

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

-----X

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

Index No. \_\_\_\_\_

Petitioner,

-against-

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

Respondents.

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**AFFIRMATION OF TERRI GERSTEIN  
IN SUPPORT OF VERIFIED PETITION**

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May 23, 2016

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TERRI GERSTEIN, an attorney duly admitted to practice in the courts of the State of New York, affirms the following under penalty of perjury:

1. I am the Bureau Chief in the Labor Bureau of the office of Eric T. Schneiderman, Attorney General of the State of New York. I make this affirmation in support of the Verified Petition and the relief sought therein.

2. I am familiar with the facts and circumstances of this proceeding. The facts set forth in this Affirmation are based upon information contained in the investigative files of the Office of the Attorney General (“Attorney General” or “OAG”).

3. Pursuant to New York Executive Law §63(12) and Article 4 of the New York Civil Practice Law and Rules, the OAG brings this special proceeding against Domino’s Pizza, Inc., Domino’s Pizza LLC and Domino’s Pizza Franchising LLC (collectively, “Domino’s”), as well

as Matthew J. Denman and Denman Enterprises, Inc. (collectively, “Denman Respondents”), Anthony 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 (collectively, “Maestri Respondents”), and Shueb Ahmed, Nader Inc. and Super Duper Pizza Inc. (collectively, “Ahmed Respondents”). Matthew J. Denman, Anthony Maestri and Shueb Ahmed are collectively referred to below as the “Three Franchisees” or “Franchisee Respondents.”

## **I. THE PARTIES**

4. Petitioner, Eric T. Schneiderman, the Attorney General of the State of New York, is empowered under New York Executive Law §63(12) to seek, on behalf of the People of the State of New York, injunctive relief, restitution, and damages for repeated and persistent illegality in the transaction of business in the State of New York. The OAG has a principal office in New York County.<sup>1</sup>

5. Respondent Domino’s Pizza, Inc. is a Delaware corporation with its headquarters at 30 Frank Lloyd Wright Drive, Ann Arbor, Michigan. Ex. 1 (Domino’s 2015 Form 10-K, cover).<sup>2</sup> According to its 2015 Annual Report on Form 10-K filed with the United States Securities and Exchange Commission on or about February 25, 2016, Domino’s Pizza, Inc. is the second largest pizza company in the world and the largest pizza delivery company in the United States, with over a quarter of total U.S. pizza delivery based on reported consumer spending. Ex. 1 (2015 Form 10-K, at 7). Domino’s Pizza, Inc. operates through directly or indirectly 100%-owned subsidiaries including Respondents Domino’s Pizza LLC, a Michigan limited liability

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<sup>1</sup> The OAG is also the state agency responsible for regulating franchise sales in New York State.

<sup>2</sup> “Ex. \_\_” refers to the exhibits filed contemporaneously with this Affirmation, referred to and relied upon by the OAG in this special proceeding, which are true and correct copies of, *inter alia*, documents produced by Respondents as part of this investigation; transcripts of subpoena hearings; affidavits of franchisees; affirmations and affidavits of OAG personnel regarding the analysis of certain records; publicly available documents; and other documents from the OAG’s investigative file.

company, and Domino's Pizza Franchising LLC, a Delaware limited liability company created in 2007 for the primary purpose of franchising Domino's stores. Ex. 2 (Domino's 2016 Financial Disclosure Document, issued April 1, 2016 ("2016 FDD"), at 1, 3). Respondents Domino's Pizza, Inc., Domino's Pizza LLC and Domino's Pizza Franchising LLC are collectively referred to below as "Domino's."

6. Respondent Anthony Maestri is a Domino's franchisee and owns or owned the following six Domino's franchise stores in New York State: 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.<sup>3</sup> Ex. 3 (Maestri Tr. 22:19 - 24:18). He operates the stores through his home office. Ex. 3 (Maestri Tr. 32:19-23). Maestri also personally inspects each of the stores at least once a week, inspecting records and supervising employees. Ex. 3 (Maestri Tr. 37:19 - 42:7). Maestri has overseen the stores' bookkeeping himself or through his supervisor. Ex. 3 (Maestri Tr. 43:4-16). He approves all pay increases, and he and his managers set store policies. Ex. 3 (Maestri Tr. 45:19-24, 48:22 - 49:8).

7. Respondent Hi-Rise Pizza, Inc. is a New York corporation with its principal place of business at 965 Amsterdam Avenue, in New York County, and is a Domino's franchisee operating a franchise store in New York State. Ex. 4 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-003).

8. Respondent Hudson River Pizza, LLC was a New York limited liability company with its principal place of business at 189 South Highland Avenue, Ossining, in Westchester County, and was a Domino's franchisee operating a franchise store in New York State. Ex. 6 (filing with N.Y. Dep't of State); Ex. 5 (DP00000587) (spreadsheet of New York State

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<sup>3</sup> Maestri currently owns Hi-Rise Pizza, Inc., Upper West Harlem Pizza, Inc., and Uptown Pizza, Inc. In or about November 2013, Maestri sold Hudson River Pizza, LLC, North Bedford Avenue Pizza, Inc. and Northern Westchester Pizza, LLC, and no longer operates these stores.

Domino's franchisees, as of May 10, 2013). On November 25, 2013, it was sold to a different franchisee, Robert Cookston. Ex. 3 (Maestri Tr. 24:21 - 25:2).

9. Respondent Upper West Harlem Pizza, Inc. is a New York corporation with its principal place of business at 2554 Adam Clayton Powell Jr. Boulevard, in New York County, and is a Domino's franchisee operating a franchise store in New York State. Ex. 7 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-003).

10. Respondent North Bedford Avenue Pizza, Inc. was a New York corporation with its principal place of business at 130 North Bedford Road, Mount Kisco, in Westchester County, and was a Domino's franchisee operating a franchise store in New York State. Ex. 8 (filing with N.Y. Dep't of State); Ex. 5 (DP00000587) (spreadsheet of New York State Domino's franchisees, as of May 10, 2013). On November 25, 2013, it was sold to a different Domino's franchisee, Robert Cookston. Ex. 3 (Maestri Tr. 25:3-7).

11. Respondent Uptown Pizza, Inc. is a New York corporation with its principal place of business at 409 West 125th Street, in New York County, and is a Domino's franchisee operating a franchise store in New York State. Ex. 9 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-003).

12. Respondent Northern Westchester Pizza, LLC was a New York limited liability company with its principal place of business at 2050 East Main Street, Cortlandt Manor, Westchester County, and was a Domino's franchisee operating a franchise store in New York State. Ex. 10 (filing with N.Y. Dep't of State); Ex. 5 (DP00000587) (spreadsheet of New York State Domino's franchisees, as of May 10, 2013). On November 25, 2013, it was sold to a different Domino's franchisee, Robert Cookston. Ex. 3 (Maestri Tr. 25:8-11).

13. Respondent Mohammed Shueb Ahmed is a Domino's franchisee and owns the



following two Domino's franchise stores in New York State: Nader Inc. and Super Duper Pizza Inc. Ex. 11 (Ahmed Tr. 11:18 - 12:16). He personally supervises Nader Inc. and Super Duper Pizza Inc., and sets store policies following guidelines issued by Domino's. Ex. 11 (Ahmed Tr. 28:19-22; 29:21 - 31:12).

14. Respondent Nader Inc. is a New York corporation with its principal place of business at 475 West Merrick Road, Valley Stream, NY, and is a Domino's franchisee operating a franchise store in New York State. Ex. 12 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-006).

15. Respondent Super Duper Pizza Inc. is a New York corporation with its principal place of business at 181 Church Street, New York, NY, and is a Domino's franchisee operating a franchise store in New York State. Ex. 13 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-006).

16. Respondent Matthew J. Denman is the sole owner of Respondent Denman Enterprises, Inc., a Domino's franchisee that owns two Domino's stores in New York State. Ex. 14 (Denman Tr. 14:7-10, 14:17-20; 15:12-19). He personally visits and inspects both stores regularly, sometimes as much as four times a week, and otherwise supervises the stores through regular communication with store managers. Ex. 14 (Denman Tr. 22:17 - 24:20). Denman personally approves employees' pay rates, oversees bookkeeping and reconciles accounts, sets store policies subject to Domino's rules and procedures, and informs store managers whether Domino's has approved applicants the managers wish to hire. Ex. 14 (Denman Tr. 26:6 - 30:3).

17. Denman Enterprises, Inc. is a New York corporation and is a Domino's franchisee operating franchise stores in New York State: one at 132 West Fulton Street, Gloversville, in Fulton County, New York, and one at 43 Market Street, Amsterdam, in Montgomery County,

New York. Ex. 15 (filing with N.Y. Dep't of State); Ex. 2 (2016 FDD, Ex. B, at B-004); Ex. 14 (Denman Tr. 14:14-25).

## **II. DOMINO'S OPERATIONS IN NEW YORK STATE**

18. Domino's is an operator and franchisor of quick-service food establishments specializing in the delivery of pizza and beverages to customers. Of its 5,273 stores in the contiguous United States, the vast majority — 4,888 — are owned and operated by franchisees, who generally pay Domino's a royalty fee of 5.5% of sales revenue, plus a comparable fee to fund local, regional and national advertising and marketing campaigns. Ex. 2 (2016 FDD, at cover, 5, 18). The remaining stores are owned and operated by Domino's itself (i.e., Domino's "corporate stores"). For the fiscal year ended January 3, 2016, Domino's collected approximately \$272.8 million in revenue from United States franchisees. Ex. 1 (2016 Form 10-K, at 43). Of course, franchisee employees — delivery workers in particular — are also critical to Domino's business. Domino's website states that "[o]ur corporate and franchise store team members make up the engine that drives a quality product," and notes the "major role . . . in the brand's success" played by such employees. (emphasis added).<sup>4</sup>

19. In New York State, Domino's currently operates a total of 190 stores, fifty-four of which are corporate-owned and 136 of which are owned by thirty-eight different franchisees. Ex. 2 (2016 FDD, at 83, 91 and Ex. B, at B-003 - B-007). In New York County, as of May 2013, Domino's did business through nineteen franchise stores. Ex. 5 (DP000000585-587). On February 28, 2014, Domino's Pizza LLC sold four corporate-owned New York stores to a franchisee. Ex. 16 (February 28, 2014 Sale of Assets Agreement) ("Domino's-Khan Agreement"); Ex. 17 (Gayden Tr. 129:18-25). The thirty-eight franchisees employ many hundreds of individuals in New York State.

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<sup>4</sup> See Ex. 145 (<https://jobs.dominos.com/dominos-careers/opportunities/in-store>) (last visited May 10, 2016).

20. The relationship between Domino's and franchisees is governed by a Standard Franchise Agreement ("Franchise Agreement" or "SFA") drafted by Domino's. Ex. 18 (DP00000290-344); Ex. 19 (Ridge Tr. 136:5-18). The Franchise Agreement requires franchisees "to fully comply with all specifications, standards and operating procedures and rules from time to time prescribed for the operation of a Domino's Pizza Store." Ex. 18 (SFA, §15.1, at DP00000312); Ex. 19 (Ridge Tr. 136:19 - 137:13).

21. The terms of the Franchise Agreement are non-negotiable, a fact confirmed by the sworn testimony of numerous franchisees. Respondent Anthony Maestri, for example, testified that "if you want to own a store you would have to sign it" and "there is nothing in that contract that is negotiable, as far as I know." Ex. 3 (Maestri Tr. 76:10-14, 93:22-24). Respondent Matthew J. Denman described Domino's uniform franchise operating circular, which included the Franchise Agreement, as "a requirement." Ex. 14 (Denman Tr. 44:13-15). Numerous other franchisees investigated by the OAG similarly testified and/or stated in affidavits that the Franchise Agreement was not negotiable. See, e.g., Ex. 21 (Cookston Aff. ¶13); Ex. 22 (Lee Aff. ¶7); Ex. 23 (Gaisser Aff. ¶9).

22. The terms of the Franchise Agreement, among other things, specifically:

- a) set the fees franchisees must pay to Domino's (Ex. 18, SFA §§6, 13 at DP0000300-301, 307-308);
- b) require franchisees to "fully comply with all specifications, standards and operating procedures and rules from time to time prescribed" by Domino's (Ex. 18, SFA §15.1 at DP0000312); Ex. 19 (Ridge Tr. 136:22 - 139:6));
- c) require franchisees to "operate the Store in full compliance with all applicable laws, ordinances and regulations" (Ex. 18, SFA §15.2 at DP0000313);
- d) require franchisees to "acquire, install and continuously use the Domino's PULSE store computer system" and to pay annual fees to Domino's for its use (Ex. 18, SFA §15.9 at DP0000317-319); Ex. 19 (Ridge Tr. 171:20 - 172:23));

- e) require franchisees, if directed by Domino's, to purchase other equipment from Domino's or an approved vendor (Ex. 18, SFA §8.2 at DP0000303-304);
- f) require franchisees to provide Domino's with "full access, either on-site or from a remote location, to all of your computer data, equipment and systems containing any and all of the information, records and reports required," with "access to all such data, equipment and systems to facilitate the exchange of information you are required to provide us," and with "the right at any time during business hours and without prior notice to conduct reasonable inspections of the Store, its operations and its business records, including, but not limited to, information from the Store's computer . . . either on-site or from a remote location" (Ex. 18, SFA §§14.1, 17 at DP0000310, 320); Ex. 19 (Ridge Tr. 173:12-15, 184:12 - 185:3)); and
- g) grant to Domino's the unilateral "right to terminate this Agreement effective upon delivery of notice to you" for, among other reasons, "any conduct which, in [Domino's] judgment, adversely affects the reputation of the Store or the Domino's System or the goodwill associated with [the Domino's] Marks." Ex. 18 (SFA §18.2.1(f) at DP0000321)<sup>5</sup>; Ex. 19 (Ridge Tr. 194:18-25).

23. Regarding this last requirement of Domino's "right to terminate," Domino's Vice President of Franchise Operations Kimberly Ridge testified before the OAG that "anything that would reflect poorly or create a problem for the marks would be considered unacceptable" within the meaning of this termination provision, and that "[a]ny illegal conduct is grounds for immediate termination." Ex. 19 (Ridge Tr. 195:17-22, 197:3-5). She testified that compliance with laws, including local minimum wage and overtime laws, is among the standards imposed on franchisees by their agreement, and that "[p]aying the correct minimum wage rate, including for tipped employees, would be a Domino's minimum standard." Ex. 19 (Ridge Tr. 209:19 - 210:16).<sup>6</sup>

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<sup>5</sup> The Franchise Agreement defines the "Marks" as "the use of certain valuable trademarks, service marks and commercial symbols in connection with the operation of Domino's Pizza Stores including the mark 'Domino's Pizza.'" Ex. 18 (SFA §1, at DP00000296).

<sup>6</sup> Ridge was testifying concerning a provision in the "Operations Standards" included in Domino's Manager's Reference Guide ("MRG" or "Manager's Guide"), the nearly 800-page manual that Domino's provides to all franchisees. Ex. 24 (DP00000588-699). These standards state that "all stores must comply with any statutes, codes, ordinances, regulations, rules, or standards applicable to the operation of a pizza store at their locality." Ex. 24 (DP00000590). The Franchise Agreement states that "the mandatory and suggested specifications, standards and

24. The Franchise Agreement also requires franchisees to submit any original or renewal lease for a franchisee store to Domino's, prior to execution, "for examination and approval that it contains the terms we require in all leases" (Ex. 18, SFA §7.4, at DP00000302); requires that a store "at all times be under the direct, on-premises supervision of" the franchisee; requires franchisees to "devote full time and efforts (excluding reasonable vacation periods)" to managing their Domino's stores or other related Domino's-approved activities; and prohibits franchisees, without Domino's prior written consent, from working at or owning any other business. Ex. 18 (SFA §15.6, at DP00000315).

25. A team of individuals within the Domino's Franchise Operations department is responsible for Domino's relationship with New York State franchisees, including the Franchise Respondents. Kimberly Ridge, the Vice President of Franchise Operations, oversees a Franchise Operations Director, Mark Rudd, who, in turn, oversees three Area Leaders covering the three principal areas into which Domino's has divided New York State.<sup>7</sup> As of January 2014, the three Area Leaders were Robert Machin (New York City, Westchester), Choua Vang (Long Island), and Edward Dupont (upstate New York, including, e.g., Rochester, Syracuse, Albany). Ex. 19 (Ridge Tr. 27:15 - 28:20, 33:6-25).<sup>8</sup> Prior to their promotions, Ridge and Rudd both served as Domino's Area Leaders in New York (in Ridge's case, at a time when that job's title was Franchise Regional Manager; Ridge also once held the title Franchise Operations Director).

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operating procedures and rules prescribed from time to time" in Domino's manuals, operational bulletins or similar materials "will constitute provisions of this Agreement as if contained in this Agreement." Ex. 18 (SFA §15.4, at DP00000314). Ridge also testified that failure to follow any of the Operations Standards in the Manager's Guide could lead to Domino's declaring a franchisee in default and potentially to termination or sale of the franchise. Ex. 19 (Ridge Tr. 205:15 - 206:11).

<sup>7</sup> Domino's groups Buffalo with its Midwest region, which has a different Vice President of Franchise Operations other than Ridge. Ex. 19 (Ridge Tr. 34:2-6).

<sup>8</sup> Machin was later promoted by Domino's to Director of Corporate Operations; Roger Vella became Area Leader for Long Island, with Vang transferred to Manhattan, Westchester, and Dutchess Counties. Ex. 25 (Rudd Tr. 23:17 - 25:12); Ex. 21 (Cookston Aff. ¶37).

Ex. 19 (Ridge Tr. 24:11 - 25:25, 29:6-16); Ex. 25 (Rudd Tr. 17:23 - 18:19).

26. Franchisee Respondent Maestri and his Area Leader, Machin, communicated “three times a week, sometimes four, [but] we can sometimes go a week or two without talking.” Ex. 3 (Maestri Tr. 101:5 - 102:12). Franchisee Respondent Denman and his Area Leader, Dupont, communicated by email or text on a daily basis. Ex. 14 (Denman Tr. 65:14 - 66:21).

27. In addition to the Franchise Operations team, Domino’s interacts with New York State franchisees through the Domino’s human resources department, called the PeopleFirst Department, which performs certain human resources-related functions for franchisees, and through the Information Technology Department, which provides updates and support for PULSE, Domino’s required store computer system. Julie Wigley served as Domino’s Director of PeopleFirst Shared Services from 2002 or 2003 until February 27, 2014, shortly before she gave testimony in this investigation, including a period in about 2004-2005 when her title was Director of Franchise Support, Legal Affairs. Ex. 26 (Wigley Tr. 10:23 - 11:3, 19:8 - 21:25). Wigley’s responsibilities included: “reviewing changes to the law and providing updates to franchisees” (Ex. 26 (Wigley Tr. 60:11-15)); together with other PeopleFirst employees, discussing possible improvements in PULSE functionalities available to franchisees (Ex. 26 (Wigley Tr. 56:9 - 58:13)); facilitating and communicating to franchisees the results of surveys concerning their compensation practices (Ex. 26 (Wigley Tr. 78:11 - 80:19)); and providing franchisees with information concerning PULSE updates. Ex. 26 (Wigley Tr. 223:22 - 226:20). When franchisees encountered situations they did not know how to handle, Vice President of Franchise Operations Ridge sometimes recommended they speak to Wigley. Ex. 19 (Ridge Tr. 126:16 - 127:9). Wayne Pederson, Domino’s Vice President of Information Technology and, later, of Corporate Operations, was responsible for planning PULSE enhancements and new

features and was designated by Domino's to testify concerning PULSE in connection with the OAG's investigation. Ex. 27 (Pederson Tr. 8:7 - 9:8, 35:6 - 36:23).

### **III. OAG'S INVESTIGATION INTO WIDESPREAD WAGE-AND-HOUR VIOLATIONS IN DOMINO'S NEW YORK STORES**

28. Beginning in 2012, after receiving a number of complaints that Domino's stores were, among other things, paying employees below required minimum and overtime wages, the OAG began interviewing Domino's delivery workers in New York State. Statements by these workers suggested a pattern of wage-and-hour violations at several different Domino's franchisee locations, which led the OAG to issue subpoenas in July 2012 to seven franchisees who, at that time, owned a total of 24 Domino's stores throughout the state.<sup>9</sup> Documents produced by these franchisees in response to the subpoenas revealed widespread and systemic labor law violations.<sup>10</sup> To give a few examples, five franchisees paid less than the legal minimum wage rate for tipped delivery workers for all or part of the six-year period covered by the subpoena. All seven franchisees also paid less than the legal overtime rate for tipped delivery employees for all or part of the six-year period, and for certain periods of time, three of them failed to pay any overtime premium at all. Four of the franchisees had employees who worked shifts longer than ten hours and all four failed to pay the "spread of hours" premium required by New York law for employees who work shifts longer than ten hours. All seven franchisees required delivery employees to use their own vehicles for deliveries, but none tracked or fully reimbursed the actual cost of using automobiles and bicycles for deliveries: six

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<sup>9</sup> Section 63(12) gives the OAG the authority "to take proof and make a determination of the relevant facts and to issue subpoenas" in connection with OAG investigations of fraudulent or illegal acts committed in the course of a business activity. N.Y. Exec. L. §63(12).

<sup>10</sup> For a full description of the statutory framework underlying the Labor Law violations investigated by the OAG which are the subject matter of this proceeding, see Petitioner's Memorandum of Law, filed contemporaneously with this Affirmation, at 8-13. See also Ex. 29 (N.Y. Dep't of Labor Summary of Wage Order Rates and Credits for the Hospitality Industry) ("DOL Summary").

franchisees reimbursed employees below their actual costs, while the seventh did not reimburse employees at all. See Exs. 30-36 (Assurance of Discontinuance by the seven franchisees).

29. The facts underlying these and other violations were memorialized as admissions by the seven franchisees in Assurances of Discontinuance (“AOD”) signed in settlement of the investigations on March 26, 2014 and in one instance, April 16, 2014.<sup>11</sup> The seven franchisees agreed to pay a total of \$486,710.16 in monetary restitution for hundreds of underpaid employees. See Ex. 36 (Cilmi AOD ¶¶34, 47); Ex. 30 (Dobson AOD ¶¶34, 46); Ex. 31 (Hanley AOD ¶¶49, 61); Ex. 33 (Karaborklu AOD ¶¶32, 44); Ex. 34 (Lopez AOD ¶¶34, 47); Ex. 35 (Sharma AOD ¶¶52, 64); Ex. 32 (Zaatreh AOD ¶¶34, 48).

30. In the seven AODs signed in March and April 2014, all seven franchisees stated that their improper wage rates were shown in PULSE, the proprietary computer system that Domino’s requires its franchisees to purchase and use in their stores.<sup>12</sup> Four of these franchisees stated in their AOD that failure to pay overtime properly was partially caused by PULSE’s miscalculation of such pay.<sup>13</sup> As detailed further below, infra, ¶¶98-113, the OAG discovered during its franchisee investigations that Domino’s PULSE system cannot properly calculate the gross wages of franchisee employees, in compliance with the New York Labor Law (“Labor

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<sup>11</sup> Pursuant to Exec. Law §63(15), the OAG may accept an Assurance of Discontinuance (similar to a settlement agreement) in lieu of bringing a civil action or proceeding to enforce laws within the OAG’s jurisdiction.

<sup>12</sup> Ex. 36 (Cilmi AOD ¶12); Ex. 30 (Dobson AOD ¶11); Ex. 31 (Hanley AOD ¶11); Ex. 33 (Karaborklu AOD ¶11); Ex. 34 (Lopez AOD ¶12); Ex. 35 (Sharma AOD ¶14); Ex. 32 (Zaatreh AOD ¶11).

<sup>13</sup> As stated in the Dobson and Zaatreh AODs, the franchisee “relied on [PULSE] to correctly calculate owed overtime,” but “PULSE did not correctly calculate overtime for tipped employees as the regular minimum wage rate less the applicable tip credit.” Ex. 30 (Dobson AOD ¶11); Ex. 32 (Zaatreh AOD ¶11). As stated in the Cilmi AOD, the franchisee “relied on PULSE to incorrectly calculate overtime wages for tipped employees as one and one half times those employees’ regular hourly wages, instead of one-and-one-half times the then-lawful minimum wage . . . minus the tip credit.” Ex. 36 (Cilmi AOD ¶12). As stated in the Sharma AOD, “PULSE failed to combine all hours worked by employees regardless of work location, and did not correctly calculate overtime for tipped employees as the regular minimum wage less the applicable tip credit.” Ex. 35 (Sharma AOD ¶14). The Dobson, Sharma and Zaatreh AODs also noted PULSE’s failure to calculate “spread of hours” pay owed to employees who worked a shift longer than ten hours. Ex. 30 (Dobson AOD ¶11); Ex. 35 (Sharma AOD ¶14); Ex. 32 (Zaatreh AOD ¶11).



Law”), in at least four ways.

31. These seven franchisees provided documents and testimony indicating widespread violations of wage-and-hour laws at Domino’s franchisee stores. These findings led the OAG to issue two subpoenas to Domino’s itself in 2013, seeking, inter alia, documents showing Domino’s relationship with its franchisee stores in New York State as well as PULSE data showing franchisee payments of rates below the required minimum and overtime wage rates in franchisee stores. The OAG also sought, inter alia, all documents showing information provided by Domino’s to New York State franchisees regarding compliance with employment and labor laws and concerning the use of PULSE by franchisees; showing employees of franchise stores paid less than then-applicable legal minimums (e.g., less than \$5.65 per non-overtime hour or \$9.275 per overtime hour for hours after January 1, 2011); or showing employees of franchise stores working over ten hours per day without being paid an additional hour of pay for that day at the basic minimum rate. Ex. 37 (April 26, 2013 Subpoena, at 7-9).<sup>14</sup> In response, Domino’s produced certain payroll data for all of its franchisees within New York State, which the company drew from its PULSE computer system. Pederson, Domino’s Vice President for Information Technology, testified that Domino’s has continuous access to the information franchisee stores enter into PULSE; specifically, he testified that Domino’s technical support not only “can connect with a store remotely and look at data” but “we pull the data out of the system every night” so that Area Leaders and Domino’s auditing department, as well as the franchisees themselves, can have access to current and archived data. See Ex. 27 (Pederson Tr. 258:5-21). Clifford Miller, Manager of Domino’s Data Warehouse, testified that Domino’s retains archived

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<sup>14</sup> In this and a subsequent subpoena issued August 12, 2013 (Ex. 37), the OAG also requested documents related to Domino’s practices at corporate-owned stores in New York State. Some of those issues were later resolved in a separate class action. See Bodon v. Domino’s Pizza, LLC, 2015 U.S. Dist. LEXIS 17358 (E.D.N.Y. Jan. 16, 2015), aff’d and adopted, 2015 U.S. Dist. LEXIS 16722 (E.D.N.Y. Feb. 5, 2015).

data for seven years and that, in addition to any regular reports to Domino's concerning franchisee data, Miller's department frequently — about once a month — responds to ad hoc Domino's requests for franchisee PULSE data, including sales, order counts, and “load time” (i.e., “the time it would take to load a pizza into the oven, how long it would spend on the rack . . . [t]emporal measurements of activity in the store”). Ex. 38 (Miller Tr. 25:12-22, 19:1 - 20:11, 22:24 - 23:13, 62:5 - 64:18).

32. Pederson testified that data available to Domino's also includes “the amount of hours clocked in and what is reported as the wage” as well as delivery drivers' daily or weekly compensation and reported tips. Ex. 27 (Pederson Tr. 268:14-25). While Pederson cautioned that some franchisee data is archived by Domino's only on an aggregated (not employee-by-employee) basis and that it was possible Domino's had had to obtain certain information requested by the OAG by “connect[ing] to the store,” he testified that PULSE gives Domino's “the same access” to franchisee data as franchisees themselves, and enables Domino's “to get straight into the databases of the store.” Ex. 27 (Peterson Tr. 271:7 - 275:5). In any event, Miller's testimony makes clear that PULSE-generated information, such as which employees of franchise stores worked for wage rates lower than \$5.65 per hour, was archived by Domino's and available for search from a Domino's employee's local laptop. Ex. 38 (Miller Tr. 40:16-25).

33. Specifically, in response to the OAG's subpoena request for PULSE records showing wage rates below required minimum and overtime wages, Domino's extracted data from PULSE records to create spreadsheets that showed, for the period from October 2011 through June 2013, and with respect to each franchise store in New York State: (a) regular wage payments below \$5.65 per hour; (b) overtime wages below \$9.275 per hour; and (c) regular wage payments below \$7.25 per hour where an employee had no reported tips. Ex. 38 (Miller Tr. at

37:1 - 42:6, 44:6 - 48:10, 50:16 - 51:19, 57:2 - 58:10, 59:4-13); Ex. 39 (DP00012639); Ex. 40 (DP00012640); Ex. 41 (DP00012641).<sup>15</sup> Data Warehouse Manager Miller testified that he prepared these spreadsheets using a process identical to what he routinely follows when given ad hoc Domino's requests for franchisee PULSE data, as he had done at least a hundred times. Ex. 38 (Miller Tr. 38:19 - 39:10).

34. The PULSE data that Domino's produced to the OAG in October 2013 showed the widespread nature of wage-and-hour violations by Domino's franchisees in New York State. For the period October 2011 through June 2013, 33 of the 42 Domino's franchisees operating at that time — over 78% — reported in PULSE instances in which they paid one or more delivery workers less than \$5.65 per hour, which was the lowest legal minimum wage that any restaurant in New York State could pay a tipped fast food delivery worker<sup>16</sup> during the relevant period of this proceeding: July 17, 2008 to the present (hereinafter, “the Relevant Period”).<sup>17</sup> Ex. 40

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<sup>15</sup> Ex. 39 (DP00012369), Ex. 40 (DP00012640) and Ex. 41 (DP00012641) are voluminous Excel spreadsheets: DP00012639 contains 885 pages and 31,833 entries, DP00012640 contains 4644 pages and 135,268 entries, and DP00012641 contains 1,821 pages and 65,535 entries. As such, these three spreadsheets cannot practicably be filed electronically as PDF documents. Accordingly, as to each spreadsheet, Petitioner has filed NYSECF Form EF 21 as a placeholder in the Record pursuant to Rule B(10) of the Protocol On Courthouse and County Clerk Procedures For Electronically Filed Cases (rev. Oct. 7, 2015), <https://www.nycourts.gov/courts/ljd/supctmanh/EF-Protocol-100715.pdf>. Petitioner is prepared to submit an electronic version of Exs. 39, Ex. 40 and/or Ex. 41 to the Court on a compact disc if and when so directed. A summary analysis of the data in these spreadsheets follows.

<sup>16</sup> This tipped rate (and not the higher full minimum wage) could only be paid if the employees were “tipped employees” and if the employer had taken all necessary steps to claim the maximum possible tip credit permitted by law.

<sup>17</sup> The “Relevant Period” is defined herein as: (1) from July 17, 2008 to the present, as to the Franchisee Respondents with respect to their alleged wage-and-hour violations; and (2) from May 23, 2010 to the present, as to Domino's, for its liability as a joint employer of the workers at the franchise stores and for the PULSE-related claims set forth in the Verified Petition and herein. The Franchisee Respondents entered tolling agreements with the OAG, tolling the statute of limitations from July 17, 2014 to the termination of that agreement by either side. Ex. 43 (Tolling Agreements). The Tolling Agreements were terminated by written notice from the OAG dated May 23, 2016. Ex. 44 (Termination Notices). The restitution the OAG currently seeks for the wage-and-hour violations set forth herein is based on violations of the Restaurant Wage Order and the Hospitality Wage Order (“the Wage Orders”), in effect from July 17, 2008 through December 30, 2015. Any violations of the wage-and-hour laws that subsequently may be discovered that post-date December 30, 2015 would be subject to the Hospitality Wage Order, 12 N.Y.C.R.R. Part 146, as amended effective December 31, 2015, which incorporates new requirements in the fast food industry.

(DP00012640); Ex. 42 (Filpo Aff. ¶¶4, 9). Similarly, 36 of the 42 Domino’s franchisees at that time — over 85% — reported on PULSE instances in which they paid one or more employees less than the legal minimum overtime rate of \$9.28 that any restaurant could pay a tipped delivery worker during the Relevant Period. Ex. 39 (DP00012639); Ex. 42 (Filpo Aff. ¶12). Finally, every single franchisee reported instances in PULSE in which one or more employees were paid less than the then-applicable minimum wage of \$7.25 per hour, even though no tips at all were reported for such employees. Ex. 41 (DP00012641); Ex. 42 (Filpo Aff. ¶15).<sup>18</sup>

35. Drawing from the PULSE records produced by Domino’s, the OAG identified and issued subpoenas to additional franchisees in New York State who — based upon these records — appeared to have committed among the most serious violations of wage-and-hour laws. Three such franchisees are the current Franchisee Respondents and five others entered into settlement agreements in April 2015. These settling franchisees admitted to wage-and-hour violations of the same scope and substance as those found among the seven franchisees who settled in 2014, agreeing to pay over \$970,000 in combined restitution to hundreds of employees. See 2015 AODs for five franchisees: Ex. 45 (Cookston AOD); Ex. 46 (Gaisser AOD); Ex. 47 (Goodman AOD); Ex. 48 (Jali AOD); Ex. 49 (Lee AOD). Three of the franchisees stated that their improper wage rates were shown in PULSE, three acknowledged that the failure to pay

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<sup>18</sup> The Affidavit of the OAG’s Yadira Filpo (Ex. 42) sets forth the basis for these calculations. As she explains, the OAG calculated these percentages by counting the number of individual franchisees whose store or stores appeared on the lists of PULSE wage rates that were produced by Domino’s. For example, DP00012640 comprised all the appearances in PULSE of a regular wage rate below \$5.65 at any New York franchisee store, organized by Domino’s “location code,” which is a unique identifier for each Domino’s store. The OAG analyzed the data and determined that 77 individual stores were represented by the data, owned by 33 individual franchisees. Similarly, DP00012639 comprised all the appearances in PULSE of an overtime wage rate below \$9.28 at any New York franchisee store, again organized by Domino’s “location code”; the OAG analyzed the data and determined that the data contained information from 98 individual stores, owned by 36 individual franchisees. And DP00012641 comprised all the appearances in PULSE of a regular wage rate below \$7.25 per hour at each New York franchisee store (where an employee had no reported tips), again organized by Domino’s “location code”; the OAG analyzed the data and determined that it contained information from 129 individual stores, owned by all 42 individual franchisees then operating in New York. See Ex. 42 (Filpo Aff. ¶4 & Ex. E to Filpo Aff.).

overtime properly was partially caused by PULSE's miscalculation of such pay, and one noted PULSE's failure to calculate spread of hours. Ex. 46 (Gaisser AOD ¶¶11); Ex. 47 (Goodman AOD ¶12); Ex. 48 (Jali AOD ¶¶13, 15).

36. While the wage rates franchisees entered into PULSE for employees did not always reflect the exact wage rates that were actually paid, the twelve franchisees who entered into AODs with the OAG, who owned a total of 61 stores at the time, confirmed that in every single store that showed unlawfully low wage rates in PULSE, numerous employees were, in fact, paid wage rates below any legal minimum or overtime wage.<sup>19</sup>

37. Additionally, the OAG issued subpoenas to third-party vendors that provide services to Domino's, including: Runzheimer International, Ltd. ("Runzheimer"), a company that helps businesses manage corporate policies, including reimbursement policies, for employees who travel as part of their jobs, which produced documents and testimony related to the estimates it developed of vehicle expenses of delivery workers for Domino's franchisee- and corporate-owned stores in New York State; and HireRight and InfoMart, credit reporting and background check agencies that produced documents showing their relationships with Domino's and describing the services that they provided to Domino's franchisees pursuant to their agreements with Domino's.

#### **A. The Investigated Franchisees**

38. The OAG has concluded investigations of the three Franchisee Respondents named

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<sup>19</sup> Throughout this Affirmation, the OAG refers to a May 13, 2013 list of New York franchisees, which was produced by Domino's, which lists the number of stores then owned by the Settling Franchisees as 52. Due to sales of stores among franchisees since that date, the number of stores owned by the Settling Franchisees at the time of the settlements was 61. The Domino's spreadsheet lists 128 total franchisee stores in New York State as of May 2013, out of 182 total stores. Subsequently, in February 2014, the number of total franchisee stores in New York State rose to 132, after Domino's sold four corporate-owned stores to a franchisee. Ex. 5 (DP00000585-587); see also Ex. 16 (Domino's-Khan Agreement (Feb. 28, 2014), selling four corporate-owned stores to franchisee Muhammad Khan). Currently, as disclosed in Domino's 2016 FDD, there are 136 franchise stores in New York as of April 3, 2016. Ex. 2 (2016 FDD, Ex. B, at B-003 - 007).

in this proceeding and twelve franchisees that have settled with the OAG (“Settling Franchisees”). At the time of the settlements with the OAG in 2014 and 2015, the twelve Settling Franchisees collectively owned a total of sixty-one Domino’s stores in fourteen counties across New York. Ex. 5 (DP00000585-587) (May 2013 spreadsheet of all NY state franchisees, listing stores owned by Cilmi, Cookston, Dobson, Gaisser, Goodman, Hanley, Jali, Karaborklu, Lee, Lopez, Sharma, Zaatreh); Ex. 36 (Cilmi AOD); Ex. 30 (Dobson AOD); Ex. 31 (Hanley AOD); Ex. 33 (Karaborklu AOD); Ex. 34 (Lopez AOD); Ex. 35 (Sharma AOD); Ex. 32 (Zaatreh AOD); Ex. 45 (Cookston AOD); Ex. 46 (Gaisser AOD); Ex. 47 (Goodman AOD); Ex. 48 (Jali AOD); Ex. 49 (Lee AOD). These sixty-one stores comprise approximately 45% of the 136 franchise stores now operating in New York State. See supra n. 19.

39. The OAG found that the Labor Law violations by the Settling Franchisees fell into several categories, including (i) the minimum wage, (ii) overtime, (iii) spread of hours pay, and (iv) reimbursement of delivery (bicycle and/or automobile expenses).

### **1. Minimum Wage Violations**

40. The majority of the Settling Franchisees paid less than New York’s legal minimum wage rate for delivery workers for all or part of the six-year period covered in the investigation. That is, seven of the twelve Settling Franchisees paid employees less than the legal minimum wage of \$5.65 that any restaurant in New York State could pay a fast food delivery worker for the Relevant Period (even assuming that employee was a “tipped” employee and the franchisee had taken all required steps to properly claim the maximum tip credit permitted by law). Ex. 34 (Lopez AOD ¶11); Ex. 36 (Cilmi AOD ¶11); Ex. 47 (Goodman AOD ¶10); Ex. 31 (Hanley AOD ¶10); Ex. 48 (Jali AOD ¶11); Ex. 33 (Karaborklu AOD ¶10); Ex. 32 (Zaatreh AOD ¶10).

41. In addition, numerous minimum wage violations stemmed from franchisees’ failure

to comply with the requirements for claiming a tip credit. Among other things, under the Labor Law, in order to claim a tip credit an employer must keep accurate records of tips to ensure that an employee has received a requisite hourly average tip amount, and tips plus wages must equal at least the minimum wage and minimum overtime rate. See 12 N.Y.C.R.R. §§146-1.3, 146-2.1 and 2.2.<sup>20</sup> However, nine of the twelve Settling Franchisees failed to keep track of how much their employees earned in tips or calculate that the base wage plus tips equaled the minimum wage. See Ex. 34 (Lopez AOD ¶15); Ex. 36 (Cilmi AOD ¶15); Ex. 46 (Gaisser AOD ¶12); Ex. 31 (Hanley AOD ¶14); Ex. 30 (Dodson AOD ¶14); Ex. 33 (Karaborklu AOD ¶14); Ex. 49 (Lee AOD ¶10); Ex. 32 (Zaatreh AOD ¶14); Ex. 35 (Sharma AOD ¶19). Also, under the Labor Law, an employer may not claim a tip credit for any day that the employee worked more than 20% of his or her shift, or two hours (whichever is less), in non-tipped work. See 12 N.Y.C.R.R. §146-2.9.<sup>21</sup> However, nine of the twelve Settling Franchisees admitted they failed to keep track of how much non-tipped work their employees did per shift. Ex. 34 (Lopez AOD ¶14); Ex. 36 (Cilmi AOD ¶14); Ex. 46 (Gaisser AOD ¶13); Ex. 31 (Hanley AOD ¶13); Ex. 30 (Dobson AOD ¶13); Ex. 33 (Karaborklu AOD ¶13); Ex. 49 (Lee AOD ¶11); Ex. 32 (Zaatreh AOD ¶13); Ex. 35 (Sharma AOD ¶18). And even as they claimed a tip credit for entire shifts of their employees, nine of the Settling Franchisees had delivery employees perform in-store, non-tipped work for more than 20% of their shifts. Ex. 34 (Lopez AOD ¶14); Ex. 45 (Cookston AOD ¶12); Ex. 46 (Gaisser AOD ¶13); Ex. 47 (Goodman AOD ¶13); Ex. 30 (Dobson AOD ¶13); Ex. 33 (Karaborklu AOD ¶13); Ex. 49 (Lee AOD ¶11); Ex. 32 (Zaatreh AOD ¶13); Ex. 35 (Sharma

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<sup>20</sup> As pointed out in each AOD, this is also a required under the Fair Labor Standards Act (“FLSA”). See 29 U.S.C. § 203(m); 29 C.F.R. §531.59(b).

<sup>21</sup> By way of analogy, federal law, which also uses the tip credit concept, states: “the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a ‘tipped employee.’” 29 C.F.R. §531.59(b). See 29 C.F.R. §531.56(e); Ex. 50 (U.S. Dep’t of Labor Handbook, § 30d00(e)) (available at [http://www.dol.gov/whd/FOH/FOH\\_ch30.pdf](http://www.dol.gov/whd/FOH/FOH_ch30.pdf)).

AOD ¶18).

## 2. Overtime Violations

42. The first type of overtime-related violation committed by the Settling Franchisees involved improper calculation of the overtime rate for employees paid the lower, tip-credit adjusted or “tipped rate.” Under the Labor Law, to compute overtime for tipped employees, an employer must multiply the regular wage (before any tip credit) by 1.5 and then subtract the applicable tip credit. See 12 N.Y.C.R.R. §146-1.4.<sup>22</sup> Instead, eight of the twelve Settling Franchisees calculated overtime rates for such workers by improperly subtracting the tip credit from the regular wage and then multiplying this lower tip credit-adjusted wage by 1.5. See, e.g., Ex. 36 (Cilmi AOD ¶12); Ex. 46 (Gaisser AOD ¶10); Ex. 47 (Goodman AOD ¶11); Ex. 30 (Dodson AOD ¶10); Ex. 48 (Jali AOD ¶12); Ex. 34 (Lopez AOD ¶11); Ex. 32 (Zaatreh AOD ¶10); Ex. 35 (Sharma AOD ¶12). For example, one investigated franchisee paid \$5.00 per regular hour to tipped delivery workers and \$7.50 per overtime hour. Ex. 11 (Ahmed Tr. 105:21 - 107:7). However, under the Labor Law at that time the franchisee should have been paying \$9.28 per overtime hour (\$10.88, which is one-and-a-half of \$7.25, less a \$1.60 tip credit) and a “tipped” minimum wage of \$5.65 per hour (the \$7.25 minimum wage at the time less \$1.60 tip credit). Ex. 29 (N.Y. Dep’t of Labor Summary of Wage Order Rates). This approach of simply multiplying the lower, tipped rate by 1.5 has the effect of multiplying the benefit of the tip credit to the employer, in clear violation of the Labor Law.

43. The second type of overtime-related violation involved the undercompensation of employees for overtime when work was performed at different store locations for the same franchisee. From July 2007 until July 2012, at least one of the Settling Franchisees routinely assigned employees to work in multiple stores during the same pay period, and improperly

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<sup>22</sup> See also FLSA, 29 C.F.R. §531.60.



calculated total hours by store, as opposed to aggregating hours for all store locations owned by the franchisee in order to properly pay overtime for hours worked over forty in a week. Ex 35 (Sharma AOD ¶11); Ex 51 (Sharma Aff. ¶¶12-14).

### **3. “Spread of Hours” Violations**

44. Nine of the twelve Setting Franchisees failed to pay an additional hour of pay at the basic minimum hourly wage rate to any employee whose spread of hours in a given workday exceeded ten hours, as required by the Labor Law. See 12 N.Y.C.R.R. §146-1.6; see also Ex. 34 (Lopez AOD ¶12); Ex. 36 (Cilmi AOD ¶13); Ex. 46 (Gaisser AOD ¶15); Ex. 47 (Goodman AOD ¶14); Ex. 30 (Dobson AOD ¶16); Ex. 48 (Jali AOD ¶14); Ex. 49 (Lee AOD ¶13); Ex. 32 (Zaatreh AOD ¶16); Ex. 35 (Sharma AOD ¶13).

### **4. Reimbursement for Necessary Work Expenses**

45. Eleven of the twelve Settling Franchisees required delivery workers to use their personal automobiles or bicycles to make deliveries to customers without reimbursing these employees for all expenses necessary to carry out duties assigned by their employer. See Labor Law §193; 12 N.Y.C.R.R. §§146-1.8, 2.7. See Ex. 34 (Lopez AOD ¶17); Ex. 36 (Cilmi AOD ¶16); Ex. 45 (Cookston AOD ¶14); Ex. 46 (Gaisser AOD ¶17); Ex. 47 (Goodman AOD ¶15); Ex. 31 (Hanley AOD ¶16); Ex. 30 (Dobson AOD ¶17); Ex. 33 (Karaborklu AOD ¶15); Ex. 49 (Lee AOD ¶15); Ex. 32 (Zaatreh AOD ¶17); Ex. 35 (Sharma AOD ¶20). Three of the Settling Franchisees in New York City also did not provide employees who used bicycles for deliveries with free safety equipment required under municipal law, such as helmets, reflective vests, lamps, bells/noisemakers, brakes, and reflective tires or reflectors on the spokes of each wheel. See N.Y.C. Admin. Code §§10-157, -157.1; see also Ex. 34 (Lopez AOD ¶17); Ex. 36 (Cilmi AOD ¶17); Ex. 47 (Cookston AOD ¶14).

#### **IV. SPECIFIC VIOLATIONS OF THE LABOR LAW BY THE FRANCHISEE RESPONDENTS**

##### **A. The Maestri Respondents**

###### **1. Violations**

46. Maestri claimed a tip credit of up to \$1.60 per hour, for a wage rate of \$5.65 per hour for delivery employees who worked in New York City and \$6.00 per hour for delivery employees who worked in Westchester County. Ex. 3 (Maestri Tr. 336:13-19, 368:21 - 369:12).

47. Maestri admitted that he did not check whether delivery workers earned enough in tips for him to lawfully claim the tip credit and took no steps to ensure that the managers at his stores reviewed this information. Ex. 3 (Maestri Tr. 370:12 - 371:15). Maestri further testified that his records did not reflect tips received in cash and admitted that his own payroll records showed instances in which tips plus wages did not equal the minimum wage. Ex. 3 (Maestri Tr. 369:13 - 370:6, 419:18 - 422:3).

48. Maestri admitted under oath that delivery employees performed non-tipped work when not performing deliveries, such as making pizzas and cleaning (Ex. 3 (Maestri Tr. 346:9 - 348:2)), and were paid the lower, tipped rate for that work. Ex. 3 (Maestri Tr. 349:5-9). His stores did not keep track of the proportion of non-tipped work performed by delivery employees. Ex. 3 (Maestri Tr. 344:5 - 345:6). In sworn affidavits, former employees of Respondent Maestri stated that they regularly spent more than two hours or 20% of their shifts performing non-tipped work. See Ex. 52 (Bonkougou Aff. ¶3); Ex. 53 (Diaz Aff. ¶5); Ex. 54 (Hassane Aff. ¶4); Ex. 55 (Kafando Aff. ¶4); Ex. 56 (Sam Aff. ¶4); Ex. 57 (O. Sawadogo Aff. ¶5); Ex. 58 (Yacouba Aff. ¶4).

49. At least until 2010, Maestri did not pay the correct minimum or overtime wages to delivery employees. Prior to 2010, the Maestri stores paid delivery workers less than the

permissible minimum wage. For example, in 2008 and 2009, the minimum wage rate for tipped employees in the restaurant industry was \$4.85 per hour, but the Maestri stores paid many delivery workers \$4.60 per hour. Ex. 60 (Maestri Payroll History Report, at 27-31). Prior to 2010, the Maestri stores also paid overtime to delivery workers at one-and-one-half times the lower, tipped rate of \$4.60 to \$6.00 per hour, instead of the required one-and-one-half times the minimum wage, less the claimed tip credit. Ex. 3 (Maestri Tr. 280:4 - 281:22, 283:21 - 284:2, 356:21 - 358:6).

50. At least until late September 2012, Maestri did not pay an additional hour at minimum wage for employees whose spread of hours was greater than ten hours in a single workday. Ex. 3 (Maestri Tr. 358:7 - 359:2, 418:7 - 419:17).

51. The Maestri Respondents' payroll records show that employees were assigned to work in multiple establishments in a single week but did not have their hours combined for the purpose of calculating overtime. For example, from October 2009 until July 2010, employee Mahfuzur Bhuiyan regularly worked more than forty combined hours per week at two stores. Ex. 59 ("Maestri PULSE Payroll Reports," at 1-15). During a sample week, the week ending October 4, 2009, Bhuiyan worked at North Bedford Avenue Pizza Inc., store number 3352, for 34.91 hours.<sup>23</sup> Ex. 59 (Maestri PULSE Payroll Reports, at 1). The same week, Bhuiyan also worked at Hudson River Pizza LLC, store number 3441, for 26.27 hours. Ex. 59 (Maestri PULSE Payroll Reports, at 3). Bhuiyan therefore worked a combined 61.18 hours for the Maestri Respondents during this week. However, instead of being paid for 40 regular hours and 21.18 overtime hours, Bhuiyan was separately paid for the 34.91 hours worked at store 3552 and

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<sup>23</sup> The PULSE payroll records list employees under "Team Member Name," second column from the left, and list the number of hours worked under "Regular Hours," seventh column from the right. Each employee's work hours are contained in the outlined, horizontal bar of information alongside his or her name.

the 26.27 hours worked at store 3441, both at regular, “straight time” hourly wage rates.<sup>24</sup> Ex. 60 (Maestri Payroll History Report, at 2, 7). Another employee named Yaogo Ablasse regularly worked more than forty combined hours per week at two stores, from January 2012 until April 2012, also without having his hours added together in order to calculate overtime.<sup>25</sup> Ex. 61 (Ablasse Aff. ¶6); Ex. 59 (Maestri PULSE Payroll Reports, at 16-57). For example, during the week ending February 12, 2012, Ablasse worked at Upper West Harlem Pizza, Inc., store number 3335, for 37.88 hours. Ex. 59 (Maestri PULSE Payroll Reports, at 26). The same week, Ablasse also worked at Hi-Rise Pizza Inc., store number 3684, for 21.85 hours. Ex. 59 (Maestri PULSE Payroll Reports, at 18). Ablasse therefore worked a combined 59.73 hours for the Maestri Respondents during this week. However, instead of being paid for 40 regular hours and 19.73 overtime hours, Ablasse was separately paid for the 37.88 hours worked at store 3335 and the 21.85 hours worked at store 3684, both at regular, “straight time” hourly wage rates. Ex. 60 (Maestri Payroll History Report, at 9, 15).

52. The Maestri Respondents required each delivery employee in the Manhattan stores to own and operate a bicycle to make deliveries. Ex. 3 (Maestri Tr. 390:13 - 391:3). Maestri admitted that he did not reimburse delivery employees for the purchase of their bicycles. Ex. 3 (Maestri Tr. 392:2-5). Maestri consistently failed to properly reimburse workers for their bicycle delivery expenses, until at least May 2015. Ex. 61 (Ablasse Aff. ¶¶22-24); Ex. 52 (Bonkougou Aff. ¶¶15-17); Ex. 53 (Diaz Aff. ¶¶18-20); Ex. 54 (Hassane Aff. ¶¶12-15); Ex. 55 (Kafando Aff. ¶¶13-15); Ex. 56 (Sam Aff. ¶¶10-12); Ex. 57 (O. Sawadogo Aff. ¶¶21-23); Ex. 58 (Yacouba Aff.

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<sup>24</sup> The Maestri Respondents’ payroll company, BMW Services Inc., provided Excel spreadsheets that contain payroll data for all the Maestri Respondents’ Domino’s stores, pursuant to an October 9, 2013 OAG subpoena. Each relevant field in these spreadsheets is outlined and in bold for the court’s convenience; the fields were not highlighted in the originally-produced documents.

<sup>25</sup> Yaogo Ablasse used the name Aly Kabore while he worked for Maestri. Ex. 61 (Ablasse Aff. ¶3).

¶¶12-14). Maestri testified that he only paid for minor repairs, such as patching flat tires, and could recall only two times when he reimbursed employees whose bicycles were stolen during deliveries. Ex. 3 (Maestri Tr. 292:3-19). Although he later claimed to pay for additional bicycle repairs, Maestri admitted that he does not “have a lot of receipts” of bicycle reimbursement expenses. Ex. 3 (Maestri Tr. 391:9 - 393:13).

## **2. Underpayment and Non-Reimbursement Calculations**

53. To estimate the amount of minimum wage and overtime owed to employees at the Maestri stores, the OAG created minimum wage and overtime underpayment reports for each of the six locations. Ex. 62 (Henriquez Aff. ¶¶7-9 & Exs. B-G to Henriquez Aff.).

54. These individual minimum wage and overtime underpayment reports calculated the wages owed by comparing wages actually paid to Maestri employees (as reflected in electronic payroll records produced by Maestri’s accountant, BMW Services) with the wages Maestri should have paid by law. These minimum wage and overtime underpayment reports estimated that at the six Maestri locations, there are at least \$18,000 in underpayments caused by Maestri’s improper wage rates from July 2008 until at least December 2010. Ex. 62 (Henriquez Aff. ¶18 & Ex. J to Henriquez Aff.) (“Maestri Summary Underpayment Report”).

55. To estimate the total amount of wages owed to employees at the Maestri stores caused by Maestri’s failure to pay spread of hours, the OAG created a spreadsheet entitled “Maestri Spread of Hours Spreadsheet.” Ex. 62 (Henriquez Aff. ¶10-13 & Ex. H to Henriquez Aff.). The OAG examined both a two-month sample (January and July of 2012) of Maestri’s payroll records (generated by the Domino’s PULSE system), and the 2013 electronic payroll records provided by Maestri’s accountant (the first full year that Maestri tracked shifts of longer

than ten hours).<sup>26</sup> The OAG manually counted the number of instances in which employees at each store worked a shift longer than 10 hours during the two-month sample period, and calculated the total number of such shifts that were worked during 2013 to obtain a more general sense of how frequently such shifts were worked. These records were used to calculate a monthly and yearly average that was then extrapolated to calculate an estimate of total underpayments to Maestri employees due to Maestri's failure to pay spread of hours from August 2008 through August 2012. The Maestri Spread of Hours Spreadsheet estimates there are at least \$52,000 in underpayments owed to Maestri employees because of Maestri's failure to pay spread of hours from at least August 2008 through at least August 2012. Ex. 62 (Henriquez Aff. ¶18); Ex. H to Henriquez Aff.

56. To estimate the total amount of reimbursement owed to Maestri employees who delivered pizza on bicycles at the three Maestri Manhattan stores (Hi-Rise Pizza, Inc.; Upper West Harlem Pizza, Inc.; and Uptown Pizza, Inc.), an amount of \$500.00 per employee per year was used for full-time employees, and \$250.00 per employee per year for part-time employees. Ex. 62 (Henriquez Aff. ¶15). These reimbursement amounts were derived from case law addressing delivery reimbursement in New York and corroborated by the sworn testimony of former employees. See Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 245, 257-58 (S.D.N.Y. 2008); Ex. 61 (Ablasse Aff. ¶¶22-24); Ex. 54 (Hassane Aff. ¶¶12-15). Ex. 55 (Kafando ¶¶13-15); Ex. 53 (Diaz Aff. ¶¶18-20); Ex. 57 (Sawadogo Aff. ¶¶21-23); Ex. 58 (Yacouba Aff. ¶¶12-14).

57. The OAG created a spreadsheet entitled "Maestri Mileage Spreadsheet," and multiplied the average number of full-time and part-time employees by their respective

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<sup>26</sup> Although Maestri paid spread of hours during 2013, the OAG relied on the 2013 records to provide a more accurate accounting of the frequency with which employees worked shifts of more than ten hours. Since 2013 records were in an electronic format, the OAG was able to more easily calculate the total number of violations. Ex. 62 (Henriquez Aff. ¶¶11-12). See Matter of D & D Mason Contrs., Inc. v. Smith, 81 A.D.3d 943, 944 (N.Y. App. Div. 2nd Dep't 2011) (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)).

reimbursement amount. These amounts were then multiplied by the total amount of years (5.417 years) during which Maestri failed to reimburse his bicycle delivery workers (August 2008 through December 2013). Ex. 62 (Henriquez Aff. ¶14-16 & Ex. I to Henriquez Aff.).

58. The Maestri Reimbursement Analysis estimates that there are over \$108,000 in underpayments owed to Maestri employees because of Maestri's failure to reimburse his bicycle delivery workers. Ex. 62 (Henriquez Aff. ¶18 & Ex. I to Henriquez Aff.).

59. Based on the analysis done by the OAG of the data provided during this investigation, the Maestri Respondents' wage violations resulted in estimated underpayments of at least \$178,000 owed to the employees at his six stores, plus liquidated damages and interest. Ex. 62 (Henriquez Aff. ¶18 & Ex. J to Henriquez Aff.). It should be noted that these calculations are extremely conservative estimates in several ways. For example, the end date used for calculations was late 2013; and the OAG does not have sufficient evidence to state with certainty whether the Maestri Respondents were in compliance subsequent to that date. Also, although there were violations of the 80/20 rule in Maestri locations, the documents provided did not allow for ready calculation of the underpayments resulting from this violation. An accounting is needed to determine the full scope of underpayments by the Maestri Respondents. See Ex. 62 (Henriquez Aff. ¶6).

## **B. The Ahmed Respondents**

### **1. Violations**

60. Ahmed testified that his own payroll records — the ones produced for him by his accountant — accurately reflected all hours worked by, and all wages paid to, his employees. Ex. 11 (Ahmed Tr. 104:7-24, 107:24 - 108:14). He also testified that until 2011, some delivery employees were paid \$5.00 per regular hour and \$7.50 per overtime hour. Ex. 11 (Ahmed Tr.

106:7 - 108:14). In fact, the Ahmed Respondents' payroll records show that some delivery employees were paid \$5.00 per regular hour for a longer period, until at least January 2013. Ex. 63 (Ahmed Payroll Records-Super Duper, at 1-20). In the accountant-produced Payroll Register for the pay period ending January 27, 2013, which shows weekly hours, pay rates, and wages paid for all employees, five employees have wage rates of \$5.00 listed in the "Reg. Rate" column, fourth from the right: Shahed Abu, Romany Hanna, Nurul Hassan, Ashraful Islam, and Burhan Uddin. Ex. 63 (Ahmed Payroll Records-Super Duper, at 18-20). Another five employees have wages rates of \$5.50 listed in the "Reg. Rate" column — still less than the legal minimum wage of \$5.65 that any restaurant in New York State could pay tipped delivery workers for the Relevant Period: MD Khan, Sultan Mohammad, Ma Talukder, Juber Ahmed, and Nasim Beshar. Ex. 63 (Ahmed Payroll Records-Super Duper, at 18-20). Furthermore, until as late as July 2013, Ahmed routinely paid overtime to delivery workers at one-and-one-half times the lower, tipped minimum wage instead of the required one-and-one-half times the minimum wage, less the claimed tip credit. Ex. 63 (Ahmed Payroll Records-Super Duper, at 1-7); Ex. 64 (Ahmed Payroll Records-Nader Inc., at 1-26).

61. In testimony, Ahmed also admitted that until the end of 2012, he did not pay any additional "spread of hours" pay for workdays longer than ten hours. Ex. 11 (Ahmed Tr. 110:5 - 112:3). Ahmed testified that he learned about the spread of hours requirement some time in 2013. Ex. 11 (Ahmed Tr. 110:11 - 115:14).<sup>27</sup> The Ahmed Respondents' payroll records confirm that he did not begin paying employees spread of hours pay until at least January 2013. Ex. 63 (Ahmed Payroll Records-Super Duper, at 18-20); Ex. 64 (Ahmed Payroll Records-Nader Inc., at 20-22). In Super Duper Pizza Inc.'s Payroll Register, there are no entries in the "Qualified

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<sup>27</sup> Ahmed (incorrectly) refers to spread of hours pay as a "bonus hour," and spread of hours appear in the accountant-produced payroll register as "Qualified Bonus Hours." Ex. 11 (Ahmed Tr. 39:5-18; 110:5 - 112:14); Ex. 63; Ex. 64.



Bonus Hour” column, sixth from the left, until the week ending January 27, 2013. Ex. 63 (Ahmed Payroll Records-Super Duper, at 18-20). In Nader Inc.’s Payroll Register, there are no entries in the “Qualified Bonus Hour” column until the week ending March 17, 2013. Ex. 64 (Ahmed Payroll Records-Nader Inc., at 20-22).

62. Ahmed testified that his Manhattan store, Super Duper Pizza Inc., required delivery employees to own and operate bicycles for deliveries and did not reimburse employees for the cost of the bicycles. Ex. 11 (Ahmed Tr. 144:18 - 145:5). Ahmed stated under oath that he provided helmets and materials for bike repairs, and that he reimbursed for other repairs, but admitted that he only had documents showing the purchase of helmets and other reimbursements beginning November 2013. Ex. 11 (Ahmed Tr. 145:6-10, 148:20 - 152:11). A former employee stated in a sworn affidavit that he did not receive any form of bicycle reimbursement during the entire period of his employment, which dated from 2007 until approximately October 2010. Ex. 65 (Bella Aff. ¶¶18-20).

## **2. Underpayment and Non-Reimbursement Calculations**

63. To estimate the total minimum wage and overtime back wages owed to employees of the Ahmed Respondents, the OAG created minimum wage and overtime underpayment reports for both of those Respondents’ store locations. Ex. 62 (Henriquez Aff. ¶¶30-34 & Ex. M to Henriquez Aff. (“Super Duper Underpayment Report”) & Ex. N to Henriquez Aff. (“Nader Inc. Underpayment Report”).

64. These individual minimum wage and overtime underpayment reports calculated the wages owed by comparing wages actually paid to the Ahmed Respondents’ employees (as reflected in payroll records produced by the Ahmed Respondents’ accountant, Christopher Miu) with the wages the Ahmed Respondents should have paid to employees had they used the proper

minimum and overtime wage rates. The OAG manually inputted information from these payroll records into an Excel spreadsheet for each store for the months of January and July from 2008 through 2013.<sup>28</sup> These minimum wage and overtime underpayment reports show that at the two Ahmed locations, there are at least \$79,000 in underpayments due to Ahmed's failure to properly pay minimum wage and overtime rates. Ex. 62 (Henriquez Aff. ¶41 & Exs. M and N to Henriquez Aff.).

65. To estimate the total wages owed to employees of the Ahmed Respondents' because of failure to pay spread of hours, the OAG examined both a seven-month sample (January through July of 2012) of the Ahmed Respondents' payroll records (generated by the Domino's PULSE system), as well as the 2013 payroll records provided by the Ahmed Respondents' accountant (who tracked shifts of longer than ten hours). The OAG manually counted the number of instances in which employees at each store worked a shift longer than 10 hours during the seven-month sample period and recorded the total number of such shifts worked during 2013. Ex. 62 (Henriquez Aff. ¶¶35-36 & Ex. O to Henriquez Aff.) ("Ahmed Spread of Hours Spreadsheet"). These records were used to calculate a monthly and yearly average, which was then inserted into two spreadsheets, entitled "Super Duper Underpayment Report" and "Nader Inc. Underpayment Report." Ex. 62 (Henriquez Aff. ¶37 & Ex. M, at 29 and Ex. N, at 26). The OAG then extrapolated to arrive at an estimated total amount of underpayments to the Ahmed Respondents' employees because of failure to pay spread of hours from August 2008 through December 2012. The two Ahmed Underpayment Reports estimate that there is at least \$50,000 in underpayments owed to the Ahmed Respondents' employees because of failure to pay spread of hours from at least August 2008 through at least December 2012. Ex. 62

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<sup>28</sup> Accountant records were not available for one of the Ahmed Respondents' stores, Super Duper Pizza, Inc., for the year 2009, so payroll information from the Ahmed Respondents' PULSE records was used for January and July of that year.

(Henriquez Aff. ¶41 & Ex. P to Henriquez Aff.) (“Ahmed Summary Underpayment Report”).

66. To calculate the total amount of reimbursement for bicycle-related costs owed to employees of the Ahmed Respondents who delivered pizza on bicycles at Super Duper Pizza, Inc., a figure of \$500.00 per employee per year was used for full-time employees, and \$250.00 per employee per year for part-time employees. Ex. 62 (Henriquez Aff. ¶38). These reimbursement amounts were derived from case law addressing delivery reimbursement in New York and corroborated by the sworn testimony of a former Super Duper Pizza, Inc. employee. See Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 245, 257-258 (S.D.N.Y. 2008); Ex. 65 (Yarra Bella Aff. ¶¶18-20).

67. As part of the spreadsheet entitled “Super Duper Underpayment Report,” the average number of full-time and part-time employees was multiplied by their respective reimbursement amount. These amounts were then multiplied by the total number of years during which the Ahmed Respondents failed to reimburse his bicycle delivery workers (2008 through 2013). Ex. 62 (Henriquez Aff. ¶¶38-39 & Ex. M to Henriquez Aff., at 29) (“Super Duper Underpayment Report”).

68. The Super Duper Underpayment Report estimates that there is a total of at least \$27,000.00 in underpayments due Ahmed employees resulting from Ahmed’s failure to reimburse his bicycle delivery workers. Ex. 62 (Henriquez Aff. ¶41 & Ex. M to Henriquez Aff., at 29) (“Super Duper Underpayment Report”).

69. Based on the OAG’s analysis of the data provided during this investigation, the Ahmed Respondents’ wage violations resulted in estimated underpayments totaling at least \$156,000 to the employees at his two stores, plus liquidated damages and interest. Ex. 62 (Henriquez Aff. ¶41). It should be noted that these calculations are highly conservative

estimates. For example, the end date used for calculations was late 2013; and the OAG does not have sufficient evidence to state with certainty whether the Ahmed Respondents were in compliance subsequent to that date. An accounting is needed to determine the full scope of underpayments by the Ahmed Respondents. See Ex. 62 (Henriquez Aff. ¶29).

### **C. The Denman Respondents**

#### **1. Violations**

70. The Denman Respondents paid delivery employees an hourly wage of \$6.25 to \$6.80 per hour, and did not keep track of cash tips received by delivery employees. Ex. 14 (Denman Tr. 180:8-11, 156:15-19).

71. Respondent Denman testified that he did not keep track of the amount of time delivery employees spent on tipped work (such as making deliveries) versus non-tipped work. Ex. 14 (Denman Tr. 227:22 - 228:3). He estimated that they spent about 70% of their time making deliveries. Ex. 14 (Denman Tr. 176:14-19; 178:13-17). He further testified that he did not use any records to calculate how much time tipped employees spent on non-tipped work. Ex. 14 (Denman Tr. 229:24 - 230:23).

72. In response to the OAG's subpoena request for documents showing employees' time spent performing tipped and non-tipped work, the Denman Respondents produced PULSE reports in a spreadsheet format, showing the dates and times of delivery orders placed by customers in May and October of 2011 and 2012, as well as the delivery employees assigned to deliver each of those orders (the "Delivery Sample"). See Ex. 66 (Lynch Aff. Ex. B).<sup>29</sup> The OAG merged this spreadsheet with the Denman Respondents' time and payroll records of the same time periods to compare the amounts of time that employees were out of the stores, making

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<sup>29</sup> The four-month delivery sample was narrowed from the OAG's original request for one year of delivery records due to the Denman Respondents' claim that a request of that size would be too burdensome to produce in a timely manner.

deliveries, and inside the stores, performing non-tipped work. See Ex. 66 (Lynch Aff. Exs. F, G) (“Tip Credit Analysis”). The Tip Credit Analysis shows that in 99.7% of shifts in the Delivery Sample, delivery employees spent over 20% of their shifts performing non-tipped work. Ex. 66 (Lynch Aff. ¶25 and Exs. F, G). In total, employees spent an average of 43.7% of their time out on deliveries and 56.3% of their time performing work other than delivery work. See Ex. 66 (Lynch Aff. Exs. F, G).

73. Using a highly conservative estimate of the underpayments resulting from the Denman Respondents’ improper use of the tip credit, the calculation in the Tip Credit Analysis included only those shifts where delivery employees spent less than 50% of their shift — not less than 80% of their shift, which is the legal minimum — performing tipped work. Ex. 66 (Lynch Aff. ¶25).

## **2. Underpayment and Non-Reimbursement Calculations**

74. The Tip Credit Analysis shows that in just a four-month delivery sample period, there were over \$1,000 in underpayments to delivery employees caused by the Denman Respondents’ improper use of the tip credit at Store 3301, and approximately \$2,000 in underpayments at Store 3443. Ex. 66 (Lynch Aff. Exs. F, G).

75. The OAG prepared a Summary Underpayment Analysis in which these average underpayment amounts were extrapolated to estimate the total amount of underpayments owed to the Denman Respondents’ employees from July 2008 to May 2014, and estimates that the Denman Respondents are liable for over \$54,000 caused by their improper use of the tip credit. Ex. 66 (Lynch Aff. ¶50 & Ex. J to Lynch Aff.).

76. The Denman Respondents required delivery employees to use their personal vehicles to make deliveries, and reimbursed them fifty cents per delivery at Store 3301 and sixty

cents per delivery at Store 3443. They provided an additional forty cents per delivery for employees who used car tops on their vehicles. Ex. 14 (Denman Tr. 199:9-11, 200:5-7); Ex.66 (Lynch Aff. ¶¶32-45). In his testimony, Respondent Denman estimated that the delivery range for the stores is between 1.7 and 2 miles per delivery. Ex. 14 (Denman Tr. 207:5-15). He also testified that in developing a reimbursement rate for delivery employees, he did not calculate their actual driving expenses, including gas, insurance, maintenance, repairs, and depreciation. Ex. 14 (Denman Tr. 206:9 - 207:4).

77. In response to a subpoena request for documents showing delivery-related information, the Denman Respondents produced PULSE data containing customer addresses and the times and dates of delivery orders during May and October of 2011 and 2012 (the “Mileage Sample”). The OAG took a representative sample of days from the Mileage Sample, for a total of 1,633 deliveries, and calculated the number of round-trip miles driven for each delivery. See Ex. 66 (Lynch Aff. ¶¶32-34 and Ex. I) (“Mileage Reimbursement Analysis”).<sup>30</sup> The Mileage Reimbursement Analysis shows that delivery employees drove an average of 2.7 miles roundtrip per delivery in one store and 2.3 miles roundtrip per delivery in the other store. Dividing the monetary reimbursement per delivery by the average miles driven per delivery in each store yields a reimbursement rate of between 22 and 23 cents per mile for employees who did not use car tops. Id.

78. Twenty-two to twenty-three cents per mile is lower than any national estimate of reasonable, necessary vehicle costs. It is also lower than Domino’s and Domino’s franchisees’ own estimates of the per-mile driving costs of delivery employees in New York State, and lower

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<sup>30</sup> The OAG’s sample consisted of fourteen days of delivery records. For each delivery, OAG entered delivery addresses into Google Maps to compute round-trip mileage between the stores and customers’ addresses. D & D Mason Contrs., Inc. v. Smith, 81 A.D.3d at 944.

than the employees' own estimates of actual delivery costs. See Ex. 67 (Rodriguez Aff. ¶¶5-6).

79. The Internal Revenue Service publishes a standard mileage rate for employees to use in computing the deductible costs of operating a vehicle for business purposes. That rate was 57.5 cents per mile in 2015, up from 56 cents per mile in 2014, and in previous years was between 50 and 56.5 cents per mile.<sup>31</sup> This rate “is based on an annual study of the fixed and variable costs of operating an automobile, including depreciation, insurance, repairs, tires, maintenance, gas and oil.”<sup>32</sup>

80. The American Automobile Association (“AAA”) publishes an annual report that details estimated driving costs per mile. As with the IRS rate, the AAA rate estimates per-mile costs of driving certain categories of vehicles by factoring in the major variable and fixed costs, including gas, maintenance, tires, insurance, license, registration, taxes, depreciation and finance costs.<sup>33</sup> The AAA estimated that in 2015 the per-mile cost of driving a large sedan was between 58 and 93.1 cents per mile, of driving a medium sedan was between 47.8 and 75.8 cents per mile, and of driving a small sedan was between 36.9 and 57.4 cents per mile, depending on the total number of miles driven per year. Id. at 2.<sup>34</sup>

81. Domino's and some of its franchisees have also obtained professional estimates of the reasonable and necessary per-mile cost of driving in New York State that are significantly above 23 cents per mile. Domino's, and the Domino's Franchisee Association (“DFA”), a large

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<sup>31</sup> See Ex. 68 (Internal Revenue Service, Standard Mileage Rates) (<http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates>).

<sup>32</sup> See Ex. 69 (Internal Revenue Service, New Standard Mileage Rates Now Available; Business Rate to Rise in 2015, IR-2014-114 (Dec. 10, 2014)) (<http://www.irs.gov/uac/Newsroom/New-Standard-Mileage-Rates-Now-Available;-Business-Rate-to-Rise-in-2015>); see also Ex. 70 (Internal Revenue Bulletin: 2010-51, ([http://www.irs.gov/irb/2010-51\\_IRB/ar14.html#d0e2005](http://www.irs.gov/irb/2010-51_IRB/ar14.html#d0e2005))).

<sup>33</sup> See Ex. 71 (AAA, Your Driving Costs, 2014 Ed., at 3) (<http://publicaffairsresources.aaa.biz/wp-content/uploads/2014/05/Your-Driving-Costs-2014.pdf>).

<sup>34</sup> These estimates were higher in earlier years covered by the Relevant Period due to, for example, higher gas prices.

franchisee membership organization, previously contracted with Runzheimer. Domino's and the DFA separately contracted with Runzheimer to help each create a vehicle mileage reimbursement program, which entailed Runzheimer calculating and providing the per-mile costs of driving, specifically for delivery employees. Ex. 72 (Bassi Aff. ¶¶2-3); Ex. 73 (Czarapata Aff. ¶¶2-3); Ex. 74 (Abraham Aff. ¶3).

82. For Domino's, Runzheimer analyzed the fixed and variable costs involved in the operation of a standard vehicle (in this case, a Toyota Corolla LE), and determined that the average cost to delivery employees who drove a standard vehicle for business purposes in New York State was 37.1 cents per mile in 2005 and 44.79 cents per mile in 2008. Ex. 72 (Bassi Aff. ¶¶7, 8, 13, 17, 26, 30). For the DFA, Runzheimer in 2010 used data DFA members provided to generate per-mile reimbursement rates for each of the DFA members who requested the analysis. Ex. 73 (Czarapata Aff. ¶3). Runzheimer used three categories of standard vehicle (sub-compact, compact, and mid-size) and factored in fixed and variable costs. Ex. 73 (Czarapata Aff. ¶¶5, 8, 9(b)).

83. The assumptions utilized in Runzheimer's calculations for Domino's were not consistent with vehicles actually driven by employees in the Denman Respondents' stores. In response to a subpoena request, Respondent Denman produced a list of employees' personal vehicles that he stated they used for deliveries. Of the fourteen vehicles listed, only six were compact cars like the standard vehicle used in Runzheimer's calculations; the others ranged from medium and large sedans to mid-size sport utility vehicles, which have a higher per-mile driving cost. See Ex. 71 (AAA, Your Driving Costs, 2016 Edition, at 6-8).<sup>35</sup>

84. One employee who worked at a store owned by the Denman Respondents' reported that the reimbursement rates he received were not sufficient to reimburse him for the cost of

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<sup>35</sup> Medium and large sedans can cost nearly 20 to 40 more cents per mile than a compact car. See id.



using his vehicle for deliveries. He recalled receiving approximately \$45 per week in reimbursement from his store, while spending between \$107.50 and \$117.50 per week on delivery-related expenses including gas and insurance. See Ex. 67 (Rodriguez Aff. ¶¶5-6).

85. The OAG's Mileage Reimbursement Analysis estimates that, during the two-week period covered by the analysis, there was approximately \$600 in underpayments to delivery employees at Store 3301, and a total of \$550 in underpayments to delivery employees at Store 3443. Ex. 66 (Lynch Aff. Ex. I).

86. The OAG's Summary Underpayment Analysis extrapolated these per-store underpayment amounts to calculate the total amount owed to the Denman Respondents' employees during the Relevant Period, and estimates that the Denman Respondents are liable for at least \$179,000 in mileage reimbursement underpayments. Ex. 66 (Lynch Aff. ¶50 and Ex. J).

87. As a result of the OAG's analysis of the data provided during this investigation, the Denman Respondents' wage violations resulted in estimated underpayments of at least \$233,000 to its employees in his two stores, plus liquidated damages and interest. Ex. 66 (Lynch Aff. ¶50 & Ex. J to Lynch Aff.). As noted supra ¶73, these estimates are very conservative in that they calculated underpayments caused by the 80/20 rule only for instances where employees spent over 50% of their time performing non-tipped work. In addition, the end date used for calculations was the date when the OAG first completed its calculation of the Denman Respondents' underpayments; the OAG does not have sufficient evidence to state with certainty whether the Denman Respondents were in compliance subsequent to that date. An accounting is needed to determine the full scope of underpayments. See Ex. 66 (Lynch Aff. ¶¶6, 25).

## **V. DOMINO'S SOFTWARE DEFECTS IN PULSE AND THEIR IMPACT ON THE FRANCHISEE RESPONDENTS' PAY PRACTICES**

88. Pursuant to Section 14.1 of Domino's Franchise Agreement, franchisees have been required to implement "a bookkeeping, recordkeeping, computer and point of sale system . . . conforming to the requirements prescribed by [Domino's], relating, without limitation, to the use and retention of daily sales information, counts of pizza types and other approved menu items sold, coupons, purchase orders, purchase invoices, payroll records, check stubs, bank statements, sales tax records and returns, cash receipts and disbursements, checks and credit card sales, journals and general ledgers." Ex. 18 (SFA §14.1, at DP00000310). Beginning in 2001, Domino's began rolling out its proprietary computer system called PULSE to its stores, and by mid-2008 Domino's required all stores, whether corporate or franchise, to purchase and install the PULSE system. Ex. 27 (Pederson Tr. 79:8 - 80:15); Ex. 19 (Ridge Tr. 124:21-22) ("they can't have any other system other than PULSE"); Ex. 11 (Ahmed Tr. 37:24, 92:10-17); Ex. 14 (Denman Tr. 43); Ex. 3 (Maestri Tr. 265:19 - 266:21).

89. PULSE consists of hardware (e.g., monitors, terminals) and software, which perform a number of tasks, including recording point-of-sale (i.e., cash register) functions, tracking pizza delivery information, housing store-specific data (e.g., personnel data, store hours, product prices), acting as a timekeeping system in which employees clock in and clock out using individual employee codes, recording tips, and generating various types of reports (e.g., sales, revenue, payroll). Ex. 27 (Pederson Tr. 90:16 - 91:24; 98:6 - 100:11; 132:24 - 133:11); Ex. 23 (Gaisser Aff. ¶¶12-14); Ex. 21 (Cookston Aff. ¶¶16, 20). Franchisees are contractually obligated to provide Domino's full access to their business information.<sup>36</sup> Thus, from its corporate

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<sup>36</sup> Section 14.1 of the Franchise Agreement provides: "You [the franchisee] agree that we [Domino's] shall have full access, either on-site or from a remote location, to all of your computer data, equipment and systems containing

headquarters in Ann Arbor, Michigan, Domino's has constant, real-time access to all information stored in PULSE in any franchisee store in New York State or nationwide, information which it pulls from all its stores every day. Ex. 27 (Pederson Tr. 41:4-15, 258:5-21, 260:1-18); Ex. 21 (Cookston Aff. ¶19); Ex. 23 (Gaisser Aff. ¶16). Domino's corporate headquarters also has "additional layers of access" that allow corporate "to get straight into the database of the store" and can reach a franchisee's own data "a lot quicker" than even the franchisee can. Ex. 27 (Pederson Tr. 272:18 - 274:14).

90. Substantial fees for the use of PULSE are incurred by New York franchisees for each store. Domino's own estimate, in its FDD, is that the cost per store to acquire the hardware and software required to run PULSE is \$15,000 to \$25,000 and the estimated cost per store for required maintenance and support contracts, third party software license fees, and upgrades or updates to the PULSE software average up to \$4,500.00 annually. Ex. 2 (2016 FDD, at 24).

**A. Domino's PULSE Software and Franchisees' Payroll**

91. PULSE provides a wide array of functionalities to Domino's stores, whether corporate or franchise — e.g., harvesting sales data from stores, or tracking the progress of a pizza order — and among them is a payroll function capable of tracking and adding up hours worked and calculating gross wages. See, e.g., Ex. 14 (Denman Tr. 148:25 - 149:6); Ex. 23 (Gaisser Aff. ¶13). Domino's created a reference guide for all corporate stores and franchisees, the "PULSE Management Reports Guide" ("PULSE Reports Guide"), which sets forth the reports PULSE can generate. Ex. 27 (Pederson Tr. 150:15 - 151:25). The PULSE Reports Guide identifies the "Payroll Report" among "frequently used reports," and describes this report as a "listing of all team members and their total hours and pay" for any specified date range. Ex.

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any and all of the information, records and reports required by this Section 14.1 or any other provision of this Agreement or any other agreement with our affiliates." Ex. 18 (SFA §14.1, at DP00000310).

75 (DP000075398). The PULSE Reports Guide describes “typical uses” of the Payroll Report as “viewing payroll information, including clock in and clock out times . . . [and] generating payroll information to give to your accountant or payroll service.” Id. Wayne Pederson, Domino’s Vice President for Information Technology, who was responsible for maintaining and updating the PULSE system, testified that it is one of the “accepted uses” of PULSE to submit Payroll Reports to a franchisee’s payroll service. Ex. 27 (Pederson Tr. 242:8-13). In fact, Domino’s advised franchisees to pull payroll data from PULSE “so that they can keep and archive the information, so they are compliant with whatever state or local laws are required for retention.” Ex. 27 (Pederson Tr. 117:25 - 118:2).

92. Pederson further testified that the Payroll Report produced by PULSE calculates and tracks: (a) employee hours; (b) all regular wages owed; (c) all overtime wages owed; (d) all tips received; and (e) through a separate report, total reimbursements owed, on a per employee, per pay period basis. Ex. 27 (Pederson Tr. 242:8 - 250:23). The Payroll Report contains columns for, e.g., an employee’s Time In, Time Out, Regular Hours, Pay Rate, Overtime 1.5, Bonus, Tips, and Total Pay. Ex. 80 (sample from Ahmed PULSE Payroll Report); Ex. 27 (Pederson Tr. 147:2 - 148:7). The Payroll Report combines regular and overtime pay owed for each employee to arrive at a “Total Pay” owed to the employee for the pay period. Ex. 27 (Pederson Tr. 164:8 - 166:5, 168:4 - 170:14); Ex. 80 (sample from Ahmed PULSE Payroll Report). Pederson testified that the only functions PULSE could not perform — as compared to a payroll service — were the calculation of tax deductions and handling multiple wage rates for employees working in tipped and non-tipped capacities during the same payroll period. Ex. 27 (Pederson Tr. 247:22 - 248:8).

93. In testimony before the OAG, Domino’s maintained that PULSE is not a payroll

service for franchisees, but rather a timekeeping function for franchisees to track when their employees are working. Pederson, Domino's senior Information Technology professional, testified to that effect: "I am not sure how [franchisees] would use it [for a payroll function], if you do deductions and withholdings and things of that nature, none of which is calculated in any shape or form inside of PULSE." Ex. 27 (Pederson Tr. 120:9 - 121:23). Nevertheless, certain features offered in PULSE upgrades require franchisee stores to use the wage-calculating payroll functions in PULSE in order to function. For example, PULSE provides the ability to track ideal labor costs, *i.e.*, comparing the "ideal" time for performance of critical tasks, set in the PULSE system, compared to the actual recorded time taken per the PULSE records. However, this PULSE "ideal labor" calculator only works if franchisees enter employee wage rates so that PULSE can calculate "the average wage range of the store" in order to compare it to the "ideal labor" number for the store. Ex. 27 (Pederson Tr. 221:9 - 222:18).

94. Domino's made PULSE a necessary part of its franchisees' payroll systems in several ways. PULSE automatically records employees' hours worked, making it highly unlikely a franchisee would also use a completely separate timekeeping system, which would, among other things, increase costs and slow down employee productivity. The Payroll Reports generated in PULSE are clearly marked as "Payroll," with a "Total Pay" column, and they provide daily and weekly employee time and pay information. Ex. 75 (DP00075398-400). In fact, Domino's encouraged franchisees to use the PULSE system to "generat[e] payroll information to give to your accountant or payroll service." Ex. 75 (DP000075398). However, other than a small change made in May 2015 embedded within its Manager's Guide (Ex. 76), Domino's has never provided to its franchisees a disclaimer or warning that they should not use PULSE as a payroll system or use it for calculating gross wages, and the Payroll Report does not

contain any such disclaimer or warning. Ex. 27 (Pederson Tr. 123:7 - 124:11, 248:15 - 249:19); Ex. 23 (Gaisser Aff. ¶13); Ex. 21 (Cookston Aff. ¶25).<sup>37</sup>

95. In order to allow its workers to conduct any tasks, franchisees necessarily must create timekeeping records in PULSE for their workers. A worker at a franchisee store cannot perform any work-related function, such as taking an order, without first logging in to PULSE. Another Domino's-authored reference guide concerning PULSE provided to all franchisees, the PULSE Reference Guide, states that entering a worker's "User ID" (and password) is the required first step in recording an order. See, e.g., Ex. 77 (PULSE Reference Guide, at DP00001219-1220, §2-7). Similarly, the PULSE Reference Guide lists "steps you must take in your Domino's Pulse system to close your store," including "Clock[ing] Out Team Members [i.e., employees]" which "helps make sure payroll records are accurate." Ex. 77 (PULSE Reference Guide, at DP00001307, 1320, §§ 6-1, 6-14).

96. Regarding how they actually use PULSE's timekeeping or payroll functionality, numerous investigated franchisees testified that they routinely used PULSE to generate the "Total Pay" or gross weekly wages (captured in the PULSE Payroll Report) — from which a payroll service or accountant computes employee net earnings. Ex. 3 (Maestri Tr. 269:19 - 271:12, 286:5-20); Ex. 78 (Webster Tr. 204:2-12, 206:11-16); Ex. 11 (Ahmed Tr. 36:19 - 37:16); Ex. 21 (Cookston Aff. ¶21); Ex. 22 (Lee Aff. ¶11); Ex. 51 (Sharma Aff. ¶7); Ex. 23 (Gaisser Aff. ¶13).

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<sup>37</sup> Only in or about May 2015, after the OAG subpoenaed documents and took testimony of Domino's officials, did Domino's, for the first time, add two sentences to Section 12 of its nearly 800-page Manager's Guide regarding the uses of PULSE as a payroll system, stating "The 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." Ex. 76 (2015 amendment to Manager's Guide). To the best of the OAG's knowledge, Domino's did not make, and has not made, any other changes in its FDD or any other document provided to franchisees concerning this information. In no way do these two sentences, buried as they are in the Section 12 Operating Standards of the Manager's Guide, give any notice to franchisees of the flaws in PULSE or of violations they were, or may be, committing by relying on PULSE.

97. Since at least 2009, Domino's has known that some New York-based franchisees use PULSE to generate the raw data regarding gross wages to be submitted to a payroll service. Pederson testified that he was aware franchisees used PULSE to calculate the gross wages of their employees. Ex. 27 (Pederson Tr. 290:21 - 291:2). Furthermore, an email from another Domino's employee reveals that, despite its stated position that PULSE is not a payroll service for franchisees, Domino's was aware that not all franchisees, in fact, used payroll companies to compute their payrolls. On February 3, 2009, Kimberly Ridge, Domino's Vice President of Franchise Operations, responded to an email from an Area Leader — a Domino's employee operating as a direct liaison between franchisees and the company — concerning a problem with a New York franchisee's W-2 filings. In response to the Area Leader, Ridge advised: "I would do the following: 1. Contact franchisee. Find out if he uses a payroll company." Ex. 79 (DP00072035).

### **B. Domino's Knowledge of PULSE Software Flaws**

98. As noted above, the PULSE software generates a "Payroll Report" that Domino's acknowledged is an "accepted use" by franchisees to provide to a payroll service or accountant for the computation of employee payroll. Ex. 27 (Pederson Tr. 242:8-13). However, at least as early as 2007, Domino's was aware of flaws in PULSE relating to how the software calculates employee gross wages reflected in the PULSE Payroll Report. Three flaws relate to aspects of overtime or wage rate calculation, while a fourth flaw relates to the New York state regulation on "spread of hours" pay.

#### **1. Overtime Under-Calculated for Employees Working at Multiple Stores**

99. The first of these flaws relates to PULSE's inability to compute overtime where an employee works at more than one store location owned by the same franchisee. The PULSE

Payroll Report contains a column for “Overtime 1.5” — intended to capture when an employee works more than the “Regular Hours” of forty hours per week — but the PULSE software cannot capture and aggregate hours from more than one store location owned by the same franchisee in the same Payroll Report. See Ex. 75 (PULSE Reports Guide, at DP00075399 - 400); Ex. 80 (sample page from Ahmed PULSE Payroll Report). Thus, when a franchisee owned more than one store, and sent an employee to work thirty hours in Store A and thirty hours in Store B in the same week, PULSE calculated that the employee worked sixty hours of regular or “straight” time, rather than the forty hours of straight time and twenty hours of overtime to which the employee is entitled under law. When the Franchisee Respondents submitted a PULSE Payroll Report as the raw data for a payroll service to use — an action expressly approved by Domino’s — and the payroll service was not aware of this limitation, the employee was underpaid. In fact, this occurred with employees in Maestri stores and in other franchise stores, and their use of PULSE led to inaccurate calculations of overtime and employee underpayment from July 2007 until July 2012. See supra ¶¶46-52, describing the violations at the Maestri franchises; Ex. 51 (Sharma Aff. ¶¶12-14).

100. Domino’s was aware of this PULSE flaw at least as early as 2010. In a December 6, 2010 email chain, Domino’s IT and human resources professionals discussed proposed improvements to the PULSE software. One proposal, contained in a spreadsheet attached to the email, recommends adding the “ability to have all TMs [Team Members] in all stores (owned by same franchisee) so if there is a borrowed TM, the GM [General Manager] just needs to activate the TM in the borrowed store.” Ex. 81 (DP00086333 - 335 and attachment, second to last page of attachment, bottom row).<sup>38</sup> Testifying about this proposal, Pederson, the Domino’s senior IT professional, acknowledged that he was aware of the software’s limitation in calculating

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<sup>38</sup> “TMs” refers to “team members,” the Domino’s term for “employees.” Ex. 25 (Rudd Tr. 129:10-14).



overtime for employees who worked in more than one location for the same franchisee. Ex. 27 (Pederson Tr. 253:3 - 255:5). He testified that, to this day, the limitation has yet to be addressed by Domino's because it "is nothing that we [can] do very easily" and "that is why [franchisees'] payroll provider would need to merge their data and determine what the appropriate overtime rules would be for that situation." Ex. 27 (Pederson Tr. 254:22-23). However, Pederson also acknowledged that PeopleSoft, an additional software product used by Domino's corporate stores along with PULSE, can and does properly calculate overtime for an employee who works at more than one Domino's corporate store during a single pay period. Ex. 28 (Pederson Tr. 533:16 - 534:18). Pederson testified that PeopleSoft includes within it, "the pay rates, all of the state specific rules, and any garnishments, anything else that is needed to properly pay the employee, to calculate both gross and net pay for that team member." Ex. 28 (Pederson Tr. 370:13-18). Domino's decision not to correct the PULSE problems and not to notify franchisees resulted in underpayments to workers at the Maestri Respondents' and other franchisee stores.

## **2. Overtime Under-Calculated Where Tip Credit Wage Was Used**

101. A second flaw in the PULSE software relates to the calculation of overtime for tipped employees, who in Domino's stores are delivery workers. As far back as 2007, Domino's was aware that its PULSE software systematically miscalculates and understates overtime owed to franchisees' tipped delivery workers. When computing overtime, PULSE simply multiplies the lower "tipped wage" by 1.5, which in effect magnifies the value of the tip credit for the employer by a factor of .5 and underpays employees.

102. Franchisee Respondents Maestri and Ahmed, as well as nine of the Settling Franchisees, underpaid employees during the Relevant Period by underpaying overtime in the manner calculated by PULSE, i.e., multiplying the tipped wage by 1.5. For example, one

Settling Franchisee used the software to calculate overtime wages, following the overtime rate “programmed within PULSE.” Ex. 51 (Sharma Aff. ¶14). In another example, Respondent Ahmed paid \$7.50 per overtime hour to tipped delivery workers who were paid \$5.00 per regular hour (the then-effective \$7.25 minimum wage less a \$2.25 tip credit). Ex. 11 (Ahmed Tr. 105:21 - 107:7). However, under the Labor Law the franchisee should have been paying \$8.63 per overtime hour (\$10.88, which is one-and-a-half times \$7.25, less the \$2.25 tip credit). This had the effect of multiplying the benefit of the tip credit to the employer, in clear violation of the Labor Law. See also supra ¶¶46-52 (Maestri); ¶¶60-62 (Ahmed); see also Ex. 34 (Lopez AOD ¶12); Ex. 36 (Cilmi AOD ¶14); Ex. 46 (Gaisser AOD ¶¶10-11); Ex. 47 (Goodman AOD ¶¶11-12); Ex. 30 (Jadza AOD ¶¶10-11); Ex. 48 (Jali AOD ¶¶12-13); Ex. 33 (Karaborklu AOD ¶¶10-11); Ex. 32 (Maha AOD ¶¶10-11); Ex. 35 (Sharma AOD ¶¶12,14).

103. Domino’s was aware of this flaw within PULSE, as evidenced both by documents and the testimony of company employees. In a May 30, 2007 email chain, five different Domino’s employees — including Julie Wigley, a senior human resources professional, and Pederson, the senior IT professional — discuss this defect. Pederson, in a part of this chain dated May 18, 2007, notes that, as a result of the PULSE defect, franchisees “could end up underpaying in most cases of overtime” and then clarifies his observation by walking the other Domino’s officials through a specific example of how PULSE miscalculates overtime for tipped employees.<sup>39</sup> Ex. 82 (DP00088351). Pederson concludes his detailed example in the email chain by stating that Domino’s “will need to address this with release 3.3” of the PULSE software. Id.

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<sup>39</sup> Though Pederson’s example actually misstates the formula for computing overtime under New York law, Pederson’s example, nonetheless, correctly identifies the problem that PULSE’s calculation of overtime rates on tipped wages is wrong and results in the under-calculation of what is owed for overtime work.

104. Later in the same email chain Wigley concurs, responding that “we need to communicate how to pay the drivers differently in Pulse (is [sic] there instructions anywhere that I could direct franchisees to?) and then get the other fix for OT in release 3.3 (when is that due out?).” Ex. 82 (DP00088350). In sworn testimony in 2014, Pederson confirmed the PULSE software’s inability to compute overtime accurately for tipped employees, and that PeopleFirst, the Domino’s human resources department where Wigley worked, suggested fixing the flaw. Ex. 27 (Pederson Tr. 192:2-6; 192:18 - 193:3; 194:17 - 195:25). However, Pederson testified that Domino’s informed him that the issue was a “low priority” and, consequently, did not fix the flaw. Ex. 27 (Pederson Tr. 235:24 - 236:8).<sup>40</sup>

105. Payroll Reports from the Maestri and Ahmed Respondents show that this under-calculation for overtime for tipped delivery employees continued throughout the Relevant Period. For example, from January 2008 through at least July 2013, nearly all of the employees listed in the Payroll Registers for Nader Inc. and Super Duper Pizza Inc. had overtime pay rates that were simply one-and-a-half times their regular “tipped” hourly pay rates. Ex. 64 (Ahmed Payroll Records, Nader Inc., at 1-26); Ex. 63 (Ahmed Payroll Records, Super Duper, at 1-7). In January 2012, a full year after New York’s Hospitality Industry Wage Order, 12 N.Y.C.R.R. Part 146, increased the lowest possible overtime rate for tipped delivery workers to \$9.28 per hour, employees for the Ahmed Respondents were still paid at overtime rates that were less than \$9.28 because those rates were incorrectly calculated at one-and-a-half times the tipped hourly rate. For example, during the pay period ending January 8, 2012, at least eight Nader Inc. employees

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<sup>40</sup> Despite the recommendation to correct this flaw in the 3.3 version of PULSE, this flaw (and the other flaws described here), remained uncorrected in the numerous, regular updated versions of PULSE that Domino’s has released since May 2007, when Domino’s was preparing to release PULSE version 3.3. At least as of August 2015, Domino’s appeared to be using PULSE version 3.81, as demonstrated in a compliance report that was provided to the OAG from one of the Settling Franchisees. See Ex. 83 (page from Gaisser compliance report).

had tipped pay rates of \$6 per hour and overtime pay rates of \$9 per hour (one-and-a-half times the regular pay rate). Ex. 64 (Ahmed Payroll Records, Nader Inc., at 10-12).<sup>41</sup> As late as July 2013, this incorrect calculation continued to lead to overtime underpayments for certain employees, such as Mian Mohammad, who earned a \$9.13 overtime rate, below the lowest possible permissible overtime rate for tipped delivery workers at that time. Ex. 64 (Ahmed Payroll Records, Nader Inc., at 24). The Maestri Respondents also calculated overtime incorrectly, at one-and-a-half times a delivery worker's tipped hourly rate, until January 2010. For example, during the pay period ending October 4, 2009, PULSE Payroll Records show that a North Bedford Pizza Inc. employee named Jose Pesantez had a regular tipped hourly rate of \$6 per hour and worked 40 regular hours and 11.79 overtime hours. Ex. 59 (Maestri PULSE Payroll Reports, at 2). The Maestri Respondents' corresponding payroll records for this week (pay date of Oct. 9, 2009) show that Jose Pesantez (employee 8222) was paid \$6 per hour for 40 hours and \$9 per hour for 11.79 hours. Ex. 60 (Maestri Payroll History Report, at 21).

106. Certain Domino's franchisees in New York State eventually noted this flaw within PULSE concerning the inaccurate calculation of overtime for tipped delivery employees. Respondent Maestri testified in 2013 that approximately two years before, a group of franchisees contacted Domino's about the flaw, and Domino's responded that the company was working on the problem but had not yet made any change to PULSE as a result. Ex. 3 (Maestri Tr. 281:23 - 283:5). Maestri's supervising manager, Duane Webster, also testified in 2013 that he reported to Domino's that PULSE under-calculated owed overtime to tipped delivery workers. Ex. 78 (Webster Tr. 259:2-10). Another New York franchisee used PULSE's flawed overtime

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<sup>41</sup> With their names listed down the left-hand column of the Payroll Register, those employees are: Arjun Sharma, Haider Hussain, Hudson Joachim, Justin Gamba, Rahman Mahmudur, Saham Malik, Shah Ahmed, and Sirin Niyazi. Haider Hussain's overtime pay rate is listed as \$9.13, slightly higher than \$9, though still below the legal minimum for tipped delivery workers.

calculation until 2011, when, after discovering the flaw, he contacted Domino's and was informed by a company IT representative that Domino's was aware of the flaw, confirming to him that PULSE was unable to accurately calculate the overtime rate for tipped delivery workers whose employers claimed a tip credit. Ex. 51 (Sharma Aff. ¶14).

### **3. Improper Wage Rate for Employees Performing Tipped and Non-tipped Work**

107. A third flaw in the PULSE software relates to the recording of the proper wage rates — and application of the tip credit — for employees who perform a mix of tipped and non-tipped work within the same shift. To ensure that an employer does not inappropriately take a tip credit for time an employee is working without an opportunity to receive tips, state law prohibits an employer from claiming a tip credit for a given service employee on any day that the employee works at a non-tipped occupation for over 20% of her shift or for two hours or more during the shift, whichever is less. See 12 N.Y.C.R.R. §146-2.9. Despite the fact that Domino's PULSE software does track the time that employees perform delivery work (and Domino's grades franchisee stores based on these times) (see Ex. 27 (Pederson Tr. 229:11 - 230:19); Ex. 84 (Khan Tr. 211:18 - 212:15)), and tracks which workers were paid tipped wage rates, PULSE does not alert franchisee stores when employees perform delivery work for less than 80% of their shift and therefore, are ineligible for "tip credit" wage rate. Ex. 27 (Pederson Tr. 177:23 - 178:9). More significantly, PULSE does not allow two different wage rates to be entered for the same employee. Thus, PULSE calculates the delivery workers' pay at the tipped rate even when they spent more than two hours or 20% of their shift at a non-tipped occupation. As such, PULSE does not accurately compute or reflect wage rates for tipped employees — e.g., delivery drivers — who are often required to spend considerable time performing myriad in-store tasks like cooking, boxing pizzas, or taking orders (i.e., non-tipped work) while they are in between

deliveries. Id. This flaw presents another threat of underpayment for drivers paid at a lower, tip credit-adjusted wage, who often perform non-tipped work for considerably more than 20% of their shifts.

108. Despite PULSE’s inability to accommodate two rates for the same employees, Domino’s encourages its franchisees, in franchisee training materials, to “cross train” its delivery workers to perform in-store (i.e., non-tipped) work when they are not making deliveries. Domino’s expressly recommends that franchisees cross-train their drivers to be able to perform, for example, pizza-making, customer service, and other non-tipped work. See Ex. 85 (Asst. Manager Training Guide, at DP00007688) (“Capitalize on cross-training. All of your Team Members should be able to perform all of the tasks in your store. This will allow you to staff your store with fewer Team Members because the productivity level will increase); Ex. 19 (Ridge Tr. 296:16 - 99:22); see also Ex. 3 (Maestri Tr. 135:2 - 136:2); Ex. 51 (Sharma Aff. ¶19).<sup>42</sup>

109. At least as early as 2007, Domino’s was aware of this flaw within PULSE, and its negative effect upon franchisees’ compliance with certain labor laws. Julie Wigley, Domino’s Director of PeopleFirst, in a May 30, 2007 email chain, reported to her Domino’s IT and human resources colleagues on May 17, 2007: “I’m told the Pulse [sic] system does not currently function to pay a driver a different rate of pay in the same shift and therefore franchisees are just paying the tip wage for the entire shift which is not following the law.” Ex. 82 (DP00088351-352). Later in that email chain, in response to a request that guidance be provided to franchisees on this point, Pederson, the senior IT professional, responded on May 30, 2007 that his group

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<sup>42</sup> Domino’s also notes on the portion of its website regarding job opportunities with the company that “while there may be many different roles within a store, everyone on the team pitches in and helps out with whatever is needed.” See Ex. 145 (<https://jobs.dominos.com/dominos-careers/opportunities/in-store>) (last visited May 10, 2016).

would “probably handle this request as a one-off.” Ex. 82 (DP00088350). However, despite Pederson’s assurance in 2007 that this “request” would be handled in some form, nothing was done and a full two years later nothing had changed. In an April 2009 email by Julie Wigley to New York franchisee Angie Melton (who was later sued by her employees for, inter alia, failing to limit the tip credit when excessive non-tipped work was performed), Wigley noted: “[T]here are a lot of franchisees who are not doing tip credit correctly.” Ex. 86 (DP00088368).<sup>43</sup> In a September 2009 email with a number of franchisees (none of whom were New York franchisees) and Domino’s officials, a franchisee stated: “Based on feedback I have heard from [Domino’s], we are probably not paying our drivers properly on tip credit due to the requirement that at least 80% of their time has to be spent on the tipped job in order to be paid less than the minimum wage.” Domino’s IT personnel responded: “We’re pushing hard on a consensus approach here.” Ex. 87 (DP00077740-741). But again, Domino’s did not modify PULSE or notify all franchisees after this exchange.

110. By 2011, a former New York Area Leader asked Pederson to elaborate “on a few highly sought after enhancements” in PULSE, including “Can the Pulse [sic] system be configured to take the dual wages or split wages many franchisees are paying to calculate Labor costs and Ideal Labor.” In response, Pederson stated that Domino’s would not attempt to configure PULSE to accommodate employees with multiple wage rates. Instead, he stated “I would recommend that the franchisees use a blended rate by . . . [having] them take the gross pay divided by the number of hours over a few month period.” Ex. 88 (DP00072817-818). This recommended approach, however, plainly violates the Labor Law.

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<sup>43</sup> That lawsuit was Cano v. DPNY, Inc., 287 F.R.D. 251, 254 (S.D.N.Y. 2012), and involved the claim that franchisee Melton and other defendants “applied tipped wage calculations even when the plaintiffs performed tasks for which tips were not available.” The court granted plaintiffs’ motion to amend the complaint to add Domino’s as a joint employer (over Domino’s opposition); later, the case settled.

111. Finally, when Pederson testified before the OAG in 2014, he admitted that, to this day, “there is no way for Pulse [sic] to have one rate if you are in a tipped position and one if you are in a non-tipped position.” Ex. 27 (Pederson Tr. 175:12-14).

#### **4. “Spread of Hours” Not Included**

112. A fourth flaw in the PULSE software relates to a regulation known as “spread of hours.” New York State requires an additional hour of pay at minimum wage for each day on which an employee’s spread of hours — the time between the start and end of work — exceeds ten. See 12 N.Y.C.R.R. §146-1.6. However, Domino’s PULSE software cannot accommodate this regulation, resulting in the potential underpayment of workers. When asked whether any field in PULSE allows a franchisee to pay additional wages when an employee works over ten hours a day, Pederson, the Domino’s senior IT professional, testified that “there is no way for Pulse [sic] to calculate that.” Ex. 27 (Pederson Tr. 171:7-10).

113. The record shows that Domino’s knew about PULSE’s inability to account for the spread of hours requirement, yet chose to not advise franchisees systematically about the problem or about two fixes — one available through a third-party software product called “Wizard,” and the other, through the workaround that Domino’s used in its corporate-owned New York stores. For example, Natasha Gayden, a Domino’s HR professional, testified that she knew of New York’s spread of hours rule; that spread of hours information is not calculated through PULSE; and that Domino’s corporate-owned stores calculate spread of hours through PeopleSoft, an additional, non-PULSE software program. Ex. 17 (Gayden Tr. 159:5 - 160:2). Further, a New York franchisee — discovering that PULSE was not calculating this required compensation — contacted Domino’s Area Leader Choua Vang and informed her that “PULSE failed to record or note in any way the requirement of payment of spread of hours for employees



whose shifts are more than ten hours in length.” In response, “Ms. Vang confirmed that PULSE did not account for the spread of hours requirement.” Ex. 51 (Sharma Aff. ¶15); see also Ex. 84 (DP00071990) (January 30, 2013 email chain concerning franchisee Sharma’s query about the spread of hours requirement, where Vang commented to another area leader, “I wonder how many people are actually doing it . . .”). According to another New York franchisee, at the time he made the required purchase of the PULSE software from Domino’s, Domino’s did not disclose that PULSE could not track spread of hours; nor did Domino’s disclose this fact to the franchisee at any time thereafter. Ex. 22 (Lee Aff. ¶¶27, 30). Finally, Respondent Denman also testified that Domino’s never offered information stating that PULSE could not track spread of hours. Ex. 14 (Denman Tr. 181:12 - 182:14, 213:7-11).

### **C. Domino’s Failure to Inform Franchisees of PULSE Flaws**

114. Despite Domino’s awareness of the PULSE flaws described above — and the resulting inaccuracies in the gross wages in the Payroll Reports that franchisees provided to payroll services — Domino’s did not inform franchisees of these flaws. See, e.g., Ex. 21 (Cookston Aff. ¶25). Historically, Domino’s IT department has issued two software updates every year to improve PULSE — one major update and one minor — and in this way the company is regularly in contact with all franchisees about the evolving functions of the PULSE software. Ex. 27 (Pederson Tr. 76:13-18). Yet even with its recurring, twice annual contact concerning PULSE, Domino’s only informed some of the franchisees about certain of the flaws described above on an ad hoc basis, typically only when contacted by a franchisee first. Ex. 27 (Pederson Tr. 248:19-20). Pederson testified that, in the event a franchisee affirmatively called and asked his IT department about PULSE limitations, he would inform them of these problems; however, he could not name a single franchisee he had spoken with, and while testifying that he

had spoken to at least one franchisee between 2000 and 2010, he had no further recollection of when, how many, or which franchisees he informed about such flaws, nor did he have any knowledge of Domino's systematically informing franchisees of these flaws in writing or by any other means. Ex. 27 (Pederson Tr. 248:19 - 249:12, 294:11 - 295:6). The OAG has not found any documents or information produced by Domino's indicating that Domino's ever affirmatively informed New York State franchisees of the PULSE flaws described above, though all franchisees were required to purchase the software from Domino's under the Franchise Agreement.

115. In the absence of such notification from Domino's, franchisees in New York State usually learned of flaws in PULSE and in the Payroll Report (if at all) if a payroll service or accountant happened to catch a problem with the calculations in the "Total Pay" column or once the franchisee was investigated by a law enforcement agency or faced litigation. One franchisee believed that paying his employees in accordance with gross wages included in PULSE payroll reports was appropriate and legally compliant until his franchise was investigated by the U.S. Department of Labor. Ex. 21 (Sharma Aff. ¶7). Another franchisee relied upon PULSE to calculate employee gross wages until three of his stores were the subject of a lawsuit alleging, among other things, underpayment of overtime and failure to pay spread of hours pay. Ex. 21 (Cookston Aff. ¶23). The Maestri and Ahmed Respondents — who are among those franchisees who used third-party payroll or accounting services — both failed to pay spread of hours and also underpaid overtime by multiplying the tip-credit wage by 1.5. See supra ¶¶49-50 (Maestri), ¶¶60-61 (Ahmed).

116. The Maestri Respondents only learned about the flaws in PULSE (and its Payroll Report) because their payroll service "happened to catch inaccuracies" related to spread of hours

and overtime for tipped employees years after the work had been completed and the employees were underpaid. Ex. 3 (Maestri Tr. 280:7 - 281:12, 357:5 - 358:22). Respondent Ahmed learned about the PULSE spread of hours flaw only after a discussion with former Area Leader Robert Machin and several other franchisees in 2012 about Wizard, the third-party software program, and he learned about the PULSE overtime underpayment flaws only after being informed of this requirement by the OAG in November 2013. Ex. 11 (Ahmed Tr. 114:14 -115:19). Similarly, Respondent Denman testified that he “probably wouldn’t have missed” money owed to an employee had Domino’s informed him that PULSE could not accurately calculate spread of hours or overtime for employees receiving a tip credit-adjusted wage. Ex. 17 (Denman Tr. 213:7-16).

117. When franchisees who relied on PULSE’s Payroll Report learned of the PULSE flaws, they typically changed their practices to comply with the law. However, absent a lawsuit or enforcement action, this compliance was usually only prospective; employees were not paid any back wages owed. See, e.g., Ex. 78 (Webster Tr. 279:23 - 280:24) (discussing underpayments by Maestri Respondents).

118. Domino’s failure to fix the flaws in PULSE (i.e., PULSE’s failure to aggregate all hours worked at multiple locations owned by the same franchisee; PULSE’s under-calculation of overtime for tipped rate employees; PULSE’s inability to track or incorporate tipped versus non-tipped work hours; and PULSE’s inability to accommodate New York’s “spread of hours” requirement) resulted in at least several hundred thousand dollars in underpayments by Respondent Franchisees based on OAG’s estimates. See supra ¶¶59, 69, 87.

**D. Domino's Knowledge of Wage Violations by the Franchisee Respondents and Other Franchisees, and Its Failure to Remedy**

119. Domino's had undeniable knowledge of wage-and-hour violations and had the unique ability to ensure the ongoing compliance of its franchisees with wage-and-hour law.

120. As discussed above, in order for employees to do any work at franchisee stores, Domino's requires them to log in and out of PULSE, thus creating timekeeping records. The Settling Franchisees and the Franchisee Respondents all stored timekeeping, wage, and other payroll-related information in PULSE, all of which Domino's can access from its corporate headquarters in Ann Arbor, Michigan. See supra ¶¶88-89, 94-95.

121. As described in ¶34, supra, a review of New York State franchisee PULSE pay records showed that between October 2011 and June 2013, the vast majority of franchisees reported instance of pay rates in PULSE that facially violated the Labor Law. Specifically, the PULSE records indicate that during the sample period over 78% of franchisees reported instances of regular wage rates below \$5.65, the lowest possible regular rate that could be paid to a tipped restaurant delivery worker at that time, assuming the maximum possible tip credit, and over 85% of franchisees reported instances of overtime rates of less than \$9.28, again the lowest possible overtime rate at that time for a delivery worker assuming the maximum tip credit. See supra ¶34. Through PULSE, Domino's has comprehensive, current access to the pay records of its franchisees, and at least since October 2011, the start date for the OAG-subpoenaed PULSE records showing wage rates below required minimum and overtime wages, Domino's has had information that the overwhelming majority of New York State franchisees reported pay rates in PULSE that did not comply with wage-and-hour law.

122. In addition to Domino's general knowledge from franchisee PULSE payroll data that franchisees violate wage-and-hour law, as described above, Domino's has been aware of

systemic wage-and-hour law violations by its franchisees at least since 2009. In one April 2009 email by Julie Wigley to New York franchisee Angie Melton, Wigley explains that “there are a lot of franchisees who are not doing tip credit correctly.” Ex. 86 (DP00088368).<sup>44</sup>

123. In June 2009, Domino’s conducted a “Tip Credit Survey,” in which an Area Leader collected wage information from franchisees who paid hourly wage rates incorporating the tip credit, including franchisees in New York State, and circulated this information within Domino’s. The Tip Credit Survey included responses showing that some franchisees paid employees \$4.60 per hour, lower than any then-permissible wage rate for tipped delivery workers, even assuming the maximum tip credit. See Ex. 90 (DP00056274); Ex. 91 (DP00074497); 12 N.Y.C.R.R. §137-1.2, 1.4(a)(5).

124. Domino’s also kept track of employee complaints received about franchisees by topic, finding that, inter alia, in 2011 “pay issues” were the most frequent complaint about franchisees, comprising 25% of all complaints for that one year period. Ex. 26 (Wigley Tr. 178:1-14); Ex. 92 (DP00122607-609); see also Ex. 93 (DP00122850) (also finding that in 2009 25% of franchisee employee complaints concerned pay issues). In another instance in New York State, in March 2010 a Domino’s Customer Care employee contacted a Domino’s New York Area Leader about a complaint by a New York franchisee’s employee that the franchisee did not give meal breaks, asking the Area Leader to follow up “to make sure [the franchisee] is running her store legally compliant [sic].” The Area Leader responded that he spoke with the franchisee “and told her that she needs to follow New York Labor laws on breaks . . . . [The franchisee] assures me that other employees will get proper breaks going forward.” Ex. 94 (DP00077749-51).

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<sup>44</sup> Melton was later sued by her employees for, inter alia, failure to pay required minimum wage and overtime. See Cano v. DPNY, Inc., 287 F.R.D. 251 (S.D.N.Y. 2012).

125. During the Relevant Period, Domino's also conducted "compensation surveys" of franchisees. Ex. 26 (Wigley Tr. 78:11 - 81:25). In one such survey in 2012, Domino's found that most surveyed franchisees claimed a tip credit, and those that did paid an average tip credit minimum wage of \$4.61 per hour, which was below the legally allowable tip credit minimum wage at the time. Ex. 95 (DP00174148-49). After additionally noting that franchise stores pay managers less than managers in other quick-service restaurants, and that turnover rates are higher, Domino's wrote among its "Conclusions," that franchisees should address the "gap" in management compensation, reduce turnover, consider paying employees who act as shift leaders a "split rate," and utilize tax credits like the Work Opportunity Tax Credit, a Federal tax credit available to employers who hire and retain veterans and individuals from other target groups with significant barriers to employment. Ex. 95 (DP00174172).<sup>45</sup>

126. Pursuant to the terms of the Franchise Agreement, Domino's is contractually authorized to place in default and terminate the franchises of franchisees who violate the terms of the agreement, including the requirement to comply with all applicable laws. See Ex. 18 (DP00000290-344) (Standard Franchise Agreement), §14.1 ("Bookkeeping and Recordkeeping"), §15.2 ("Compliance With Laws and Other Business Practices"), §§18.2.1, 18.2.2 ("Immediate Termination by DPF - Upon Written Notice" and "Termination by DPF - After Opportunity for Cure").

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<sup>45</sup> "Split rate" refers to paying one rate for delivery related work and one for work done inside the store. Ex. 25 (Rudd Tr. 229:12-17).

## **VI. DOMINO'S STATEMENTS ABOUT PULSE IN ITS FDD**

127. Before the offer and sale of a franchise to a franchisee prospect, New York's Franchise Sales Act, as well as federal law, requires a franchisor to provide a prospective franchisee with a detailed offering prospectus, its "Franchise Disclosure Document" or "FDD." Gen. Bus. L. § 683(8); see also 16 C.F.R. §436.2. Twenty-three separate disclosures must be contained in the FDD. See 13 N.Y.C.R.R. §200.2. These disclosure requirements apply not just to franchise offerings, agreements, and fees themselves, but to "all written or oral arrangements . . . in connection with" a franchising offer, "including, but not limited to . . . sales of goods or services . . . and all other arrangements in which the franchisor or subfranchisor has an interest." Gen. Bus. L. § 682.

128. Domino's offered no warnings or qualifications about PULSE in the FDD that Domino's must provide to its franchisees. Rather, Domino's has made these statements related to PULSE in its FDD and related documents:<sup>46</sup>

- In Item 11, Domino's represented that "PULSE includes the following functions: . . . Capability to interface with a payroll company or a commercial accounting package." Ex. 2 (2016 FDD, at 46) (emphasis added).
- Domino's represented that it would provide "operating assistance [that] will include . . . 'administrative, accounting, inventory control, and general operating procedures.'" Ex. 2 (2016 FDD, at 41) (emphasis added).
- In Paragraph 5.1 of Domino's PULSE Software License Agreement, Domino's represented that "Software as delivered by [Domino's] will perform in all material respects in accordance with the then current applicable user documentation delivered by [Domino's]" and that Domino's would "replace or correct the Software so that it will perform in substantial conformance with the applicable user documentation . . ." Ex. 2 (2016 FDD, Ex. M, ¶5.1) (emphasis added)
- In Attachment B to the PULSE Software License Agreement, paragraph 1.1.(b), Domino's also represented that it would "use reasonable efforts to correct any

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<sup>46</sup> The disclosures identified here are from the April 2016 FDD. They have not changed substantively from those made in earlier Domino's FDDs, such as the FDD dated July 2009. Compare Ex. 2 (excerpts from 2016 FDD) with Ex. 96 (excerpts from 2009 FDD).

Software error, and will provide to [Franchisee] any error corrections, enhancements and updates to the Software which are developed and published by [Domino's] and made generally available to other licensees of the Software at no additional cost. Error corrections will remedy any documented failure of the Software to perform in substantial conformance with the then-applicable user documentation." Ex. 2 (2016 FDD Ex. M, Att. B, ¶1.1(b)) (emphasis added).

- In the "applicable user documentation" that is distributed to all franchisees in connection with their purchase of a Domino's franchise, *i.e.*, the PULSE Management Reports Guide, Domino's identifies the Payroll Report as among the "frequently used reports" and states that typical uses include "viewing payroll information . . . [and] generating payroll information to give to your accountant or payroll service." Ex. 75 (PULSE Reports Guide at DP00075398).

129. Domino's FDD representations about PULSE contained several inaccuracies. The "accounting assistance" Domino's promised to render its franchisees (through the PULSE software) was fundamentally flawed; PULSE was unable "to perform in all material respects in accordance with the then current applicable user documentation"; and PULSE was incapable of providing a legitimate "interface" with a payroll service or accountant.

130. Moreover, despite its representations that it would correct all software errors, since as early as 2007, Domino's knew that PULSE's had flaws relating to how the software calculates employee earnings, and to how such earnings are reflected on PULSE Payroll Reports. See supra ¶¶98-113. However, Domino's did not alert all of its franchisees about problems or limitations of PULSE, and nowhere in its FDD and other documents provided to franchisees in connection with the purchase of a Domino's New York franchise did Domino's inform franchisees of the PULSE flaws, each of which results in an under-calculation of wages due. See supra ¶114.

131. The underpayment of franchisee labor facilitated by the PULSE flaws and the widespread labor law violations of which Domino's was aware also impacts the accuracy of Domino's financial disclosures concerning projected franchisee profitability in Item 19 of its



FDD. Domino's FDD disclosures at Item 19 show franchisee earnings projections, which are based on EBITDA calculations (earnings before interest, taxes, depreciation and amortization). Using selected franchisee profit and loss statements, Domino's EBITDA calculation in its FDD subtracts the "Total Variable Costs" and "Total Fixed Costs" of franchisees from their total earnings to project how much a franchisee can expect to earn before taking into account interest, taxes, depreciation and amortization. Total variable costs include franchisee labor costs and payroll taxes. See, e.g., Ex. 2 (2016 FDD Item 19, at 71-72). As described herein, the facts from this investigation show that a significant number of franchisees underpaid their employees during the Relevant Period. Since Domino's Item 19 projections rely on franchisees reported labor costs, Domino's Item 19 disclosures of projected franchisee profitability are likely misleading so long as the PULSE flaws are uncorrected and the unlawful underpayment of wages continue.

## **VII. DOMINO'S JOINT EMPLOYMENT OF WORKERS AT THE FRANCHISEE RESPONDENTS' STORES**

132. Domino's asserts its control over the employees and employee relations at its franchisee stores in various ways, including through enforcement of the terms of its Franchise Agreement, chiefly through PULSE and personnel in its Franchise Operations department, as well as other personnel from Domino's information technology and human resources departments. See supra ¶¶20-27. Domino's control is both direct and indirect over franchisee workers, as the facts developed by the OAG show that Domino's: (a) had the power to and, at times, exercised that power, to control key aspects of hiring, firing, and disciplining franchisee workers; (b) supervised and controlled workers' schedules and other conditions of employment at the franchisee stores, including by directly imposing its own anti-unionization preferences upon franchisees and their workers; (c) had the power to determine the rate and method of payment for franchisee workers, including, through PULSE, causing Labor Law violations and

underpayment of wages at stores owned by the Franchisee Respondents; and (d) maintained employment and time records of the franchisee workers.

**A. Domino's Power to Hire, Fire and Discipline Franchisee Workers**

**1. Hiring**

133. Domino's required a franchisee to hire managerial staff. Using the threat of franchise termination, Domino's Franchise Operations Director Mark Rudd pressured the Maestri Respondents to hire a supervisor to help manage their stores. According to Duane Webster, the supervisor who was ultimately hired, Domino's

had been pressuring [Maestri] to get a supervisor because they felt he was too hands-off in his company. They were unhappy with the inspection scores and they were unhappy with the personal visits that were made by different corporate people. So [Rudd] basically met with me and said . . . the people aren't doing things the way Domino's wants them done. You need to make them do things the right way. They said [Maestri's] stores are so substandard, that if they wanted to, they could take the stores away from him.

Ex. 78 (Webster Tr. 130:18 - 131:6).

134. In response to Domino's pressure, Maestri hired Webster as a supervisor. Rudd, the Franchise Operations Director, then met with Maestri and newly-hired Supervisor Webster to outline the specific job functions that the Domino's Director required of the supervisor. As Webster testified, Rudd told them "these are the things that I want Duane [Webster] to work on in your company." Ex. 78 (Webster Tr. 131:12-15).

135. Domino's also exercised control over hiring decisions regarding franchisees' non-managerial employees. For example, in fall 2013 Domino's Vice President of Franchise Operations Kimberly Ridge raised the possibility of Domino's selling several corporate-owned stores in Staten Island to a franchisee. The sale proceeded, and in the sales contract Domino's required the franchisee "to offer substantially similar jobs with substantially similar wages and

benefits in the same or similarly located stores to a substantial number of qualified persons employed in the Stores just prior to [the sale].” Ex. 16 (Domino’s-Khan Agreement, ¶XXVIII, at MSK000240). Or, as the purchasing franchisee described this aspect of the contract, “[w]e are not going to change anything at all” (Ex. 84 (Khan Tr. 96:8)), and he offered substantially all employees their prior positions and at the same wage. Ex. 84 (Khan Tr. 95:7 - 96:8, 97:19 - 98:12). This franchisee conducted no due diligence on existing employees prior to his purchase: he did not conduct any interviews and he ran none of the background checks or motor vehicle checks required by Domino’s. Instead the franchisee testified, “we took corporate’s judgment on that. They were running backgrounds and whatever needed to be done.” Ex. 84 (Khan Tr. 93:21-23). A Domino’s employee testifying about this sale noted that wholesale retention of employees was “common” in such sales from Domino’s to a franchisee. Ex. 17 (Gayden Tr. 124:15-25); see also Ex. 20 (Ridge Tr. 314:9-15).

136. Domino’s controls all sales of franchisee stores between franchisees. If a franchisee wants to sell, Domino’s must approve the sale, and will only approve the sale to another franchisee who is in “good standing” with Domino’s. Ex. 19 (Ridge Tr. 192:6 - 193:8). Among the factors Domino’s considers in whether to approve a sale is the supervisory structure the prospective buyer intends to use at the store. See, e.g., Ex. 21 (Cookston Aff. ¶15).

137. Domino’s also controls franchisee hiring practices, including those at the Franchisee Respondents, by mandating how and through what agencies franchisees may conduct required background checks. Domino’s requires that a criminal background check be run on any prospective franchisee employee at the start of employment and at every third anniversary thereafter; a candidate cannot be employed by a franchisee if a check reveals a conviction for a crime that Domino’s believes could, among other things, harm the Domino’s reputation or brand.

Ex. 24 (Manager's Guide, at DP00000593, §12, at 6). For franchisee delivery drivers, among other things, Domino's (i) requires franchisees to obtain a motor vehicle report for any prospective driver at the start of employment, and again every six months; (ii) restricts franchisee driver positions to individuals 18 or over; and (iii) prohibits the hiring of a driver with certain violations, e.g., more than two traffic tickets in the past two years or one at-fault accident in the past three years. Ex. 24 (MRG, at DP00000597, §12 at 10; see also Ex. 21 (Cookston Aff. ¶43).

138. Despite their supposed status as independent businesses, franchisees do not have the power to choose any vendor they want to run the Domino's-mandated background checks on their own prospective employees. Rather, Domino's specifies four credit reporting agencies ("Reporting Agencies") in its Manager's Guide that franchisees must use for this mandatory element of the hiring process (i.e., HireRight, Infomart, Kroll and Acxiom Information Services ("AISS"), now known as SterlingBackcheck). Ex. 24 (MRG, at DP00000593, §12 at 6); Ex. 21 (Cookston Aff. ¶43).

139. Franchisees have extremely limited power concerning the eligibility standards for the background check of a prospective employee. Domino's not only selects the four Reporting Agencies that provide background check services to franchisees, Domino's also sets the eligibility standards that prospective and current employees must meet to pass the background check. Domino's contracted with the Reporting Agencies to offer the same background check services to franchisees that the Reporting Agencies offered to Domino's. Under these agreements, the default adjudication guidelines the Reporting Agencies used to conduct checks for franchisees were the same as those they used for conducting checks for Domino's. See, e.g., Ex. 97 (HireRight Amendment #1 to Service Agreement, at HIRERIGHT 000032); Ex. 98 (Kroll adjudication guidelines, at KBA000001).

140. Domino's also controls the franchisees' ability to negotiate their own prices with Domino's-approved Reporting Agencies like HireRight. For example, Domino's specifically instructed HireRight not to allow individual franchisees to negotiate any prices lower than the supposedly preferred pricing Domino's had negotiated for franchisees. Ex. 99 (HIRERIGHT 002612).

141. Domino's further controls the level of service franchisees must obtain from Domino's-approved Reporting Agencies like HireRight, including a requirement that franchisees obtain a service called "adjudication" as a part of their background check packages. Early in its communications with Domino's, a HireRight representative wrote that "franchisees may not want the adjudication in their packages[,] which is HireRight passing/failing the employee based on Domino's guidelines and standards. Without this service, the franchise[e] would be able to make their own decision whether to hire or not based on the results of the report." Ex. 100 (HIRERIGHT 002981). Domino's ultimately mandated that all franchisees obtain the adjudication service as a part of their package from approved Reporting Agencies. Ex. 101 (HIRERIGHT 002985) ("The franchisees are going to be required to have HireRight adjudicate. It is not an option.").

142. With respect to Infomart, the Reporting Agency used by Franchisee Respondents Maestri and Ahmed, Domino's was actively involved in creating the adjudication matrix that InfoMart ultimately applied to franchisee applicants and employees. Domino's provided its corporate hiring criteria to InfoMart and then, in a series of detailed emails between InfoMart staff and Domino's legal and human resources personnel, Domino's approved various revisions to the criteria in the adjudication matrix for franchisees, resulting in hiring criteria that identified specific occurrences triggering "for your review" grades or "does not meet criteria" grades that

would be used to deny hiring or continued employment. See, e.g., Ex. 102

(INFOMART000364-366, at 365) (“Does Not Meet Criteria” includes, e.g., “Any felony or misdemeanor conviction in the past 7 years” related to a number of types of crimes, three traffic tickets in the previous two years or two or more cited accidents in the previous three years).

143. Because of Domino’s heavy involvement in the background check screening process for franchisees, franchisees have little or no knowledge of or input into what Domino’s corporate adjudication guidelines mean or what standards are used to evaluate their current and prospective employees. Maestri Respondents’ supervisor Duane Webster testified, “We’re not even told why they fail. The company just sends us a report saying meets Domino’s standards or does not meet and from there we can make the interview, interview them and talk to them. If they don’t meet obviously, there’s no need to go forward. That’s just Infomart and I believe there’s another company that does that for us and they just say yes or no.” Ex. 78 (Webster Tr. 186:10-19).

144. Other franchisees across New York State, including several in Respondent Denman’s upstate area and Respondent Maestri’s area of New York City, similarly lack knowledge about the substance of the background check process. Several stated that they know nothing about the standards that are used to perform these checks and to determine a worker’s eligibility for employment with a franchisee. Ex. 22 (Lee Aff. ¶17); Ex. 23 (Gaisser Aff. ¶21); Ex. 21 (Cookston Aff. ¶43). Despite lacking an understanding of how or by what standard adjudication is occurring at Domino’s-approved Reporting Agencies, at least one franchisee observed he had decided not to hire a prospective employee simply because that individual’s check came back as “not meeting company standards.” Ex. 23 (Gaisser Aff. ¶21). All of these franchisees are aware that Domino’s receives information from its approved Reporting Agencies

concerning which franchisees have — and have not — conducted criminal background checks for particular periods of time. Ex. 22 (Lee Aff. ¶17); Ex. 23 (Gaisser Aff. ¶21); Ex. 21 (Cookston Aff. ¶43).

145. The Reporting Agencies do not operate as independent agents on behalf of the franchisees; Domino's imposes certain requirements upon the Reporting Agencies to ensure franchisee compliance. For example, Domino's regularly monitored franchisee compliance with its background check and motor vehicle requirements by soliciting information directly from the Reporting Agencies. See, e.g., Ex. 103 (INFOMART000314). Domino's required InfoMart to send it copies of contracts franchisees signed when they elected InfoMart as their Reporting Agency, followed by regular reports containing information as to how many checks each franchisee requested from InfoMart. Ex. 104 (INFOMART000351-352); Ex. 105 (INFOMART000318-330). Such reports enabled Domino's to identify franchisee accounts where there was little or no activity, possibly indicating franchisees that were not running sufficient background checks on employees. Ex. 105 (INFOMART000318); see also Ex. 23 (Gaisser Aff. ¶21) (describing how Domino's received information from Reporting Agency SterlingBackcheck (formerly AISS) about when Gaisser ran background checks and Edward DuPont, the Area Leader from Domino's Franchise Operations department, called Gaisser to ask why he was not seeing any background checks). In addition, Domino's enlisted the Reporting Agencies to ensure that potentially non-compliant franchisees came into full compliance. For example, Domino's sent InfoMart a list of each franchisee's active employees and then required that InfoMart provide written certification to Domino's that checks had been run on each employee. Ex. 103 (INFOMART000314).

146. Domino's supervision of franchisee background and motor vehicle checks affects

employees' ability to work at the franchisees stores. In addition to Domino's control over the vendors and standards used when franchisees request background checks, the results of these checks — as well as motor vehicle, and driver's license and insurance information — are stored in the PULSE computer system, to which Domino's has constant, real time access. PULSE is configured to collect and monitor the status of a delivery driver's license and auto insurance. If PULSE contains information suggesting a delivery driver's license has expired or auto insurance has lapsed, that franchisee employee cannot log in to PULSE and consequently cannot work his or her shift at the franchisee store until updated information has been entered into PULSE. See, e.g., Ex. 27 (Pederson Tr. at 209:3-7, 210:6-10, 211:20-24); Ex. 3 (Maestri Tr. 199:15 - 200:11); Ex. 78 (Webster Tr. 227:6-13); see also Ex. 22 (Lee Aff. ¶8); Ex. 23 (Gaisser Aff. ¶12); Ex. 21 (Cookston Aff. ¶16). Also, from its headquarters in Ann Arbor, Domino's audits franchisees. One element of such an audit is confirmation that all franchisee employees have current background checks on file, run by a Domino's-approved vendor. Ex. 19 (Ridge Tr. 186:10-187:6). If a franchisee does not have current checks on file, or did not use a Domino's-approved vendor, the franchisee can be placed in default of the Franchise Agreement. Ex. 19 (Ridge Tr. 211:10-16).

## **2. Firing and Discipline**

147. Domino's Franchise Agreement variously and repeatedly disclaims any employment relationship between Domino's and the workers at its franchisees' stores. These references can be found at the following sections of the Franchise Agreement: Ex. 18 (SFA, §11.1) ("Advice and Guidance . . . . You acknowledge and understand that it is not our responsibility or duty to operate the Store and we do not have the legal right to direct your employees in the operation of the Store. Those functions remain your sole responsibility and



duty.”); Ex. 18 (SFA, §15.6) (“Franchisee Must Directly Supervise Store . . . . You shall be 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.”); Ex. 18 (SFA, §22.8) (“Independent Contractors: The parties to this Agreement are independent contractors and no training, assistance, or supervision which we may give or offer to you shall be deemed to negate such independence or create a legal duty on our part . . . . The parties further acknowledge and agree the relationship created by this Agreement and the relationship between us is not a fiduciary relationship nor one of principal and agent. Furthermore, neither we nor our affiliates have any relationship with your employees and have no rights, duties, or responsibilities with regard to their employment by you.”).

148. Notwithstanding these numerous disclaimers in its Franchise Agreement, the manner in which Domino’s invokes the Franchise Agreement in its oversight of the Franchisee Respondents — and other franchisees supervised by the same Domino’s Franchise Operations Officials in New York State — exceeds the scope of and, at times, contradicts these disclaimers in the Franchise Agreement. In practice, Domino’s reserves for itself the authority to compel the termination and discipline of workers at its franchisees, and whenever Domino’s has deemed it necessary, it has exercised this authority. Indeed, Domino’s has done so repeatedly with several franchisees in different regions of New York State.

149. Franchisee Respondent Denman testified that Domino’s forced him to terminate an employee or his franchise would have been terminated by Domino’s. For a year and a half, Denman had employed a “very good employee, worked hard, come [sic] into work extra if somebody called in sick.” The employee had a criminal conviction and was hired before

Domino's current background check requirements were in place. Denman chose to retain the employee. Ex. 14 (Denman Tr. 45:8 - 46:3).

150. When Domino's learned about the employee's criminal record, however, the company scheduled an in-person meeting between Denman, Edward DuPont, the Area Leader from Domino's Franchise Operations department, and a senior Domino's security official. Ex. 14 (Denman Tr. 47:22 - 48:10). Denman testified that DuPont "straight out told me they would terminate my contract if I did not terminate this employee. But they would not put it in writing." Ex. 14 (Denman Tr. 46:23-25, 49:4-6). In response to this threat from Domino's — that would mean that "everybody would lose their jobs" at Denman's two store locations — Denman terminated the employee. Ex. 14 (Denman Tr. 48:14-15). He did this, as he testified, because "I was forced to . . . [Domino's] gave me a time frame, and they followed up and they said, 'Oh, you made the right choice.' What other choice was there?" Ex. 14 (Denman Tr. 47:17-21); see also Ex. 106 (DENMAN000011) (Aug. 22, 2011 email from Domino's Julie Wigley, summarizing as follows: "Matt [Denman] was contacted by myself, Ed Dupont and Tom Curtis on numerous occasions to discuss this issue both via phone and email. Matt was also visited by Ed Dupont and Van Carney on 8/17 to discuss. We officially heard that Matt term[inated] the [employee] in question on 8/19.").

151. Respondent Maestri also testified that when Domino's did one of its regular, on-site inspections ("Evaluations"), and the inspectors found alcohol and cocaine packets in back of one of his stores, Domino's "called me up, [told me] you should go down to your store, I live 45 miles away and I went down there and fired everyone." Ex. 3 (Maestri Tr. 235:6-12). Nonetheless, barely two days later and despite his action, Maestri received a default notice. Ex. 107 (DP00004965). Domino's issued a notice of default because of finding the drugs, and they

“asked me to post something in the store . . . about no alcohol, drugs, and I did that . . . and they came back and visited me and took me out of default.” Ex. 3 (Maestri Tr. 237:8-14). Another franchisee was similarly put in default when an Evaluation found alcohol stored in a cooler. Ex. 108 (DP00004919).

152. Domino’s also instructs franchisees on the need to, and how to, discipline workers short of termination. For example, Domino’s instructed the Maestri Respondents to discipline an employee. In response to a complaint about a manager at one of the Maestri Respondents’ stores using foul language, Franchise Operations Director Mark Rudd wrote to Maestri informing him, “[t]his has got to stop. Please copy me on closing notes and hold someone accountable.” Ex. 109 (DP00079863-864).

153. Franchise Operations Director Rudd similarly issued instructions to other New York franchisees about their employees following a call to Domino’s Customer Care hotline. Domino’s operates a Customer Care Center for both customers and employees of franchisees to report complaints directly to the franchisor. These complaints sometimes are related to employees at a franchisee store. Ex. 26 (Wigley Tr. 143:3 - 144:10); Ex. 110 (DP00104140-142). As part of this Center, Domino’s maintains a hotline through which customers and employees can report complaints about Domino’s either by phone or email, regardless of whether the store is corporate- or franchisee-owned. See, e.g., Ex. 3 (Maestri Tr. 182:15 - 183:16). Upon receiving a complaint through its hotline, Domino’s sends the complaint to the relevant franchisee and gives the franchisee five days to resolve and close the complaint. Ex. 25 (Rudd Tr. 94:24 - 95:7); Ex. 3 (Maestri Tr. 186:10-22); Ex. 84 (Khan Tr. 228:7-10).

154. Domino’s not only sets a short time frame for franchisees to resolve customer complaints, Domino’s Franchise Operations personnel also monitor the adequacy of franchisee

responses to complaints. Domino's uses the adequacy of franchisee response to customer and employee complaints as one basis for placing franchisees in default. See, e.g., Ex. 111 (DP00005045); Ex. 112 (DP00004777). In one instance arising from this Customer Care hotline, later dealt with by Franchise Operations Director Rudd, a franchisee employee complained to the Domino's hotline that the manager at the franchisee store withheld compensation and wrongfully terminated the employee. In response, Rudd spoke to both the franchisee and the employee. He then sent an email to Domino's Human Resources department, copying the franchisee and stating that "it appears that some training for the manager is in order" and that he "advised the franchisee to proceed accordingly." Ex. 113 (DP00079988).

155. In another instance involving Franchise Operations Director Rudd, an employee at a franchisee complained to Domino's Customer Care that the franchisee's manager was allowing his family members to log in and work off the clock. Domino's HR department considered the franchisee's initial response to the complaint inadequate — stating that the franchisee "did not make much of an effort to correct or address the concerns" — and then had a senior HR official contact Rudd "to offer guidance on how to discuss" the situation with the franchisee. Ex. 114 (DP00079208 - 209) (March 6, 2011 email). Following this conversation with the senior HR official, Rudd wrote the franchisee with detailed instructions as to how to investigate the complaint properly, stating "I would advise you to have a meeting with [the manager] in person the next time you are in town and to have written documentation of those conversations outlining what steps you are taking to insure [sic] that [the manager] is acting appropriately. It would be good to have [your supervisors] sit in on that meeting." Ex. 114 (DP00079208) (March 12, 2011 email).

156. Finally, Domino's also forced a Manhattan-based franchisee, Robert Cookston, to discipline an employee despite his view of the unfairness of the actions Domino's required him to take. Cookston was supervised during the Relevant Period by the same Area Leader, Robert Machin, who supervised the Maestri Respondents. In October 2009, Domino's asked Cookston, who had a franchise store located in midtown Manhattan, to deliver food to Fox Business News on October 13, 2009, as part of an early morning live interview with Domino's Chairman and Chief Executive Officer, David Brandon. Ex. 21 (Cookston Aff. ¶56); Ex. 115 (DP00173791-92) (Oct. 14, 2009 email from Brandon). After the broadcast Domino's took issue with Cookston about the quality of the food that was delivered ("the pizzas had large bubbles"); Cookston was immediately pressured by Brandon and Vice President of Franchise Operations, Kimberly Ridge, to discipline the employees responsible for the Domino's food that was delivered. Ex. 21 (Cookston Aff. ¶56) (describing Brandon demanding action instead of a mere apology; Ridge demanding something "had to be done"). Cookston understood that Domino's was directing him to discipline his employees for the delivery to Fox. Ex. 21 (Cookston Aff. ¶¶57-58). Cookston notified Domino's, emailing Brandon directly on October 15, of his action plan to suspend the manager on duty at the time for two weeks without pay, issuing a warning to the general manager, and setting up training at the store. Ex. 116 (DP00173775-77) (Oct. 15, 2009 email). Notwithstanding these efforts, within a week, Cookston was placed in default of the Franchise Agreement based solely on this "incident," in a default letter dated October 20, 2009. This default letter put him in jeopardy of losing his franchise — though he was given the opportunity to cure if he, among other things, provided written proof of any disciplinary action that he took and training that he gave to the employees involved in the "incident." Ex. 117 (DP00006645). Cookston took action by suspending the employee for a week, and the employee

subsequently quit, though Cookston “felt it was unfair to discipline the employee . . . but I felt that I had no choice, that Domino’s was directing me to discipline him.” Ex. 21 (Cookston Aff. ¶59). And though Cookston acted promptly, he was not “cured” of his alleged default until January 15, 2010. Ex. 118 (DP00173817).

157. When asked about the discipline and other employment-related instructions he provided to the Maestri Respondents and other franchisees about their employees, Franchise Operations Director Rudd tried to characterize each case as a “suggestion, not a request,” explaining that the difference between a suggestion and a request from Domino’s was “manners,” i.e., saying “please” as opposed to “go do.” Ex. 25 (Rudd Tr. 251:9-18).

### **B. Domino’s Supervision and Control of Scheduling and Other Conditions of Employment at the Franchisee Respondents’ Stores**

158. Domino’s exercises control over the employees of its franchisees, including of the Franchisee Respondents, by retaining the authority to control, or actually exercising control, over scheduling and other conditions of employment.

#### **1. Scheduling**

159. Section 12 of the Manager’s Guide sets mandatory minimum scheduling and staffing rules for all franchise stores which, effectively, determine key aspects of scheduling of those stores’ employees. When Ridge testified in January 2015, the stated “minimum standard store hours” were 11:00 a.m. to 12:00 midnight Sunday through Thursday and 11:00 a.m. to 1:00 a.m. Friday and Saturday, with stores required to be open every day of the year except Thanksgiving, Christmas Eve and Christmas Day.<sup>47</sup> On May 29, 2014, Franchise Operations

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<sup>47</sup> Ex. 24 (DP00000633); see also Ex. 19 (Ridge Tr. 254:11 - 255:1). These hours were required of franchisees beginning in 2008, as shown by numerous Domino’s letters notifying franchisees that unless they promptly complied with “the new standard, effective August 11, 2008,” Domino’s “may exercise any rights and remedies available to it, including its right to terminate the Franchise Agreement.” See, e.g., Ex. 119 (DP00004337) and Ex.

Director Rudd testified that Domino's had "recently changed the standard to open at 10:30" a.m. and for a franchisee to continue opening at 11:00 a.m. "would be a violation of the standards." Ex. 25 (Rudd Tr. 91:11 - 92:5).<sup>48</sup> During the required hours, stores must be open for business and fully functioning; the "make line"<sup>49</sup> must be stocked and operational"; and "Orders must be taken completely through close." Ex. 24 (MRG, at DP00000604, §12 at 17).<sup>50</sup> Mandatory minimum staffing requirements "during all store hours" include, in addition to a managerial employee, an employee who meets "driving/delivery standards and is able to make deliveries" and a second employee to act as "primary telephone person and/or pizza maker." Ex. 24 (MRG, at DP00000629, §12 at 42); see also Ex. 19 (Ridge Tr. 253:1-21). Franchisees can deviate from the Manager's Guide standards including scheduling standards only in "isolated circumstances . . . where strict compliance with the standards may not be practical or even reasonably possible" and after requesting and obtaining a written variance from Domino's. Ex. 24 (Manager's Guide §12, at DP00000589). Ridge testified, for example, that if a local ordinance prohibits operating a store after 11:00 p.m., a franchisee "will submit a variance" with "documented proof" of the ordinance and Domino's will then approve pre-midnight closings. Ex. 19 (Ridge Tr. 97:12 - 98:5). Thus, Ridge's testimony indicates that a specific Domino's-approved variance is required

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120 (DP00004367) (August 22, 2008 and September 19, 2008 letters to (respectively) franchisee stores 3672 and 3429).

<sup>48</sup> On occasion, Domino's has required franchisees to schedule employees earlier than Section 12 requires. As explained in one Manhattan franchisee's affidavit from whom Domino's orders "special deliveries for media outlets including the Today Show . . . [t]his often requires me to direct employees to perform deliveries early in the morning, before their shifts would normally begin, and when my store would otherwise be closed. I feel that I cannot refuse these orders . . . ." Ex. 21 (Cookston Aff. ¶61).

<sup>49</sup> The "make line" is Domino's term for "where employees prepare pizzas." Ex. 21 (Cookston Aff. ¶16).

<sup>50</sup> As Ridge explained in her testimony: "The make line is where the product is held under refrigeration, so they need to . . . not clear up until the time that they close," and "until 12 and 1:00, which are our standard hours, they must operate their store," including filling and delivering any orders placed at closing time. Ex. 19 (Ridge Tr. 223:5 - 224:21).

to vary Domino's mandatory minimum scheduling even in such unusual and compelling circumstances.

160. Testimony taken by the OAG from franchisees, including the Franchisee Respondents, confirms both that Domino's mandates franchisee store scheduling and rarely grants variances allowing scheduling changes. For example, Respondent Denman testified that he "fought tooth and nail" for approval of a variance to open on weekdays at 4:00 p.m. rather than 11:00 a.m. since his stores were "a dinner business, predominantly . . . it is a waste of labor hours," but "was told straight out they would not grant a variance to close for lunches, unless you could prove that there was no sales at all." Ex. 14 (Denman Tr. 109:16 - 110:14).<sup>51</sup> Franchisee Gaisser similarly stated that although his stores "have low volumes that do not support lunch business," he "was told I had to remain open for lunch" and understood that if he did not, "I could be placed in default." Ex. 23 (Gaisser Aff. ¶29). Denman testified that if he had closed on a day other than the two holidays (Thanksgiving and Christmas) permitted in the Manager's Guide, "I would be in default of my contract, and they could proceed as far as termination." Ex. 14 (Denman Tr. 110:15-22).<sup>52</sup> In March 2013, Respondent Maestri received an email from Domino's Vice President Ridge directed to "Franchise Partners and Teams" stating "a friendly reminder," that: "**Stores [are] required to be open 11 am till 12 am on Easter Sunday. Minimum Standard Store Hours per the [Franchise Agreement].**" Ex. 121 (UP0000001) (emphasis in original). Ridge confirmed in testimony that failure to open for delivery on a day

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<sup>51</sup> Denman testified that "all variances were shot down after a certain period," with requests approved only if Domino's was "doing a test market on a product in a region, and then there was a variance granted for that during the test market." Ex. 14 (Denman Tr. 102:11-20).

<sup>52</sup> When an out-of-state Domino's franchisee he knew closed on July 4<sup>th</sup>, Denman testified, that franchisee "got called up" and told, "You better get down there and open it, or they are going to terminate your contract. He went down, he opened it . . . because he was told to." Ex. 14 (Denman Tr. 111:13 - 112:9). Franchisee Robert Cookston recalled that when he accompanied Area Leader Machin on a visit to another franchisee on the day of Super Bowl 2012, Machin called the franchisee "to find out why the door was locked." Ex. 21 (Cookston Aff. ¶42).



other than Thanksgiving, Christmas, or Christmas Eve could be a basis to find the franchisee in default of the Franchise Agreement. Ex. 19 (Ridge Tr. 255:3-7). She testified that franchisees seeking an hours variance must “present documentation as to why they want[] to open up later. . . . [T]hey have to present a business case,” she testified. Apart from one franchisee in Wheeling, West Virginia, who was allowed to open later than 11 a.m., “several years ago,” she could remember no other requests for such variances. She testified that “Domino’s has the ultimate authority to grant or deny a request to open later.” Ex. 19 (Ridge Tr. 225:3 - 227:19).

161. Domino’s personnel have repeatedly provided written instructions to franchisees, including the Franchisee Respondents, concerning employee scheduling and staffing levels. For example, in a July 20, 2011 email with the subject line “How to schedule,” then-Area Leader Rudd instructed all franchisees in his area, including Respondents Ahmed and Maestri, to: (a) adjust employee scheduling each week by reviewing schedules of days where there was 100% on-time delivery, comparing those days with a review of the daily PULSE reports to see where late deliveries occur, and ensure the stores are making the “necessary adjustments” in the next week’s schedules based on such a review; (b) “[c]ross train[],” that is, train delivery employees to prepare pizzas to make it possible to schedule “[m]ore people on the road and less people inside”; (c) schedule enough delivery staff to “eliminate triples”<sup>53</sup>; and (d) schedule employees in “15 minute increments” since focusing on “when people are going home as well as when they are coming in . . . is the biggest opportunity to save labor.” Ex. 122 (DP00073197-198); Ex. 25 (Rudd Tr. 85:9-23, 86:19 - 88:6). In an October 28, 2010 email, Area Leader DuPont instructed two franchisees that despite their general managers’ belief that “they can’t afford to schedule” employees for marketing, “the team at the stores must be involved,” two

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<sup>53</sup> A “triple,” in Domino’s parlance, is “[t]hree deliveries that go out with one delivery expert,” a practice “discouraged” since “typically, that third pizza is very old when it gets to the customer.” Ex. 25 (Rudd Tr. 83:14-24).

marketing activities “every week . . . need to be on the schedule,” and “you must schedule more team members to accomplish this.” Ex. 123 (DP00072456). As another franchisee recalled, Domino’s both “expects me to schedule an ‘ideal’ number of employees at any one time, as few as possible to meet the customer demand,” and “has told me that I have received a notice of default for . . . failing to schedule enough personnel to handle customer orders.” Ex. 51 (Sharma Aff. ¶¶29, 37).

## **2. Supervision and Control of Working Conditions**

162. Domino’s supervision and control of other conditions of employment at the Franchisee Respondents’ stores is demonstrated in the following ways: (a) Domino’s sets various employee standards and enforces these standards through training and in-person inspections throughout the year; (b) Domino’s exerts supervisory control through on-site visits and instructions provided by Domino’s Franchise Operations personnel; (c) Domino’s monitors employee performance via PULSE; (d) Domino’s promotes and implements an anti-union management policy; and (e) Domino’s directly involves itself with customer and employee complaints at its franchise stores.

### ***a. Domino’s Enforcement of Standards and Training***

163. Domino’s requires franchisees to comply with “company practices, policies, and standards for stores” listed in the Manager’s Guide, including Section 12 (“Operations Standards”). See Ex. 124 (DP00008065-8066) (excerpt from 2008 Manager’s Guide).<sup>54</sup> Section

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<sup>54</sup> The 2008 version of the Manager’s Guide stated that, as “Used by Franchisees,” it will “provide [franchisees] with company practices, policies, and standards for stores” and that “Franchisees are required to adhere to all Standards in operating their stores (see sections on PRODUCT, STANDARDS, and IMAGE AND IDENTITY).” Ex. 124 (DP00008065-066). Those three sections were, respectively, Sections 2, 12 and 15. The Manager’s Guide also states: “Information contained in other sections is presented to franchisees for informational purposes only. . . . Further, franchisees are solely responsible for the terms and conditions of employment applicable to their team members.” Id. In a June 24, 2011 email, Domino’s Vice President Ridge directed Area Leaders to communicate that “Domino’s Pizza Standards have been updated, effective June 22, 2011. . . . All enforceable standards from every Manager’s Reference Guide section has [sic] been combined . . . .” Ex. 125 (DP00043437-438). The June

12 of the Manager’s Guide claims that because standards “were developed through the joint effort of representatives of Domino’s Pizza LLC, as Master Servicer[,] and franchisees,” they “are not imposed upon franchisees, nor should they be construed as requirements of Domino’s Pizza LLC, as Master Servicer.”<sup>55</sup> Yet despite this attempt by Domino’s to disclaim that it is imposing these standards upon its franchisees, Section 12 goes on to say that “all stores must comply with all standards.” Ex. 24 (DP00000589). Section 12 further states that only in “isolated circumstances . . . where strict compliance with the standards may not be practical or even reasonably possible,” franchisees must request “a variance from complying with a standard or standards under specific, limited circumstances”; such requests “can only be approved in writing by Domino’s”; and “[i]f a variance is granted, the written approval must be filed in and maintained in the Manager’s Reference Guide in each store to which the variance applies.” Id.; see also Ex. 24 (DP00000629) and Ex. 19 (Ridge Tr. 98:25 - 99:8; 252:8-20). Absent Domino’s approval, a franchisee cannot opt out of a standard. Ex. 19 (Ridge Tr. 208:19-22). Ridge’s testimony confirmed that compliance with Section 12 is “required of franchisees”: she testified that “to insure that Domino’s franchisees follow these standards, Domino’s conducts various inspections and the like” and that “if a franchisee fails to follow any of these rules or procedures, that could lead to a default” and potentially termination or sale of the franchise. Ex. 19 (Ridge Tr. 205:15 - 206:11). As already discussed, the Franchise Agreement itself specifically states it is a Domino’s requirement that franchisees operate their stores “in full compliance with all applicable laws, ordinances and regulations.” Ex. 18 (DP00000313). Ridge’s testimony

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2011 Section 12 indicates that standards previously in other sections have been combined. Ex. 24 (DP00000589). At the time Ridge testified in January 2014 before the OAG, she testified that the 2011 revision of the Operating Standards was the current version. Ex. 19 (Ridge Tr. 203:15 - 204:11).

<sup>55</sup> Ex. 24 (DP00000589). Ridge claimed that franchisees are involved in developing the standards to the extent that Domino’s selects certain franchisees to serve on an advisory board “that review[s] the standards.” However, franchisees do not participate in choosing members of this advisory review board. Ex. 19 (Ridge Tr. 206:19 - 208:18).

confirmed that “[a]ny illegal conduct is grounds for immediate termination,” and “[w]e would consider a possibility of default” if a franchisee violates an employment law. Ex. 19 (Ridge Tr. 197:3-5); Ex. 20 (Ridge Tr. 338:7-12).

164. Section 12 of the Manager’s Guide sets forth exacting requirements for the attire, appearance, grooming and conduct of employees at franchise stores, including those of the Franchisee Respondents. These attire/ appearance/ grooming requirements go far beyond detailed requirements for employee uniforms. Ex. 24 (DP00000668-673). For example: “[d]aily shaving is a requirement” and facial hair may not exceed “one (1) inch (2.5 cm)”; earrings are limited to two small stud or hoop earrings per ear; and “[t]attoos must not be on the face, neck, or hands” and employees “should make every reasonable effort to cover” them with pants or a long sleeve undershirt, except “for traditional military affiliation tattoos that are non-offensive in nature.” Ex. 24 (DP00000673). Besides being required to wear a “[f]ull uniform,” employees are limited to Domino’s-approved clothing that is not necessarily even visible, e.g., black or brown belts with “no decorative buckles,” and “[s]ocks or hose.” Any visible undershirt “must be white, khaki, red, black, royal blue or navy in color, knit-type structure, with no visible print or decorations.” Ex. 24 (DP00000668-670). The standards also require that before performing any job duties, all franchisee employees must complete specific Domino’s training lessons. Ex. 24 (DP00000635). The standards also regulate franchisee employees’ conduct: for example, drivers are told they must “NOT leave the store with more than a total of \$20, or the international equivalent, including personal and store money” (Ex. 24 (DP00000595); see also Ex. 24 (DP00000594)); most employees are permitted to wear only “inexpensive watches;”<sup>56</sup> employees “are not to smoke in the store or while in uniform” (Ex. 24 (DP00000672)); and radar detectors

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<sup>56</sup> This applies to “All team members who deliver product” (Ex. 24 (DP00000670)) and “Nonfood preparation team members” (Ex. 24 (DP00000672)); watches for “Food preparation team members” are not permitted at all.

“are not permitted in any vehicle used while in the scope of employment.” Ex. 24 (DP00000598).<sup>57</sup>

165. With respect to training, Domino’s also issues mandatory training materials to its franchisees. Domino’s authored a training module known as “Book One” and, just as in corporate-owned stores, “[t]he franchisees must train their employees on the book one materials” in order to begin working at a Domino’s store. Ex. 20 (Ridge Tr. 291:3-10). The Book One materials are made available to franchisees via a Domino’s internal website. See, e.g., Ex. 21 (Cookston Aff. ¶¶27-28). While franchisees seemingly are allowed to seek Domino’s approval to use training materials not authored by Domino’s (see Ex. 24 (DP00000635) (“Training ¶B”)), Domino’s Vice President for Franchise Operations testified that she did not know of a single franchisee in her entire East Coast region that used anything other than the Domino’s-authored training materials. See, e.g., Ex. 19 (Ridge Tr. 272:4-13). Indeed, the Franchisee Respondents and the other Settling Franchisees require their supervisors, managers and employees to use the Domino’s training materials and attend Domino’s training presentations. See Ex. 14 (Denman Tr. 72:4 - 74:5); Ex. 11 (Ahmed Tr. 64:21 - 65:22); Ex. 78 (Webster Tr. 156:9 - 164:6); Ex. 21 (Cookston Aff. ¶¶28, 31-34); Ex. 51 (Sharma Aff. ¶34).

166. The Domino’s-authored training materials cover personnel matters. For example, there are specific training materials on how to use the “labor scheduler” function in PULSE to lower labor expenses (Ex. 126 (DP00012288-345) (“Lower Labor & Better Service With PULSE Labor Tools”)); how to avoid unions (Ex. 127 (DP00101125-167)); and how to “cross-train” franchisee employees so that employees who perform tipped work (e.g., deliveries) can perform

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<sup>57</sup> Domino’s Vice President Ridge confirmed in testimony that this standard applies to all franchisee-owned stores’ delivery drivers’ cars, while stating that she has “no idea why” other than that “[t]here are some states that it is not lawful to have a radar detector.” Ex. 19 (Ridge Tr. 220:10 - 221:4).

in-store non-tipped tasks (e.g., pizza making) between deliveries. See Ex. 20 (Ridge Tr. 296:16 - 299:22); Ex. 85 (DP000007688). A number of the Settling Franchisees, as well as Franchisee Respondents Maestri, Denman, and Ahmed, have adopted these personnel practices, including cross-training employees and assigning them to both delivery and inside work. See, e.g., Ex. 14 Denman Tr. 82:5-15); Ex. 3 (Maestri Tr. 134:22 - 136:2); Ex. 21 (Cookston Aff. ¶28); Ex. 51 (Sharma Aff. ¶19). As discussed above, the status of a franchisee employee's work — tipped versus non-tipped — and the proportions of such work within an employee's shift have consequences for compensation and payroll under the Labor Law.

167. Domino's enforces these standards upon the Franchisee Respondents through Domino's Area Leaders. For example, as mentioned above, Vice President Ridge's June 24, 2011 email to Area Leaders called it "IMPERATIVE" to "communicate[], follow[] up and remind[]" franchisees and their general managers of "Standards changes," including that "Hoop earrings are allowed, up to two earrings per ear, 3/4" diameter maximum," and declaring, as a "reminder," that "any deviation from these standards must have a variance initiated by the Area Leader and signed off by the Regional Vice President. It is then sent to Ann Arbor for review by the Standards Committee." Ex. 125 (DP00043437-440) (emphasis in original). Franchise Operations Director Rudd testified that such communications were sent to Area Leaders "from time to time when standards change." Ex. 25 (Rudd Tr. 96:5 - 97:13). Vice President Ridge — Domino's top Franchise Operations official for New York State, designated by Domino's during the OAG's investigation to testify with regard to franchise requirements (Ex. 19 (Ridge Tr. 9:4-9)) — testified that she does not know why, for example, Domino's restricts the number of earrings that a franchise store employee can wear, or whether it would hurt the Domino's brand if franchise store employees wore additional earrings. Ex. 19 (Ridge Tr. 279:7-14).

168. Domino's also enforces these standards through its on-site Evaluations inspections. If an Evaluation reveals conduct that Domino's determines "adversely affects the reputation of the Store or the Domino's system" or if the Evaluations result in three or more Notices of Default stemming from non-compliance with standards within any twelve-month period, Domino's can terminate a store owner's franchise.<sup>58</sup> During the OAG's investigation, these Evaluations were described in generally consistent ways in testimony: by Domino's Franchise Operations Department and other executives;<sup>59</sup> by the Franchisee Respondents;<sup>60</sup> and by a Settling Franchisee.<sup>61</sup> Three or four times each year, a Domino's Evaluation inspector makes an unannounced visit to each store, awarding it a score from 0 to 100 for compliance with Domino's standards. As summarized in one franchisee's affidavit, the inspector "spends about an hour and a half examining operations at the store. He or she looks at food supplies, food preparation and cooking procedures, the amount of money carried by delivery drivers . . . drivers' appearance and grooming, cleanliness of delivery drivers' vehicles, and a range of other aspects of operations." Ex. 23 (Gaisser Aff. ¶24). As stated in another franchisee's affidavit, inspectors arrive

with a stopwatch, and an employee must greet the [Evaluation] inspector within nine seconds. The inspector also evaluates the appearance of my stores' employees, including whether the employees' clothing looks clean and new, whether they are clean shaven, have no visible tattoos and only wear stud earrings, no more than two per ear. The OER [Evaluation] inspector also pretends to be an unhappy customer with the drivers to

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<sup>58</sup> As stated earlier, the Franchise Agreement grants Domino's the right to terminate a franchise for among other reasons, "any conduct which, in [Domino's] judgment, adversely affects the reputation of the Store or the Domino's System," or failure "on three (3) or more occasions during any twelve (12) month period to comply with any one or more provisions of any franchise agreement... whether or not such failure to comply is corrected." Ex. 18 (DP00000321 - 322); Ex. 19 (Ridge Tr. 194:18-25).

<sup>59</sup> See, e.g., Ex. 19 (Ridge Tr. 45:11 - 50:2, 51:13-19, 111:7-8); Ex. 20 (Ridge Tr. 346:15-20, 353:18 - 354:14, 357:24 - 358:9); Ex. 25 (Rudd Tr. 33:3 - 37:16, 108:2 - 109:2); Ex. 17 (Gayden Tr. 116:20 - 117:10, 118:6-20).

<sup>60</sup> See, e.g., Ex. 11 (Ahmed Tr. 80:24 - 86:9); Ex. 14 (Denman Tr. 125:8 - 132:25); Ex. 3 (Maestri Tr. 103:5-21, 119:19-25, 127:10-24, 221:19 - 228:6); Ex. 78 (Webster Tr. 140:8 - 141:13, 187:17 - 190:23, 193:24 - 194:20).

<sup>61</sup> See, e.g., Ex. 21 (Cookston Aff. ¶¶47-60).

evaluate whether they address customer complaints using the Domino's LEADS (Listen, Apologize, Empathize, Do Whatever It Takes, Stand by Your Promise) method. The [Evaluation] inspector also inspects the drivers' cars. . . .

Ex. 21 (Cookston Aff. ¶50).

169. While the most common large deductions from a perfect Evaluation score of 100 are for infractions such as improper food temperature or slow order completion, points are deducted for non-compliance with rules discussed above. Franchise Operations Director Rudd provided the following uniform violations as examples that lead to deductions in an Evaluation: "Somebody wearing no hat,"<sup>62</sup> wearing "[a] shirt with dirt on it," or having an undershirt of the wrong color. Ex. 25 (Rudd Tr. 34:23 - 36:2); see also Ex. 19 (Ridge Tr. 275:16 - 277:11). Respondent Maestri testified that one of his stores had its score reduced because an employee with an ingrown hair condition "didn't have a doctor's note" to justify facial hair longer than an inch. Maestri also testified that Evaluation inspectors follow delivery employees or wait for their return to assess their driving. Ex. 3 (Maestri Tr. 239:21 - 241:6, 242:11-23). As described in an affidavit from another franchisee, "if three employees do not fit the uniform standard exactly (one is not wearing a Domino's hat, one is wearing jeans instead of black pants, one is wearing a Domino's shirt with a stain), that comprises an 'extreme' violation worth thirty points." Ex. 22 (Lee Aff. ¶20).

170. When a Maestri store received a poor Operations Evaluation Report ("OER") score, supervisor Duane Webster said the Franchise Operations Regional Director, Bob Machin, "would call me and say what happened, you need to go to that store and start working with the people and show them how to do it." Ex. 78 (Webster Tr. 144:3-7). As a store manager, Webster testified that Domino's Area Leaders communicated directly with him, as opposed to

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<sup>62</sup> At Respondent Maestri's stores, supervisor Duane Webster testified, "employees hate wearing the hats." Ex. 78 (Webster Tr. 174:16-18).



with the franchisee owner, Maestri: “Like sometimes they would come to the store for an unannounced visit, not just the OER coach, but Mark [Rudd] or Bob [Machin] would show up . . . [T]hey would just talk to me and say [] this is what I see and don’t like,” pointing to, for example, uniform issues, store cleanliness, and food quality. Ex. 78 (Webster Tr.134:11-23).

171. Domino’s Safety and Security Department regularly investigates franchisee stores and requires franchisees to take specific operational actions based on audit results and complaints. For example, a representative from the Occupational Safety and Health Administration (“OSHA”) contacted Domino’s and Franchisee Respondent Maestri regarding broken tiles “in the dish washing area and near the freezers” that were a tripping hazard for employees. Ex. 128 (DP00102873-74). Safety and Security head for the East Coast Van Carney contacted New York Area Leader Robert Machin, who told Franchisee Respondent Maestri “You have 5 days to get this fixed.” Id.; Ex. 3 (Maestri Tr. 244:10 - 248:8).

172. Besides the Evaluations by Domino’s inspectors, franchisees are also required to input into PULSE monthly self-evaluations scoring themselves, using the “exact same” standards as in Evaluations by Domino’s personnel. Ex. 19 (Ridge Tr. 109:17 - 111:7). Each store’s initial 100-point Evaluation score is converted by Domino’s to a zero- to five-star grade: “five stars is 91 or above, four stars is like an 81 or above, and a three st[ars] is like a 71,” with “below a three, so 69 or lower” automatic grounds for receiving a Notice of Default specifying the Domino’s standards that were violated.<sup>63</sup> As already stated, three Notices of Default resulting from Evaluations within a twelve-month period can mean termination of a franchise, as the

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<sup>63</sup> Ex. 3 (Maestri Tr. 225:25 - 227:4). Other franchisees confirmed that below a 70%, three-star rating is considered failing. See, e.g., Ex. 21 (Cookston Aff. ¶47); Ex. 23 (Gaisser Aff. ¶24); Ex. 22 (Lee Aff. ¶20). Domino’s executives testified that a Notice of Default “could potentially be” based on a two-star rating. Ex. 19 (Ridge Tr. 48:17 - 49:7); Ex. 25 (Rudd Tr. 108:2-9). Ridge testified that a franchisee in New York State who receives zero stars is automatically fined \$200, which occurs at least once a year. Ex. 20 (Ridge Tr. 371:2 - 372:4).

Franchise Agreement expressly states, “whether or not such failure to comply is corrected.” Ex. 18 (DP00000322).

173. Based on such inspections and evaluations, Domino’s also requires certain New York franchisees and managers to attend trainings and meet with Area Leaders regarding Domino’s operational requirements. In response to one poor Evaluation score, Domino’s placed Franchisee Respondent Maestri in default for, inter alia, Maestri store employees not meeting Domino’s uniform and grooming standards, and required him to contact Machin to attend an “Operations Workshop.” Ex. 129 (DP174004). Webster testified that franchisees’ store managers had to attend a mandatory class for every failed Evaluation inspection. Ex. 78 (Webster Tr. 144:8-11).

174. Similarly, as Area Leader in 2010, Rudd placed another New York franchisee near New York City in default after an unannounced inspection, informing him that “[i]t is time you and I sat down so we have a clear understanding of the direction and standards by which Domino’s Pizza insist [sic] you operate your store,” and arranged a personal meeting with the franchisee after the required Domino’s operational requirements class. Ex. 130 (DP00173877) (emphasis in original); see also Ex. 25 (Rudd Tr. 283:2 - 286:16).

175. As to those franchisees who receive a Notice of Default, Area Leaders require them to submit an “action plan” to cure it, and follow up with one or more subsequent Evaluation visits to make sure the condition that caused the default has been corrected. Mark Rudd testified that, as an Area Leader, he would require his franchisees to submit an “action plan” whenever an Evaluation score was “two stars” or below, even if it did not result in a default. Ex. 25 (Rudd Tr. 107:10 - 108:19). In at least one example, action plans included changes to personnel policies. Id.

176. In response to the OAG's subpoenas, Domino's produced approximately 800 Notices of Default that it issued to New York franchisees during the five-year period from May 4, 2007 to May 7, 2012 (of those, 41 were issued to the Franchisee Respondents), and produced approximately fifty Notices of Termination that it issued to New York franchisees from June 26, 2007 to September 6, 2011 (with one sent to one of the Franchisee Respondents).<sup>64</sup>

177. Multiple Notices of Default were sent to each of the three Franchisee Respondents in the present proceeding.<sup>65</sup> The OAG's review of all Notices of Default produced by Domino's reveals that Domino's issued at least thirty such notices based on failure to comply with Domino's criminal background check standards to at least nineteen individual franchisees, including to Respondent Ahmed.<sup>66</sup> Domino's required curing each such default by checking "retroactively from August 1, 2009 on all candidates and team members in accordance with the Criminal Background Check Standard and taking appropriate action with any violations identified." Ex. 132 (DP00004732). Domino's issued at least 75 Notices of Default based on

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<sup>64</sup> The Notices of Default Domino's sent to New York franchisees were produced to the OAG with Bates numbers DP00002653-2868, 2972-7107. The Notices of Termination Domino's sent to New York franchisees were produced to the OAG with Bates numbers DP00002869-2971. Because these documents combined total over 4,400 pages, these documents cannot practicably be filed electronically as PDF documents. Accordingly, for these two groups of documents, collectively bearing Bates numbers DP00002653 to 7107, Petitioner is providing here, at Ex. 131, NYSECF Form EF 21 as a placeholder in the Record pursuant to Rule B(10) of the Protocol On Courthouse and County Clerk Procedures For Electronically Filed Cases (rev. Oct. 7, 2015). Petitioner is prepared to submit an electronic version of the full set of these documents to the Court on a compact disc if and when so directed. The Notices of Default and Notices of Termination sent to the Respondent Franchisees, and certain other individual such Notices, are included separately in the Record and referred to herein.

<sup>65</sup> For default notices sent to Respondent Ahmed, see Ex. 132 (DP00004650, 4731, 4733, 4864 and 5114). For default notices sent to Respondent Denman, see Ex. 133 (DP00004627, 4628, 4629, 4779, 4939, 4941, 4983, 5004 and 5006). For default notices sent to Respondent Maestri, see Ex. 134 (DP00004278, 4280, 4282, 4284, 4648, 4680, 4751, 4759, 4769, 4771, 4773, 4801, 4837, 4841, 4851, 4868, 4893, 4905, 4949, 4955, 4965, 5008, 5010, 5012, 5067 and 5150).

<sup>66</sup> For the default notice sent to Respondent Ahmed reflecting this issue, see Ex. 132 (DP00004731-34). Similar default notices sent to 18 other franchisees, produced by Domino's, are part of Ex. 131 (supra n. 64) and bear Bates numbers DP00004696; DP00005028; DP00004698 and 5022; DP00004700 and 4703; DP00004706; DP00005098; DP00005134 and 5139; DP00004735; DP00004708, 4991, 5071 and 5076; DP00004710; DP00004712 and 4714; DP00004716 and 4719; DP00005041; DP00005081 and 5086; DP00005106; DP00004721; DP00004723 and 4726; and DP00004729.

failure to comply with Domino's standards for employee uniforms to at least thirty individual franchisees, including Respondents Denman and Maestri.<sup>67</sup> Domino's issued at least forty-eight Notices of Default based on failure to comply with Domino's standards for employee grooming to at least twenty-three individual franchisees, including Respondent Maestri.<sup>68</sup> Domino's issued at least twenty-six Notices of Default based on violation of Domino's prohibition of employees' having more than \$20 including personal and store money in their possession to at least eighteen individual franchisees, including Respondents Denman and Maestri.<sup>69</sup>

178. With respect to Notices of Termination, Domino's issued one such notice to Respondent Denman for a store which he had closed (and which is not one of his two stores involved in the present proceeding). See Ex. 135 (DP00002969).<sup>70</sup> Domino's issued at least

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<sup>67</sup> For the default notices sent to Respondent Denman reflecting this issue, see Ex. 133 (DP00004779, 4939, 4983 and 5004). For the default notices sent to Respondent Maestri reflecting this issue, see Ex. 134 (DP0004648, 4680, 4751, 4868, 4905, 5010, 5012 and 5150). Similar default notices sent to 28 other franchisees, produced by Domino's, are part of Ex. 131 (supra n. 64) and bear Bates numbers DP00002978, 3260, 4654, 4876 and 4897; DP00004803 and 4911; DP00004672 and 4749; DP00004821, 4917, 5000 and 5154; DP00004998; DP00004652 and 5020; DP00004819; DP00004308, 4691 and 4935; DP00004937; DP00004897 and 4996; DP00004359; DP00004891, 4978 and 5070; DP00005035 and 5152; DP00004747, 5033 and 5055; DP00004789; DP00004785 and 4973; DP00002976, 4582, 4741, 4743, and 4763; DP00004761, 4783, 4795, 4887 and 4925; DP00004995 and 5054; DP00004789, 4878 and 4967; DP00004967 and 4969; DP00004656; DP00003759 and 4945; DP00003171; DP00003258; DP00004686; DP00004588 and 4787; and DP00004753 and 5002.

<sup>68</sup> For the default notices to Respondent Maestri reflecting this issue, see Ex. 134 (DP00004648, 4801, 4841, 4955, 5009, 5012, 5067 and 5150). Similar default notices sent to 22 other franchisees, produced by Domino's, are part of Ex. 131 (supra n. 64) and bear Bates numbers DP00003260, 4654, 4876 and 4897; DP00004911; DP00004821, 4850, 4917 and 5154; DP00004652 and 5020; DP00004618; DP00004530; DP00004616, 4922 and 4937; DP00003216; DP00005052; DP00004660, 4662 and 5061; DP00004747, 4957, 4987 and 5033; DP00004789; DP00005017; DP00005065; DP00004785; DP00004582, 4743 and 4897; DP00004783 and 4795; DP00004403; DP00004789; DP00003759; DP00003258; and DP00004753.

<sup>69</sup> For default notices to Respondent Denman reflecting this issue, see Ex. 133 (DP00004939); to Respondent Maestri reflecting this issue, see Ex. 134 (DP00005150). Similar default notices sent to 16 other franchisees, produced by Domino's, are part of Ex. 131 (supra n. 64) and bear Bates numbers DP00004876; DP00004951; DP00004745, 4799, 4821, 4917 and 4953; DP00005020; DP00004862; DP00004996; DP00005052; DP00004891; DP00005031; DP00005065; DP00004785; DP00004740 and 4889; DP00004403; DP00004789 and 4878; DP00003759, 4872 and 4945; and DP00004588.

<sup>70</sup> This September 6, 2011 notice concerned a Broadalbin, N.Y. store that "closed effective September 5, 2011." Respondent Denman testified that he closed the store because of losses he was incurring there. Ex. 14 (Denman Tr. 141:17 - 142:20).

seven other Notices of Termination to other franchisees stating that they were based, in part, on default through a violation of the uniform standards;<sup>71</sup> at least two stating that they were based, in part, on default through violation of the grooming standards;<sup>72</sup> and at least one stating that it was based, in part, on default through violation of the prohibition of employees' having more than \$20 in their possession.<sup>73</sup> Domino's also terminated a franchisee for reasons such as financial misconduct. Ex. 20 (Ridge Tr. 387:3 - 389:6).

179. The foregoing Notices of Default and Notices of Termination confirm both that Domino's could and frequently did enforce its standards and rules including those concerning hiring of franchisee employees and the terms of franchisee employees' employment through measures up to and including franchise termination. By contrast, although Domino's on at least seven occasions advised New York franchisees that it could terminate their franchises unless they promptly came into compliance with state and federal wage-and-hour law, and although Vice-President Ridge testified that "any illegal conduct is grounds for immediate termination," Domino's apparently did not follow up on those warnings. There is no evidence that Domino's ever terminated a franchisee for such a violation, and Ridge testified that she could not even recall a New York franchisee receiving a default notice for such a violation. Ex. 19 (Ridge Tr. 197:3-5); Ex. 20 (Ridge Tr. 406:11-25).

***b. Domino's Supervision Through Area Leader Visits and Instructions***

180. The Domino's Area Leaders' regular contact with the franchisees was a feature of its supervision over franchisees. Franchisees received emails, texts, telephone calls, and/or visits

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<sup>71</sup> These seven termination letters, produced by Domino's, are part of Ex. 131 (*supra* n. 64) and bear Bates numbers DP00002908; DP00002964; DP00002937; DP00002959; DP00002967; DP00002932; and DP00002962.

<sup>72</sup> These termination letters, produced by Domino's, are part of Ex. 131 (*supra* n. 64) and bear Bates numbers DP00002908; DP00002967.

<sup>73</sup> This termination letter, produced by Domino's, is part of Ex. 131 (*supra* n. 64) and bears Bates number DP00002967.

from them and other Domino's officials numerous times a week. Respondent Denman received daily emails and/or text messages concerning his stores from DuPont, his Domino's Area Leader, and other Domino's personnel about operations, promotions, sales, and other matters. Ex. 14 (Denman Tr. 65:14 - 66:21). Respondent Maestri had contact with his Area Director, Robert Machin, three to four times a week, in addition to contact with Machin's superiors (i.e., Franchise Operations Director Rudd, Vice President Ridge) and others. Ex. 3 (Maestri Tr. 101:5 - 104:25).

181. Concerning the Evaluations performed as part of the inspection regime instituted by Domino's (see supra ¶¶168-170), Domino's Area Leaders typically performed follow-up Evaluation visits, including speaking to franchisee employees, without the franchisee being personally present; Franchise Operations Director Rudd testified that, when he was an Area Leader, the franchisee was not personally present for such visits more than half of the time. Ex. 25 (Rudd Tr. 129:20 - 130:18, 150:14 - 151:14, 152:5-9). On such occasions, Rudd introduced himself to employees "if they didn't know me already." Ex. 25 (Rudd Tr. 133:2-6, 134:16-20). A May 21, 2010 email from Domino's Vice President Ridge to Area Leaders ("ALs"), referred to "the importance of open communications" with franchisees and "TMs" (team members) at franchise stores, recognizing that "ALs" obtain information "as you visit [franchisee] stores without the owners," including from "disgruntled" employees. Ex. 136 (DP000073326).

182. But in addition to the Area Leaders' follow-up Evaluations, Area Leaders also make other unannounced visits to franchise stores, including speaking with franchisee employees without franchisees being present and later calling or texting "supervisors or managers directly to make sure they are following up on operations problems [the Area Leaders] found." Ex. 23 (Gaisser Aff. ¶26). Area Leader DuPont told employees at one of the Settling Franchisees'

stores “that he had the power to shut the stores down . . . [and] threatened to close the store down ‘because I can,’ and . . . sometimes said ‘I’m your boss’ to [the Settling Franchisee’s] employees.” Ex. 22 (Lee Aff. ¶16).

***c. Domino’s Monitoring of Franchisee Workers via PULSE***

183. Domino’s uses PULSE to track franchisee employees’ work functions at every franchisee store in New York State. As noted above, Domino’s requires all of its franchisees to use its proprietary PULSE software. See supra ¶¶22(d), 88. Through PULSE, Domino’s can monitor the work functions of employees at every franchisee store in New York State (and nationwide) from its headquarters in Michigan, from the time those employees arrive at work until the time they leave to go home. See supra ¶95. Employees at the Franchisee Respondents, and at all franchise stores, must log in to PULSE when they arrive for work at a store using an employee number and password. See supra ¶95. Employees cannot even log in to PULSE without valid drivers’ license and insurance information. See supra ¶146; see also Ex. 3 (Maestri Tr. 199:15 - 200:11); Ex. 22 (Lee Aff. ¶8); Ex. 23 (Gaisser Aff. ¶12); Ex. 16 (Cookston Aff. ¶16).

184. Only after franchisee workers have successfully logged in to PULSE can they take a pizza order, make a pizza, or dispatch or deliver a pizza. Ex. 77 (PULSE Reference Guide, DP00001219-1220). From the moment a pizza order is placed at a franchisee store, Domino’s PULSE system tracks — by the minute — all actions that follow. Ex. 77 (DP00001206 -1207). A timer within PULSE begins running as soon as a franchisee employee enters a customer order in PULSE. There is a PULSE computer terminal next to the “make line,” where employees prepare pizzas. As they complete steps in the cooking process, including placing the uncooked pizza in the oven and placing the cooked pizza on the routing stand to

await delivery, franchisee employees must repeatedly hit “Enter” on the touch screen. When employees do not hit the correct buttons when prompted, the order does not pass through to the next step and/or times out, which can only be overridden by a manager. As one franchisee explains, “Domino’s has, in the past, contacted me when they believed there have been too many of these manager overrides in my stores’ operations.” Ex. 22 (Lee Aff. ¶10). The assigned delivery driver then enters into PULSE his or her name and the order he or she is responsible for, and as the delivery driver leaves the store with the order, the driver checks out of PULSE. Ex. 23 (Gaisser Aff. ¶14). The exact time of each step of the order preparation and dispatch process is logged in PULSE, which calculates the time intervals between each step and the total time for preparation of each order. These total times per order appear in a report generated by PULSE called the “Service Time Report,” which also shows average times across given time periods, such as a week or month of operations. Ex. 23 (Gaisser Aff. ¶15); Ex. 22 (Lee Aff. ¶10); Ex. 21 (Cookston Aff. ¶16).

185. Franchisee Respondent Maestri testified that PULSE “will keep track of time so if someone is on the phone with a customer, it will keep track of how long that order takes, so let’s say it’s a minute and [a] half . . . [PULSE] sends the order to the make line screen, it prints out a label, it keeps data of all of our employees, it will compute the time they’re out in deliveries and the time they come back.” Ex. 3 (Maestri Tr. 264:20 - 265:5). Franchisee Respondent Denman similarly testified that PULSE

knows how long you were on the phone with that customer . . . . It knows that you processed the order or didn’t process the order. It knows when the order was cleared from making it at the make line. It knows how long it will take in the oven. It knows when it should be dispatched by a delivery driver or if it is a carry out.

Ex. 14 (Denman Tr. 89:4-12).



186. Domino's does not merely collect or store this data about the Franchisee Respondents' workers. Rather, Domino's actively uses this data on employees when evaluating the Franchisee Respondents' stores during the Evaluation inspections Domino's conducts at all franchisees at least three times a year. The record shows that Domino's inspectors will access a store's Service Time Reports for the past 28 days and "look through our service times, which is speed of service between how long it takes to load products, how long it takes for them to go out the door." Ex. 14 (Denman Tr. 128:3-11); Ex. 21 (Cookston Aff. ¶48). 15% of the total points in an Evaluation inspection concern whether a franchisee has met Domino's requirements that a pizza order be taken within one minute, assembled and placed in the oven within three minutes, cooked within seven minutes, and delivered within thirty minutes. Ex. 21 (Cookston Aff. ¶48). Through PULSE, Domino's thus knows on precise days how long each employee function took within a franchisee's store (e.g., taking orders, making pizzas, dispatching, delivering) and uses this information about employee performance to evaluate the franchisee. See, e.g., id.; Ex. 22 (Lee Aff. ¶20); Ex. 23 (Gaisser Aff. ¶24).

187. The Maestri Respondents were placed in default of the Franchise Agreement due, in part, to the Service Time Report data a Domino's inspector obtained from PULSE during an Evaluation inspection on April 21, 2012. At that time, a store owned by the Maestri Respondents received an Evaluation score of 53, in part because of PULSE data showing that only 68% of orders were delivered "on time" (meaning within a half hour), resulting in zero points for that section. Ex. 129 (DP00173999-4000). As a result of this score, the Maestri Respondents received a default notice on April 24, 2012, advising them that "in our [Domino's] judgment operating assistance has been made necessary," requiring him and his managers to attend a training on how to meet Domino's operational guidelines. Ex. 129 (DP00174002-4004).

188. Domino's Evaluation inspectors are not the only Domino's personnel who use the data stored in PULSE, concerning store operations, in order to evaluate franchisees. Domino's Franchise Operations officials also routinely rank franchisees in measurements captured by PULSE and their Evaluation scores and report these rankings to franchisees, along with specific directions to franchisees and franchisee store managers concerning store operations in order to move up in the rankings. See, e.g., Ex. 137 (DP00077819) (Mar. 1, 2010 email from Ridge to one investigated franchisee criticizing his own internal communications with his Domino's stores managers and instructing him to address various PULSE metrics, including "Service Challenges, Load Times, OTD% 15, DOT%, average delivery times, etc.").

189. Similarly, Mark Rudd testified that when he was an Area Leader — before he was promoted to Franchise Operations Director covering all three Franchisee Respondents — he ranked New York franchisees on a weekly basis by their previous day's store operations performance as tracked in PULSE, including, inter alia, each store's "load" time, or the time an order takes to go into the oven, the number of "single" deliveries (which Domino's encourages) and "triple" deliveries (which Domino's discourages), and percentage of deliveries "on time," i.e., within a half hour. Ex. 25 (Rudd Tr. 82:6 - 83:24); Ex. 122 (DP00073197-198).

***d. Domino's Imposition of Its Own Anti-Unionization Preferences upon Franchisees and Their Employees***

190. Domino's works aggressively to prevent union organizing at its franchisees. Domino's HR Director Wigley testified, for example, that "if a franchisee had a question about potential union activity, they would call me." Ex. 26 (Wigley Tr. 84:20-22). But when contacted, Wigley did not supply informational material neutrally outlining laws regarding unions or refer franchisees to neutral sources or to any governmental agency or website. Ex. 26 (Wigley Tr. 88:3-11). Instead, she told franchisees to "get a labor law attorney"; then she would

recommend a specific labor law attorney, Hagood Tighe, who “had experience with unions in the Domino’s system.”<sup>74</sup> Wigley then provided written advice that she and Domino’s lawyers drafted about “things to look for to suspect union activity” and “how to . . . avoid union activity.” Wigley testified that from 2004 to 2010 or 2011, franchisees contacted her regarding union campaigns “10 to 25 times.” Ex. 26 (Wigley Tr. 84:18 - 86:3, 87:11-20, 90:19-25, 92:3-9). Wigley also distributed to Vice President Ridge and other regional Domino’s executives, for distribution to all franchisees through an electronic newsletter, literature drafted by Wigley and Domino’s lawyer on steps “to prevent union activity.” Ex. 139 (DP00077754); Ex. 26 (Wigley Tr. 197:8-13, 198:9 - 199:21, 200:5-7). As a May 21, 2010 email to New York Area Leaders from Ridge indicates, union activity was “especially concerning to [Domino’s] as we know . . . this possibility existed for many stores throughout PA and in NY/NJ area,” noting “for those new to the team, we have had filings in PA, and NY areas for possible unions in stores over the last 2 years.”<sup>75</sup> Ex. 136 (DP00073326-327); Ex. 20 (Ridge Tr. 469:24 - 470:24, 472:23 - 473:2).

191. In addition to such general efforts “to prevent union activity” at franchise stores, Domino’s took action with respect to specific New York franchisees. For example, Wigley came to New York to train franchisees on dealing with a union campaign. See, e.g., Ex. 84 (Khan Tr. 194:3 - 195:2, 197:19 - 199:19). In another example, when franchisee Tim Jarvis received papers from the National Labor Relations Board stating that his employees sought union representation, he contacted Area Leader DuPont, which ultimately resulted in Wigley being

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<sup>74</sup> Tighe, admitted to the bar in South and North Carolina but not New York, is described on his firm’s website to have “successfully run many union avoidance campaigns.” See Ex. 138 (<http://www.laborlawyers.com/jtighe>, last visited April 20, 2016). From 2006 to 2010, Domino’s retained him to lead eight to ten labor law seminars annually for its franchisees. Ex. 26 (Wigley Tr. 38:19 - 39:13, 40:15-22, 41:22 - 42:6).

<sup>75</sup> Ridge received this email from her boss, Domino’s Executive Vice President Scott Hinshaw. Ex. 136 (DP00073326); Ex. 19 (Ridge Tr. 26:23 - 27:5). Wigley reported to Hinshaw, who forwarded to Ridge, news of union efforts at New York franchisees. Ex. 140 (DP00078442).

brought in. She advised franchisee Jarvis to retain Tighe. But Domino's went further, sending John Martinez, director of PeopleFirst (Domino's corporate human resources department), to give Jarvis "training so that he could provide some training for his employees." Ex. 20 (Ridge Tr. 309:6 - 312:14).

192. On June 4, 2008, Martinez reported to Area Leader DuPont, Vice President Ridge, and Charles Restko, a supervisor employed by Jarvis, Martinez's "80% confidence" that an employee petition "to withdraw our union petition cards" would end the union effort "very soon." Ex. 141 (DP00073422-424). In a June 18, 2008 email to Ridge, Martinez "outline[d]" what he directed Restko and Jarvis to do next:

- 1) ... keep pushing [employees] to contact the union and state their position openly and blatantly...i.e. Drivers Want Out/WITHDRAW[A]L! They need to be relentless ....
- 2) Let's play up the fact that this union could care less about their desires....
- 3) All employees must know that this union is ignoring their withdraw[a]l petition and apparently still pushing for a vote....
- 4) However we play it, we need drivers pissed and mad at the union!....

GET EM!!!!

Ex. 142 (DP00078398-399). As a result, Ridge testified, "A union never happened. . . . I don't believe there was a necessary vote." Ex. 20 (Ridge Tr. 313:22 - 314:8). On June 20, 2008 she informed her boss, Domino's Executive Vice President Hinshaw, that Restko had just advised DuPont that the union had withdrawn. Ridge credited "the continued efforts and due diligence led by John Martinez (remind me never to get on your s\_\_t list, John!)...or should I say 'bulldog' Martinez." Hinshaw replied: "Congrats!" Ex.143 (DP00078404).

193. Ridge's June 20, 2008 email to Hinshaw noted that she and Area Leader DuPont "spoke about continuing our efforts to educate and inform our franchisees and their GMs about

unions.” Ex. 143 (DP00078404). In December 2013, Respondent Denman testified about one such meeting he attended with a Domino’s corporate employee and a law firm hired by Domino’s, “about possible union infiltration,” placing that meeting about five years prior to his testimony. Ex. 14 (Denman Tr. 75:6 - 76:8). On June 8, 2008 another Domino’s New York Area Leader, Thomas Curtis,<sup>76</sup> forwarded to a franchisee Domino’s literature including “Questions A Store Manager May Receive About Unions,” that began:

1. Q. How does the company feel about the union organizing drive?

A. There is no union at Domino’s, and the company does not want a union here. We will do everything legally possible to keep a union out.

Ex. 127 (DP00101158). On June 5, 2008 Curtis forwarded similar anti-union literature to ten New York franchisees, including Respondent Maestri, warning that the union that tried to organize Jarvis’s store “indicated that they were heading to downtown NY city in a couple of days to generate interest here as well. . . . If you see or hear [sic] of any recruiting activity please let me know.” Ex. 144 (DP00061349).

*e. Domino’s Direct Involvement with Customer Complaints*

194. As noted supra ¶¶154, 168, Domino’s has direct involvement in the resolution of customer complaints concerning its franchisee stores. Domino’s maintenance of the Customer Care Center telephone hotline, described above (see supra ¶153), is another demonstration of this involvement.

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<sup>76</sup> Rudd testified that Curtis later became (and preceded Rudd as) Franchise Operation Director for Domino’s East Region, and still later became Vice President (Ridge’s counterpart) for Domino’s West Zone. Ex. 25 (Rudd Tr. 48:14-25).

**C. Domino's Control over the Rate and Method of  
Payment of Employees at the Franchisee Respondents' Stores**

195. While Domino's did not directly set hourly wages for the employees at the Franchisee Respondents' stores, Domino's nonetheless exercised direct influence and power over the rate and method of franchisee employee compensation.

196. Domino's directly influenced the compensation of these employees through the miscalculations and flaws in PULSE that Domino's allowed to stand undisclosed and uncorrected, which caused the Payroll Report PULSE generates to under-calculate wages owed to workers at the Maestri and Ahmed Respondents. These Respondents used the PULSE-generated reports in the manner expressly authorized by Domino's, *i.e.*, to provide to their payroll services for the second stage of payroll processing (making deductions and cutting checks). As a result, for significant lengths of time, flaws in Domino's PULSE software caused workers at these Franchisee Respondents' stores to receive a rate of payment lower than the law permits.

197. As described *supra* ¶94, PULSE provides payroll information to franchisees via a PULSE Payroll Report. The PULSE Payroll Report says "Payroll" at the top of the report, and contains all the elements of a typical payroll record, including each employee's name and "payroll number," regular and overtime hours worked, pay rate, tips received, gross regular and overtime wages owed, and total gross wages owed, shown in a column entitled "Total Pay."<sup>77</sup> See, e.g., Ex. 80 (sample Ahmed PULSE Report). The significance of Domino's unique informational advantage over franchisees concerning PULSE was noted by one Settling Franchisee, who observed that it was "impossible to know that PULSE calculates overtime incorrectly without checking the calculations manually" because the PULSE Payroll Report does

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<sup>77</sup> The PULSE Payroll Report does not show the underlying calculations.

not show underlying calculations and, instead, only shows gross regular and overtime wages for a pay period. Ex. 21 (Cookston Aff. ¶23).

198. The Maestri Respondents used PULSE to keep track of employees' time records and hourly wages, and to create payroll reports containing gross wages that the Maestri Respondents then sent to a company to process payroll, calculate net wages, and generate paychecks for employees at their stores. See Ex. 3 (Maestri Tr. 35:2 - 36:25, 284:17 - 285:2, 286:14-20). Only in 2011, after using the PULSE system for several years, did the Maestri Respondents learn through their payroll company that the "system does not compute some overtime correctly pertaining to tipped employees," and "[t]he problem is that it does not do it the way the New York State overtime formula is, it takes the pay rate and times it by 1.5 times" instead of multiplying the applicable minimum wage by 1.5 and then deducting the tip credit from that amount, as required by New York law. Ex. 3 (Maestri Tr. 280:7-14).<sup>78</sup>

199. Prior to learning of the error, Respondent Maestri believed that the overtime calculations in PULSE were accurate — and in any case, that they could not be changed in the system — and he paid employees the overtime rates computed by the PULSE system. Ex. 3 (Maestri Tr. 279:18-24, 281:13-22, 407:7 - 408:14, 416:11-19). For example, as described above, supra ¶105, a North Bedford Pizza Inc. employee named Jose Pesantez was paid an hourly rate of \$6.00 from October 2009 through December 2009. Ex. 59 (Maestri PULSE Payroll Reports, at 2-20).<sup>79</sup> For weeks in which he worked more than 40 hours, such as the week ending October 4, 2009, the Maestri Respondents' payroll records show that Pesantez was paid \$9.00 per overtime hour, the rate calculated by PULSE, when he should have been paid \$9.63

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<sup>78</sup> Respondent Maestri testified in December 2013 that he had learned of the error from his payroll company "about two and a half years ago." Ex. 3 (Maestri Tr. 357:5-11).

<sup>79</sup> In PULSE, an employee's, hours and rate of pay are located above his/her name, not below.

per overtime hour. Ex. 60 (Maestri Payroll History Report, at 17-21). Consequently, at the time the Maestri Respondents learned of this problem in PULSE, tipped employees at their stores had been underpaid for years. Respondent Maestri testified that no one at Domino's ever informed him that PULSE could not accurately calculate the overtime wages of tipped employees. Ex. 3 (Maestri Tr. 281:18-22). While Respondent Maestri instructed his payroll company to manually correct for this flaw in PULSE going forward, the Maestri Respondents did not retroactively pay tipped employees for any overtime wages for the years that PULSE had incorrectly computed wages for tipped employees. Ex. 3 (Maestri Tr. 357:5-23).

200. Similarly, the Maestri Respondents did not learn of PULSE's inability to incorporate and calculate spread of hours pay owed to employees until alerted by their payroll company. Ex. 3 (Maestri Tr. 358:7 - 359:2). Although PULSE records the number of hours worked by employees, it does not compute spread of hours when an employee works more than ten hours in a day. Ex. 3 (Maestri Tr. 286:21-23, 411:3-10). As a result, the Maestri Respondents did not begin to pay spread of hours to employees until at the latest October 2012.<sup>80</sup> Ex. 3 (Maestri Tr. 418:22 - 419:4).

201. As with the Maestri Respondents, the Ahmed Respondents' use of PULSE resulted in under-calculation of owed wages to employees. The Ahmed Respondents used PULSE to keep track of employees' time records and hourly wages, and to send the PULSE-generated Payroll Reports to their accountant to process payroll, calculate net wages, and generate paychecks for employees at their stores. Ex. 11 (Ahmed Tr. 26:7-10, 38:2-14, 42:15-20, 97:15 - 98:3, 113:16-20).

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<sup>80</sup> In the payroll records for each store operated by the Maestri Respondents, the OAG located the earliest appearance of a new payment category called "TEN" in the "Code" column. For all stores the earliest such appearance was in October 2012.



202. Respondent Ahmed testified that PULSE is unable to calculate spread of hours pay that is owed to an employee who works more than ten hours in a day.<sup>81</sup> Ex. 11 (Ahmed Tr. 39:8-18). He was unaware of this defect in PULSE until Robert Machin, an Area Leader in Domino's Franchise Operations department, informed him during a meeting with ten to fifteen franchisees in late 2013. Ex. 11 (Ahmed Tr. 51:11 - 55:7). During this meeting with franchisees, Machin informed them that there was a program called Wizard that was "very good for calculating payroll. If you use Wizard then there wouldn't be any mistake" in calculating spread of hours pay properly. Ex. 11 (Ahmed Tr. 52:23 - 53:17). This was the first time that Domino's informed Respondent Ahmed that PULSE had problems calculating spread of hours pay. Ex. 11 (Ahmed Tr. 53:21-24). Within a week of this meeting, the Ahmed Respondents began using Wizard to correct the deficiencies in PULSE that led to non-payment of spread of hours pay for employees. Ex. 11 (Ahmed Tr. 55:5-7). The OAG has found no evidence that, beyond the group of franchisees who happened to be at that meeting, Domino's advised any other New York franchisees about this problem or about the method of correcting this problem.

203. The Ahmed Respondents' payroll records further show that, during the Relevant Period, employees' overtime rates were calculated as one-and-a-half times their tipped rates as late as January 2013. For example, during the pay period ending January 13, 2013, at least eighteen Nader Inc. employees were paid overtime rates of one-and-a-half times their tipped rates. Ex. 64 (Ahmed Payroll Records - Nader Inc., at 14-16). Respondent Ahmed testified that PULSE was unable to calculate the correct overtime rate for tipped employees. Ex. 11 (Ahmed Tr. 41:4-9). He also said he did not learn about this PULSE flaw until the OAG's investigation began in November 2013. Ex. 11 (Ahmed Tr. 114:20-22). Domino's never informed the Ahmed

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<sup>81</sup> Respondent Ahmed referred to spread of hours pay, in his testimony, as "bonus pay" or a "bonus hour." Ex. 11 (Ahmed Tr. 39:10-16).

Respondents of PULSE's inability to accurately calculate overtime pay for tipped employees. Ex. 11 (Ahmed Tr. 115:15-19).

204. A second way that Domino's impacted the rate and method of employees' compensation at all three Franchisee Respondents lies in Domino's prohibition of tip jars in its franchisee stores. The Domino's-mandated Section 12 Standard in the Manager's Guide imposes a policy prohibiting the use of tip jars in franchisee-owned stores. Ex. 24 (MRG, at DP00000605, §12 at 18). Both Vice President Ridge and Franchise Operations Director Rudd offered no rationale as to why tip jars were not allowed in franchisee-owned stores, except to affirm that "It is our [Domino's] policy" or "a standard." Ex. 19 (Ridge Tr. 230:13-20); Ex. 25 (Rudd Tr. 100:4-23). Indeed, Ridge's June 24, 2011 email to Area Leaders called it "IMPERATIVE" to "communicat[e], follow[] up and remind[]" franchisees and their general managers that "**Tip jars are not allowed. . . . Our system and pricing is established with margins to provide adequate wages.**" Ex. 125 (DP00043437-441, at 1, 3) (emphases in original). Area Leader DuPont ordered franchisee Michael Lee to remove a tip jar from Lee's store. As stated in Lee's affidavit, the Area Leader "did not explain why, and I had to comply immediately." Ex. 22 (Lee Aff. ¶22).

**D. Domino's Maintenance of Employment Records  
for Employees at the Franchisee Respondents' Stores**

205. A final feature of Domino's supervision and control over employees at the Franchisee Respondents' stores is found in Domino's maintenance of employment records for workers at the Franchisee Respondents' stores. As described above, Domino's requires that franchisees maintain employment records in PULSE, to which Domino's has virtually unlimited contemporaneous access. See supra ¶¶31-32, 89, 94. In order to allow its workers to conduct any tasks, franchisees must inevitably create timekeeping records in PULSE for their workers. A

worker at a franchisee store cannot perform any work-related function (e.g., take an order) without first logging in to PULSE. The Domino's-authored PULSE Reference Guide states that entering a worker's User ID (and password) is the required first step in recording an order. See supra ¶95. Similarly, the Domino's Guide lists "steps you must take in your Domino's Pulse system to close your store," including "Clock[ing] Out Team Members [i.e., workers]" which "helps make sure payroll records are accurate." Id.

206. Accordingly, Domino's maintains franchisee store records containing all franchisee employees' clock in identifications, first and last names, and all timekeeping data for the hours employees worked in a franchisee store. Ex. 27 (Pederson Tr. 281:4-15). PULSE also stores wage rates for employees, tips reported by drivers, and mileage calculations to be used to reimburse drivers for delivery expenses. Ex. 27 (Pederson Tr. 268:9-25); Ex. 75 (DP00075398-400).


207. Finally, Domino's requires that franchisees maintain, in either hard copy or electronic format, all business records of each franchisee's store, including payroll documents, W-2 forms, and I-9 forms, to be kept by the franchisee in accordance with Domino's own record retention policies and Domino's further requires unfettered access, either remotely or on-site, to all such franchisee records and information. Ex. 18 (SFA §14.1, at DP00000310); Ex. 24 (MRG, at DP00000634, §12 at 47); Ex. 51 (Sharma Aff. ¶37).

**VIII. CONCLUSION**

208. Based on the foregoing facts, for the reasons set forth in the Verified Petition and in Petitioner's Memorandum of Law in Support of the Verified Petition, Petitioner respectfully requests that the Court grant the relief sought in the Verified Petition in all respects and grant such other and further relief as the Court deems just and proper.

209. No prior application has been made for the relief requested herein.

Dated: New York, New York  
May 23, 2016

  
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TERRI GERSTEIN