No. 11-4035

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARLOS TORRES, on behalf of himself and all others similarly situated, LEWIS CHEWNING,

Plaintiffs-Counter-Defendants-Appellees,

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

(*For continuation of caption, see inside cover.*)

On Appeal From The United States District Court
For The Southern District Of New York
No. 04 Civ. 3316 (PAC)

REPLY BRIEF OF DEFENDANT-APPELLANT JOHN CATSIMATIDIS

WALTER DELLINGER
JONATHAN D. HACKER
BRIANNE J. GOROD
JOANNA NAIRN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001
(202) 383-5300
Attorneys for Defendant-Appellant

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,

and

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,

v.

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

Defendants-Counter-Claimants,

GALLO BALSECA, JAMES MONOS,

Defendants,

JOHN CATSIMATIDES,

Defendant-Appellant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The FLSA does not make all corporate officers personally liable for every act of the companies they operate or control. Instead, as this Court has recognized, the FLSA imposes liability only on officers who *actually exercise personal control* over the workers in question. The pertinent record here is undisputed: defendant-appellant John Catsimatidis did *not* exercise personal control over the employees at issue and thus was not their "employer" within the meaning of the FLSA. Plaintiffs have recourse for FLSA violations, but it must come from the company that actually employed them, not from Catsimatidis himself.

Plaintiffs' principal response is that this Court's decision in *Herman v. RSR Security Services Ltd.*, 172 F.3d 132 (2d Cir. 1999), forecloses Catsimatidis's arguments. Plaintiffs have it backward: *RSR* defeats plaintiffs' position, not Catsimatidis's. As *RSR* explains, under the FLSA, "control of employees is central to deciding whether [a defendant] should be deemed an employer." *Id.* at 135. And to determine whether the "alleged employer possessed the power to control the workers in question," *RSR* establishes an "economic reality" test composed of four factors, each of which looks to the alleged employer's actual, functional relationship with the employees in question. *Id.* at 139. What matters under *RSR* is the defendant's "operational control" over the challenged employment practices, *id.* at 140, not the defendant's *theoretical* control through his management of the

company's overall business, as plaintiffs would have it. Neither plaintiffs nor their *amici* cite a single case finding that a corporate officer or owner was an FLSA employer absent the sort of active involvement and personal responsibility that is at the heart of *RSR*'s "economic reality" test.

Perhaps recognizing that *RSR* requires the type of personal control that plainly does not exist in this case, plaintiffs and their *amici* retreat to vague policy arguments. They say Congress defined the term "employer" broadly to ensure that there would be expansive individual liability when companies violated their FLSA obligations. Plaintiffs misread the Act's history. Congress broadly defined the covered employment relationship for a different reason: to ensure that *all types of workers* would be protected, including those who do not fit traditional legal definitions of employee. *See, e.g.*, *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (concluding that the FLSA's protections apply because "[a] worker is as much an employee when paid by the piece as he is when paid by the hour"); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (concluding that "the members of this cooperative are employees within the meaning of the Act"). In other words, Congress's principal concern was with ensuring that all workers could seek recourse from *someone* if their rights were violated, not with *who* would provide that recourse.

As noted above, this Court has adopted an "economic reality" test to answer

that latter question. Under that test, it is plain that Catsimatidis is not liable for any FLSA violation because he did not exercise personal responsibility over the conduct that violated the Act. Indeed, he did not exercise *any* control with respect to the employees in question: he did not hire or fire them; he did not supervise their work schedules or conditions; he did not determine the rate or method of their payment; and he did not maintain their employment records. Plaintiffs can present an "undisputed" record on the relevant factors only by ignoring virtually all of the evidence discussed in Catsimatidis's opening brief, and offering in response "evidence" that either misstates the record or is simply irrelevant to the central question of personal control.

The actual record here compels only one conclusion: Catsimatidis did not exercise personal control over these plaintiffs' employment and thus is not their employer within the meaning of the FLSA. The record, at the least, plainly *permits* that conclusion, and thus summary judgment for plaintiffs cannot stand. The district court similarly erred in granting partial summary judgment to plaintiffs under the NYLL because the NYLL does not provide for personal civil liability of individual officers.

The judgment below should be reversed.

I. THE SUMMARY JUDGMENT ORDER WAS ERRONEOUS BECAUSE CATSIMATIDIS WAS NOT PLAINTIFFS' "EMPLOYER" UNDER THE PROPER LEGAL STANDARD

A. The "Economic Reality" Test For Personal Liability Under The FLSA Focuses On The Officer's Actual Relationship With The Affected Employees

It is well-established that a corporation is "an entity distinct from its shareholders." *Puma Indus. Consulting, Inc. v. Daal Assocs., Inc.*, 808 F.2d 982, 986 (2d Cir. 1987). The definition of "employer" in the FLSA preserves that fundamental principle of corporate law, while at the same time preventing officers who were genuinely responsible for their corporation's employment decisions from "shielding themselves from responsibility." *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983).

Plaintiffs and their *amici* assert that FLSA liability extends to *any* officer who is in "a position to ensure compliance with the Act," NELP Br. 21, but Congress struck a different balance in the FLSA. It sought to effectuate the goals of the FLSA without completely eviscerating the corporate form, and it determined that the best way to do that was to hold responsible officers and owners who bear *personal responsibility* for violations of the Act. Congress thus enacted a definition broad enough to "transcend traditional common-law parameters of the employer-employee relationship" (and thus extend the statute's substantive protections to all workers), but not so broad as to make "any corporate officer or

other employee with ultimate operational control over payroll matters … personally liable for the corporation's failure to pay minimum and overtime wages as required by the FLSA." *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 677 (1st Cir. 1998) (quotations omitted); *see Gray v. Powers*, 673 F.3d 352, 356 (5th Cir. 2012) ("individuals 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" (quotation omitted)).

This Court has respected the balance that Congress struck in the FLSA by limiting FLSA liability to officers who "possess[] the power to control *the workers in question*." *RSR*, 172 F.3d at 139. Accordingly, "[a]pplying the FLSA's definition, courts have imposed liability for a corporation's minimum wage obligations upon a corporate officer who was *personally responsible* for making (or not making) the required payments." *Saaso v. Cervoni*, 985 F.2d 49, 50 (2d Cir. 1993); *see infra* at 9-12.[1]

[1] *Amici* NELP et al. argue that expansive individual liability is necessary to realize the goals of the FLSA (NELP Br. 11-12), but of course, this Court may not expand liability beyond what Congress intended. As noted, Congress's objective was to ensure coverage of workers who would not have been considered "employees" at common law, so as to ensure that they would have some recourse if their rights were violated. While the case law has not limited the definition of "employer" to addressing this particular problem, that case law also makes clear that "employer" does not broadly encompass every corporate officer or owner with overall corporate control. Individual liability is appropriate only if the defendant

Plaintiffs argue that this test is too narrow and that Catsimatidis's "significant ownership interest," taken with his involvement in the "business operations of the corporation," "establishes that he is an 'employer' under the FLSA." Appellees' Br. 31 (quotations omitted). According to plaintiffs, this evidence of general control is sufficient, even if that control is never exercised with respect to the specific employees in question. *Id.* at 23. That argument is incorrect. As the Department of Labor ("DOL") recognizes, an individual must "*exercise*[] significant control over *a company's employees* and its operations" to qualify as an employer under the FLSA. DOL Br. 10 (emphases added). Precedents of this Court and other circuits make that rule plain.

1. In *RSR*, this Court established a clear test for determining "employer" status under the FLSA. The Court emphasized that "the overarching concern is whether the alleged employer possessed the power to control the workers in question[] with an eye to the 'economic reality' presented by the facts of each case." 172 F.3d at 139 (citation omitted). The "relevant factors" for determining "economic reality," the Court held, "include 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

---

actually exercised personal control over the employees in question. *See infra* at 9-12.

of payment, and (4) maintained employment records." *Id.* (citation omitted).

Plaintiffs would write these four factors out of existence simply because the Court in *RSR* also acknowledged that "authority over management, supervision, and oversight of [the company's] affairs in general" could be relevant. 172 F.3d at 140. But those additional factors were deemed relevant in *RSR* only insofar as they shed light on the defendant's actual operating relationship with the particular employees in question. *See id.* (explaining that defendant's argument that such factors were irrelevant "ignores the relevance of the totality of the circumstances in determining [the defendant's] operational control *of RSR's employment of the guards*" (emphasis added)); *see also Baystate*, 163 F.3d at 678 ("At bottom, *Agnew*'s economic reality analysis focused on the role played by the corporate officers in causing the corporation to undercompensate employees …. In addition to direct evidence of such a role, other relevant indicia may exist as well ….").

The *RSR* Court nowhere suggested that *general* operational control was otherwise relevant, or that consideration of that factor could supersede the four factors targeted at the "economic reality" of the working relationship. Nor has the Court ever held that such general control could alone be sufficient where *none* of the four factors of the "economic reality" test support employer status. "While each element need not be present in every case, finding employer status when none of

the factors is present would make the test meaningless." *Gray*, 673 F.3d at 357.[2]

Plaintiffs also argue that *RSR* rejected the argument that courts must focus on a defendant's "*personal control* over the employees in question," rather than his "*general* control over the company," because this Court stated that "evidence of general operational control is relevant even if that control is 'restricted, or exercised only occasionally.'" Appellees' Br. 23 (quoting *RSR*, 172 F.3d at 139).[3] But this Court made that statement in *RSR* in the context of rejecting the argument that employer status "require[d] *continuous* monitoring of employees, looking over

[2] NELP suggests that district courts have held officers individually liable in the absence of personal control, but the cases they cite involve precisely the sort of personal control that does *not* exist in this case. *See Chu v. New Silver Palace Restaurant*, 246 F. Supp. 2d 220, 227-28 (S.D.N.Y. 2002) (defendants individually liable because of their "personal and direct involvement," including that they "negotiated with the union over" employment practice at issue, "held and exercised hiring and firing powers," and "enforc[ed]" practice at issue); *Lopez v. Silverman*, 14 F. Supp. 2d 405, 413 (S.D.N.Y. 1998) (defendant's "liability as an employer … is beyond question, given his admissions that he … made all of the company's business decisions" and "hired, fired, and set the salaries for its employees"); *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 193 (S.D.N.Y. 2003) (defendants "personally oversee and operate the companies and their agents on a daily basis"); *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 264-65 (S.D.N.Y. 2008) (describing defendants' "direct involve[ment]" with employees in question and their "significant managerial authority"). To the extent any district court case did not involve that sort of personal control, it would be incorrect under *RSR*.

[3] Plaintiffs also cite *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir. 1982), which suggested in dicta that "latent" authority was sufficient. But even in that case, the defendant had "fire[d] one employee, reprimand[ed] others, and engage[d] in some direct supervision of" the employees in question. *Id.* at 531.

their shoulders *at all times*, or any sort of *absolute control* of one's employees." 172 F.3d at 139 (emphasis added). As DOL acknowledges, no precedent of this Court suggests that control over employees that exists only in theory, but is never actually exercised, will suffice to establish employer status. DOL Br. 18. Other circuits agree. *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008) ("unexercised authority is insufficient to establish liability as an employer"); *Wirtz v. Pure Ice Company*, 322 F.2d 259, 262 (8th Cir. 1963) (defendant not an FLSA employer because even though "as the majority stockholder and dominant personality" in company, he "could have taken over and supervised the relationship between the corporation and its employees had he decided to do so," he "did not do so").[4]

2. Plaintiffs and their *amici* also suggest that out-of-circuit case law supports their expansive view of FLSA employer liability under which any corporate officer or owner who has general operational control is responsible for every employment decision the company makes. But not one case they cite supports that position. They instead rely on selective quotations from a handful of

[4] DOL's concern that "Catsimatidis's formulation would effectively reward delegation to subordinates even if the person at the top effectively determines the policies and corporate priorities that set the stage for the FLSA violations" (DOL Br. 20) is misplaced: in that situation the officer would have indirectly controlled the employees in question and would thus qualify as an FLSA employer. *See infra* at 10 n.5. Here, there is no evidence whatsoever that Catsimatidis exercised that kind of personal but indirect control over the employees in question.

FLSA cases recognizing that ownership interest or operational control may be *relevant* to the question of FLSA employer status. Appellees' Br. 28-34; NELP Br. 26; DOL Br. 16-18. None of the cases deemed ownership or general control sufficient to establish employer status. Rather, in every one, the defendants exhibited the sort of active, personal control over the particular employees in question that is absent in this case.[5]

For example, plaintiffs cite *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991), and *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983), for the propositions that "'operational control of significant aspects of the corporation's day to day functions'" and "significant ownership interest" make an individual an FLSA employer. Appellees' Br. 24, 29; *see id.* at 1. But in each of those cases the defendants enjoyed not just general operational control, but significant personal control over the employees in question. In *Dole*, the defendant actually "determined the amount of employee salaries," 942 F.2d at 966, and in *Donovan*, the defendants "were actively engaged in the management, supervision and

[5] NELP effectively concedes as much, acknowledging that "under the operational control inquiry, courts have held individually liable those persons who *used their control* over the corporation to make decisions that caused the corporation to fail to compensate employees in accordance with the FLSA." NELP Br. 25 (emphasis added). Likewise, DOL emphasizes that "control over the company's employees can be exercised indirectly" (DOL Br. 14), but that control must still be *exercised* and in relation to the *employees in question*. No such control exists here. Appellant's Br. 22-42; *infra* at 12-20.

oversight of ... employee compensation and benefits." 712 F.2d at 1511. In *Donovan*, one of the defendants "was personally responsible for allowing the company's workers' compensation insurance to lapse in derogation of its legal responsibility," and the other "personally supervised the cash flow of the company on a day to day basis[and] was personally involved in decisions about layoffs and employee overtime hours." *Id.*

Likewise, plaintiffs cite *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), and *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984), for the proposition that "'control over the purse strings" is "strong evidence of operational control." Appellees' Br. 29. But, again, in *Bonnette*, the defendants' control over the company's purse strings was not the basis for the court's conclusion of employer status. Rather, the defendants "controlled the rate and method of payment," "maintained employment records," "exercised considerable control over the structure and conditions of employment," and had "'periodic and significant involvement in supervising the … job performance'" of the employees in question. *Bonnette*, 704 F.2d at 1470. Similarly, the record in *Grim Hotel* included "the testimony of hotel managers and employees concerning [the defendant's] ultimate control over wages," and the defendant was the only one "who could authorize compliance with the Fair Labor Standards Act." 747 F.2d at 972 & n.7.

Plaintiffs also cite *Chambers Construction Co. v. Mitchell*, 233 F.2d 717 (8th Cir. 1956), for the proposition that an individual defendant was an "employer" because the corporation, "in practical effect, [was] subject to termination at his pleasure." *Id.* at 724. Yet again plaintiffs ignore critical facts: "The record show[ed] that the supervisors and home office force were hired by [the defendant] directly and the wages paid all employees were subject, in varying degrees, to his control." *Id.*[6]

The case law from other circuits is thus entirely consistent with this Court's decision in *RSR*: corporate officers, even those with ownership interests and general operational control, are not responsible for their company's employment decisions unless there is evidence that they exercised *personal control* over the employees in question. To determine whether such personal control exists, the proper test is the four-factor "economic reality" test set out in *RSR*. That test, applied to the undisputed record here, compels the conclusion that Catsimatidis was *not* plaintiffs' employer as a matter of law.

B. Under The Correct Legal Standard for Personal Liability Under The FLSA, Catsimatidis Was Entitled To Summary Judgment

As demonstrated in Catsimatidis's opening brief, not one of the four *RSR*

[6] Remarkably, plaintiffs even rely on *Wirtz*, which held that the defendant was *not* an FLSA employer, simply because the court noted in dicta that some hypothetical "combination of stock ownership, management, direction and the right to hire and fire employees" might theoretically establish FLSA employer status. 322 F.2d at 263.

"economic reality" factors indicates that Catsimatidis exercised the kind of personal control over employment decisions that creates personal liability for corporate FLSA violations. Appellants' Br. 23-39. Plaintiffs argue otherwise, asserting that "the undisputed evidence on each of the four factors in this case is stronger than evidence *RSR* held sufficient to satisfy those factors." Appellees' Br. 24. No. The record plaintiffs describe as "undisputed" flatly ignores almost all the evidence discussed in Catsimatidis's opening brief. And most of the "evidence" plaintiffs do cite either misstates the record, or is simply irrelevant, or both. The four *RSR* factors may not necessarily be exhaustive (Appellees' Br. 36), but there is no basis for finding employer status where *none* of the factors weighs in favor of employer status.

1. *Catsimatidis Did Not Have The Power To Fire Or Hire The Affected Employees*

The first factor is "the power to hire and fire the employees" in question. *RSR*, 172 F.3d at 139. Plaintiffs argue that this factor was satisfied in *RSR* "because the defendant there had hired a small number of 'mainly managerial staff,'" and "[t]he undisputed evidence here shows the same thing: that Catsimatidis hired and promoted company managers, including the head of the company's payroll." Appellees' Br. 38. In fact, the defendant in *RSR* was directly responsible for hiring the individuals "who were in charge of the" employees in question. 172 F.3d at 140. Here, the record evidence is that Catsimatidis was *not*

involved in hiring either the employees in question or the store managers who hired them. Indeed, he was not even involved in hiring (or firing) any of the district managers who hired the store managers who hired the employees in question. Appellant's Br. 23-24. Hiring the highest-level corporate executives cannot satisfy this inquiry if those executives have nothing whatsoever to do with hiring the employees in question.

Moreover, even if the hiring of those high-level company managers were relevant, plaintiffs dramatically overstate Catsimatidis's involvement in such decisions, as the record evidence they cite makes clear. First, plaintiffs cite Catsimatidis's own brief, which explained that "over the past decade, there is only *one* undisputed instance of a company employee being hired by Catsimatidis" and "*at most*" Catsimatidis hired "three or four employees, primarily for high-level management positions." Appellant's Br. 25, 28. Second, they cite deposition testimony that Catsimatidis "offered" Deborah Clusan a promotion to the position of director of payroll and HR. Notably, that deposition testimony said nothing about who actually made the promotion decision. JA-476. In the facts section of their brief, plaintiffs provide some additional citations, but the only one not already discussed in Catsimatidis's opening brief is testimony that Catsimatidis promoted someone from "district manager to vice president of all operations." JA-247-48. But again the testimony does not reveal who actually made the promotion

decision.[7]

Evidence that over the course of a *decade* Catsimatidis may have been involved in a few hiring and promotion decisions for high-level management positions is not remotely as strong as the evidence in *RSR* and is insufficient to undermine the undisputed evidence that Catsimatidis has never been involved in hiring the employees in question, or their supervisors, or even their supervisors' supervisors.[8] Thus, this factor weighs strongly against any conclusion of FLSA employer status.[9]

---

[7] DOL asserts that Catsimatidis was "consulted about several terminations." DOL Br. 25. That assertion misstates the record. In fact, Catsimatidis was *informed* about some terminations of "long-time employees" "as a courtesy," but the terminations happened even when Catsimatidis "wasn't happy about it." JA-1343; *see id.* at 1346 ("[Catsimatidis] wasn't happy about it, but he basically said, look, you guys are running the company, so I can't – I'm not going to tell you not to, although I'm not happy about it.").

[8] DOL asserts that two store managers—one Catsimatidis was "involved in hiring" and one he "promoted"—"supervised Gristede's store employees who worked in the same positions as the Plaintiffs." DOL Br. 25. DOL provides no citation for this assertion. In any event, as discussed in Catsimatidis's opening brief, the promotion occurred more than a decade ago, and the other employee, who was brought in as an "executive" to "oversee" two "problem stores," was actually *not* hired by Catsimatidis. Appellant's Br. 25-26 & n.5.

[9] Plaintiffs also argue that "the evidence was undisputed that Catsimatidis had authority to open and close stores, or even to shut down the company altogether." Appellees' Br. 38. But the broad authority to open or close a store is not the same thing as being able to hire or fire specific employees, or even classes of employees. In any event, even if this fact were relevant (and plaintiffs do not explain why it should be), plaintiffs overstate what the evidence shows in this regard. *See infra* at 16-17.

2. *Catsimatidis Did Not Supervise Or Control Employee Work Schedules Or Conditions of Employment*

The second factor is whether the defendant "supervised and controlled employee work schedules or conditions of employment." *RSR*, 172 F.3d at 139 (quotation omitted). In *RSR*, the defendant "assigned guards to cover specific clients," "gave [the guard's supervisor] instructions about guard operations, and forwarded complaints about guards to [their supervisor]." *Id.* at 137. Here, there is no evidence that Catsimatidis had any involvement in the day-to-day operations of the stores or the schedules and conditions under which store employees worked. Appellant's Br. 30-31.

On a broad greater-implies-the-lesser theory, plaintiffs argue that Catsimatidis's authority to "open and close entire stores" satisfies this factor because that involvement is greater than "just assigning employees to work locations." Appellees' Br. 39. But control over store openings and closings is irrelevant to control over individual employee work assignments, which is principally concerned with whether a corporate officer actually controlled the specific work conditions and schedules of employees. But even if this factor were relevant, plaintiffs overstate the evidence. The only citation they offer (elsewhere in the brief) is the district court's order. SA-50. That order, in turn, cites Catsimatidis's affidavit in a separate trademark case. *See id.* at 49-50. Even if it was proper for the court to rely on an affidavit submitted by neither party (*but see*

Appellant's Br. 19 n.3), that affidavit only addresses Catsimatidis's decision to open the "experimental" Gristede's Trader John's store. JA-3751-57. It says nothing about Catsimatidis's general authority to open and close stores.[10]

Plaintiffs also argue that Catsimatidis "authorized an application for wage subsidies and tax credits on behalf of Gristede's employees." Appellees' Br. 39. But all that evidence showed is that when "employees are coming off of Social Services, off of welfare, [the company is] entitled to some tax credits for employing them." JA-482. Even if it were relevant, all Catsimatidis did was sign the form. Nothing more. *Id.* at 482-83. Likewise, plaintiffs argue that Catsimatidis "signed at least three collective-bargaining agreements establishing employee wages and benefits." Appellees' Br. 39. But the undisputed evidence is that Catsimatidis did not participate in the collective bargaining negotiations for any agreements that he may have signed. JA-1804-08.

Finally, plaintiffs misquote Catsimatidis as testifying that he "has handled complaints from Gristede's workers' union representatives 'every week for as long as I could remember.'" Appellees' Br. 39 (citing JA-1876). In fact, Catsimatidis's

[10] DOL also cites deposition testimony from a Gristede's executive that Catsimatidis could shut down a store if he thought it appropriate. JA-1370. That statement presumably reflected nothing more than the executive's belief that Catsimatidis could make any "decisions as to how the company is run" by virtue of his ownership. *Id.* at 1329. DOL cites no evidence that Catsimatidis generally exercised this authority.

testimony was that "[t]he unions are in our offices mitigating various problems every week for as long as I could remember." JA-1876. He did not say that *he* was personally involved in resolving their problems; to the contrary, he said that he "wasn't involved in the last five, six years." *Id.*

3. *Catsimatidis Did Not Determine The Rate And Methods Of Payment Of The Affected Store Employees*

The third factor is whether the defendant "determined the rate and method of payment." *RSR*, 172 F.3d at 139 (quotation omitted). In *RSR*, the defendant not only "signed security guard payroll checks," but also "ordered a stop to the illegal pay practice of including security guards on 1099 forms as independent contractors." *Id.* at 140. Again, here, there is no evidence that Catsimatidis had any involvement in determining when or how much the employees in question were paid. Appellant's Br. 34-37.

Plaintiffs argue that this factor is satisfied because "Catsimatidis has personally set a companywide policy that 'if somebody works, they get paid.'" Appellees' Br. 40 (citing JA-469). That this is the most specific "policy" set by Catsimatidis that plaintiffs can identify speaks volumes about his role in the company, and especially his lack of control over the methods and rates of store employees' payment.

Plaintiffs also argue that "[o]n at least one occasion, Catsimatidis set up a meeting between management and a payroll company," *id.*, but not only did

Catsimatidis not participate in the meeting, he left it after advising the payroll company representatives that his colleagues were "the people that [they] need[ed] to do business with because they make the decisions for the company." JA-1452-55.[11] Renee Flores, who testified about that meeting, also testified that she had not been in any other payroll meetings with Catsimatidis. *Id.* at 1455.

Finally, plaintiffs argue that Catsimatidis's "signature appears on *all* employee payroll checks," Appellees' Br. 40-41, but they ignore the case law consistently holding that non-personal, electronic signatures do not support a finding of FLSA employer status. Appellant's Br. 36. Despite that case law, plaintiffs argue that, as in *RSR*, the auto-signatures show that Catsimatidis "'had the authority to sign paychecks.'" Appellees' Br. 41 (emphasis omitted). But in *RSR* the signature was *not* electronic and thus showed that the defendant could—and *did*—give personal attention to employee pay during the relevant period. There is no such evidence here.[12]

---

[11] Indeed, it is not even entirely clear from the record how exactly the meeting was set up. *See* JA-1453-54 ("Q. How did it come about that you – how did this meeting come about with this payroll company? A. I have no idea. Q. But you said that Mr. Catsimatidis had something to do with it? … A. I don't know that he had something to do with it. His secretary came to me and said, 'You have a meeting Thursday at 10 o'clock with Bob Zorn.'").

[12] DOL also notes that "[s]everal of the executives and managers reported directly to Catsimatidis" (DOL Br. 5), but DOL cites nothing to show that the reporting involved or affected store employees' working conditions.

4. *Catsimatidis Does Not Maintain Any Employment Records*

The fourth factor is whether the defendant personally "maintained employment records." *RSR*, 172 F.3d at 139. Here, the evidence shows that Catsimatidis does not maintain *any* employment records, let alone records for store employees. Appellant's Br. 38. As DOL candidly acknowledges, the "fourth factor is not met" in this case. DOL Br. 27 n.6.

Plaintiffs are not so forthright. They insist that "[u]nlike the defendant in *RSR*, Catsimatidis works in the same office where employment records are kept, and he was responsible for promoting and supervising the head of the company's payroll." Appellees' Br. 41. Nowhere does *RSR* suggest that such *constructive* control would be sufficient to satisfy this factor, and plaintiffs point to no other case so holding. Indeed, if plaintiffs were correct, in any case in which all of a company's departments are housed in one location, *all* corporate officers who work out of that location would "constructively" maintain the company's employment records. No precedent construes the FLSA so broadly.

* * * *

As the foregoing discussion shows, Catsimatidis was not an employer under this Court's "economic reality" test. Plaintiffs argue that this Court should not "disregard[] relevant evidence that fails to conform to a narrow, four-factor test," Appellees' Br. 41, and point to the observation in *RSR* that the defendant's

"authority over management, supervision, and oversight of RSR's affairs in general" was relevant, 172 F.3d at 140. But in *RSR*, this Court *also* held that three of the four "economic reality" factors favored employer status. *Id.* at 139-40. Plaintiffs cite no case finding FLSA employer status where *none* of those factors was satisfied. Even if there were evidence that Catsimatidis had general authority over Gristede's affairs (and, as discussed below, the evidence on that score is considerably weaker than plaintiffs suggest, *see infra* at 22-27), that evidence does not overcome the evidence on the "economic reality" factors. Catsimatidis accordingly is entitled to summary judgment, and the decision below should be reversed.

C. At A Minimum, Disputed Issues Of Fact Preclude Summary Judgment In Plaintiffs' Favor

As shown in the prior section, Catsimatidis submits that the only reasonable conclusion from the summary judgment record is that he did not exercise personal responsibility over store employees' working conditions and thus is not personally liable if those conditions violated the FLSA. At minimum, however, there are disputed issues of material fact, and Catsimatidis is thus at least entitled to remand for a trial on this issue. Plaintiffs argue that "summary judgment for plaintiffs is appropriate when 'the record as a whole compel[s] the conclusion' that the defendant is an employer even if 'isolated factors point against [it].'" Appellees' Br. 21 (citing *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 (2d Cir. 2003)). But

that only means that not *every* factor must weigh in favor of employer status if the record as a whole compels the conclusion that the defendant is an employer. It does not mean that the district court may resolve the disputed "historical findings of fact that underlie each of the relevant factors." *Zheng*, 355 F.3d at 76; *see Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 144-45 (2d Cir. 2008) (summary judgment determinations are rare where inquiry is highly "fact-intensive"); Appellant's Br. 40-41. Yet that is exactly what the district court did below—and what plaintiffs ask this Court to do on appeal.

Significantly, this is not a case in which there are just "isolated factors" that point against employer status. Rather, there is substantial uncontradicted evidence on every factor of this Court's "economic reality" test establishing that Catsimatidis did not control the employees in question and thus was not their "employer" within the meaning of the FLSA. As shown, that evidence refutes personal liability as a matter of law, but even if it does not suffice to eliminate a jury question on the issue, it certainly suffices to *create* one.

D. Even Under Plaintiffs' "Operational Control" Test, Disputed Issues Of Material Fact Preclude A Grant Of Summary Judgment In Plaintiffs' Favor

Even if overall "operational control" were the only question, disputed issues of fact would still preclude granting summary judgment to plaintiffs. Plaintiffs say that in *RSR* this Court "held that a 50% owner and chairman of the board had

'operational control' based on far less day-to-day involvement" than Catsimatidis. Appellees' Br. 23; *see id.* at 26. As an initial matter, *RSR* was decided *after a bench trial* and thus provides no support for the argument that the record there (or the record here) is sufficient to support a finding of "employer" status *as a matter of law* at summary judgment. Further, as previously detailed, the *RSR* defendant's day-to-day involvement with affected employees was substantial, *see supra* at 13-18, and it was that involvement—*not* his ownership status or title—that was the basis for this Court's conclusion that he was an FLSA employer.

In any event, plaintiffs cannot point to evidence that Catsimatidis's control was anywhere close to the control that existed in *RSR*. Plaintiffs primarily emphasize Catsimatidis's titles, ownership status, and ultimate control over financial matters.[13] They note that he refers to himself as the "'boss'" and "serv[es] as the company's 'public face'" (Appellees' Br. 26),[14] and they point out that he could have the company file for bankruptcy and was involved with seeking a letter of credit to facilitate paying for the judgment in this case (*id.* at 29). But

[13] Because *RSR* was based on the defendant's active role in managing the company and controlling the employees in question, plaintiffs' argument that Catsimatidis has more titles than the *RSR* defendant (Appellees' Br. 26) and owns more of the company (*id.* at 30) is simply beside the point.

[14] Plaintiffs make much of the fact that Catsimatidis has referred to himself as the plaintiffs' "employer." Appellees' Br. 14. But Catsimatidis's colloquial use of the term "employer" obviously does not establish that he is their "employer" under the pertinent FLSA legal standards.

none of that evidence suggests that he is actually involved in *managing* or *controlling* the company on a day-to-day basis.

Plaintiffs attempt to paint Catsimatidis as a micromanager who is actively involved in every detail of his company's management. But the evidence they cite reveals the true picture: although Catsimatidis occasionally expresses preferences on miscellaneous aspects of the company's operations (none of which relates to employment in any way), he plays no systematic or comprehensive role in managing his company and has instead delegated those responsibilities to others.

For example, plaintiffs assert that Catsimatidis "'routinely reviews' the company's financial reports," citing the district court's opinion and Catsimatidis's deposition testimony. Appellees' Br. 8; *see id.* at 27. Although the district court did conclude that Catsimatidis "routinely reviews financial reports," SA-52, the deposition testimony does not support that conclusion. In fact, Catsimatidis testified that he was not sure why he was "CC'd on a lot of reports": "I couldn't even begin to remember. They feel it's necessary just to send me copies, I guess." JA-1849; *see id.* at 1845 ("Q. This is a weekly update for October 2, *2002*. Why are you on the CC line of this document? … A. I guess it's talking about merchandising. Maybe he was trying to, you know, just let me know what merchandising things he was doing. Q. Have you ever gotten other e-mails that contained weekly updates from Mr. Lang? A. Not for a while, but I used to get

them. I haven't seen them for a while." (emphasis added)). He also testified that he has not received "payroll report[s]" "in the last 6 years, 10 years." *Id.* at 1850. Although he does review profit-and-loss statements four times a year, that hardly suggests that he is actively involved in managing the company on a day-to-day basis.

Plaintiffs argue that "[t]he company's weekly merchandising and operations meetings ... take place in [Catsimatidis's] office, where [he] can listen to the discussion and 'yell out' merchandising and sales instructions to the participants." Appellees' Br. 8. But, in fact, although Catsimatidis "sometimes … hear[s] things [t]hat's going on in [the meetings]" because they are held in the same physical space as his office, he does not actually attend them. JA-1798 ("I haven't sat in on those meetings in a while, long time."); *id.* at 1816 ("I'm not copied when they are having the meetings. In other words, they have the meetings amongst themselves."). Plaintiffs also argue that Catsimatidis "'yell[s] out'" instructions whenever he wants," but the record evidence reveals that those "instructions" were more motivational pep talk than management direction. As Catsimatidis testified, he would sometimes "yell out to go out and do more sales." *Id.* at 1817; *id.* at 1819 ("That's my focus, drive sales, drive product, get more sales out of the stores.").

To be sure, Catsimatidis would sometimes step in with suggestions about

"how best to display potato chips and what kinds of fish to sell in a particular store," and he decided to "launch a new 'experimental' brand of store, which he chose to name 'Gristede's Trader John's,' after himself." Appellees' Br. 25. All that evidence suggests, however, is that Catsimatidis would occasionally provide very high-level creative ideas or provide his opinions on minor merchandising issues when they happened to come to his attention. They do not establish that he was generally engaged in the day-to-day operations of his company, not to mention that he was engaged in ways specific to the employment of store employees.

Finally, plaintiffs argue that even if Catsimatidis is not involved in running the company, it does not matter: "Catsimatidis does not *want* to run the company himself, so he *chooses* to abide by an organizational chart," but "no legal principle would prevent him from changing or bypassing the corporate hierarchy if it suited his purposes." Appellees' Br. 27-28. That may be true, but it is also irrelevant. Plaintiffs point to no case in which a court has recognized FLSA employer liability simply because a corporate officer *could* control the company or the employees in question. Instead, the question is whether the corporate officer *did* control the employees in question. *See* Appellant's Br. 20-22; *supra* at 9. Were it otherwise, virtually every corporate officer could be held liable for any action his company takes. Again, that is not the law.

The record evidence, in short, simply does not compel the conclusion that

Catsimatidis was the plaintiffs' employer, even under plaintiffs' (erroneous) test for FLSA liability. The district court ignored all of this record evidence and, in so doing, turned the proper summary judgment standard on its head. *See* Appellant's Br. 11-12. At minimum, the decision of the district court should be vacated, and this case remanded for trial.

II. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS UNDER THE NEW YORK LABOR LAW BECAUSE THERE IS NO PERSONAL LIABILITY FOR CORPORATE OFFICERS

Plaintiffs' claim that Catsimatidis is personally liable under the NYLL fails, as well. The NYLL does not impose personal liability against corporate officers. Appellant's Br. 43-45. Plaintiffs argue that although the New York law does not permit suits against corporate officers as such, it does permit suit when plaintiffs can show that the corporate officer is an "employer." Appellees' Br. 42. But the New York courts have suggested otherwise: "Although the definition in subdivision 3 of section 190 of 'employer' provides no clue, we have recently held that the provisions of section 198-a subjecting corporate officers to criminal sanctions for violation of the article indicates a legislative intent that they *not* be subject to civil liability." *Patrowich v. Chem. Bank*, 473 N.E.2d 11, 13 (N.Y. 1984). Plaintiffs cite *Ovadia v. Office of Industrial Board of Appeals*, 918 N.Y.S.2d 56, 57 (N.Y. App. Div. 2011), for the proposition that the "'test for determining whether an entity or person is an "employer" is the same under New

York State and federal law.'" Appellees' Br. 42. But on appeal, the New York Court of Appeals reversed the Appellate Division's decision, holding that it "need not resort to federal precedent to resolve this issue." *Ovadia v. Office of the Indus. Bd. of Appeals*, 19 N.Y.3d 138, 145 (2012). And plaintiffs cite no other New York state court decisions in support of their position.[15]

In any event, even if this Court were to conclude that the NYLL treats "employer" status the same as the FLSA, summary judgment was still improper as to plaintiffs' NYLL claims for all of the reasons it was improper as to the FLSA claims: the summary judgment record demonstrates that Catsimatidis was not an "employer," or, at minimum, there are genuine disputes of material fact. *See supra* at 12-20, 22-26. Accordingly, summary judgment should not have been entered for plaintiffs on personal liability under the NYLL.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

[15] Plaintiffs do cite two decisions of the New York Industrial Board of Appeals, but those agency decisions cannot trump a New York Court of Appeals decision.

Dated: October 25, 2012

Respectfully submitted,

/s Jonathan D. Hacker

WALTER DELLINGER
JONATHAN D. HACKER
BRIANNE J. GOROD
JOANNA NAIRN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001
(202) 383-5300

Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14-point font.

Dated: October 25, 2012

/s Jonathan D. Hacker
Jonathan D. Hacker

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012, I electronically filed the Reply Brief of Defendant-Appellant John Catsimatidis with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: October 25, 2012

/s Brianne J. Gorod
Brianne J. Gorod