workers [at issue], and … were responsible for over-

seeing various administrative aspects of the business." *Id.* The court rejected the argument that liability should turn on whether "the individual exercised control over [a company's] work situation" generally. *Id.* at 677. If "the significant factor in the personal liability determination is simply the exercise of control by a corporate officer or corporate employee over the 'work situation,'" the court warned, "almost any supervisory or managerial employee of a corporation could be held personally liable for the unpaid wages of other employees and the civil penalty related thereto." *Id.* at 679. Such an "expansive definition" of employer would be "untenable." *Id.* "[I]ndividuals ordinarily are shielded from personal liability when they do business in a corporate form, and … it should not lightly be inferred that Congress intended to disregard this shield in the context of the FLSA." *Id.* at 677.

The Seventh Circuit similarly interprets the FLSA to authorize personal liability only when the individual defendant "had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation." *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *see Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (a "supervisor who uses his authority over the employees whom he supervises to violate their rights under the FLSA is liable for the violation"). In *Luder*, the court held that plaintiffs stated an FLSA claim against the "warden, deputy warden, and personnel officers of the prison" where they worked by alleging that the defendants "force[d] them to work before and after their official shifts without paying them." 253 F.3d at 1021-22.

The Eighth Circuit likewise focuses on the individual defendant's role in causing an FLSA violation. *See Wirtz v. Pure Ice Company*, 322 F.2d 259, 262 (8th Cir. 1963). In *Wirtz*, the court rejected an attempt to hold the defendant, who owned 75% of the stock of the company at issue, personally liable for back wages owed under the FLSA. The court recognized that the defendant was "the majority stockholder and dominant personality" in the company and "could have taken over and supervised the relationship between the corporation and its employees had he decided to do so." *Id.* at 262. But because the defendant "left the matter of compliance up to the various managers of the businesses in which he had an interest" and "had nothing to do with the hiring of the employees or fixing their wages and hours," the court concluded that he was not an employer: he had not "acted … in the interest of an employer (the corporation) in relation to an employee." *Id.* at 262-63 (quotation omitted).

The Eleventh Circuit has also held that, for purposes of assigning personal liability, the court's "primary concern is the [defendant's] role in causing the FLSA violation." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1313 (11th Cir. 2013). An individual will not be made to pay for a corporate violation unless he exercised "control … over 'significant aspects of [the company's] day-to-day functions, including compensation of employees or other matters in relation to an employee'"—control that "must be both substantial and related to the company's FLSA obligations." *Id.* at 1313-14 (quoting *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) (second alteration in

original)). Applying that standard, the Eleventh Circuit refused to hold a shareholder-president-medical director of a rehabilitation center liable for the center's FLSA violations where he "did not have operational control of significant aspects of [the center's] day-to-day functions, including compensation of employees or other matters 'in relation to an employee.'" *Patel v. Wargo*, 803 F.2d 632, 638 (11th Cir. 1986) (quoting § 203(d)).

B. The Second, Fifth, Sixth, and Ninth Circuits Hold That An Individual's General Corporate Control Suffices To Justify His Personal Liability For Corporate FLSA Violations

In conflict with the foregoing decisions, the Fifth, Sixth, and Ninth Circuits, as well as the Second Circuit below, have held that an individual may be held liable under the FLSA as a result of his ownership interest in or "general" control over a company, even if the individual did not actually exercise control over conditions of employment and thereby cause the FLSA violation.

The Fifth Circuit relies on the same four-factor test applied by the Second Circuit and derived from the joint-employer context. *See Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012) (asking whether the alleged employer "(1) possessed 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" (quotation omitted)). Like the Second Circuit, the Fifth Circuit has held that an employee need not prove

that "each element" of the test is "present in every case." *Id.* at 357. In fact, the Fifth Circuit has suggested that an individual can be held personally liable on the basis of theoretical corporate authority never actually exercised with respect to the challenged employment practice: "[W]e perceive the parameters of § 203(d) as sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, *or has the power to act*, on behalf of the corporation vis-à-vis its employees." *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir. 1983) (emphasis added).

The Sixth Circuit has taken a similar approach, holding that an individual "need only have operational control of significant aspects of the corporation's day to day functions" to be personally liable. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991). In *Elliott Travel*, the court held a company's president personally liable for overtime violations despite the fact that "the actual details of calculating the hours, overtime, and commission were handled by the payroll bookkeeper," not the president. *Id.*; *see also Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994).

Like the Second and Fifth Circuits, the Ninth Circuit applies a multi-factor test adopted originally to determine whether a distinct *business entity* qualifies as a joint employer. In *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (en banc), the court held that an individual defendant could be held liable for FLSA violations where the jury determined that he "had [1] a significant ownership interest with opera-

tional control of significant aspects of the corporation's day-to-day functions; [2] the power to hire and fire employees; [3] the power to determine salaries; [4] the responsibility to maintain employment records." *Id.* at 1011-12 (quotation and alterations omitted); *see Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (citing *Lambert* test).

The Second Circuit below recognized the different approaches the courts of appeals had taken and expressly declined to "go[] as far as" the First Circuit's rule limiting liability to those individuals personally responsible for an FLSA violation. App. 19a-21a. The Second Circuit instead applied the four-factor joint-employment test. App. 11a, 32a-35a ("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" (quotation omitted)). The court ruled that an individual need not satisfy each factor of the test—or even a majority of the factors—to be liable, *see* App. 35a, and it placed great weight on a defendant's "functional control over the enterprise as a whole," *id.* The court's analysis also made clear that an individual may be an employer even if his authority is "rarely exercised" or never exercised with respect to the employees at issue. *See* App. 24a, 36a. Under the approach below, therefore, an individual may be—and in this case was—held personally liable for millions of dollars of backpay and penalties even though "there is no evidence that he was responsible for the FLSA violations." App. 36a.

* * * *

As the discussion in this section shows, the liability of individual owners, officers, and managers of corporate entities for FLSA violations committed *by the entity* turns on the geographic region in which those individuals happen to face suit. There is no reason for this Court to tolerate such geographic variation in the application of an important federal statute. As the next section demonstrates, there is also no reason for this Court to tolerate appellate decisions that break decisively from settled rules of limited liability. While it may make sense to construe "employer" to encompass distinct businesses acting together with respect to the same employees—to ensure that *some* entity is legally accountable when employees are subjected to unlawful terms of employment—it makes no sense to construe "employer" to impose personal liability on individuals *within* a single business entity, where that same entity is already fully accountable under the FLSA to the affected employees.

II. IMPOSING PERSONAL FLSA LIABILITY ON AN INDIVIDUAL BASED SOLELY ON HIS GENERAL CORPORATE AUTHORITY CONFLICTS WITH THE FLSA'S TEXT AND PRECEDENTS OF THIS COURT

The term "employer" as used in the FLSA cannot reasonably be understood as authorizing personal liability for corporate FLSA violations, at least not when the individual had no personal responsibility for the conduct at issue. This Court has never held that individuals may be personally liable with their own companies as joint "employers" under the FLSA.

Indeed, the Court has held the opposite in an analogous statutory context, based in part on the important presumption that Congress does not intend to override traditional corporate-law principles of limited liability unless it says so explicitly. The decision below thus conflicts with the FLSA's text, this Court's precedents, and established common-law rules of limited liability that inform the statute's meaning and application.

A. The FLSA's Text Does Not Authorize Personal Liability Based Solely On General Corporate Control

It is a "basic tenet of American corporate law … that the corporation and its shareholders are distinct entities." *Dole*, 538 U.S. at 474. Under "traditional agency principles," it is "the corporation," and "not … its officers or owners" who are vicariously liable "for the unlawful activity of the corporation's employee or agent." *Meyer*, 537 U.S. at 282-83 (emphasis omitted). "Only under exceptional circumstances" may the corporate form be disregarded, and individual corporate owners held liable for the business entity's debt. *Burnet*, 287 U.S. at 415.

This Court has repeatedly held that it will not presume Congress means to depart from such well-established principles unless a statute "speak[s] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993); *see Meyer*, 537 U.S. at 286-87. And Congress has, in fact, spoken directly to the question of individual liability in other statutes. For example, a statute governing vessel identification systems provides that "[i]f a person, not an individual, is involved in a vio-

lation of this chapter, the president or chief executive of the person also is subject to any penalty provided under this section." 46 U.S.C. § 12507(d). An antitrust statute similarly provides that, "[w]henever a corporation shall violate any of the … antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." 15 U.S.C. § 24.

The FLSA, by contrast, holds only "employers" liable for civil penalties under the Act, and it provides that the term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The Act nowhere expressly provides for owner or officer liability. Nor does it contain text remotely comparable to the statutes above.

To be sure, the FLSA uses the term "employer" in a way that encompasses individuals. *See id.* ("employer" includes "person[s]," which is defined to include "individual[s]," *id.* § 203(a)). That provision, however, merely simply establishes that liability under the Act is not strictly limited to corporate entities—it does not say anything about whether a given individual qualifies as a "person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d). Obviously the latter provision cannot be read too literally—if it were, then every low-level shop supervisor would be subject to personal, joint-and-several liability for his employer's FLSA violations, since all company supervisors act in the interest of the company in relation to the employees they supervise. *See Baystate*,

163 F.3d at 679 (if "the significant factor in the personal liability determination is simply the exercise of control by a corporate officer or corporate employee over the 'work situation,' almost any supervisory or managerial employee of a corporation could be held personally liable for the unpaid wages of other employees and the civil penalty related thereto").

There is of course no indication that Congress meant the statute to be enforced that broadly. The term "employer" must be construed to embody a plausible, workable understanding of the individuals who may be subjected to liability, and the circumstances under which such individual liability may attach. The statute's language suggests one indispensable limitation on its reach: personal liability applies at most only to those individuals who act "in the interest of an employer *in relation to an employee*." 29 U.S.C. § 203(d) (emphasis added). That phrase by its terms excludes individuals who act only in relation to the enterprise as a whole, and do not exercise personal responsibility for the decisions affecting the employees. *See Patel*, 803 F.2d at 638 (no liability where defendant did not have operational control over "compensation of employees or other matters 'in relation to an employee'" (quoting § 203(d))); *Wirtz*, 322 F.2d at 262 (owner not liable where he "had not acted '… in the interest of an employer (the corporation) in relation to an employee'" (quoting § 203(d))).

Furthermore, the penalty provision of the Act awards damages against only those "employers" that "violate" the minimum wage-and-hour provisions of the statute. 29 U.S.C. § 216(b). An individual who has not taken any action with respect to employees

has neither acted "in relation" to those employees nor "violated" the statute's mandates. There is therefore no basis for holding him personally liable under the Act.

B. This Court's Precedents Preclude The Imposition Of Personal FLSA Liability Based Solely On General Corporate Control

1. This Court has not directly addressed the question whether, and under what circumstances, an individual within a company's chain of command may be held personally liable for the company's FLSA violations. But the Court's precedents have never suggested that § 203(d) was intended to reach anything more than *joint employers*, as in *Falk v. Brennan*, 414 U.S. 190 (1973). In *Falk*, the Court held that an apartment management company could be held liable for unlawful wage-and-hour conditions imposed on workers subject to the management company's day-to-day supervision, even though the workers were nominally employed by the building owners. *Id.* at 195. The management company in that situation clearly operated in the interest of the owners in relation to the on-site workers, and imposing liability on the management company ensured that the entity personally responsible for the workers' wage-and-hour conditions was held legally liable for those conditions.

Imposing that liability on individuals *within* a single corporate employer serves no such purpose. When the corporation as employer is held liable for FLSA violations, then *the corporation is liable*. There is simply no legal or practical reason to im-

pose that same liability on individuals within the corporate chain of command, especially when the individuals were not personally responsible for the acts found to be unlawful.[1]

2. a. The Court considered a similar use of the term "employer" in an analogous context and did not read it as subjecting individuals to personal liability for the acts of distinct corporate entities. Indeed, the Court construed the term to achieve the opposite, i.e., subjecting corporate entities to vicarious liability for the acts of their agents. In *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488 (1947), the Court interpreted the term "employer" in the National Labor Relations Act ("NLRA"), 49 Stat. 450 (1935), which was defined to "include[] any person acting in the interest of an employer, directly or indirectly." The Court held that the purpose of the provision was "to render employers responsible in labor practices for acts of any persons performed in their interests," and was "an adaptation of the ancient maxim of the common law, respondeat superior, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants." 330 U.S. at 489. The Court explained that Congress had defined "employers" to include not simply the "employing entity, but also others, whether employee

[1] Similarly, it is no answer to say that Congress in the FLSA "did not intend to incorporate the common law parameters of the employer-employee relationship." *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). It may be true that Congress wanted the Act to cover more *workers* than would be traditionally encompassed by the common-law master-servant concept of "employee," but that interest does not require enforcing the Act against individuals within an otherwise liable corporate employer.

or not, who are 'acting in the interest of an employer'" in order to ensure that "courts would apply the tort rule of respondeat superior" to the "new class of wrongful acts to be known as unfair labor practices." *Id.*

Nothing in the FLSA—which the Court has recognized to be "of the same general character" as the NLRA, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947)—suggests that Congress meant to take a different approach. As the First Circuit has observed, "[i]t makes more sense … to interpret [§ 203(d)] as intended to prevent employers from shielding themselves from responsibility for the acts of their agents," than it does to read it to "make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages of other employees." *Agnew*, 712 F.2d at 1513. If, contrary to established common-law rules of limited liability, Congress meant hold such individuals liable for acts in which they played no part, it was required to speak much more clearly than it did in the text of the FLSA.

b. The Second Circuit's decision imposing personal liability for corporate FLSA violations based merely on petitioner's general authority over corporate affairs also conflicts with this Court's 2003 decision in *Meyer*. The Court in *Meyer* unanimously refused to "impose[] personal liability without fault upon an officer or owner of a residential real estate corporation for the unlawful activity of the corporation's employee or agent" under the Fair Housing Act ("FHA"). 537 U.S. at 282. The Court explicitly rejected the argument that "corporate owners and of-

ficers" could be held "liable for the unlawful acts of a corporate employee simply on the basis that the owner or officer controlled (or had the right to control) the actions of that employee." *Id.* at 286. Such "unusually strict rules" apply "only where Congress has specified that such was its intent," the Court explained, further noting that Congress had "said nothing in the statute or in the legislative history about extending vicarious liability in this manner." *Id.* at 287. Even though the objective of the FHA was "an overriding social priority," the Court concluded that judgments must be issued "in accordance with traditional principles of vicarious liability" absent a specific statutory instruction to the contrary. *Id.* at 290-91.

Again, Congress has not instructed otherwise in the FLSA. At most, the Act imposes liability on entities and individuals who act in the interest of an employer in relation to an employee—not individuals who act only in relation to the corporation as a whole. It is one thing to say that the FLSA ensures that individuals and entities actually responsible for an employee's wage-and-hour conditions are held liable for those conditions. It is another thing entirely to say that the FLSA creates a new rule of "reverse vicarious liability" that overrides traditional corporate-law principles of limited liability. Nothing in the text, history, or logic of the statute supports that construction.

III. THIS CASE PRESENTS A RECURRING QUESTION OF NATIONAL IMPORTANCE, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

The standard for imposing personal liability under the FLSA is a recurring issue of national importance, as evidenced by the many published circuit precedents already addressing the issue. Given the lax standard for personal liability applicable in multiple circuits, the issue can arise in virtually any case alleging that a corporation has violated the FLSA, many thousands of which are filed annually.[2] The significance of the issue is confirmed by the involvement in this case of the U.S. Department of Labor, which filed an amicus brief in the court of appeals and participated in oral argument.

There is no doubting the importance of the issue to businesses and the individuals who own and manage them. Severe consequences attach to liability under the FLSA. The Act holds employers liable not just for backpay but also for equal amounts in liquidated damages, as well as prejudgment interest, attorneys' fees, and costs. 29 U.S.C. § 216(b). When there are multiple employers, liability is joint and several. *See* App. 18a. In addition, the FLSA explicitly authorizes plaintiffs to file collective actions that are similar to class actions and determine liability for an entire class of similarly situated employees. 29 U.S.C. § 216(b). Under the standard applied by

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[2] Over 7,000 FLSA civil cases were filed in federal court each year between 2011 and 2013. Federal Judicial Center, Federal Judicial Caseload Statistics: March 31, 2012, at 49 tbl. C-2 (2012); B. Gee, *Swell in Employment Suits Amplified in Mass.*, Massachusetts Lawyers Weekly, Aug. 15, 2013.

the Second, Fifth, Sixth, and Ninth Circuits, therefore, owners and officers who exercise no direct responsibility over company acts that violate the FLSA may be forced to personally pay class wages and penalties that can total millions of dollars—as this case demonstrates. App. 56a.

What is more, the significance of the question presented is not limited to the FLSA. Several courts of appeals have relied on the interpretation of "employer" in the FLSA context to determine whether individuals may be held personally liable for violations of other statutes, including the Family and Medical Leave Act ("FMLA") and the Employee Retirement Income Security Act ("ERISA"). *E.g.*, *Wascura v. Carver*, 169 F.3d 683, 685-86 (11th Cir. 1999) (FMLA); *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387-88 (2d Cir. 1989) (ERISA). The Court should take this opportunity to reinforce the long-established principles of limited liability it has repeatedly—and unanimously—announced and applied.

This case also presents an ideal vehicle for resolving the conflict in the courts of appeals. The Second Circuit's decision was explicitly premised on the court's view, based on the summary judgment record, that petitioner "was not personally responsible for the FLSA violations that led to this lawsuit." App. 37a. On that same premise, petitioner could not be held personally liable for those violations in the First, Seventh, Eighth, or Eleventh Circuits. Indeed, the court of appeals recognized that this was a "close case" even under the lenient standard it applied. App. 36a. If this Court were to reject the Second Circuit's approach and instead hold that indi-

viduals may be subjected to personal liability only for those corporate FLSA violations for which they are personally responsible, the individual judgment against petitioner would necessarily be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2013

APPENDIX

APPENDIX A

11-4035-cv
Irizarry v. Catsimatidis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: December 13, 2012 Decided: July 9, 2013)

Docket No. 11-4035-cv

BOBBY IRIZARRY, RUBEN MORA, JOSELITO AROCHO, JOSEPH CREMA, ALFRED CROKER, FRANK DELEON, MARIO DIPRETA, WILLIAM HELWIG, ROBERT MISURACA, ROBERT PASTORINO, VICTOR PHELPS, DANIEL SALEGNA, GILBERTO SANTIAGO,

Plaintiffs-Appellees,

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,

BRIAN HOMOLA, ANNA GARRETT, NELSON BETANCOURT, JOSE DELACRUZ, YURI LAMARCHE, MICHAEL GROSECLOSE, RODOLFO DELEMOS, PIO MOREL, ABIGAIL CLAUDIO, MALICK DIOUF, DAVID OTTO, ALEJANDRO MORALES, VICTOR DIAZ, PAUL PETROSINO, EDUARDO GONZALEZ, JR., JOSE BONILLA-REYES, VINCENT PEREZ, MARTIN GONZALEZ, CALVIN ADAMS, WILLIAM FRITZ, KATHERINE HALPERN, CHRISTIAN TEJADA, EDWARD STOKES, PLINIO MEDINA, TOWANA STARKS, LAWSON HOPKINS, RUBEN M. ALEMAN, EUGENE RYBACKI, EARL CROSS, MANOLO HIRALDO, ROBERT HAIRSTON,

Plaintiffs,

-v.-

JOHN CATSIMATIDIS,

Defendant-Appellant.

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.[*]

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[*] The Clerk of the Court is directed to amend the caption as listed above.

Before:

WESLEY and HALL, *Circuit Judges*, GOLDBERG, *Judge*.[**]

A class of current and former employees of Gristede's supermarkets sued several corporate and individual defendants for alleged violations of the Fair Labor Standards Act and the New York Labor Law. The United States District Court for the Southern District of New York (Crotty, *J.*) granted partial summary judgment for the plaintiffs, concluding that John Catsimatidis, the owner, president, and CEO of Gristede's, was the plaintiffs' "employer" under both laws. Catsimatidis appeals, and we AFFIRM IN PART, VACATE IN PART, AND REMAND.

JONATHAN D. HACKER (Walter Dellinger, Brianne J. Gorod, Joanna Nairn, *on the brief)*, O'Melveny & Myers LLP, Washington, D.C. *for Appellant.*

DEEPAK GUPTA, Gupta Beck PLLC, Washington, D.C. (Gregory A. Beck, Jonathan E. Taylor, Gupta Beck PLLC, Washington, D.C.; Adam T. Klein, Justin M. Swartz, Molly A. Brooks, Outten & Golden LLP, New York, NY, *on the brief*) *for Appellees*.

RACHEL GOLDBERG, Attorney, Office of the Solicitor (M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Paul L.

[**] The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation.

Frieden, Counsel for Appellate Litigation, *on the brief*), *for Amicus Curiae Secretary of Labor*.

Tsedeye Gebreselassie, Catherine K. Ruckelshaus, National Employment Law Project, New York, NY, *for Amicus Curiae Make The Road New York, Brandworkers International, Restaurant Opportunities Center New York, Chinese Staff and Workers Association, National Mobilization Against Sweatshops, National Employment Law Project, Legal Aid Society of New York, Urban Justice Center, Asian American Legal Defense and Education Fund.*

WESLEY, *Circuit Judge.*

After the failure of a settlement in a wage-and-hour case brought by a group of employees of Gristede's supermarkets, the plaintiff employees moved for partial summary judgment on the issue of whether John Catsimatidis, the chairman and CEO of Gristede's Foods, Inc., could be held personally liable for damages. The case turns on whether Catsimatidis is an "employer" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(d), and the New York Labor Law ("NYLL"), N.Y. Lab. Law §§ 190(3), 651(6). The United States District Court for the Southern District of New York (Crotty, *J.*) granted partial summary judgment for the plaintiffs on the issue, establishing that Catsimatidis would be held jointly and severally liable for damages along with the corporate defendants. *See Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316(PAC), 2011 WL 4571792 (S.D.N.Y. Sept. 9, 2011) ("*Torres III*"). Catsimatidis appeals. We affirm the district court's decision so far as it established that Catsima-

tidis was an "employer" under the FLSA; we vacate and remand the grant of partial summary judgment on plaintiffs' NYLL claims.

Background

Catsimatidis is the chairman, president, and CEO of Gristede's Foods, Inc., which operates between 30 and 35 stores in the New York City metro area and has approximately 1700 employees. Although a series of mergers and acquisitions has complicated the question of which companies are responsible for the Gristede's business and supermarkets, the parties have not made corporate structure the focus of this case. They essentially agree that Catsimatidis is the owner and corporate head of all implicated companies, but they dispute the manner and degree of his control over the stores and employees.

In 2004, a group of then-current and former employees of Gristede's supermarkets sued several companies involved in operating the stores. The employees also sued three individual defendants: Catsimatidis, Gristede's District Manager James Monos, and Gristede's Vice President Gallo Balseca. The district court certified a class composed 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 (the 'class period')." *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316(PAC), 2006 WL 2819730, at *11 (S.D.N.Y. Sept. 29, 2006) ("*Torres I*") (quotation marks omitted). In this decision, the court noted that the parties disputed the

duties of co-managers and department managers, though the scope of plaintiffs' duties are not at issue in this appeal.

After two-and-a-half years of litigation, the district court granted summary judgment for the plaintiffs on their FLSA and NYLL claims, which concerned reduction of hours, withholding of overtime, misclassification as exempt employees, and retaliation. *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 461-63, 475 (S.D.N.Y. 2008) ("*Torres II*"). The court held that plaintiffs were entitled to liquidated damages, the amount of which would be determined in future proceedings. *Id.* at 462 n.14, 465. Plaintiffs reserved the right to move separately for a determination that the individual defendants were individually liable as joint employers. *Id.* at 453 n.2.

Following the summary judgment order, the parties reached a settlement agreement, which the district court approved. The corporate defendants later defaulted on their payment obligations under the agreement. Defendants sought to modify the settlement, but the district court denied their request. Plaintiffs then moved for partial summary judgment on Catsimatidis's personal liability as an employer.

The district court granted the motion for reasons both stated on the record at the conclusion of oral argument on the motion, *see* Special App'x at 43-46, and memorialized in a written decision, *see Torres III*. The reasons included the fact that Catsimatidis "hired managerial employees," "signed all paychecks to the class members," had the "power to close or sell Gristede's stores," and "routinely review[ed] financial reports, work[ed] at his office in Gristede's cor-

porate office and generally preside[d] over the day to day operations of the company." *Torres III*, 2011 WL 4571792, at *2. According to the district court, "[f]or the purposes of applying the total circumstances test, it does not matter that Mr. Catsimatidis has delegated powers to others[; w]hat is critical is that Mr. Catsimatidis has those powers to delegate." *Id.* (citation omitted). The court concluded that "[t]here is no area of Gristede's which is not subject to [Catsimatidis's] control, whether [or not] he chooses to exercise it," and that, therefore, Catsimatidis "had operational control and, as such, [] may be held to be an employer." *Id.* at *3.[1]

[1] In its oral ruling and accompanying order, the district court granted summary judgment finding Catsimatidis individually liable as an "employer" under the NYLL, but the court did not explain its reasons beyond what might be inferred from its discussion setting forth its reasoning in the FLSA context. *See Torres III*, 2011 WL 4571792, at *1; Special App'x at 46-47.

Discussion[2]

I. Definition of "employee" under the FLSA

The Supreme Court has recognized "that broad coverage [under the FLSA] is essential to accomplish the [statute's] goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Found v. Sec'y of Labor*, 471 U.S. 290, 296 (1985). Accordingly, the Court "has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction." *Id.* (quotation marks omitted). "The common law agency test was found too restrictive to encompass the broader definition of the employment relationship contained in the [FLSA]." *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993). Instead, the statute "defines the verb 'employ' expansively to mean 'suffer or permit to work.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (quoting 29 U.S.C. § 203(g)). Unfortunately, however, the statute's definition of "employer" relies on the very word it seeks to define: "'Employer' includes any person acting di-

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[2] "We review an award of summary judgment *de novo*, and we will uphold the judgment only if the evidence, viewed in the light most favorable to the party against whom it is entered, demonstrates that there are no genuine issues of material fact and that the judgment was warranted as a matter of law." *Barfield v. NYC Health & Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir. 2008) (citing Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). "The nonmoving party must set forth specific facts showing that there is a genuine issue for trial, and this Court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor." *Rubens v. Mason*, 527 F.3d 252, 254 (2d Cir. 2008) (internal quotation marks and citation omitted).

rectly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The statute nowhere defines "employer" in the first instance.

The Supreme Court noted early on that the FLSA contains "no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). The Court has also observed "that the 'striking breadth' of the FLSA's definition of 'employ' 'stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles' in order to effectuate the remedial purposes of the act.'" *Barfield*, 537 F.3d at 141 (quoting *Darden*, 503 U.S. at 326) (internal citation omitted).

"Accordingly, the Court has instructed that the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.'" *Id.* (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)). The "economic reality" test applies equally to whether workers are employees and to whether managers or owners are employers. *See Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

"[T]he determination of the [employment] relationship does not depend on such isolated factors" as where work is done or how compensation is divided "but rather upon the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730. Some early cases concerned managerial efforts to distance themselves from workers in an apparent effort to escape the FLSA's coverage. For example, in *Goldberg*, the

Supreme Court considered whether a manufacturing cooperative was an "employer" of "homeworker" members who created knitted and embroidered goods in their homes and were paid by the month on a rate-per-dozen basis. 366 U.S. at 28-29. The Court concluded that this constituted an employer-employee relationship because management's authority made "the device of the cooperative too transparent to survive the statutory definition of 'employ' and the Regulations governing homework." *Id.* at 33. "In short, if the 'economic reality' rather than 'technical concepts' is to be the test of employment, these homeworkers are employees." *Id.* (internal citations omitted). Similarly, the Court noted in *Rutherford* that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." 331 U.S. at 729.

The Second Circuit "has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances"; we have "identified different sets of relevant factors based on the factual challenges posed by particular cases." *Barfield*, 537 F.3d at 141-42.

In *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), we identified factors that are likely to be relevant to the question of whether a defendant is an "employer." In that case, prison inmates teaching classes in a program that was managed by a college claimed the college was their employer. The district court rejected this assertion because "the college had only qualified control over the

inmate instructors; the Department of Correctional Services always maintained ultimate control." *Barfield*, 537 F.3d at 142 (describing *Carter*) (quotation marks omitted). This Court, however, concluded that the "ultimate control" rule "would not comport with the 'remedial' purpose of the FLSA, which Congress intended to 'have the widest possible impact in the national economy.'" *Id.* (quoting *Carter*, 735 F.2d at 12). Instead, we established four factors to determine the "economic reality" of an employment relationship: "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." *Id.* (quoting *Carter*, 735 F.2d at 12).[3]

Barfield also discusses the factors this court has used "to distinguish between independent contractors and employees," 537 F.3d at 143 (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988)), and "to assess whether an entity that lacked formal control nevertheless exercised functional con-

[3] Although the *Carter* court did not ultimately conclude that the prisoners were employees of the college, it noted that the following facts about the college "may be sufficient to warrant FLSA coverage" and certainly presented issues of material fact on the subject: the college "made the initial proposal to 'employ' workers; suggested a wage as to which there was 'no legal impediment'; developed eligibility criteria; recommended several inmates for the tutoring positions; was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account." 735 F.2d at 15.

trol over a worker," *id*. (citing *Zheng v. Liberty Apparel Co*., 355 F.3d 61, 72 (2d Cir. 2003)).[4] None of the factors used in any of these cases, however, comprise a "rigid rule for the identification of an FLSA employer." *Id*. "To the contrary, . . . they 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 to give proper effect to the broad language of the FLSA." *Id*. (quoting *Zheng*, 355 F.3d at 75-76).

a. Individual liability

None of the cases above dealt specifically with the question we confront here: whether an individual within a company that undisputedly employs a

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[4] In *Zheng*, the court considered whether a garment manufacturer that contracted out the last phase of its production process to workers including the plaintiffs was an "employer" under the FLSA. It concluded that the relevant factors in such an instance were

> (1) whether [the manufacturer]'s premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the manufacturer]'s process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [manufacturer] or [its] agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for [the manufacturer].

Zheng, 355 F.3d at 72. These factors highlight the flexible and comprehensive nature of the economic realities test in determining when an entity is an "employer" (in this case, whether the manufacturer was a "joint employer" along with another corporation) but are not directly implicated here.

worker is personally liable for damages as that worker's "employer." The only case from our Circuit to confront the question squarely is *RSR*, 172 F.3d 132. RSR provided guards, pre-employment screening, and other security services. It was sued for FLSA violations with regard to its security guards. Its chairman of the board, Portnoy, was found by the district court after a bench trial to be an "employer" under the statute. We affirmed, in a decision that both applied the four-factor test from *Carter* and noted other factors bearing upon the "overarching concern [of] whether the alleged employer possessed the power to control the workers in question." *Id.* at 139.

As background, we noted that "[a]lthough Portnoy exercised broad authority over RSR operations . . . , he was not directly involved in the daily supervision of the security guards." *Id.* at 136. Nonetheless, because "he was the only principal who had bank credit, he exercised financial control over the company." *Id.* "Thus, he had authority over" the operations manager, who directly supervised the guards. *Id.* "Portnoy kept himself apprised of RSR operations by receiving periodic reports [including] work orders, memos, investigation reports, and invoices concerning the business operations, as well as weekly timesheets of [a manager's] duties." *Id.* at 137. He also "referred a few individuals to RSR as potential security guard employees," "assigned guards to cover specific clients, sometimes set the rates clients were charged for those services, gave [a manager] instructions about guard operations, and forwarded complaints about guards to" a manager. *Id.*

Portnoy also "signed payroll checks on at least three occasions" and "established a payment system by which clients who wanted undercover operatives would pay" Portnoy's separate labor-relations firm. *Id.* Additionally, Portnoy "represented himself to outside parties as" being "the 'boss' of RSR" by "allowing his name to be used in sales literature, by representing to potential clients that he was a principal with control over company operations . . . and by giving [a manager] instructions with respect to [] clients' security needs." *Id.*

We determined that at least three of the four *Carter* factors applied. First, Portnoy had hired employees, and although this "involved mainly managerial staff, the fact that he hired individuals who were in charge of the guards [was] a strong indication of control." *Id.* at 140. Second, Portnoy had, "on occasion, supervised and controlled employee work schedules and the conditions of employment." *Id.* Third, he had "participate[d] in the method of pay[ing]" the guards, even though he was not involved in determining their salaries, because he had previously "ordered a stop to the illegal pay practice of including security guards on 1099 forms as independent contractors," and he "had the authority to sign paychecks throughout the relevant period." *Id.* Although there was no evidence that Portnoy had been involved in maintaining employment records, we confirmed that the fact that "this fourth factor is not met is not dispositive." *Id.* The "'economic reality' test encompasses the totality of circumstances, no one of which is exclusive." *Id.* at 139. In sum, we determined that Portnoy was "not only a 50 percent stockowner; he had direct involvement with the security guard operations from time to time and was

generally involved with all of RSR's operations." *Id.* at 141.

RSR also highlighted two legal questions relevant here. The first concerns the scope of an individual's authority or "operational control" over a company — at what level of a corporate hierarchy, and in what relationship with plaintiff employees, must an individual possess power in order to be covered by the FLSA? The second inquiry, related but distinct, concerns hypothetical versus actual power: to what extent and with what frequency must an individual actually use the power he or she possesses over employees to be considered an employer?

i. Operational Control

In addition to applying the *Carter* test, *RSR* noted the district court's recognition that Portnoy exercised direct authority over the two persons most responsible for managing the security guards, as well as the fact that "[b]ecause [Portnoy] controlled the company financially, it was no idle threat when he testified that he *could have* dissolved the company if [one of the managers] had not followed his directions." *Id.* at 140 (emphasis added). Accordingly, we emphasized that we rejected Portnoy's argument "that evidence showing his authority over management, supervision, and oversight of RSR's affairs in general is irrelevant, and that only evidence indicating his direct control over the guards should be considered." *Id.* We concluded that this formulation "ignores the relevance of the totality of the circumstances in determining Portnoy's operational control of RSR's employment of the guards." *Id.* We also noted that "operational control" had been cited as

relevant by other circuits considering the question of individual liability under the FLSA. *See id.*

"Operational control" is at the heart of this case. Catsimatidis's core argument is that he was a high-level employee who made symbolic or, at most, general corporate decisions that only affected the lives of the plaintiffs through an attenuated chain of but-for causation. Although Catsimatidis undisputedly possessed broad control over Gristede's corporate strategy, including the power to decide to take the company public, to open stores, and to carry certain types of merchandise, he contends that a FLSA "employer" must exercise decision-making in a "day-to-day" capacity. Appellant's Br. at 3. By this, he appears to mean decisions about individual store-level operations, close to, if not actually including, the particular working conditions and compensation practices of the employees themselves. Plaintiffs counter that many cases have found individuals with "operational control" on a more general level to be employers. Appellees' Br. at 28-31.

Most circuits to confront this issue have acknowledged — and plaintiffs do not dispute — that a company owner, president, or stockholder must have at least some degree of involvement in the way the company interacts with employees to be a FLSA "employer." Many cases rely on *Wirtz v. Pure Ice Co.*, 322 F.2d 259, 262 (8th Cir. 1963), for this proposition. In *Wirtz*, the court concluded that the individual defendant was not an employer even though he was the "controlling stockholder and dominating figure" because although he "could have taken over and supervised the relationship between the corporation and its employees had he decided to do so," he

did not. *Id.* (quotation marks omitted). The defendant visited the facility at issue a few times per year but "had nothing to do with the hiring of the employees or fixing their wages or hours," and he "left the matter of compliance with the Fair Labor Standards Act up to the various managers of the businesses in which he had an interest." *Id.* at 262-63. The court noted, however, that if it were to consider "a combination of stock ownership, management, direction and the right to hire and fire employees, then a contrary conclusion would be well supported." *Id.* at 263.

In *RSR*, we cited three cases with holdings in accordance with *Wirtz* in resolving the "operational control" issue. First, in *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir. 1983), the Fifth Circuit determined that an individual without an interest in the employer corporation could be held liable if he "effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees" — or if he lacked that power but "independently exercised control over the work situation." The *Sabine* court found the individual defendant liable because he "indirectly controlled many matters traditionally handled by an employer in relation to an employee (such as payroll, insurance, and income tax matters)," noting also that the defendant's "financial gymnastics directly affected Sabine's employees by making it possible for Sabine to meet its payroll and keep its employees supplied with the equipment and materials necessary to perform their jobs." *Id.* at 195. (quotation marks omitted).

Second, in *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991), the Sixth Circuit was unmoved by the protestations of an individual defendant who testified that he "made major corporate decisions" but "did not have day-to-day control of specific operations." The court found that the defendant's responsibilities, which included determining employee salaries, constituted "operational control of *significant aspects* of the corporation's day to day functions." *Id.* (quotation marks omitted) (emphasis in original).

Finally, in *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983), the First Circuit imposed liability on individual defendants "who together were President, Treasurer, Secretary and sole members of the Board" of the defendant company. One of the defendants had been "personally involved in decisions about layoffs and employee overtime hours," *id.*, and the defendants together had "operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and [] personally made decisions to continue operations despite financial adversity during the period of nonpayment," *id.* at 1514.

Plaintiffs in our case place particular emphasis on the statement by the *Agnew* court that "[t]he overwhelming weight of authority is 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."[5] *Id.* at 1511. Although

[5] This language was cited by our Circuit in a case concerning the meaning of the word "employer" in the context of the Employee Retirement Income Security Act ("ERISA"), in which

this appears to suggest that any amount of corporate control is sufficient to establish FLSA liability, the First Circuit warned against taking the FLSA's coverage too far, noting that "the Act's broadly inclusive definition of 'employer'" could, if "[t]aken literally and applied in this context[,] . . . make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages of other employees." *Id.* at 1513.

Drawing on this language, the First Circuit later concluded that individuals who had "exercised some degree of supervisory control over the workers" and been "responsible for overseeing various administrative aspects of the business" but had not demonstrated other important characteristics — "in particular, the personal responsibility for making decisions about the conduct of the business that contributed to the violations of the Act" — were not personally liable under the FLSA. *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998). The court rejected an "expansive application of the definition of an 'employer'" that would find that "the significant factor in the personal liability determina-

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we noted that "[i]n FLSA cases, courts have consistently held that a corporate officer with operational control who is directly responsible for a failure to pay statutorily required wages is an 'employer' along with the corporation, jointly and severally liable for the shortfall." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387 (2d Cir. 1989) (citing *Agnew*, 712 F.2d at 1511). Because *Leddy* did not require or contain any actual analysis of the FLSA, however, this statement does not constitute a holding that liability on the basis of "operational control" requires an individual to have been directly responsible for FLSA violations.

tion is simply the exercise of control by a corporate officer or corporate employee over the 'work situation.'" *Id.* at 679. No other decision has gone as far as *Baystate*; most courts have endeavored to strike a balance between upholding the broad remedial goals of the statute and ensuring that a liable individual has some relationship with plaintiff employees' work situation.

For example, in *Gray v. Powers*, 673 F.3d 352, 354-57 (5th Cir. 2012), the court found that the co-owner of a company that owned a nightclub was not a bartender's "employer" despite being a signatory on the corporate account and "occasionally sign[ing] several pages of pre-printed checks." The individual defendant had little control over the bar and its employees except to direct a bartender to serve certain customers on several occasions when he was at the bar. *Id.* at 354. Similarly, in *Patel v. Wargo*, 803 F.2d 632, 638 (11th Cir. 1986), the Eleventh Circuit held that an individual who was both president and vice president of a corporation, as well as a director and principal stockholder, was not an employer because he did not "have operational control of significant aspects of [the company's] day-to-day functions, including compensation of employees or other matters 'in relation to an employee.'"

By contrast, in *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 329 (5th Cir. 1993), the court found that a non-owner of a company that had invested in a nightclub had exercised sufficient "control over the work situation" as the "driving force" behind the company. The court cited evidence that the individual hired employees, gave them instructions (including specific songs for dancers' routines),

and signed their payroll checks. *Id.* He had also removed money from corporate safes, "ordered one employee to refrain from keeping records of the tip-outs," and "spoke[n] for [the company] during the Secretary's investigation of possible FLSA violations." *Id.*

These cases reaffirm the logic behind our holding in *RSR*, which focused on defendant Portnoy's "operational control *of RSR's employment of the guards*," *see RSR*, 172 F.3d at 140 (emphasis added), rather than simply operational control of the company. Evidence that an individual is an owner or officer of a company, or otherwise makes corporate decisions that have nothing to do with an employee's function, is insufficient to demonstrate "employer" status. Instead, to be an "employer," an individual defendant must possess control over a company's actual "operations" in a manner that relates to a plaintiff's employment. It is appropriate, as we implicitly recognized in *RSR*, to require some degree of individual involvement in a company in a manner that affects employment-related factors such as workplace conditions and operations, personnel, or compensation — even if this appears to establish a higher threshold for individual liability than for corporate "employer" status.

The fundamental concern in the initial cases construing the FLSA was preventing a business entity from causing workers to engage in work without the protections of the statute. It was an "economic reality" that the "homework" cooperative in *Goldberg* functioned as the workers' employer because it paid them to create clothing, even if the compensation structure technically circumvented agency-law con-

cepts of formal employment. *See Goldberg*, 366 U.S. at 31 (stating that the Court would be "remiss . . . if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations"); *see also United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) ("A worker is as much an employee when paid by the piece as he is when paid by the hour."). This concern is not as pressing when considering the liability for damages of an individual within a company that itself is undisputedly the plaintiffs' employer.

Even in the individual-liability context, however, "the remedial nature of the [FLSA] . . . warrants an expansive interpretation of its provisions so that they will have 'the widest possible impact in the national economy.'" *RSR*, 172 F.3d at 139 (quoting *Carter*, 735 F.2d at 12). Nothing in *RSR*, or in the FLSA itself, requires an individual to have been personally complicit in FLSA violations; the broad remedial purposes behind the statute counsel against such a requirement. The statute provides an empty guarantee absent a financial incentive for individuals with control, even in the form of delegated authority, to comply with the law, and courts have continually emphasized the extraordinarily generous interpretation the statute is to be given. Nor is "only evidence indicating [an individual's] direct control over the [plaintiff employees] [to] be considered." *RSR*, 172 F.3d at 140. Instead, "evidence showing [an individual's] authority over management, supervision, and oversight of [a company's] affairs in general" is relevant to "the totality of the circumstances in determining [the individual's] operational control of [the company's] employment of [the plaintiff employees]." *Id.*

A person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees' employment. Although this does not mean that the individual "employer" must be responsible for managing plaintiff employees — or, indeed, that he or she must have directly come into contact with the plaintiffs, their workplaces, or their schedules — the relationship between the individual's operational function and the plaintiffs' employment must be closer in degree than simple but-for causation. Although the answer in any particular case will depend, of course, on the totality of the circumstances, the analyses in the cases discussed above, as well as the responsibilities enumerated in the *Carter* factors, provide guidance for courts determining when an individual's actions rise to this level.

ii. Potential Power

In *RSR*, we noted that "operational control" need not be exercised constantly for an individual to be liable under the FLSA:

> [Employer] status does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. Control 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.

172 F.3d at 139 (quotation marks and alteration omitted). The district court in this case appears to have relied on this language in stating that "[w]hat

is critical is that Mr. Catsimatidis has [certain] powers to delegate" and that "[t]here is no area of Gristede's which is not subject to his control, whether [or not] he chooses to exercise it." *Torres III*, 2011 WL 4571792 at *2-3. The parties also dispute the importance of evidence indicating that Catsimatidis only rarely exercised much of the power he possessed.

Employer power that is "restricted or exercised only occasionally" does not mean "never exercised." In *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528, 531 (5th Cir. 1982), the Fifth Circuit noted that the company owner's "considerable investment in the company gives him ultimate, if latent, authority over its affairs," and the fact that he had "exercised that authority only occasionally, through firing one employee, reprimanding others, and engaging in some direct supervision of Johnson Disposal drivers, does not diminish the significance of its existence." In *Superior Care*, this court noted that although representatives of the defendant business, a nurse-staffing company, visited job sites only infrequently, the company had "unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes." 840 F.2d at 1060. "An employer does not need to look over his workers' shoulders every day in order to exercise control." *Id.* Similarly, in *Carter*, we rejected the proposition that the community college was not employing prison inmates solely because the prison had "ultimate control" over the prisoners, reasoning that the community college also made decisions that affected the prisoners' work. 735 F.2d at 13-14.

The Eleventh Circuit has squarely held that even when a defendant "could have played a greater role in the day-to-day operations of the [] facility if he had desired, . . . unexercised authority is insufficient to establish liability as an employer." *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008). The *Alvarez* court found that an officer in a company that owned a kennel club was not an employer, in part because even though he might have had the authority to do so, he "had not taken part in the day-to-day operations of the facility, had not been involved in the supervision or hiring and firing of employees, and had not determined their compensation." *Id.*

Unlike *Alvarez*, *RSR* does not state unambiguously that unexercised authority is insufficient to establish FLSA liability, and we see no need to do so here in light of the evidence of the authority that Catsimatidis *did* exercise. Nonetheless, all of the cases discussed indicate that the manifestation of, or, at the least, a clear delineation of an individual's power over employees is an important and telling factor in the "economic reality" test. Ownership, or a stake in a company, is insufficient to establish that an individual is an "employer" without some involvement in the company's employment of the employees.

II. Catsimatidis as "employer"

"Using this 'economic reality' test, we must decide whether [Catsimatidis] is an employer under the FLSA." *See RSR*, 172 F.3d at 140. Is there "evidence showing his authority over management, supervision, and oversight of [Gristede's] affairs in general," *see id.*, as well as evidence under the

Carter framework or any other factors that reflect Catsimatidis's exercise of direct control over the plaintiff employees?

a. Catsimatidis's overall authority

Catsimatidis is the chairman, president, and CEO of Gristede's Foods, Inc. Joint App'x 1016.[6] He does not report to anyone else at Gristede's. *Id.* at 1794. Catsimatidis personally owns the building in which Gristede's headquarters is located. *Id.* at 1789-90. His office is in that building, shared with Charles Criscuolo, Gristede's COO. *Id.* at 1793-94. Catsimatidis was "usually there for part of the day, at least [four] days a week." *Id.* at 1334. The human resources and payroll department is located in the same building. *Id.* at 1794-5. Regarding his duties, Catsimatidis testified: "I do the banking. I do the real estate. I do the financial. . . . I come up with concepts for merchandising. . . . I'm there every day if there is a problem," including problems with buildings, problems with the "Department of Consumer Affairs, governmental relations," and "[p]roblems with vendors, relationships with vendors, it takes up most of the time." *Id.* at 1800-01.

A series of subordinate managers reported to Catsimatidis but did not appear to have an extensive amount of interaction with him. Catsimatidis spoke to Criscuolo every day because they shared an office. *Id.* at 1797. Catsimatidis testified that Vice President Gallo Balseca "runs operations" and was "in the

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[6] Although Catsimatidis's and other employees' functions within Gristede's appear to have shifted during the lengthy pendency of this lawsuit, all references are to the period relevant to the case.

stores every day," and that the district managers reported to Balseca. *Id.* at 1796. Balseca reported to Criscuolo, but Catsimatidis rarely spoke directly to Balseca. *Id.* at 1794, 1797. Catsimatidis testified that the company's director of security "reports to the chief operating officer on a day-to-day basis, but if there is something he thinks I should know about, he would call and tell me." *Id.* at 1809. Catsimatidis occasionally sat in on merchandising and operations meetings. *Id.* at 1799.

Catsimatidis stayed apprised of how Gristede's was doing, reviewing the overall profit and loss statements as well as the "sales to purchases" statements of particular stores. He received "weekly gross margin reports from all the perishable departments" and "a comprehensive P[rofit] and L[oss] report on a quarterly basis" that he studied in depth and sometimes used to make general recommendations. *Id.* at 1849. As Executive Director of Human Resources and Asset Protection Renee Flores stated, "if there is a store that buys more than they sell, and it's a consistent thing, he may say, 'You know what, you might want to take a look at that, because they're buying more than they're selling.'" *Id.* at 1450-51.

Catsimatidis testified that he made "big picture" "merchandising decisions, like do we, for the next six months, push Coca-Cola or push Pepsi-Cola?" and "the decisions on having pharmacies in the stores." Id. at 1815. He testified that after making this sort of decision, he would tell Criscuolo or "yell it out when they have the [merchandising meeting]" in their shared office. *Id.* at 1816. He might also "yell out to go out and do more sales." *Id.* at 1817.

In general, employees agreed, as Executive Vice President Robert Zorn testified, that Catsimatidis "has whatever privileges an owner of a company has" to "make ultimate decisions as to how the company is run," and that there was "no reason to believe that if he chose to make a decision anybody there has the power to override him." *Id.* at 1329. They also agreed that Catsimatidis has the power to "shut down a store" or "sell a store if he felt that was the appropriate thing to do." *Id.* at 1370.[7]

b. Involvement with stores

Although Catsimatidis did not exercise managerial control in stores on the day-to-day level of a manager, the evidence demonstrates that he exercised influence in specific stores on multiple occasions. For example, he made suggestions regarding

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[7] At oral argument and in its written decision, the district court placed substantial reliance on an affidavit that Catsimatidis submitted in a separate lawsuit, a trademark action brought by Trader Joe's Company after it found out about a Gristede's plan to re-open a former Gristede's store under the name "Gristede's Trader John's." The district court emphasized that the affidavit, which discussed the process by which Catsimatidis had come up with the idea, indicated that Catsimatidis has the power to "set prices for goods offered for sale," "select the decor for the stores," and "control any store's signage and advertising." *Torres III*, 2011 WL 4571792, at *1. Although the parties dispute the significance and admissibility of the affidavit, it is not necessary to our decision. The affidavit indicates that Catsimatidis had the power to open a new store that was generally intended to offer "items at prices materially lower than comparable items in our other Gristede[']s stores." Joint App'x 3752. This only underscores the implication of the evidence we have already discussed: that Catsimatidis possessed the ability to control Gristede's operations at a high level.

how products are displayed in stores. In general, he testified that he focused on "driv[ing] sales, driv[ing] product, get[ting] more sales out of the stores" through techniques such as "buying a Coca-Cola at [the] right price, and [] put[ting] it on a front end display at the right price." *Id.* at 1819.

Catsimatidis testified specifically that "when [he] used to go around the stores, [he] used to make comments to the store managers about displays," telling them, for example, "if you put up this product, you might sell $100 a week." *Id.* at 1828. He would make visits to "five or ten" stores on Saturday mornings, staying about ten minutes in each one. *Id.* He referred to these as "just [] goodwill visit[s], merchandising, sales, what are we doing right, what are we doing wrong, what can we do better." *Id.* at 1831-32. His deposition also contained the following exchange:

> Q: Why did you want to visit every store?
>
> A: To check the merchandising.
>
> Q: Can't the store managers take care of that themselves?
>
> A: If the store managers did it perfectly, then I wouldn't have to visit the stores.
>
> Q: But you have a level of trust in the store managers, right?
>
> A: You hope so, yes.
>
> Q: Why do you think it was necessary for the president of the company to go around to all these stores?
>
> A: For the same reason Sam Walton went and visited his stores.

> Q: What reason is that?
>
> A: You just get a better feeling for merchandising. Sam Walton was a great merchandiser.
>
> Q: On the Saturday morning visits to the stores, what did you do?
>
> A: I walked in, introduced myself to the manager, most of them I knew, and just we would talk about merchandising. I would say is this selling, is this not selling, are you missing any products that you think you should have? And I would — I felt I would get input from store managers on merchandising problems.

Id. at 1829-30.

Catsimatidis would also address problems that occurred in individual stores. For example, he testified that if a vendor called him and said there was a problem, "[m]aybe that he was supposed to have a display and not have a display," he would not get involved personally but would refer the issue to Criscuolo. *Id.* at 1827. Catsimatidis testified that "if a store didn't look clean, or if it was very cluttered, [he] would make the comment about it . . . to the store manager, and then follow up and say it to [Criscuolo]." *Id.* at 1831. On one occasion, he went to a store and was "annoyed" that a type of fish he tried to buy was not in stock, so he "sent an e-mail to the meat director, copy to his boss, . . . sent one to the store manager, and sent one to the district manager." *Id.* at 1882. Catsimatidis commented that the emails were his attempt to "bring[] it to their attention that the department looked bad" and that he

"would hope the supervisor or the merchandisers would fix it." *Id.* at 1883.

Additionally, Catsimatidis testified that the company's system automatically forwards him copies of any consumer complaints, which he then forwards by email "to the responsible parties . . . with a comment of 'What the hell is happening?'" *Id.* at 1821. For example, he might forward a complaint about a store being dirty, and he sent a complaint about lids not fitting coffee cups to the deli director. *Id.* He testified, "I figured if they think I know about the problem, they'll work harder towards fixing it." *Id.* at 1822. When asked why this was, he said, "I guess they want to keep the boss happy, and I want to keep the consumers happy," and that "one of my jobs is how to get the consumers in our stores, and how to keep them in our stores." *Id.* at 1823. He has directed similar complaints to store managers. *Id.* at 1825.

Mitchell Moore, a former store manager, testified that Catsimatidis asked him to get involved with a "reset" at a particular store, meaning an effort to "change the store around, move items around the store, allocation, bring in new items." *Id.* at 1418. Moore also testified that Catsimatidis, while walking through a store, might "want me to change a display around or to make it fuller or to put a different variety in there," or to "put signs on certain items, give them a good deal on it" if he wanted Moore to "push a particular item." *Id.* at 1421-22. Zorn said that he had seen Catsimatidis go to stores for grand openings or reopenings, "walk up and down the aisles . . . ask[] questions about — you know, he sees a product that is new and asks, you know — you know, who we

buy that from and, you know, comments on the store decor," although Zorn noted that Catsimatidis was "there more in a PR capacity than a management type capacity." *Id.* at 1352-53.

c. The *Carter* factors

The first element of the *Carter* test considers whether the individual defendant "had the power to hire and fire employees." *Barfield*, 537 F.3d at 142 (quotation marks omitted). The evidence demonstrates that Catsimatidis possesses, but rarely exercises, the power to hire or fire anyone he chooses. He testified, "I guess I can fire the people that directly report to me," which he said would include "only maybe four or five" employees such as the COO and CFO. Joint App'x 1863. He testified in 2005 that he could not remember having fired anyone in five or six years. *Id.* at 1862. In *RSR*, we emphasized that the hiring and firing of "individuals who were in charge of [the plaintiff employees] is a strong indication of control." *RSR*, 172 F.3d at 140.

Zorn testified that Catsimatidis had hired him and "obviously would" have the authority to hire and fire others, "but he doesn't get involved in that." Joint App'x 1338. For example, when Zorn was "involved in letting go long-time employees for various reasons," he let Catsimatidis know "as a courtesy" and fired the employees even if Catsimatidis "wasn't happy about it." *Id.* at 1343. On one occasion when both Zorn and Catsimatidis interviewed a potential manager, Catsimatidis "was in favor of it but he left the decision to" Zorn. *Id.* at 1342. Catsimatidis promoted Deborah Clusan from director of payroll to director of payroll and human resources. *Id.* at 476. He promoted Moore to store manager from night

manager. Moore testified that Catsimatidis "came to speak with me, asked me what my background was, . . . and then the next day the vice president called me, and told me that I would be starting in the Store 504 the next day." *Id.* at 1412, 1415. Moore, like other employees, indicated that he "view[ed] Mr. Catsimatidis as [his] boss" and that Catsimatidis would have the power to fire a store employee. *Id.* at 1425-26.

The second *Carter* factor asks whether the individual defendant "supervised and controlled employee work schedules or conditions of employment." *Barfield*, 537 F.3d at 142 (quotation marks omitted). Plaintiffs overstate the importance of the two pieces of evidence on which they rely for this factor. Although they state in their brief that Catsimatidis said he "has handled complaints from Gristede's workers' union representatives 'every week for as long as I could remember,'" Appellees' Br. at 39, this mischaracterizes Catsimatidis's testimony; he stated that he had not been personally involved in union negotiations or discussions of problems, *see* Joint App'x 1802-03, 1812, 1876. Plaintiffs also assert that Catsimatidis "authorized an application for wage subsidies and tax credits on behalf of Gristede's employees." Appellees' Br. at 39. The evidence reflects only that Catsimatidis signed the application for tax credits to which Gristede's was entitled for employing people "coming off of Social Services, off of welfare." Joint App'x at 482-83. Moreover, plaintiffs do not indicate how this affected their "work schedules or conditions of employment." Although Catsimatidis's involvement in the company and the stores as discussed above demonstrates some exercise of oper-

ational control, it does not appear to relate closely to this factor of the *Carter* test.

The third factor asks whether the individual defendant "determined the rate and method of payment." *Barfield*, 537 F.3d at 142 (quotation marks omitted). The district court and plaintiffs emphasize the fact that Catsimatidis's electronic signature appears on paychecks. This — like all factors — is not dispositive. *See Gray*, 673 F.3d at 354. Nonetheless, we held in *RSR* that "[t]he key question is whether [the defendant] had the authority to sign paychecks throughout the relevant period, and he did." *RSR*, 172 F.3d at 140.

RSR also focused on the fact that the defendant "controlled the company financially." *Id.* It is clear that Catsimatidis possessed a similar degree of control. He testified that he keeps track of "payroll" as "a line item on accounting" and "a part of profit and loss," to know what percentage of Gristede's sales and expenses payroll comprises, but he does not get involved with individual salaries or schedules. Joint App'x at 1834-35. Although he did not speak to his managers "about people getting paid," *id.* at 1834, he knew that employees were paid on time "[b]ecause the unions would have come down on us real hard" if there was a problem. *Id.* at 1852. Catsimatidis explained that he might also learn about a problem "[i]f I walked down the aisle, and the employee saw me, they might complain," although the official procedure for such complaints involved the employees' union and store manager. *Id.* at 1866-67. Catsimatidis set up a meeting between lower-level managers and an outside payroll company, *id.* at 1452-53, and although he did not know specifically "if George San-

tiago in the store got a paycheck that week," his "rules are if somebody works, they get paid," *id.* at 469. The district court also noted that Catsimatidis stated "in open Court in this proceeding 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," *Torres III*, 2011 WL 4571792, at *1, which further demonstrates the kind of financial control emphasized in *RSR*.

The fourth *Carter* factor asks whether the individual defendant "maintained employment records." *Barfield*, 537 F.3d at 142 (quotation marks omitted). Plaintiffs offer only that "Catsimatidis works in the same office where employment records are kept" and promoted the payroll director, Appellees' Br. at 41, essentially admitting that Catsimatidis did not meet this factor. In sum, the evidence — much of it Catsimatidis's own testimony — indicates that Catsimatidis meets the first and third *Carter* factors.

d. Totality of the circumstances

There is no question that Gristede's was the plaintiffs' employer, and no question that Catsimatidis had functional control over the enterprise as a whole. His involvement in the company's daily operations merits far more than the symbolic or ceremonial characterization he urges us to apply. Unlike the defendant in *Wirtz*, who visited his company's facilities only a few times a year, Catsimatidis was active in running Gristede's, including contact with individual stores, employees, vendors, and customers. Catsimatidis dealt with customer complaints, in-store displays and merchandising, and the promotion of store personnel. That he may have done so

"only occasionally" does not mean that these actions are irrelevant, *see RSR*, 172 F.3d at 139, especially when considered in the context of his overall control of the company.

Although there is no evidence that he was responsible for the FLSA violations — or that he ever directly managed or otherwise interacted with the plaintiffs in this case — Catsimatidis satisfied two of the *Carter* factors in ways that we particularly emphasized in *RSR*: the hiring of managerial employees, and overall financial control of the company. *See id.* at 136-37, 140 (finding that the individual defendant "exercised financial control over the company" and "frequently" gave instructions to subordinate managers); *see also Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984) (noting that the individual defendant was the "'top man'" in a hotel company who "held [the hotels'] purse-strings and guided their policies" and that the hotels "speaking pragmatically, . . . functioned for the profit of his family"). This involvement meant that Catsimatidis possessed, and exercised, "operational control" over the plaintiffs' employment in much more than a "but-for" sense. His decisions affected not only Gristede's bottom line but individual stores, and the personnel and products therein.

We recognize that the facts here make for a close case, but we are guided by the principles behind the liquidated damages provision of the FLSA in resolving the impact of the totality of the circumstances described herein. The Supreme Court has noted that "liquidated damages as authorized by the FLSA are not penalties but rather compensatory damages 'for the retention of a workman's pay which might result

in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Republic Franklin Ins. Co. v. Albemarle County Sch. Bd.*, 670 F.3d 563, 568 (4th Cir. 2012) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)); *see also Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) (noting that liquidated damages "are compensatory, not punitive in nature").

As counsel for *amicus curiae* the Secretary of Labor explained at oral argument, the purpose of the FLSA is not to punish an employer but to remunerate aggrieved employees. Considered in the context of the expansive interpretation that courts have afforded the statute, this policy reasoning particularly counsels in favor of finding that Catsimatidis was an "employer" given the failure of the settlement between the corporate defendants and the plaintiff employees. Catsimatidis was not personally responsible for the FLSA violations that led to this lawsuit, but he nonetheless profited from them. And although the Gristede's Supermarkets business entity appears to have been larger than other businesses discussed in the cases that have considered this question, the company was not so large as to render Catsimatidis's involvement a legal fiction. The company is not public. Its stores, in which Catsimatidis actively exercised his influence, are all in the New York City metropolitan area, as are the company headquarters, where he worked almost daily. In sum, as the district court concluded, "it is pellucidly clear that he is the one person who is in charge of

the corporate defendant."[8] *Torres III*, 2011 WL 4571792, at *3.

Although we must be mindful, when considering an individual defendant, to ascertain that the individual was engaged in the culpable company's affairs to a degree that it is logical to find him liable to plaintiff employees, we conclude that this standard has been met here. Catsimatidis's actions and responsibilities — particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the plaintiffs' wages, his supervision of managerial employees, and his actions in individual stores — demonstrate that he was an "employer" for purposes of the FLSA.

III. New York Labor Law

The NYLL defines "employer" as "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). The definition of "employed" under the NYLL is that a person is "permitted or suffered to work." *Id.* § 2(7).

The district court granted partial summary judgment in plaintiffs' favor on their NYLL claims, but neither its oral nor its written decision contained any substantive discussion of the issue. Plaintiffs

[8] The district court's decision indirectly referenced statements made by Catsimatidis in open court at a hearing on the settlement agreement to the effect that he was "here to speak for 1,700 employees that [sic] their jobs . . . on the line," that he "represent[ed] the 1,700 current employees," and that he was "their employer." Joint App'x 3594-95. We do not, of course, afford these statements weight as legal conclusions, but they are telling.

assert that the tests for "employer" status are the same under the FLSA and the NYLL, but this question has not been answered by the New York Court of Appeals. Defendants respond that corporate officers cannot be held liable under the NYLL simply by virtue of their status, but plaintiffs are arguing that Catsimatidis should be held liable "not as [a] corporate officer[] or shareholder[], but as [an] employer[]." *See Chu Chung v. New Silver Palace Rest., Inc.*, 272 F. Supp. 2d 314, 318 (S.D.N.Y. 2003).

Plaintiffs also contend in their response brief that "there is no need to also establish [Catsimatidis's] status as an employer under state law" because the settlement agreement establishes that he will be personally liable "'if the Court holds John Catsimatidis to be an employer'—period." Appellees' Br. at 41-42 (quoting Settlement Agreement § 3.1(H)). Defendants do not respond to this in their reply brief.

In light of the possible disagreement between the parties regarding the need for us to decide this issue of state law, and particularly in light of the absence of discussion of the issue in the district court's decision, we vacate the grant of summary judgment in plaintiffs' favor on the NYLL claims and remand to the district court. The case will return to the lower court in any event for a determination of damages in light of our holding today; in the process, the parties and the district court may determine (1) whether the NYLL question requires resolution, and (2) what that resolution should be.

Conclusion

We have examined all of Catsimatidis's arguments on appeal and find them to be without merit. For the foregoing reasons, the judgment of the dis-

trict court granting partial summary judgment in favor of plaintiffs is **AFFIRMED IN PART, VACATED IN PART, AND REMANDED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of July, two thousand and thirteen.

Before: RICHARD C. WESLEY,
PETER W. HALL,
Circuit Judges,
RICHARD W. GOLDBERG[*]

JUDGMENT
Docket No. 11-4035

Bobby Irizarry, Ruben Mora, Joselito Arocho, Joseph Crema, Alfred Croker, Frank DeLeon, Mario DiPreta, William Helwig, Robert Misuraca, Robert Pastorino, Victor Phelps, Daniel Salegna, Gilberto Santiago,

Plaintiffs - Appellees,

Carlos Torres, on behalf of himself and all others similarly situated,
Lewis Chewning,

Plaintiffs - Counter-Defendants - Appellees,

[*] The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation

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, Brian Homola, Anna Garrett, Nelson Betancourt, Jose DelaCruz, Yuri Lamarche, Michael Groseclose, Rodolfo Delemos, Pio Morel, Abigail Claudio, Malick Diouf, David Otto, Alejandro Morales, Victor Diaz, Paul Petrosino, Eduardo Gonzalez, Jr., Jose Bonilla - Reyes, Vincent Perez, Martin Gonzalez, Calvin Adams, William Fritz, Katherine Halpern, Christian Tejada, Edward Stokes, Plinio Medina, Towana Starks, Lawson Hopkins, Ruben M. Aleman, Eugene Rybacki, Earl Cross, Manolo Hiraldo, Robert Hairston,

Plaintiffs,

v.

John Catsimatidis,

Defendant - Appellant,

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.

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the

district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDICATED and DECREED that the judgment of the district court is AFFIRMED in part, VACATED in part, and the case is REMANDED in accordance with the opinion of this court.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of the Court

Seal of the Court
/s/ Catherine O'Hagan Wolfe

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, *et al.*, Plaintiffs, v. GRISTEDE'S OPERATING CORP., *et al.*, Defendants.	04 Civ. 3316 (PAC)

New York, N.Y.
September 8, 2011
11:00 a.m.

Before:

HON. PAUL A. CROTTY,

District Judge

(Transcript Excerpts)

* * *

THE COURT: All right. I thank the parties for their argument, which has always been very helpful.

Before me is the plaintiffs' motion for partial summary judgment holding Mr. Catsimatidis as an employer under the Fair Labor Standards Act and New York Labor Law and hold that Mr. Catsimatidis is jointly and severally liable for the plaintiffs' damages. I'm going to grant the motion.

Under the Fair Labor Standards Act, an employer is broadly defined as any person acting directly or

indirectly in the interest of an employer in relation to an employee. And I'm quoting now from the Herman decision, Above and beyond the plain language which calls for expansiveness, the remedial nature of the statute warrants an expansive interpretation of

its provisions so it will have the widest possible impact on the national economy. The overarching concern is whether the alleged employer possessed the power to control the workers in question.

And there's the economic reality test. According to the Herman decision, that status does not require a continuous monitoring of employees, looking over their shoulders or any sort of absolute control of one's employees. In that particular case, in the Herman case, it was sufficient that the individual at issue, Mr. Portnoy, hired managerial employees who in turn hired most of the guards.

I don't have to review the individual factors because it's clear that Mr. Catsimatidis has the power to supervise and control the employees. Indeed, he has a greater power, that is, the power to determine whether or not they're going to be employees at all because he raises the concern that he will have to go into bankruptcy and perhaps terminate employment.

In the Herman case, Mr. Portnoy contended that the evidence showing his authority over management, supervision, and oversight of the company's affairs was irrelevant. The only evidence that should be considered is his direct control of the guards. The court held "such a contention ignores the relevance of the totality of the circumstances in determining Portnoy's operational control of RSR's employer's employment of the guards."

Here I'm deeply troubled by the affidavit that Mr. Catsimatidis submitted in the Trader Joe's case before Judge Preska, subsequently resolved amicably, I guess.

He says he's the owner, president, and CEO of the defendant Gristede's and the parent company. He's run the companies, run the supermarket chain for over 20 years. He made the determination as a result of the severe economic downturn to launch, on an experimental basis, a new store. So it indicates his power to launch stores.

And he made a further determination to distinguish this store from the regular model for existing Gristede's stores. He decided, Mr. Catsimatidis, to give the store a different name while at the same time maintaining much of the look and feel of our regular stores. So he has the power to open and close stores, he has the power to determine their decor.

He decided also, he says, to feature many items at prices materially lower than comparable items at our other Gristede's stores. So he has the power to set prices in the stores.

The idea of the new experimental store was Mr. Catsimatidis' alone. He considered other alternatives like cheap John's and John's bargain stores, but he decided he did not like the image of either. And because he made a fortune trading in the kinds of goods sold in his stores, he decided what he wanted to do. He also refers to his operation, his arrangement with ShopRite branded products and the decor in the store. The floor is blue and white tile, not red, distinguishing it from Trader Joe's.

I find based on this affidavit that was submitted in the context of another case, and not this case, it's clear that Mr. Catsimatidis is in charge in all respects of the business at Gristede's. Indeed, he concludes as evidence of his good faith that he is going to change the name from Trader John's to Gristede's Trader John's, indicating that he controls both signage and advertising.

I don't think there's any doubt and certainly there's no genuine issue of fact about who runs Gristede's: It is Mr. Catsimatidis, and he is an employer within the meaning of the law.

Further, the evidence in this case for the reasons cited by Mr. Swartz in his arguments, and in particular the 56.1 statements which are not really contested -- they're quibbled with rather than contested; the defendants do not raise genuine issues of material fact -- I find that Mr. Catsimatidis is a person who can be properly described as an employer under the meaning of the act.

That constitutes my disposition of this motion, and as I indicated at the beginning, I grant the motion for partial summary judgment and hold that Mr. Catsimatidis is an employer of plaintiffs under the Fair Labor Standards Act and New York Labor Law, and I now hold that he's jointly and severally liable for the plaintiffs' damages.

I'll enter an order to that effect this afternoon. Thank you very much.

MR. PARLO: Thank you, your Honor.

MR. SWARTZ: Thank you, your Honor.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, on behalf of himself and all others similarly situated, Plaintiffs, -against- GRISTEDE'S OPERATING CORP., *et al.*, Defendants.	04 Civ. 3316 (PAC) ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

For the reasons stated on the record at the conclusion of oral argument, the Court grants Plaintiffs' motion for partial summary judgment; and holds that defendant John Catsimatidis is an employer within the meaning of the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). As such, defendant John Catsimatidis is jointly and severally liable for Plaintiffs' damages. The Court makes the following additional holdings in support of this decision.

Both parties agree that the word "employer" is defined broadly to include "any person acting directly or indirectly in the interest of an employer in relation to any employee." 29 U.S.C. § 203(d). "Person" includes individual, so that individuals may be held liable or responsible for violations of the law by a corporate employer. Id. at § 203(a).

Both parties agree that the traditional requirements for piercing the corporate veil are not required to establish individual liability under the FLSA and NYLL.

At the hearing held on September 8, 2011, the Court recited passages from an affidavit signed by Mr. Catsimatidis, on January 13, 2009, in a case that was pending here in the Southern District of New York, Trader Joe's Company v. Gristede's Foods, Inc., et al., 09 Civ. 163 (LAP).

There is no need to repeat what was said in open Court, except to briefly summarize Mr. Catsimatidis' affidavit: (1) he is the sole owner, President and CEO of Gristede's and its parent company; (2) he has owned the enterprise for 20 years; (3) he has the right and authority to open, close and reopen stores; (4) he can set prices for goods offered for sale; (5) select the décor for the stores; (6) control any store's signage and advertising. Indeed, he can run the entire operation where he "made [his] fortune trading in the kind of goods sold in the Red Apple and Gristede's supermarket chains that [he] own[s]."

This affidavit, together with Mr. Catsimatidis' statements in open Court in this proceeding 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, demonstrate that he has absolute control of Gristede's, and all of its operations.

Nonetheless, Mr. Catsimatidis' urges that he should not be held to be an employer. The "economic reality" test he applies requires the individual to have:

(1) the power to hire and fire employees;
(2) supervise and control employee work schedules;
(3) determine the rate and methods of pay; and
(4) maintain employment records.

Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984). In other words, before an individual can be held to be an employer, he must have acted in an immediate and direct way over the workers in question.

But, as the Second Circuit later held in Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2d Cir. 1999), the Carter test of "economic reality" should be based on "all the circumstances . . . so as to avoid having the test confined to a narrow legalistic definition." Id. at 139 (emphasis in original). That, of course, is precisely what Mr. Catsimatidis is attempting to do, as he argues that there must be some connection between what the individual has done (in the exercise of his responsibility) and the wrong alleged in the complaint. He argues that corporate officers should not be liable solely due to that officer status; nor should they be held accountable because they have cheap products.

However, "[a]n employer need not look over his workers' shoulders every day in order to exercise control." Id. at 190 (quoting Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988) (finding the plaintiffs to be employees, as opposed to independent contractors, even though the employer's "visits to the job sites occurred only once or twice a month")). In the Herman case, the individual at issue was held to be an employer because he hired management staff, as opposed to the workers who had FLSA com-

plaints. 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.

Mr. Catsimatidis signed all paychecks to the class members. See Dong v. Ng, No. 08 Civ. 917 (JGK)(MHD), 2011 WL 2150544, at *9 (S.D.N.Y. Mar 08, 2011) (finding the signing of payroll certifications to be a significant factor in the economic reality test) (adopted by 2011 WL 2150545 (S.D.N.Y. May 31, 2011)). He argues that it was only an electronic signature. But, even if that is a difference, it does not have any significance.

Based on these facts, defendant Catsimatidis argues, as Portnoy did in Herman, that only evidence indicating direct control over the employees at issue should be considered. The Court specifically rejected the argument: "Such a contract ignores the relevance of the totality of the circumstances in determining Portnoy's operational conduct of RSR's employment of the Guards." Id. at 140.

Mr. Catsimatidis argues that he cannot fire anyone, but we should be careful about accepting the characterization of limitations on his power. See Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 190 (S.D.N.Y. 2003) (employer's characterization cannot control, "otherwise there could be no enforcement of any minimum wages or overtime law"). This is especially true when key managerial employees at Gristede's concede that Mr. Catsimatidis hired them, and acknowledged his power to close or sell Gristede's stores. (Plaintiffs' 56.1 Statement of Facts, ¶¶ 18, 19, 20, 21). Defendant's responses do not deny these statements, so much as

engage in an extended quibble about their legal significance. See United States v. Mottley, 130 Fed. App'x 508, 510 (2d Cir. 2005) (quoting Lipton v. Nature Co., 71 F.3d 464, 469 (2d Cir. 1995) ("[M]ere conclusory allegations or denials . . . are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist.")).

Mr. Catsimatidis 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. His employees recognize that he is in charge. (Id. at ¶¶ 53, 55, 56, 57, 59, 62, 63, 64). For the purposes of applying the total circumstances test, it does not matter that Mr. Catsimatidis has delegated powers to others. (Id. at ¶ 71). What is critical is that Mr. Catsimatidis has those powers to delegate.

Further, Mr. Catsimatidis admits that he controls Gristede's banking and real estate matters. Notwithstanding the argument that his control in these two critical areas is not relevant to his status as employer, (Id. at ¶¶ 75-79), they are part of "the total circumstances" in analyzing whether Mr. Catsimatidis is in fact an employer.

Where officers and owners have "overall operational control of the corporation, possess an ownership interest in it, control significant functions of the business or determine the employees' salaries and makes hiring decisions," they may be held to be employers under the FLSA. Ansoumana, 255 F. Supp. 2d at 192 (quoting Lopez v. Silverman, 14 F. Supp. 2d 405, 412 (S.D.N.Y. 1998)) (emphasis added).

In short, there is no aspect of Gristede's operations from top to bottom and side to side which is be-

yond Mr. Catsimatidis' reach. There is no area of Gristede's which is not subject to his control, whether he chooses to exercise it. He had operational control and, as such, he may be held to be an employer. Herman, 172 F.3d at 140-41; Ansoumana, 255 F. Supp. 2d at 193.

The conclusion should come as no surprise to Mr. Catsimatidis. Given his own public pronouncements, as well as his conduct here in this proceeding, it is pellucidly clear that he is the one person who is in charge of the corporate defendant. There is no genuine issue of material fact concerning Mr. Catsimatidis' statements. Mr. Catsimatidis is an employer within the meaning of the law and he will be held jointly and severally liable for the damages which have accrued in this action.

Dated: New York, New York
September 9, 2011

SO ORDERED

/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, on behalf of himself and all others similarly situated, Plaintiffs, -against- GRISTEDE'S OPERATING CORP., *et al.*, Defendants.	04 Civ. 3316 (PAC) ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

Upon reading the Court's order of September 9, 2011, there is a typographical error on page 3 line 3, the last two words. The order is corrected by deleting the words "cheap products" and inserting the words "deep pockets."

Dated: New York, New York
September 9, 2011

SO ORDERED

/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, RUBEN MORA, BOBBY IRIZARRY, LEWIS CHEWNING, GILBERTO SANTIAGO, WILLIAM HELWIG, ROBERT MISURACA, JOSEPH CREMA, MARIO DIPRETA, VICTOR PHELPS, JOSELITO AROCHO, ALFRED CROKER, DANIEL SALEGNA, FRANK DELEON, and ROBERT PASTORINO, on behalf of themselves and all others similarly situated, Plaintiffs, -against- GRISTEDE'S OPERATING CORP.; NAMDOR, INC.; GRISTEDE'S FOODS, INC.; CITY PRODUCE OPERATING CORP.; GRISTEDE'S FOODS NY, INC., JOHN CATSIMATIDIS, JAMES MONOS, and GALO BALSECA, Defendants.	**No. 04 CV 3316 (PAC)**

~~[PROPOSED]~~ [PAC] PARTIAL FINAL JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Partial final judgment is entered in favor of Plaintiffs against Defendants Gristede's Operating Corporation, Namdor, Inc., Gristede's foods, Inc., City Produce Operating Corp., Gristede's Foods NY, Inc., and John Catsimatidis, jointly and severally, for TWO MILLION ONE HUNDRED ELEVEN THOUSAND THREE HUNDRED TWENTY-SEVEN DOLLARS AND FORTY-ONE CENTS ($2,11,327.41), which includes the unpaid Total Settlement Fund Amount of TWO MILLION SIXTY-NINE THOUSAND NINE HUNDRED NINETY-NINE DOLLARS AND NINETY-NINE CENTS ($2,069,999.99) and interest accrued until September 20, 2011, of FORTY-ONE THOUSAND THREE HUNDRED TWENTY-SEVEN DOLLARS AND FORTY-TWO CENTS ($41,327.42).

2. Defendants Gristede's Operating Corporation, Namdor, Inc., Gristede's Foods, Inc., City Produce Operating Corp., Gristede's Foods NY, Inc., and John Catsimatidis remain jointly and severally liable for paying any interest that continues to accrue under the Settlement Agreement.

3. Defendants Gristede's Operating Corporation, Namdor, Inc., Gristede's Foods, Inc., City Produce Operating Corp., Gristede's Foods NY, Inc., and John Catsimatidis remain jointly and severally liable for Plaintiffs' attorneys' fees, costs, and expenses as determined by the Court.

4. This Partial Final Judgment does not alter the parties' continuing rights and obligations under the Settlement Agreement, including but not limited to Plaintiffs' entitlement to an award of attorneys' fees, costs, and expenses, ~~increasing interest rates for late payments,~~ [PAC] and right to move for in-

junctive relief. The parties are to comply with all terms of the Settlement Agreement.

5. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement, overseeing the distribution of settlement funds, ruling on Plaintiffs' application for attorneys' fees, costs and expenses filed on July 1, 2011, ruling on [PAC] [any] supplemental applications for attorneys' fees, costs and expenses, and ruling on a motion for injunctive relief, if any.

6. ~~In order to expedite implementation of the Settlement Agreement, this~~ [PAC] [The] Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering this Partial Final Judgment and it is expressly directed that this Partial Final Judgment be entered forthwith.

So Ordered, Enter Judgment.

New York, New York

October 5, 2011

/s/ Paul A. Crotty
Hon. Paul A. Crotty, U.S.D.J.

Judgment entered _____, 2011

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CARLOS TORRES, RUBEN MORA, BOBBY IRIZARRY, LEWIS CHEWNING, GILBERTO SANTIAGO, WILLIAM HELWIG, ROBERT MISURACA, JOSEPH CREMA, MARIO DIPRETA, VICTOR PHELPS, JOSELITO AROCHO, ALFRED CROKER, DANIEL SALEGNA, FRANK DELEON, and ROBERT PASTORINO, on behalf of themselves and all others similarly situated, Plaintiffs, -against- GRISTEDE'S OPERATING CORP.; NAMDOR, INC.; GRISTEDE'S FOODS, INC.; CITY PRODUCE OPERATING CORP.; GRISTEDE'S FOODS NY, INC., JOHN CATSIMATIDIS, JAMES MONOS, and GALO BALSECA, Defendants.	Civil Action No. 04 CV 3316 (PAC) *Electronically Filed* DECLARATION OF JOHN CATSIMATIDIS

I, John Catsimatidis, declare:

1. I am the Chairman, President and CEO of Gristede's Foods, Inc.

2. Gristede's Foods, Inc. owns a subsidiary, Namdor, that operates the Gristede's supermarkets in and around the New York City area.

3. Gristede's Foods, Inc. is a professionally managed company whose stock I indirectly own and where I hold the honorary role of Chairman, President, and CEO. The business is operated by Charles Criscuolo, Executive Vice President. My role is limited to high level corporate financial management and strategic planning. I have no involvement in either store operations or the day-to-day management of the Company; and in fact, a great deal of my high level involvement in the Company has been delegated to my Deputy.

4. For at least the last ten years, I do not recall hiring, firing or disciplining any Gristede's store employee. During the same period, I do not recall referring or recruiting any individuals for any position in any Gristede's store; having been involved in reviewing any employee applications or application forms; assigning duties to any store employee — including department managers or co-managers; or giving any store employees instructions on how to operate any stores — including department managers or co-managers.

5. For at least the last ten years, the only individual I recall hiring was Robert Zorn, the Executive Vice President, Deputy to the Chairman of Red Apple Group, who reports directly to me on financial matters. I did not hire Gristede's Chief Operating

Officer, Charles Criscuolo. Charles Criscuolo was hired by Tony Petrillo, who worked with Mr. Criscuolo at a previous employer and who brought him to Gristede's. Thus, aside from my decision to hire Mr. Zorn, who does not work for Gristede's, I do not recall hiring or firing any executive or manager of Gristede's over the last ten years.

6. For at least the last ten years, I have not had any involvement in the firing of any store employees of Gristede's; nor have I fired any executives of the Company. I leave the running of the Company to the people who are responsible for running the Company.

7. For at least the last ten years, I was not involved in supervising or controlling the work schedule or conditions of employment of any Gristede's store employee, at any time, in any store.

8. In January 2000, I stopped regularly visiting stores because I began to experience health-related eye problems. I remember the date I stopped visiting stores because it was one year before I eventually had a medical procedure to address my eye problem, and that medical procedure occurred in January 2001.

9. In the past, when I did visit some stores, those visits were brief (10 minutes) and were solely to look at and make comments on the placement of certain merchandise or on general store appearance. During these visits, I did not have anything to do with the schedule or conditions of employment of any employee, and I rarely had any communications with any employee other than exchanging general "hellos" and pleasantries. I did not discuss payroll,

wages, time keeping, work schedules or any related topics with any store employees.

10. Since January 2000, I recall visiting stores only if there was a grand opening, grand re-opening, or a similar event, and then only to serve in a public relations function. Aside from those limited exceptions, the only time I visit stores is when performing personal shopping like any other Gristede's customer.

11. For at least the last ten years, I was not directly involved, at any time with the negotiation of any labor agreement or in any other labor relations issue. When Gristede's had a representative at the bargaining table, it has been Jack Squicciarini or another Gristede's representative. However, Gristede's often has not had anyone involved as the negotiations are often conducted on a multi-employer basis by representatives of other supermarkets and Gristede's just follows what is decided by other companies.

12. I have not been involved in any way with day-to-day issues regarding Gristede's union employees, including grievances, suspensions, terminations, and issues regarding hours. Deborah Clusan and Renee Flores perform these duties. Ms. Clusan and Ms. Flores are responsible for all union billing and the withholding of any payment of union dues.

13. Although I sit on the board of a union pension fund, through that position I do not have — and thus did not exercise — any authority to control any employee in their day-to-day work. Their pension benefits have nothing to do with employee compensation, schedules or conditions of employment.

14. With regard to operations sales reports, I do receive and review these reports at a high level. These sales reports do not individually relate to any employee or to any issue relating to employee wages or terms and conditions of employment.

15. For at least the last ten years, I have not possessed any control over, and do not recall ever being involved with, any payroll or human resources issue. Ms. Clusan, Ms. Flores and their staff were and are responsible for handling all payroll and human resources issues and I do not supervise any of those individuals.

16. As such, for at least the last ten years I do not recall having made any decision about, or exercising any authority over, any payroll or payment issue relating to store employees, nor establishing, or even suggesting, a single compensation rule in relation to store employees. I have no idea on a week-to-week basis which store employees get paid and which do not, or what they get paid. In fact, for at least the last ten years I do not recall having a conversation with anyone about any store employee payroll or payroll policy issue.

17. I do not handle any compensation-related complaints and, if there were any, they would be handled by Ms. Clusan or Ms. Flores.

18. Mr. Criscuolo and the operations team are involved with formulating and changing any Payroll or Human Resources Department policy I am not involved. I have not exercised any authority to make decisions about payroll issues or to establish rules relating to the payment of Gristede's store employees. That is the way our corporate structure works — authority has been delegated to the Company's

management team and it is up to them to run the Company and make those decisions. This has been the case for the past ten years or so.

19. I have not been involved in any way with determining the amount, rate and/or method of payment of any store employee, at any time, in any store, for at least the last ten years.

20. Although I had the power to, and do in fact sign company checks, those checks generally relate to vendor payments and general corporate matters. They have nothing to do with payroll or any store employee. Further, although the store employee payroll checks bear my electronic signature, I do not personally sign or even review those checks. In fact, for at least the last ten years, I do not recall having signed or reviewed any payroll check for any store employee.

21. As I have had no involvement in the compensation of store employees, I did not have knowledge of the wage-and-hour issues and alleged violations in this action until after the lawsuit was filed. Moreover, for at least the last ten years, I do not recall any employee ever complaining to me about a failure to pay overtime or inappropriate calculation of any wage or overtime.

22. For at least the last ten years, I was also not involved in maintaining any employment records. Although I have an office in the same building as the Payroll and Human Resources Departments, I seldom interact with anyone in those departments, and do not involve myself with any payroll, human resources, or timekeeping records.

23. Since I began to experience health-related eye problems around January 2000, in addition to no longer visiting stores, I stopped sitting-in on any operations meetings. I also have not had any input with regard to employees' work schedules or hours; I do not attend any meetings of any kind involving Gristede's store employees; I do not meet with or speak to any co-manager or department manager to discuss any employment related issue; I have no involvement in the amount, rate or method of compensation of any store employee; and I otherwise do not supervise, control or have any involvement at all with the work schedules or hours of any store employee. In other words, since 2000 I have not had any direct involvement in relation to any store employee, nor any role whatsoever in the day-to-day operations of any Gristede's store or store employees. Instead, there are numerous other individuals, at varying levels of responsibility, who control those operations and manage those people.

24. My role is, and for some time has been, with the big picture of trying to establish what Gristede's image is and what it means to the consumer.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of March, 2009.

/s/ John Catsimatidis
John Catsimatidis

APPENDIX H

RELEVANT STATUTORY PROVISIONS

§ 203. Definitions

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid over-

time compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2)

legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an

employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages,

shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section

554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.