COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2018-P-0822

COOPER CERULO, JORDAN TETREAULT, on behalf of themselves and all others similarly situated

Plaintiffs - Appellants

v.

HERBERT G. CHAMBERS, individually; JAMES DUCHESNEAU, individually; ALAN MCLAREN, individually; JENNINGS ROAD MANAGEMENT CORP. d/b/a THE HERB CHAMBERS COMPANIES; HERB CHAMBERS OF NATICK, INC.; AND HERB CHAMBERS OF AUBURN, INC.

Defendants - Appellees

On Appeal from an Order of the Middlesex Superior Court

PLAINTIFFS-APPELLANTS' BRIEF

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August 15, 2018

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STATEMENT OF ISSUES

Did the Superior Court err when ruling, as a matter of law, that the only "employer" with respect to wage claims under Massachusetts law is the entity from which an employee receives his or her paycheck?

STATEMENT OF THE CASE

This appeal raises a critical issue of law affecting employers and employees across the Commonwealth: who is liable as an "employer" for purposes of the Massachusetts Wage Acts, G.L. c. 149 and G.L. c. 151? The Superior Court ruled that employer status is not determined by G.L. c. 149, § 148B, or by reference to governing Department of Labor Standard regulations, or by common law principles of joint employment. Instead, the Superior Court used a narrow definition that confers employer status only on the entity from which an employee receives his or her paycheck. (ADD.10). That ruling conflicts with the plain language of G.L. c. 149, § 148B and is directly contrary to settled law, including a recent decision by this Court and another Superior Court. *See, e.g., Gallagher v. Cerebral Palsy of Massachusetts, Inc.*, 92 Mass. App. Ct. 207, 209-210, 212-214 (2017) (G.L. c. 149, § 148B "defines the overall employer-employee relationship *for all cases* arising under G.L. c. 149 and G.L. c. 151" and issuing paychecks does not determine employer status) (emphasis added); *Malebranche v. Colonial Automotive Group, Inc.*, Case

No. 2016-3479-BLS2, 2017 WL 5907557 (Mass. Super. Ct. Oct. 19, 2017) (same) (ADD.22-25).

A. Relevant Facts

The Complaint alleges that Plaintiffs-Appellants Cooper Cerulo and Jordan Tetrault worked as inside car salespersons for The Herb Chambers Companies, a commonly-controlled chain of car dealerships in Massachusetts. (Complaint ¶¶ 1-6) (R.7-8). Mr. Cerulo worked at a dealership in Natick, Massachusetts, nominally operated by a sub-corporation called Herb Chambers of Natick, Inc. (Complaint ¶¶ 1, 7, 41) (R.7-8, 12). Mr. Tetreault worked at a dealership in Auburn, Massachusetts, nominally operated by a sub-corporation called Herb Chambers of Auburn, Inc. (Complaint ¶¶ 2, 8, 43) (R.7-8, 12).

Defendant-Appellee Jennings Road Management Corp. ("JRM") is registered to do business as "The Herb Chambers Companies," and manages and controls a chain of over 50 dealerships in Massachusetts, including the dealerships in Natick and Auburn. (Complaint ¶¶ 6, 13, 41-46, 48-49) (R.8-9, 12-13). JRM implements uniform employment practices and policies at each of the Massachusetts dealerships. (Complaint ¶¶ 21-22) (R.10). Those practices and policies govern the terms

and conditions of employment for all salespersons, including the following, among other things:

- Creating and implementing payroll policies, including the rate and method of payment;
- Vetting employment applications;
- Screening applicants for inside sales positions;
- Training new and current employees;
- Maintaining personnel files and employment records;
- Implementing work schedules;
- Establishing and overseeing sales employee dress code;
- Establishing and overseeing discrimination policies;
- Establishing and overseeing sexual harassment policies;
- Establishing and overseeing policies on weapons in the workplace; and
- Directing and overseeing personnel decisions, including hiring and firing employees.

(Complaint ¶¶ 31, 58, 60) (R.11, 14).

JRM also sponsors and administers a single 401(k) and profit sharing plan ("Plan"). (Complaint ¶ 31) (R.11). The formal name of the Plan, which is open to all salespersons across the Herb Chambers Companies, is "The Herb Chambers Companies Section 401k Profit

Sharing Plan," and the "Plan Sponsor" is located at 47 Eastern Boulevard, Glastonbury, CT, which is the headquarters for JRM. (Complaint ¶ 36) (R.12).

JRM employs "controllers" to work at each dealership, and the controllers are responsible for, among other things, implementing JRM's practices and policies at the dealerships under their supervision. (Complaint ¶¶ 23-26) (R.10). JRM also employs a "corporate controller," who is responsible for overseeing the work of all of the individual controllers. (Complaint ¶ 29-30) (R.11).

Defendant-Appellee Herb Chambers is the president, treasurer, and sole director of JRM, as well as Herb Chambers of Natick, Inc. and Herb Chambers of Auburn, Inc. (Complaint ¶¶ 3, 32) (R.8, 12). Defendant-Appellee James Duchesneau is the Chief Financial Officer of JRM. (Complaint ¶¶ 4, 34) (R.8, 12). Defendant-Appellee Alan McLaren is the Chief Executive Officer of JRM. (Complaint ¶¶ 5, 39-40) (R.8, 12).

The website for Herb Chambers, which is subject to judicial notice at any stage of this case,[1]

[1] The Court can take judicial notice of the representations that Herb Chambers makes to the public

indicates that it is a single company with a single "team" and common employment practices. (R.28-33). It notes, for example, "We provide our employees with the opportunity to earn above average compensation and opportunity for advancement in our organization." (R.30). It says, "We have great benefits like a 401K plan with a company contribution, paid vacation, and insurance with dental coverage." (R.30). It proclaims, "Every year we recognize our top performers at an awards ceremony and banquet." (R.30). It adds, "We choose to work for Herb Chambers because he is the best person to work for in the automobile industry." (R.30).

Given the extent to which JRM manages and controls the terms and conditions of employment for all salespersons, the Complaint alleges that JRM was an employer of Mr. Cerulo and Mr. Tetreault. (Complaint ¶¶ 16-17) (R.9). The Complaint includes various wage violations arising from JRM's common

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on its website, because the authenticity of the website (www.herbchambers.com) is self-evident and undisputed. *Mass. Guide to Evidence* § 201(b)(2). For purposes of this appeal, the information in the website is relevant not for the truth of any statements, but for the undisputed evidence it provides about how Herb Chambers presents itself to the public.

policies and procedures. (Complaint ¶¶ 62-80) (R.14-17). Those claims include alleged violations of the Payment of Wages Law, M.G.L. c. 149, §§ 148, 150 (Counts I-IV), the Overtime Law, M.G.L. c. 151, §§ 1A-AB (Count V), and the Minimum Wage Law, M.G.L. c. 151, §§ 1 et seq. (Complaint ¶¶ 81-107) (R.17-21). The Complaint also includes various common law claims, which are not at issue in this appeal. (Complaint ¶¶ 108-130) (R.21-24).

B. Prior Proceedings

Mr. Cooper and Mr. Tetreault filed their class action complaint in the Middlesex Superior Court on December 29, 2016. (R.3, 7-25). On May 2, 2017, JRM, Mr. Duchesneau, Mr. McLaren, and Mr. Chambers (in his capacity as a JRM executive) moved to dismiss all claims against them. (R.4, 26-27). Mr. Cooper and Mr. Tetreault opposed the motion. (R.4). On October 26, 2017, they filed a notice of supplemental authority, notifying the Superior Court about this Court's decision in *Gallagher* and another Superior Court's ensuing decision in a virtually identical case, *Malebranche, supra*. (R.5).

The Superior Court held a hearing on November 14, 2017. (R.5). On December 15, 2017, the Superior Court

issued a Memorandum and Order, allowing the motion to dismiss. (R.5, ADD.1-14).

On January 12, 2018, Mr. Cooper and Mr. Tetreault filed a motion for reconsideration. (R.5). That motion was denied on February 6, 2018. (R.5).

On January 16, 2018, Mr. Cooper and Mr. Tetreault filed a Petition for Interlocutory Relief Pursuant to M.G.L. c. 231, § 118. (R.5). On May 19, 2018, a single justice (Hanlon, J.) granted permission to file an interlocutory appeal on or before June 1, 2018. (R.48). Mr. Cooper and Mr. Tetreault filed their notice of appeal on May 30, 2018. (R.6, 49-50).

ARGUMENT

A. Standard of review.

A trial court's allowance of a motion to dismiss is a legal ruling subject to de novo review. *Lopez v. Commonwealth,* 463 Mass. 696, 700 (2012). In its review, an appellate court "may consider the allegations in the complaint, items appearing in the record, and exhibits attached to the complaint." *Melia v. Zenhire, Inc.*, 462 Mass. 164, 165-66 (2012) (citations omitted). The factual allegations in the complaint, as well as all reasonable inferences

arising from those allegations, must be accepted as true. *Id.* at 166 (citation omitted).

B. G.L. c. 149, § 148B determines employer status for all claims under the Massachusetts wage laws, and under that statute it was error to dismiss the Complaint.

This Court recently held that G.L. c. 149, § 148B "defines the overall employer-employee relationship for *all cases* arising under G.L. c. 149 and G.L. c. 151." *Gallagher*, 92 Mass. App. Ct. at 210 (emphasis added). Under section 148B, a plaintiff must make a threshold showing that he performed a service for the defendant. *Id.* "If this threshold is met, the individual is presumed to be an employee" of the defendant. *Id.* The defendant can rebut that presumption only by showing that "(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; *and* (2) the service is performed outside the usual course of the business of the employer; *and* (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." M.G.L. c. 149, § 148B(a) (emphasis added).

The defendant must prove all three elements to rebut the presumption of employment. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 590 (2009). When a corporation like JRM is liable as an employer, liability also attaches to the corporation's president, treasurer, and any other individuals having management of the corporation. M.G.L. c. 149, §§ 148, 148B; *Cook v. Patient Edu, LLC*, 465 Mass. 548, 554 (2013).

When construing section 148B, the Supreme Judicial Court has made clear that an employee may have more than one employer. In *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321 (2015), for example, the Court considered wage claims against multiple defendants. The Court held that "[t]he correct approach...*is to consider each defendant's relationship with the plaintiffs separately.*" *Sebago*, 471 Mass. at 329 (emphasis added). Ultimately, the Court determined that certain defendants were not the plaintiffs' employers, but that conclusion was not based on a ruling that a plaintiff can have only one employer; it was based on an application of section 148B *to each potential employer*. *Id.* at 329-37.

The Superior Court attempted to distinguish *Gallagher* on the grounds that this case does not involve a claim for independent contractor misclassification. (ADD.11). But when stating that section 148B defines the employer-employee relationship for "all" wage cases, this Court did not state or imply that section 148B applies only for cases involving claims of independent contractor misclassification. Indeed, *Gallagher* was not a misclassification case. The issue in *Gallagher*, as here, was whether an alleged employee of one entity could bring wage claims against another entity. The plaintiff in *Gallagher* was classified as an employee, as demonstrated by the fact that the plaintiff signed W-4 and I-9 forms and was issued a Form W-2 for her wages, *id.* at 209, all of which are indicators of employee status.

M.G.L. c. 149, § 148, which governs the timely payment of wages, provides further support for this Court's reading of section 148B - i.e., that it applies to determine employer status for all claims under the wage law, not solely to resolve cases alleging independent contractor misclassification. Section 148 "requires 'every person having employees

in his service' to pay 'each such employee the wages earned' within a fixed period after the end of a pay period." *Melia v. Zenhire, Inc.*, 462 Mass. 164, 169-70 (2012), *quoting* M.G.L. c. 149, § 148. (ADD.15). The clause "every person having employees in his service" in section 148 is broad. As importantly, it is entirely consistent with the similarly broad "service" language in section 148B, which states that "an individual performing any service, except as authorized under this chapter, shall be considered to be an employee." (ADD.18). Both sections lead to the same conclusion, which is that a person receiving services from another is presumptively an employer. The statutes say nothing, meanwhile, about employer status being limited to the entity that pays an employee.

Based on its ruling, the Superior Court did not apply section 148B to the allegations in the Complaint. It is plain, however, that the Complaint sufficiently alleges, for purposes of Mass. R. Civ. P. 12(b)(6), that JRM is an employer under section 148B. According to their Complaint, Mr. Cooper and Mr. Tetreault provided sales services for JRM, which was doing business as The Herb Chambers Companies. Under

section 148B, therefore, they were presumptively JRM's employees. JRM will be unable to rebut that presumption, because it will be unable to prove *any* of the three prongs of section 148B, much less all of them, as is required. JRM controlled their work through common policies (including the pay policies at issue in this case) (Complaint ¶¶ 31, 58, 60) (R.11, 14); the Appellants' services were within the usual course of JRM's business of selling cars (Complaint ¶¶ 6, 13, 41-46, 48-49; Screenshots) (R.8-9, 12-13, 28-33); and the Appellants worked for JRM more than full-time, so they could not have had independently established businesses selling cars (Complaint ¶ 64) (R.15). If JRM were unable to prove even one of those three elements, it would be deemed the Appellants' employer. *Somers*, 454 Mass. at 590. As a result, the Superior Court erred by dismissing the claims against JRM. In addition, to the extent JRM was an employer, the president, treasurer, and any other individuals having management of JRM were likewise liable for any wage violations. *Cook*, 465 Mass. at 554. The Superior Court also erred, therefore, by dismissing the individual defendants.

C. Employer status also may be determined by reference to regulations and common law principles of joint employment, and under those authorities it was error to dismiss the Complaint.

Even if section 148B did not apply to this case, JRM is subject to liability based on Massachusetts regulations and common law principles of joint employment.

First, the Massachusetts wage laws do not directly define the term "employer," but that term is defined expansively in regulations promulgated by the Department of Labor Standards. The regulations define an "employer" broadly as "[a]n individual, corporation, partnership or other entity, *including any agent thereof*, that employs an employee or employees for wages, remuneration or other compensation." 454 CMR 27.02 (emphasis added). The term "employ," meanwhile, is defined as "to suffer or permit to work." *Id.* These definitions do not limit an employee's "employer," as the Superior Court did, to the one entity that issues the employee's paycheck. Instead, they are sufficiently broad to cover JRM as the Appellants' employer, given the allegations in the Complaint. The Department's interpretation of the wage laws is entitled to substantial deference, unless the

interpretation is "contrary to plain language of the statute and its underlying purpose." *Swift v. AutoZone, Inc.*, 441 Mass. 443, 450 (2004). Given the fundamental remedial purposes of the wage laws, *Melia*, 462 Mass. at 170-71, the Department's broad definition of "employer" is harmonious with those laws and therefore entitled to deference.

Second, JRM is subject to liability under well-established principles of common law. The concept of "joint employment" is longstanding and well-recognized in Massachusetts. *See, e.g., Williams v. Westover Finishing Co., Inc.*, 24 Mass. App. Ct. 58, 60 (1987) ("[j]oint employment, where a person under the simultaneous control of two employers simultaneously performs services for both, is a well recognized phenomenon"). As this Court recently noted, "The basis of [a joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." *Gallagher*, 92 Mass. App. Ct. at 214, *quoting Commodore v. Genesis Health Ventures, Inc.*, 63 Mass. App. Ct. 57, 62 (2005) (brackets in original;

other citations omitted). Whether joint employment exists "is ordinarily a question of fact." *Id.* (citation omitted).

There are ample allegations in the Complaint to support a joint employment theory against JRM. That is, the Complaint alleges sufficient facts to conclude that JRM "retained for itself sufficient control of the terms and conditions of employment." *Id.* For example, the Complaint alleges that JRM implements uniform employment practices and policies at each of its Massachusetts dealerships, including practices and policies governing the rate and method of wage payments. (Complaint ¶¶ 21-22, 31, 58, 60) (R.10-11, 14).

When allowing the motion to dismiss, the Superior Court appeared to conflate the concept of joint employment with the concept of corporate disregard, or "piercing the corporate veil." (ADD.12-13). They are different concepts under the law, and no court has equated them. On the contrary, when examining a potential application of a veil piercing theory, the Supreme Judicial Court noted that it was akin to arguing that multiple defendants operated as a "monolithic" or "singular" employer. *Sebago*, 471 Mass.

at 328-29. That is different, as the Court recognized, from evaluating whether multiple defendants could be deemed a plaintiff's employer. *Id.* at 329 ("The correct approach in these cases is to consider each defendant's relationship with the plaintiffs separately"). Mr. Cooper and Mr. Tetreault do not rely on a veil-piercing theory in this case, so the issue of whether they can pierce the corporate veil is of no moment.

D. The Superior Court's narrow test for determining employer status - the "paycheck" test - is contrary to direct authority and violates the Legislative intent manifest in the wage laws.

The Superior Court ruled that employer status may be conferred only on "the entity from which the employee gets his or her paycheck, and its management." (ADD.10). That test is manifestly unworkable in a variety of common contexts. What would happen, for example, if an employee performs work and receives no pay, which is a relatively common occurrence in the "day laborer" context?[2] According to

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[2] *See, e.g.*, Abel Valenzuela Jr., et al., *On The Corner: Day Labor in the United States* (2006), available at http://portlandvoz.org/wp-content/uploads/images/2009/04/national-study.pdf, at 15-16 (noting results of nationwide survey, where nearly half of all day laborers reported having been completely denied payment by at least one employer for

the Superior Court's test, there would be no "employer" in that case, because no entity issued a paycheck. But that is obviously wrong.

Likewise, what if a large company, We-Make-It, Inc., contracted with a small third-party company, We-Pay, Inc., to issue paychecks to workers performing services for We-Make-It? If We-Pay fails to pay the workers, or fails to satisfy minimum wage or overtime requirements, are the workers limited to pursing claims against We-Pay? Under the Superior Court's test, they are.

That outcome is plainly wrong as a matter of common sense, and it is directly contrary to this Court's recent holding in *Gallagher*. There, the plaintiff argued that the entity that issued her paycheck was her employer. 92 Mass. App. Ct. at 207-209. This Court squarely rejected that argument, holding that the entity that issued her paycheck did not receive services from her, so could not be deemed her employer under section 148B. *Id.* at 213-14. The Court also held that the plaintiff's allegation of joint employment failed as a matter of law, because

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work they completed in the two months prior to being surveyed).

the defendant had no right to control her work. *Id.* at 214. The Superior Court's "paycheck" test is flatly inconsistent with those holdings, because under that test the defendant would have been the plaintiff's one and only employer.

The "paycheck" test is also inconsistent with the core principle the Supreme Judicial Court repeatedly has applied when interpreting the wage laws - i.e., that those laws should be read broadly to prevent responsible parties from evading liability. As a starting point, a statute must be interpreted "according to the intent of the Legislature," as ascertained from its language and "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 620 (2013). A remedial statute, meanwhile, "should be given a broad interpretation...to 'promote the accomplishment of it beneficent design.'" *Neff v. Comm'r of Dep't of Indus. Accidents*, 421 Mass. 70, 73 (1995), *quoting Young v. Duncan,* 218 Mass. 346, 349 (1914). As one form of remedial statutes, "[e]mployment statutes in particular are to be liberally construed, 'with some

imagination of the purposes which lie behind them.'" *Depianti*, 465 Mass. at 620 (citation omitted).

The Legislature intended that the parties responsible for violations of the wage laws should not be permitted to evade liability based on technical distinctions or formalities. That intent is manifest in provisions that hold key individuals jointly and severally liable and that preclude "special contracts." *See* M.G.L. c. 149, § 148 (imposing joint and several liability on individuals and precluding special contracts); M.G.L. c. 149, § 148B (imposing joint and several liability on individuals); M.G.L. c. 151, § 1B (precluding special contracts); M.G.L. c. 151, § 20 (precluding special contracts). The Legislature also placed significant weight on preventing wage violations though the imposition of mandatory treble damages and attorneys' fees. M.G.L. c. 149, § 159; M.G.L. c. 151, §§ 1B, 20.

The Supreme Judicial Court's interpretation of these and other wage law provisions has been robust, recognizing the dangers of an overly narrow construction. Most significantly here, in *Cook v. Patient Edu, LLC*, 465 Mass. 548 (2013), the Court considered whether the managers of a limited liability

company could be individually liable under the wage law, where the statutory language expressly imposed liability only on "[t]he president and treasurer of a *corporation* and any officers or agents having the management of such *corporation.*" M.G.L. c. 149, § 148 (emphasis added). The Court noted that "[i]n the various provisions setting forth those who may be held individually liable for payment of wages,...the statute makes no explicit mention of managers of LLCs or managers of any other limited liability entity." *Cook*, 465 Mass. at 553. Nonetheless, the Court recognized that the statutory language was not meant to limit individual liability to the corporate context, but rather "to illustrate the circumstances in which an individual may be deemed a 'person having employees in his service.'" *Id.* The Court concluded, in a passage of significant import here, "We discern from the inclusion of the provisions regarding corporate and public officer liability *a clear legislative intent to ensure that individuals with the authority to shape the employment and financial policies of an entity be liable for the obligations of that entity to its employees.*" *Id.* at 554 (emphasis added). That is precisely what Mr. Cerulo and Mr.

Tetreault seek to do in their Complaint against JRM and its managers, because those defendants, according to the Complaint, exercised control over the terms and conditions of their employment, regardless of the nominal entity that issued their paychecks.

Other decisions from the Supreme Judicial Court further demonstrate that the parties responsible for violations of the wage laws should not be permitted to evade liability based on technical distinctions or formalities. In *Depianti*, the defendant argued that it could not be liable under the wage laws, because the plaintiffs had contracts with other entities, not with the defendant. The Court rejected that argument. It recognized that "[l]imiting the statute's applicability to circumstances where the parties have contracted with one another would undermine the purpose of the statute," because it "would permit misclassification where a putative employer...is insulated from such liability by virtue of an arrangement permitting it to distance itself from its employees." 465 Mass. at 621, *citing Cumpata v. Blue Cross Blue Shield of Mass., Inc.,* 113 F. Supp. 2d 164, 168 (D.Mass.2000) ("The Wage Act is meant to protect

employees from the dictates and whims of shrewd employers").

Likewise, in *DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486 (2009), American Airlines argued that it could not be liable under the Tips Law for retaining skycap service charges, because it was not the nominal "employer" of the skycaps (American contracted with another company, G2, to employ the skycaps), and therefore it was not barred under the literal statutory language from retaining the charges. *Id.* at 496. The Supreme Judicial Court rejected that argument, which ran counter to the Legislature's plain intent. *Id.* at 493-97. The Court recognized that "the Legislature was cognizant, in general, of the risk that employers or other persons may seek to find ways, through special contracts or other means, to attempt to avoid compliance with the Act, and intended to thwart such schemes." *Id.* at 497.

Finally, in *Sebago*, the Supreme Judicial Court noted, "Our cases are clear that employers may not circumvent the Wage Act or other laws affecting employee compensation by creating illusory distinctions in the services they provide." 471 Mass. at 340 (citation omitted). A business cannot, for

example, seek to evade liability by "creating a false dichotomy between the administrative and operational aspects of their business." *Id.* at 330 (emphasis added).

The common thread of all of these cases is clear: the parties who wield control and authority should not be permitted to evade liability based on technical distinctions or formalities. The Superior Court's test makes it a simple matter for an employer to evade liability. All it has to do is contract with or set up a separate entity - a corporation, an LLC, or otherwise - and have that entity issue paychecks. Given the now well-entrenched principle that businesses cannot avoid liability by attempting to distance themselves from their workers, however, that type of scheme cannot be allowed to serve as a ready source of immunity for those controlling the terms and conditions of employment.

E. The Massachusetts wage laws should be read in harmony with the Fair Labor Standards Act, which has an expansive definition of employment.

Massachusetts courts have sought to harmonize enforcement of the Massachusetts wage laws with enforcement of the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* *See, e.g., Vitali*

v. Reit Mgt. & Research, LLC, 88 Mass. App. Ct. 99, 103 (2015) ("in interpreting the State law, we look to how the FLSA has been construed"). That is because the Massachusetts wage laws, in key respects, were "intended to be essentially identical" to the FLSA. *Mullally v. Waste Mgt. of Mass., Inc.*, 452 Mass. 526, 531 (2008) (citations and internal quotation marks omitted). As a consequence, the Supreme Judicial Court has "ascribe[d] the legislative purposes underlying the FLSA to" parallel Massachusetts law. *Id.* (citation omitted). Likewise, this Court has looked to interpretations of the FLSA when ruling on the scope of the Massachusetts wage laws, including who is covered under those laws. *See, e.g., Whyte v. Suffolk County Sheriff's Dep't*, 91 Mass. App. Ct. 1124, 2017 WL 2274618, at *1 (May 24, 2017) (when determining who is covered under Massachusetts law as an "employee," court is "guided in the interpretation of our wage laws by Federal case law interpreting the [FLSA]") (citations omitted).

As this Court has recognized, "case law has interpreted the FLSA in a manner that is highly protective of employee rights." *Vitali*, 88 Mass. App. Ct. at 103. That expansive reading of the FLSA

includes, among other things, a broad definition of "employer." As the First Circuit held, "the remedial purposes of the FLSA require courts to define 'employer' more broadly than the term would be interpreted in common law applications." *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (citation omitted). Among other things, "the FLSA contemplates several simultaneous employers, each responsible for compliance with the Act." *Id.* (citations omitted).

Given the expansive reading that courts have given the term "employer" under the FLSA, that term should be read equally expansively under the Massachusetts wage laws. To do otherwise - that is, to interpret the term "employer" narrowly under Massachusetts law - would make no sense given that the remedial purposes of the Massachusetts wage laws are no less important than the remedial purposes of the FLSA.

CONCLUSION

As set forth above, the Superior Court erred when allowing the Appellees' partial motion to dismiss. Accordingly, Mr. Cooper and Mr. Tetreault respectfully

requests that the Court reverse the Superior Court's Order and remand the case for further proceedings.

COOPER CERULO, JORDAN TETREAULT, on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Stephen Churchill
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Dated: August 15, 2018

CERTIFICATION OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18; and Mass. R. App. P. 20.

Signed under the penalties of perjury this 15th day of August, 2018.

/s/ Stephen Churchill
Stephen Churchill

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(d), Plaintiffs-Appellants, through their counsel, hereby certify that on August 15, 2018, two copies of this document, as well as two copies of the Record Appendix, were served, by regular mail, on counsel for the Defendants-Appellees:

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 16-3749

COOPER CERULO and JORDON TETREAULT,
on behalf of themselves and all others similarly situated

vs.

HERBERT G. CHAMBERS, individually;
JAMES DUCHENSEAU, individually;
ALAN McLAREN, individually;
JENNINGS ROAD MANAGEMENT CORP.
d/b/a THE HERB CHAMBERS COMPANIES;
HERB CHAMBERS OF NATICK, INC., and
HERB CHAMBERS OF AUBURN, INC.

****

MEMORANDUM AND ORDER ON JENNINGS ROAD MANAGEMENT CORP., JAMES DUCHESNEAU, and ALAN McLAREN'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT, and HERBERT G. CHAMBERS' PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT.

For the following reasons, the defendants' motion to dismiss the claims against defendants Jennings Road Management Corp. ("JRM"), Herbert G. Chambers in his executive capacity with JRM, James Duchenseau, and Alan McLaren is ALLOWED.[1]

ALLEGATIONS OF THE COMPLAINT

This a Wage Act case in the automotive sales and service industry. The named plaintiffs, Cerulo and Tetreault, were formerly inside car salesmen in Herb Chambers dealerships in Natick (Mercedes-Benz) and Auburn (Hyundai-Scion), respectively. As the caption suggests, each of these

[1]Counts I - VI are claims under the Massachusetts Wage Act. The parties agree that Counts VII - X, which are common-law claims preempted by the Wage Act, should be dismissed.

dealerships is attached to a separate and corresponding Massachusetts corporation; however, according to the Complaint, each is "operated" by Jennings Road Management Corp., d/b/a The Herb Chambers Companies (herein, "JMR"), a Connecticut corporation headquartered in Glastonbury, Connecticut.

The plaintiffs allege that trainees in Herb Chambers dealerships are paid a guaranteed wage for the first several weeks, but then compensated them strictly by commission on the cars they sell. Salespersons are required to attend company-wide meetings once a month, without extra pay for time or travel. They are scheduled at times for longer than 40-hour weeks and sometimes Sundays, and sometimes need to work late to finish a sale. JRM's policy is to credit earned commissions toward overtime compensation, so that a salesperson only receives minimum wage and/or time-and-a-half if commissions fall short. Commissions are docked or reduced if a salesperson is found to have violated company policy. These practices, they assert, are unlawful under the Wage Act.

Whether any or all of these compensation policies are in fact unlawful is not presently before me. Instead, the issues are (a) whether JRM and its Chief Financial Officer (Duchesneau) and Chief Executive Officer (McLaren) should be held responsible for any such malefactions, and (b) whether Mr. Chambers, who is the President, Treasurer, and sole registered Director of JRM and the two dealerships, should be held responsible in his executive capacity with JRM. (He does not seek dismissal as a defendant in his executive capacity in the two dealerships.)

Many of the Complaint's allegations on the "employer" issue are conclusory; e.g., that JRM "employed Mr. Cerulo," "employed Mr. Tetreault," and "collectively employs approximately over 1,500 ... individuals as inside car sales employees at the car dealerships it operates in Massachusetts" (¶¶16, 17, 20), and that both the Natick and Auburn dealerships are "agent[s] of JRM" and are "sub-

corporation[s] that JRM operates, controls, and/or oversees" (¶¶41-44). The more specific allegations are the following:

- At each dealership, "JRM implements uniform employment practices and policies regarding the terms and conditions of employment for the inside car sales employees that it employs at each car dealership." (¶21)
- "JRM manages, controls, oversees, and/or directs the work activities of each individual whom [it] employs as an inside car salesman, including the Plaintiffs, at each one of the car dealerships that it operates in Massachusetts including HC Natick and HC Auburn." (¶22) The policies of requiring salespersons to attend meetings without recording their house, not paying minimum wage, crediting commissions and bonuses toward overtime compensation, not paying time and a half for Sunday labor, and docking pay for alleged violations of company policies, are JRM's policies, and are applied in all Herb Chambers dealerships. (¶¶60-63, 71, 75-77)
- JRM employs numerous "Controllers" and assigns one to each Massachusetts car dealership. The Controllers are responsible for implementing JRM's employment practices and policies, directing and/or overseeing the business operations including employment matters, the payroll, hiring and firing, and scheduling of inside car sales employees. Each Controller reports directly to JRM, which pays them and manages, directs, and/or oversees their work activities. They oversee the employment of the inside car sales employees in the dealerships. One Denise Devoe, an employee of JRM with the title Corporate Controller, oversees the work of the Controllers assigned to Massachusetts. (¶¶23-30, 45, 48, 50)

- JRM creates and implements uniform practices and policies regarding hiring and the terms and conditions of employment – payroll policies including the rate and method of payment, vetting employment applications, screening applicants for inside sales positions, training, maintaining personnel files and employment records, implementing work schedules, directing and overseeing personnel decisions including hiring and firing, sponsoring and administering a 401k profit sharing plan, and establishing and overseeing dress codes, discrimination policies, and policies on sexual harassment and weapons in the workplace. (¶31)
- Mr. Chambers is President, Treasurer and sole registered Director of JRM and also of the Natick and Auburn dealerships. (¶32)
- Mr. McLaren is JRM's CEO. He and Mr. Duchesneau, who is employed by JRM, both work as agents of JRM to manage, direct and oversee its employment practices at each of the Massachusetts dealerships. (¶¶39-40)
- * Mr. Duchesneau is the Administrator and Plan Sponsor of the Herb Chambers Companies 401k Profit Sharing Plan. It is a "single employer" plan in which more than 1,000 employees participate. (¶¶33-38)

DISCUSSION

A. Rules 12(b)(2) and (6).

In their motion to dismiss, the defendants have included an affidavit of James Duchesneau, denying in conclusionary form various of the Complaint's allegations concerning JRM's connections to the Massachusetts dealerships. They have moved under Rule 12(b)(2) ("Lack of jurisdiction over

the person"), asserting that the plaintiffs lack standing against the defendants other than the dealerships in which they work, "[b]ecause JRM Corp. never employed Plaintiffs."

A bona fide Rule 12(b)(2) motion would permit reference to the Duchesneau affidavit and other extraneous evidence.[2] Standing to sue, however, depends not on the plaintiffs' proof that they will prevail on ultimate issue – this is, after all, only a Complaint – but on their "asserting a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest." Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 493 (1989); see Slama v. Attorney Gen., 384 Mass. 620, 624 (1981) ("[t]o have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury").

In this case, the plaintiffs allege that the defendants – including JRM and its managers – have invaded their legal rights under their contracts and the Wage Act, such that they were paid less than was legally required. At the pleading stage, at least, the "plausibility" of the allegations of the Complaint is best determined within its four corners under Mass. R. Civ. P. 12(b)(6), lest it morph into a premature Rule 56 motion. See Mass. R. Civ. P. 12(b), penultimate sentence, and Stop & Shop Companies, Inc. v. Fisher, 387 Mass. 889, 892 (1983) ("[m]emoranda and arguments on legal issues are not sufficient to convert a rule 12(b)(6) motion to one under rule 56").

To withstand a Rule 12(b)(6) challenge, a plaintiff's complaint must contain "allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect [a] threshold requirement ... that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." While a complaint need not set forth detailed factual allegations, it must present

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[2]See Diamond Group, Inc. v. Selective Distribution International, Inc., 84 Mass. App. Ct. 545, 548 (2013).

more than labels and conclusions, and must raise a right to relief "above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007) (internal quotations omitted).

B. "Employer."

Both sides agree that these issues depend on the meaning of the statutory term "employer," and both agree that the Wage Act itself does not clearly define the term.[3] Section 1 of Chapter 149 of the General Laws – the same chapter as contains the Wage Act – defines "employer," as used in sections 105A - 105C, to include "any person acting in the interest of an employer directly or indirectly." This is a near reprint of the definition of "employer" in the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*[4] Sections 105A - 105C, however, have to do with the pooling and misdirection of tips. The definition in section 1therefore does not apply to the Wage Act, which is found in G.L. c. 149, §§ 148-150 and c. 151, §§ 1, 1A, and 19.

Although the Wage Act does not formally define "employer," the language of G.L. c. 149, § 148, strongly points to the entity that cuts the paycheck, and the managers thereof:

> *an employer may make payment of wages* prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this

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[3]454 CMR 27.02, in defining "Employer" as "[a]n individual, corporation, partnership or other entity, including any agent thereof, that employs an employee or employees for wages, remuneration or other compensation," and "employ" as "[t]o suffer or permit to work," sheds little light on the subject.

[4]"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 209 U.S.C. §203(d).

> section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid *by an employer* for more than six days from the termination of the pay period in which such wages were earned by the employee. ... An employer, *when paying an employee his wage*, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.
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> ****
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> The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the *employers of the employees of the corporation within the meaning of this section.* (Emphasis supplied.)

Nonetheless, the plaintiffs argue that the FLSA definition should control, citing Goodrow v. Lane Bryant, 432 Mass. 165 (2000) among others.[5] In Goodrow, the issue was whether the plaintiff was owed overtime, or whether she was a "bona fide executive" to whom the overtime statute (G.L. c. 151, §1A) did not apply. There being no definition of "bona fide executive" in the Massachusetts statute, the SJC looked to the FLSA's definition of the term. The reasoning was as follows:

> Where a "statute does not effectively define [terms] we have said that the Legislature should be supposed to have adopted the common meaning of the word, as assisted by a consideration of the historical origins of the enactment." The legislative history of G. L. c. 151, § 1A, provides no guidance as to the meaning of the term "bona fide executive." In such instances we may look to interpretations of analogous Federal statutes for guidance,
>
> There is also the matter of preemption. Title 29 U.S.C. 218(a) makes clear that the wage and hour standards as forth in the FLSA are the floor, and that "the FLSA does not preempt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute." Conversely, a State law may be preempted by the

[5]For the sake of brevity, I have here focused on the FLSA issue and have passed over a number of other, somewhat less cogent arguments concerning the "employer" issue.

> FLSA if it conflicts with the FLSA, or if it is impossible for a third party to comply with both the FLSA and the State law.

432 Mass. at 170-71 (citations omitted).

There are several reasons not to apply the ruling in Goodrow, an overtime case, to a Wage Act case. One is that the FLSA's definition of "bona fide executive," although lengthy, was about what one would expect,[6] whereas its definition of an "employer" – anyone "acting directly *or indirectly* in the interest of an employer in relation to an employee" – goes well beyond the term's

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[6]At the time Goodrow was decided, Title 29 C.F.R. § 541.1 defined "employee employed in a bona fide executive . . . capacity" as "any employee:

> "(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department [or] subdivision thereof; and
>
> "(b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> "(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> "(d) Who customarily and regularly exercises discretionary powers; and
>
> "(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . . and
>
> "(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . [p]rovided, [t]hat an employee who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section." 432 Mass. at 171, n. 5.

common meaning and the statutory language in section 148 (see above), at least where the "employer" - employee relationship crosses company lines.

The preemption argument, too, is considerably less apt in this instance than it was in Goodrow. The FLSA provision cited in Goodrow on the subject, 29 U.S.C. § 218(a), is carefully drawn, to ensure (1) that the FLSA's minimum wage is a floor, not a ceiling; (2) that the 40-hour work week (without overtime) is a ceiling; and (3) that the FLSA's child labor law shall not stand in the way of more protective legislation by any municipality, state, or the United States.[7] It does *not* say or suggest that the States must, in their own wage laws, impose liability as broadly as the FLSA does in 209 U.S.C. §203(d), and courts considering the issue have not. Tillman v. Louisiala Children's Medical Center, 2017 WL 1399619 (E.D. La. Apr. 19, 2017) at *3 ("the analysis used to determine whether a party is an employer under the LWPS [Louisiana Wage Payment Statute] differs from the FLSA analysis"); Saunders v. Getchell Agency, 2014 WL 559040 (U.S.D. Ct., D. Me., February 11, 2014) at *6 ("Maine law does not track the FLSA with respect to the definition of 'employer'"); King v. West Virginia's Choice, Inc., 234 W. Va. 440, 766 S.E.2d 387, 394-95 (2014)

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[7]Section 218(a) reads as follows:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(holding that defendant was "a FLSA-regulated employer" and so "d[id] not meet the definition of an 'employer' under the state's MWMHS [Minimum Wage and Maximum Hours Standards]").

Finally, there is the fact that substantively, the Massachusetts wage and hour laws are at least as protective – and usually more so – than the FLSA in every respect, including minimum wage ($11.00 vs. $7.25), overtime (in both, time and a half for all hours over 40 per week), earned sick time (1 hour for every 30 hours worked vs. none), and family medical leave (12 unpaid weeks plus 24 hours annually vs. 12 unpaid weeks annually). Goodrow considered whether the plaintiff was entitled to overtime or was exempted as a "bona fide executive," and logically adopted the FCLA definition of that term, which determined whether the plaintiff was entitled to time and a half for extra work.

In contrast, the issue before me is not what the plaintiffs are owed, but whom they may sue; specifically, whether and when an officer of Company A must answer to a Wage Act claim lodged by a person who gets his paycheck from Company B, an affiliate of Company A. Limiting liability to a plaintiff's "employer(s)," as that term is applied in section 148 and is customarily understood – i.e., the entity from which the employee gets his or her paycheck, and its management – does not conflict with the FLSA. If an employee wishes to settle for his FLSA rights in exchange for a greater number of prospective payors, he may bring an FLSA action concerning minimum wage or overtime "in any Federal or State court of competent jurisdiction," subject to removal to the federal courts. 29 U.S.C. §216(b); Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003).

The case of Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321 (2015) is also instructive. There, the SJC held that the independent contractor statute, G. L. c. 149, § 148B, applied to Boston cab drivers, but rejected the plaintiffs' argument that several taxicab owners, radio associations, and

a taxicab garage should all be deemed their "employers." Significantly, it did so without reference to the FLSA or its definition of "employer," looking instead to the Massachusetts common law concerning the liability of one corporation and its officers for the obligations of another:

> Disregard of the corporate form requires an analysis of the following factors: "(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud."
>
> Although there is common ownership among some of the defendants, "[t]he mere fact of common management and shareholders among related corporate entities has repeatedly been held not to establish, as a matter of law, a partnership, agency or 'joint venture' relationship that renders the corporations a 'single employer.'"

471 Mass. at 328, quoting from Attorney General v. M.C.K., Inc., 432 Mass. 546, 555 n.19 (2000) and Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 624 (1990); see also My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614 (1968); Evans v. Multicon Constr. Corp., 30 Mass. App. Ct. 728, 733 (1991); and Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 14-16 (1st Cir. 1985). I see no reason why the same approach ought not to be applied here.[8]

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[8]In a recent case, the Appeals Court remarked in passing that "[w]hile the common-law approach has continuing vitality in certain contexts, where the Wage Act and the overtime statute are concerned, the common-law approach has been superseded by G. L. c. 149, § 148B, which defines the over-all employer-employee relationship for all cases arising under G. L. c. 149 and G. L. c. 151." Gallagher v. Cerebral Palsy of Massachusetts, Inc., 92 Mass. App. Ct. 207, 210 (2017). This is so where the issue is whether a person is an employee or an independent contractor, which is the subject of section 148B and the Gallagher case. Whether and when the term "employer" should extend to corporate affiliates, however, is not addressed in either.

In a fairly recent decision from the Business Litigation Session, a colleague considered two cases in which former salespersons in various Herb Chambers dealerships brought Wage Act claims against the dealerships, JRM, and Herb Chambers and James Duchesneau in their capacities as JRM officers. Rogier v. Chambers, 33 Mass. L. Rptr. 523, 2016 WL 5890024 (Superior Court BLS, September 1, 2016; Leibensperger, J.). Judge Leibensperger concluded that the FLSA definition of "employer" does not apply to the Massachusetts Wage Act, and that absent a statutory definition in the Wage Act of "employer," the Massachusetts common law governs whether a person or entity affiliated with the hiring entity is liable under the Act. For the reasons stated above (largely borrowed from Rogier, but carefully reexamined for this case), I agree.

C. Piercing the Corporate Veil.

"The doctrine of corporate disregard is an equitable tool that authorizes courts, in rare situations, to ignore corporate formalities, where such disregard is necessary to provide a meaningful remedy for injuries and to avoid injustice." Attorney Gen. v. M.C.K., 432 Mass. at 555.

> Particularly is this true (a) when there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship, or (b) when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting. In such circumstances, in imposing liability upon one or more of a group of "closely identified" corporations, a court "need not consider with nicety which of them" ought to be held liable for the act of one corporation "for which the plaintiff deserves payment."

My Bread Baking, 353 Mass. at 619 (citation omitted). In other words: commonality of ownership and control alone does not usually warrant piercing an affiliate's corporate veil, unless it has facilitated fraud, injury, or confusion to the detriment of creditors or others whom the principal has wronged.

Of the twelve M.C.K. / Pepsi-Cola factors recommended for determination of whether corporate formalities are to be set aside, only the second (pervasive control) is clearly pled.[9] "It is well settled that common ownership and control of the two corporations, standing alone, is insufficient to merge them into one or to make either the agent of the other." Westcott Construction Corp. v. Cumberland Construction Co., Inc., 3 Mass. App. Ct. 294, 297 (1975). Notably lacking in the Complaint is any suggestion that the Chambers auto empire was fractured into different entities with the intent or result of defrauding, injuring, or confusing the dealerships' employees or other creditors. It is these concerns, not a desire for leverage, that the "doctrine of corporate disregard" exists.

It follows, therefore, that the "employers" in this case consist of the Natick and Auburn dealerships, and Herbert Chambers in his executive capacity in both, and that the other defendants deserve a dismissal.

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[9]The first (common ownership) might reasonably inferred from the fact that Herbert Chambers is the sole director and statutory officer of JRM and the Massachusetts (Natick and Auburn) dealerships. Massachusetts law does not, however, outright prohibit this, even in corporations that have more than one shareholder. See G.L. c. 156D, §§8.03(a), 8.40(d). Of the rest, there is no suggestion of a confused intermingling of business assets (#3), no reason to suspect use of the corporation in promoting fraud (#12), and no information one way or the other as to the remaining eight factors.

ORDER

For the foregoing reasons, the following claims are hereby dismissed:

1. In Counts I - VI, all claims against defendants Jennings Road Management Corp., Herbert G. Chambers in his executive capacity with JRM, James Duchenseau, and Alan McLaren; and

2. Counts VII (breach of contract), VIII (unjust enrichment), IX (quantum meruit), and X (breach of the covenant of good faith and fair dealing) in their entirety.

Thomas P. Billings
Justice of the Superior Court

Dated: December 15, 2017

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 149 LABOR AND INDUSTRIES

Section 148 PAYMENT OF WAGES; COMMISSIONS; EXEMPTION BY CONTRACT; PERSONS DEEMED EMPLOYERS; PROVISION FOR CASHING CHECK OR DRAFT; VIOLATION OF STATUTE

Section 148. Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive,

administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a particular pay period. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.

Compensation paid to public and non-public school teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year; provided, however, that payment of such compensation may be deferred to the extent that equal payments may be established for a 12 month period including amounts payable in July and August subsequent to the end of the school year.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such

employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 149 LABOR AND INDUSTRIES

Section 148B PERSONS PERFORMING SERVICE NOT AUTHORIZED UNDER THIS CHAPTER DEEMED EMPLOYEES; EXCEPTION

Section 148B. (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:?

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and

the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

Notify

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
Civ. No. 2016-3479-BLS2

DJHON MALEBRANCHE, WISKINDA LAMANDIER, NICHOLAS PEZZANO, and CHRISTOPHER FARIAS, on behalf of themselves and all others similarly situated,
Plaintiffs

vs.

COLONIAL AUTOMOTIVE GROUP, INC.; GORDON CHEVROLET, INC. f/k/a GORDON CHEVROLET GEO, INC.; COLONIAL NISSAN OF MEDFORD, INC.; GORDON VOLKSWAGEN, INC.; COLONIAL DODGE, INC; and LAWRENCE GORDON,
Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' AMENDED MOTION TO DISMISS

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This is a putative class action against a family of automotive dealerships and their parent company, Colonial Automotive Group, Inc. (CAG), alleging a failure to pay car sales employees compensation due under the Massachusetts wage and overtime laws. G.L.c. 149 §§ 148, 150. Plaintiffs Djhon Malebranche, Wiskinda Lamandier, Nicholas Pezzano, and Christopher Farias were employed as such salespersons. The First Amended Class Action Complaint (the Complaint) asserted both statutory violations (Counts I through V) and common law claims (Counts VI through IX). Defendants CAG and Gordon Chevrolet, Inc. (Gordon Chevrolet) moved to dismiss pursuant to Rule 12(b) (6), Mass.R.Civ. P. By the time of the motion hearing, the plaintiffs had voluntarily dismissed the common law claims, leaving only Counts I through V. As to those claims, CAG and Gordon Chevrolet contend that the Complaint fails to

allege facts sufficient to show that either of them ever employed plaintiffs.[1] For the reasons set forth below, this Court concludes that the Motion must be **Denied**.

BACKGROUND

The Complaint sets forth the following allegations, which this Court assumes as true for purposes of this Motion.

CAG is a domestic corporation that manages and controls the business operations and employment matters for all of the sixteen automotive dealerships that comprise the "Colonial Automotive Group," including Gordon Chevrolet, Colonial Nissan, Colonial Dodge, and Gordon Volkswagen. ¶¶ 5, 15. Gordon Chevrolet (formerly known as Gordon Chevrolet Geo) is a foreign corporation with a principal office in Acton, Massachusetts. ¶ 5. Colonial Nissan, Colonial Dodge, and Gordon Volkswagen are all domestic corporations with principal offices in Medford, Hudson, and Westborough, Massachusetts, respectively. ¶¶ 6-9. As sub-corporations or subsidiaries of CAG, the dealerships function as CAG's agents. ¶ 36.

CAG and the dealerships all do business under the Colonial Automotive Group umbrella, and regularly sell cars to members of the public. ¶¶ 15-16, 34, 41. CAG controls, operates, oversees, and/or directs both the business and employment operations for the dealerships, including hiring and firing, creating and implementing payroll policies, overseeing employee performance, maintaining personnel and employment records, and controlling work schedules. ¶ 33. CAG also operates a general website for all of the dealerships, representing the group "as a single 'dealership' that actively employs over 600 employees." ¶ 34.

[1] Defendants also contended that the plaintiffs did not satisfy the statutory prerequisite of first filing a Wage Act complaint with the Attorney General's Office. Plaintiffs have since amended the Complaint to eliminate this procedural issue.

With respect to Gordon Chevrolet, the Complaint alleges that Gordon Chevrolet assists CAG as its agent in the management and control of business and employment operations for all of the dealerships. ¶ 19. Additionally, plaintiffs Malebranche and Lamandier executed documents acknowledging their employment with Gordon Chevrolet. ¶¶ 49, 51. Malebranche's document acknowledges an agreement with "Gordon Chevrolet Geo dba Colonial Chevrolet," and Lamandier's acknowledges an agreement with "Gordon Chevrolet Geo dba Colonial Nissan." Id.

Malebranche, Lamandier, Pezzano and Farias were all employed as inside car salesmen who worked at different dealerships under the CAG umbrella. ¶¶ 1-4. They worked to sell cars on behalf of CAG and its dealerships. ¶¶ 1-4, 48, 50, 52-53. The defendants were aware that plaintiffs and other similarly situated sales employees often worked more than forty hours per week and on Sundays without receiving compensation required by the Wage Act. ¶¶ 55, 56, 62. This was the result of a "companywide practice and policy" of CAG and the dealerships. ¶ 54, 68.

DISCUSSION

In moving to dismiss Counts I through V, CAG and Gordon Chevrolet argue that the Complaint does not allege sufficient facts to show that either of them is an "employer" of the plaintiffs within the meaning of the Massachusetts Wage Act. The standard that this Court applies to this Rule 12(b) (6) motion is well established. Although the complaint must contain more than mere "labels and conclusions," Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), the ultimate inquiry is whether the plaintiff has alleged facts that are "adequately detailed so as to plausibly suggest an entitlement to relief." Greenleaf Arms Realty Trust, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012) (reversing lower court's allowance of 12

(b) (6) motion). Thus, that the complaint relies on facts that are improbable does not support dismissal so long as those allegations, "even if doubtful in fact," "raise a right to relief above the speculative level." Iannacchino, 451 Mass. at 636, quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). This Court must draw all reasonable inferences from those factual allegations in favor of the nonmoving party. See Iannacchino, 451 Mass. at 625 n.7, citing Nader v. Citron, 372 Mass. 96, 98 (1977). Finally, it is important to note that employment status is ordinarily a question of fact that can rarely be decided on a motion to dismiss. See Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 194 (1991) (affirming lower court's denial of motion to dismiss in part because whether an employer-employee relationship existed under the Jones Act was a question of fact). This Court concludes that the Complaint satisfies the 12(b) (6) standard.

In a recent decision, the Appeals Court applied two tests to determine whether the defendant was an "employer" within the meaning the Massachusetts Wage Act. Gallagher v. Cerebral Palsy of Mass., Inc., 92 Mass. App. Ct. 207 (2017). The first is a statutory test analyzing the employer-employee relationship according to G.L. c. 149, § 148B. The focus there is whether the plaintiff provided services to the defendant. Id. at. 210, quoting Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 329 (2015). The second is a common law test. Under this second test, a defendant who was not the direct employer of the plaintiff would nevertheless be considered the "joint employer" of the plaintiff where it "retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." Id at. 214, quoting Commodore Health Ventures, Inc., 63 Mass.App.Ct. 57, 62 (2005). The Appeals Court noted that under either test, whether or not an employer-employee

relationship exists is ordinarily a question of fact and thus cannot easily be decided on a Rule 12(b) (6) motion.

Noting that the case before it was "not the ordinary case," the court in Gallagher affirmed the lower court's allowance of a motion to dismiss because an extensive regulatory framework governed the work arrangement at issue and the corresponding relationships between the various parties. The plaintiffs were personal care attendants who performed work in the homes of individual consumers covered by MassHealth. The defendant acted as a "fiscal intermediary agency" between MassHealth and the consumer. The Appeals Court concluded that the defendant was not an employer under the statutory test because the services were rendered to the individual consumers, not the defendant agency. The Court also concluded that the plaintiffs could not satisfy the common law test because the defendant did not exercise sufficient control over the plaintiff's work: it was MassHealth, not the defendant, that set the plaintiffs' work schedule and determined payroll policies. [2] In the instant case, no regulatory framework governs the employer-employee relationship of car sales employees at the Colonial Automotive Group dealerships, suggesting that whether such a relationship exists for purposes of the Wage Act is a question of fact. The issue is whether the Complaint pleads sufficient facts to satisfy the two tests described in Gallagher. This Court concludes that it does.

As to CAG, the Complaint alleges that all defendants, including CAG, sell cars to members of the public through sales employees such as the plaintiffs. ¶¶ 41, 20-31. Assuming these facts to be true, CAG thus receives the "services" of the plaintiffs. The Complaint also alleges that CAG maintains a common website for all of the dealerships, and holds itself out as a

[2] Gallagher left open the question of whether the statutory "services" test entirely supplants the common law "control" test. In the absence of any appellate case that deals directly with this issue, this Court concludes that the common law test supplements the statutory test – that is, that both can be applied to determine if a defendant is an employer under the Wage Act.

single dealership with over 600 employees. CAG controls and manages the business operations and employment matters for all of the dealerships, which implement CAG employment policies and procedures, including those that pertain to wage and overtime compensation. Finally, plaintiffs attached to their memorandum in opposition certain agreements signed by plaintiffs Malebranche and Lamandier, apparently with CAG, which state among other things that failure to comply with "The Colonial Automotive Group's information security policies and procedures" could result in "termination of my employment with The Colonial Automotive Group." Although these documents are not specifically referenced in the Complaint and thus should not be considered on this 12 (b) (6) motion, they do indicate that if discovery were allowed to proceed, there may be further information that would support plaintiffs' claim that they were employed by CAG.

Although a closer call, this Court also concludes that the Complaint alleges enough to show an employment relationship between plaintiffs and Gordon Chevrolet, particularly if this Court draws all reasonable inference in favor of the plaintiffs. At least two of the plaintiffs executed agreements acknowledging the terms of their employment with "Gordon Chevrolet Geo dba Gordon Chevrolet" and "Gordon Chevrolet Geo dba Colonial Nissan." This suggests that they *do* provide services to Gordon Chevrolet or alternatively, that Gordon Chevrolet maintains some control over the terms and conditions of their employment. The Complaint also alleges that Gordon Chevrolet assists CAG as its agent in its management and control of the business and employment matters for the dealerships. In short, whether Gordon Chevrolet or CAG should remain in the case is best decided after plaintiffs have had an opportunity to explore these issues in discovery.

CONCLUSION

For the foregoing reasons, the defendants' Motion to Dismiss is **DENIED**. This case is scheduled for a Rule 16 conference November 29, 2017 at 2:00.

Janet L. Sanders
Justice of the Superior Court

Dated: October 19, 2017