

No. 11-4035-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

RAYMOND ALLEN, LLANOS BLAS, NABIL ELFIKY, MOHAMMED DABASH,
CARLOS MARTINEZ, LUIS MORALES, STEVE GROSSMAN, FRANKLYN

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF FOR THE SECRETARY OF LABOR AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

RACHEL GOLDBERG
Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

COLLADO, DAVID ADLER, DINO A. ZAINO, PATRICK LABELLA, ROBERT
MASTRONICOLA, ANTHONY BROOKS, VICTOR BENNETT, CANDIDO MOREL,
JOSE MARTINEZ, WAYNE HENDRICKS, HAROLD HORN, TROY MILLER, OUSMANE
DIATTA, ELLIOT STONE, TINA RODRIGUEZ, GABRIEL KARAMANIAN,
Plaintiffs,

BRIAN HOMOLA, ANNA GARRETT, NELSON BETANCOURT, JOSE DELACRUZ, YURI
LAMARCHE, MICHAEL GROSECLOSE, RODOLFO DELEMONS, 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,

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 CATSIMATIDIS,
Defendant-Appellant.

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**BRIEF FOR THE SECRETARY OF LABOR AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Plaintiffs-Appellees. For the reasons set forth below, the district court correctly concluded that Defendant John Catsimatidis is an employer under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, subject to individual liability.

STATEMENT OF IDENTITY, INTEREST,
AND SOURCE OF AUTHORITY TO FILE

The Secretary administers and enforces the FLSA, see 29 U.S.C. 204, 211(a), 216(c), 217, and thus has a substantial interest in ensuring that the FLSA's definition of employer is interpreted accurately and consistently with the broad remedial purpose of the FLSA. It is crucial to effective enforcement of the FLSA that, in addition to the companies that employ employees, individuals who act as employers be held personally liable for violations of the FLSA. Employees who are owed backwages, liquidated damages, and attorney's fees and costs should not be denied recovery of those amounts when the company, for whatever reason, is not able to pay the judgment.

This brief is filed in accordance with Federal Rule of Appellate Procedure 29(a), which permits an agency of the United

States to file an amicus-curiae brief without the consent of the parties or leave of the court.

STATEMENT OF THE ISSUE

Whether an individual who is the sole owner of a company, its president, chief executive officer, and chairman of the board, and who had ultimate authority to exercise control over significant aspects of the company's operations and actually exercised such control, was an employer under the FLSA and thus subject to individual liability.

STATEMENT OF THE CASE

A. Statement of Facts

1. Plaintiffs are current and former employees of Gristede's grocery stores who were not paid overtime for all the hours in excess of 40 hours per week that they worked. JA-130, 143, 152, 157, 161, 165, 169, 176, 189, 205, 222. The Gristede's grocery stores where the Plaintiffs work or worked are operated and owned by Namdor, Inc., which is owned by Gristede's Foods, Inc. JA-279, 144-43, 1016. Catsimatidis is the chairman of the board, president, and chief executive officer of Gristede's Foods, Inc. SA-50; JA-275, 356-57, 1016. Gristede's Foods, Inc. is owned by United Acquisitions Corporation. JA-277-79. United Acquisitions Corporation in

turn is owned by Red Apple Group. JA-277.¹ Catsimatidis is the sole owner of Red Apple Group. JA-277-78.

Catsimatidis owns the building at 823 11th Avenue in New York City where Gristede's' corporate headquarters are located, including its Human Resources and Payroll Departments. JA-282-83, 287-88, 1333. Catsimatidis's office is also in this building, on the same floor as Gristede's' Human Resources and Payroll Departments as well as the offices of several Gristede's managers and executives. SA-52; JA-282-88, 332-33. During the relevant period of liability, Catsimatidis worked there four to five days per week. JA-1334.²

2. Catsimatidis had ultimate control over Gristede's' finances. He routinely reviewed Gristede's' financial reports. SA-52; JA-421-22, 599, 835-37, 841-44, 848, 1018. He controlled Gristede's' banking and real estate matters, deciding on new store locations and whether to enter lease agreements for such locations. SA-52; JA-293, 1366, 1375. Catsimatidis had

¹ These corporate entities are collectively referred to as "Gristede's."

² The liability period for Plaintiffs' FLSA claims is from 2001 to 2009. See *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 453, 465 (S.D.N.Y. 2008) (applying three-year statute of limitations to FLSA claims, which were filed in 2004, and noting that the certified class would run through the date of the final judgment). All the facts outlined below are applicable or occurred during this period. Although many of the facts are still applicable, facts after the period of liability are not relevant to this appeal.

authority to close or sell Gristede's stores. SA-50; JA-1370. He signed most checks, such as checks to vendors or for general corporate matters, on behalf of Gristede's. JA-349. Robert Zorn, Catsimatidis's deputy and executive vice president at Red Apple Group, indicated that Catsimatidis had ultimate authority to do whatever he wanted in regard to Gristede's because he owns one hundred percent of the company. JA-1329, 1369. No one was above Catsimatidis in Gristede's' hierarchy, and no one could override his decisions. JA-428, 1329.

Catsimatidis's control over Gristede's' finances included overseeing Gristede's' payroll. He regularly received quarterly profit-loss statements that contained payroll information and weekly emails that contained payroll updates. SA-52; JA-835-37, 841-44, 848. In a 2001 email regarding payroll practices from a store manager to Deborah Clusan, Gristede's' Director of Human Resources and Payroll, which was copied to Catsimatidis's email address, the store manager said that "John C. wanted me to point this out to you." JA-490-94. In 2009, Catsimatidis set up a meeting with a payroll company and delegated authority to Zorn and Renee Flores, the Executive Director of Gristede's' Human Resources and Payroll Departments, to deal with the payroll company representatives. JA-1452-53, 1456-57. Catsimatidis's electronic signature appeared on all of the payroll checks that the Plaintiff-employees received. SA-51; JA-1019.

3. Catsimatidis was involved in hiring and firing. He hired or promoted several managers and executives within the various corporate entities outlined above. SA-52. He hired Zorn, Catsimatidis's deputy and the executive vice president at Red Apple Group, in 2007. JA-1322-23, 1351. Catsimatidis promoted Galo Balseca from district manager to vice president of operations in 1999 or 2000. JA-229-30, 247-48. In 2008, Catsimatidis sent an email to all Gristede's stores announcing the promotion of Renee Flores to Executive Director of Human Resources and Asset Management and indicating that she would have management responsibility for Gristede's' Human Resources and Payroll Departments. JA-1486. He also announced in this email the hiring of Walter D'Agostino to manage various stores. *Id.* Catsimatidis had input into hiring D'Agostino as a store manager. JA-1341-42. Mitchell Moore testified that Catsimatidis promoted him from night manager to store manager in 2000 or 2001. JA-1412-13. Moreover, Zorn testified that Catsimatidis had authority to make any hiring or firing decision for Gristede's. JA-1359-60, 1337-38, 1348. Catsimatidis was consulted about certain employee terminations. JA-1341-50.

4. Catsimatidis exercised authority over several aspects of the conditions of employment. Several of the executives and managers reported directly to Catsimatidis. Specifically, Zorn, Charles Criscuolo, Gristede's Foods, Inc.'s senior executive

vice president and chief operations officer who ran Gristede's' day-to-day operations, and Kishore Lahl, the chief financial officer, reported directly to Catsimatidis. JA-286-87, 379-80, 1322-23, 1351. In the 2008 email from Catsimatidis to all Gristede's stores, Catsimatidis said that he asked Flores, who had just been promoted, to evaluate specific areas in human resources, including salary administration and the administration of Gristede's' medical benefits program. JA-1486. In this same email, he indicated that D'Agostino, the newly-hired store manager, would report to Catsimatidis and Criscuolo. *Id.* Managers and employees regarded Catsimatidis as the "boss" or "head honcho." SA-52; JA-315-16, 456, 485-86, 583-600.

Moreover, Catsimatidis signed at least three labor contracts with unions on behalf of Gristede's, and Criscuolo and Jack Squicciarini, vice-president of corporate security at Red Apple Group who reported to Criscuolo, signed others. JA-305, 361, 496-581. In addition, Squicciarini was involved in negotiating labor contracts for Gristede's. JA-299-305. Catsimatidis represented Gristede's on the board of the union pension fund. JA-296. He personally knew and interacted with union leaders, whom he believed would call him if problems arose concerning how employees were being paid. JA-879-83. He stated

that they were "in our offices mitigating various problems every week for as long as I could remember." JA-883.

5. Catsimatidis was also involved in significant aspects of Gristede's' business operations. Catsimatidis sat in on and participated in operations meetings. JA-820-21. He reviewed operations sales reports. JA-1018. He received weekly gross margin reports from all departments dealing with perishables. JA-848. He also regularly visited individual stores, albeit with less frequency in recent years, in addition to attending grand openings. JA-583-600, 830-31, 1351-52. During his store visits, Catsimatidis advised employees and managers what merchandise should be purchased, how merchandise should be displayed, which merchandise should be promoted, what space should be devoted to specific merchandise, how merchandise should be priced, what sales strategies should be pursued, as well as how store appearances and cleanliness should be kept up. SA-50; JA-293, 308-09, 312-13, 417-18, 583-600, 888-89, 1351-52, 1415-17. He handled relationships with vendors. JA-294. He was similarly involved in customer relations, including receiving copies of customer complaints and instructing store managers how to handle those complaints. JA-314-18. Catsimatidis stated that staff took customer complaints more seriously if they knew that he was aware of them. JA-315.

B. The District Court's Decision

On September 9, 2011, the district court granted Plaintiffs' motion for partial summary judgment, concluding that Catsimatidis is an employer within the meaning of the FLSA and therefore is jointly and severally liable for Plaintiffs' damages. SA-49-53. The court noted that the economic realities test looks to whether the individual has the power to hire and fire employees, supervise and control employee work schedules, determine the rate and methods of payment, and maintain employment records. SA-50. The court further noted, however, that under this Court's precedent, the economic reality should be based on all of the circumstances so as to avoid an overly legalistic and narrow definition of employer under the FLSA. SA-50 (citing *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999)). Citing this Court's decision in *RSR* for the principle that an individual need not exercise direct control over his employees every day in order to be an employer, the court rejected Catsimatidis's argument that he was not an employer under the FLSA because he was not directly involved in supervising or controlling the employees who had FLSA claims. SA-50-51.

Applying the economic realities test, the district court concluded that Catsimatidis has absolute control over Gristede's, thus making him an employer under the FLSA. SA-49-

51. The court concluded "there is no aspect of Gristede's operations from top to bottom and side to side which is beyond Mr. Catsimatidis's reach. There is no area of Gristede's which is not subject to his control, whether he chooses to exercise it." SA-53. The court found it significant that Catsimatidis signed all paychecks to the Plaintiffs, regardless of the fact that he did so with an electronic signature. SA-51. It also found it significant that he had hired managerial employees, and therefore it was less significant that he had not hired any of the Plaintiffs. *Id.* The court found several other facts as evidence of Catsimatidis's operational control: Catsimatidis is the sole owner, as well as the president and chief executive officer, of Gristede's; he has the power to close or sell Gristede's stores; he routinely reviews Gristede's' financial reports; he works in the Gristede's' corporate office and generally presides over Gristede's' day-to-day operations; and his employees view him as being in charge. SA-50-52. In its analysis, the court relied, in part, on an affidavit that Catsimatidis filed in 2009 in an another case -- a trademark action -- in which he asserted that he has the right and authority to open and close stores, set prices for sale, select store décor, and control store advertising. SA-49-50. The court commented that, looking at the totality of the circumstances under the economic realities test, it does not

matter that Catsimatidis delegated powers to others; “[w]hat is critical is that Mr. Catsimatidis has those powers to delegate.” SA-52.

SUMMARY OF ARGUMENT

An individual who exercises significant control over a company’s employees and its operations is an employer under the FLSA. To determine whether an individual is an employer, this Court focuses its inquiry on the economic realities of the situation, which includes, but is not limited to, four factors: whether the individual (1) had the power to hire and fire the employees; (2) supervised and controlled the employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. In analyzing these factors, an individual’s indirect control over the employees is no less relevant than his direct control. Moreover, while these four factors can be sufficient to establish an individual’s status as an employer under the FLSA, they are not necessary to do so. Because the economic realities must be based on all the circumstances, the individual’s operational control over the corporation as a whole, even if exercised only occasionally, is also relevant. Thus, the totality of the circumstances must be considered, so as to avoid applying a narrow legalistic definition of who is an employer under the FLSA.

In this case, John Catsimatidis, the sole owner, president, chief executive officer, and chairman of the board of the parent company of the Gristede's grocery stores, was an employer under the FLSA because he possessed the power to control all Gristede's employees, which necessarily included the Plaintiffs, and exercised that power, and because he exercised pervasive control over Gristede's' operations as a whole. He had ultimate authority and exercised such authority over significant aspects of Gristede's' finances, including payroll, and thus had a role in determining the rate and method of payment of employees. He had the power to hire and fire employees, and exercised that power by hiring and promoting several Gristede's managers and executives and by being consulted regarding terminations. He also exercised direct and indirect control, through his supervision of managers and executives, over the conditions of employment, such as in his dealings with the unions. Finally, Catsimatidis exercised significant and pervasive control over the company's business operations, from participating in operations meetings and reviewing operations sales reports to advising employees about the purchase and display of merchandise. Significantly, he directly supervised the chief operations officer in charge of Gristede's' day-to-day operations.

Regardless whether Catsimatidis exercised his control only occasionally or only indirectly controlled Gristede's employees, the totality of the circumstances supports the district court's conclusion that Catsimatidis was an employer under the FLSA subject to individual liability. To hold otherwise would ignore the economic reality of how Gristede's actually operated, with Catsimatidis as the central person in charge, and would undermine enforcement of the FLSA.

ARGUMENT

JOHN CATSIMATIDIS WAS AN EMPLOYER UNDER THE FLSA BECAUSE HE HAD THE ULTIMATE AUTHORITY OVER GRISTEDE'S EMPLOYEES AND ITS OPERATIONS AS A WHOLE AND EXERCISED THAT AUTHORITY

A. An Individual Who Exercises His Authority to Control a Company's Employees and Operations Is an Employer Under the FLSA.

1. Section 16(b) of the FLSA makes "any employer" who violates sections 6 or 7 of the FLSA liable to the employer's employees for unpaid minimum wages or overtime compensation, an equal amount as liquidated damages, and any reasonable attorney's fees and costs awarded by the court. 29 U.S.C. 216(b); see 29 U.S.C. 206, 207. An employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" 29 U.S.C. 203(d). The definition of person includes an individual. See 29 U.S.C. 203(a). Thus, under the FLSA, it is well established that an individual can be an employer liable for backwages, liquidated

damages, and attorney's fees and costs. See, e.g., *RSR*, 172 F.3d at 139-40; *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984); *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983); *Chambers Const. Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956).

The Supreme Court has described the FLSA's definition of employer as "expansive[.]" *Falk v. Brennan*, 414 U.S. 190, 195 (1973); cf. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (the FLSA "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category"). An employer is defined more broadly under the FLSA than under traditional common law. See *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993); *Elliott Travel & Tours*, 942 F.2d at 965. Given the remedial purpose of the FLSA, this Court has noted that the FLSA "warrants an expansive interpretation of its provisions[.]" *RSR*, 172 F.3d at 139; see *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir. 2008) ("In identifying the persons or entities who qualify as 'employers' [,] . . . statutory definitions sweep broadly."). Whether a person is an employer under the FLSA is ultimately a question of law. See

Zheng v. Liberty Apparel Co., 355 F.3d 61, 76 (2d Cir. 2003);
Elliott Travel & Tours, 942 F.2d at 965.

2. In determining whether an individual is an employer under the FLSA, "the overarching concern is whether the [individual] possessed the power to control the workers in question, with an eye to the 'economic reality' presented by the facts of each case[.]" *RSR*, 172 F.3d at 139. This economic realities test in individual employer cases includes, but is not limited to, four factors: whether the individual (1) had the power to hire and fire the employees; (2) supervised and controlled the employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. *See id.* (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)). No one factor is determinative. *See id.*

Moreover, control over the company's employees can be exercised indirectly. This Court in *RSR* rejected the argument that an individual must directly control the employees at issue in order to be an employer under the FLSA. *See* 172 F.3d at 140. The Fifth Circuit similarly concluded that an individual who "indirectly controlled many matters traditionally handled by an employer in relation to an employee (such as payroll, insurance, and income tax matters)" is an employer under the FLSA. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir. 1983)

(emphasis added).³ This interpretation is in harmony with the statutory language defining “employer,” which contemplates that an employer may indirectly control his employees. See 29 U.S.C. 203(d) (defining employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee”) (emphases added).

In looking at the economic realities, this Court instructs that the totality of the circumstances must be considered. “Since economic reality is determined based upon all the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition.” *RSR*, 172 F.3d at 139 (emphasis in original); see *Zheng*, 355 F.3d at 69 (“[N]either *Carter* nor *Herman* [*v. RSR*] supports the application of a rigid four-part test” in determining whether an entity is an employer.). The factors a court should consider in determining if an individual falls within the FLSA’s definition of employer must be “sufficiently

³ A recent Fifth Circuit case does not alter that circuit’s broad interpretation. The Fifth Circuit concluded in *Gray v. Powers*, 673 F.3d 352, 355-56 (5th Cir. 2012), that an individual was not an employer under the FLSA merely based on his status as a shareholder of the business and his participation in hiring the manager who supervised the employee at issue because the individual did not exercise any operational control over the business. The decision in *Gray* is consistent with *Sabine Irrigation* because in *Sabine Irrigation* the individual exercised indirect control over matters traditionally handled by an employer in relation to an employee, whereas there was no evidence in *Gray* that the individual exercised direct or indirect control over such matters.

comprehensive and flexible to give proper effect to the broad language of the FLSA.” *Barfield*, 537 F.3d at 143 (citing *Zheng*, 355 F.3d at 75-76). Consistent with the Court’s dictate that the totality of the circumstances be considered, this Court in *RSR* relied on the individual’s general operational control as a relevant factor, in addition to the four factors outlined above, showing that the individual was an employer. See 172 F.3d at 140.

Furthermore, in considering the totality of the circumstances, this Court cautioned that the individual does not need to monitor employees continuously or have absolute control over employees to be an employer. See *RSR*, 172 F.3d at 139.

The Court stated:

[S]uch [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.

Id. (emphasis added) (internal quotation marks omitted).

3. This Court’s precedent is consistent with that of several other circuits, which have similarly relied on an individual’s operational control over the corporation as a whole in determining whether the individual is an employer under the FLSA. The Sixth Circuit stated 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[.]'" *Elliott Travel & Tours*, 942 F.2d at 965 (quoting *Agnew*, 712 F.2d at 1511).⁴ The Sixth Circuit made clear that the individual does not need to have absolute or exclusive control; he "need only have operational control of significant aspects of the corporation's day to day functions." *Id.* at 966 (emphasis in original) (internal quotation marks omitted). Thus, in *Elliott Travel & Tours*, the Sixth Circuit concluded that an individual was an employer, in part because he controlled significant aspects of the

⁴ The First Circuit has since read *Agnew* as requiring not only that the individual have operational control of significant aspects of the company's functions to be an employer under the FLSA, but also that the individual have been personally involved in causing the company to violate the FLSA, such as controlling the purse-strings or making corporate policy about compensation practices. See *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677-78 (1st Cir. 1998). No other circuit has adopted the First Circuit's requirement that the individual be involved in causing the company to violate the FLSA. In his appellate brief, Catsimatidis cites *Saaso v. Cervoni*, 985 F.2d 49, 50 (2d Cir. 1993), to suggest that this Court has adopted this position. Def's Br. at 17, 20. *Saaso*, however, is inapposite. It is a case analyzing the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. 1002 *et seq.* In comparing the definition of employer in ERISA and the FLSA, the court merely noted that the First Circuit in *Agnew* imposed FLSA liability on a corporate officer who was personally responsible for making (or not making) the required payments to keep the company running. *Saaso*, 985 F.2d at 50 (citing *Agnew*, 712 F.2d 1510-11). This Court in *Saaso* did not establish this as a requirement to individual liability as an employer under the FLSA.

corporation's day-to-day functions, including determining employees' salaries. See *id.*

The case law of the Eleventh and Eighth Circuits addressing this issue is not inconsistent with this Court's conclusion in *RSR* that control may be exercised only occasionally. The Eleventh Circuit requires that, for a corporate officer to be an employer, the officer must either be involved in the day-to-day operations of the company or have direct responsibility for the supervision of the employees at issue. See *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008) ("[U]nexercised authority is insufficient to establish liability as an employer."). Similarly, the Eighth Circuit requires that the individual actually exercise control over the relationship between the company and its employees. See *Wirtz v. Pure Ice Co.*, 322 F.2d 259, 262-63 (8th Cir. 1963) (the fact that the majority stakeholder could have supervised the relationship between the company and its employees "is beside the point as long as he did not do so"). These cases, like *RSR*, require that the officer have actually exercised control over employees or general operations, but not that the officer necessarily have done so on a continuous basis. Thus, neither circuit's case law contradicts this Court's statement in *RSR* that control, even if exercised only occasionally, may be

sufficient to establish an individual's status as an employer under the FLSA.

4. Catsimatidis argues on appeal that exercising general control over operations is insufficient to establish employer status. Def's Br. at 15-18. Instead, he argues, the economic realities test should examine the "operational relationship" between the affected employees and the individual. *Id.* Catsimatidis's argument is not consistent with this Court's analysis in *RSR*. While this Court stated in *RSR* that the inquiry should focus on whether the individual possessed the power to control the employees at issue, this Court also emphasized that the economic reality should be based on the totality of circumstances and "any relevant evidence" should be considered to avoid confining the test to a "narrow legalistic definition." 172 F.3d at 139. Indeed, this Court explicitly rejected an argument similar to the one Catsimatidis makes here. Specifically, the company chairman in *RSR* argued that evidence of his authority over management and his supervision and oversight of the company's general affairs was irrelevant; rather, only his direct control over the employees at issue should be considered. *See id.* at 140. This Court rejected that argument, stating that it "ignores the relevance of the totality of the circumstances" in determining the individual's operational control of the employment of the employees. *Id.*

Catsimatidis also argues that the court's inquiry should specifically focus on whether the individual exercised personal, operational responsibility for the acts that violated the FLSA. Def's Br. at 15-18. There is no support for Catsimatidis's proposition under this Court's precedent. In *RSR*, this Court did not require that the company chairman be personally involved in the FLSA violations as a precondition to concluding that he was individually liable as an employer. Moreover, 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. Thus, in determining an individual's status as an employer under the FLSA, the inquiry should focus on the employer's general authority over his employees and operations as a whole rather than the employer's culpability for the FLSA violations.

5. The facts of *RSR* are instructive. This Court concluded that the company chairman, Portnoy, qualified as an employer under the FLSA. See 172 F.3d at 140-41. While Portnoy did not hire the employees at issue, he hired managers who supervised the employees, which the Court described as "a strong indication of control." *Id.* at 140. He occasionally supervised and controlled employee work schedules and locations of assignments, revised the employment application form, referred potential

employees to the company, and on one occasion ordered a payment practice stopped due to his concern that it did not comply with the FLSA. See *id.* Portnoy signed payroll checks on three occasions. See *id.* at 137. Moreover, he controlled the company's finances, and therefore had the authority to unilaterally dissolve the company if he so chose. See *id.* at 136. He was the only principal with bank credit, signed for all loans, approved purchases, and leased vehicles on his personal credit. See *id.* In addition, working from a branch office rather than the company's main office, Portnoy frequently gave managers instructions on conducting business and he kept apprised of operations by receiving periodic reports from employees. See *id.* at 136-37. Employees viewed him as the "boss" of the company. See *id.* at 137. Portnoy represented himself as having such authority by using his name in sales literature and representing to potential clients that he controlled operations. See *id.*

Others in the company, however, had primary responsibility for hiring and firing the employees at issue, schedules, assignments, supervising and monitoring employee performance, setting pay rates, preparing payroll, and maintaining company files. See *RSR*, 172 F.3d at 136, 140. Thus, although Portnoy was not the direct supervisor of the employee security guards at issue, he exercised sufficiently broad authority over the

company to make him an employer under the FLSA. See *id.* at 136; accord, *Elliot Travel & Tours*, 942 F.2d at 966; *Grim Hotel*, 747 F.2d at 972; *Sabine Irrigation*, 695 F.2d at 193-95.

B. The Totality of the Circumstances Shows that Catsimatidis Was Plaintiffs' Employer.

Catsimatidis exercised broad and pervasive control over Gristede's during the relevant period of liability. The totality of the circumstances shows that, as a matter of economic reality, Catsimatidis was Plaintiffs' employer.

1. Catsimatidis's sole ownership over the grocery stores and his position as Gristede's' president, chief executive officer, and chairman of the board gave him ultimate control over Gristede's' finances. See *Elliott Travel & Tours*, 942 F.2d at 966 (the president was an employer because, among other things, he held the purse-strings); *Grim Hotel*, 747 F.2d at 972 (same). In addition, Catsimatidis owns (and had an office in) the building where Gristede's has its corporate headquarters and where Gristede's managers and executives work. JA-282-88, 332-33, 1333. Catsimatidis handled Gristede's' banking matters. SA-52; JA-293. He also handled Gristede's' real estate matters, including decisions regarding entering lease agreements for store locations. SA-52; JA-293, 1366, 1375. Significantly, he signed most checks, such as checks to vendors or for general corporate matters, on behalf of Gristede's. JA-349.

While Catsimatidis did not directly determine the rate of pay of the employees in this case, he had control over and was involved in Gristede's' payroll. He routinely reviewed financial reports, including quarterly profit-loss statements that contained payroll data, and weekly "labor to sales" reports that compared yearly payroll and sales data, and he received weekly emails that contained payroll updates. SA-52; JA-835-37, 841-44, 848. Because he had ultimate control over Gristede's' finances, his review of these reports indicates that he approved of, or at a minimum countenanced, Gristede's' payroll. Moreover, his involvement in payroll extended beyond regularly reviewing Gristede's' payroll information. In a 2001 email from a store manager to Clusan, the Director of Payroll, which was copied to Catsimatidis's email address, discussing numerous payroll issues, the manager said that "John C. wanted me to point this out to you." JA-490-94. This email illustrates that Catsimatidis had a role in payroll and that his comments on payroll issues carried weight. In 2009, Catsimatidis arranged a meeting with a payroll company and delegated authority to Zorn and Flores to represent Gristede's in negotiating with the payroll company. JA-1452-53, 1456-57. Thus, at a minimum, he indirectly controlled the rate and method of pay.

In addition, Catsimatidis's electronic signature appeared on all the payroll checks that the Plaintiffs received. SA-51;

JA-1019. In *RSR*, this Court found it significant that Portnoy had signed payroll checks on at least three occasions. See 172 F.3d at 140. This Court concluded that it was not relevant that two of these occasions occurred outside the period of liability because “[t]he key question is whether Portnoy had the authority to sign paychecks throughout the relevant period, and he did.” *Id.* Not only did Catsimatidis have the authority to sign employee paychecks, he in fact regularly signed them. Catsimatidis makes much of the fact that his signature was electronic and that he did not personally review the paychecks. Def’s Br. at 36; JA-1019. Regardless whether his signature was electronic or hand-written, or whether he personally reviewed the paychecks, the fact is that the paychecks bore his signature. An individual should not be able to escape employer liability by virtue of using convenient modern payroll procedures.⁵

2. Catsimatidis had the authority to hire and fire and, in fact, exercised that authority by hiring and promoting several managers and executives and by being consulted regarding employee terminations. Catsimatidis hired Zorn as his deputy

⁵In *Santos v. Cuba Tropical, Inc.*, 829 F. Supp. 2d 1304, 1313 (S.D. Fla. 2011), the authorized use of a rubber stamp with the co-owner’s signature to sign checks, without any other indication that the co-owner exercised operational control, was found not to show sufficient control to make the co-owner an employer. In the present case, by contrast, Catsimatidis’ signature was accompanied by significant operational control.

and the executive vice-president at Red Apple Group. JA-1322-23, 1351. He promoted Balseca from district manager to vice president in charge of operations. JA-229-30, 247-48. In addition, Catsimatidis sent an email in 2008 to all Gristede's stores announcing the promotion of Renee Flores to Executive Director of Human Resources and Asset Management. JA-1486. This email shows his involvement in promotions even if it does not specifically state that he promoted Flores.

Catsimatidis was also involved in the hiring and firing of lower-level managers. In the 2008 email discussed above, Catsimatidis also announced that Walter D'Agostino had been hired as a store manager. JA-1486. Catsimatidis was involved in hiring D'Agostino as a store manager. JA-1341-42. Catsimatidis promoted a night manager, Moore, to store manager. JA-1412-13. These store managers supervised Gristede's store employees who worked in the same positions as the Plaintiffs. See *RSR*, 172 F.3d at 140 (although Portnoy did not hire the employees at issue, he hired managers who supervised the employees, which the court described as "a strong indication of control"). Catsimatidis was also consulted about several terminations. JA-1341-50. Significantly, the managers and employees viewed Catsimatidis as having the authority to hire or fire anyone if he so chose. JA-1359-60, 1337-38, 1348.

3. Catsimatidis controlled and directly supervised managers and executives who controlled several aspects of the Plaintiffs' employment. Specifically Zorn, Criscuolo (senior executive vice-president and chief operations officer in control of Gristede's Food Inc.'s day-to-day operations), and Lahl (the chief financial officer) all reported to Catsimatidis. JA-286-87, 379-80, 1322-23, 1351. Catsimatidis signed at least three of Gristede's' collective bargaining agreements, and Criscuolo and Squicciarini, who reported to Criscuolo, signed others. JA-305, 361, 496-581. Additionally, Squicciarini participated in the negotiations for at least one collective bargaining agreement for Gristede's. JA-299-305. Catsimatidis represented Gristede's on the board of the union pension fund. JA-296. Moreover, he personally knew and interacted with union leaders, whom he believed would call him if problems arose concerning how employees were being paid. JA-879-83. He described them as "in our offices mitigating various problems every week for as long as I could remember." JA-883.

Additionally, the 2008 email that Catsimatidis sent to all Gristede's stores illustrates his role in overseeing certain conditions of employment: in conjunction with his announcement that Flores had been promoted to Executive Director of Human Resources and Asset Management, Catsimatidis indicated that he had asked Flores to evaluate specific areas in human resources,

including salary administration and the administration of Gristede's' medical benefits program. JA-1486. He also indicated that D'Agostino, the newly-hired store manager, would report to Catsimatidis and Criscuolo. *Id.* Thus, like the president in *Sabine Irrigation*, Catsimatidis controlled, directly and indirectly, many traditional functions of an employer in relation to his employees. *See Sabine Irrigation*, 695 F.2d at 195 (company president was employer because he indirectly controlled many matters traditionally handled by an employer in relation to an employee). In addition, Gristede's managers and employees generally viewed Catsimatidis as the "boss" or "head honcho." SA-52; JA315-16, 456, 485-86, 583-600. *See Elliott Travel & Tours*, 942 F.2d at 966 (company president was the company's "top man"); *Grim Hotel*, 747 F.2d at 972 (same).⁶

4. Not only did Catsimatidis have ultimate authority over Gristede's' finances, hiring and firing, and conditions of employment, which he exercised, but he also was personally involved in many significant aspects of Gristede's' general business operations. This Court in *RSR* explicitly recognized such operational control, in addition to the four factors

⁶ This Court in *RSR* noted that the fourth factor -- maintenance of employment records -- was not met, but that fact was not dispositive. *See* 172 F.3d at 140. Similarly here, the fact that the fourth factor is not met is not dispositive.

discussed above, as significant in considering the totality of the circumstances. See 172 F.3d at 140. Catsimatidis usually worked at the Gristede's corporate office four to five days a week. JA-1334. No one was above Catsimatidis in Gristede's hierarchy and no one could override his decisions. JA-428, 1329. Like Portnoy in *RSR*, Catsimatidis had the sole authority to close or sell any individual store. SA-50, JA-1370. This Court in *RSR* found it significant that Portnoy controlled the company's finances and therefore "it was no idle threat" that Portnoy could have dissolved the company if other high-level managers had not followed his directions. 172 F.3d at 140.

Other facts further show Catsimatidis's pervasive control over Gristede's operations. He directly supervised Criscuolo, who was the chief operations officer in charge of Gristede's day-to-day operations. JA-286-87. He sat in on and participated in operations meetings. JA-820-21. He reviewed operations sales reports. JA-1018. He received weekly gross margin reports from all departments that handled perishables. JA-848. He also regularly visited individual stores, albeit with less frequency in recent years, in addition to attending grand openings. JA-583-600, 830-31, 1351-52. During his store visits, he advised employees and managers what merchandise should be purchased, how merchandise should be displayed, which merchandise should be promoted, what space should be devoted to

specific merchandise, how merchandise should be priced, what sales strategies should be pursued, as well as how store appearances and cleanliness should be kept up. SA-50; JA-293, 308-09, 312-13, 417-18, 583-600, 888-89, 1351-52, 1415-17. Catsimatidis thus exercised control similar to Portnoy in *RSR*, where Portnoy frequently instructed company managers how to run the business. See 172 F.3d at 140. Catsimatidis also handled relationships with vendors. JA-294. He was similarly involved in customer relations, including receiving copies of customer complaints and instructing store managers how to handle those complaints. JA-314-18. Catsimatidis acknowledged that staff took customer complaints more seriously if they knew that he was aware of the complaint. JA-315. Thus, he exercised control over significant aspects of Gristede's' operations. See *Elliott Travel & Tours*, 942 F.2d at 966 (employer status exists where the individual exercises control over "significant aspects" of a company's operations) (emphasis in original).

5. Catsimatidis's argument that his control is "quite limited" and therefore he is not an employer under the FLSA, Def's Br. at 41, is unavailing. As described in greater detail above, Catsimatidis's control, when looked at through the prism of the economic reality of the situation, was not actually "quite limited." Moreover, "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment

relationship from the protections of the FLSA, since such limitations on control do[] not diminish the significance of its existence." *RSR*, 172 F.3d at 139 (internal quotation marks omitted). Catsimatidis was not merely a titular head of Gristede's; he was actively involved in its operations. The key is that Catsimatidis possessed the power to control all of Gristede's employees, which necessarily included the Plaintiffs, and exercised that authority. The totality of the circumstances indicates that Catsimatidis was Plaintiffs' employer.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

/s/ Rachel Goldberg
RACHEL GOLDBERG
Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 monospaced typeface, using Microsoft Word 2010 utilizing Courier New, in 12-point font in text and 12-point font in footnotes containing no more than 10.5 characters per inch.

/s/ Rachel Goldberg
RACHEL GOLDBERG
Attorney

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I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this 18th day of October, 2012:

/s/ Rachel Goldberg
Rachel Goldberg
Attorney