No. 13-50632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BENJAMIN OROZCO,
Plaintiff-Appellee,

v.

CRAIG PLACKIS,
Defendant-Appellant.

Appeal from the U.S. District Court
for the Western District of Texas, Austin Division
No. 1:11-cv-00703
Hon. Mark Lane, U.S. Magistrate Judge

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Benjamin Orozco, Plaintiff-Appellee

2. Craig Plackis, Defendant-Appellant

3. Aaron Johnson and Christopher Willet, Equal Justice Center, Attorneys for Plaintiff-Appellee

4. Guillermo Ochoa-Cronfel, The Cronfel Law Firm, Attorney for Defendant-Appellant

5. Mark A. Keene, Keene & Seibert, PC, Attorney for Defendant-Appellant

6. National Restaurant Association and Texas Restaurant Association, Amici Curiae in support of Defendant-Appellant

8. Peter G. Kilgore, General Counsel, National Restaurant Association

9. Glenn Carey, General Counsel, Texas Restaurant Association

10. David B. Jordan, Littler Mendelson, Attorney for Amici Curiae National Restaurant Association and Texas Restaurant Association

11. Roxs Enterprises, Inc., franchisor entity of Craig O's Pizza and Pastaria franchise system

12. Sandra Entjer, Arnold Entjer, and Pane E Vino, Inc., former Defendants and former Craig O's Pizza and Pastaria franchisee

13. Fey Justicia Worker Center of Houston, Texas Southern Poverty Law Center, Paso Del Norte Civil Rights Project (the El Paso Office of the Texas Civil Rights Project), Workplace Justice Project at Stuart H. Smith Law Clinic & Center for Social Justice, Loyola College of Law (WJP), Workers Defense Project, National Employment Law Project, Amici Curiae in support of Plaintiff-Appellee

14. Tsedeye Gebreselassie and Catherine K. Ruckelshaus, National Employment Law Project, Attorneys for Amici Curiae Fey y Justicia Worker Center, et al.

15. M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, Paul L. Edenfield, Attorney, U.S. Department of Labor, Attorneys for Amicus Curiae Secretary of Labor

/s/ Paul L. Edenfield
PAUL L. EDENFIELD

Attorney for the Secretary of Labor

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the employee in this Fair Labor Standards Act ("FLSA" or "the Act") case.

STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

The Secretary, who administers and enforces the FLSA's wage and hour protections, *see* 29 U.S.C. 204(a), (b); 216(c); 217, has a substantial interest in this case, which primarily concerns the scope of the Act's definition of an

employer, *see* 29 U.S.C. 203(d) (defining employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee"). Specifically, the Secretary believes that the Act's definition of an employer is uniquely broad and that such a broad definition promotes compliance with the Act.

STATEMENT OF THE ISSUES

1. Whether the owner of a franchisor was an "employer" of a franchisee's employee and thus individually liable for the franchisee's overtime violations under the Fair Labor Standards Act ("FLSA" or "Act").

2. Whether the franchisor and franchisee were a single enterprise for purposes of section 3(r)(1) of the FLSA, 29 U.S.C. 203(r)(1), thus allowing for the aggregation of their annual sales volume for purposes of determining whether the threshold for coverage under the FLSA was met.

STATEMENT OF THE CASE

1. Plackis and his wife are the owners of Roxs Enterprises, Inc., the Franchisor of an Austin, Texas pizza chain called Craig O's Pizza & Pastaria. ROA.1841-42, 1885-86.[1] Initially, Plackis had operated his own Craig O's restaurants; then, in 2005, Roxs Enterprises entered an agreement ("Franchise Agreement" or "Agreement") with Pane e Vino, Inc., a corporation owned and run

[1] "ROA" denotes the record on appeal, followed by a period and the page numbers.

by Sandra Entjer, to open the first Craig O's franchise in nearby San Marcos, Texas. *Id.* at 1863-64.

The Franchise Agreement gave Roxs Enterprises broad authority to dictate operating procedures for the Franchisee, including "selection, supervision, or training of personnel." ROA.316. Although the Agreement stated that Entjer reserved ultimate responsibility for running the Franchisee, this statement was intended to prohibit delegation of day-to-day managerial authority to a hired manager, and not to diminish the Franchisor's explicit rights. *Id.*; Dist. Ct. Order at 5.

Consistent with the Agreement, Plackis routinely issued instructions to the Franchisee regarding the business. Some involved traditional aspects of franchisor control, such as ensuring brand consistency and negotiating with suppliers. *See* Orozco Ex. 3 at 038 (instructing Franchisee to make sure pizzas look the same); *id.* at 049 (instructing Franchisee regarding use of product line that Franchisor had negotiated the price on).[2] But Plackis's instructions to Entjer also involved store-level employment matters, such as the assignment of duties to staff, furnishing tax documents to employees, setting safety rules for staff, and hiring practices. *See id.* at 039 (ordering Franchisee to make cleanliness a focus for crews); *id.* at 062

[2] Orozco's trial exhibits are paginated consecutively by Bates stamp, beginning with exhibit one and proceeding continuously through all his exhibits.

(stating that W-2's needed to be issued and instructing Franchisee to make sure staff greets each guest); *id.* at 090 (telling Franchisee not to use hiring bodies to select staff); *id.* at 092 (instructing Franchisee how to go about evaluating a prospective applicant); *id.* at 148 (pointing out that Franchisee needed to make sure it was sufficiently staffed for summer months); *id.* at 116 (telling Franchisee to make sure staff was friendly); *id.* at 141 (instructing Franchisee to make sure there was sufficient staffing to deal with big delivery day); *id.* at 150-51 (telling Franchisee to post kitchen safety checklist to help avoid liability for kitchen accidents).

Plackis also involved himself in some of the general details of running the Franchisee's restaurant. He made announced and unannounced visits to the store one or more times a month, usually meeting with Entjer and sometimes working alongside employees to serve customers. ROA.1797, 1800. He issued orders to the Franchisee to respond to individual customer complaints, instructions as to how often inventory needed to be taken, and directions for where promotional materials, such as catering menus, should be placed. *See* Orozco Ex. 3 at 054, 059, 067, 124, 137. He told the Franchisee to market to schools, placed caps on the amount of complimentary products to be given away, insisted that the Franchisee examine utility bills before paying them, and required that financial statements be submitted to him directly. *Id.* at 049, 057, 079, 090, 153. Moreover, several employees were

shared between Plackis's personally-owned Craig O's restaurant in Austin and the Franchisee's San Marcos restaurant. Dist. Ct. Order at 6; ROA.1782-83, 1944-45, 2037-41. And, Plackis trained the Franchisee in business administration and examined payroll records to determine how it might achieve savings. ROA.1895-98.

2. Salvadoran immigrant Benjamin Orozco began working for the Franchisee in 2005. ROA.1749-50, 1833. He typically worked seven days and well over 40 hours a week as a cook and kitchen staffer at the pizza franchise, earning a flat biweekly salary. *Id.* at 1833. For the relevant 2-1/2 year backpay period in this case, Orozco worked 70 hours in a typical week and earned $1050 per two-week paycheck – or an effective wage rate of $7.50 an hour with no overtime pay.[3] Orozco Ex. 6; ROA.776-81; *see* 29 U.S.C. 207(a)(1) (prescribing time-and-a-half for weekly hours in excess of 40). Plackis was aware of Orozco's work hours and of his flat salary. ROA.1906, 1908. On one occasion, Plackis met with Entjer in the San Marcos Craig O's for about 30 minutes to examine work schedules and determine positions that could be eliminated to reduce payroll costs. *Id.* at 1816-18, 1897. About ten minutes after Plackis left, Entjer notified Orozco that she was cutting a dishwasher during certain parts of the day and was requiring

[3] The backpay period was limited by the FLSA's statute of limitations. *See* 29 U.S.C. 255(a).

him to begin washing dishes because payroll costs were too high. *Id.* at 1816-18; Dist. Ct. Order at 7.

3. Entjer and the Franchisee were initially the named defendants, but they entered bankruptcy proceedings and were dropped from the case. ROA.2055. The matter proceeded with Plackis as the lone defendant. The parties consented to a jury trial before a magistrate judge. Following the presentation of evidence, the court denied a motion for a directed verdict. *Id.* at 2148, 2157. The jury was charged with determining, *inter alia*, whether Plackis was an employer under the FLSA and whether the Franchisor and Franchisee were a single enterprise.[4] The court instructed the jury to consider this Court's four-factor test for employer status as well as the three statutory criteria for determining the existence of a single enterprise (both of which are discussed *infra*). *Id.* at 2218-19. Determining that Plackis was an employer and that there was enterprise coverage in this case, the jury then made findings concerning Orozco's weekly hours that made him eligible for overtime backpay. *Id.* at 771-80. On June 13, 2013, the district court denied Plackis's renewed motion for judgment as a matter of law. Dist. Ct. Order at 12. Noting that it was required to be especially deferential to jury findings, the court

[4] FLSA coverage is established only if Orozco was working for an enterprise in commerce, *see* 29 U.S.C. 207; an enterprise must gross $500,000 annually to be deemed in commerce, and this threshold can only be met for the entire backpay period if the Franchisor and Franchisee are combined as a single enterprise.

held that there was a legally sufficient evidentiary basis for the jury to conclude that Plackis was an employer of Orozco and that the Franchisor and Franchisee could be considered a single enterprise. *Id.* at 2, 7, 12. The court accordingly awarded backpay. ROA.898.

4. Plackis timely appealed to this Court. He argued that the jury could not have reasonably found facts to support a finding that any of the four factors for employer status was met. Plackis Br. at 11. Plackis contended that, at most, he gave nonbinding advice to the Franchisee concerning employment matters. *Id.* at 15. Plackis further asserted that the Franchise Agreement reposed ultimate management authority in the Franchisee. *Id.* at 24.

Plackis also contended that there was no enterprise coverage. Specifically, he claimed that the jury could not have reasonably found facts to support the conclusion that the Franchisor and Franchisee shared common control of the Franchisee's operations. Plackis Br. at 48-49. He further argued that the Act prohibits a finding of common control in franchise relationships. *Id.* at 49-50. Plackis also asserted that enterprise coverage can apply only if a named defendant is part of that enterprise: "[I]t is the activities of Craig Plackis individually that is the central inquiry. The Plaintiff herein is not permitted to aggregate the conduct of the non-party corporate Franchisor and Franchisee to create some abstract

'enterprise' that *ipso facto* applies to Plackis for purposes of establishing FLSA enterprise coverage." *Id.* at 47, 49-50.

SUMMARY OF THE ARGUMENT

1. To determine whether one falls with the FLSA's "expansive" definition of an employer, one must consider the economic reality of the work situation, rather than the traditional indicia of an employment relationship. *Donovan v Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984) (citing *Falk v. Brennan*, 414 U.S. 190, 195 (1973)). An individual is an employer under the "economic reality" test if he or she possesses "operating control" over employees' work situation. *Gray v. Powers*, 673 F.3d 352, 357 (5th Cir. 2012). Such an approach to liability best serves the Act's underlying intent of eradicating substandard wages, *see Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) (one must broadly construe FLSA to serve statute's remedial goals); any individual or entity with genuine control over an employee's work situation has a stake in FLSA compliance, making it more likely that employers will take the necessary steps to ensure that employees are paid their lawful wages.

In this case, the jury had sufficient evidence to find that Plackis had control over Orozco's employment situation. A Franchise Agreement accorded Plackis broad authority. He regularly issued instructions on a wide range of operational matters, including personnel management. For example, Plackis instructed Entjer

on what means to use in hiring new staff, on the assignment of specific duties to employees, and on the implementation of employee safety measures. Notably, there is evidence from which a jury could infer that Plackis possessed control and awareness with respect to the employment matter at the core of the overtime violation in this case, Orozco's hours of work and rate of pay. The record contains evidence that Plackis, who knew of Orozco's hours and salary, examined work schedules at the Franchisee and told Entjer how to reduce payroll costs; immediately thereafter she terminated a dishwasher and expanded Orozco's duties and hours.

While the existence of a franchise relationship is far from an automatic indicator that a franchisor or its principals are employers of a franchisee's employees, the economic reality test permits a franchisor's principal to be held liable where the specific facts demonstrate operational control. Therefore, under the economic reality test, Plackis should be held liable as an FLSA employer (as the jury found he should be).

2. In addition to individual employees whose jobs involve commerce, the FLSA's minimum wage and overtime provisions also cover employees who work for an "enterprise" engaged in commerce. *See* 29 U.S.C. 206(a), 207(a). For an enterprise to meet the commerce requirement, it must, *inter alia*, have an annual gross volume of sales of at least $500,000. *See* 29 U.S.C. 203(s)(1)(A)(ii). The

Act allows for the combination of multiple entities as a single enterprise, and consequently for annual gross revenue to be combined, if they are related businesses with a common business purpose and under common control. *See* 29 U.S.C. 203(r)(1).

Here, contrary to Plackis's contention, there is no legal impediment to finding a franchisor and franchisee to be a single "enterprise" for purposes of the FLSA, nor is there any such impediment to finding enterprise coverage even though no named defendant was part of the enterprise. *See* Plackis Br. at 46-47, 50. Moreover, giving the jury the benefit of all reasonable inferences, the evidence supports a finding that there was common control of the Franchisor and Franchisee, thus creating a single enterprise that met the $500,000 threshold in combined revenues. Plackis was involved in numerous details of running the Franchisee, as evidenced by his emails to and meetings with Entjer, and the Franchise Agreement expressly granted him authority to set operating procedures.

ARGUMENT

I. PLACKIS IS INDIVIDUALLY LIABLE AS AN EMPLOYER UNDER THE FLSA

1.a. The Act defines an employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). To apply this definition, courts look to the "economic realities" of the work relationship. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir.

1983) (citing *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961)). This Court considers several factors in assessing this economic reality: whether the alleged employer "'(1) possessed the power to hire and fire the employees, (2) supervised or controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Gray v. Powers*, 673 F.3d at 355 (quoting *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010)). These factors are not to be looked at in isolation; rather, the "dominant theme" in applying them is to discern whether the alleged employer had sufficient "operational control" to be held liable for FLSA violations. *Gray*, 673 F.3d at 357. Individuals may be deemed employers whether or not they have an official position or title, or a possessory interest in the company, by effectively exercising control over the work situation of an employee. *See Sabine Irrigation*, 695 F.2d at 194-95 (describing "the parameters of § 203(d) as sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-à-vis its employees"). Even an outside consultant may be an employer if he "exercised control over the work situation." *Circle C. Invs.*, 998 F.2d at 329. In this construct, an employee may have more than one employer at the same time. *See Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007).

1.b. The economic reality test was adopted by courts as the best means to effectuate Congress's remedial intent in light of the fact that the Act's definition of an employer, 29 U.S.C. 203(d), while plainly broad, is not exhaustively descriptive on its face. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) ("[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act."); *Williams*, 595 F.3d at 620 ("Because courts have found these definitions vague, the 'economic reality test' has arisen to determine FLSA coverage."). Congress sought to "protect[] commerce from injury [resulting from] . . . sub-standard working conditions," by broadening the traditional definition of employment to better address the many economic relationships that contribute to suppressing wages. *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 131 (1943). The economic reality test for employment accomplishes this goal of eliminating substandard wages by holding individuals accountable as employers when an employee's work situation is functionally subject to the control of such individuals. *See Circle C. Invs.*, 998 F.2d at 329 ("The FLSA's definition of employer must be liberally construed to effectuate Congress's remedial intent.") (citing *Sabine Irrigation*, 695 F.2d at 194); *Lambert v. Ackerley*, 180 F.3d 997,1011-12 (9th Cir. 1999) (*en banc*) ("We have held that the definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but 'is to be given an expansive interpretation

in order to effectuate the FLSA's broad remedial purposes.'") (quoting *Bonnette v. Cal. Health & Welfare Agency,* 704 F.2d 1465, 1469 (9th Cir. 1983)).

By holding individuals liable who have operational control over employees, the Act prevents corporate structures from potentially insulating responsible individuals from liability. *See Gambino v. Index Sales Corp.*, 673 F. Supp. 1450, 1455 (N.D. Ill. 1987) (observing that the FLSA's "broad-sweep definition was intended to strip away [corporate-form] insulation where the corporation-controlling individual has opted to prefer the payment of other corporate debts to the payment of obligations running to corporate employees and [was] given special statutory recognition by Congress"). The Act instead creates incentives for individuals with genuine control over the employment situation, particularly wage and hour matters, to ensure the proper payment of wages, and to ensure that there are responsible entities who are able to compensate an employee in the event violations occur. *Id.*

Indeed, where an individual or entity was responsible for or possessed sufficient operational control to prevent the FLSA violation, it is especially appropriate to ascribe employer liability. *See Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 252 (5th Cir.) (noting that evidence that alleged employer "determin[ed] . . . rate or method of payment, . . . will be considered in the context of the whole record of economic reality test," but suggesting that it should be

given particular weight due to its relationship to FLSA compliance (citations omitted)), *cert. denied*, 133 S. Ct. 795 (2012); *Grim Hotel Co.*, 747 F.2d at 972 n.7 (placing emphasis on the fact that individual corporate officer could compel FLSA compliance).[5]

1.c. Thus, where the facts show operational control by the principal of a franchisor over a franchisee's employee, it is fully consistent with the Act's policies to hold the franchisor's principal individually liable notwithstanding the existence of a franchise relationship that purports to maintain two separate entities. *Cf. Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (a garment manufacturer may be the joint employer of its contractor's employees if it "has functional control over workers"). It is true that the characteristic feature of a franchise is "[a] method of doing business by which a 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 fra[n]chisor and which is substantially associated with the franchisor's trade mark, name, logo or advertising." *Francorp, Inc. v. Siebert*, 210 F. Supp. 2d 961, 965 n.4 (N.D. Ill. 2001). But as a factual matter, the contours of franchisor-franchisee relationships

[5] Specific proof of awareness of and complicity in any FLSA violations themselves is not required to impute personal employer liability. *See Irizarry v. Catsimatidis*, 722 F.3d 99, 116-17 (2d Cir. 2013), *petition for cert. filed* (Dec. 6, 2013) (No. 13-683).

vary, and a franchisor's interests and involvement may, and often do, go beyond merely maintaining a brand name and system of marketing. *Cf., e.g., Toppel v. Marriott Int'l, Inc.*, No. 03 Civ. 3042 (DAB), 2006 WL 2466247 at *6-8 (S.D.N.Y. Aug. 24, 2006). Therefore, under the FLSA and its broad view of who is an employer, the question is whether, under the particular facts, a franchisor's principal exerts sufficient operational control of the employment situation at a franchisee to warrant individual employer liability.[6]

2.a. In analyzing whether the facts here show sufficient operational control to conclude that the principal of the Franchisor should be held individually liable under the FLSA, it is important to keep in mind that all the evidence must be evaluated through the prism of a jury verdict, which requires that the evidence be viewed "in its strongest light in favor of [the prevailing party], giving [that party] 'the advantage of every fair and reasonable inference which the evidence justifies.'" *Streber v. Hunter*, 221 F.3d 701, 721 (5th Cir. 2000) (*en banc*) (quoting

[6] Amicus National Restaurant Association's ("NRA") assertion that in the traditional legal view of a franchise relationship a franchisor is not responsible for the employment actions of a franchisee, NRA Amicus Br. at 1-2, 10-12, fails to recognize that a formalistic analysis of employment does not obtain under the FLSA. Nor does the NRA's argument account for the different types of agreements or methods of operation that might exist across franchises.

Bartley v. Euclid, Inc., 180 F.3d 175, 179 (5th Cir.1999)).[7] The record here contains evidence from which a jury could reasonably infer that Plackis exercised actual operational control over Orozco's employment situation in numerous ways; it does not "overwhelmingly" point to a contrary conclusion. *Id.* As the district court noted, there need not be direct testimony that Plackis exercised operational control over Orozco's work situation; rather, a jury was permitted to make all reasonable inferences from the evidence as a whole. Dist. Ct. Order at 7.

Plackis and Entjer maintained a steady stream of email traffic between late 2006 and early 2012 in which Plackis not only advised but *gave orders to* Entjer concerning the running of her franchise. Although some of what Plackis dictated fell within the normal franchise concerns of having a uniform product and exercising combined purchasing power, he also issued instructions concerning day-to-day management. These included placement of promotional items, taking inventory, and responding to customer complaints. Orozco Ex. 3 at 054, 059, 067, 124. Moreover, there is specific evidence that Plackis instructed Entjer concerning personnel matters, such as how to go about hiring new staff, the assignment of

[7] Although, in general, questions regarding the existence of an employment relationship are ultimately questions of law to be decided by the court, underlying factual questions are matters for the jury. *See Castillo v. Givens*, 704 F.2d 181, 185 n.9 (5th Cir. 1983). In such mixed-fact-and-law cases, one must accept all reasonable factual findings and inferences that the jury could have reached, based on the record before it, that support its legal conclusion. *See Am. Home Assur. Co. v. United Space Alliance, LLC*, 378 F.3d 482, 488-89 (5th Cir. 2004).

specific duties to employees, and implementing employee safety measures. Orozco Ex. 3 at 039, 062, 090, 092, 116, 148-51. Plackis ordered Entjer to assign employees to sweep the floor and to make sure guests were greeted by staff. *Id.* at 039, 062. He told her not to use hiring agencies to procure new employees and told her what to look for in making a new hire. *Id.* at 090, 092. Plackis instructed Entjer to make sure staffing levels were sufficient during the summer months and on high-volume days. *Id.* at 109, 141. He told her to mail out her W-2 forms on time, and he required the use of a safety checklist for employees. *Id.* at 062, 148-51. Further, as the district court laid out in detail, Plackis instructed Entjer concerning labor management and payroll. ROA.1895-98; Dist. Ct. Order at 6-7. Significantly, Plackis met with Entjer to state his view that Entjer should eliminate some of the positions in the kitchen to save on payroll, and after that meeting Entjer promptly reduced staff levels and correspondingly increased Orozco's hours (which effectively reduced his rate of pay). ROA.1816-18, 1897; Dist. Ct. Order at 7.

Looking at the totality of this evidence – including Plackis's email instructions concerning day-to-day operations and personnel matters, along with his payroll meeting with Entjer that immediately preceded an increase in Orzoco's duties and hours – a jury could readily infer that Plackis exercised control both over Orozco's work schedule and duties, and over his rate of pay (the second and

third factors of this Court's economic reality test). *See Irizarry v. Catsimatidis*, 722 F.3d 99, 107 (2d Cir. 2013), *petition for cert. filed* (Dec. 6, 2013) (No. 13-683) ("'evidence showing [an individual's] authority over management, supervision, and oversight of [a company's] affairs in general'" is relevant to "'the totality of the circumstances in determining [the individual's] operational control of [the company's] employment of [the plaintiff employees]'") (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999)). Indeed, Plackis exercised control over the very aspects of Orozco's employment terms that constituted a violation of the FLSA. *See Grim Hotel Co.*, 747 F.2d at 972 n.7 (noting strong case for employer liability where individual had role in ensuring lawfulness of payroll policy). Moreover, the backdrop of a Franchise Agreement granting broad authority over employment matters to the Franchisor (discussed more fully in the following section) offers additional grounds for a reasonable jury to infer that Plackis exercised operational control on these matters.[8]

2.b. Plackis argues that the Franchise Agreement establishes that operational authority resides with the Franchisee. But in fact the language of the provision conveys the opposite meaning. The Franchise Agreement provides that:

[8] There is also evidence that Plackis shared employees originally hired at his personally-owned Craig O's with the Franchisee, *see* Dist. Ct. Order at 6, and that he gave instructions regarding how Entjer should go about interviewing and selecting staff, *see* Orozco Ex. 3 at 092, 109. These provide a basis for a jury to infer that Plackis exercised control over hiring (factor one).

> [the] Franchisee shall at all times comply with all lawful and reasonable policies, regulations, and procedures promulgated or prescribed from time to time by Franchisor in connection with Franchisee's shop or business, including but not limited to standards, techniques, and procedures in the installation or servicing of products or the rendering of other services, *selection, supervision, or training of personnel*, sales, advertising, and promotional techniques, programs and procedures, maintenance and appearance of the Franchise, the Franchise premises, policies and procedures relating to warranties or guarantees, payment, credit, and accounting and financial reporting policies and procedures.

ROA.316 (emphasis added). Thus, operational control over critical aspects of the operation – including personnel matters – is conferred upon the Franchisor by the Agreement.

And, while the Franchisee does possess management authority, the Agreement does nothing to suggest that the management authority supersedes the Franchisor's overarching power to set operating policies. Indeed, the purpose of the Agreement's reference to the Franchisee's management authority is to limit the authority of any hired manager:

> Franchisee shall be charged with the following managerial responsibilities: (a) Franchisee shall either devote Franchisee's full time effort to actively manage, or cause to be managed, the operation of Franchisee's shop. (b) Franchisee shall, irrespective of any delegation of responsibility, reserve and exercise ultimate authority with respect to the management and operation of Franchisee's shop. (c) In the event that Franchisee employs a manager to run the day-to-day operations of the Franchise, Franchisee shall ensure that Franchisee's manager is adequately trained to manage the Franchise pursuant to the terms of this Agreement. Irrespective of Franchisee's employment of a manager, Franchisee must reserve and exercise the ultimate authority and responsibility with respect to the operation of the Franchise.

ROA.316. Such reservation of the Franchisee's managerial rights vis-à-vis a hired manager does not diminish the predominant authority of the Franchisor. A comparison of the language of the instant Agreement with that in *Folsom v. Burger King*, 958 P.2d 301, 308-09 (Wash. 1998), illustrates the breadth of the Franchisor prerogatives here with respect to employment. In *Folsom*, the franchise agreement specifically stated that the franchisee was an independent contractor and that franchisor Burger King had no control over the terms and conditions of the franchisee's employees. *Id.* No such plain disclaimer of Franchisor's control of employment matters is present in this Franchise Agreement; to the contrary, the agreement itself allows for such control (for instance, the "selection, supervision, or training of personnel"). Further, contrary to the situation here, several examples of typical franchise agreements set forth by amicus NRA contain language explicitly granting the franchisee full responsibility and control with respect to its employees. NRA Amicus Br. at 7-8.

Even if the Franchise Agreement did reserve power unto the Franchisee, this would not be determinative in the face of the evidence here concerning the authority Plackis *actually* exercised over the Franchisee's operations. The heart of the economic reality test, after all, is to look beyond formal arrangements. What matters is whether an individual exercises actual operational control over a work situation. *See, e.g.*, *Sabine Irrigation*, 695 F.2d at 194. But, while the existence

of formal authority may be insufficient to prove or disprove employer status, it can provide a relevant backdrop for inferring operational control. Thus, the Agreement's conferral of broad powers to the Franchisor permits a jury to more readily infer that Plackis had operational control over employment at the Franchisee. *See Gray*, 673 F.3d at 355-56 (formal authority is itself not sufficient to find operational control but may be the basis to infer such authority where there is evidence that it is actually exercised).

Further, contrary to amicus NRA's suggestion, holding Plackis liable would not dramatically upset settled expectations concerning the obligations of franchisors. NRA Amicus Br. at 11-12. A franchise relationship alone does not make the franchisor an employer of its franchisee's employees, and the Secretary is not seeking such a generalized ruling unmoored to the facts presented by a particular case. Indeed, a franchisor or its principals would only be held liable if, *under the facts of a given case*, they possessed operational control over employment matters. In this case, as found by the jury, the facts support the conclusion that the owner of the Franchisor was an employer of the Franchisee's employee and thus individually liable under the Act.

II. THE FRANCHISOR AND THE FRANCHISEE FORM A SINGLE "ENTERPRISE" FOR PURPOSES OF THE FLSA

1. The FLSA, as originally enacted, covered only those employees whose individual job duties involved interstate commerce. *See* Pub. L. No. 75-718, 52

Stat. 1060, 1062-63 (1938). Coverage was later expanded to include employees "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. 206(a), 207(a). This expansion resulted from Congress's recognition that substandard wages at an enterprise engaged in commerce had a depressive effect on wages across the economy, just as surely as substandard wages paid to individuals whose jobs involved commerce. As the Senate report on the Fair Labor Standards Amendments of 1961 observed: The congressional "policy to correct and as rapidly as practicable to eliminate those conditions" which allow the perpetuation of substandard wages through the channels of commerce was only partially met because coverage "extends [under the original 1938 Act] only to those individual employees who can be proved to be personally engaged in interstate commerce or in the production of goods for interstate commerce." S. Rep. No. 87-145 at 6 (1961). Thus, "there exist substantial gaps in the minimum wage-hour protection of the act in large enterprises of various kinds and in other areas which, because of their size and importance to our national economy, should be brought within the coverage of the act," *id.* at 6-7, and these gaps make it "plainly appropriate, therefore, to extend to the employees of the retail selling enterprise [that is engaged in commerce] the same minimum wage protection that the act now affords to the production and transportation employees [who are individually engaged in commerce], who

participate to no greater extent in the interstate commerce carried on in the same goods," *id.* at 43.

For an enterprise to meet the commerce requirement, it must have some employees who are involved in commerce. *See* 29 U.S.C. 203(s)(1)(A)(i). The enterprise must also have an annual gross volume of sales of at least $500,000. *See* 29 U.S.C. 203(s)(1)(A)(ii). The Act further contemplates that multiple interrelated businesses often act as a single entity for the purpose of interstate competition. It provides that when multiple, nominally separate entities are related, with common control and common business purpose, they should be considered a single enterprise. *See* 29 U.S.C. 203(r)(1). Notably, in analyzing common control under the Act, Congress recognized that a wide range of management structures exist and allowed that there was no set formula to determine whether multiple business entities functioned as a single "economic unit" with a unitary impact on commerce. S. Rep. No. 87-145 at 41. Thus one must "look beyond formalistic corporate separation to the actual or pragmatic operation and control." *Grim Hotel Co.*, 747 F.2d at 970.

2. In the instant case, the $500,000 annual revenue threshold is met for the entire backpay period only if the Franchisor and Franchisee are considered a single enterprise (the Franchisee standing alone satisfies the threshold for only

part of the period). *See* Dist. Ct. Order at 9. Thus, finding a single enterprise is necessary if Orozco is to be entitled to recovery for the entire backpay period.

Plackis argues that the Act provides that a franchise relationship may never be found to involve common control and thus franchisors and franchisees cannot form a single enterprise. *See* Plackis Br. at 49-50. Section 3(r) of the FLSA addresses application of the common control test with respect to franchise-type arrangements. It states:

> [A] retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area . . . .

29 U.S.C. 203(r). The Supreme Court, reading this provision, concluded that "[s]pecific exemptions [from common control] are noted, making clear that exclusive-dealership arrangements, collective-purchasing pools, franchises, and leases of business premises from large commercial landlords do not create 'enterprises' within the meaning of the Act." *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 517-18 (1973). Plackis argues that this statement creates a blanket exclusion for franchises; but in fact, it indicates only that the existence of a franchise arrangement by itself is insufficient to establish common control, i.e., it

states that franchises "do not create" enterprises, not that franchises can never be an enterprise. This is exactly what the statute says: there may not be common ownership "*by reason of*" a franchise-type arrangement, 29 U.S.C. 203(r) (emphasis added); the Act says nothing about whether there may be common control for franchises *by reason of* other factors. Furthermore, when the statutory provision and the Supreme Court's interpretation thereof are read in light of an explicit statement of congressional purpose, there can be no doubt that a franchise arrangement does not preclude a common control finding. With respect to the Act's approach to franchise arrangements, the Senate report on the 1961 FLSA amendments notes:

> Whether such arrangements bring the establishment within the franchisor's, lessor's, or grantor's 'enterprise' is a question to be determined on all the facts. The facts may show that the arrangements reserve the necessary right of control in the grantor or unify the operations among the separate 'franchised' establishments so as to create an economic unity of related activities for a common business purpose. In that case, the 'franchised' establishment will be considered a part of the same 'enterprise.' [A determination] will depend upon the terms of the agreements and the related facts concerning the relationship between the parties.

S. Rep. No. 87-145 at 42. FLSA regulations further confirm that franchises can be a single enterprise. *See* 29 C.F.R. 779.232(b) (noting that whether a franchise is a single enterprise involves consideration of "all the facts and circumstances," and proceeding to provide an example that "illustrates a franchising company and

independently owned retail establishments which would constitute a single enterprise").

3. Plackis also argues that the facts here do not establish a single enterprise. Of the three factors that must be met to show that two entities constitute a single enterprise, Plackis contests only one: common control. *See* Plackis Br. at 48. Recognizing Congress's instruction to take a broad view of what constitutes control, the applicable regulation defines it as including both functional control, 29 C.F.R. 779.221 (defining control as "the act … of controlling") and formal control, *id.* (control includes "the power to direct, restrict, regulate, govern, or administer the performance of the activities"). Common control also encompasses "the sharing of control and it is not limited to sole control or complete control by one person or corporation." *Id.*

The FLSA regulations provide that common control is based on specific facts: "It is not possible to lay down specific rules to determine whether a franchise or other agreement is such that a single enterprise results because all the facts and circumstances must be examined . . . ." 29 C.F.R. 779.232(b). However, the regulations give an example of a set of facts that might be relevant to the inquiry. The regulations state that considerations may include: use of combined buying power for purchases for the franchise, general administrative jurisdiction by the franchisor, control over the type of merchandise carried, and

control over merchandise promotions. *Id.* Put another way, there is a single enterprise where "the operators of the franchised establishments are denied the essential prerogatives of the ordinary independent businessman because of restrictions as to products, prices, profits and management." 29 C.F.R. 779.232(c).

In this connection, the inferences one must credit the jury with are sufficient to sustain a legal conclusion that the Franchisor and Franchisee were under common control. The Franchisor possessed both formal authority to control the Franchisee's operations pursuant to the Franchise Agreement and operational control, as evidenced most forcefully by Plackis's emails to Entjer. The Franchisor was deeply involved in directing the activities of the franchise, including details of the Franchisee's operations. Plackis engaged in common purchasing, controlled recipes and product design, directed promotional activities and discounts, and operated under a broad grant of authority under the Franchise Agreement. *See* 29 C.F.R. 779.232(b). [9] Thus, the jury had sufficient basis to find that the "essential prerogatives" of an independent business were denied to the Franchisee. 29 C.F.R. 779.232(c).

[9] While not all of the facts from the regulations' hypothetical, *see* 29 C.F.R. 779.232(b), are present in this case, the set of facts therein is merely illustrative and is not intended to be the sole means to satisfy the test for a single enterprise. *See* 29 C.F.R. 779.232(b) ("It is not possible to lay down specific rules . . . .").

4. Finally, Plackis argues that enterprise coverage may apply only if the enterprise is itself a party to the case, which it is not here. Plackis Br. at 46-47. As the district court reasoned, Dist. Ct. Order at 9, the plain language of the Act indicates that coverage attaches to the employee based on his or her employment by an enterprise, but places no limits on who can be deemed a responsible employer of a covered employee. The Act states that "[e]very employer shall pay [minimum wage and overtime pay where appropriate] to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ." 29 U.S.C. 206(a), 207(a). Thus, "[*e*]*very* employer," regardless of its status as an enterprise, is required to comply with the FLSA if its employees are covered by the Act. 29 U.S.C. 206(a) (emphasis added). If an entity other than the enterprise meets the criteria for employer status, i.e., someone like Plackis, then that employer can be held liable. Moreover, the Act contemplates liability for responsible *individuals*, 29 U.S.C. 203(d), not just businesses. To require that, in an enterprise coverage case, a business enterprise must be named as a defendant along with any individual, would undermine the policy of individual liability because often individuals will be named precisely because of the absence of a solvent business enterprise. In sum, it is entirely appropriate to argue for the coverage of Orozco because of the

establishment of a single enterprise and, simultaneously, for the individual employer liability of Plackis; this is totally consistent with the dictates of the FLSA.

CONCLUSION

For the foregoing reasons, the Secretary urges that the decision of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Fifth Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 6,811 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-spaced typeface, Times New Roman, in 14-point font. This brief was prepared using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of January 2014, I electronically filed this Amicus Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all other participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following:

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