No. 11-4035

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARLOS TORRES, RUBEN MORA, BOBBY IRIZARRY, LEWIS CHEWNING, GILBERTO SANTIAGO, WILLIAM HELWIG, ROBERT MISURACA, JOSEPH CREMA, MARIO DIPRETA, VICTOR PHELPS, JOSELITO AROCHO, ALFRED CROKER, DANIEL SALEGNA, FRANK DELEON, and ROBERT PATORINO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

GRISTEDE'S OPERATING CORP.; NAMDOR, INC.; GRISTEDE'S FOODS, INC.; CITY PRODUCE OPERATING CORP.; GRISTEDE'S FOODS NY, INC.; JOHN CATSIMATIDIS; JAMES MONOS; and GALO BALSECA,

Defendants-Appellants.

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

BRIEF OF DEFENDANT-APPELLANT JOHN CATSIMATIDIS

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INTRODUCTION

John Catsimatidis is the long-time owner of Gristedes Foods, Inc. ("Gristede's"), a professionally managed company which, through a subsidiary, operates the Gristede's supermarkets throughout the New York area. Catsimatidis also holds the honorary role of Chairman, President, and CEO. Although Catsimatidis remains somewhat involved in the company's high-level financial management and strategic planning, he has not been involved in the day-to-day operations of the Gristede's supermarkets for over a decade. He plays no role in hiring or firing store employees; he does not participate in setting store employees' work schedules or assignments; he does not decide when store employees get paid or how much.

Despite the overwhelming record evidence that Catsimatidis does not supervise Gristede's store employees or control the conditions of their employment, the district court concluded that the "undisputed" facts establish that Catsimatidis is their "employer" and thus personally liable for any violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") that Gristede's supermarkets may have committed.

That decision is incorrect. It is settled that individual officers or majority shareholders in a corporation are not automatically liable for all of the acts of the corporation. And while traditional, common-law veil-piercing is not required to

establish personal liability for FLSA violations, Congress did not intend for officers or owners to be personally liable for such violations merely by virtue of their high-level control over general corporate affairs. Otherwise, virtually *every* senior officer or owner would be liable for the company's FLSA's violations—even those who bore no personal responsibility for the company's violations. To prevent that result, the FLSA provides that a corporate officer is personally liable for a company's FLSA violations only if the plaintiff proves that the officer exercised personal responsibility for the company acts that violated the statute, including by controlling the affected employees' hiring and firing, the conditions of their employment, and the rate and methods of their pay. And, of course, a plaintiff cannot obtain summary judgment on the officer's personal liability unless the evidence on the foregoing factors is all so overwhelmingly one-sided that no reasonable factfinder could possibly reject personal liability. Plaintiffs here came nowhere close to satisfying that standard. If anything, the record compels the opposite conclusion: Catsimatidis did *not* exercise the direct control over these plaintiffs' conditions of employment that would be required to establish his personal liability for any FLSA violations committed by Gristede's.

The district court concluded otherwise only because it asked the wrong legal question. Rather than examine the "economic reality" of the relationship between Catsimatidis and store employees, as required by this Court's precedent, the court

below simply looked to whether Catsimatidis had general control over the company. That high-level inquiry is contrary to this Court's well-established precedent, and would lead to personal liability for corporate employers' FLSA violations in many—if not most—cases involving companies with controlling shareholders who oversee the company's general operations, but who do not make day-to-day decisions about employment issues. The FLSA does not contemplate such disdain for the corporate form. Rather, the FLSA permits personal liability only when the corporate officer is *personally responsible* for the acts that violated the statute. Under the correct standard, it is Catsimatidis who is entitled to summary judgment, not plaintiffs. At a bare minimum, there are genuine disputes of material fact that preclude granting summary judgment in plaintiffs' favor.

The district court also erred in granting plaintiffs' motion for partial summary judgment under the NYLL because, as the New York courts have squarely held, the NYLL does not provide for personal civil liability of individual officers. The court below failed to address that issue at all.

The judgment below should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 over the federal claim under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"). The district court had supplemental jurisdiction over

plaintiffs' state law claim under the New York Labor Law Article 6, §§ 190 *et seq*. and Article 19, §§ 650 *et seq*. ("NYLL") under 28 U.S.C. §§ 1332 and 1367.

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from the partial final judgment entered by the district court on October 6, 2011. That judgment disposed of plaintiffs' claims that John Catsimatidis is jointly and severally liable for plaintiffs' damages under the FLSA and the NYLL. Catsimatidis timely filed a notice of appeal on September 27, 2011 and an amended notice of appeal on November 4, 2011.

STATUTORY PROVISIONS INVOLVED

As pertinent here, the FLSA defines the term "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee." 28 U.S.C. § 203(d).

Article 6 of the New York Labor Law provides that an "employer" is "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." N.Y. Labor Law § 190(3). Article 19 defines "employer" to mean "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer." *Id*. § 651(6).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment to plaintiffs on Catsimatidis's personal liability for Gristede's FLSA violations on the ground that high-level control over Gristede's operations sufficed to establish his personal status as an "employer" under the FLSA.

2. Whether this Court's "economic reality" test for employer status requires summary judgment in favor of Catsimatidis where the undisputed facts establish that he did not control the hiring and firing of the employees in question, the conditions and terms of their employment, the methods and rate of their pay, or the maintenance of their employment records.

3. Whether the New York Labor Law provides for personal liability of individual corporate officers.

STATEMENT OF THE CASE

This appeal arises from a civil action in which plaintiff employees of Gristede's supermarkets allege violations of the FLSA, 29 U.S.C. §§ 201 *et seq*., NYLL Article 6, §§ 190 *et seq*. and Article 19, §§ 650 *et seq*., and New York common law. Plaintiffs filed this action as a collective action under the FLSA and a class action under New York law on behalf of themselves and all similarly situated current and former employees of the defendants.

On September 29, 2006, the district court (Crotty, J.) granted plaintiffs' motion for class and collective action certification, certifying a class of "all persons employed by defendants as Department Managers or Co-Managers who were not paid proper overtime premium compensation for all hours that they worked in excess of forty in a workweek any time between April 30, 1998 and the date of final judgment in this matter." *Torres v. Gristede's Operating Corp.*, 2006 U.S. Dist. LEXIS 74039, at *37 (S.D.N.Y. Sept. 29, 2006) ("*Torres I*"). On August 28, 2008, the Court granted, in part, plaintiffs' motion for summary judgment. *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447 (S.D.N.Y. 2008) ("*Torres II*").

On January 7, 2009, the district court granted plaintiffs' request to file a motion for summary judgment as to the personal liability of John Catsimatidis for any monetary judgment against Gristede's. On December 21, 2010, following briefing on the partial summary judgment motion, the district court granted plaintiffs' motions for final approval of a settlement agreement. On August 24, 2011, after Gristede's financial difficulties prompted some efforts to modify the settlement structure, plaintiffs filed a motion to supplement their motion for partial summary judgment as to Catsimatidis's individual liability.

Following briefing on that motion, the district court denied plaintiffs' motion to supplement, but granted their motion for partial summary judgment on its merits, concluding that Catsimatidis has "absolute control of Gristede's, and all of

its operations." JA-3758. The court rejected Catsimatidis's argument that "there must be some connection between what the individual has done (in the exercise of his responsibility) and the wrong alleged in the complaint," explaining that such a requirement would "'confine[]'" the question of employer status to "'a narrow legalistic definition.'" *Id*. at JA-3758-59. The court did not separately analyze whether Catsimatidis qualified as an "employer" under the NYLL, but nonetheless summarily concluded that he did. *Id*. at 3757.

STATEMENT OF FACTS

Because this appeal arises from an order granting summary judgment to plaintiffs on Catsimatidis's personal liability, the record must be viewed in the light most favorable to Catsimatidis, drawing all inferences in his favor, resolving all ambiguities against plaintiffs, and disregarding all evidence favorable to plaintiffs that is subject to genuine dispute. *See infra* at 11-12. That said, the following facts are wholly uncontradicted.

Gristede's supermarkets in and around the New York City area are operated by Namdor, Inc., which is in turn a subsidiary of Gristede's Foods, Inc. JA-2482 ¶ 2 (Catsimatidis Decl.). Gristede's Foods, Inc. is a professionally managed company whose stock is indirectly owned by John Catsimatidis, who serves in the honorary role of Chairman, President, and CEO of the company. *Id*. ¶ 3. Catsimatidis's involvement in the company is limited to high-level management

issues; he focuses on "the big picture of trying to establish what Gristede's image is and what it means to the consumer." *Id.* ¶ 24. The business is operated on a day-to-day basis by Charles Criscuolo, Executive Vice President. *Id.* ¶ 3.

For at least the last ten years, Catsimatidis has not been involved in the day-to-day operations of Gristede's supermarkets. In fact, even the higher-level management responsibilities he previously assumed have been largely delegated to his Deputy. *Id.* ¶¶ 3, 6. During this period, Catsimatidis has not been involved in the hiring, firing, or disciplining of a single Gristede's store employee. *Id.* ¶ 4. In fact, the only individual Catsimatidis has hired in the last decade is Robert Zorn, the Executive Vice President and Deputy to the Chairman of Red Apple Group, a holding company that owns United Acquisitions, which in turn owns Gristede's Foods, Inc. Zorn reports directly to Catsimatidis on financial matters. *Id.* ¶ 5.

Catsimatidis has also not been involved in assigning duties to store employees or instructing them about how to operate the Gristede's supermarkets. *Id.* ¶ 4. Nor has he been involved in supervising or controlling the work schedules or conditions of employment of any Gristede's store employee. Although Catsimatidis has occasionally visited stores, those visits were focused on merchandising and product placement or served a public relations function. During these visits, Catsimatidis did not discuss payroll, wages, timekeeping, work schedules, or any similar matters with store employees. *Id.* ¶ 9.

Catsimatidis's involvement with Gristede's supermarkets' affiliated unions has also been quite limited. He signed one collective bargaining agreement, sat on one union pension fund board, and is theoretically accessible to union presidents who know him. *See* JA-1802-03 (Catsimatidis Dep. 44:18-45:12); JA-2044-2123 (collective bargaining agreements). But to the extent Gristede's has participated in collective bargaining negotiations, Gristede's officers other than Catsimatidis have represented Gristede's in those negotiations. JA-2483-84 ¶ 11 (Catsimatidis Decl.). And Catsimatidis has not been involved in any day-to-day issues regarding Gristede's union employees, including issues regarding hours and wages. Again, other Gristede's officers are responsible for and perform these functions. *Id.* ¶ 12.

Likewise, Catsimatidis has not controlled—or even been involved with—payroll and human resources issues. There are specific departments tasked with those responsibilities, and they perform all payroll and human resource related tasks. Catsimatidis does not supervise the individuals in those departments. *Id.* ¶ 15; *see also id.* ¶ 18. For at least the last ten years, Catsimatidis has not made any decision related to, or established any rule regarding, payroll or payment issues relating to store employees. *Id.* ¶ 16. Nor has he been involved in determining the amount, rate, or method of payment of store employees during that time period. *Id.* ¶ 19. Although payroll checks bear his electronic signature, he does not

personally sign the checks or review them and has not done so for at least the last ten years. *Id.* ¶ 20.

Finally, Catsimatidis is not involved in maintaining Gristede's employment records. *Id.* ¶ 22. Although his office is in the same building as the payroll and human resources departments, he rarely interacts with individuals in those departments and plays no role in the maintenance of those employee records. *Id.*

SUMMARY OF ARGUMENT

I. The district court's summary judgment order was erroneous because Catsimatidis was not the plaintiffs' FLSA "employer" under the proper legal standard. At minimum, there were genuine disputed issues of material fact that precluded a grant of summary judgment in plaintiffs' favor.

A. The "economic reality" test this Court has adopted to determine "employer" status under the FLSA requires a focus on the officer's actual relationship with the particular employees in question. This focus achieves the statute's objective of expanding liability without eviscerating the corporate form.

B. The district court did not apply the "economic reality" test or focus on Catsimatidis's relationship with the store employees in question. Instead, it looked at Catsimatidis's overall corporate control and supervision. That was plainly improper under this Court's precedent. The district court's approach would

impose personal liability on virtually every senior corporate officer, in contravention of Congress's intent in enacting the FLSA.

C. Had the district court applied the correct standard, it would have been clear that Catsimatidis was entitled to summary judgment. The undisputed facts demonstrate that he did not hire or fire the employees in question; he did not control their schedules or conditions of employment; he did not control the methods or rates of their pay; and he did not maintain their employment records.

D. At minimum, and regardless of the proper legal standard, there were genuinely disputed issues of material fact that precluded a grant of summary judgment in plaintiffs' favor. There was considerable evidence in the record that Gristede's supermarkets are professionally managed, and Catsimatidis's involvement has been quite limited for over a decade.

II. The summary judgment order was erroneous as to plaintiffs' NYLL claims for the additional reason that the New York courts have held that there is no personal liability for corporate officers under the NYLL.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant summary judgment *de novo*. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). Summary judgment is appropriate only if "there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Miller*, 321 F.3d at 300.

On a motion for summary judgment, "all factual inferences must be drawn in favor of the non-moving party." *Miller*, 321 F.3d at 300. This means the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of [Catsimatidis]." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). It also means the Court must "mak[e] all credibility assessments in his favor," *McCarthy v. N.Y. City Technical Coll.*, 202 F.3d 161, 167 (2d Cir. 2000), and "must disregard all evidence favorable to [plaintiffs] that the jury is not required to believe," *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000); *see In re Dana Corp.*, 574 F.3d 129, 152 (2d Cir. 2009).

ARGUMENT

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

The FLSA does not make all corporate officers or controlling shareholders personally liable for acts of the companies they operate or control. The Act's focus, instead, is on the "economic reality" of the relationship between the individual officer and the employees whose rights were violated. "Economic reality" means just that—the *reality* of the relationship, not the legal formalities, or the theoretically extant but never exercised power of control that almost any senior

officer possesses over subordinate employees. The district court misunderstood the "economic reality" standard, and hence found Catsimatidis personally liable, as a matter of law, for FLSA violations by Gristede's based simply on his general control of the company, even though plaintiffs did not and could not point to any facts—much less *undisputed* facts—establishing that Catsimatidis exercised personal control over the company's FLSA-related decisions. Indeed, the undisputed record showed the opposite: Catsimatidis has not been involved in the day-to-day operations of Gristede's supermarkets for at least a decade, and for that reason he has not

- hired or fired Gristede's store employees;
- controlled their conditions of employment or their pay; or
- maintained any employment records.

Plaintiffs adduced no evidence to the contrary.

Under the proper standard, Catsimatidis is the party properly entitled to summary judgment here. Certainly plaintiffs were not, given the substantial record evidence contradicting their position, thereby creating—at the very least—a genuine issue of material fact as to Catsimatidis's personal liability for any FLSA violations Gristede's may have committed.

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

"A principal attribute of, and in many cases the major reason for, the corporate form of business association is the elimination of personal shareholder liability." *LeBoef, Lamb, Green & MacRae L.L.P. v. Worsham*, 185 F.3d 61, 66 (2d Cir. 1999) (quotation omitted); *see Puma Indus. Consulting, Inc. v. Daal Assocs., Inc.*, 808 F.2d 982, 986 (2d Cir. 1987) ("the law deals with a corporation as an entity distinct from its shareholders"); *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983) (the "shield from personal liability" is "one of the major purposes of doing business in a corporate form").[1] The FLSA does not dispense with the corporate form, but instead respects it—Congress did not "intend[] that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable for the corporation's failure to pay minimum and overtime wages as required by the FLSA." *Agnew*, 712 F.2d at 1513; *see Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677 (1st Cir. 1998).

At the same time, however, this Court and others have construed the FLSA's definition of "employer" to "transcend traditional common-law parameters of the employer-employee relationship." *Baystate*, 163 F.3d at 677; *see Herman v. RSR*

[1] This is no less true when the corporation is owned by a single individual. *See* 1 Fletcher Cyclopedia Corporations § 25.10 ("A sole shareholder and the corporation are not one and the same, but are distinct and separate legal entities and must be so treated.").

Sec. Servs., Ltd., 172 F.3d 132, 139 (2d Cir. 1999). The Act defines an "employer" as "any person acting directly or indirectly in the interests of an employer in relation to an employee." 29 U.S.C. § 203(d). That definition, courts have held, "does not support the proposition that officers of a corporation can never be held personally liable for unpaid wages." *Baystate*, 163 F.3d at 677. But the language cannot be "taken literally," because otherwise "it would make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages of other employees." *Agnew*, 712 F.2d at 1513; *see Diaz v. Consortium for Worker Educ., Inc.*, 2010 U.S. Dist. LEXIS 107722, at *5 (S.D.NY. Sept. 28, 2010); *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 628-29 (S.D.N.Y. 1996) (Parker, J.). The definition's evident objective is to prevent entities who are genuinely employers "from shielding themselves from responsibility for the acts of their agents," *Agnew*, 712 F.2d at 1513—not to make all officers and owners per se liable for the acts of the company, which would completely override the fundamental state policy interests inherent in allowing business to be conducted through corporate entities.

To achieve the FLSA objectives of expanding liability without eviscerating the corporate form, this Court has adopted an "economic reality" test that examines the nature of the specific, operational relationship between the employees affected by the alleged FLSA violations and the individual said to be personally liable for

them as the employees' statutory "employer." *RSR*, 172 F.3d at 139; *see also Baystate*, 163 F.3d at 677-78. The "overarching concern" of the test is "whether the alleged employer possessed the power to control the workers in question"—not just in a general, abstract sense, but "with an eye to the 'economic reality' presented by the facts of each case." *RSR*, 172 F.3d at 139. The "'economic reality' of the relationship between the alleged employer and employee has guided courts' interpretation" because "the [FLSA's statutory language] taken literally would support liability against any agent or employee with supervisory power over employees." *A.P. Prods.*, 934 F. Supp. at 628-29.

The "economic reality" test is not "confined to a narrow legalistic definition" of the relationship between an employee and a supervisor or officer, but instead "encompasses the totality of the circumstances" that establish the actual, operational relationship between them. *RSR*, 172 F.3d at 139. Although "any relevant evidence may be examined," and no one factor is dispositive "standing alone," this Court has described the "relevant factors" as including "'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Id.* (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

As is obvious for a test designed to assign *personal* liability for corporate decisions, a fundamental consideration underlying all of these factors is the alleged employer's *personal responsibility* for the decisions that violated the Act. "Applying the FLSA's definition," this Court has recognized, "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 Diaz*, 2010 U.S. Dist. LEXIS 107722, at *7 ("the term 'employer' under the FLSA has been interpreted to include individuals with substantial control over the aspect of employment alleged to have been violated, but not those who do not control the terms and conditions of employment" (quoting *A.P. Prods.*, 934 F. Supp. at 629)). Thus in *RSR*, the defendant was held liable because he personally hired the employees' immediate supervisors, "supervised and controlled employee work schedules and the conditions of employment," and exercised "operational control" over the employees' employment. 172 F.3d at 140. Similarly, in *Lanzetta v. Florio's Enterprises*, the defendant "shared responsibility for keeping 'handwritten records of the hours [employees] worked, using those notes to determine employees' wages for the week, and 'destroy[ing]' the notes thereafter." 763 F. Supp. 2d 615, 627 (S.D.N.Y. 2011) (Chin, J.). Cases from other circuits likewise consistently recognize that personal liability under the FLSA requires "personal

responsibility for making decisions about the conduct of the business that contributed to the violations of the Act." *Baystate*, 163 F.3d at 678.[2]

The focus on the defendant's personal control over the employee's employment conditions follows naturally from the statutory definition of "employer" as a person who acts directly or indirectly for an employer "in relation to an employee." 29 U.S.C. § 203(d). What matters, in other words, is not a person's ownership status or general management functions, but what he or she does "in relation to" the employees of the enterprise.

B. The District Court's Summary Judgment Ruling Applies The Wrong Legal Standard By Focusing On Catsimatidis's Overall Corporate Ownership And Supervision

The district court's summary judgment ruling determined that Catsimatidis, personally, was an FLSA employer as a matter of law only because the court applied the wrong legal standard for determining personal liability under the FLSA. In its written opinion, the court mentioned the "economic reality" test dismissively as the "test [Catsimatidis] applies," JA-3758, and the court declined to

[2] *See, e.g., Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991) (defendant personally "made arrangements for the amount of salary to be paid an employee"); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 & n.7 (5th Cir. 1984) (defendant had "ultimate control over wages," "[i]t was only he who could authorize compliance with the [FLSA]," and he "personally selected the manager at every hotel"); *Agnew*, 712 F.2d at 1511 (one defendant was "personally responsible for allowing the company's workers' compensation insurance to lapse in derogation of its legal responsibility" and other defendant "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").

consider all the relevant factors this Court has identified, *see id*. at 3758-61; *see also* JA-3742 (Oral Argument Tr. 44:12-14) ("I don't have to review the individual factors because it's clear that Mr. Catsimatidis has the power to supervise and control the employees.").

Rather than examining the economic reality of the actual relationship between Catsimatidis and Gristede's employees through the lens of the practical, concrete factors this Court has utilized, the district court focused generally on Catsimatidis's control over the corporation as a whole. In fact, the court relied heavily on an affidavit submitted by Catsimatidis in a completely different case—a *trademark* case that had nothing to do with the FLSA, and hence had nothing to do with Catsimatidis's control over store employees' conditions of employment. JA-3757-58.[3] Unsurprisingly, the affidavit focused almost entirely on matters irrelevant to personal liability under the FLSA, such as the duration of

[3] What is more, neither party submitted the affidavit—the court somehow found the affidavit on its own, and surprised both parties with it at oral argument, giving Castimatidis no notice or realistic opportunity to respond. JA-3664-65 (Oral Argument Tr. at 5:15-6:8). The irregularity involved in the affidavit's introduction itself raises substantial due process issues, at least to the extent the affidavit makes any material difference in the analysis. *See Sullivan v. City of Springfield*, 561 F.3d 7, 19 (1st Cir. 2009); 10A Wright, Miller & Kane, Fed. Prac. & Proc. § 2723, at 391-97 (3d ed.1998). Catsimatidis submits, however, that the affidavit does not actually affect the analysis, because as explained in the text, it relates only to irrelevant matters concerning his overall corporate supervision, and says nothing about his personal, operational control over store employees' conditions of employment.

Catsimatidis's general company ownership, and his authority to set product prices, select store décor and signage, and to open and close stores. *Id*. But the court considered those factors to be crucial. *Id*. at 3758. The court likewise emphasized other matters equally divorced from operational control over store employees' conditions of employment, such as Catsimatidis's authority to provide the personal signature necessary for a bank letter of credit in favor of Gristede's, *id*., his "review[]" of "financial reports," *id*. at 3760, and his control over the company's "banking and real estate matters," *id*. The trademark-case affidavit and other evidence combined to show, the court concluded, that Catsimatidis "has absolute control of Gristede's, and all of its operations." *Id*. at 3758.

The court's focus on Catsimatidis's alleged control over general company operations was obviously misplaced. As the discussion in the previous section shows, a corporate officer is personally liable for FLSA violations only if he or she has *personal responsibility for the corporate acts that constitute the violations*. *See supra* at 16-17. But rather than inquiring into whether Catsimatidis exercised personal, operational responsibility for the decisions that violated the store employees' rights under the FLSA—and conducting that inquiry in the light most favorable to Catsimatidis—the district court held that Catsimatidis's general control over the corporation sufficed to establish his personal liability, because it showed that he *could have* controlled the employees in question. JA-3761 ("There

is no area of Gristede's which is not subject to [Catsimatidis's] control, whether he chooses to exercise it."); *id*. at 3760 ("[I]t does not matter that Mr. Catsimatidis has delegated powers to others. What is critical is that Mr. Catsimatidis has those powers to delegate." (internal citation omitted)).

But theoretical, formal legal control over subordinate employees cannot be enough to establish personal liability—otherwise virtually any senior corporate manager could be personally liable for the company's FLSA violations, contrary to Congress's intent. *See supra* at 15-16. For this reason, courts have recognized that "unexercised authority is insufficient to establish liability." *Perez v. Sanford-Orlando Kennel Club, Inc*., 515 F.3d 1150, 1161 (11th Cir. 2008); *see id*. (concluding that the defendant was not liable because even though "Tom Bowersox—the director of racing and operations—admitted that he would have complied with any directive [the defendant] gave him," he also "testified that [the defendant] had never given him any instructions about any employment matter"); *Wirtz v. Pure Ice Co*., 322 F.2d 259, 263 (8th Cir. 1963) (fact that defendant "might have taken over and acted '. . . in the interest of an employer (the corporation) in relation to an employee' is beside the point as long as he did not do so"). While it is true that, as this Court has noted, "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA," *RSR*, 172 F.3d at 139, this Court has not suggested

that control *never* exercised is sufficient to establish personal liability under the FLSA. Indeed, even *exercised* control is inadequate, if it does not constitute sufficiently direct control over acts affecting employment conditions: "If . . . the significant factor in the personal liability determination is simply the exercise of control . . . over the 'work situation,' almost any supervisory or managerial employee of a corporation could be held personally liable for the unpaid wages of other employees and the civil penalty related thereto." *Baystate*, 163 F.3d at 679.

Accordingly, the district court erred in focusing on Catsimatidis's general control over the company, rather than inquiring into his personal control over the employees in question. Had the district court applied the correct legal standard, it would have been plain that there was no basis for granting summary judgment in favor of plaintiffs. In fact, the undisputed evidence suggests that summary judgment should have been entered in favor of Catsimatidis, as the next section demonstrates.[4]

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

As noted above, this Court has identified four factors that are particularly relevant to the "economic reality" of the relationship between the defendant and

[4] Even if Catsimatidis's general control over the company were a significant factor, the district court's decision should still be vacated because there are factual disputes and ambiguities concerning his overall corporate control that preclude a grant of summary judgment in plaintiffs' favor. *See infra* at 41-42.

the affected employees. Not one of those factors indicates that Catsimatidis exercises the kind of personal control over employment decisions that creates personal liability for corporate FLSA violations.

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

The first relevant factor is "the power to hire and fire the employees." *RSR*, 172 F.3d at 139. In *RSR*, this Court concluded that the defendant was personally liable for FLSA violations related to the payment of overtime to security guards, because the defendant had "hir[ed] . . . some RSR employees," including the person who "managed the security guard operations." *Id*. at 136-37; *see id*. at 140 ("[a]lthough [the defendant's] hiring involved mainly managerial staff, the fact that he hired individuals who were in charge of the guards is a strong indication of control"). The defendant had also been involved in other aspects of hiring, such as "referr[ing]" "potential security guard employees" to the company. *Id*. at 137.

In this case, by contrast, there is no evidence whatsoever that Catsimatidis ever hired or fired any of the Gristede's store employees who were allegedly denied overtime pay. Nor is there any evidence that he generally played a role in hiring or firing any of the Gristede's store managers who were responsible for supervising plaintiffs. And there is no evidence that Catsimatidis was involved in hiring or firing any of the district managers who were responsible for the store managers who were responsible for the plaintiffs. In fact, the undisputed evidence

is that Catsdimatidis was *not* involved in any of those decisions. JA-2482 ¶ 4 (Catsimatidis Decl.) ("For at least the last ten years, I do not recall hiring, firing or disciplining any Gristede's store employee."); *id*. at 2482 ¶ 5 ("aside from my decision to hire Mr. Zorn, who does not work for Gristede's, I do not recall hiring or firing any executive or manager of Gristede's over the last ten years"); *id*. at 2483 ¶ 6 ("For at least the last ten years, I have not had any involvement in the firing of any store employees of Gristede's . . . ."); *id*. at 2308 (Zorn Dep. 129:14-15) ("I have no – no – no instance where Mr. Catsimatidis has fired somebody."); *id*. at 2304-05 (Zorn Dep. 122:23-123:5) ("[Catsimatidis] . . . doesn't get involved in [hiring and firing employees]"); *id*. at 2719-20 (Clusan Dep. 408:22-409:3) ("[Mike McCormick] makes all the hiring decisions for the regular hourly people, the operations people would hire management people"); *id*. at 2722 (Clusan Dep. 411:19-23) ("Q. Who is in charge of hiring co-managers? A. Mike McCormick would probably interview them, and then operations makes the final decision."); *id*. at 2790-91 (Lang Dep. 176:16-177:8) (only store managers and human resources personnel participate in hiring store employees).

The district court acknowledged that "[t]here is no evidence that Mr. Catsimatidis hired any class member," but concluded that "there does not have to be." *Id*. at 3759. According to the court, "[i]t stands uncontradicted that he hired managerial employees." *Id*.; *id*. at 3760 ("key managerial employees at Gristede's

concede that Mr. Catsimatidis hired them"). The district court's analysis was wrong on the law and wrong on the facts.

As to the law, the district court offered no explanation of why it would be relevant if Catsimatidis hired high-level corporate managers. In *RSR*, the hiring of managerial employees was relevant because they were the employees who immediately supervised the employees in question. *See* 172 F.3d at 140. Certainly a senior officer's hiring of *any* managerial employees cannot establish personal liability for FLSA violations concerning employees hired many seniority levels lower, otherwise personal liability would extend to virtually all senior corporate officers.

The court was also wrong on the facts. It was not "uncontradicted" that Catsimatidis hired managerial employees. To the contrary, over the past decade, there is only *one* undisputed instance of a company employee being hired by Catsimatidis: Zorn, an executive in the holding company that owns the company that owns Gristede's. *See supra* at 8. Zorn's function was to "report directly to [Catsimatidis] on financial matters." JA-2482 ¶ 5 (Catsimatidis Decl.). Unsurprisingly, nothing in the record suggests that Zorn supervised or otherwise controlled the employees in question here. There is also evidence that Catsimatidis provided "input" into the hiring of one other employee, who was brought in "as an executive" to "oversee" two "problem stores." *Id*. at 2308-09 (Zorn Dep. 129:11-

130:15). But in that case, the undisputed evidence established that final hiring authority rested with Zorn. *Id*. at 2309 (Zorn Dep. 130:3-6) ("Yeah, both Mr. Catsimatidis and myself met with him. I mean, since he came in as an executive, and John was in favor of it but he left the decision to me.").[5]

The evidence cited by the court in support of its conclusion that Catsimatidis hired managerial employees does not support that proposition. In fact, the court provides no citation for its initial statement that it is "uncontradicted" that Catsimatidis hired managerial employees. And the citations provided for its statement that "key managerial employees at Gristede's concede that Mr. Catsimatidis hired them," *id*. at 1608—paragraphs 18, 20, and 21 of plaintiffs' Rule 56.1 Statement of Facts[6]— simply do not support that statement.

Paragraph 18 cites depositions in which executive officers stated that they *assumed* Catsimatidis could hire and fire people if he wanted to do so. *See id*. at 2324 (Zorn Dep. 146:22-25) ("I mean, if John Catsimatidis wanted to be an active owner of this company, I'm sure under law he has the absolute right to do that."));
id. at 2796-97 (Lang Dep. 266:12-267:20) (repeatedly "assum[ing]" that

[5] There is also evidence that more than a decade ago, Catsimatidis may have been involved in the promotion of one night manager to a store manager. JA-2356-57 (Moore Dep. 20:17-21:24).

[6] The court also cited ¶ 19 in the plaintiffs' statement of facts, presumably to support the other part of the sentence, *viz*., that Catsimatidis has the "power to close or sell Gristede's stores," JA-3760; *see id*. at 2338 (Zorn Dep. 163:11-19). That observation is facially irrelevant to Catsimatidis's control over employees.

Catsimatidis could fire various employees because he is "the owner of the company"). On its face that evidence does not address the actual exercise of any hiring authority by Catsimatidis. Moreover, the court's focus on *plaintiffs'* citations exposes its failure to view the record in the light most favorable *to Catsimatidis*—a record that showed that he did not, in fact, have authority to hire and fire store employees, but only the four or five company executives who reported directly to him. *Id*. at 1863 (Catsimatidis Dep. 221:2-5) ("I have 'X' amount of people that directly report to me. I guess I can fire the people that directly report to me. There are only maybe four or five people."); *id*. at 2310 (Zorn Dep. 131:2-13) (discussing terminations that Catsimatidis "wasn't happy about," but nonetheless occurred); *id*. at 2591 (Catsimatidis Dep. 159:14-21) (explaining that he could not get a store manager fired even if he wanted to; instead, he would simply have to "talk to the people responsible, who they report to, who the store manager reports to"); *id*. at 2600 (Catsimatidis Dep. 218:5-7) ("No. I can't fire anybody. It's—they're all union employees and it goes through a procedure.").

The other two cited paragraphs (¶¶ 20 and 21) do pertain to actual hiring decisions, but neither demonstrates that Catsimatidis hired and fired the store employees affected here, or even those who supervised them. Paragraph 21 cites a deposition discussing Zorn's hiring, which is irrelevant, as already discussed.

Paragraph 20 cites a deposition of Galo Balseca, who at one point asserts that Catsimatidis hired Charley Criscuolo, JA-1742 (Balseca Dep. 140:16-20), but later acknowledges that he simply "assume[d]" Catsimatidis hired him because "he's working for the company," *id*. at 1753-54 (Balseca Dep. 286:1-287:8). And that evidence is contradicted by other evidence in the record indicating that Tony Petrillo hired Criscuolo. *Id*. at 2482 ¶ 5(Catsimatidis Decl.); *id*. at 2514 (Criscuolo Dep. 21:2-7) (testimony that Criscuolo got his job at Gristede's because he "applied for and interviewed for the position through [Tony Petrillo]"). The only other evidence Balseca offers related to hiring is that Catsimatidis "maybe" hired Jim Monos (*id*. at 1742 (Balseca Dep. 140:21-23)) and that he hired "[s]ome lady that is in charge of customer service" (*id*. at 1752 (Balseca Dep. 285:3-23)). Balseca did not know the woman's last name, when she was hired, or where her office is located. *Id*. Evidence that over the last *decade* Catsimatidis hired *at most* three or four employees, primarily for high-level management positions, is not sufficient to rebut the substantial countervailing evidence that Catsimatidis does not generally exercise hiring authority over the employees in question.

The district court also recognized that "Mr. Catsimatidis argues that he cannot fire anyone," but disregarded entirely the factual evidence supporting that position. Instead, the court stated that "we should be careful about accepting the characterization of limitations on his power. This is especially true when key

managerial employees at Gristede's concede that Mr. Catsimatidis hired them, and acknowledged his power to close or sell Gristede's stores." *Id*. at 3759-60. As noted above, however, the materials cited by the court in support of its assertions about Catsimatidis's hiring power do not support those assertions. *See supra* at 26-27. Of course, it also bears emphasis that the court simply disregarded Catsimatidis's evidence on *plaintiffs*' motion for summary judgment. That approach is exactly backwards. *See supra* at 11-12.

Had the district court considered the entire summary judgment record concerning Catsimatidis's personal responsibility for hiring store employees—and not just characterizations of the evidence offered by plaintiffs—it would have been clear that this factor weighs strongly against any conclusion that Catsimatidis can be personally liable as an "employer" for FLSA violations committed by Gristede's.

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. Those facts

demonstrated that the defendant both possessed and exercised control over the work conditions of the particular employees in question.

Here, by contrast, 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. The undisputed record established that "[f]or at least the last ten years, [Catsimatidis] was not involved in supervising or controlling the work schedule or conditions of employment of any Gristede's store employee, at any time, in any store." JA-2483 ¶ 7 (Catsimatidis Decl.). The record instead showed that "work schedules at Gristede's" were "maintain[ed] and direct[ed]" by the director of operations, Galo Balseca, supervisors, department managers, and store managers—and no one else. *Id*. at 2518-19 (Criscuolo Dep. 72:8-73:6); *see id*. at 2790 (Lang Dep. 176:7-15) (store managers set the schedules for store employees). Catsimatidis's role in the management of the company, to the extent he continued to have one during the relevant time period, was limited to "high level corporate financial management and strategic planning," and even much of that "high level involvement" was "delegated to [his] Deputy." *Id*. at 2482 ¶ 3 (Catsimatidis Decl.); *see also id*. at 2529 (Zorn Dep. 55:7-20) (describing all of the people who run Gristede's day-to-day operations). Since roughly 2000, Catsimatidis's involvement in the stores has been significantly limited due to health issues. *See id*. at 1829 (Catsimatidis Dep.

74:5-9) (stopped making regular visits to store because of "medical problem"); *id*. at 1845 (Catsimatidis Dep. 108:16-19) (explaining that he "used to get [e-mails that contained weekly updates from Lang]," but he had not "seen them for a while").

Plaintiffs offered no evidence contradicting Catsimatidis's showing that he played no role in supervising store employees. Their evidence instead showed only that Catsimatidis was involved in *other* aspects of the company's operations—operations that had nothing to do with store employees. For example, plaintiffs pointed to Catsimatidis's receipt of "regular reports on Gristede's operations," e.g., its profit and loss statements and its gross margin reports, Plaintiffs' Brief in Support of Summary Judgment ("Pl. Br.") (ECF No. 324), at 18; *see* JA-1622 (Plaintiffs' Rule 56.1 Statement ¶¶106-08), and his "consult[ation] with" "senior operations executives as to the overall progress of the company," *id*. at 1623 (Plaintiffs' Rule 56.1 Statement ¶¶ 109-10). Plaintiffs also noted that Catsimatidis would occasionally make 10-minute visits to stores and "make comments to store managers about displays" and "check the merchandising." JA-1828-29 (Catsimatidis Dep. 73:4-74:16). The record makes clear that the purpose of these visits was to "get input from store managers on merchandising problems." *Id*. at 1830 (Catsimatidis Dep. 75:20-21); *see id*. (Catsimatidis Dep. 75:16-19) ("we would talk about merchandising. I would say is this selling, is this not

selling, are you missing any products that you think you should have?"); *id*. at 2365-66 (Moore Dep. 33:19-34:15) (explaining that Catsimatidis would use his visits to discuss merchandise placement). Plaintiffs point to no evidence suggesting that these visits were ever used as an opportunity to address the schedules or working conditions of store employees.

In fact, the record shows the opposite. "During these visits," Catsimatidis explained, "I did not have anything to do with the schedule or conditions of employment of any employee, and I rarely had any communications with any employee other than exchanging general 'hellos' and pleasantries. I did not discuss payroll, wages, timekeeping, work schedules or any related topics with any store employees." *Id*. at 2483 ¶ 9 (Catsimatidis Decl.). That testimony was not only uncontradicted, it was corroborated. *Id*. at 2756 (Moore Dep. 29:20-23) ("Q[:] Did he give any instructions to any other employees while he was walking the store with you? A[:] No."); *id*. at 2758 (Moore Dep. 34:10-15) (Catsimatidis did not use store visits to discuss "personnel issues"); *id*. at 2768 (Wong Dep. 39:15-17) (explaining that Catsimatidis did not discuss employees during his store visits); *id*. at 2320-21 (Zorn Dep. 140:24-141:4) (Catsimatidis visits stores "more in a PR capacity than a management type capacity").

Plaintiffs also argued below that Catsimatidis's involvement in union matters established his supervision over employees' working conditions and

schedules. The court did not rely on that argument, perhaps because the record established that Catsimatidis's involvement was very limited: he did not participate in the collective bargaining negotiations and, in fact, did not even know which executive in the company participated in those meetings. *Id*. at 1804-08 (Catsimatidis Dep. 46:20-49:21). Moreover, although Catsimatidis stated that "union presidents know" him and could call him, he also explained that "99.9 or 100 percent of the problems are handled between human resources and the [union representatives]." *Id*. at 1802-03 (Catsimatidis Dep. 44:20-45:3); *see id*. at 2008-09 (Clusan Dep. 15:24-16:6) ("I handle day-to-day problems with unions . . . I handle union billings, I handle, as I said, grievances with unions, unemployment cases"); *id*. at 2815 (Squicciarini Dep. 208:8-15) (when asked whether Catsimatidis is involved in negotiating union contracts, replied, "The boss? Are you kidding? . . . He doesn't get involved in none of that."). Over the course of the past decade, Catsimatidis did sign *one* collective bargaining agreement (one negotiated by someone else) and has sat on the board of *one* union pension fund, but plaintiffs do not and cannot explain how those facts establish that he personally controlled store employees' working conditions. The evidence squarely and uniformly demonstrates that he did not.

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

The third relevant factor is whether the defendant "determined the rate and method of payment." *RSR*, 172 F.3d at 139 (quotation omitted). In *RSR*, there was "[l]ittle evidence" suggesting the defendant determined the security guards' rate of payment, but he did "sign[] security guard payroll checks" and, more significantly, he "ordered a stop to the illegal pay practice of including security guards on 1099 forms as independent contractors." *Id*. at 140. The fact that he had ordered an end to one illegal payment practice indicated both his general awareness of the company's methods of paying its employees, as well as his authority to control those methods.

Here, by contrast, there is again no evidence that Catsimatidis determined the rates or methods of employees' pay or exercised any control over Gristede's payroll systems or policies. The record again shows the opposite. *Id*. at 2484 ¶¶ 15-16 (Catsimatidis Decl.) ("For at least the last ten years, I have not possessed any control over, and do not recall ever being involved with, any payroll or human resources issue. Ms. Clusan, Ms. Flores and their staff were and are responsible for handling all payroll and human resources issues and I do not supervise any of those individuals."); *id*. at 1832 (Catsimatidis Dep. 77:9-19) (did not use store visits to talk about payroll); *id*. at 1834 (Catsimatidis Dep. 79:12-14) ("I have never talked to Mr. Monos or Mr. – Galo or Mr. Lang about people getting paid.");

id. at 2580 (Catsimatidis Dep. 112:20-25) (explaining that he has had nothing to do with payroll for the last 10 years, and probably the last 15); *id*. at 2588 (Catsimatidis Dep. 129:20-21) ("I don't deal with payroll. It doesn't filter up to my level."); *id*. at 1959 (Lang Dep. 305:12-15) ("I have never seen [Catsimatidis] get involved in anything with payroll and stuff like that as far as, you know, who gets paid, and you know, things along the lines like you are asking").

According to the director of human resources and payroll, Catsimatidis was "not actually involved" in payroll or determining payroll policies, *id*. at 2699 (Clusan Dep. 91:21-24); *id*. at 2726 (Clusan Dep. 536:8-25) (explaining that a payroll policy change came from Criscuolo), other than having said once in conversation that "[h]is policy" is to "pay[] people for what they work," *id*. at 2700 (Clusan Dep. 92:5-24). Moreover, Catsimatidis never sent her an email regarding payroll or timekeeping, *id*. at 2730-31 (Clusan Dep. 624:16-625:2); she never heard him have a conversation with anyone about payroll, *id*. at 2700 (Clusan Dep. 92:14-16) ("[Q:] Have you ever heard Catsimatidis have a conversation with anybody about payroll? [A:] No."); she received her instructions regarding payroll changes from other officers, *id*. at 2706, 2712-13 (Clusan Dep. 136:19-21, 306:20-307:11); and Catsimatidis did not even have access on his computer to the company's payroll software, *id*. at 2703 (Clusan Dep. 117:5-16); *see id*. at 2700 (Clusan Dep. 92:2-4) (agreeing that Catsimatidis "doesn't do the hands-on day-to-

day payroll"). Moreover, there was evidence that Catsimatidis did not know "on a week-to-week basis which store employees get paid and which do not, or what they get paid." *Id.* at 2484 ¶ 16 (Catsimatidis Decl.).

The district court did not discuss this factor, other than to note that Catsimatidis "signed all paychecks to the class members." *Id.* at 3759. The district court acknowledged that "it was only an electronic signature," but concluded that "even if that is a difference, it does not have any significance." *Id.* The district court was wrong: Catsimatidis's non-personal, electronic signature does not support a finding that he was an "employer" within the meaning of the FLSA. *See, e.g.*, *Wilke v. Salamone*, 404 F. Supp. 2d 1040, 1051 (N.D. Ill. 2005) (defendant's signature on paychecks "fails to evidence [defendant's] involvement in [plaintiffs'] terminations" where the company's "office manager stamped [defendant's] signature"); *Santos v. Cuba Tropical, Inc.*, 2011 WL 5361118, at *9 (S.D. Fla. Nov. 7, 2011) (fact that managers were delegated the authority to "stamp the [defendant's] signature" on paychecks suggested that defendant was *not* an FLSA employer). To the contrary, the use of an electronic signature confirmed that Catsimatidis did not have any personal involvement in payroll or payroll policies. In fact, the record evidence established that payroll checks were handled by Namdor, the entity which employed store employees, and Catsimatidis did not "review those checks." JA-2485 ¶ 20 (Catsimatidis Decl.); *id.* at 1879

(Catsimatidis Dep. 270:20-25) ("Q[:] Who signs the Namdor checks? I don't know. I mean, I think it's an automatic signature in the computer. I don't remember whose name is in it.").[7]

Plaintiffs' evidence did not establish that Catsimatidis controlled employees' payments. For example, plaintiffs pointed to the payroll director's statement that Catsimatidis had a "policy" that people should get paid for "what they work." *Id.* at 2700 (Clusan Dep. 92:7-8). That this is the most specific "policy" set by Catsimatidis that plaintiffs can identify is itself sufficient to refute their argument.[8] Plaintiffs also again try to rely on Catsimatidis's very limited involvement in union issues, *see supra* at 33, without concretely tying any of that involvement to employees' rates and methods of pay. Finally, plaintiffs argued that Catsimatidis's position in the company authorized him to intervene in payroll decisions. As

[7] Catsimatidis does sign some checks for the company (Pl. Br. 19), but those checks have nothing to do with store employees or payroll. JA-2485 ¶ 20 (Catsimatidis Decl.) ("Although I had the power to, and do in fact sign company checks, those checks generally relate to vendor payments and general corporate matters. They have nothing to do with payroll or any store employee."). The fact that he does sign some *non*-payroll checks provides additional confirmation of his lack of personal involvement in payroll matters.

[8] Plaintiffs also point to an e-mail regarding payroll practices, which said, "John C. wanted me to point this out to you." Pl. Br. 19. Absent any context, it is impossible to conclude that that statement proves he controlled payroll matters. On its face it suggests not control, but input, and it is not even clear what input is being provided into what subject. At summary judgment, all ambiguities must be construed in favor of the non-moving party. *See supra* at 11-12.

discussed above, the theoretical possibility that a senior officer might exercise control is irrelevant if he has not ever done so. *See supra* at 21.

4. *Catsimatidis Does Not Maintain Any Employment Records*

The fourth "economic reality" factor is whether the defendant personally "maintained employment records." *RSR*, 172 F.3d at 139.

The evidence here shows that Catsimatidis does not maintain *any* employment records, let alone records for the employees in question. *See* JA-2485-86 ¶ 22 (Catsimatidis Decl.) ("For at least the last ten years, I was also not involved in maintaining any employment records. Although I have an office in the same building as the Payroll and Human Resources Departments, I seldom interact with anyone in those departments, and do not involve myself with any payroll, human resources, or timekeeping records.").

The only "evidence" plaintiffs offered to the contrary was not actually evidence, but outright conjecture: "It can be reasonably inferred that Catsimatidis had at least constructive control over employment records," they asserted, because he worked in the same building where payroll and the human resources departments performed their function. Pl. Br. 20.[9] But plaintiffs do not point to a

[9] The only other point plaintiffs raised in support of their position was that "a payroll clerk who stores employees' time records on her computer reports to Clusan, who reports to Flores, who reports to Criscuolo, who reports to Catsimatidis." Pl. Br. 20. That impressively attenuated chain of connection proves only that Catsimatidis does *not* maintain employment records. If it did, this factor

single case in which "constructive control" has been held to satisfy this prong of the "economic reality" test. And with good reason: under that reasoning, in any case in which all of a company's departments are housed in one physical location, *all* corporate officers who work out of that location would "constructively" maintain the company's employment records. In any event, even if it might be proper for the court to draw such an inference after trial, it is plainly not proper at summary judgment, given that "all factual inferences" must be drawn "in favor of [Catsimatidis]." *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 107 (2d Cir. 2008); *see supra* at 11-12. But, to be clear, the record here permits only one inference on this factor: Catsimatidis did not himself maintain any employment records.

* * * *

As the foregoing discussion shows, under the "economic reality" factors this Court has identified, Catsimatidis was not an employer within the meaning of the FLSA. Notwithstanding his ownership of the company, he does not exercise any control over the store employees involved: he does not hire or fire them, supervise them or control the conditions of their employment, determine the methods or rate

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would almost always weigh in favor of "employer" status in the context of high-level corporate officers who, in some sense, indirectly supervise everyone in the company.

of their pay, or maintain their employment records. Thus, Catsimatidis is entitled to summary judgment, and the decision of the district court should be reversed.

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

As shown in the prior section, the summary judgment record, viewed in its entirety under the applicable legal factors, permits only one reasonable conclusion: Catsimatidis did not exercise personal responsibility for company decisions affecting store employees' conditions of employment, and thus is not personally liable as a matter of law under the FLSA for those decisions.

At a minimum, however, Catsimatidis must be entitled to a remand for factfinding on this issue. It is simply impossible to say that Catsimatidis adduced no evidence supporting his position concerning personal liability. "If there is *any* evidence in the record from which a jury could draw a reasonable inference in favor of the non-moving party on a material fact, this Court will find summary judgment is improper." *Finley v. Giacobbe*, 79 F.3d 1285, 1291 (2d Cir. 1996) (emphasis added). Indeed, summary judgment is rarely proper where, as here, the inquiry is a highly "fact-intensive" one. *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 144-45 (2d Cir. 2008). In the FLSA context, in particular, "determinations made as a matter of law on an award of summary judgment" are "rare[]" for just this reason. *Id.* As this Court has elaborated: "The fact-intensive character of the joint employment inquiry is highlighted by the fact that two of the

three leading cases in this circuit were appeals from judgment following bench trials. In the third case, we decided that genuine issues of material fact precluded summary judgment on the ultimate issue of FLSA coverage." *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 n.13 (2d Cir. 2003) (citations omitted). As discussed above, there is abundant evidence supporting Catsimatidis's position concerning this "fact-intensive" question—if not enough to reject personal liability as a matter of law, certainly enough that a factfinder could *choose* to reject it.

Notably, this would be true even if Catsimatidis's general control over the company were the sole or principal relevant factor under the "economic reality" test (which it decidedly is not), because the record of his general control is *not* undisputed. For example, there is considerable evidence in the record that Catsimatidis's control over the company is quite limited, and has been for some time. *See, e.g.*, JA-2296 (Zorn Dep. 108:18-19) ("[Catsimatidis is] very minimally involved in the operations"). Robert Zorn testified that Catsimatidis has made the decision that "in the context of his entire business enterprise that his time spent on the supermarket is not an optimal use of his time, and he's delegated that to people." *Id.* at 2327 (Zorn Dep. 147:14-25). Thus, although Catsimatidis, as the long-time owner of the company, may be copied on reports and oversee certain high-level matters, *id.* at 2582 (Catsimatidis Dep. 120:3-12) (when asked what he is "CC'd on with respect to operations," Catsimatidis testified, "I couldn't even

begin to remember. They feel it's necessary just to send me copies, I guess"), his deputies bear primary responsibility for the management of the Gristede's supermarkets, *see, e.g.*, *id.* at 2591 (Catsimatidis Dep. 159:6-13) (describing the company's "chain of command"); *id.* at 2605 (Catsimatidis Dep. 223:12-16) ("We have a table of organization. Unless I wanted to run the entire company myself, then the table of organization wouldn't work, so that's why I leave it up to all the people responsible for doing their own jobs."); *id.* at 2511-12 (Criscuolo Dep. 13:24-14:17) (explaining that he "run[s] the operations of the company" and what responsibilities that entails); *id.* at 2326 (Zorn Dep. 146:4-8) ("You know, [J]ohn is not real active in the supermarket, and a lot of decisions that I guess he could make he defers to me"); *id.* at 2777 (Flores Dep. 123:11-14) (recounting a meeting with an insurance company and stating that Catsimatidis stepped into the meeting briefly, explained that Flores and Zorn are "'the decisionmakers," "'so these are the people you want to speak to,'" and "then . . . went back to his office").

The district court granted summary judgment in plaintiffs' favor only by ignoring all of this record evidence and resolving all factual disputes in plaintiffs' favor. In doing so, the district court turned the summary judgment standard on its head. The district court should have resolved all factual disputes in Catsimatidis's favor and disregarded all contrary evidence. *See supra* at 11-12. Had it done so, it would have been plain that summary judgment in plaintiffs' favor was improper.

Thus, 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 for the simple reason that the NYLL does not impose personal liability against corporate officers. Under Article 6 of the NYLL, an "employer" is "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." N.Y. Labor Law § 190(3); *see id.* § 651(6) (defining "employer" as "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer"). Although superficially similar to the definition of "employer" in the FLSA, the New York Court of Appeals has held that the text of the definition in Article 6 "provides no clue" as to whether it allows corporate officers to be held personally liable. *See Patrowich v. Chem. Bank*, 473 N.E.2d 11, 13 (N.Y. 1984) (per curiam).

As a result, New York courts attempting to determine whether there should be personal liability for corporate officers under Article 6 have looked to two other provisions—§§ 197 and 198-A—which provide for civil and criminal penalties, respectively. As the New York courts have explained, section 198-A explicitly

provides for criminal penalties against the "officers and agents of any corporation." N.Y. Labor Law § 198-a(1). By contrast, section 197 does not provide for civil penalties for corporate officers and agents. *Id.* § 197; *see also Stoganovic v. Dinolfo*, 461 N.Y.S.2d 121, 122-23 (N.Y. App. Div. 1983), *aff'd*, 462 N.E.2d 149 (N.Y. 1984) (sections 197 and 198 "do not refer to civil actions for the recovery of wages against officers or agents of corporations"). "The logical inference from this omission," the courts have held, "is that the Legislature did not intend that a civil action against officers and agents of corporations for the recovery of wages should be implied under section 198-a of the Labor Law." *Id.*; *see Patrowich*, 473 N.E.2d at 13 ("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"); *Renzler v. D. F. White, Inc.*, 267 A.D.2d 443, 444 (N.Y. App. Div. 1999) ("The Legislature clearly intended that corporate officers not be subjected to civil liability under that article of the Labor Law.").[10]

[10] Article 19 is somewhat different insofar as it does allow civil penalties against corporate officers, but those penalties are strictly limited. *See* N.Y. Labor Law § 662(1) ("[a]ny employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, who pays or agrees to pay to any employee less than the wage applicable under this article shall be guilty of a misdemeanor and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year").

Federal district courts applying New York law have reached the same conclusion. *See Robles v. Copstat Sec., Inc.*, 2009 U.S. Dist. LEXIS 112003, at *6-7 (S.D.N.Y. Dec. 2, 2009); *Rosen v. Fink*, 1999 WL 169684, at *4 (S.D.N.Y. Mar. 26, 1999), *aff'd by* 1999 U.S. App. LEXIS 32438, at *5-6 (2d Cir. Dec. 13, 1999) (dismissing plaintiff's claim attempting to "hold officers and agents of the corporation personally liable . . . to recover wages and benefits"); *Bullock v. Presbyterian Hosp. of N.Y.*, 1996 WL 328740, at *4 (S.D.N.Y. June 13, 1996); *cf. Griffin-Baez v. The Institute for Responsible Fatherhood & Family Revitalization*, 2002 WL 1143738, at *3 n.4 (S.D.N.Y. May 29, 2002) ("As concerns plaintiffs' Labor Law claims, individual corporate officers of an employer may not be subjected to civil liability under the New York Labor Law").[11] Accordingly, summary judgment should have been entered for Catsimatidis on personal liability under the NYLL.

[11] Although some district courts have held that the analysis of "employer" status under the NYLL is the same as that under the FLSA, they have provided little or no analysis supporting that conclusion or explaining how can it be reconciled with New York state-court precedents, *see, e.g.*, *Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342 n.25 (S.D.N.Y. 2005), even though "federal courts must follow the holdings of the highest state court in applying state law," *cf. Travelers Ins. Co. v. Henry*, 470 F.3d 56, 62 (2d Cir. 2006). Of course, 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 that precluded a grant of summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: February 28, 2012

Respectfully submitted,

/s Jonathan D. Hacker

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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 10,871 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: February 28, 2012

By: /s Jonathan D. Hacker
Jonathan D. Hacker

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, I electronically filed the Brief of Defendant-Appellant John Catsimatidis and Joint Appendix 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: February 28, 2012

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