

2018 WL 3231273

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United States District Court,  
N.D. Illinois, Eastern Division.

In Re: Jimmy John's Overtime Litigation

14 C 5509

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15 C 1681, 15 C 6010

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Filed 06/14/2018

### MEMORANDUM OPINION

Charles P. Kocoras United States District Judge

\*1 This is a consolidated collective action alleging violations of the Fair Labor Standards Act (the “FLSA”). Named Plaintiffs Emily Brunner, Caitlin Turowski, Alexander Whiton, and Scott Watson (collectively, “Plaintiffs”), all former employees of Jimmy John's franchisees, brought this action against their franchisee employers as well as several corporate Jimmy John's entities. In their Amended Complaint, Plaintiffs claim that they were improperly classified as exempt under the FLSA and consequently denied overtime pay. Now before the Court is Defendants Jimmy John's LLC, Jimmy John's Franchise, LLC, and Jimmy John's Enterprises, LLC's (collectively, “Jimmy John's”) motion for summary judgment on the narrow issue of whether Jimmy John's is Plaintiffs' joint employer.<sup>1</sup> Also before the Court is Jimmy John's motion to exclude the expert report and testimony of Plaintiffs' expert witness. For the following reasons, both motions are granted.

### BACKGROUND

#### **I. Local Rule 56.1**

Local Rule 56.1 requires each party on a summary judgment motion to submit a Statement of Material Facts in support of its respective position (“56.1 Statements”). These statements are meant to streamline the adjudicative process by identifying the material facts and presenting them in a concise and easy-to-follow manner. Rule 56.1 Statements should contain only factual allegations and avoid legal arguments or conclusory statements. Similarly,

responses to 56.1 Statements are “not the place for purely argumentative denials.” *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000).

Both Jimmy John's and Plaintiffs expressed their dissatisfaction with one another's 56.1 Statements, urging the Court to strike those statements in full or in part. Jimmy John's claims that Plaintiffs violated Rule 56.1 by failing to properly cite evidence “and/or misstating, overstating, or citing to non-supportive or inadmissible evidence.” Further, Jimmy John's argues that Plaintiffs' 56.1 Statement contains “inadmissible hearsay, speculation, assertions not based on personal knowledge, and improper argument.” Plaintiffs, too, object to many of Jimmy John's' statements as conclusory, and they frequently deny statements made by declarants who allegedly lack personal knowledge to make that statement. Plaintiffs also note that many paragraphs in Jimmy John's' 56.1 Statement contain multiple allegations, running afoul of the requirement that it consist of only eighty “short numbered paragraphs.” N.D. Ill. R. 56.1(a).

\*2 “It is the function of the Court, with or without a motion to strike, to review carefully statements of material facts and to eliminate from consideration any argument, conclusions, and assertions that are unsupported by the documented evidence of record offered in support of the statement.” *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc.*, 68 F. Supp. 3d 917, 921 (N.D. Ill. 2014). Having considered both sides' objections to one another's 56.1 Statements, we find that both contained issues that warrant the disregard of certain statements. For example, Jimmy John's relied on the declaration of a corporate representative for thirty years' worth of historic information regarding Jimmy John's. Even as Jimmy John's' CEO, the declarant would lack personal knowledge of that information. Plaintiffs often listed the wrong exhibit number or cited to pages of the deposition transcript that was not provided in the excerpt. Both sides submitted responses that were at times argumentative and therefore inappropriate as a response to a 56.1 Statement.

The Court has discretion in deciding whether or not to strictly enforce Rule 56.1. *See Bordelon v. Chi. Sch. Reform Bd. of Trustees*, 233 F.3d 524, 527 (7th Cir. 2000). Exercising said discretion, the Court declines to fully strike either 56.1 Statement. Nonetheless, “any statements or responses that contain legal conclusions or argument, are evasive, contain hearsay or are not based on

personal knowledge, are irrelevant, or are not supported by evidence in the record will not be considered by the Court in ruling on [Jimmy John's] summary judgment motion.” *Univ. HealthSystem*, 68 F. Supp. 3d at 921 (stating that “[m]otions to strike at the summary judgment stage are disfavored and generally unnecessary, for the Court may only consider admissible evidence when ruling on a motion for summary judgment.”).

With this in mind, the Court turns to the relevant facts. The following facts taken from the record are undisputed, except where otherwise noted.

## II. Facts

### A. Parties

Plaintiffs are all former employees of Jimmy John's restaurants owned by separate Jimmy John's franchisees. Each Plaintiff worked as an Assistant Store Manager (“ASM”) at one point during their employment. Plaintiffs brought this collective action, which this Court conditionally certified, of individuals currently or formerly employed as salaried ASMs at any Jimmy John's restaurant nationwide against several Jimmy John's corporate entities, franchise companies licensed by Jimmy John's, and individual franchise owners who own and operate Jimmy John's restaurants. Relevant to the instant motion, however, are the following defendants.

Defendant Jimmy John's Enterprises, LLC (“JJ Enterprises”) owns the trademarks, service marks, commercial symbols, and certain other intellectual property associated with the Jimmy John's Brand and licensed to Jimmy John's franchisees, but has no direct contractual relationship with any Jimmy John's franchisee. Defendant Jimmy John's Franchise, LLC (“JJ Franchise”), is the franchisor of the Jimmy John's system. JJ Franchise enters into franchise agreements with franchise owners, allowing them to make use of the Jimmy John's brand in their franchise stores. Defendant Jimmy John's LLC is a holding company and has no contractual relationship with any Jimmy John's franchisee. Collectively, we refer to these Defendants as “Jimmy John's.”

### B. The Jimmy John's Franchise

There are more than 700 individual Jimmy John's franchise owners. Collectively, they own and operate nearly 2,200 franchise stores in 43 states, plus the District of Columbia. Some franchisees own as few as one franchise location, while the largest own more than 50 locations.

Each franchisee enters into a franchise agreement with JJ Franchise that sets forth the respective rights and responsibilities of the franchisee and franchisor (the “Franchise Agreement”). Jimmy John's issues a new version of the Franchise Agreement every year. The Franchise Agreement provides the franchisee with the license to use Jimmy John's Intellectual Property, as well as the Jimmy John's business format, which includes the methods, procedures, signs, designs, layouts, standards, and specifications for Jimmy John's branded stores. In exchange, Jimmy John's franchisees are obligated to: (1) make payments to Jimmy John's, specifically, a certain percentage of their gross sales as a royalty and a separate percentage as a contribution to a national advertising fund; and (2) uphold the “Jimmy John's Brand Standards” that are essential to the quality and consistency of the Jimmy John's customer experience.

\*3 While the franchisees must adhere to the Jimmy John's Brand Standards, the Franchise Agreement establishes that the franchise owns and operates an independent business. It also explicitly states that Jimmy John's has no control over certain labor relations. Section 8(A)(12) of the Franchise Agreement states:

[Jimmy John's has] no control or authority over [the franchisee's] labor relations, including, but not limited to, employee selection, training, promotion, termination, discipline, hours worked, rates of pay, benefits, work assigned, working conditions, or adjustment of grievances and complaints, or any other meaningful control over [the franchisee's] employment practices. RESTAURANT employees are under [the franchisee's] control.<sup>2</sup>

Jimmy John's claims that the Franchise Agreement does not give Jimmy John's the authority to control certain employment-related matters, including the ability to: (1) hire or fire franchisee employees; (2) control the work schedules of franchisee employees or mandate the number of franchisee employees to be hired or scheduled for a particular shift; (3) exercise supervision or control over the conditions governing payment of franchisee employees; (4) dictate the rate or method of payment to franchisee employees; or (5) maintain employment records for franchisee employees. Plaintiffs disagree, citing to sections of the Franchise Agreement that permit Jimmy John's to impose dress codes and minimum staffing levels, including the presence of certified managers.

Prior to signing the Franchise Agreement, potential franchisees meet with a franchise salesperson to review and sign a document entitled "Make or Break Statements of Commitment and Lifestyle." The document contains a list of thirteen statements, such as "I am committed to following Jimmy Systems 100% of the time" and "executing 100% of the requirements in the coaches [sic] report." Plaintiffs contend that this document is essentially a contract between Jimmy John's and the franchisee that requires the franchisee to follow each of the thirteen statements. Jimmy John's counters that it is an "aspirational document" that allows potential franchisees to ask themselves if they are willing to take on the role of a Jimmy John's franchisee.

### **C. The Jimmy John's Brand**

#### **1. Brand Standards**

Brand Standards are a set of policies that Jimmy John's establishes to help ensure the quality and consistency of the customer experience in relation to the store's operations, including: menus; food preparation; store cleanliness, layout, and appearance; signage; and employee dress and grooming.

The Franchise Agreement gives Jimmy John's the right to establish and enforce Brand Standards so that the Jimmy John's customer experience is not only of high quality, but is also uniform across thousands of Jimmy John's locations nationwide, including both corporate-owned and franchisee-owned stores.

#### **2. Business Coaches**

\*4 Jimmy John's monitors compliance with Brand Standards through its Business Coaches, who visit franchise stores approximately every four to six weeks and perform audits for a minimum of seven hours. Business Coaches audit, inspect, and report on the store's compliance with Brand Standards, observing, among other things: the cleanliness of the store; adherence to the dress code; the proper weight and thickness of the meats, cheese, and vegetables that are used in sandwich preparation; and the time that it takes to prepare sandwiches and get them into customers' hands or out the door for delivery. For example, Business Coaches have audited employees on "the appropriate way to spread mayonnaise, how many hot peppers and/or onions go on a sandwich...[and] how to clean the store." They have also noted when employees wore "shoes with too many colors, un-tucked shirts, [and] un-tucked hair under corporate approved hats."

The Business Coach completes a Jimmy John's In-Store Survey form ("Business Coach Survey Form") during the audit of a franchise store. The Business Coach Survey Form contains a number of categories and sub-categories related to store performance, and a franchisee is assigned an audit score based on the Business Coach's assessment of the franchisee's compliance or lack of compliance with each of those items. These categories include sandwich preparation, formulas and product freshness, bread baking, customer service, uniforms and personal grooming, cleanliness, paperwork procedures, and additional compliance areas. For example, Business Coaches have docked points from a store's audit for employee dress code violations. Business Coaches audit whether the store is "staffed for volume" and, if not, recommend the number and type of additional employees the franchisee should hire. They also evaluate whether the store employs the requisite number of Certified Managers<sup>3</sup> and whether the store is using a fixed employee schedule. The Business Coach Survey Form outlines with specificity the Brand Standards with which Jimmy John's expects franchisees to comply. It also identifies for franchisees the areas in which they have excelled or fallen short. Business Coaches communicate the results of their audits and the assigned audit score to franchisees.

Perhaps the largest dispute between the parties is the role of the Business Coaches and their influence on the franchisees. Whereas Jimmy John's insists that Business Coaches make recommendations during and after their audits that franchisees are free to follow or ignore, Plaintiffs paint a different picture. Plaintiffs contend that franchisees are expected to follow "100%" of what the Business Coaches suggest. And while Jimmy John's claims that no audit is performed with respect to whether a franchisee decides to follow the Business Coach's recommendations or not, Plaintiffs contend that Business Coaches work with the franchisees to ensure compliance, assign "redirects," and follow up with corrective action. If a store consistently disregards the Brand Standards and receives multiple poor audit scores, Jimmy John's reserves the right to terminate the franchise relationship.

Business Coaches do not audit franchisee stores for compliance with employment-related matters, including franchisees' decisions on employee titles or job descriptions, scheduling, employee compensation, employee classifications (including ASMs' classifications), or compliance with the FLSA. Plaintiffs note that Business Coaches advise franchisees on staffing, at times instructing franchisees to hire additional staff or to send employees home when a store was overstaffed during an audit.

\*5 Franchise employees are present when Business Coaches perform their audits, but Jimmy John's claims that Business Coaches are not authorized to hire, fire, or discipline those employees. Plaintiffs dispute this, pointing to evidence that Business Coaches were involved in the discipline and termination of franchisee employees, albeit indirectly. For example, a Business Coach wrote in an email to a franchisee that he wanted an employee "gone in 10 days." Another franchisee employee believed that the store's Business Coach had "a hand" in his termination. Regarding discipline, Plaintiffs point to a situation where an employee was incorrectly making a sandwich. The Business Coach pointed this out to a manager, who then "disciplined" the employee by "correct[ing] them on how they were doing things wrong."

Franchisees are not required to hire or staff an employee as an ASM at any time. Franchisees are not audited with regard to whether their ASMs (if the franchisee chooses to employ someone with that job title) are classified as

exempt or non-exempt under the FLSA, or whether they are paid hourly or on a salaried basis. Jimmy John's does not determine when the ASMs in a franchisee-owned store (if any) must be scheduled to work, and no audit is performed with respect to when and how many ASMs are scheduled to work, if any. Jimmy John's claims that it does not dictate which duties the ASMs in a franchisee-owned store (if any) must perform, and no audit is performed with respect to the nature of the duties that franchisees have assigned to the ASMs (if any) in a particular store. Plaintiffs contend that the Operations Manual, discussed in greater detail below, defines the scope of ASMs' duties at Jimmy John's to the extent that "there are virtually no activities for which ASMs are not governed in timing, procedure, and methods by the Operations Manual."

### **3. Certified Manager Training**

Jimmy John's offers and administers a Certified Manager Training program, the purpose of which is to better acquaint the employee with Brand Standards and prepare him or her to help manage the store in a manner that preserves and enhances the Jimmy John's Brand. Jimmy John's requires all new franchisees to participate in the Certified Manager Training program before they are allowed to operate a Jimmy John's franchise store. Jimmy John's' Certified Manager Training program is also made available to franchisees for their employees that serve as managers in their stores, or who will soon be promoted to a management role by their franchisee employer. Prior to Certified Manager training, Jimmy John's tests employees to determine the length of the Certified Training course they must take.

### **4. Jimmy John's Confidential Operations Manual**

Jimmy John's provides each of its franchisees with an Operations Manual, which encompasses subjects such as Operations, Advertising, Financial and Accounting, and Services. For example, the Operations Manual includes detailed descriptions and photographs that provide instructions on how to bake bread, slice meat and vegetables, and assemble and wrap sandwiches. There is also a detailed discussion of accounting procedures that franchisees are expected to utilize in order to properly report royalties owed to Jimmy John's. Jimmy John's explains that the Operations Manual contains

both requirements and recommendations regarding the operations of a Jimmy John's store, but Plaintiffs contend that the Operations Manual must be followed “in full.”

Plaintiffs state that the Operations Manual provides detailed instructions on “nearly every aspect of store operations,” including proper sandwich preparation, daily beautification and cleaning tasks, and financial administration. Most significantly, the Operations Manual contains a “Daily Punchlist” that lists a number of activities that store employees must complete each day, with no modifications. Employees completing these tasks must initial each item so that Business Coaches can review the Punchlist for compliance. Every franchise must use the Daily Punchlist, as well as similar task lists such as Opening Procedures (instructing managers to open the store with a step-by-stop process) and the Daily Beautification List (detailing the store cleaning procedures). Oftentimes, Plaintiffs state, an ASM would be the only employee in the restaurant during opening shifts and would have to complete the Opening Procedures as specifically stated, the “Jimmy John's way.” Jimmy John's notes that these checklists do not specify which employee needs to perform these tasks—it is up to the franchisees to determine whether ASMs will perform these tasks or not.

\*6 The Operations Manual has evolved and changed over time. Prior to 2015, the Operations Manual included a Human Resources section (“HR Section”) containing tools, recommendations, information, and Sample Forms for Jimmy John's franchisees to use as a resource.<sup>4</sup> Some of the Sample Forms have since been moved to a password-protected training toolkit on the Owner's Website, and the HR section was removed in its entirety from the Operations Manual in 2016.

Jimmy John's does not audit whether franchisees choose to adopt the “Jimmy John's Sample Policies.” Though some might choose to implement employment policies that closely mirror the samples that Jimmy John's provides, franchisees are free to decide whether and to what extent they will adopt, reject, accept, or modify the Sample Policies that Jimmy John's provides. Franchisees develop, implement, and administer their own personnel policies and forms, which are tailored to the needs of their independent operations.

Plaintiffs concede these points, but maintain that the “Rules of Employment” found in the Operations Manual direct human resource matters on a franchise level. The Rules of Employment list thirty-one “rules” that govern attendance and related employment matters. For example, one item states that “[i]f you are late you must call prior to your scheduled arrival time. If you don't, you will be TERMINATED. NO EXCEPTIONS!”

Plaintiffs also note that the Operations Manual provides detailed instructions on how franchisees should train new employees, using the four-step “Tell-Show-Do-Review” method and the 5 Step Hourly Process, which trains the employee “the Jimmy Way, [forcing] their success and thus, [the franchise store's] success.” Jimmy John's contends that the Operations Manual does not require franchisees to follow these training methods; instead, the Operations Manual recommends franchisees to model the training they provide after the training they received with the Jimmy John's program.

Jimmy John's further requires all franchise stores to use specific equipment, machinery, and supplies, as well as specific software for timekeeping, point of sale, and staffing. Jimmy John's also directs how stores look, including the store's design, décor, and the way stocked items are displayed. Jimmy John's stores are organized such that “one should be able to open a refrigerator in any Jimmy John's restaurant and expect to see the same items, located in the same spaces, prepared and stored in the identical manner.” The Operations Manual includes photographs of how the items in the front of the store had to be displayed and how the kitchen was to be organized.

## **D. Facts Relevant to the Joint Employer Analysis**

### **1. Power to Hire & Fire Employees**

\*7 Jimmy John's provides franchisees with information, tools, and suggestions about interviewing techniques (including template interview forms), but imposes no requirements with respect to how franchisees are to interview prospective employees. Representatives from Jimmy John's do not review job applications, nor do they participate in interviews of prospective franchise employees. Plaintiffs concede that Jimmy John's does not have an active role in the interviewing or hiring process, but contend that it provides extensive rules, guidelines,

and guidance with respect to recruitment and hiring. For example, a former version of the HR Section included two “subscreen” documents, which listed interview questions for franchisees to use.

Franchisees and their managers ultimately hire new franchise employees. Jimmy John's imposes just one hiring restriction: franchisees are prohibited from recruiting any individuals who were employed by Jimmy John's or another franchisee during the prior twelve—or, in some instances, twenty four—months. Plaintiffs note that a Business Coach once helped a franchisee obtain permission to hire another franchisee's former employee.

Jimmy John's insists that franchisees and their managers, not Jimmy John's, are responsible for disciplining their employees. Plaintiffs disagree, explaining that Business Coaches, through their feedback during audits, can influence franchisee managers into disciplining employees. Furthermore, Jimmy John's states that it does not have the power to terminate employees, nor do Business Coaches; termination decisions are made by franchisees and their employees. Plaintiffs again disagree, stating that the Operations Manual contains a list of rules, which, if not followed by employees, may trigger termination or reduction of their bonus.

## **2. Supervision & Control of Employee Work Schedules**

Franchisees and their managers, not Jimmy John's, set the work schedules for franchisee employees. Plaintiffs claim that Jimmy John's imposes a fifty-hour minimum work week for all managerial employees. They also reiterate that the Operations Manual dictates the tasks that franchise employees must follow daily.

Plaintiffs add that Jimmy John's ensures that stores are staffed based on projected sales and volume. Moreover, the Operations Manual requires each franchised store to have at least one Certified Manager and for this manager to “manage/run no less than [five] full shifts a week.”

Some franchisees employ four ASMs at a single store, while others have as few as one. At least one franchisee chose not to employ any ASMs at all for the first few years of operation. Some franchisees have created unique management roles, such as a “Support Manager,” to assist General Managers and/or ASMs in certain markets.

## **3. Rate & Method of Payment for Franchise Employees**

Franchisees are responsible for deciding how their employees will be classified and compensated, and Jimmy John's imposes no requirements with respect to classification and compensation. Franchisees are responsible for making decisions regarding the method of payment applicable to those employees, including ASMs (if any), and Jimmy John's imposes no requirements with respect to the method of payment. Plaintiffs contend that franchisees nonetheless sought information and guidance from Jimmy John's on base rates of pay and methods of compensation, which Jimmy John's representatives shared.

Some franchisees have paid their ASMs an hourly wage and thus gave them overtime pay throughout the relevant time period; others have been classified as exempt and paid a salary. The compensation received by franchise ASMs varies. Some franchisees have converted ASMs from exempt to non-exempt employees.

Franchisees make their own decisions regarding whether and how to pay bonuses to employees. Jimmy John's imposes no requirements with respect to the payment of bonuses. Plaintiffs note that Business Coaches pushed franchise owners to adopt the “Jimmy John's Bonus Program” verbatim, especially because Business Coaches were evaluated on whether the franchisees they audited were following the program. Furthermore, bonus eligibility and value depended on the audit scores received by Business Coaches. Under the Jimmy John's Bonus Program, franchise stores must receive a “passing” audit score of at least 85 out of 100 points for its managers to be eligible for bonuses. Lower audit scores resulted in lower bonuses.

## **4. Employment Records**

\*8 Franchisees, not Jimmy John's, maintain employment records for their employees. Jimmy John's does not maintain employment files for ASMs or other employees pertaining to their work in franchisees' stores. Plaintiffs note, however, that Jimmy John's was able to produce a significant number of ASMs' names and contact information to a third-party claims administrator after

the Court authorized FLSA notice. Franchisees do not provide employment records for their employees to Jimmy John's. When Business Coaches visit stores, they do not audit or inspect franchisee employment records.

### LEGAL STANDARD

In considering a motion for summary judgment, the Court construes all facts and draws all reasonable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine issue of material fact arises where a reasonable jury could find, based on the evidence of record, in favor of the non-movant. *Anderson*, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court considers the “record as a whole.” *Morgan v. Harris Trust & Sav. Bank of Chi.*, 867 F.2d 1023, 1026 (7th Cir. 1989).

Northern District of Illinois Local Rule 56.1 requires the “party moving for summary judgment to include with the motion ‘a statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to a judgement as a matter of law.’ ” *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004) (quoting N.D. Ill. R. 56.1(a)(3)). “The movant bears the initial burden of showing that no genuine issue of material fact exists.” *Genova v. Kellogg*, 2015 WL 3930351, at \*3 (N.D. Ill. 2015). “The burden then shifts to the non-moving party to show through specific evidence that a triable issue of fact remains on issues on which the movant bears the burden of proof at trial.” *Id.* The non-moving party must respond to the movant's Local Rule 56.1(a)(3) statement and may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits. N.D. Ill. R. 56.1(b); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-movant must support their contentions with documentary evidence of specific facts that demonstrate that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The Court is concerned only with disputes over material facts and “factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. If the non-moving party fails to identify, with reasonable particularity, evidence that precludes summary

judgment, “the moving party is entitled to a judgment as a matter of law.” *Celotex*, 477 U.S. at 323.

### DISCUSSION

#### **I. Motion to Exclude Expert Report**

We first address Jimmy John's motion to exclude the expert report and testimony of Plaintiffs' expert witness, David Lewin. Lewin, an expert in human resource management and employment relations, provided an expert report analyzing the relationship between Jimmy John's and the employees of its franchisees. Lewin came to two conclusions:

(1) “[T]he economic and contractual relationship between Jimmy John's and franchisees' ASMs is such that Jimmy John's has the right to control and does in fact exercise very substantial control over Jimmy John's franchisees' ASMs' wages, hours, working conditions and work performed,” and

(2) “Jimmy John's imposes operational standards on franchisees and their ASMs that encompass virtually every aspect of the franchisees' businesses and the ASMs' work, and that thereby substantially determine franchisees' labor and human resource management practices.”

\*9 Jimmy John's moves to exclude Lewin's report and prevent him from testifying as an expert witness for failure to meet the requirements of Federal Rule of Evidence 702.

As proponents of Lewin's expert report, Plaintiffs bear the burden of establishing that it is admissible. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009). Rule 702, which governs the admissibility of expert witness testimony, states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the

testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

When expert testimony is proffered, the Court must serve as a gatekeeper and ensure that it is “not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). The expert’s opinion must have “a reliable basis in the knowledge and experience of his discipline” and must be “more than subjective belief or unsupported speculation.” *Id.* at 590, 592.

### A. Qualifications

Jimmy John’s first argues that Lewin is not qualified on the pertinent issues of joint employment and franchising. “There must be some degree of correlation between [Lewin’s] superior knowledge and the subject matter of the offered opinions.” *Chiriboga v. National R.R. Passenger Corp.*, 2011 WL 2295281, at \*2 (N.D. Ill. 2011). Jimmy John’s focuses heavily on Lewin’s concession that he is not specialized in the area of franchising and that he has only opined on the joint employment issue once before. Further, Lewin has not published any materials regarding franchising, nor has he testified on the specific topic. Had Lewin held himself out to be an expert on franchising and purported to apply such a perspective on his analysis, the Court would have cause for concern. Instead, Lewin marshaled his expert knowledge in human resource management and employment relations to analyze the interactions between Jimmy John’s and its franchisees’ employees, specifically to decipher the amount of control Jimmy John’s exerts over those employees’ working conditions.

The essential question is this: does Lewin’s general knowledge of employment relations suffice, or does the subject matter of this case necessitate a specific knowledge on franchising in order to render a relevant and valuable expert opinion? We are not convinced that the subject matter of this case requires particularized knowledge in franchising, although it would be helpful. Lewin need not be a franchising expert to arrive to his conclusions regarding the amount of control Jimmy John’s has over its franchisees’ employees. Jimmy John’s also notes that Lewin did not familiarize himself with

Federal Trade Commission (“FTC”) regulations or the Lanham Act in preparation for his expert report, which Jimmy John’s claims are fundamental to an understanding of franchising. Such background knowledge would have been helpful to Lewin, but we do not find it necessary to formulate his opinion in the general context of employee control.

\*10 Jimmy John’s next embarks on a mission to disqualify Lewin by listing a sample of his previous engagements in which courts have excluded his expert reports, finding that his opinions lacked sufficient support or foundation. While those cases may aid the Court’s determination of Lewin’s expert report’s reliability, it is inappropriate to claim that Lewin’s track record of exclusions in other cases mandates his exclusion here.

Jimmy John’s highlights Lewin’s engagement in *Salazar v. McDonald’s Corp.*, No. 14-CV-02096 (N.D. Cal.), wherein he offered an expert report on a joint employment issue that greatly mirrors his report in this matter. In *Salazar*, Lewin concluded that McDonald’s was a joint employer of its franchisees’ employees. Jimmy John’s contends that the *Salazar* court “implicitly rejected” Lewin’s expert opinion by finding that McDonald’s was not a joint employer. This despite Jimmy John’s acknowledgement that “the court in *Salazar* made *no reference to Lewin’s opinions...*in its decision granting summary judgment.” (emphasis added).

Jimmy John’s focus on *Salazar* is perplexing. For one, it is unclear how *Salazar* should inform the Court’s decision on whether or not Lewin is a qualified expert here. The fact that the *Salazar* court came to the opposite conclusion does not discredit Lewin’s opinion, especially when the court did not directly discuss the credibility or reliability of Lewin’s report. Surely, many qualified experts have rendered opinions that did not prevail in court. Secondly, *Salazar* did not consider the issue before this Court: the admissibility of Lewin’s expert report. It seems that Jimmy John’s points to *Salazar*, then, merely to point out that Lewin “failed” in his only attempt to provide an expert opinion on the joint employment issue. This has absolutely nothing to do with whether he is qualified as an expert to discuss the topics before us.

Jimmy John’s does not dispute that Lewin is an expert in employment relations. This readily equips him with the requisite knowledge and qualifies him to opine on the subject matter of his expert report, notwithstanding his

lack of expertise in the factual province of the case before us, that is, franchises.

### B. Reliability

Next, Jimmy John's argues that Lewin's report is not grounded in the facts of the case and contains factual inaccuracies. Jimmy John's contends that Lewin did not adequately review the plethora of evidence on record. Aside from official Jimmy John's documents such as the Operations Manual and the Franchise Agreement, Plaintiffs also provided Lewin with close to thirty full deposition transcripts, as well as a dozen "deposition digests," deposition summaries prepared by Plaintiffs' counsel. Jimmy John's takes issue with the deposition digests, claiming that Lewin's failure to test the veracity and accuracy of those digests before relying on them to formulate his opinions is not only unreliable, but also led to a myriad of factual inconsistencies in his report. Furthermore, Lewin rarely read any deposition transcripts in their entirety, including the already-shortened deposition digests. Plaintiffs also failed to provide Lewin with any of the Business Coach declarations, which Jimmy John's contends are central to Lewin's analysis. Plaintiffs argue that Lewin analyzed portions of an extensive record that he determined to be relevant to his analysis and questions regarding the credibility of Lewin's sources go to the weight, not the admissibility, of his expert report.

\*11 Our task is to ensure that Lewin's expert report is reliable, *i.e.*, that his opinions are based on sufficient and sound facts. That he relied on "deposition digests" prepared by Plaintiffs' counsel rather than full deposition transcripts does not automatically render his opinions unreliable. It is "common practice" for counsel to select and provide a subset of documents to its expert, and courts generally permit such a practice. *Arjangad v. JPMorgan Chase Bank, N.A.*, 2012 WL 1890372, at \*6 (D. Or. 2012) (citing *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1260 (N.D. Cal. 1997) (admitting expert testimony when expert had not read all of the depositions in the matter and had relied upon plaintiffs' counsel to provide her with relevant materials)). An expert may also rely on information provided by counsel that limits the scope of his analysis so long as counsel does not formulate the expert's ultimate opinions. *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 933 (W.D. Wis. 2007).

Lewin had over 200 documents at his disposal. It is not worrisome that Plaintiffs' attorneys provided Lewin with deposition digests to facilitate his review of the extensive record. That Lewin chose to rely on certain excerpts of the full deposition transcripts that he deemed relevant is within reason, as well.

Worrisome, however, are the number of factual inaccuracies that contaminate Lewin's expert report. Jimmy John's noted dozens of alleged inaccuracies in Lewin's report, most of which are propositions that are inconsistent with testimony from another witness or contradicted by further testimony from the same witness. Most destructive to the reliability of Lewin's expert report are the number of propositions that are simply unsupported by the cited deposition testimony. Jimmy John's points out several such instances, but two are particularly alarming, as they implicate one of the central issues raised by the instant summary judgment motion: the role of Jimmy John's Business Coaches and whether they wield the power to fire or discipline employees or franchisees for failing to follow their recommendations. Lewin concludes that they do, citing to deposition testimony of employees who have witnessed or experienced such "control" from the Business Coaches.

The first alarming proposition used to support Lewin's conclusion is: "Rather than the business coach recommendations being truly optional, they are enforced by subsequent 'punishment' if they are not followed." Lewin cites to an excerpt of deposition testimony in which a franchisee was asked how Business Coaches would "hold [him] accountable" for failing to follow franchise standards. The franchisee responded that Business Coaches "tri[ed] to make sure that [franchisees] adhere to compliance issues." Tellingly, the franchisee testified that, while he had been found to be noncompliant in the past, he never paid Jimmy John's any fines nor was he ever penalized for his noncompliance. Plaintiffs refer to Jimmy John's argument that the franchisee never said the word "punishment" as "verbal nitpicking," but it clearly is not.<sup>5</sup> The franchisee made clear in his deposition testimony that being "held accountable" for noncompliance did not involve punishment. Yet Lewin relies on this testimony to assert that Business Coach recommendations were enforced by "punishment," citing to deposition testimony that is entirely devoid of the word and its standard meaning.

In another example of Lewin's misleading usage of words, he states that a store manager “imposed discipline” on an employee for making a sandwich incorrectly after being informed of the error by a Business Coach. A quick review of the cited deposition testimony, however, demonstrates that the employee was far from “disciplined,” as the term is commonly understood. The deponent employee stated that the manager approached the employee and “corrected them on how they were doing things wrong.” When asked if she would characterize the manager's actions as “discipline,” the deponent said that she would, “based on the tone that [the manager] used.” Lewin also stated that Business Coaches “communicated policy enforcement” directly and indirectly to store employees, citing to deposition testimony that Business Coaches would inform either the store managers or the employees that tasks such as mopping floors or wiping down tables were not being done properly.

\*12 Lewin uses these examples to conclude that Business Coaches have the power, or at least the influence, to discipline and punish franchisees and their employees for failing to comply with Jimmy John's standards. His sources, however, do not substantiate these claims, and he cites to no other sources that would sufficiently justify his assertions. “An expert's report that does nothing to substantiate [his] opinion is worthless, and therefore inadmissible.” *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1996). There must be a “link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support.” *U.S. v. Mamah*, 332 F.3d 475, 478 (7th Cir. 2003); see also *AngioScore, Inc. v. TriReme Med., Inc.*, 87 F. Supp. 3d 986, 1016–17 (N.D. Cal. 2015) (excluding Lewin's expert testimony because it was “based merely upon anecdotal, self-selected examples” and “failed to establish that his opinions are sufficiently rooted in factual knowledge such that they are reliable and relevant”). As noted by Jimmy John's, Lewin's report is riddled with factual inaccuracies beyond the few examples we have discussed. There is a critical gap between the facts Lewin purported to rely on and the strong conclusions he made. He cannot rely on obvious mischaracterizations of the facts to support his ultimate conclusions. We find that Lewin's expert report lacks sufficient support from the facts of the case and is therefore unreliable and inadmissible.

### C. Specialized Knowledge & Helpfulness

For the sake of completeness, we briefly discuss Jimmy John's arguments that Lewin did not use specialized knowledge in arriving at his conclusions and is therefore unhelpful to the Court. In order to be admissible, expert testimony must be based on the expert's specialized knowledge and help the trier of fact to understand the evidence or determine a fact in issue. Fed. R. Ev. 702(a); *Daubert*, 509 U.S. at 592. Lewin's expert report discussed the “vertical agency problem,” under which a franchisor may exercise excessive operational control over its franchisees to combat the risk of its franchisees engaging in opportunistic behavior, also known as “free-riding.” Plaintiffs claim that Lewin applied his specialized knowledge on this topic and that his conclusion on the amount of Jimmy John's control over its franchisees will be helpful for the trier of fact to determine whether Jimmy John's is a joint employer.

We disagree with Plaintiffs on both counts. While Lewin's discussion about the vertical agency problem is intriguing, he did not analyze the facts of this case under that framework. In his deposition, Lewin testified that he did not conduct a study on any Jimmy John's franchisees to observe whether any franchisees were engaged in opportunistic behavior such as to create the vertical agency problem he described. Moreover, Lewin's review of deposition transcripts did not reveal any examples of opportunistic behavior or free-riding. Thus, any discussion about the vertical agency problem as it relates to Jimmy John's is mere speculation. Lewin's work on his expert report amounts to reviewing and analyzing deposition transcripts and corporate Jimmy John's documents to ascertain whether Jimmy John's had control over its franchisees' employees. This type of review does not require expertise, nor does it assist the trier in fact in understanding the evidence or determining a fact in issue. Any ordinary person could perform this same sort of critical analysis. Lewin's conclusions are nothing more than his subjective beliefs on the facts of the case. Failure to connect the concept of vertical agency to the abundance of discovery evidence in this case is not only unhelpful, but misleading as well.

\* \* \*

For the aforementioned reasons, the Court grants Jimmy John's motion to exclude Lewin's expert report, and it is stricken from the record.

## II. Motion for Summary Judgment

Jimmy John's seeks summary judgment in its favor, with a finding that it is not a joint employer of Jimmy John's franchise employees. Before we consider whether Jimmy John's is a joint employer, we must first determine which test is appropriate to analyze its status.

### A. Joint Employer Analysis

The FLSA defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee...” 29 U.S.C. § 203(g). Courts across many circuits have agreed that the term “employer” should be applied broadly so as to fulfill Congress' remedial intent. *See, e.g., Schneider v. Cornerstone*, 148 F. Supp. 3d 690, 696 (N.D. Ill. 2015); *Boucher v. Shaw*, 572 F.3d 1087, 1090 (9th Cir. 2009); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991). “The FLSA's definition of ‘employee’ is strikingly broad and stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” *Keller v. Miri Microsystems, LLC*, 781 F.3d 799, 804 (6th Cir. 2015) (internal citations and quotations omitted). Thus, courts assess the “economic reality” of the working relationship to determine whether an employment relationship exists under the FLSA. *Villareal v. El Chile, Inc.*, 776 F. Supp. 2d 778, 785 (N.D. Ill. 2011). Courts must consider the “totality of the circumstances” for this inquiry. *See Villareal*, 776 F. Supp. 2d at 785; *Schneider*, 148 F. Supp. 3d at 696.

\*13 A joint employer relationship exists where each alleged employer exercises control over the working conditions of the employees. *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008).<sup>6</sup> There is no “one-size-fits-all” test that all courts use in determining employer status under the FLSA; instead, courts have developed different methodologies to determine whether a defendant exercised sufficient control to be deemed an employer. *See Schneider*, 148 F. Supp. 3d at 696–97. The Seventh Circuit in *Moldenhauer* acknowledged one version of the economic reality test,

which asks whether the alleged employer “(1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payments, (3) determined the rate and method of payment, and (4) maintained employment records.” 536 F.3d at 644. The court continued that “[a]lthough these factors are certainly relevant in deciding whether an employer-employee relationship exists, it would be foolhardy to suggest that these are the *only* relevant factors, or even the most important.” *Id.* Jimmy John's urges the Court to apply the four-factor test noted in *Moldenhauer* (as we did previously in this litigation<sup>7</sup>) and organized its summary judgment memorandum accordingly.

Plaintiffs, on the other hand, emphasize that courts have repeatedly rejected the notion that the joint employer analysis is restricted to the four-factor test noted in *Moldenhauer*. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (“The issue of the employment relationship does not lend itself to a precise test, but is to be determined on a case-by-case basis upon the circumstances of the whole business activity.”); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 69, 72 (2d Cir. 2003) (holding that the district court erred by applying the four-factor test and remanding the case to consider “functional” control factors as well). Plaintiffs do not offer another test or delineate a list of specific factors that the Court should consider. Instead, they discuss two recent cases from the Southern District of New York that evaluated joint employment claims under the FLSA and acknowledged the “functional control” test factors:

- (1) whether the alleged employers' premises and equipment were used for the Plaintiffs' work;
- (2) whether the [defendants] had a business that could or did shift from one putative joint employer to another;
- (3) the extent to which [the] Plaintiffs performed a discrete line job that was integral to the alleged employers' process of production;
- (4) whether responsibility under the contracts could pass from one [defendant] to another without material changes;
- (5) the degree to which the alleged employers or their agents supervised [the]

Plaintiffs' work; and (6) whether [the] Plaintiffs worked exclusively or predominantly for the alleged employers.

*Ocampo v. 455 Hospitality LLC*, 2016 WL 4926204, at \*6 (S.D.N.Y. 2016) (quoting *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 205–06 (S.D.N.Y. 2014)). In both cases, the plaintiffs were found to have pled sufficient facts to allege joint employment. *Olvera*, 73 F. Supp. 3d at 207 (plaintiffs pled that the putative employer guided franchises on how to hire and train employees, set and enforced requirements for franchise operations, and retained the right to inspect the franchise facilities); *Ocampo*, 2016 WL 4926204, at \*8 (plaintiffs alleged that the franchisor imposed mandatory training programs for franchise employees, established standards and controls for construction, furnishing, operation, appearance, and service of the hotel, and used software to track franchisee revenues).

\*14 Plaintiffs also refer to *Schneider*, which held that “[t]he test is to look at all facts surrounding the defendant's supervision of the employee and determine whether the defendant exercised control and authority over the employee in a manner that caused the FLSA violation (at least in part).” 148 F. Supp. 3d at 698. The *Schneider* court provided more guidance:

First, although a [defendant] must act in the interests of an employer in relation to an employee, more than supervision of an employee is required. Second, all relevant facts should be considered, including the four commonly bundled ones. These four factors, however, are neither dispositive nor necessarily weightier than any others. Third, to be an employer, the defendant's conduct must have caused, in whole or in part, the alleged violation...Fourth, and this follows from the previous point, the defendant must have actually exercised his authority, at least enough to have caused the violation in whole or in part.

*Id.* at 697–98.

Ultimately, Plaintiffs create a curious amalgam of the “functional control” and the four-factor “human resources” test, arguing that Jimmy John's: (1) micro-manages ASMs' working conditions through mandatory policies and procedures (by imposing requirements on franchise stores such as (i) strict compliance with the Operations Manual; (ii) the use of specific equipment and materials; (iii) uniform store decoration, display, and organization; and (iv) the use of specific software and systems); (2) employs Business Coaches to manage franchise stores; (3) was responsible for the FLSA misclassification claim at issue; and (4) directed franchisee human resource matters.

As noted above, we previously used the four-factor test on a motion to dismiss to determine whether Plaintiffs sufficient pled that Jimmy John's' CEO, James John Liautaud, was a joint employer. *See Brunner v. Liautaud*, 2015 WL 1598106 (N.D. Ill. 2015). We stated that the four factors noted in *Moldenhauer* were “relevant, but not exhaustive, to the inquiry.” *Id.* at \*3. We analyzed Plaintiffs' Complaint based on the four factors as well as other factors, including Liautaud's role as CEO. *Id.* at \*4. Under the “law of the case” doctrine, when a court states a rule of law or reaches a holding that is to be applied in the case before it, the court will apply that standard to the same issues in subsequent proceedings in that case. *Rubin v. City of Berwyn*, 553 F. Supp. 476, 478–79 (N.D. Ill. 1982). We will therefore apply the same analysis that we did in *Brunner* to the instant summary judgment motion. That is not to say that we will ignore the Plaintiffs' “other factors,” but we will begin with the four-factor test.

### 1. Power to Hire & Fire Employees

The first factor is whether Jimmy John's has the power to hire and fire franchisee employees. The parties are in agreement, according to Plaintiffs' Opposition Brief, that “Jimmy John's does not directly hire ASMs.” Plaintiffs contend, however, that Jimmy John's “exercises substantial influence on the hiring of ASMs.” Despite admitting that Jimmy John's does not participate in the interview or decision-making process for prospective employees, Plaintiffs argue that Jimmy John's *guides* the hiring process by providing “extensive” guidelines such as interview forms, called “subscreens,” and other materials for franchisees to use in the process. Further, Plaintiffs claim that Business Coaches instruct franchisees

to hire additional staff and have helped a franchisee “circumvent” a no-hire clause imposed by Jimmy John's.

**\*15** The HR Section of the Operations Manual provided guidance to franchisees on various matters including employment policies, staffing and scheduling, and the hiring process. A former version of the HR Section included two “subscreen” documents that listed interview questions for franchisees to use. Plaintiffs claim that, by offering these interview guides and insisting on compliance with the Operations Manual, Jimmy John's controlled the interview process by providing “extensive guidelines.” Jimmy John's contends that these forms were recommended guides that franchisees could decide whether to use, and the record shows that the subscreens were recommendations that managers used at their discretion.

Jimmy John's guidance in the hiring process does not equate to a *power* to hire employees. As we concluded in *Jimmy John's I*, a showing of corporate guidance in the hiring process, without any personal involvement in the hiring decisions of individuals seeking employment at a Jimmy John's Sandwich Shop, is insufficient to demonstrate that Jimmy John's controls the selection of franchise employees. *See Jimmy John's I*, 2015 WL 1598106, at \*4; *see also Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 481 (Cal. 2014) (finding that the Domino's franchise was not in control of franchisee's hiring because “Domino's did not participate in any job interviews” and did not receive or view candidates' applications). Here, it is evident that Jimmy John's performs no actual role in the hiring process.

Plaintiffs also argue that Jimmy John's exerts control in the hiring process by imposing a no-hire clause, prohibiting one franchisee from hiring an individual who is currently employed, or within the last twelve months was employed, by another Jimmy John's franchisee. They note that a Business Coach once helped a franchisee obtain permission from the former employer to circumvent the no-hire clause. Jimmy John's insists that this fact does not demonstrate that it claims or exercises the right to hire franchise employees. We agree. This general rule against hiring another franchisee's employee, while restrictive, does not amount to control over the hiring process. By imposing this requirement, Jimmy John's is protecting its franchisees from unfair

competition. It is not making any determinations or instructing its franchisees to hire certain individuals.

Plaintiffs' claim that Business Coaches instructed franchisees to hire additional staff similarly fails to establish an issue of material fact. Business Coaches review whether the franchise stores are “staffed for volume” and, if they are not, recommend the number and type of additional employees the franchisee should hire. That marks the end of their participation in the hiring process. Jimmy John's also contends that the Business Coaches make recommendations that may influence the franchisee's hiring decisions, but do not have the power to compel the franchisee to hire any employees. There is no evidence that Business Coaches play an actual role in the interview process or determine who to hire, which is the heart of the test. Jimmy John's has demonstrated, and Plaintiffs have not adequately contested, that Jimmy John's does not have the power to hire franchisee employees.

Nor does Jimmy John's have the power to discipline or fire franchisee employees. Jimmy John's demonstrated that franchise store managers, and not Jimmy John's or its corporate representatives, take disciplinary action and terminate employees. Plaintiffs agree that Jimmy John's does not *directly* discipline or terminate franchise employees, except while at corporate training. They contend, however, that Jimmy John's exercises *substantial influence* on disciplinary and termination decisions. None of the evidence they set forth, however, creates a genuine dispute of material fact in this regard.

**\*16** First, Plaintiffs state that the Operations Manual “sets forth very clear instructions regarding employee discipline.” They cite to the “Rules of Employment,” which is a list of approximately thirty rules ranging from methods of making, wrapping, and delivering sandwiches to dress code and employee behavior. The Rules of Employment state that “[f]ailure to comply with the items below may result in immediate termination of employment and/or reduction or elimination of any bonus due.” One item states explicitly that the employee will be terminated if he or she does not follow the rule:

If you are late, you must call prior to your scheduled arrival time. If you don't, you will be TERMINATED. NO EXCEPTIONS!

A couple other items warn that the employee “may be terminated” for noncompliance. These alone, however, do not refute Jimmy John's proof that it does not discipline or fire franchisee employees. No evidence shows that Jimmy John's plays a role in disciplining or terminating employees for failure to comply with these rules. Nor has there been any showing that franchisees actually followed the Rules of Employment and terminated employees for reasons stated in the Rules. The only evidence put forth by Plaintiffs is that an entire store was “penalized,” *i.e.*, docked points, during a corporate audit because an employee was wearing shoes that were believed to be green, and not black, in violation of the dress code. Not only does this not involve a franchisee employee—it implicates only the store itself—it also does not constitute discipline. The Business Coach's job was to audit the store and its employees for compliance with Jimmy John's Brand Standards, including employee dress code. He fulfilled his duties by reducing the store's points in that category. Doling out a low audit score does not amount to discipline.

Plaintiffs also claim that Business Coaches, either directly or indirectly, disciplined individual employees during audits. Their examples, however, hardly demonstrate Business Coaches handing down discipline. As already discussed in this opinion, simply informing an employee on proper sandwich-making technique does not constitute discipline. Plaintiffs' other example involves a manager who was “disciplined” for failing to shave his beard in accordance with Jimmy John's grooming requirements. The “discipline” faced here was that the Business Coach “noted in his audit report that [a manager's] facial hair was not in compliance with Jimmy John's standards.” Again, Business Coaches are meant to audit franchise stores and employees to ensure compliance with Jimmy John's Brand Standards; merely noting a failure to comply with such a standard does not constitute discipline.

Next, Plaintiffs contend that Business Coaches participate in the decision-making process to terminate individual franchise employees. Plaintiffs point to two emails in which Business Coaches expressed their distaste for certain franchise employees and stated that they wanted them out of the store. These facts, however, do not sufficiently demonstrate that Business Coaches play a role or even influence franchise owners' and managers' decisions regarding employee termination. There is no evidence that the individuals discussed in the emails were

later disciplined or terminated, nor that the Business Coaches followed up to ensure that they were. Business Coaches may have suggested that certain employees be disciplined or terminated, but the record does not reflect that they, in fact, influence such personnel decisions.

Contrary to Plaintiffs' contention that Jimmy John's has “a great deal of control” over the hiring, firing, and disciplining of ASMs, we find that Jimmy John's guidance does not amount to actual control over franchise employment, which has been established to be in the managers' control. *See Zampos v. W & E Commc'ns, Inc.*, 970 F. Supp. 2d 794, 803 (N.D. Ill. 2013) (finding that Comcast's role in the hiring and firing process was in the context of “quality control” and that Comcast did not exercise functional control over the process because W & E hired applicants without input from Comcast and terminated employees without permission from Comcast).

## **2. Supervision & Control of Employee Work Schedules or Conditions of Payment**

\*17 Again, the parties are in agreement that Jimmy John's does not itself determine franchise employees' specific work schedules. Franchise managers perform this task at the store level. Plaintiffs contend, however, that Jimmy John's exerts control over franchise employee schedules via various staffing and scheduling requirements. For one, Plaintiffs claim that Jimmy John's requires franchise managers to work at least fifty hours per week. Jimmy John's pushes back, stating that the fifty-hour minimum, found in the Additional Rules of Management in the Operations Manual, is simply a recommendation. Next, the Franchise Agreement requires a certain number of shifts per week to be covered by a Certified Manager, which may or may not be an ASM. Jimmy John's notes that it does not determine which specific shifts must be covered by Certified Managers; that is up to the franchise managers to decide. Lastly, Plaintiffs claim that, by establishing and enforcing uniform store hours, Jimmy John's in turn “dictates the hours worked by ASMs.”

Despite the parties' disagreements on the effect of these facts, there is no genuine dispute of material fact as to Jimmy John's control over employee schedules for purposes of the joint employer analysis. It takes more than general scheduling and staffing requirements to fulfill

this factor. Whether or not franchise stores followed Jimmy John's rules, the record demonstrates that the franchise managers themselves were in charge of creating, directing, and managing employee schedules at the store level—not Jimmy John's. *See Vann v. Massage Envy Franchising LLC*, 2015 WL 74139, at \*8 (S.D. Cal. 2015). Further, while Plaintiffs insist that Jimmy John's imposes a fifty-hour minimum work week for managers (which may demonstrate control over ASM working hours and conditions), they have shown no proof that this is an actual requirement that is followed by the franchisees, nor that Jimmy John's audits franchisees for compliance with this rule (as it does with its other requirements, like Certified Manager staffing).<sup>8</sup> And to claim that determining general store hours “dictates” ASMs working hours is absurd; employee schedules are naturally bound to the opening and closing times of their workplace.

Plaintiffs also contend that the Operations Manual “directs how stores were to be staffed based on projected sales.” In reviewing the Operations Manual, however, there is no evidence that it “directs” or “requires” franchisees to staff their stores in any specific way. It does supply certain calculations and advises franchisees on how to use “schedule blocks” to staff and schedule their stores adequately, which Plaintiffs also briefly mention as proof that Jimmy John's controls employee schedules.

Plaintiffs continue that if stores were not staffed according to Jimmy John's requirements and expectations, *i.e.*, having the requisite number of Certified Managers and being “staffed for volume,” they would receive lower audit scores and lose bonus eligibility. Similarly, Plaintiffs note that Business Coaches “directed” franchisees to revise schedules and staffing levels. This is the strongest evidence put forth by Plaintiffs that Jimmy John's may have influenced the staffing decisions at franchise stores. But influence alone does not constitute control. Jimmy John's insists that Business Coaches simply make recommendations on staffing and cannot compel the franchisee to follow their recommendations. Even viewing the facts in the light most favorable to Plaintiffs, pressuring franchisees to follow the Business Coaches' suggestions and handing out negative audit scores for failing to comply does not constitute control. *See Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015) (finding that franchisor's ability to exert “considerable pressure” on its franchisees, including negative reviews and threats to terminate the franchise

relationship, did not establish a triable dispute on whether the franchisor had direct control of hiring, firing, wage, and staffing decisions of the franchise store). Furthermore, general staffing and scheduling obligations related to ensuring proper customer service do not constitute control. *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743, 750 (W.D. Tenn. 2012) (“Any directives relating to personnel management—including obligating franchisees to ‘employ adequate personnel so as to operate the Restaurant at its maximum capacity and efficiency’...—are far too general to constitute control rising to the level of employment.”)<sup>9</sup> “Mere monitoring of these customer service metrics is not active employee control, and the fact that [Jimmy John's] would have to resort to economic and business relationship sanctions to motivate [franchise owners] to implement service changes underscores its lack of direct authority or control.” *Ochoa*, 133 F. Supp. 3d at 1236.

### 3. Determination of Rate & Method of Payment

\*18 Jimmy John's established, and Plaintiffs did not refute, that Jimmy John's does not determine the rate or method of payment for franchise employees. Jimmy John's put forth evidence showing that franchisees have exclusive control over whether to use ASMs in their stores and, if so, how to classify and compensate them. Moreover, Jimmy John's showed that it has no involvement in franchisees' payroll services.

As before, Plaintiffs concede this point: “Jimmy John's does not, of course, decide the salary of an individual franchise ASM.” They add, “But it does direct franchise owners to adopt the Jimmy John's corporate bonus program ‘verbatim.’” This argument fails for two reasons. First, the cited evidence shows one Business Coach instructing his peers to “push” or encourage franchise owners into executing the bonus program verbatim. While this may demonstrate that Business Coaches attempted to influence franchise owners into adopting the bonus program, it cannot be said that Jimmy John's “directed” franchise owners to adopt it. Influence and compulsion are two distinct concepts, and influence alone, even if substantial, does not constitute control. Secondly, assuming, arguendo, that franchise owners were required to adopt the bonus program, that is far from coordinating the rate and method of payment on a regular basis.

Plaintiffs also claim that Jimmy John's "coordinates" with franchisees regarding how much to pay their employees. The cited evidence, however, shows franchise owners asking Jimmy John's representatives for information or advice on how they compensate their corporate employees. These discussions are by no means coordination between Jimmy John's and franchisees regarding how to pay franchise employees. Simply providing information, or even guidance, on how to compensate employees, especially in response to a request from the franchisee, does not mean that Jimmy John's is playing an active role in the determination of employee compensation.

Lastly, Plaintiffs briefly note that Jimmy John's implements labor costs goals and distributes the actual labor costs of franchisees to "facilitate knowledge and information sharing among franchisees." It is unclear how this piece of evidence has any bearing on whether Jimmy John's determines the rate and method of payment of franchise employees. To the extent that Jimmy John's shares information between its franchisees, even with the hope that they model their compensation after one another, it does not, itself, determine the rate and method of payment for franchise employees.

#### 4. Maintenance of Employment Records

There is no dispute that Jimmy John's does not maintain employment records for franchise employees. Plaintiffs concede so in their Opposition Brief: "Personnel files for franchise ASMs are kept by the franchise..." They claim, however, that Business Coaches have the right to audit such records, and that Jimmy John's directs franchisees to use certain forms, such as a "New Hire Packet," for employee files. Significantly, this is the whole of Plaintiffs' argument regarding this factor, spending just two sentences to argue not that Jimmy John's maintains employment records, but that it "retains the right to inspect employment records." Mere access<sup>10</sup> to employment records is insufficient to demonstrate that Jimmy John's "exercised control over the economic aspects of [Plaintiffs'] employment relationship." See *Cavallaro v. UMass Mem'l Health Care, Inc.*, 971 F. Supp. 2d 139, 150 (D. Mass. 2013). The record before the Court establishes that Jimmy John's did not keep and maintain employment records for franchise employees.

#### 5. Other Factors Relevant to Joint Employment

\*19 We now consider whether the other factors put forth by Plaintiffs, including human resource matters such as training and functional control of store operations and management, demonstrate that Jimmy John's exercised sufficient control so as to be deemed a joint employer. Plaintiffs' discussion falls into three categories: (1) Jimmy John's exercises control over human resource matters through employee training and dress code; (2) Jimmy John's directs day-to-day operations of franchise stores with its extremely detailed Operations Manual and related requirements; and (3) Business Coaches effectively control franchisees through their audits and feedback.

##### i. Human Resource Factors

Plaintiffs contend that Jimmy John's exercises substantial control over franchise employee training and appearance. Jimmy John's provides its franchisees with training materials both in the Operations Manual and an online toolkit. These materials instruct franchisees to train their employees using the four-step "Tell-Show-Do-Review" method. Plaintiffs contend that ASMs were not allowed to decide for themselves how to train employees and instead were required to follow the training methods provided by Jimmy John's. Jimmy John's also instituted its own training program for Certified Managers and tested employees beforehand to determine which level of training they required. Jimmy John's, on the other hand, states that the training methods provided in the Operations Manual (that are now on the online toolkit) are recommendations only, noting that Business Coaches do not audit franchisees on training mechanisms.

In our view, even accepting Plaintiffs' characterization that Jimmy John's required franchisees to follow its training methods, that does not speak to joint employment. Certainly, training employees to perform tasks the "Jimmy John's way" constitutes some control over the way the store is managed. But that alone does not rise to the level of joint employment, and no reasonable juror would decide that a franchisor that sets up training programs for its franchisees' employees is in control of those employees in a meaningful way for joint employment purposes.

Jimmy John's also mandates the dress and appearance of franchise employees. Jimmy John's requires all franchise employees to wear a Jimmy John's-approved t-shirt and hat and circumscribes the colors of the pants, shoes, and belt that employees can wear. Moreover, Jimmy John's has strict policies on facial hair, tattoos, jewelry, and other aspects of personal appearance. It even goes so far as to disallow employees from becoming managers if they have tattoos on their lower forearms. These requirements, however, fall under the Jimmy John's Brand Standards. They control not the employees' actual working conditions, but the quality of the Jimmy John's Brand.

Lastly, Plaintiffs refer to Jimmy John's' prior dealings with the Department of Labor (“DOL”) regarding violations of federal wage and hour laws as proof of Jimmy John's' “implicit control.” In 2014 and 2015, the DOL recommended multiple changes within the Jimmy John's brand and encouraged Jimmy John's corporate representatives to inform and push franchisees to make these changes. Plaintiffs point out that Jimmy John's agreed that it would be appropriate for it to cut ties or limit expansion with franchisees who were “egregious violators.” They argue: “When an option for Jimmy John's, at any time, is simply to end the relationship with the franchise should the franchise not comply with Jimmy John's directives on human resource matters, a reasonable jury could conclude that Jimmy John's maintains control over those matters.” That is not entirely so. Control over franchise employees and the human resource matters that affect them is different than control over ending or restricting the franchise relationship, which directly affects the franchisee. *See, e.g., Ochoa*, 133 F. Supp. 3d at 1236 (stating that a franchisor may try to “influence a franchisee in many ways, up to and including termination of the business relationship,” but that does not make the franchisor a joint employer); *Jimmy John's I*, 2015 WL 1598106, at \*4 (explaining that a franchisor's ability to terminate a franchise relationship does not amount to the ability to terminate a franchise employee but deals with breach of contract between the franchisor and franchisee).

## ii. Jimmy John's Operations Manual & Related Requirements

\*20 Plaintiffs point to various requirements imposed by Jimmy John's that they claim amount to complete control

of franchise stores' day-to-day operations, including ASMs' daily tasks and working conditions. Jimmy John's' requirements also transcend operations to affect store decoration and display, leaving little control to franchise employees over the look of the store.

First, Plaintiffs explain that franchise employees must follow the various checklists found in the Operations Manual verbatim. These lists include, among others, the Daily Punchlist, which lists all activities that store employees must complete each day; the Opening Procedures, which provides a step-by-step process for opening the store daily; and the Daily Beautification list, which details specifically how to clean the store. Plaintiffs contend that these detailed instructions dictate every aspect of ASMs' tasks, leaving them with no managerial authority over how to operate and manage the store. Furthermore, the Operations Manual provides detailed instructions on various aspects of the store's operation, including bread baking, sandwich preparation, and even how to handle financial matters.

Jimmy John's also dictates exactly how each store should be decorated, including signage, logos, and other brand imagery. The Operations Manual details how every item in the store should be displayed as well as how the store should organize and stock its items. Plaintiffs note that Jimmy John's' control over store organization was “so pervasive” that “one should be able to open a refrigerator in any Jimmy John's restaurant and expect to see the same items, located in the same spaces, prepared and stored in the identical manner.”

Similarly, Jimmy John's requires each franchise store to consist of the same equipment and informs franchisees which machines, supplies, and materials they have to purchase and use in their stores. Jimmy John's ensures this uniformity by requiring franchisees to use particular vendors for their supplies and materials. Furthermore, Jimmy John's requires each franchise store to use specific programs and software for timekeeping, point of sale, staffing, and scheduling.

Jimmy John's' control over the systems, operations, and dress code at franchise stores, as pervasive as it may seem, does not amount to joint employment. As we discussed in *Jimmy John's I*, requirements imposed “in the context of quality control and brand uniformity [do] not manifest an employer-employee relationship.” 2015

WL 1598106, at \*4 (citing *Braucher ex rel. Braucher v. Swagat Grp., LLC*, 702 F. Supp. 2d 1032, 1043 (C.D. Ill. 2010) (control which is necessary “to maintain the required level of quality associated with the franchised brand” does not subject a franchisor to additional duties)). Jimmy John's has developed a system under which each franchise store will provide an identical atmosphere, product, and customer service regardless of its owner or location. In order to achieve that goal, Jimmy John's must impose requirements, including sandwich preparation, store organization, and systems software, and ensure that each store complies with these requirements. The purpose of these requirements is not to control franchise employees but to protect the Jimmy John's Brand Standards that make it a successful business.

Plaintiffs said it themselves—the operational checklists ensure that franchise employees are completing tasks the “Jimmy John's way.” As a franchisor, Jimmy John's is entitled to require strict adherence to its Brand Standards. *Jimmy John's I*, 2015 WL 1598106, at \*4. As we previously concluded:

\*21 Unequivocal compliance to [Jimmy John's] uniform standards means brand recognition and further growth. A franchisor, which may have thousands of stores located throughout the country, often imposes comprehensive and meticulous standards to protect its brand and operate the franchises in a uniform way in order to maintain a consistent customer experience.

*Id.* Therefore, while the factors put forth by Plaintiffs certainly constitute control on some level over franchisees and their employees, control over Brand Standards does not constitute the type of control required to be deemed a joint employer.

### iii. Business Coaches' Role

Plaintiffs argue that Business Coaches essentially manage franchise employees through their regular audits of franchise stores, their feedback and influence on franchise owners and managers, and the consequences of receiving low audit scores on franchise employees' bonuses. Their main contention is that Business Coaches, by enforcing

Jimmy John's policies and procedures, control franchise employees.

First, Plaintiffs take issue with Jimmy John's claim that Business Coaches merely provide suggestions that franchisees may choose to follow or ignore. Plaintiffs note that all franchisees sign a “Make or Break” document that explicitly states that the franchisees agree to “execut[e] 100%” of what Business Coaches recommend. They add that Business Coaches issue “directives” that inform franchisees which issues need to be resolved and that franchisees are subject to “punishment” if the Business Coaches' suggestions are not followed. Lastly, Plaintiffs point out that franchisees who do not follow the Business Coaches' suggestions receive lower audit scores, which may lead to a decrease in bonus.

Jimmy John's strongly disagrees with Plaintiffs' framing of this issue. Aside from describing the “Make or Break” document as “aspirational,” Jimmy John's also argues that (1) Business Coaches enforce Brand Standards, which this Court previously held does not manifest an employee-employer relationship; and (2) Plaintiffs mischaracterize the record by providing insufficient support for their contention that franchisees are “punished” for not following Business Coaches' suggestions.

Next, Plaintiffs contend that the Business Coaches' role goes beyond what is needed for quality control and steps into operations as well. Much of Plaintiffs' discussion here has already been analyzed previously under the four-factor test.<sup>11</sup> Plaintiffs add that Business Coaches have suggested to franchisees to reduce the cost of goods sold, carefully inspected the cleanliness of stores, and informed a franchisee that they were “spot on” for having an ASM in the store.

As discussed above, Jimmy John's is entitled to impose and enforce its Brand Standards on its franchisees. It does so by utilizing Business Coaches who communicate with franchisees to ensure that they are adhering to these requirements. An agreement by the franchisee to “execut[e] 100%” of what Business Coaches suggest, whether or not it is a strict agreement or “aspirational,” does not cause concern when the suggestions are made to ensure compliance with Brand Standards. We have already discussed several categories of suggestions that Business Coaches make to franchisees, none of which we determined constitute control. For the most part, Business

Coaches' suggestions are related to Jimmy John's Brand Standards, which are in the context of quality control and brand uniformity. Even assuming that franchisees had to follow all of the Business Coaches' suggestions, there has not been a showing that Business Coaches' suggestions go beyond that of ensuring compliance with Brand Standards. Noting that a store was "spot on" for having an ASM, discussing costs of goods sold, and auditing cleanliness of the store are not examples of a Business Coach overstepping in a way that goes beyond his job duties and exerting control over the franchisee.

\*22 Plaintiffs also note that Business Coaches use "aggressive tactics" in their audits. For example, one Business Coach followed a delivery driver to see whether he was making a delivery outside the delivery zone. Another timed how long it took to make a sandwich with a stopwatch. While these are certainly aggressive measures, they are still focused on compliance with Jimmy John's Brand Standards, which, as we discussed, do not constitute control.

One way in which the Business Coaches have an actual effect on franchisees that may constitute control involves bonus eligibility. Business Coaches perform audits regularly and give franchise stores an audit score based on whether they complied with various Brand Standards and related requirements. Plaintiffs state that audit scores were one of the factors used to determine manager and ASM bonuses. Opt-In Plaintiffs testified that they understood that their bonuses were influenced by the store's audit scores. Under the Jimmy John's Bonus Program, franchise stores must receive a "passing" audit score of at least 85 out of 100 points for its managers to be eligible for bonuses. Plaintiffs did not show, however, that Jimmy John's was the entity determining whether franchise employees would receive bonuses and, if so, the amount of said bonuses. Instead, as Jimmy John's pointed out, franchise owners were making the decisions regarding bonuses based on many factors, including whether the store received good audit scores and met its sales targets so that it had extra money to give bonuses. Thus, while Business Coaches might indirectly influence bonus eligibility and the amount of the bonus, the ultimate decision to give bonuses remains with the franchise owners.

## B. Control over the Alleged FLSA Violation: Classification of ASMs

All factors discussed thus far boil down to one essential question: whether Jimmy John's exercised control and authority over franchise employees in a manner that caused the FLSA violation (at least in part). *Schneider*, 148 F. Supp. 3d at 698; *see also Villareal*, 776 F. Supp. 2d at 785 ("Courts have found that determination of whether an individual is liable under the FLSA depends not upon whether the individual controlled every aspect of the employees' conduct, but upon whether the individual had control over the alleged FLSA violation."). The next question, then, is what caused the alleged FLSA violation.

The crux of Plaintiffs' claims is the alleged misclassification of ASMs as exempt from the FLSA's overtime provisions. Under the FLSA, employees who work more than forty hours in a workweek must receive overtime pay. 29 U.S.C. § 207. Certain employees, including those who perform managerial duties and are salaried, are exempt from the overtime provision. Employees who are paid an hourly wage and perform routine labor tasks, on the other hand, are non-exempt and are entitled to overtime pay. Plaintiffs claim that they were improperly classified as exempt under the FLSA because they rarely perform managerial duties. They allege that more than ninety percent of their time is spent performing manual labor similar to hourly employees, including making sandwiches, taking orders, and working the register (non-exempt work). Furthermore, they claim that they lack any managerial authority because Jimmy John's dictates every aspect of their workdays. Therefore, according to Plaintiffs, they should have been classified as non-exempt and given overtime pay.

\*23 Plaintiffs insist that "the question is not whether the *decision* over the plaintiffs' exempt classification was made by the putative joint employer, but whether the *economic reality of the working conditions* established by the putative joint employer resulted in the plaintiffs performing primarily non-exempt work." They claim that whether they were misclassified will turn on the work they did. And because Jimmy John's set policies and procedures that dictated ASMs' daily work, Plaintiffs say, Jimmy John's caused the FLSA violation. We disagree. According to *Schneider* and *Villareal*, the question is whether the putative joint employer caused, at least in

part, the FLSA violation. Plaintiffs have made clear in their pleadings and briefs that the alleged FLSA violation is the *misclassification* of ASMs as exempt under the FLSA. Were the named Plaintiffs classified as non-exempt, as at least some other ASMs are across the various Jimmy John's franchises, then there would be no FLSA violation. This even though the very tasks of these non-exempt ASMs are arguably identical to those of the named Plaintiffs.<sup>12</sup> Thus, it is not the actual work performed that is causing the alleged FLSA violation, but the misclassification of ASMs as exempt.

Jimmy John's has established, and the record reflects, that franchise owners determine how to classify and compensate franchise ASMs. Jimmy John's does not instruct franchise owners to classify their ASMs as exempt or non-exempt, or whether to pay them a salary or hourly wage. Jimmy John's representatives have shared information on how they compensate their employees at corporate-owned stores to franchise owners, but that was per the franchise owners' requests. Jimmy John's did not direct them to compensate their employees accordingly.

The Operations Manual discusses the FLSA and states explicitly that franchise owners must determine how to classify their employees:

A franchisee's operation of its Restaurant is governed by various laws, including employment laws regarding salaried employees and their exempt status from overtime. The franchisee needs to consult with its own legal advisors regarding all of these laws in order to be aware of their existence, to understand their requirements, and to make sure that the franchisee takes the action necessary to comply.

It also warns that labor laws may differ from state to state:

All nonexempt workers must be paid overtime pay – 1.5 times their regular rate of pay for hours worked in excess of 40 in any workweek. Again, states may have different overtime laws and may supersede the Federal definition of overtime.

Thus, it is the franchise owners who determine whether to classify their employees as exempt or nonexempt. Unlike its Brand Standards, which Jimmy John's works hard to standardize across all franchise stores, Jimmy John's does not attempt to control classification under the FLSA, nor does it require that all franchisees classify their employees uniformly. This is evidenced, again, by the fact that some ASMs are classified as non-exempt whereas others, like Plaintiffs, have been classified as exempt. For these reasons, we find that Jimmy John's does not exercise control over the alleged FLSA violation, which is the misclassification of Plaintiffs as exempt from the FLSA overtime provisions.

\* \* \*

For the aforementioned reasons, the Court finds that Jimmy John's is entitled to judgment as a matter of law on the joint employer issue. Jimmy John's has established that it does not: (1) have the power to hire or fire franchise employees; (2) supervise and/or control employee work schedules or conditions of payments; (3) determine the rate and method of payment; or (4) maintain employment records for franchise employees. Moreover, any control that Jimmy John's does exert over the franchisees relates to Brand Standards, which Jimmy John's is entitled to enforce and protect through compliance measures against the franchisees. No issue of material fact has been demonstrated, and, all things considered, no juror could reasonably decide in favor of Plaintiffs based on the evidence set forth. We conclude that Jimmy John's is not a joint employer and grant summary judgment in its favor.

### CONCLUSION

\*24 The Court grants Jimmy John's' motion to exclude Lewin's expert report and testimony. The Court also finds in favor of Jimmy John's on its motion for summary judgment on the joint employer issue. It is so ordered.

### **All Citations**

Slip Copy, 2018 WL 3231273

Footnotes

- 1 This motion concerns only whether Jimmy John's is a joint employer of its franchisees' employees. This opinion does not address the franchisee defendants. Nor does it affect any claims arising from corporate-owned Jimmy John's stores, employees of which there is no doubt that Jimmy John's is an employer. At this time, we are not considering the merits of the alleged FLSA violation, *i.e.*, whether classifying Plaintiffs as exempt was indeed a misclassification. Instead, we are only analyzing whether Jimmy John's could be deemed Plaintiffs' joint employer and thus may be held liable under the FLSA.
- 2 This language comes from the 2015 version of the Franchise Agreement. A previous version of the Franchise Agreement, from 2012, stated that each franchisee has the "sole responsibility and authority for [its] labor relations, including employee selection, promotion, termination, hours worked, rates of pay, benefits, work assigned, and working conditions; [the franchisee's] employees are under [the franchisee's] day-to-day control at the RESTAURANT."
- 3 Business Coaches note on their In-Store Surveys how many Certified Managers are required for the store and whether the required number of shifts each week are being covered by Certified Managers. This is a pass/fail category and does not affect the numerical audit score for the store.
- 4 Plaintiffs' main dispute regarding the HR Section was that only the first subsection explicitly stated that it "contains only general information and guidelines." Thus, according to Plaintiffs, only the first subsection contained recommendations or guidelines while the rest, including the Sample Forms, were requirements. This is not so. A review of several HR Sections demonstrated that they included language meant to signify that the information found within was to be used as a helpful resource and not mandatory. For example, the HR Section listed personnel policies that franchisees "may wish to consider" and also encouraged franchisees to contact their own labor attorneys to develop policies specific to their stores.
- 5 Plaintiffs also claim that Jimmy John's' motion to exclude Lewin's expert report revealed that material facts remain in dispute, and, as such, its motion for partial summary judgment should be denied. We set this argument aside as it is irrelevant for purposes of determining the admissibility of Lewin's expert testimony. We revisit Plaintiffs' argument regarding the existence of a genuine dispute of material fact when we weigh both parties' arguments on the motion for summary judgment.
- 6 Although *Moldenhauer* involved a claim under the Family Medical Leave Act, the Seventh Circuit noted that "[t]he joint-employer regulation in the FLSA mirrors that in the FMLA" and therefore the standards for determining employer status are interchangeable in the FMLA and FLSA contexts. 536 F.3d at 644.
- 7 We applied the four-factor joint employer analysis on a motion to dismiss Jimmy John's' CEO, James John Liautaud, and found that he was not a joint employer of Plaintiffs. *Brunner v. Liautaud*, 2015 WL 1598106 (N.D. Ill. 2015) (hereinafter "*Jimmy John's I*").
- 8 In support for this position, Plaintiffs point to the "Additional Rules of Management" previously contained within the HR Section of the Operations Manual, which has since been displaced by a training toolkit accessible online only. Jimmy John's has adequately argued that the forms in its HR Sections were recommendations and by no means required to be followed by franchise owners. Plaintiffs' citation to support this proposition is also deficient; the cited pages of the deposition testimony are not included in the excerpt provided in the Exhibit. Thus, Plaintiffs have not sufficiently disputed this fact.
- 9 Though *Gray* does not employ the joint employer analysis used in the instant case, its test for employer status includes as a factor "whether the two entities have 'centralized control of labor relations and personnel,' including the power to hire and fire employees, and the power to dictate terms of employment including salaries and severance pay..." *Gray*, 874 F. Supp. 2d at 750. We find the cited language useful to our analysis. More significantly, Plaintiffs cite to no case law to inform the Court's analysis on this factor.
- 10 In their response to Jimmy John's' 56.1 Statement regarding the maintenance of employment records, Plaintiffs allege that Jimmy John's "maintained a significant number of employment records for franchisee employees as demonstrated by its production of tens of thousands of records of ASM names and contact information to the third-party claims administrator in this case after the Court authorized FLSA notice." The evidence cited in support, however, does not prove that Jimmy John's *maintained* the records (and Plaintiffs conceded that it did not); rather, the only reasonable inference is that Jimmy John's gained *access* to the records for the production.
- 11 These topics include Business Coach suggestions regarding scheduling employees, auditing staffing to ensure that Certified Managers are covering shifts, disciplining employees, and encouraging franchisees to implement the Jimmy John's corporate bonus program.

- 12 Plaintiffs claim that the Operations Manual dictates the daily tasks for franchise employees, including ASMs. We therefore assume, for purposes of this analysis, that all Jimmy John's ASMs are performing the same tasks. While we have no way of being certain of what tasks other ASMs are performing and how that impacted their classification and compensation, the significant fact here is that other employees with the same job title that follow the same Operations Manual have been classified as non-exempt.

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