

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of the
State of New York,

Index No. 450627/2016

Hon. Eileen Bransten
Part 3
Courtroom 442

Petitioner,

-against-

Motion Seq. No. 001

DOMINO’S PIZZA, INC., DOMINO’S PIZZA, LLC,
DOMINO’S PIZZA FRANCHISING, LLC,
ANTHONY MAESTRI, HI-RISE PIZZA, INC.,
HUDSON RIVER PIZZA, LLC, UPPER WEST
HARLEM PIZZA, INC., NORTH BEDFORD AVENUE
PIZZA, INC., UPTOWN PIZZA, INC.,
NORTHERN WESTCHESTER PIZZA, LLC,
SHUEB AHMED, NADER INC., SUPER DUPER
PIZZA INC., MATTHEW J. DENMAN, and DENMAN
ENTERPRISES, INC.,

Respondents.

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**AMENDED MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION**

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Petitioner, the People of the State of New York, through the Office of the Attorney General, Eric T. Schneiderman (the “OAG”), submits this Amended Memorandum of Law in support of the Verified Petition, pursuant to Executive Law §63(12), Articles 6 and 19 of the New York Labor Law (“NYLL”) and the rules and regulations promulgated thereunder, and General Business Law §687(2)(b), for injunctive relief, restitution, damages, disgorgement and civil penalties against Respondents, amended as per the Court’s Order filed October 4, 2016.¹

PRELIMINARY STATEMENT

Domino’s promotes itself as the largest pizza delivery company in the U.S., but that success does not translate to the hardworking people who deliver pizzas at franchisee stores throughout New York. These workers (the linchpin of Domino’s business) have been systematically underpaid in blatant violation of the NYLL. The Franchisee Respondents, as the workers’ front-line employers, are liable for numerous wage-and-hour violations committed at their ten franchise stores, amounting to over \$567,000 owed to these workers in back wages and other underpayments.

But Domino’s also bears responsibility and liability for these violations. First, due to Domino’s unusually high level of control over employee conditions at its franchisee stores and its role in causing the wage violations, Domino’s is liable as these workers’ joint employer. Viewing the “economic realities” under the applicable multi-factor tests for determining joint employment, indisputable facts show that Domino’s retained and actively exercised authority over the Franchisee Respondents’ employee relations, playing a key role in hiring, discipline,

¹ See Stipulation and Order (NYSCEF Doc. No. 181). Respondents herein are Domino’s Pizza, Inc., Domino’s Pizza LLC and Domino’s Pizza Franchising LLC (“Domino’s”); Anthony Maestri and Hi-Rise Pizza, Inc., Hudson River Pizza, LLC, Upper West Harlem Pizza, Inc., North Bedford Avenue Pizza, Inc., Uptown Pizza, Inc., and Northern Westchester Pizza, LLC (the “Maestri Respondents”); Shueb Ahmed and Nader Inc. and Super Duper Pizza, Inc. (the “Ahmed Respondents”); and Matthew Denman and Denman Enterprises, Inc. (the “Denman Respondents) (collectively, the “Franchisee Respondents”).

recordkeeping, operations, employee relations and employment conditions. Second, Domino's also directly caused many of the Franchisee Respondents' violations. Domino's requires all franchisees to use a computer system (known as "PULSE") and encouraged them to use a "Payroll Report" function in PULSE to calculate gross wages. Domino's knew that PULSE illegally under-calculated gross wages in at least four ways, but failed to disclose to franchisees that PULSE's wage calculations failed to comply with the NYLL.

For the reasons set forth below and in the Verified Petition and the Affirmation of Assistant Attorney General Terri Gerstein, the Court should grant the Petition for injunctive relief, restitution, damages, disgorgement, civil penalties and costs, and other equitable relief.

STATEMENT OF FACTS

The accompanying Affirmation in Support of Verified Petition by Terri Gerstein ("Gerstein Aff.") dated May 23, 2016 (NYSCEF Doc. No. 5) includes a full statement of all relevant facts.² A brief summary is given here.

A. Attorney General's Investigation

After a multi-year investigation, the OAG in 2014 and 2015 settled claims with twelve Domino's franchisees (the "Settling Franchisees") who admitted to various NYLL violations, including failure to pay minimum wage, overtime, "spread of hours" pay (the premium required for working shifts longer than ten hours), and to adequately reimburse employees for delivery expenses. Gerstein Aff. ¶¶28-30, 35-36, 38-45. Seven franchisees stated that failure to pay overtime properly was partially caused by PULSE's miscalculation of such pay, and several also noted PULSE's failure to calculate spread of hours pay. *Id.* ¶¶30, 35 & n. 13. At the time, the Settling Franchisees collectively owned 61 Domino's stores in 14 counties, comprising

² "Ex." (as used herein and in the Gerstein Affirmation) refers to Petitioner's Exhibits filed in this proceeding (NYSCEF Doc. Nos. 9-153). See Appendix of Exhibits (NYSCEF Doc. No. 8).

approximately 45% of all franchisee stores now operating in New York State. Gerstein Aff. ¶38. Similar violations were uncovered at stores operated by the Franchisee Respondents. Gerstein Aff. ¶¶46-87.

The OAG's investigation also revealed Domino's liability for the Franchisee Respondents' NYLL violations as a joint employer, based on a multitude of facts evidencing the direct and indirect control that Domino's retained and/or exercised over the operations of its franchisees. Gerstein Aff. ¶¶132-207; see infra at 15-35. The overwhelming and indisputable evidence in support of the Verified Petition includes: (1) sworn testimony of the top Domino's official responsible for relations with East Coast region franchisees, the Domino's VP and senior information technology official responsible for maintaining PULSE, three other top Domino's officials, and owners and managers of numerous Domino's franchisees; (2) 14 affidavits of current and former franchisees and employees; (3) facts admitted in settlement agreements with 12 current franchisees; (4) two affidavits from the company Domino's hired to estimate vehicle expenses of Domino's delivery workers in New York State; (5) documents from credit reporting agencies retained by Domino's to investigate job applicants seeking work at franchisee stores; and (6) other substantial documentary evidence, much of it produced by Domino's. Appendix of Exhibits (NYSCEF Doc. No. 8); Gerstein Aff. ¶¶25, 27, 29, 31, 35, 37.

B. Domino's Requirements for Franchisees Include a Flawed PULSE System

Domino's operates in New York through 54 corporate-owned stores and 136 stores owned by 38 different franchisees. Gerstein Aff. ¶¶18-19. Domino's control of its franchisees begins with its Standard Franchise Agreement ("Franchise Agreement") which imposes non-negotiable, detailed, and exacting specifications, standards, operating procedures, and rules on franchisees. Id. ¶¶ 20-22; Ex. 18. Domino's also requires franchisees to purchase, install and

continuously use the PULSE computer system, grant Domino's unrestricted 24/7 access to their PULSE data as well as physical access to their stores to conduct inspections, and pay Domino's for the use of PULSE. Id. ¶¶22(d)-(f), 89.³

While PULSE performs point-of-sale (i.e., cash register) functions, it also does much more, including generating reports (e.g., sales, revenue, payroll) and continuously tracking delivery information, maintaining store personnel data and product prices, recording employees' clock-in/-out times, tracking employee work tasks in real time, and recording tips. Gerstein Aff. ¶¶88-89. A worker at a franchise store cannot perform any work-related function (e.g., take an order) without first logging in to PULSE. Id. ¶95. The moment an order is taken, a timer starts and PULSE tracks minute-by-minute all subsequent actions until the order is fulfilled, including which employee performs each order-related task. Id. ¶¶95, 184-185.

Crucially, Domino's effectively made PULSE a part of its franchisees' payroll system. The PULSE-generated reports include a "Payroll Report." Identified as a "frequently used report[]" in Domino's PULSE reference manual ("PULSE Reports Guide"), the Payroll Report lists "all team members and their total hours and pay" for any specified date range. Gerstein Aff. ¶91. The Payroll Report calculates gross wages due based on an employee's clock-in/-out times in PULSE and on the employee's wage rate entered in PULSE by a store owner or manager. Id. at ¶¶91-92. Labeled "Payroll" at the top of each page, the Payroll Report shows each employee's daily hours worked, pay rate, regular hours, "Overtime 1.5," "Tips," and "Total Pay," among other things. Id. ¶92; Ex. 80. Once a manager enters an employee wage rate, PULSE automatically calculates "Total Pay" for each employee for each pay period, combining regular and overtime pay owed to each employee, based on the hours recorded in PULSE, and

³ The estimated cost per store to acquire PULSE is \$15,000 to \$25,000 and costs per store for required maintenance and support contracts, license fees, upgrades and updates to PULSE average up to \$4,500 annually. Gerstein Aff. ¶90; Ex. 2 (at 24).

shows this “Total Pay” in the Payroll Report. Id. ¶¶92, 94; Ex. 80.

PULSE automatically records employees’ hours worked, and requires franchisees to enter a wage rate for each employee, making it highly unlikely a franchisee would expend time and money on a separate timekeeping system. Indeed, Domino’s unquestionably knew that a number of franchisees used the PULSE Payroll Report to calculate gross wages. Gerstein Aff. ¶¶96-97.

C. Domino’s Fails To Disclose PULSE’s Four Flaws

Domino’s offered no warnings or qualifications to its franchisees about PULSE in the Financial Disclosure Documents (“FDD”) provided to franchisees as required by New York’s Franchise Sales Act. See infra at 39-41. Instead, Domino’s FDD and incorporated documents indicated that PULSE and its payroll function could be relied upon, claiming, among other things, that PULSE has the “capability to interface with a payroll company,” and that the Payroll Report “generat[es] payroll information to give to your accountant or payroll service.” Ex. 2 (at 45-46); Ex. 75 (at DP75398); Gerstein Aff. ¶¶127-128. These and other representations in the FDD were either materially misleading or omitted material information that should have been disclosed because Domino’s has been aware for years of four flaws in its Payroll Report that should have been disclosed. Gerstein Aff. ¶¶129-130. Despite its knowledge of the flaws in PULSE and of franchisees’ continued use of PULSE for payroll purposes, Domino’s never advised franchisees in the FDD or elsewhere not to use PULSE as a payroll system, or to exercise proper precautions if they did. Nor did the Payroll Report itself contain any such disclaimer or warning. Id. ¶94.

1. PULSE Fails To Count Overtime Hours Accumulated at Multiple Stores

The Payroll Report generated by PULSE cannot combine a single employee’s hours from more than one store location owned by the same franchisee; thus, an employee who works 30

hours a week at each of two stores will not be shown as owed an overtime premium for work over 40 hours. See Ex. 80; Gerstein Aff. ¶¶99. This resulted in underpayment of overtime to employees in the Maestri Respondents' stores and other stores. Gerstein Aff. ¶¶51, 99; Ex. 51 (at ¶¶12-13).

Domino's knew about this flaw in PULSE at least as early as 2010, when Domino's IT and HR officials discussed by email a proposal to remedy the flaw but never did it. Gerstein Aff. ¶100; Ex. 27 (at 253-55); Ex. 81 (at DP86333-35 and attachment, p. 3 last row). Domino's never disclosed to franchisees that there was any problem nor that a separate software program called "PeopleSoft," used at Domino's corporate stores along with PULSE, properly calculates overtime for employees who work at multiple locations in a workweek. Gerstein Aff. ¶100; Ex. 28 (at 533-34, 370).

2. PULSE Under-Calculates Overtime for Tipped Employees

PULSE uses the wrong formula to calculate overtime wages owed to delivery workers who are paid a "tipped rate" (the sub-minimum wage the NYLL permits for certain tipped workers): PULSE calculates overtime pay at 1.5 times the tipped rate, rather than 1.5 times the standard minimum wage minus the tip credit, as required by law, thus undercalculating overtime wages owed to tipped employees. Gerstein Aff. ¶101; 12 N.Y.C.R.R. §146-1.4. The Maestri and Ahmed Respondents, as well as nine settling franchisees, regularly underpaid their delivery workers because they relied on PULSE and its "Total Pay" column, and they were unaware of PULSE's tipped-rate overtime flaw. Gerstein Aff. ¶¶102, 105.

Domino's knew about this flaw at least as early as 2007 but never took action to correct it because it was a "low priority." Gerstein Aff. ¶¶103-104; Ex. 27 (at 192-93, 235-36). Nor did Domino's systematically alert New York franchisees about this flaw and that they needed to

ensure proper payment of overtime to tipped delivery workers, even when several franchisees brought the flaw to Domino's attention in approximately 2011. Gerstein Aff. ¶106; Ex. 3 (at 281-83); Ex. 78 (at 259); Ex. 51 (at ¶14).

3. PULSE Miscalculates Wages for Those Doing Both Tipped and Non-Tipped Work

State law prohibits an employer from paying workers a "tip credit" wage on any day workers perform non-tipped work for over 20% of their shift or for two hours or more during the shift, whichever is less ("the 80/20 Rule"). See 12 N.Y.C.R.R. §146-2.9; Gerstein Aff. ¶107. However, PULSE does not track when employees perform delivery work for less than 80% of their shift and, therefore, cannot legally be paid a "tip credit" wage rate for the day, nor does it allow entry of more than one wage rate for the same employee. This leads franchisees with tipped delivery workers, such as the Franchisee Respondents, to underpay employees when they perform non-tipped work for over 20% of their shift. Gerstein Aff. ¶107; Ex. 27 (at 177-78, 229-30).

Domino's knew about this PULSE flaw (and its impact on franchisees and workers) at least as early as 2007 but again chose to do nothing. Gerstein Aff. ¶¶109-110; Ex. 82 (at DP88351-52) ("franchisees are just paying the tip wage for the entire shift which is not following the law"); Ex. 86 (at DP00088368) ("[T]here are a lot of franchisees who are not doing tip credit correctly.") Domino's compounded this PULSE flaw by directing franchisees to "cross-train" their delivery workers "to perform all of the tasks in your store" (i.e., non-tipped work such as cooking, boxing pizzas, or taking orders when not making deliveries), even as the company knowingly failed to warn franchisees or program PULSE to lawfully compensate "cross-trained" workers who performed both tipped and non-tipped work. Gerstein Aff. ¶108; Ex. 85 (at DP7688); Ex. 20 (at 296-99); Ex. 3 (at 135-36); Ex. 51 (at ¶19).

4. PULSE Does Not Calculate “Spread of Hours” Pay

Finally, PULSE does not allow a franchisee to calculate and add the additional hour at minimum wage that is due to an employee who works over ten hours in a day (the “spread of hours” requirement). Gerstein Aff. ¶¶112; Ex. 27 (at 171); 12 N.Y.C.R.R. §§146-1.6, 137-1.7. The Franchisee Respondents and many of the Settling Franchisees systematically underpaid employees for significant time periods as a result of this PULSE flaw. Gerstein Aff. ¶¶44, 50, 55, 61. Domino’s knew, but never advised all New York franchisees, about this flaw or about available fixes. *Id.* ¶¶113. Such fixes included a commercially available software add-on, Wizard, as well as the PeopleSoft program Domino’s used in its corporate stores, both of which properly calculate spread of hours pay. *Id.* ¶¶116, 201-202; Ex. 17 (at 159-60).

D. PULSE Data Reveals Systemic Wage-and-Hour Violations of Which Domino’s Should Have Known

Domino’s knowledge of, and failure to fix, the flaws in PULSE resulted in hundreds of thousands of dollars in underpayments by the Franchisee Respondents. Gerstein Aff. ¶¶114-118. But PULSE data to which Domino’s had 24/7 access also enabled it to know of additional pervasive franchisee violations of the NYLL. This data produced by Domino’s during the OAG’s investigation presents a startling picture of system-wide underpayment. According to these records, from 2011 to 2013 over 78% of franchisees operating in New York State (33 of the then 42) reported instances of wage rates in PULSE below the lowest legal wage for delivery workers (even assuming the employer was entitled to the full tip credit); over 85% (36 of the 42) reported instances of overtime rates below the lawful overtime rate for delivery workers (again assuming the employer was entitled to the full tip credit); and every single franchisee reported instances where one or more employees were paid less than \$7.25 per hour (the then-minimum

wage), even though no tips at all were reported for such employees. See id. ¶¶33-34 & n.18; Ex. 42.

In addition to these data reported by franchisees on Domino’s own compulsory PULSE system, since at least 2009 Domino’s also knew through other means that its franchisees were violating wage-and-hour laws, including that many franchisees were misusing the tip credit. Gerstein Aff. ¶122. Through its own surveys on tip credit and compensation and employee complaints it received, Domino’s had abundant evidence of serious wage-and-hour violations at its New York franchisee stores. Id. ¶¶123-125. For example, in June 2009, Domino’s surveyed its franchisees and at least two franchisees in New York State responded that they were paying employees \$4.60 per hour, lower than any then-permissible wage rate. Id. ¶123.

The widespread and systemic nature of wage-and-hour violations at Domino’s New York franchisees revealed by the PULSE data, confirmed in franchisee surveys, has been borne out by the OAG’s investigation leading to the filing of the Verified Petition. Gerstein Aff. ¶¶28-31, 35.⁴

ARGUMENT

I. RESPONDENTS ARE JOINTLY LIABLE FOR REPEATED AND PERSISTENT ILLEGAL CONDUCT VIOLATING THE NYLL.

Executive Law §63(12) grants the OAG authority to seek redress for “persistent fraud or illegality in the carrying on, conducting or transaction of business” in New York. Violations of the NYLL and the Franchise Sales Act alleged in the Verified Petition constitute fraudulent or illegal acts properly brought in a §63(12) proceeding. See, e.g., People v. Trump Entrepreneur

⁴ The “Relevant Period” here is (1) July 17, 2008 to the present, as to the Franchisee Respondents; and (2) May 23, 2010 to the present, as to Domino’s. Gerstein Aff. ¶34 n.17. All claims in this proceeding are subject to a six-year limitations period. See NYLL §§198(3), 663(3) (wage claims); State v. Cortelle Corp., 38 N.Y.2d 83 (1975) (§63(12) fraud). Tolling agreements entered by the Franchisee Respondents extend the limitations period for claims against them to July 2008. Gerstein Aff. ¶34 n. 17.

Initiative LLC, 137 A.D.3d 409 (1st Dep't Mar. 1, 2016), appeal pending, No. APL-2016-00115 (N.Y. 2016); People v. Frink Am., Inc., 2 A.D.3d 1379, 1380 (4th Dep't 2003). Section 63(12) proceedings are special proceedings. See, e.g., People v. Telehublink Corp., 301 A.D.2d 1006 (3d Dep't 2003); State v. Daro Chartours, Inc., 72 A.D.2d 872 (3d Dep't 1979). Thus, they are subject to the same standards and rules of decision as apply on a motion for summary judgment. Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008); C.P.L.R. §409(b); see also Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) (citing C.P.L.R. §3212 (b)); Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Matter of Fin. Guar. Ins. Co., 39 Misc. 3d 208, 210 (Sup. Ct. N.Y. Cty. 2013). An evidentiary hearing is unnecessary where the party opposing the motion does not submit evidence sufficient to raise a material issue of fact. See id. at 210-211; State v. Waterfine Water Conditioning Co., 87 Misc. 2d 18, 19-20 (Sup. Ct. Albany Cty. 1975).

A. The Franchisee Respondents Violated the NYLL

The indisputable facts uncovered in the OAG's investigation demonstrate that during the Relevant Period the Franchisee Respondents violated the NYLL by, inter alia, failing to pay the legal minimum wage and overtime wage; failing to pay spread of hours pay; and/or failing to adequately reimburse for delivery expenses. Gerstein Aff. ¶¶46-59 (Maestri); 60-69 (Ahmed); 70-87 (Denman).

The Maestri Respondents failed to pay the legal minimum wage because they took a tip credit for all hours worked even though delivery workers spent over 20% of their time performing non-tipped work; they also failed to satisfy other requirements for taking the tip credit. Gerstein Aff. ¶¶46-48. The Maestri Respondents violated overtime laws because they calculated overtime based on unlawfully low tipped regular rates, and they did not combine hours worked at all stores. Id. ¶¶49, 51. In addition, the Maestri Respondents did not pay spread

of hours pay or fully reimburse employees' bicycle-related delivery expenses. Id. ¶¶50, 52. The estimated resulting underpayments total at least \$178,000, plus liquidated damages and interest. Id. ¶¶53-59; Ex.62 (at ¶¶ 17-18); Petition ¶¶175-235.

The Ahmed Respondents violated the minimum wage requirement by paying delivery workers as little as \$5.00 per hour, less than the then-applicable \$5.65 tipped rate. See 12 N.Y.C.R.R. §§146-1.3; Gerstein Aff. ¶60. The Ahmed Respondents paid employees 1.5 times their low (and illegal) regular wage rate for overtime hours, which necessarily resulted in an unlawfully low overtime rate. Id. ¶60. Finally, the Ahmed Respondents did not pay spread of hours pay or fully reimburse employees' bicycle-related delivery expenses. Id. ¶¶61-62. The estimated resulting underpayments total at least \$156,000, plus liquidated damages and interest. Id. ¶¶63-69; Ex. 62 (at ¶¶40-41); Petition ¶¶175-235.

The Denman Respondents failed to pay the legal minimum wage during part of the Relevant Period, because they claimed the tip credit even though delivery workers routinely performed too much non-tipped work. Gerstein Aff. ¶¶70-75. The Denman Respondents also failed to adequately reimburse delivery drivers for automobile-related expenses. Id. ¶¶76-84. The estimated resulting underpayments total at least \$233,000, plus liquidated damages and interest. Id. ¶¶85-87; Ex. 66 (at ¶50); Petition ¶¶175-187, 195-206, 220-235.

B. Domino's Is a Joint Employer Under the "Economic Realities" Test

The NYLL, like the federal Fair Labor Standards Act ("FLSA"), is a remedial statute designed to protect workers. As a result, the term "employer" is to be broadly construed. Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 188-89 (S.D.N.Y. 2003). The term "employer" includes "any individual, partnership, association, corporation . . . or any organized group of persons acting as employer" and "employed" includes "permitted or suffered

to work.” NYLL §§651(6), 2(7). This “suffer or permit to work” definition (incorporated into the FLSA at 29 U.S.C. §203(g)) is “the broadest definition [of ‘employ’] that has ever been included in any one act,” encompassing relationships that “were not deemed to fall within an employer-employee category” at common law. Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (citations omitted). Thus, multiple entities or individuals can be treated as “joint employers.” A joint employer is jointly and severally liable for all underpayments in violation of the NYLL, whether or not that joint employer facilitated or caused the particular violation. Ansoumana, 255 F. Supp. 2d at 186.

Zheng, Barfield v. N.Y. City Health & Hospitals Corp., 537 F.3d 132 (2d Cir. 2008), and other federal-court decisions have applied an “economic realities” test — examining the economic realities of the alleged employment relationship to determine joint employment — to claims involving the NYLL as well as the FLSA (under which the economic realities test was originally articulated). Besides Zheng and Barfield, principal Second Circuit opinions articulating the test include Herman v. RSR Security Services, Ltd., 172 F.3d 132 (2d Cir. 1999) and Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013). Following these cases, district courts in New York regularly apply the test to both FLSA and NYLL claims.⁵ New York State authority follows suit, also citing to Second Circuit cases.⁶

⁵ See, e.g., Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 206 (S.D.N.Y. 2014) (citing Spicer v. Pier Sixty LLC, 269 F.R.D. 321, 335 n.13 (S.D.N.Y. 2010); Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 525-27 (S.D.N.Y. 2013) (collecting cases)); see also Cano v. DPNY, Inc., 287 F.R.D. 251, 260 n.2 (S.D.N.Y. 2012).

⁶ See, e.g., Exceed Contracting Corp. v. Indus. Bd. of Appeals, 126 A.D.3d 575, 576 (1st Dep’t 2015) (citing Zheng); see also Yick Wing Chan v. Indus. Bd. of Appeals, 120 A.D.3d 1120, 1121 (1st Dep’t 2014) (citing Herman); Bonito v. Avalon Partners, Inc., 106 A.D.3d 625, 626 (1st Dep’t 2013) (citing Herman); Ponce v. Lajaunie, 2015 N.Y. Slip Op. 31216(U), 2015 N.Y. Misc. LEXIS 2522, at *4-5 (Sup. Ct. N.Y. Cty. July 15, 2015) (citing Herman, Irizarry, Barfield); David Birnbaum LLC v. Park, 2013 N.Y. Misc. LEXIS 6210, at *27-28 (Sup. Ct. N.Y. Cty. Jan. 25, 2013) (citing Herman).

In applying the “economic realities” test,

the “overarching concern” is whether the alleged employer possessed the power to control the workers in question [] with an eye to the “economic reality” presented by the facts [T]he “economic reality” test encompasses the totality of circumstances, no one of which is exclusive.

Herman, 172 F.3d at 139.⁷ The “object of the economic reality test” “is not to determine whether the workers at issue are more economically dependent on” the immediate or the putatively joint employer, but rather “whether the totality of the evidence . . . demonstrates the economic dependence of the [workers] on both of those employers.” Lopez v. Silverman, 14 F. Supp. 2d 405, 423 (S.D.N.Y. 1998) (emphasis in original) (quotations omitted).

Since a determination of joint employment based on economic realities must be “based upon all the circumstances,” courts may examine “any relevant evidence . . . so as to avoid having the test confined to a narrow legalistic definition.” Herman, 172 F.3d at 139 (emphasis in original); see also Zheng, 355 F.3d at 72. “[A]rguments that any particular allegation . . . is insufficient, on its own, to establish a joint-employer relationship” do not disprove the claim. Flemming v. REM Conn. Cmty. Servs. Inc., 2012 U.S. Dist. LEXIS 180678, at *12 (D. Conn. Dec. 21, 2012). Zheng specifically states that a summary finding of joint employer status might be made “even when isolated factors point against imposing joint liability.” 355 F.3d at 77.

1. The Herman and Zheng Factors

In examining the “totality of the circumstances,” the courts have identified “formal” and “functional” factors for analysis. As per Herman, a court must first evaluate whether an alleged joint employer exercised “formal” control over employment. Relying on earlier precedent, the

⁷ The economic realities test is the same whether a putative joint employer is an individual person (see generally Herman, 172 F.3d 132; Bonito, 106 A.D.3d at 626), or a corporation, like Domino’s. See generally Zheng, 355 F.3d at 69; Cano, 287 F.R.D. at 260; Antenor v. D&S Farms, 88 F.3d 925, 932-33 (11th Cir. 1996); Ansoumana, 255 F. Supp. 2d at 412; and Lopez, 14 F. Supp. 2d at 412.

Herman court identified four factors establishing such control, asking whether the putative 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. 172 F.3d at 139 (citing Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984)).

In Zheng, the court further elaborated upon the “formal control” analysis, recognizing that “Carter did not hold . . . that those [four] factors are necessary to establish an employment relationship.” Zheng, 355 F.3d at 71 (emphasis omitted). The Zheng court identified a number of other factors that could establish a putative employer’s “functional” control over a worker’s employment: (1) whether the putative joint employer’s premises and equipment were used for the employees’ work; (2) whether the front-line employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which employees performed a discrete line-job that was integral to the putative joint employer’s process of production; (4) whether responsibility under the contracts between the direct and putative joint employer could pass from one entity to another without material changes; (5) the degree to which the putative joint employer or its agents supervised employees’ work; and (6) whether employees worked exclusively or predominantly for the putative joint employer. Id. at 72.

To give “proper effect” to the broad language of the wage-and-hour laws, the control factors set forth in Herman and Zheng, rather than “rigid rule[s],” “provide a nonexclusive and overlapping set of factors to ensure that the economic realities test . . . is sufficiently comprehensive and flexible.” Barfield, 537 F.3d at 143. A party need not satisfy all of the factors and the court is “free to consider any other factors it deems relevant to its assessment of the economic realities.” Zheng, 355 F.3d at 71-72.

Applying the economic realities test, courts have refused to dismiss complaints which sufficiently alleged that particular franchisors were joint employers liable for NYLL and FLSA violations. See, e.g., Ocampo v. 455 Hospitality LLC, 2016 U.S. Dist. LEXIS 125928 (S.D.N.Y. Sept. 15, 2016); Cano, 287 F.R.D. at 259-60; Olvera, 73 F. Supp. 3d at 207. In cases involving other corporate relationships, courts have found FLSA and/or NYLL joint employer liability or refused to dismiss claims against companies, like Domino's, whose product was manufactured or processed for sale, or whose service was performed, by workers directly reporting to a separate corporate entity. Examples include a company whose manufacturing work was done by employees reporting to contractors (Zheng, 355 F.3d at 73; Lopez, 14 F. Supp. 2d at 420-23); growers whose crops were picked by farmworkers hired and supervised by contractors (Antenor, 88 F.3d at 937-38; Torres-Lopez v. May, 111 F.3d 633, 642-44 (9th Cir. 1997)); a state agency together with the welfare recipients who directly hired and negotiated with home attendants (Bonnette v. Cal. Health & Welfare Agency, 525 F. Supp. 2d 128, 135 (N.D. Cal. 1981)); Yale University together with the bus company that directly hired and paid its shuttle bus drivers (Velez v. New Haven Bus Serv., Inc., 2015 U.S. Dist. LEXIS 1275, at *15-19 (D. Conn. Jan. 26, 2015)); and delivery workers hired by delivery/trucking companies but assigned to Duane Reade stores (Ansoumana, 255 F. Supp. 2d at 193-96).

C. Domino's Is Liable as a Joint Employer Because, Through PULSE, It Directly Caused or Facilitated Many of the Wage-and-Hour Violations

An unusual feature of this case is that Domino's, the joint employer, directly caused many of the wage violations by requiring franchisees to use PULSE and leading them to rely on PULSE's payroll functions without correcting or disclosing known flaws. Directly causing or facilitating wage-and-hour violations is highly probative evidence, strongly supporting a joint employer finding, as precedent bears out.

For example, in Flemming, the plaintiff sought a joint employer finding under the FLSA and state law. 2012 U.S. Dist. LEXIS 180678, at *6-7. The court rejected defendants' attempts to "slice and dice Plaintiff's allegations separately, instead of evaluating the totality of the circumstances" (id. at *12), and gave special weight to the plaintiff's claim that the putative joint employers caused the violations at issue by improperly designating all Program Managers as exempt from overtime. Id. at *17 (citing, inter alia, Lanzetta v. Florio's Enters., 763 F. Supp. 2d 615, 627 (S.D.N.Y. 2011)) ("facilitation of the alleged violation [is] a significant factor in the joint-employer analysis").

In Liu v. Donna Karan Int'l, Inc., 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. Jan. 2, 2001), plaintiffs alleged that clothing company Donna Karan shared liability for NYLL and FLSA violations with garment contractors who directly employed the workers. Plaintiffs alleged Donna Karan dictated the prices of the garments and the production requirements, the hours plaintiffs worked, and controlled wages and hours of the workers through price setting and its large output demands. Id. at *3, 9. Such alleged control was sufficient to defeat a motion to dismiss, even though Donna Karan was not alleged to have a direct interest in the contractors or supervise plaintiffs' work.

In Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240 (S.D.N.Y. 2008), the court found, after trial, joint employer liability under the FLSA and the NYLL not only on the part of the restaurants' owners but also on the part of the manager of the restaurants because he "understood the conditions under which plaintiffs were working, including their wages, and readily lent himself to, and facilitated, a system under which they were denied their rights." Id. at 264-65; see also, e.g., Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983) (finding company president a joint employer in part because he "was personally responsible for allowing the

company's workers' compensation insurance to lapse"); Lanzetta, 763 F. Supp. 2d at 627 (after trial, finding general manager "had a role in facilitating the violations at issue, which has also been considered significant in the economic reality inquiry"); Herman, 172 F.3d 132 at 141-42 (defendant a joint employer for failing to proactively ascertain the co-employer's compliance with the FLSA given knowledge of that employer's prior FLSA violations).

Similarly here, Domino's should be held liable as a joint employer because Domino's caused or otherwise facilitated a number of the violations committed by its franchisees by encouraging franchisees to use PULSE Payroll Reports without fixing or disclosing PULSE flaws of which Domino's was well aware.

D. Domino's Status as a Joint Employer Is Further Established by Evidence of Direct Control Under the *Herman* Factors

Domino's ongoing and extensive control over, and ability to control, Franchisee Respondents' operations and those of other franchisees evidences its joint employment status as per the four Herman factors.⁸

Under Herman, the significant question is not whether control over employees was exercised constantly, uniformly, or directly, but simply whether control "existed." Herman, 172 F.3d at 139. Joint employment "does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control. . . . Control may be restricted, or exercised only occasionally . . . since such limitations on control 'do[] not diminish the significance of its existence.'" Id. at 139 (emphasis added) (citations omitted).⁹ See also, e.g.,

⁸ See, e.g., Glatt, 293 F.R.D. at 526 n.26 (citing Herman, 172 F.3d at 139) (noting relevance of facts concerning relationships the joint employer had with other similarly-situated entities, finding that since the economic realities test "is based on all the circumstances, any relevant evidence may be examined").

⁹ Cf. Browning-Ferris Indus. of Cal., Inc., 2015 NLRB LEXIS 672, at *63, *70 (Aug. 27, 2015) (finding that the common law does not require constant exercise of control and that either the

Donovan v. Janitorial Servs., Inc., 672 F.2d 528, 531 (5th Cir. 1982) (that authority was “latent” and “exercised . . . only occasionally . . . does not diminish the significance of its existence”); Hart v. Rick’s Cabaret Int’l Inc., 967 F. Supp. 2d 901, 917-18 (S.D.N.Y. 2013) (mere threat of imposition of a fine evidenced control); Cano, 287 F.R.D. at 258.

1. Domino’s Power to Hire, Fire and Discipline Franchisees’ Employees

a. Hiring

The first Herman factor examines whether the alleged joint employer had the power to hire and fire the employees. Herman, 172 F.3d at 137, 139 (joint employer “participated in” hiring and recruiting “some” employees). Even without hiring rank-and-file employees, the ability to hire managerial staff is relevant in weighing the first Herman factor. See, e.g., Glatt, 293 F.R.D. at 526 (ability to hire is enough to satisfy first Herman factor); Torres v. Gristede’s Operating Corp., 2011 U.S. Dist. LEXIS 114209, at *7 (S.D.N.Y. Sept. 9, 2011).¹⁰ The level of “participation” under Herman’s first factor thus can include, as in Antenor, the power to veto hiring decisions (88 F.3d at 935), or a franchisor providing guidance to franchisees on “how to hire and train employees.” Olvera, 73 F. Supp. 3d at 207.¹¹ “Participation” may also include involvement in a background check/employee screening requirement beyond simply requiring that one be done. See, e.g., Cano, 287 F.R.D. at 260 (allegations that Domino’s “developed and implemented hiring policies such as systems for screening, interviewing, and assessing

“right to control” or “actual exercise of control, whether direct or indirect” can prove joint employer status).

¹⁰ In Torres, the court found that there did not have to be evidence that joint employer hired any class member when it “stands uncontradicted that he hired managerial employees.” Id. at *7, aff’d in part sub nom. Irizarry v. Catsimatidis, 722 F.3d 99 (2d Cir. 2013).

¹¹ Even if the “general practice” may be for a direct employer to handle hiring issues, with a joint employer intervening only if it finds the direct employer “unable or unwilling to do so,” this does not negate a finding of joint employer status. See, e.g., Bonnette, 525 F. Supp. at 134-35, 137.

applicants for employment at all of their stores” was, with other factors, sufficient to grant motion to add Domino’s as a joint employer). Domino’s retained and exercised control over managerial hiring at franchisee stores, which, under such caselaw, points toward joint employer status. For example, in requiring the Maestri Respondent to hire managerial staff, Domino’s provided the candidate ultimately hired, and met with the new supervisor and the franchisee in order to outline required job functions. Gerstein Aff. ¶¶133-134.

Domino’s also retained and exercised control over hiring decisions of non-managerial employees. Gerstein Aff. ¶135. For example, Domino’s commonly requires in the sale of corporate-owned stores (as a condition of the sale and in the sales contract) that the buyer must “offer substantially similar jobs with substantially similar wages and benefits” to most workers employed in the stores prior to sale. Id. In one instance, a purchasing franchisee carried compliance with Domino’s policy so far that it simply retained the same staff Domino’s had employed (except for those who chose not to stay) and paid them an identical wage without conducting any interviews or background checks. Id.; Ex. 84 (at 95-96).

Domino’s also has control over the process that franchisees must use to conduct Domino’s-required criminal background checks for all prospective employees. Gerstein Aff. ¶¶137-146. A candidate found to have been convicted of a crime cannot be employed by a franchisee if Domino’s objects. Id. ¶137; Ex. 24 (at DP593). The manner in which Domino’s implements background check requirements usurps key aspects of the hiring process:

- Domino’s mandates which vendors perform background checks (the “Reporting Agencies”) and dictates the criteria to approve or reject applicants. Gerstein Aff. ¶¶138-139, 141-142, 145.
- Franchisees lack knowledge about the criteria Domino’s used. Id. ¶¶143-144.
- Domino’s monitors franchisee compliance with these requirements, soliciting information directly from the Reporting Agencies. Id. ¶¶144-145.

- The Reporting Agencies give only “meets/does not meet” results for job seekers, precluding consideration by franchisees (as required by law) of individualized factors such as an ex-offender job applicant’s rehabilitation. Id. ¶¶142-144.¹²

Domino’s supervision through PULSE of franchisee background check and motor vehicle check information impacts employees’ continued ability to work for franchisees. PULSE requires entry of drivers license and auto insurance information for workers; if a worker’s drivers license or insurance has lapsed, that employee is prevented from clocking in to PULSE and cannot work until valid information has been entered. Gerstein Aff. ¶146.¹³

Thus, Domino’s role in the hiring process was far more extensive than mere “participation” in hiring decisions. See, e.g., Herman, 172 F.3d at 137. Domino’s not only reserved, but frequently exercised, powers to hire franchisee employees (managerial and otherwise) as well as to require, enforce, and dictate the process for franchisees’ background checks on potential employees and employees’ motor vehicle status.

b. Firing and Discipline

Control of firing or discipline even if “restricted, or exercised only occasionally” also shows joint employment. Herman, 172 F.3d at 137, 139; Olvera, 73 F. Supp. 3d at 207 (“authority to hire and fire employees” a factor in finding joint employment). Here, Domino’s exerts significant control over the firing and discipline of franchise employees both by reserving

¹² Domino’s control over this function exposes the franchisees to liability, as with the PULSE Payroll Report problem. New York Corrections Law §752 makes it unlawful for an employer to take adverse action in connection with an application for employment or otherwise deny employment to an employee on the basis of a past criminal conviction unless the employer has considered the factors set forth in §753, including the applicant or employee’s “rehabilitation and good conduct.” Id. §753(g).

¹³ With respect to these hiring actions, the point is not that Domino’s control over franchisee hiring and firing was wielded wisely or unwisely, or that Domino’s did or did not do the “right thing.” The point is simply that Domino’s retained and exercised such control and, having done so, cannot also assert that it is completely separate from franchisee hiring and firing decisions.

authority to compel the termination and discipline of franchise workers and by exercising this authority on a number of occasions. Gerstein Aff. ¶¶147-157. Respondent Denman reported that, under threat of termination, Domino's forced him to discharge a "very good" employee (hired before the background check requirements were in place) who had a conviction that Domino's later discovered. Id. ¶¶149-150. When a Domino's inspector discovered illegal drugs and alcohol at a Maestri store, the inspector called Maestri and the police; when Maestri arrived he fired the employees. Despite taking action, he still received from Domino's a "Notice of Default," a disciplinary step that ultimately can lead to termination of a franchise. Id. ¶151; Ex. 3 (at 235-37).¹⁴

Domino's also instructs franchisees on disciplining workers short of termination. Domino's Franchise Operations Director Mark Rudd, for example, instructed the Maestri Respondents to discipline an employee in response to a complaint Domino's received about a manager at one of the Maestri Respondents' stores using foul language, telling Maestri this "has got to stop" and he had "to hold someone accountable." Rudd issued similar instructions to other franchisees. Gerstein Aff. ¶¶152-155; Ex. 109 (at DP79863-64). In another example, a Settling Franchisee, Cookston, was directed by Domino's to take specific disciplinary action against certain employees. Cookston disagreed but felt he had "no choice" and followed instructions. Yet, within a week, Cookston was placed in default of the Franchise Agreement based on this incident (which remained in place for almost two months). Gerstein Aff. ¶156; Ex. 21 (at ¶¶56, 59); Ex. 116 (at D173776-77); Ex. 118.

Consistent with the caselaw, such evidence shows that even if "restricted, or exercised only

¹⁴ Again, the OAG is not suggesting that such employment actions were not appropriate. The point is simply that Domino's had the power to, and did, exercise control over franchisee employment decisions.

occasionally,” Domino’s had the power, and/or exercised the power, to fire and exercise disciplinary authority over the Franchisee Respondents, further satisfying the first Herman factor.

2. Domino’s Supervision and Control of Schedules and Working Conditions

Domino’s satisfies the second Herman factor because it exerts supervision and control over employee schedules and working conditions. Herman, 172 F.3d at 139.

a. Domino’s Control over Scheduling

The second Herman factor can be satisfied where an employer does not dictate particular employees’ individual shifts or schedules, but effectively dictates an overall schedule. See Velez, 2015 U.S. Dist. LEXIS 1275, at *18 (“Yale may have exerted control over hiring, firing, and work assignments of bus drivers by setting the bus routes, schedules, and stops.”); Torres-Lopez, 111 F.3d at 642 (joint employers “controlled the overall harvest schedule,” including deciding that certain days were unsuitable for farming, and controlled the number of workers needed); Antenor, 88 F.3d at 934 (growers dictated workers’ hours by, inter alia, directing how many workers were needed and when they would begin the day).

Domino’s similarly controls the scheduling of employees at franchisees’ stores. Domino’s sets mandatory minimum scheduling and staffing rules for franchisees (effectively determining scheduling of those stores’ employees) through its Manager’s Reference Guide (“Manager’s Guide”). The Manager’s Guide is the nearly 800-page manual of standards all Domino’s stores must follow, described in Parker v. Domino’s Pizza, Inc., 629 So. 2d 1026, 1028-29 (Fla. Dist. Ct. App. 1993), as a “veritable bible for overseeing a Domino’s operation . . . that literally leaves nothing to chance.” See Gerstein Aff. ¶23 n.6. Any attempt to deviate requires franchisees to apply for “variances” which are rarely granted. Gerstein Aff. ¶¶159-160;

Ex. 14 (at 109-110) (Denman “fought tooth and nail” (to no avail) to open on weekdays at 4:00 p.m. rather than 11:00 a.m. since opening early was “a waste of labor hours”).

Domino’s personnel have also repeatedly provided written instructions to franchisees, including the Franchisee Respondents, concerning employee scheduling and staffing levels; one Domino’s official provided all franchisees in his area, including Respondents Ahmed and Maestri, with detailed scheduling instructions, including directives to cross-train delivery workers and to schedule employees in 15-minute increments. Gerstein Aff. ¶161; see also Ex. 123 (directing scheduling of employees for, inter alia, marketing activities).

Domino’s involvement in dictating overall scheduling and staffing levels evidences the requisite level of control under Herman, and a level of control comparable to or greater than that displayed in Torres-Lopez and Antenor.

b. Domino’s Supervision and Control of Working Conditions

Domino’s supervises and controls franchisee working conditions in five ways: (i) setting and enforcing employee standards through regular inspections; (ii) on-site visits and instructions from Domino’s Franchise Operations; (iii) monitoring employee performance via PULSE; (iv) aggressively implementing an anti-union management policy; and (v) direct involvement in customer and employee complaints.

i. Domino’s Inspections and Standards for Franchise Employees

Inspections and enforcement of standards are probative of the second Herman factor. See, e.g., Antenor, 88 F.3d at 934-35 (growers’ representatives walked the job site, spoke directly to employees, and brought problems to the direct employer’s attention); Lopez, 14 F. Supp. 2d at 421 (garment manufacturer directly monitored garment quality and conducted on-site quality control inspections, even though manufacturer “did not hire or fire the [workers], set their

hours or rates of pay, or handle their payroll or employment records”); Torres-Lopez, 111 F.3d at 642 (finding “significant control over the farmworkers’ working conditions” in the right to inspect and the onsite presence of a company official). In Olvera, the court denied a franchisor’s motion to dismiss, finding the pleadings alleged that, among other things, the franchisor “monitored employee performance,” “specified the methods and procedures used by those employees to prepare customer orders,” and “exercised control, directly or indirectly, over the work of employees.” 73 F. Supp. 3d at 207. The court also considered the franchisor’s “right to inspect the facilities and operations of franchises, to audit any franchise’s financial records, and to terminate the franchise agreement.” Id.

Here, Domino’s supervises and controls franchise employees by requiring that all workers be trained via Domino’s training modules before beginning work. Gerstein Aff. ¶165; Ex. 20 (at 291). The training for managers covers, inter alia, personnel matters, the use of the “labor scheduler” function in PULSE to lower labor expenses, how to avoid unions, and how to cross-train and use delivery workers to perform in-store non-tipped tasks (e.g., pizza making) between deliveries. Respondents Maestri and Denman, and others, followed these personnel practices. Gerstein Aff. ¶166; Ex. 14 (at 82); Ex. 3 (at 134-136).

Domino’s also supervises and controls franchise employees by enforcing the standards contained in its Manager’s Guide, including, among other things, uniform rules for employee appearance, grooming, employee conduct, and procedures both when working in-store and when making deliveries. Gerstein Aff. ¶163. The Manager’s Guide goes far beyond mere uniform requirements (specifying requirements and expectations about, e.g., daily shaving, earring diameter, tattoo content, and sock and undershirt colors). The Manager’s Guide also addresses other policies direct employers normally set for workers, for example, how much cash delivery

workers may carry during deliveries, and more. Id. ¶164. Domino’s enforces these standards through its Area Leaders (Domino’s direct liaisons with franchisees in the three areas into which Domino’s has divided New York State) and the application of a wide-ranging evaluation program, with unannounced on-site inspections (scored on a range of 1 to 100) at least three times a year, often conducted when the franchise owner is not present or available. Id. ¶¶25, 163, 167-169.¹⁵

Franchisees that receive bad inspection evaluations or are observed to violate other franchise requirements get a Notice of Default detailing specific steps the franchisee must take to prevent Domino’s from terminating the Franchise Agreement.¹⁶ Domino’s issued almost 800 Notices of Default to New York franchisees from May 4, 2007 to May 7, 2012, which included Default Notices to each of the three Franchisee Respondents for defaults arising from, inter alia, criminal background check standards, employee uniform and grooming standards, and cash restrictions on delivery workers. Gerstein Aff. ¶¶176-178. Three Notices of Default within a 12-month period can mean termination of a franchise, “whether or not such failure to comply is corrected.” Id. ¶¶168, 172; Ex. 18 (at DP321-322). Domino’s threats of termination were not merely theoretical: for example, in 2012-2013, there were five terminations of franchisees. Ex. 20 (at 374-376).¹⁷ Faced with termination, Domino’s might allow franchisees to sell the

¹⁵ Franchisees also must conduct regular “Self Evaluations” and report the results to Domino’s via PULSE. Gerstein Aff. ¶172. Points are deducted for non-compliance with employee rules and standards, including attire, grooming and conduct rules. Id. ¶169.

¹⁶ Franchisees who receive a Notice of Default must submit an “action plan” to Domino’s indicating how they will cure the default, and Domino’s officials follow up with one or more evaluation visits, as well as unannounced visits, to make sure the condition that caused the default has been corrected. Gerstein Aff. ¶175.

¹⁷ In a five-year period, 50 Notices of Termination to New York franchisees included at least 10 for violations of the uniform, grooming and minimum cash standards. Gerstein Aff. ¶¶176, 178.

franchise, though that was not always the case. Ex. 20 (at 378). Termination thus exposed franchisees to the loss of some or all of their investment, as well as the loss of a job and livelihood in the immediate area because the non-compete/non-solicitation provisions in the Franchise Agreement survive a termination. Ex. 18 (at DP328, §20.2).

Domino's continuous involvement in inspections and enforcement supports a joint employment finding. Domino's was extensively and constantly involved in assessing on-site conditions and speaking directly with employees (as in Antenor) and in implementing a comprehensive inspection regime (as in Olvera and Torres-Lopez). Domino's inspection regime is even more intensive than in Torres-Lopez, where the joint employer had the right to inspect, but did not directly interact with employees. 111 F.3d at 642-43.

ii. Domino's Visits to Franchise Stores and Instructions to Franchisees

Supervision that goes beyond "run-of-the-mill" supervision also satisfies the second Herman factor. See generally Zheng, 355 F.3d at 74-75. Domino's regular and intense supervision amounted to co-supervision or co-management of everyday store operations and employee activities.

As noted above, Domino's directed franchisees (including the Franchisee Respondents) to take certain actions, including scheduling of employees and marketing activities, despite store managers' belief that they could not afford to do so. Gerstein Aff. ¶161. In addition, Denman received daily emails and/or text messages from his Area Leader and other Domino's personnel about operations, promotions, sales, and other matters; Maestri was contacted by his Area Director and his Area Director's superiors three to four times a week. Id. ¶26; Ex. 14 (at 65-66); Ex. 3 (at 101-102). Edward DuPont, Domino's upstate Area Leader, regularly visited franchisees' stores unannounced and outside of the franchisees' presence. DuPont spoke with

employees and followed up with text messages directly to the franchisee’s employees (supervisors and managers) to make sure they addressed operational problems that he had found. Gerstein Aff. ¶182; Ex. 23 (at ¶26). DuPont threatened employees at a franchisee’s store that he would close the store down “because I can,” warned the employees that they would lose their jobs if that happened, and sometimes told them “I’m your boss.” Gerstein Aff. ¶182; Ex. 22 (at ¶16).

Domino’s extensive actions with franchisees thus go far beyond mere “run-of-the-mill” supervision, further establishing Herman’s second factor. 172 F.3d at 140 (joint employer exercised only “occasion[al]” supervision); Antenor, 88 F.3d at 934-35 (joint employer conducted quality control inspections and monitored employees’ productivity); Lopez, 14 F. Supp. 2d at 421 (joint employer engaged in quality control inspections).

iii. Domino’s Monitoring of Workers and Job Performance via PULSE

Domino’s supervises and controls its franchisees’ working conditions through its unfettered 24/7 access to PULSE data, which it actively used when evaluating the Franchisee Respondents’ stores. See, e.g., Cano, 287 F.R.D. at 260 (finding allegations that, inter alia, PULSE “included a system of tracking hours and wages and retaining payroll records” pleaded a viable joint employer claim). Delivery times retained and reflected in PULSE are directly linked to employee and franchisee performance reviewed by Domino’s. For example, Domino’s uses PULSE to access a store’s Service Time Reports for the prior 28 days to examine information such as how much time was spent on each employee function (e.g., taking or delivering orders). Gerstein Aff. ¶¶185-186; Ex. 3 (at 264-65) (Maestri stating that data kept by PULSE on “all of our employees” included their time to input an order, and delivery departure and return times).

Domino's placed Maestri in default based in part on Service Time Report data that a Domino's inspector obtained from PULSE during an inspection. Gerstein Aff. ¶187. The PULSE data showed that only 68% of orders were delivered "on time" (within a half hour), resulting in zero points for that section. Id.; Ex. 129 (at DP173999-4000). The Default Notice advised Maestri that he needed "operating assistance" and required him and his managers to attend a training on how to meet Domino's operational guidelines. Ex. 129 (at DP174002-04).

The minute-to-minute monitoring of employees' actions and using such data for evaluations and subsequent directives are the kinds of activities which, in a prior era, could only have been done by a front-line manager who was on-site personally watching employees' job performance. New technology, like PULSE, now allows for remote monitoring, evaluation and management. However, remote managing is still managing when a company knows about every action taken by each worker on a given day and gives directives based on that information.

iv. Domino's Anti-Union Policy and Actions

Domino's actions opposing employee unionization at franchisee stores further demonstrate control over working conditions. Courts have recognized in the collective bargaining context that intervention by one business to oppose unionization at another is indicative of control by the first business leading to shared liability for labor law violations. See, e.g., Majestic Molded Prods., Inc. v. NLRB, 330 F.2d 603, 607 (2d Cir. 1964) (joint liability found, in part, because "two affiliated companies had adopted a common policy and front for labor matters designed to serve joint rather than separate interests"); NLRB v. Gibraltar Indus., Inc., 307 F.2d 428, 430-31 (4th Cir. 1962) (finding "active participation" in anti-union campaign evidences employer's "almost complete control" and joint liability, regardless of whether control was necessary to protect joint employer's investment).

Domino's implemented its opposition to unionization at franchises in several ways. Julie Wigley, a Domino's official responsible for "union avoidance" in Domino's corporate stores, provided myriad "union avoidance" materials to franchisees who reached out to her about union activity in their stores. These materials contained information and advice about preventing union activity, including, for example, "things to look for to suspect union activity." Gerstein Aff. ¶190; Ex. 26 (at 84-85, 87).¹⁸ Wigley also recommended a specific labor management attorney specializing in opposing union campaigns. Gerstein Aff. ¶190 n.74; Ex. 138.

In one example, upon learning that union organizers might be contacting franchisees in New York City, Domino's sent union avoidance literature to ten New York franchisees, including Respondent Maestri, and asked them to inform Domino's of any union activity. Gerstein Aff. ¶193; Ex. 144. This literature stated "There is no union at Domino's, and the company does not want a union here. We will do everything legally possible to keep a union out." Gerstein Aff. ¶193; Ex. 127 (at DP101158).

In another instance, when a new franchisee in New York State received papers from the NLRB, he contacted the Domino's Area Leader, who then contacted Domino's Vice President Ridge. Domino's sent its Director of Human Resources, John Martinez ("PeopleFirst Director for Team USA"), to assist and meet in person with the franchisee. Gerstein Aff. ¶191; Ex. 20 (at 311-312). Martinez directed the franchisee to push the anti-union position "openly and blatantly," "to play up the fact that this union could care less about [the workers'] desires," and get "drivers pissed and mad at the union . . . GET EM!!!" Gerstein Aff. ¶192; Ex. 142 (at DP78398-399). When Domino's anti-union effort succeeded, Ridge praised "bulldog" Martinez,

¹⁸ Franchisees contacted Wigley anywhere from 10 to 25 times from 2004 to approximately 2011. Gerstein Aff. ¶190. She distributed anti-union literature to franchisees through the Area Leader's newsletter regularly sent to franchisees. *Id.* ¶190; Ex. 139; Ex. 26 (at 197-200).

and urged continuing “efforts to educate and inform our franchisees and their GMs [general managers] about unions.” Gerstein Aff. ¶193; Ex. 143 (at DP78404). Respondent Denman also attended a meeting with Domino’s about union infiltration. Gerstein Aff. ¶193; Ex. 14 (at 75-76).

The presence of a union can affect many key aspects of employees’ working conditions, such as wages, work schedules, job security, and benefits. Domino’s vigilance against union campaigns at franchisee stores, including direct intervention by Domino’s own head of HR, goes to the very core of the employer/employee relationship, reflecting the economic reality that Domino’s was a joint employer.¹⁹

v. Domino’s Direct Involvement in Complaints

Domino’s direct handling of customer and employee complaints for franchisees is a further indicator of joint employment. See, e.g., Irizarry, 722 F.3d at 116 (citing Herman, 172 F.3d at 139) (employer’s “occasional” dealing with customer complaints deemed not irrelevant “especially when considered in the context of his overall control of the company”). Customers and employees (at both franchisee-owned and Domino’s corporate stores) report complaints directly to Domino’s Customer Care Center; Domino’s monitors the adequacy and timing of franchisee response, which must occur within five days. Gerstein Aff. ¶¶153-155. A number of employee complaints have concerned “pay issues” on which Domino’s provided direction to franchisees. Id. ¶124. For example, when a franchisee worker complained about breaks, the Domino’s Area Leader was directed “to make sure [the franchisee] is running her store legally compliant [sic]”; the Area Leader reported that he told the franchisee that “she needs to follow New York Labor laws on breaks” and the franchisee “assures me that other employees will get

¹⁹ As in the case of Domino’s requirement that franchisees run background checks, the point is not that it was unlawful for Domino’s to oppose unions at franchisee stores, but simply that Domino’s, not franchisees independently, made and executed this important decision.

proper breaks going forward.” Id.; Ex. 94 (at DP77749-751).

3. Domino’s Role in the Determination of Rate and Method of Payment

Herman’s third factor only needs evidence of “participation” in the payment of employees or that “some power” was exercised. 172 F.3d at 141 (putative employer “participate[d] in the method of payment” by ordering a stop to an illegal pay practice); Torres-Lopez, 111 F.3d at 643 (grower did not directly set workers’ wages but “exercised some power in determining the pay rates”) (emphasis added).

Domino’s influenced workers’ rates and methods of payment. Such influence can be seen through the impact of the miscalculations and flaws of the PULSE Payroll Report that Domino’s allowed to stand undisclosed and uncorrected. See supra at 5-9. Domino’s further affected worker pay by expressly prohibiting tip jars in franchisee-owned stores, justifying the policy by claiming “[o]ur system and pricing is established with margins to provide adequate wages to our team members.” Gerstein Aff. ¶204; Ex. 125 (at DP43439) (emphasis added); Ex. 24 (at DP605). Domino’s thus exercised “some power” over the rate and method of payment of employees at the franchisee stores, satisfying the third Herman factor.

4. Domino’s Maintenance of Employment Records

The indisputable evidence satisfies the final Herman factor, the maintenance of employment records by Domino’s. Herman, 172 F.3d at 139; Barfield, 537 F.3d at 144 (finding joint employer’s record of shifts worked by employees left “no question that [the joint employer] maintained employment records” on the matter most relevant to overtime obligations under FLSA, “the hours worked”); Olvera, 73 F. Supp. 3d at 207 (recordkeeping functions cited as a factor in denying the putative joint employer’s motion to dismiss); Cordova v. SCCF, Inc., 2014 U.S. Dist. LEXIS 97388, at *17-18 (S.D.N.Y. July 16, 2014) (discussing franchisor’s alleged

requirement of “certain record keeping systems, including systems for tracking hours and wages and for retaining payroll records”); Cano, 287 F.R.D. at 260 (weighing heavily PULSE’s “system of tracking hours and wages and retaining payroll records”).

Domino’s maintains franchisee store records in two ways: (1) through PULSE, containing all employees’ clock-in identifications, names, all timekeeping data for hours worked and tasks performed, reported wage rates for employees, tips reported by drivers, and mileage calculations used to reimburse delivery expenses, and (2) through unfettered 24/7 access, both remotely and on-site, to all franchisee records and information including payroll documents and W-2 and I-9 forms. Gerstein Aff. ¶¶205-207; Ex. 18 (at DP310, §14.1); Ex. 24 (at DP634); Ex. 51 (at ¶37); Ex. 75 (DP75398-400).²⁰

E. The Evidence of Domino’s Functional Control Under the Zheng Factors

While the indisputable facts clearly demonstrate Domino’s is a joint employer under the four Herman factors, they also establish Domino’s joint employer status under Zheng’s six “functional control” factors: (1) whether the putative joint employer’s “premises and equipment” were used for the employees’ work; (2) whether the direct employer’s business “could or did shift as a unit from one putative joint employer to another”; (3) the extent to which employees “performed a discrete line-job that was integral to the [putative joint employer’s] process of production”; (4) the degree to which employment responsibilities vis-à-vis the putative joint employer could pass to a different direct employer without material change; (5) the degree to which the putative joint employer supervised employees’ work; and (6) whether the employees worked “exclusively or predominantly” for the putative joint employer. See Zheng, 355 F.3d at 69-76; Olvera, 73 F. Supp. 3d at 206-07 (denying franchisor’s motion to dismiss as the pleaded

²⁰ When the OAG subpoenaed records reflecting wage rates paid by franchisee stores that fell below stated dollar amounts, Domino’s extracted that information from PULSE, demonstrating Domino’s ready access to and maintenance of franchisee payroll data. Gerstein Aff. ¶¶31, 33.

facts established joint employment under both the Herman and Zheng tests). No one factor is dispositive and not all the factors need be present to establish joint employment under Zheng. Grenawalt v. AT&T Mobility LLC, 2016 U.S. App. LEXIS 4612, at *10 (2d Cir. Mar. 14, 2016) (noting even “when as many as three Zheng factors weighed against joint employment” the court has sustained a joint employer verdict); Cordova, 2014 U.S. Dist. LEXIS 97388, at *11, 16 (denying motion to dismiss by franchisor although putative employees conceded that the first and fourth Zheng factors weighed in franchisor’s favor).

Domino’s “premises and equipment” were and are used for employees’ work (first Zheng factor): franchisees needed Domino’s approval of all leases (Ex. 18, at DP302, §7.4), and were required to purchase equipment (including hardware, PULSE software, and store equipment such as ovens and other fixtures) from Domino’s or an approved vendor. Gerstein Aff. ¶¶22, 24; Zheng, 355 F.3d at 72.

The Franchisee Respondents’ business could not and did not shift to any other joint employer other than Domino’s (second Zheng factor): no Domino’s franchisee could operate another pizza business, and franchisees were required to devote “full time and efforts” to manage their stores and could not engage in any other business without Domino’s consent. Gerstein Aff. ¶24; Ex. 18 (at §15.6); see, e.g., Cordova, 2014 U.S. Dist. LEXIS 97388, at *16.

The workers at the franchisee stores performed a job integral to Domino’s process of production (third Zheng factor): that “process” consists of providing food to customers through franchisee- and corporate-owned stores, and these employees perform a discrete line job that is integral to Domino’s process. As a pizza delivery company, Domino’s could hardly argue that delivery workers do not perform an integral task in its process of production. See, e.g., Cordova, 2014 U.S. Dist. LEXIS 97388, at *17 (denying franchisor’s motion to dismiss, finding that,

“because SCCF is a chain restaurant . . . their work within this model at Franchise Restaurants constitutes an ‘essential step’ in the production of the service for which SCCF is in business”).²¹ Domino’s website states that “[o]ur corporate and franchise store team members make up the engine that drives a quality product,” noting the major role “in the brand’s success” played by such employees. Ex. 145 (emphasis added). Franchisee Respondents’ workers perform a more integral part of Domino’s core business than delivery workers in Ansoumana, 255 F. Supp. 2d at 195 (denying motion to dismiss claim that drug store chain was a joint employer).

The responsibilities of the workers at the Franchisee Respondents vis-à-vis Domino’s would be materially the same if they worked for a different Domino’s franchisee, or even for a Domino’s corporate store (fourth Zheng factor): not only does Domino’s require workers at franchise stores to adhere to Domino’s practices, policies and standards (Gerstein Aff. ¶¶163-164), but Domino’s also routinely requires franchisees to retain a substantial number of employees at stores bought from Domino’s, including maintaining substantially the same job responsibilities and wages. Id. ¶135; Ex. 16 (at MSK240, §XXVII); see, e.g., Velez, 2015 U.S. Dist. LEXIS 1275, at *12 (fourth Zheng factor addresses whether plaintiffs are “tied to [a putative employer] rather than to an ostensible direct employer,” establishing joint employment where “the same employees [c]ould continue to do the same work in the same place”) (emphasis in original).

The degree of supervision exercised by Domino’s (fifth Zheng factor) has already been established (supra at 22-30), and such evidence is equally applicable in the Zheng analysis.

²¹ See also Lopez, 14 F. Supp. 2d at 420 (“no question” that production work by direct employees of contractors was vital to garment jobber’s business; “Renaissance depended entirely on outside sewing contractors to perform this aspect of its operations”).

Cordova, 2014 U.S. Dist. Lexis 97388, at *17.²²

Finally, the evidence shows franchisees and employees are working “exclusively or predominantly” for Domino’s (the sixth Zheng factor). Zheng, 355 F.3d at 72. Domino’s Franchise Agreement requires that franchisees work full-time to manage their franchise, and cannot own any other business without Domino’s consent. Gerstein Aff. ¶24. The Franchisee Respondents thus are principally dependent upon Domino’s for their livelihood, and the employees at the franchisee stores are similarly dependent on Domino’s. See, e.g., Lopez, 14 F. Supp. 2d at 421 (garment contractor “depended nearly entirely” on a jobber for work, and the [contractor’s] workers were as much dependent on [the jobber]”); Cordova, 2014 U.S. Dist. LEXIS 97388, at *18 (employees did not work for competing businesses).

In sum, the indisputable record evidence demonstrates Domino’s “functional control” as joint employer with the Franchisee Respondents under the Zheng factors. See, e.g., Ocampo, 2016 U.S. Dist. LEXIS 125928, at *25-*31 (denying motion to dismiss FLSA and NYLL claims against franchisor Doubletree Inn and its franchisee, finding facts pleaded satisfied Zheng).

²² In Cordova, the court denied a motion to dismiss a claim that a sandwich shop franchisor and franchisee were joint employers. Many of the factors the court considered relevant in denying the franchisor’s motion are present here, for example: the franchisor imposed management and operation policies and practices, provided materials for use in training store managers and employees, monitored employee performance, had the right to visit the facilities “to determine if they were in compliance with those policies and practices,” and required the franchisee to use recordkeeping systems for tracking hours and wages and retaining payroll records. 2014 U.S. Dist. LEXIS 97388, at *17; see also Ocampo, 2016 U.S. Dist. LEXIS 125928, at *25-27.

II. DOMINO’S SALE OF, AND ENCOURAGEMENT TO FRANCHISEES TO USE, DEFECTIVE SOFTWARE VIOLATED EXECUTIVE LAW SECTION 63(12)’S PROHIBITION AGAINST FRAUD

Domino’s sale of its flawed, proprietary PULSE software to all franchisees in New York (not just to the Franchisee Respondents), and its subsequent actions and inaction with regard to PULSE, constitute a persistent fraud in violation of Executive Law §63(12).

A. Legal Standards for Section 63(12) Fraud

Section 63(12) defines fraud as “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions.” Intended to protect against “deceptive and misleading practices,” the “definition of fraud [] is very broad and includes those acts which can be characterized as dishonest or misleading” or “contrary to the plain rules of common honesty.”²³ If an act has the “capacity or tendency to deceive, or creates an atmosphere conducive to fraud,” such an act constitutes fraud under §63(12).²⁴ The traditional elements of common law fraud such as reliance, actual deception, knowledge of deception and intent to deceive are not required to establish liability.²⁵ Misrepresentations, omissions, and the failure to act are actionable §63(12) frauds. See, e.g., People v. Empire Prop. Solutions, LLC, No. 09-017767, 2012 N.Y.

²³ People v. Greenberg, 95 A.D.3d 474, 483 (1st Dep’t 2012) (observing that the “terms ‘fraud’ and ‘fraudulent practices’ [are] to be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty”) (quoting People v. Lexington Sixty-First Assoc., 38 N.Y.2d 588, 595 (1976)); People v. 21st Century Leisure Spa Int’l, Ltd., 153 Misc. 2d 938, 943-44 (Sup. Ct. N.Y. Cty. 1991) (dishonest or misleading standard) (citing Allstate Ins. Co. v. Foschio, 93 A.D.2d 328, 331-32 (2d Dep’t 1983)).

²⁴ People v. First Am. Corp., 2008 U.S. Dist. LEXIS 51790, at *10 (S.D.N.Y. July 8, 2008) (citing People v. Gen. Elec. Co., 302 A.D.2d 314, 314 (1st Dep’t 2003)); People v. Applied Card Sys., Inc., 27 A.D.3d 104, 107 (3d Dep’t 2005), aff’d on other grounds, 11 N.Y.3d 105 (2008).

²⁵ See, e.g., Greenberg, 95 A.D.3d at 483; People v. Coventry First LLC, 52 A.D.3d 345, 346 (1st Dep’t 2008), aff’d, 13 N.Y.3d 108 (2009); State v. Apple Health & Sports Clubs, Ltd., 206 A.D.2d 266, 267 (1st Dep’t 1994), appeal denied, 84 N.Y.2d 1004 (1994).

Misc. LEXIS 1845 (Sup. Ct. Nassau Cty. Apr. 10, 2012). Section 63(12) is broadly construed to apply to virtually “all business activity.” New York v. Feldman, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002).

B. Domino’s Is Liable Under Section 63(12)

Domino’s made a number of misrepresentations to, and withheld information from, franchisees about PULSE. Domino’s told its franchisees that PULSE could be used to generate Payroll Reports, which could be given to franchisees’ payroll services (Ex. 2 (at 46); Ex. 75 (at DP75398)), and that Domino’s would correct any errors in PULSE. Ex. 2 (at M-008, ¶1.1(b)); Gerstein Aff. ¶128. Domino’s knew that software flaws in PULSE systematically under-calculated gross wages, and thus did not comply with New York law, but failed to disclose these flaws and failed to take any affirmative steps to correct them. This fraud was repeated and persistent, affecting all franchisees in New York as well as their employees. Domino’s misrepresentations and omissions not only had “the capacity or tendency to deceive, or create[d] an atmosphere conducive to fraud” (Gen. Elec., 302 A.D.2d at 314; Greenberg, 95 A.D.3d at 483), but did, in fact, deceive franchisees in New York State (including the Franchisee Respondents and numerous Settling Franchisees) about the accuracy of the software product Domino’s required them to purchase, and the Payroll Reports it produced. See FTC v. Crescent Publ’g Grp., Inc., 129 F. Supp. 2d 311, 319-20 (S.D.N.Y. 2001).

Domino’s never affirmatively informed its New York State franchisees of these PULSE flaws, despite the fact that Domino’s “alone possesses material information” about such flaws. Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995). One franchisee observed that it was “impossible to know that PULSE calculates overtime incorrectly without checking the calculations manually” because PULSE’s Payroll

Reports do not show underlying calculations and, instead, show only gross regular and overtime wages for a pay period. Gerstein Aff. ¶197; Ex. 21 (at ¶23). Only when some franchisees learned of some of the flaws (inadvertently or through an accountant or similar consultant), did they (and not Domino's) generally act to comply, and then only prospectively. If Domino's had disclosed the flaws, these underpayments would likely not have occurred. Gerstein Aff. ¶117.

Domino's failure to disclose PULSE flaws to franchisees is especially egregious given:

- For years Domino's officials from various departments (IT, Human Resources, Franchise Operations) knew about and repeatedly discussed these flaws, even walking through mathematical examples of how specific flaws in PULSE would under-calculate employee wages. See supra at 5-8; Gerstein Aff. ¶¶100, 103-104, 109, 113. Yet Domino's chose again and again not to remedy the flaws or inform its network of franchisees about them.²⁶
- Domino's knew about, and extensively discussed PULSE flaws in 2007, at least a year before the company mandated that all franchisees in New York State (and nationwide) purchase and install a known flawed product in 2008. See Gerstein Aff. ¶¶88, 103, 109.
- Domino's instructed its franchisees to "cross-train" employees even as the company knew that PULSE would likely under-calculate gross wages in precisely that scenario. Gerstein Aff. ¶¶108, 166.

Domino's misrepresentations and omissions concerning PULSE flaws caused actual financial injury, not only to the workers who were underpaid for years, but also to numerous franchisees in New York State. These franchisees had to hire counsel and ultimately pay restitution to resolve government investigations or private litigation, and incurred substantial costs to install, purchase, and use PULSE for each store, including significant annual licensing and other fees. Gerstein Aff. ¶¶90, 115.

²⁶ Domino's has still made no affirmative effort to advise all franchisees about PULSE's flaws, or to remedy the problems. The sole action Domino's has taken to date consists of two sentences, added in May 2015 to a section embedded within the nearly 800-page Manager's Guide, stating that PULSE is not a payroll system. Gerstein Aff. ¶94 n.37.

III. DOMINO’S MATERIAL MISSTATEMENTS AND OMISSIONS IN ITS FRANCHISE DISCLOSURE DOCUMENTS CONCERNING PULSE VIOLATED SECTION 687 OF THE FRANCHISE SALES ACT

New York’s Franchise Sales Act (“Franchise Act”) was enacted to prevent franchise sales abuse by requiring presale disclosure through a registered prospectus and to remedy such abuse through certain measures. Gen. Bus. L. §§680-695; Retail Software Servs., Inc. v. Lashlee, 854 F.2d 18, 21 (2d Cir. 1988). It requires franchisors to provide a prospective franchisee with a detailed offering prospectus, its “Franchise Disclosure Document” or “FDD,” before the offer and sale of a franchise. Gen. Bus. L. §683(8). The disclosure regulations itemize 23 separate disclosures that must be contained in the FDD and apply to all written or oral arrangements in connection with a franchising offer. 13 N.Y.C.R.R. §200.2; Gen. Bus. L. §682; Gerstein Aff. ¶127. The disclosure requirements are designed to protect prospective franchisees from the financial hardships that can arise when they purchase franchises. Remedial in nature, the Franchise Act is to be liberally construed. A.J. Temple Marble & Tile v. Union Carbide Marble Care, 162 Misc. 2d 941, 951 (Sup. Ct. N.Y. Cty. 1994), modified, 87 N.Y.2d 574 (1996).

The antifraud provision of the Franchise Act, Gen. Bus. L. §687(2)(b), states, in pertinent part, that it is “unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly: . . . (b) [m]ake any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” Gen. Bus. L. §687(2)(b). The Franchise Act vests the OAG with broad authority to bring an action against any person believed

to have “engaged in or is engaged in or is about to engage in any practice or transaction” which is an unlawful or fraudulent practice. Gen. Bus. L. §689(1); A.J. Temple, 87 N.Y.2d at 579.²⁷

A. Domino’s Made Untrue and Misleading Statements of Material Fact, and Omitted Material Facts, in Connection with the Sale of Franchises

Domino’s statements about PULSE in its FDD and related documents were materially misleading or failed to disclose information that would have made the statements not misleading:

- Domino’s represented that PULSE included the “Capability to interface with a payroll company or a commercial accounting package.” Ex. 2 (at 46).
- Domino’s represented it would provide “operating assistance,” including “administrative, accounting, inventory control, and general operating procedures.” Ex. 2 (at 41).
- Domino’s represented that software delivered by Domino’s would “perform in all material respects in accordance with the then current applicable user documentation delivered by [Domino’s],” that Domino’s would “replace or correct the Software so that it will perform in substantial conformance with the applicable user documentation” (Ex. 2 (at M-004, ¶5.1)), and “use reasonable efforts to correct any Software error.” Ex. 2 (at M-008, ¶1.1(b)).
- In its “applicable user documentation” (i.e., the PULSE Reports Guide), Domino’s identified Payroll Reports among “frequently used reports,” stating that “typical” uses include “viewing payroll information . . . [and] generating payroll information to give to your accountant or payroll service.” Ex. 75 (at DP75398); Gerstein Aff. ¶128.

The undisclosed PULSE flaws, resulting in systematic under-calculation of gross wages for employees, rendered Domino’s representations about PULSE materially misleading: any “accounting assistance” provided through PULSE was fundamentally compromised; PULSE was unable “to perform in all material respects in accordance with the then current applicable user documentation”; PULSE was incapable of providing a legitimate “interface” with a payroll service or accountant; and Domino’s made no effort, much less a “reasonable effort,” to correct the flaws or to alert its franchisees about PULSE’s problems or limitations. See supra at 5-8;

²⁷ This language of §689(1) tracks the language of the Martin Act (Gen. Bus. L. §§351-359), the 1921 law enacted to deter fraud in the sale of securities and commodities. Compare Gen. Bus. L. §689(1) with Gen. Bus. L. § 353(1).

Gerstein Aff. ¶¶ 128-130.

The PULSE miscalculations and widespread franchisee violations also likely led to overstatements of projected franchisee profitability disclosed in Item 19 of Domino’s FDD, which is based on numerous data points, including franchisee variable labor costs. See Gerstein Aff. ¶131; Ex. 2 (at 71-72). Given that a significant number of New York franchisees underpaid employees during the Relevant Period, the labor costs reported by such franchisees would under-report what the true labor costs would be for a legally compliant franchisee. Therefore, Domino’s Item 19 disclosure of projected franchisee profitability is also likely to have been misleading.

Such misrepresentations and omission about PULSE were material under the Franchise Sales Act’s anti-fraud provision, as there is a “‘substantial likelihood’ that a reasonable investor would have viewed inclusion of the omitted fact as ‘significantly alter[ing] the total mix’ of information available.” Coraud LLC v. Kidville Franchise Co., 121 F. Supp. 3d 387, 394 n.3 (S.D.N.Y. 2015) (quoting State v. Rachmani Corp., 71 N.Y.2d 718, 726 (1988)). Here, franchisees were required to pay significant upfront and ongoing costs for PULSE. See supra at 4 n.3. Domino’s false and misleading statements and omissions failed to alert franchisees that PULSE’s calculations of gross wages were inaccurate and unsuitable for use by accountants or payroll services as indicated by Domino’s, caused NYLL violations by the Franchisee Respondents, and also exposed New York franchisees using PULSE to continuing liability for wage-and-hour violations. Gerstein Aff. ¶30 & nn.12, 13; ¶35. There can be no question that Domino’s misstatements and omissions about PULSE in its FDD were material.²⁸

²⁸ Courts construe the Martin Act and the Franchise Act consistently with each other, and because the OAG need not show reliance or damages when bringing Martin Act claims, the OAG need not show reliance and damages to establish its Franchise Act claim. See, e.g., State v. Danny’s Franchise Sys., Inc., 131 A.D.2d 746, 747 (2d Dep’t 1987). Yet even though the OAG

IV. SUMMARY JUDGMENT IS APPROPRIATE AND RELIEF SHOULD BE GRANTED WITHOUT DISCOVERY OR A TRIAL

This Court has broad authority to order injunctive relief, restitution, disgorgement and other damages in a special proceeding brought under Executive Law §63(12). State v. Solil Mgmt. Corp., 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cty. 1985), aff'd without opinion, 114 A.D.2d 1057 (1st Dep't 1985) (injunction, restitution and damages remedies available); People v. Ernst & Young LLP, 114 A.D.2d 569 (1st Dep't 2014) (availability of disgorgement remedy). Here, Respondents' repeated and persistent fraudulent and illegal conduct warrants imposing such remedies and more.

A. Injunctive Relief Is Warranted

Pursuant to Executive Law §63(12), the Court's remedial powers are extremely broad, and courts routinely grant wide-ranging equitable relief to redress fraudulent or illegal conduct and enjoin future improper conduct. See State v. Princess Prestige Co., 42 N.Y.2d 104, 108 (1977); People v. Apple Health & Sports Club, Ltd., 80 N.Y.2d 803 (1992) (enjoining health club from entering new contracts until it posted a bond); People v. Court Reporting Inst., Inc., 240 A.D.2d 413, 414 (2d Dep't 1997) (TRO prohibiting school from enrolling new students); People v. Abortion Info. Agency, 69 Misc. 2d 825, 830 (Sup. Ct. N.Y. Cty. 1971), aff'd, 37 A.D.2d 142 (1st Dep't 1972) (appointing receiver, other relief); State v. Mgmt. Transition Res., Inc., 115 Misc. 2d 489 (Sup. Ct. N.Y. Cty. 1982) (granting restitution and injunctive relief against illegal employment agency). Where the public interest is served, the Court's powers are even broader than in private litigation. See Porter v. Warner Co., 328 U.S. 395, 398 (1946).

is not required to show reliance and damages, the evidence described here plainly shows proof of both in the franchisees' use of PULSE, the underpayment of workers due to the uncorrected flaws in PULSE, and the substantial PULSE costs incurred by franchisees.

Here, because Domino's still has not remedied the PULSE flaws or disclosed them to all franchisees almost a decade after learning of these problems, injunctive relief is not only appropriate but essential. This Court should issue an Order: enjoining Respondents from violating the law; requiring Domino's to notify all franchisees immediately about all the flaws in PULSE, and the means of fixing the problem; requiring Domino's to take immediate steps to fix the PULSE flaws; and, as a remedial measure, requiring that Domino's provide NYLL training to franchisees and that Domino's retain an independent monitor to address any ongoing NYLL violations and assure ongoing compliance.

B. Accounting, Restitution and Disgorgement Should Be Ordered

Employees at the Franchisee Respondents' stores should receive restitution for the wage underpayments. See NYLL §191; 12 N.Y.C.R.R. §§146-1.4, 137-1.3 (overtime must be paid for each workweek); see also Frink Am., Inc., 2 A.D.3d at 1380 (§63(12) relief awarded for vacation pay owed pursuant to NYLL §§191-c, 198); State v. Midland Equities of N.Y., Inc., 117 Misc. 2d 203, 208 (Sup. Ct. N.Y. Cty. 1982) (ordering restitution); State v. Hotel Waldorf-Astoria Corp., 67 Misc. 2d 90, 92 (Sup. Ct. N.Y. Cty. 1971) (same). While the OAG has been able so far to identify some of the workers who were underpaid and calculate estimates of total wage underpayments, those estimates are extremely conservative and are based on samples because the Franchisee Respondents failed to maintain accurate and complete records. Gerstein Aff. ¶¶59, 69, 87; Ex. 62 (at ¶¶6, 29); Ex. 66 (at ¶¶6, 25). Thus, a thorough accounting is necessary to accurately assess the full scope of violations and restitution due. Telehublink Corp., 301 A.D.2d at 1007, 1009-10 (affirming order directing accounting and restitution); 21st Century Leisure Spa Intl. Ltd., 153 Misc. 2d at 944-45 (same); People v. Lipsitz, 663 N.Y.S.2d 468, 476-77 (Sup. Ct. N.Y. Cty. 1997) (same). As a joint employer, Domino's is jointly and severally

liable for restitution. See Ansoumana, 255 F. Supp. 2d at 196 (joint employers “jointly and severally obligated for underpayments of minimum wage and overtime” violations).

In addition to its joint employer liability for wage-and-hour violations, Domino’s is also liable, because of its deceptive and misleading practices related to PULSE under Executive Law §63(12), for underpayments to employees at franchisee stores throughout New York State and for monies franchisees paid for PULSE. Accordingly, this Court should order that Domino’s: (a) provide an accounting of underpayments to employees at franchisee stores in New York State that were facilitated or caused by the four flaws identified in PULSE; (b) provide an accounting of the amounts paid for PULSE by franchisees during the Relevant Period; and (c) disgorge to franchisees the amount of PULSE payments received from its franchisees. The Court should further order Domino’s, under the supervision of an independent monitor, to create a “restitution fund” and “disgorgement fund” in an amount to be determined by the Court. See, e.g., Midland Equities, 117 Misc. 2d at 208 (creating restitution fund); Applied Card Sys. Inc., 41 A.D.3d at 8 n.2 (disgorgement fund).

C. Liquidated Damages, Interest and Attorneys’ Fees

In addition to restitution, Respondents are jointly and severally liable for liquidated damages, prejudgment interest, and attorney’s fees. NYLL §§198(1-a), 198(3), 663(1). See, e.g., Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999) (awarding wages, liquidated damages under NYLL, and prejudgment interest).

D. Remedies For Domino’s Franchise Sales Act Violation

For Domino’s violation of the anti-fraud provision of the Franchise Act, the Court should issue an order: (a) enjoining Domino’s from continuing to make material misrepresentations about the utility of its PULSE hardware and software; (b) directing that Domino’s make

corrective disclosure about PULSE in its FDD to be provided to prospective New York franchisees and to all current franchisees in New York; and (c) assessing an appropriate award of damages. Gen. Bus. L. §§689, 691(1), 692(2).

CONCLUSION

For all the foregoing reasons, the Court should make a summary determination in Petitioner’s favor on all causes of action and grant injunctive relief, restitution, damages, disgorgement, civil penalties and costs, as requested in the Verified Petition.

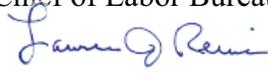
Dated: New York, New York
November 4, 2016

Respectfully submitted,

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