People v Domino's Pizza, Inc.
2020 NY Slip Op 31615(U)
May 27, 2020
Supreme Court, New York County
Docket Number: 450627/2016
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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THE PEOPLE OF THE STATE OF NEW YORK, BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

- v -

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 DENMAN, DENMAN ENTERPRISES, INC.,

Respondents.

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INDEX NO. 450627/2016

MOTION DATE 05/23/2016

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 168, 169, 170, 172, 173, 174, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 300, 301, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 337, 339

were read on this motion for SUMMARY JUDGMENT.

Petitioner, the People of the State of New York, through the Office of the Attorney General (the OAG),[1] brings this petition pursuant to Executive Law § 63 (12), Articles 6 and 19

[1] Counsel for OAG has confirmed that "[t]he position of the current Attorney General, Letitia James, remains the same as reflected in the briefs and papers filed to date in this proceeding."

of the New York Labor Law (NYLL) and the rules and regulations promulgated thereunder, and General Business Law (GBL) § 687 (2) (b) for injunctive relief, restitution, damages, disgorgement and civil penalties against respondents Domino's Pizza, Inc., Domino's Pizza LLC, and Domino's Pizza Franchising LLC (collectively, Domino's), as well as: Anthony Maestri (Maestri), 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 (Ahmed), Nader Inc. and Super Duper Pizza, Inc. (the Ahmed Respondents); and Matthew Denman (Denman), Denman Enterprises, Inc. (the Denman Respondents) (collectively, the Franchisee Respondents).[2]

The OAG contends that Domino's workers have been systematically underpaid in violation of the NYLL, and that the Franchisee Respondents are liable for numerous wage and hour violations committed at their 10 franchise stores, amounting to over $567,000 owed to these workers in back wages and other underpayments. The OAG further contends that Domino's also bears responsibility and liability for these violations as these workers' joint employer and because Domino's directly caused many of the Franchisee Respondents' violations. According to the OAG, 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. The OAG contends that 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.

(NYSCEF 343.) The case caption should be revised to accurately reflect the identity of the petitioner.

[2] As noted *infra*, the claims against the Maestri, Ahmed, and Denman respondents have been discontinued.

The OAG moves for an Order and Judgment issued pursuant to Executive Law § 63 (12) and Article 4 of the CPLR for the following relief:

(a) a finding that respondent Domino's repeatedly and persistently engaged in fraudulent and illegal activity in violation of New York Executive Law § 63 (12) through its sale of PULSE, a known defective proprietary software product, to its franchisees in New York State;

(b) a permanent injunction barring Respondents from using Domino's defective PULSE software system at all Domino's stores in New York State until and unless the following actions have been completed: (i) Domino's takes steps to fix the wage and hour-related PULSE flaws; and (ii) Domino's notifies all New York franchisees about all wage and hour-related flaws in PULSE, the limitations of the use of the PULSE Payroll Report, and the means for franchisees to address the limitations in PULSE;

(c) an accounting by Domino's to the OAG of all underpayments to employees of franchisees in New York State during the Relevant Period as reflected in its own PULSE records;

(d) restitution in an amount to be determined against Domino's for underpayments to employees of Domino's franchisees due to PULSE defects;

(e) disgorgement of monies that New York franchisees paid to Domino's for its defective PULSE software;

(f) a finding that Domino's representations about PULSE in its Franchise Disclosure Documents (FDD) were materially misleading or failed to disclose information that would have made the statements not misleading in violation of the New York Franchise Sales Act anti-fraud provision, and an order: (i) requiring corrective disclosure of the PULSE flaws; (ii) enjoining Domino's from issuing its FDD to prospective New York franchisees until such corrective disclosures are made; and (iii) awarding appropriate damages under the Franchise Sales Act;

(g) a finding that Respondents repeatedly and persistently violated NYLL §§ 191, 193, 195, 652 (1)-(2), N.Y. Comp. Codes R. & Regs. (NYCRR) tit. 12, §§ 146-1.3 (a), 1.4, 1.5, 1.6, 2.9, and 12 NYCRR §§ 137-1.2, 1.3; 1.6, 1.7 by failing to pay employees' wages required by law, and making unlawful deductions, including failing to reimburse employees for all necessary work expenses;

(h) an injunction barring Respondents, their employees, agents, and successors from continued violations of NYLL §§ 191, 193, 195, 652 (1)-(2), 12

NYCRR §§ 146-1.3 (a), 1.4, 1.5, 1.6, 2.9, and 12 NYCRR §§ 137-1.2, 1.3; 1.6, 1.7;

(i) an accounting and restitution in an amount to be determined against Franchisee Respondents Denman, Ahmed, and Maestri, and as against Domino's, as a joint employer, jointly and severally for underpayments of minimum and regular wages, overtime, spread of hours pay, and for unpaid reimbursement for necessary work expenses during the Relevant Period, and assessing liquidated damages, pursuant to NYLL §§ 191, 193, 195, 198, 652 (1), and 663, 12 NYCRR §§ 146-1.3 (a), 1.4, 1.5, 1.6, 2.9, and 12 NYCRR 137-1.2, 1.3; 1.6, 1.7;

(j) requiring Domino's to retain an independent monitor to address any ongoing Labor Law violations and assure ongoing compliance;

(k) an award of prejudgment interest; and

(l) attorneys' fees and costs associated with this action pursuant to NYLL §§ 198 and 663 in an amount to be determined; as well as such other and further relief as the Court may deem just and proper.

BACKGROUND

The following factual background is taken from the affirmation of Terri Gerstein, the OAG's bureau chief, whose affidavit is based on investigative files (NYSCEF Doc. No. 5), the affirmation of Christopher Columbo, Esq., Domino's counsel (NYSCEF Doc. No. 201), the supplemental Columbo affidavit (NYSCEF Doc. No. 320), the affidavit of Joseph Devereaux, Domino's director of Franchise Services (NYSCEF Doc. No. 199), the affidavit of Michael H. Seid, a provider of franchise advisory services (NYSCEF Doc. No. 194), the affidavit of Michael Davis, Domino's vice president for global operations technology support and strategy (NYSCEF Doc. No. 195), the declaration of Bruce Franson, vice president and chief technical officer of Servant Systems, Inc., the developer of PULSE (NYSCEF Doc No. 184); the declaration of Shawn Brunelle, president of Wizardline Technologies, Inc., the owner of Wizard, a proprietary software product for Domino's franchisees (NYSCEF Doc. No. 196); the affidavit of Maureen

Loftus, CPA, who performed a forensic accounting on behalf of Domino's (NYSCEF Doc. No. 192), and the supplemental Loftus affidavit (NYSCEF Doc. No. 319).[3]

THE OAG'S STATEMENT OF FACTS

1. The OAG's Investigation

After a multi-year investigation, in 2014 and 2015, the OAG settled claims with 12 Domino's 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 regular hours), and to adequately reimburse employees for delivery expenses (Gerstein aff, ¶¶ 28-30, 35-36, 38-45). The OAG contends that 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, and n 13). The OAG asserts that similar violations were uncovered at stores operated by the Franchisee Respondents (*id*. ¶¶ 46-87).

The OAG contends that the 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 (*id*. ¶¶ 132-207). According to the OAG, the evidence in support of this contention includes testimony from Domino's officials, affidavits of current and former franchisees and employees, facts admitted in settlement agreements with current franchisees, and other evidence produced by Domino's (*id*. ¶¶ 25, 27, 29, 31, 35, 37; *see* appendix of exhibits [NYSCEF Doc. No. 8]).

[3] The parties have stipulated that "[t]he OAG and Domino's agree to having the case resolved based on the facts presented in all the papers filed to date" (NYSCEF Doc. No. 343).

2. The 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). The Standard Franchise Agreement (Franchise Agreement) imposes detailed specifications, standards, operating procedures, and rules on franchisees (*id.* ¶¶ 20-22; *see* exhibit 18 [NYSCEF Doc. No. 26]). 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 to pay Domino's for the use of PULSE (*id.* ¶¶ 22 [d]-[f], 89).

While PULSE performs point-of-sale (*i.e.*, cash register) functions, it also does much more, such as generating reports (*e.g.*, sales, revenue, and 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 (*id.* ¶¶ 88-89). A worker at a franchise store cannot perform any work-related function (*e.g.*, take an order) without first logging into 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).

The OAG contends that 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 (*id.* ¶ 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.* ¶¶ 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; *see* exhibit 80 [NYSCEF No. Doc. 88]). Once a manager enters the employees' wage rates, 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 shows this "Total Pay" in the Payroll Report (*id.* ¶¶ 92, 94; *see* exhibit 80).

PULSE automatically records employees' hours worked and requires franchisees to enter a wage rate for each employee. The OAG contends that Domino's knew that a number of franchisees used the PULSE Payroll Report to calculate gross wages (*id.* ¶¶ 96-97).

The OAG further contends that 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. 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" (*id.* ¶¶ 127-128). The OAG contends that 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, but was not, disclosed to its franchisees (*id.* ¶¶ 129-130):

A. **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 franchisees; 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, resulting in an underpayment of overtime to employees in the Maestri Respondents' stores and other stores (*id.* ¶¶ 51, 99).

B. **PULSE undercalculates 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 (*id.* ¶ 101; 12 NYCRR § 146-1.4). The Maestri and Ahmed Respondents regularly underpaid their delivery workers because they relied on PULSE and its "Total Pay" column (Gerstein aff, ¶¶ 102, 105).

C. **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 NYCRR § 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).

D. **PULSE does not calculate "Spread of Hours" Pay**. 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 10 hours in a day (the "spread of hours" requirement) (*id.*

¶ 112; 12 NYCRR §§ 146-1.6; 12 NYCRR 137-1.7). The Franchisee Respondents systematically underpaid employees for significant time periods as a result of this PULSE flaw (Gerstein aff, ¶¶ 44, 50, 55, 61).

According to the OAG, 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).

The OAG contends that Domino's knowledge of, and failure to fix, the flaws in the PULSE system resulted in hundreds of thousands of dollars in underpayments by the Franchisee Respondents (*id*. ¶¶ 114-118). The OAG asserts that the widespread and systemic nature of wage and hour violations at Domino's New York franchises has been borne out by the OAG's investigation, leading to the filing of the petition (*id*. ¶¶ 28-31, 35).

DOMINO'S COUNTERSTATEMENT OF FACTS

1. How Franchises Operate

There were, at the time the Petition was filed, more than 5,300 Domino's Pizza stores in the United States, approximately 4,939 of which are franchised to and owned and operated by independent business owners (Devereaux aff, ¶¶ 12-13). The Franchisee Respondents are current or former franchisees of Domino's (*id*. ¶ 6). In franchising, "[t]he goal – which benefits both parties to the contract – is to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves" (*Patterson v Domino's Pizza*, LLC, 333 P3d 723, 733 [Cal 2014]).

Both the FTC and New York define a "franchise" as a commercial relationship in which a franchisee offers or sells goods or services that are substantially associated with the

franchisor's trademark (*see* 16 CFR § 436.1 [h] [1]; GBL § 681 [3] [b]). Trademark law, in turn, requires that trademark owners control the use of their marks (*see Gorenstein Enters., Inc. v Quality Care-USA, Inc.*, 874 F2d 431, 435 [7th Cir 1989]). As a result, to ensure quality and consistency, franchisors must exercise control over the standards franchisees implement in distributing goods or services under their marks (*see Patterson*, 333 P3d at 733).

Further, both the FTC and New York require that a franchisor exert significant control over a franchisee's methods of operation. In fact, New York's Franchise Sales Act defines a "franchise" as a business arrangement under which the "franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor" (GBL § 681 [3] [a]; *accord* 16 CFR § 436.1 [h] [2]).

To maintain quality control and uniformity, Domino's has established minimum standards that govern the operation of all Domino's Pizza stores (Devereaux aff, ¶¶ 18-21). Subject to their compliance with these brand standards, franchisees can operate their stores as they see fit. Franchisees decide how to implement Domino's standards, choose their store locations, lease their own premises, set their own prices, do their own local advertising, decide whether to charge delivery fees, address directly any customer complaints, and control all employment matters in their stores (*id*. ¶¶ 24-27).

In this regard, each standard franchise agreement (SFA) provides that the franchisee is "solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store and those persons shall be your employees, and not our agents or employees" (Colorado aff, ¶ 95). The SFA further states that the franchisee is an independent contractor and that "neither [the franchisor] nor [its] affiliates have any relationship with [the

franchisee's] employees and . . . have no rights, duties or responsibilities with regard to their employment by [the franchisee]" (*id.*). Franchisees agree that it is their obligation (not Domino's) to take all steps necessary to operate their stores "in full compliance with all applicable laws, ordinances and regulations" (*id.*).

Domino's contends that these provisions are consistent with the way franchisees actually run their stores (*id.* ¶¶ 98-156). For example, Ahmed testified that his general manager, and not Domino's, hires all of his employees, and determines their rates of pay (*id.* ¶¶ 98, 170), and that Domino's has never spoken with him "about any issues related to employees" (*id.* ¶ 98). Maestri likewise testified that his store managers do all of the hiring and firing at his stores, that his managers handle scheduling, that Domino's does not offer him any advice "regarding setting wage rate[s] to employees," and that he has never reached out to Domino's on any labor issue (*id.* ¶¶ 98, 116, 158). Denman similarly explained that his store managers "oversee personnel matters" and that he was "responsible for everybody who works for [him]" (*id.* ¶¶ 98, 163).

2. The PULSE System

A. Pulse Is Not a Payroll System

Domino's contends the PULSE is not a payroll system. Like most franchisors, Domino's requires that its franchisees install specific point-of-sale software (Seid aff, ¶ 35 [d]). That software, which was rolled out to franchises in 2008, is Domino's PULSE (Davis aff, ¶ 4). PULSE allows stores to take and process orders, monitor sales, manage inventory, monitor the efficiency with which orders are made and delivered, and calculate royalties owed (*id.* ¶ 2).

Domino's asserts that, while PULSE has many capabilities, franchisees are only required to make use of a few of them. For instance, while PULSE can be used to track the hours worked by employees, whether and how this feature is used is up to each franchise (*id.* ¶ 14). Domino's

only expects franchisees' employees to log into PULSE when taking or delivering orders (*id.*). Further, employees that log into PULSE to take or deliver orders can log in as anyone (*i.e.*, themselves or a co-worker) authorized by the franchisee to work in the store (*id.*).

Domino's contends that, for these reasons, it never designed PULSE to be, and never represented that it was, a system for calculating wages (*id.* ¶ 5). To prepare and issue payroll, an accountant or payroll provider would need to consolidate an employee's timekeeping data from shifts worked at all of the stores belonging to a particular franchisee; calculate gross wages and deductions in accordance with applicable laws; calculate withholding, taxes, or deductions affecting payroll; and print checks from a bank account. PULSE does none of these things. It operates only within a single store; it only aggregates data to the extent employees actually clock-in and clock-out; it does not aggregate employee data for franchisees with more than one store; it does not calculate withholding, taxes, or deductions; and it does not prepare or issue checks (*id.* ¶¶ 6-7). Significantly, PULSE was not designed to account for the wage laws of any particular jurisdiction, which vary widely (*id.* ¶ 6).

Each franchisee must sign a software license agreement (*see* Colorado aff, exhibit 27 [NYSCEF Doc. No. 228]). That agreement warrants only that PULSE "will perform in all material respects in accordance with the then current applicable user documentation delivered by" the supplier (license agreement, § 5.1). It also provides that Domino's "sole obligation and liability" is to "replace or correct the Software [*i.e.*, PULSE] so that it will perform in substantial compliance with the applicable user documentation" (*id.*). Domino's contends that the documentation has never suggested that PULSE calculates wages in accordance with the laws of any particular jurisdiction (Colorado aff, ¶ 49; Davis aff, ¶ 6). To the contrary, both the PULSE Management Reports Guide (Reports Guide) and the FDD make clear that a PULSE Payroll

Report was of limited utility and was dependent on how each franchisee chose to configure that report.

Pursuant to the FDD (Colorado aff, exhibit 52 [NYSCEF Doc. 253]), if a franchisee chooses to have its employees clock in and out of the system in a particular store, PULSE can record those times, and franchisees can provide this timekeeping data to a payroll provider: "PULSE includes the following functions . . . Capability to interface with a payroll company or a commercial accounting package" (FDD at DP0000056). To do this, PULSE uses open source programming that, if implemented by a franchisee, permits third-party accountants or payroll providers to interact with PULSE and export raw data of hours worked (Davis aff, ¶ 8).

However, the information that appeared in a Payroll Report was entirely dependent on how a franchisee configured PULSE. Franchisees could aggregate clock-in and clock-out times for any date range they designated; enter data for "Wage Rate," "Overtime," "Bonus Pay," "Excess Mileage," or "Tips"; configure the parameters for the "Overtime" field by selecting the threshold at which "Overtime" hours begin; determine whether to calculate "Overtime" on a daily, weekly, or other basis; and decide which multiple to apply to "Overtime" hours (*i.e.*, 1.5, 2.0, or 2.5 times the "regular" rate) (Colorado aff, ¶¶ 50, 51, 68). The only calculation the Payroll Report performed was to multiply hours worked (as shown by clock-in/out times) by whatever wage rate the franchisee entered and, if the franchisee configured the report to provide for overtime, by whatever multiple it selected (*id.*).

According to Domino's, for these reasons, the Payroll Report was not intended to calculate wages for payroll purposes, but simply to allow a franchisee to approximate its labor costs (*id.* ¶¶ 53-54). This is reflected in the Reports Guide, which stated that: "Typical uses for this report include: 'viewing payroll information, including clock-in and clock-out times.';

'Responding to team member questions about hours worked.'; and 'Generating payroll information to give to your accountant or payroll service' " (Colorado aff, exhibit 28 [NYSCEF Doc. No. 299] at 2-36).

B. Franchisees Do Not Use PULSE as a Payroll System

Domino's disputes the OAG's assertion that Domino's "effectively made PULSE a part of its franchisees' payroll system" (OAG mem at 4). According to Domino's, the majority of its franchisees use third-party software (not PULSE) to calculate wages. Of the 4,939 franchised Domino's stores in the United States, approximately 4,200 use one of two programs: "Wizard," or PULSE Franchisee Office Systems (*see* Brunelle declaration; Franson declaration). Neither of these programs uses or relies on PULSE to calculate wages (*id.*). Rather, each extracts timekeeping data from PULSE, consolidates data from all stores operated by the same franchisee, and adjusts the wage calculation to comply with state-specific wage and hour requirements, like those in New York (*id.*).

In addition, according to Domino's, most franchisees – including each of the Franchisee Respondents – use accountants or payroll providers (not PULSE) to calculate their employees' wages.

Anthony Maestri. Maestri has used an accounting firm (BMW Services, Inc. [BMW]) to handle payroll for his stores since 1993 (Colorado aff, ¶¶ 13, 159). Maestri sent BMW his employees' hours and BMW calculated wages by processing that information within its own payroll software (*id.*). In fact, Duane Webster, Maestri's supervisor, testified that Maestri's

stores never used PULSE to calculate wages, and that Maestri relied on BMW (not PULSE) to calculate those wages in compliance with New York law (*id.* ¶¶ 13, 159).[4]

Shueb Ahmed. Ahmed has had an accountant (Christopher Miu, CPA) to calculate payroll since 1996 (*id.* ¶ 15). In 2013, Ahmed began using Wizard and gave Miu access to his Wizard account to help Miu calculate payroll (*id.* ¶¶ 15, 172). Before 2013, Ahmed printed out and sent Miu reports of the hours that his employees worked (*id.*). Miu did "all the calculations" for Ahmed's payroll, including spread of hours and overtime pay (*id.* ¶ 172). Ahmed knew "from the beginning" that he could not rely on PULSE to properly calculate overtime for employees receiving a tip credit wage and was advised by Miu that he was following the law in that regard (*id.* ¶ 154, n 368). While Miu allegedly failed at times to correctly calculate overtime for tipped employees, those failures were unrelated to PULSE (*id.* ¶¶ 15, 172).[5]

Matthew Denman. Denman has used an accounting firm (R&A Waite) to calculate payroll for his two stores since 1999 (*id.* ¶¶ 14, 165). Denman uses PULSE to track the hours that his employees work, but not to track their wage rates or to calculate wages (*id.* ¶ 14). Denman gives his accountants the hours his employees worked and his accountants calculate the wages owed (*id.*). While Denman chose not to track the cash tips his employees received or the amount of time his delivery workers spent on tipped work versus non-tipped work, any such failures were unrelated to PULSE (*id.* ¶¶ 14, 163).[6]

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[4] This action was discontinued as against the Maestri Respondents by stipulation (NYSCEF Doc. No. 306).
[5] This action was discontinued as against the Ahmed Respondents by stipulation (NYSCEF Doc. No. 313).
[6] This action was discontinued as against the Denman Respondents by stipulation (NYSCEF Doc. No. 305).

C. PULSE Does Not Reflect the Wages That Were Actually Paid

Domino's contends that the OAG's assertion that franchisees used PULSE to calculate payroll both contradicts the Franchisee Respondents' testimony and ignores the fact that the wage information in PULSE does not match what franchisees actually paid their employees. Maestri, Ahmed, and Denman each testified that they entered incorrect wage data in PULSE, and that they relied on their accountants (who kept the correct rates) to properly calculate their respective employees' wages (Colorado aff, ¶¶ 29-32). Among other reasons, they did this to mask from their employees how much co-workers were earning (*id*. ¶ 33) or to pay some employees in cash (*id*. ¶ 36).

Domino's asserts that forensic analysis shows that the wages franchisees actually paid their employees are markedly different from the "wage" information they entered into PULSE. According to Domino's, this analysis revealed that the same PULSE data proffered by the OAG as a reliable indicator of wage violations listed franchisees' employees as having a wage rate of $0.00 for over 40,000 shifts – a claim that not only makes no sense, but is contradicted by the payroll records the franchisees produced to the OAG (Loftus aff, ¶¶ 7-8). After completing the forensic analysis, Loftus, a certified public accountant, concluded that the PULSE data is "not a reliable representation of the hourly wage rates actually paid by franchisees to franchisee employees" and that "the [O]AG's assertions about wages paid by franchisees are misleading" (*id*. ¶ 5).

D. Domino's Disclosures

Domino's contends that, although the OAG contends that certain franchisees were confused about PULSE's capabilities, it has eliminated the possibility of any such confusion by making certain disclosures. For example, in May 2015, Domino's Operational Standards were

amended to include the following statement: "Domino's Pizza PULSE system is a point-of-sale system and is neither intended nor able to be utilized as a payroll system or human resources information system. Franchisees should consider utilizing a third-party vendor solution and/or an accountant to perform such services" (Devereaux aff, ¶ 45). The pre-sale disclosures that are given to franchise applicants contain a substantively identical notice (*id.* ¶ 46).

Domino's has also disabled certain operational features in PULSE. For instance, franchisees in New York are no longer able to use PULSE to generate a "Payroll Report" (David aff, ¶ 13).

3. Oral Argument

Oral argument of this motion began on April 12, 2017 before Justice Bransten. After noting that Domino's had submitted evidence, including the testimony of the Franchisee Respondents themselves, in support of its assertion that the Franchisee Respondents used third-party accountants (and not PULSE) to calculate wages (4/12/17 tr [NYSCEF Doc. No. 340]), the Court then turned to Domino's argument that the PULSE data does not reflect the wages that were actually paid. The Court specifically asked the OAG if it had "ever compare[d] the PULSE readouts with the actual payroll records and canceled checks reflecting what the employees actually received" (*id.* at 12). The Court further inquired whether there were "inconsistencies with the PULSE readouts versus what employees actually received" (*id.*). While the OAG claimed that such a comparison had been done, it conceded that the records did not match in all cases, but that there were "some circumstances" in which the OAG was able to determine that data from PULSE had been used (*id.* at 12-13).

The Court then asked Domino's the same question it had posed to the OAG: "did [Domino's] compare the PULSE readouts with the payroll records" (*id.* at 17). Domino's stated

that it had been unable to do such a comparison because, while the OAG had obtained actual payroll records from each of the Franchisee Respondents, the OAG had refused to share those records with Domino's (*id*. at 17-19).

The Court refused to proceed further, concluding that "issues of fact exist" (*id*. at 28) and that considerations of "fairness and justice" prevented the OAG from "com[ing] to [Court] and argu[ing] premises that [Domino's has not] seen" (*id*. at 18, 23). The Court instructed the OAG to turn over to Domino's "the entirety of what you have discovered through your secret discovery procedures" (*id*. at 22-23).

Over the next two months, the OAG disclosed documents to Domino's in four separate productions (Colorado supplemental aff, ¶ 4). These productions included franchisees' actual payroll records (as created by their accountants), PULSE records maintained by franchisees, internal emails from one of the Franchisee Respondents (Maestri), transcripts from the depositions of one non-party franchisee (Joe Burch) and two franchisee employees, and notes of the OAG's interviews of franchisees' employees (*id*. ¶ 5). Domino's contends that these documents confirm what each of the Franchisee Respondents testified to under questioning from the OAG: that they relied on their accountants, and not PULSE, to calculate the wages they paid to their employees.

Domino's then retained Loftus to do an additional forensic accounting to compare the data from the PULSE records to the information in the payroll records that the OAG produced. To perform this analysis, Loftus reviewed nine months of actual payroll records created over a three-year period – from April 1, 2011 to June 30, 2011, April 1, 2012 to June 30, 2012, and April 1, 2013 to June 30, 2013 (the Franchisee Respondent Payroll Records). These payroll

records were then compared to the Franchisee Respondents' PULSE data for the same time periods.

The OAG asserts that the payroll data that the franchisees input into PULSE reflect the wages that the Franchisee Respondents actually paid to their employees. To ascertain whether the data supported this assertion, Loftus determined whether any Franchisee Respondent's accountant calculated wages for an employee using a wage rate and/or number of hours worked that differed from the corresponding data in PULSE (Loftus supplemental aff, ¶¶ 17, 29-31). Loftus asserts that she identified 30 instances in which a Franchisee Respondent's employee's wages were based on an hourly wage rate or number of hours worked that did not match the corresponding data in PULSE (*id.* ¶ 31).

Loftus also assessed whether a Franchisee Respondent ever issued a paycheck to an employee for a particular payroll period in which that employee did not appear in the Franchisee Respondents' PULSE data for that same payroll period (*id.* ¶¶ 17, 23-25). Loftus contends that the forensic analysis identified more than 170 discrepancies (*id.* ¶ 25).

An analysis of the converse situation – where an employee appeared in PULSE data for a payroll period (*i.e.*, the employee "clocked-in" to the PULSE system at the franchisee's store) but the accountant's payroll records did not reflect that any paycheck was issued to that employee – identified more than 100 instances in which an employee "clocked-in" to PULSE but did not receive a paycheck (*id.* ¶ 28).

The OAG also asserts that PULSE's limitations caused the Franchisee Respondents to miscalculate the overtime wages they owed to their employees who were paid a tipped credit wage because PULSE calculated overtime by multiplying the tipped wage rate by 1.5. Domino's contends that the forensic analysis confirms that the Franchisee Respondents did not rely on

PULSE to calculate overtime for tipped credit wage employees at a rate of 1.5 times the employee's tipped credit wage (*see id.* ¶¶ 15-16, 18-22). Loftus asserts that, in nearly 80% of the cases in which a person earning a tipped credit wage also worked more than 40 hours during a payroll period, that person's overtime wage rate was not 1.5 times that person's tipped credit wage rate (*id.* ¶ 21).

Domino's contends that the Franchisee Respondents' Payroll Records also make clear that, contrary to the OAG's claim, the Franchisee Respondents did not rely on PULSE to determine whether to make "spread of hours" payments to their employees and that, moreover, the records confirm that the Franchisee Respondents actually made spread of hours payments to their employees. For instance, a review of Maestri's payroll records between 2011 and 2013 demonstrates that he paid his employees nearly 1,500 spread of hours bonus payments during that period (Colorado supplemental aff, ¶ 7). Likewise, Denman's records demonstrate that he paid out more than 250 spread of hours bonus payments during that same period at his two stores (*id.*).

DISCUSSION

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, as alleged in the petition, constitute fraudulent or illegal acts properly brought in a § 63 (12) proceeding (*see e.g. Matter of People v Trump Entrepreneur Initiative LLC*, 137 AD3d 409, 418 [1st Dept 2016]; *Matter of People v Frink Am., Inc.*, 2 AD3d 1379, 1380 [4th Dept 2003]). Section 63 (12) proceedings are special proceedings (*see e.g. Matter of People v Telehublink Corp.*, 301 AD2d 1006, 1007 [3d Dept 2003]). "[A] special proceeding is subject to the same standards and rules of decision as apply on a motion for

summary judgment, requiring the court to decide the matter upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (*Matter of Gonzalez v City of New York*, 127 AD3d 632, 633 [1st Dept 2015] [quotation marks and internal citation omitted]; *see also Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008]).

Thus, in this special proceeding, the Court is authorized to make a summary determination only if, in applying the same standards for summary judgment, it concludes that "no triable issues of fact are raised" (CPLR 409 [b]). As the movant, it is the OAG's burden "to tender evidence, by proof in admissible form, to establish the cause of action 'sufficiently to warrant the court as a matter of law in directing judgment' " (*Matter of Financial Guar. Ins. Co.*, 39 Misc 3d 208, 209 [Sup Ct, NY County 2013] [citation omitted]).

The OAG has failed to meet that burden. Although the OAG contends that the indisputable facts uncovered in its 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), the source of the facts on which the AG primarily relies – the testimony the OAG took from Domino's employees, franchisees, and third-parties – is insufficient. Even assuming the testimony has evidentiary value, which is not clear (*see Claypool v City of New York*, 267 AD2d 33, 35 [1st Dept 1999] [precluding testimony where defendants had no notice of hearing]), issues of fact remain with regard to Domino's part, if any, in the miscalculation of wages and other payroll information.

In its opposition, Domino's disputes virtually every purported "fact" asserted in the Gerstein Affirmation insofar as it relates to the OAG's claims against Domino's. This proceeding is premised on the OAG's claim that Domino's is responsible for wage violations

allegedly committed by the Franchisee Respondents. According to the OAG, Domino's should be held liable for these claimed violations because the violations were purportedly caused by flaws in, and the Franchisee Respondents' alleged reliance, on PULSE. The OAG contends that Domino's is liable for these alleged violations as a joint employer under the "economic realities" test.

As more fully set out below, Domino's has raised material issues of fact as to whether the Franchisee Respondents used PULSE to calculate payroll and whether Domino's can be deemed to be a joint employer. Accordingly, the OAG's motion for a summary determination is denied.

Joint Employer

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 v Gristede's Operating Corp.*, 255 F Supp 2d 184, 188-189 [SDNY 2003]). *Zheng v Liberty Apparel Co.* (355 F3d 61 [2d Cir 2003]), *Barfield v New York City Health & Hosps. Corp.* (537 F3d 132 [2d Cir 2008]), *Herman v RSR Sec. Servs., Ltd.* (172 F3d 132 [2d Cir 2013]), 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 and the Fair Labor Standards Act (the FLSA), under which the economic realities test was originally articulated. Following these cases, New York state courts regularly apply the test to both FLSA and NYLL claims (*see e.g. Matter of Exceed Contr. Corp. v Industrial Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015]; *Matter of Yick Wing Chan v Industrial Bd. of Appeals*, 120 AD3d 1120, 1121 [1st Dept 2014]).

The OAG contends that a franchisor can, as a matter of law, be considered a joint employer of its franchisee's employees. However, courts that have reached the merits of this

issue have concluded the opposite – that, as a matter of law, a franchisor is not the joint employer of its franchisees' employees (*see e.g. Orozco v Plackis*, 757 F3d 445, 452 [5th Cir 2014]; *Lovett v SJAC Fulton IND I, LLC*, 2016 WL 4425363, *16 [ND Ga 2016]; *Vann v Massage Envy Franchising LLC*, 2015 WL 74139, *8 [SD Cal 2015]; *Courtland v GCEP Surprise, LLC*, 2013 WL 3894981, *10 [D Ariz 2013]; *Singh v 7-Eleven, Inc.*, 2007 WL 715488, **3-6 [ND Cal 2007]; *Reese v Coastal Restoration & Cleaning Servs., Inc.*, 2010 WL 5184841, **3-5 [SD Miss 2010]; *Hatcher v Augustus*, 956 F Supp 387, 393 [EDNY 1987]; *Donovan v Breaker of Am., Inc.*, 566 F Supp 1016, 1019 [ED Ark 1983]; *see also Chen v Domino's Pizza, Inc.*, 2009 WL 3379946, *3 [D NJ 2009] [rejecting joint employer claims on the pleadings and noting that "(c)ourts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee's employees"]).

The OAG never addresses this authority. Instead, the OAG relies entirely on three federal cases that either denied motions to dismiss joint employer claims, or granted leave to amend a complaint to allege that a franchisor was a joint employer (*see e.g. Ocampo v 455 Hospitality LLC*, 2016 US Dist LEXIS 125928 [SDNY 2016]; *Olvera v Bareburger Group LLC*, 73 F Supp 3d 201, 204 [SDNY 2014]; *Cano v. DPNY, Inc.*, 287 FRD 251, 256 [SDNY 2012]). On a motion to dismiss or to amend the pleadings, "[t]he Court must accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the non-moving party" (*Olvera*, 73 F Supp 3d at 204; *see also Cano*, 287 FRD at 256 [motion to amend]). Here, in the posture of a summary judgment motion, the opposite standard applies. "[T]he facts must be viewed in the light most favorable to [Domino's], and every available inference must be drawn in [Domino's] favor" (*Torres v Jones*, 26 NY3d 742, 763 [2016]).

Moreover, the OAG never mentions the one case that has addressed on the merits the very issue before this Court. In *Patterson* (333 P3d 723 [Cal 2014]), the plaintiff, a franchisee's employee who alleged that she was sexually harassed by the store's assistant manager, commenced an action against both the franchisee and the three Domino's respondents. The employee claimed that the harassment violated California's Fair Employment and Housing Act (FEHA), which, like the FLSA and NYLL, requires a plaintiff to demonstrate that an "employment relationship" exists (*id.* at 740). Like the FLSA and NYLL, whether such a relationship exists under FEHA depends on whether the putative employer exercised authority over "matters such as hiring, firing, direction, supervision, and discipline of the employee" (*id.*). Like the OAG here, the *Patterson* plaintiff argued that the Domino's respondents were employers because they: (1) imposed standards governing pizza-making, food safety, cleanliness, and customer complaints; and (2) established standards concerning attire, grooming, and hygiene and reviewed the franchisee's compliance with those standards (*id.* at 729-730). The *Patterson* plaintiff went even further, claiming that Domino's was involved in the franchisee's employment decisions because it advised the franchisee to "get rid of" the alleged harasser and asked the franchisee to intervene if an employee was rude to a customer (*id.* at 730-731).

Patterson held that the Domino's respondents were *not* employers of the franchisee's employees as a matter of law. The court noted that the franchise agreement (identical to those at issue here) made clear that the workers in the franchisee's store were only employees of the franchisee, and that Domino's had no right to hire, fire, train, supervise, schedule, or determine the compensation of those employees (*id.* at 740). The court also found that the factual record

was consistent with the contract language, as Domino's did not retain the traditional right of general control an employer has over hiring, firing, and terms of employment (*id*. at 741-742).

Although this court finds *Patterson* to be compelling, given that no New York state or federal court has directly addressed the issue on a summary judgment motion of whether a franchisor is a joint employer of its franchisee employees, this Court will examine the factors underlying the economic realities test to determine whether Domino's can be considered to be a joint employer along with the Franchisee Respondents.

In applying the "economic realities" test, "the 'overarching concern' is whether 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 F3d at 139). When examining the "totality of circumstances," courts have identified four "formal control" factors (*see id*., citing *Carter v Duchess Cnty. Coll.*, 735 F2d 8, 12 [2d Cir 1984]), and six "functional control" factors (*see Zheng*, 355 F3d at 72).

The four formal control factors ask 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 (*Carter*, 735 F2d at 12; *see also Herman*, 172 F 3d at 139). Accordingly, to be deemed a joint employer under the FLSA or the NYLL, the putative joint employer must have actually hired, fired, disciplined, paid, controlled the working conditions of, and/or maintained the employment records of the putative employees. Domino's submits the testimony of each Franchisee Respondent, in which they testified that they do all the hiring and firing at their stores, that they determine how much to pay their employees, that they determine how and when

to discipline their employees, and that they determine their employees' work schedules (*see* Colorado aff, ¶¶ 98, 170 [Ahmed]; *id.*, ¶¶ 98, 116, 158 [Maestri]; *id.*, ¶¶ 98, 163 [Denman]). This Court finds that these submissions raise material issues of fact as to whether Domino's satisfies the four formal control factors.

Likewise, Domino's raises issues of fact with respect to the six "functional control" factors: (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 (*Zheng*, 355 F3d at 72).

With respect to the first factor, the OAG asserts that properties and equipment owned by franchisees should be deemed Domino's "premises and equipment" because Domino's approves leases and requires that equipment be purchased from approved vendors. However, Domino's contends that it does not have any generalized right to approve leases and is not a party to any franchisee's store lease. Domino's also contends that, while there is a pre-approved vendors list, franchisees can purchase equipment meeting those standards "from anywhere [they] want" (Colorado aff, exhibit 6 at 109; SFA § 8.2).

Under the second *Zheng* factor, the threshold consideration is whether the direct employer's employees provided services to the alleged "joint employer" that could be shifted away to another "joint employer" (*Zheng*, 355 F3d at 72; *see also Jean-Louis v Metropolitan*

Cable Comm., Inc., 838 F Supp 2d 111, 133 [analyzing whether cable technician, directly employed by a subcontractor, could install cable products for another cable provider]). Domino's contends that there can be no shift of employees because the alleged joint employees (*i.e.*, those of the franchisees) do not provide any services to Domino's (*see* Devereaux aff, ¶ 15).

With respect to the third factor, Domino's contends that, as a franchisor, it "produces" trademarks and operating methods that it licenses to its franchisees. Domino's further contends that the Franchisee-Respondents' employees do not perform jobs integral to either process (*id.*).

With respect to the fourth factor, *Zheng* makes clear that where "employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity, this factor does not in any way support the determination that a joint employment relationship exists" (*Zheng*, 355 F3d at 74). Here, Domino's contends that the Franchisee Respondents' employees "work" for Domino's only to the extent that the Franchisee-Respondents entered into franchise agreements with Domino's.

As to the fifth factor, supervision weighs in favor of joint employment "only if it demonstrates effective control of the terms and conditions of the plaintiff's employment" (*id.* at 754). "By contrast, supervision with respect to contractual warranties of quality and time has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting relationship" (*id.*; *accord Ovadio*, 19 NY3d at 144-145). Here, Domino's asserts that it reviews store performance, not individual employee performance, and that franchisors are obligated to monitor compliance with broad standards. Indeed, courts uniformly hold that the right to inspect a franchisee's operations does not make a franchisor a joint employer (*e.g. Brown v Sears, Roebuck & Co.*, 2004 WL 3088683, * 5 [7th Cir 2004] [franchisor's "right" to inspect franchises is not "control" of franchisees' employees]; *Vann*,

2015 WL 74139, *8 [imposition of attire, product, and process standards did not make franchisor a joint employer]).

Finally, with respect to the sixth factor, the OAG contends that, because the Franchisee Respondents were dependent on Domino's for work, the Franchisee Respondents' employees were also dependent on Domino's for work. The OAG offers no support for this claim and does not allege that the employees work exclusively for the Franchisee Respondents.

This Court finds that Domino's contentions and evidentiary submissions with respect to the four formal control factors and the six functional control factors are sufficient to raise material issues of fact as to whether Domino's can be considered to be a joint employer of the Franchisee Respondents' employees.

PULSE

Domino's has also raised material issues of fact with respect to the AG's contention that Domino's is responsible for the wage violations allegedly committed by the Franchisee Respondents because those violations were allegedly caused "in large part" by "flaws" in PULSE. In opposition to the motion, Domino's contends that PULSE could not have caused any of the alleged wage violations because most of the Franchisee Respondents' alleged underpayments have nothing to do with PULSE; PULSE was not designed to calculate payroll in accordance with the differing laws of each jurisdiction; the data in PULSE does not reflect the wages that the Franchisee Respondents actually paid their employees; and, most importantly, the Franchisee Respondents used their accountants, and did not rely on PULSE to calculate payroll or the wages they paid their employees.

In support of this contention, Domino's submits multiple affidavits and documents, as well as the testimony of each Franchisee Respondent, in which they testified that they have used

accountants and payroll providers – not PULSE – to handle its payroll needs for at least 15 years. Domino's also submits Loftus's forensic analysis which, Loftus contends, demonstrates that the payroll records that the Franchisee Respondents produced to the OAG show that the wage data these and other franchisees put into PULSE did not even match the wages they actually paid their employees. According to Loftus, the sample of payroll records that she reviewed showed nearly 600 differences between the paychecks the Franchisee Respondents' employees received and the PULSE data for that same payroll period. If, as the OAG contends, the Franchisee Respondents relied on PULSE to calculate their employees' wages, the data in PULSE should match the information in the payroll records every single time. Loftus contends that this data appears to confirm what each of the Franchisee Respondents testified: that the Franchisee Respondents relied on their accountants, and not PULSE, to calculate the wages they actually paid to their employees (*id*. ¶¶ 13-17).

These submissions raise issues of fact as to whether the Franchisee Respondents relied on PULSE to calculate their employees' wages, and whether PULSE cause any underpayments. Accordingly, the very premise of the OAG's case – that PULSE caused the Franchisee Respondents to underpay their employees – is sharply disputed by Domino's. The Court notes, however, that OAG's analysis of the entire spectrum of payroll and PULSE records reflects that "there are many thousands of instances where these records match precisely, including identical pay rates up to 95% of the time" (OAG reply mem [NYSCEF Doc. No. 324] at 5, citing Werberg aff, ¶¶ 5, 7-8), despite the "few hundred discrepancies" found in Loftus's more narrow examination (*see id.*).

Executive Law § 63 (12) and Section 687 of the Franchise Sales Act

The OAG's remaining claims – that it is entitled to a summary judgment declaration that Domino's violated the antifraud provisions of Executive Law § 63 (12) and section 687 of Franchise Sales Act – also fail.

The OAG contends that Domino's sale of PULSE to all franchisees in New York, and its subsequent actions and inactions with regard to PULSE, constitute a persistent fraud in violation of Executive Law § 63 (12). Specifically, the OAG contends that "Domino's knew that software flaws in PULSE systematically undercalculated gross wages, and thus did not comply with New York law, but failed to disclose those flaws and failed to take any affirmative steps to correct them" (OAG mem at 37). The OAG also contends that Domino's violated the anti-fraud provision of § 687 of the Franchise Sales Act through "the undisclosed PULSE flaws, resulting in systematic under-calculation of gross wages for employees, rendering Domino's representations about PULSE materially misleading" (*id*. at 40).

However, because Domino's has raised issues of fact as to whether the Franchisee Respondents actually used PULSE to calculate the wages they paid to employees, the OAG is not entitled to summary judgment on these claims (*see e.g. People v Pharmacia Corp.*, 27 Misc 3d 368, 389 [Sup Ct, NY County 2010] [genuine issues of material fact existed as to whether prices that prescription drug manufacturer published and caused to be relied upon as a basis for reimbursement under certain government health programs were inconsistent with well-established industry practices, precluding summary judgment for state on its Executive Law § 63 (12) claim]).

* * * * *

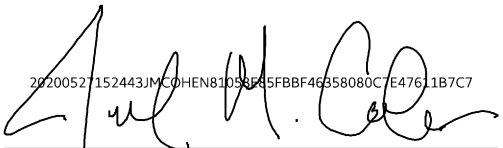
In sum, the Court declines to award summary disposition of the petition under CPLR 409 and a trial shall be held to resolve those issues "forthwith" (CPLR 410).[7] The Court has considered the parties' remaining arguments and finds them to be unavailing.

Accordingly, it is

ORDERED that Motion 001 is **denied**; and it is further

ORDERED that the parties shall appear for a conference in Part 3, to be held remotely via Skype for Business, to discuss issues pertaining to trial. The parties shall email the Court at SFC-Part3@nycourts.gov to coordinate scheduling details for the conference.

This constitutes the decision and order of the Court.



5/27/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[7] At oral argument, counsel for Domino's suggested that the Court could award summary judgment in its favor (*see* NYSCEF Doc. No. 340 [tr]). The Court denies that informal request for relief (which it did not seek in its papers) on this record.