NO. 20-111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SIMON MUJO, on behalf of themselves and all others similarly situated, INDRIT MUHARREMI, on behalf of themselves and all others similarly situated,

Plaintiff-Appellants,

v.

JANI-KING INTERNATIONAL INC. JANI-KING INC., JANI-KING OF HARTFORD INC.,
Defendant-Appellees.

On appeal from an interlocutory order of the United States District Court
for the District of Connecticut No. 3:16-cv-1990 (VAB)

PLAINTIFF-APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case was brought on behalf of more than a hundred janitorial cleaning workers in Connecticut (primarily immigrant workers who do not speak English as their first language) who were duped into paying thousands of dollars for their jobs under the guise that they were purchasing cleaning "franchises" from Jani-King, one of the nation's largest commercial cleaning companies. JA1-14, JA511-513. When faced with similar allegations, a federal court in Massachusetts determined that Jani-King franchisees are actually employees,[1] and the Supreme Judicial Court in Massachusetts (on a certified question in a similar case) held that such cleaning franchisees could recover as damages the fees they paid to obtain their cleaning jobs, as well as other expenses they had to pay to do the work, such as for insurance.[2]

Although the relevant Connecticut law is nearly identical to the Massachusetts law that led to these results,[3] in this case, the district court granted a

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[1] *See De Giovanni v. Jani-King Int'l, Inc.*, Civ. A. No. 07-10066-MLW (D. Mass. June 6, 2012) (reproduced at JA386-419).

[2] *See Awuah v. Coverall North America, Inc.*, 460 Mass. 484, 952 N.E.2d 890 (2011).

[3] Following the rulings against Jani-King and Coverall in the cases cited in notes 1 and 2, both companies entered into court-approved class settlements that resulted in a substantial refund to the franchisees of the fees that they had paid, and both companies effectively ended their operations in Massachusetts, handing over the cleaning accounts directly to the franchisees. *See Awuah v. Coverall North America, Inc.*, Civ. A. No. 1:07-cv-10287, Dkt. 640 (D. Mass. July 8, 2015)

motion to dismiss the plaintiffs' wage claims, *see* Add.001, and then, following discovery, granted summary judgment against the plaintiffs on their surviving unjust enrichment claim, *see* Add.023. This Court should reverse these decisions below and, if necessary, certify this case to the Connecticut Supreme Court so that it can determine if Connecticut law will follow Massachusetts law on the issues presented here,[4] based on its very similar statutory provisions.[5]

The district court below certified this case as a class action, *see Mujo v. Jani-King Int'l, Inc.*, 2019 WL 145524 (D. Conn. Jan. 9, 2019), and it correctly

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(approving class action settlement); *De Giovanni*, Civ. A. No. 1:07-cv-10066, Dkt. 278 (D. Mass. Aug. 8, 2014) (same).

[4] Plaintiffs will also be filing a motion to certify this case to the Connecticut Supreme Court.

[5] The Connecticut wage law, Conn. Gen. Stat. § 31-71e, is broadly worded, just like the Massachusetts wage law, Mass. Gen. L. c. 149 § 148, and both generally require employees to be paid their wages. However, Connecticut law, specifically Conn. Gen. Stat. § 31-73b (the "anti-kickback" statute), is even more expressly on point to the situation raised here than the broadly worded Massachusetts wage law, as it *expressly* prohibits conditioning a job on payments to the employer. At least one court in Connecticut seems to have recognized that Connecticut law would (like Massachusetts law) not allow misclassified employees to be required to pay for their jobs, or expenses necessary to perform their jobs. *See Bokanoski v. Lepage Bakeries Park St., LLC*, 2016 WL 11547577, at *5 (D. Conn. June 29, 2016) (denying motion for judgment on the pleadings and noting "the Complaint may fairly be construed to allege that the provisions of the Agreements that purported to require the plaintiffs to 'buy their jobs,' and that allowed the defendants to 'shift business costs' to the plaintiffs violated public policy …[s]hould the plaintiffs be considered "employees,"…"). And another court has already applied Connecticut law to a similar scheme by another janitorial company to misclassify cleaning workers as independent contractor franchisees, granting summary judgment in favor of the plaintiffs on their misclassification claims (under both the Massachusetts and Connecticut "ABC" tests for determining employee status). *See Da Costa v. Vanguard Cleaning Sys., Inc.*, 2017 WL 4817349 (Mass. Super. Sept. 29, 2017).

rejected Jani-King's contention that the plaintiffs could not establish that they were employees who had been misclassified as independent contractors based on their having signed "franchise" agreements. *See* Add.009-14, Add.039-42.[6] However, the district court erred in determining that Plaintiffs could not pursue their wage claims under Connecticut law, Conn. Gen. Stat. § 31-71e, and it misconstrued Connecticut's "anti-kickback" statute, Conn. Gen. Stat. § 31-73b, which formed the basis of Plaintiffs' unjust enrichment claim.

It has long been recognized that janitorial franchise companies are rife with abuse and exploitation of vulnerable workers.[7] In determining that workers should not be required to pay vast sums of money in order to obtain cleaning work, the Massachusetts Supreme Judicial Court quoted Justice Brandeis in declaring that

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[6] In reaching this conclusion, the district court relied on *Jason Roberts, Inc. v. Adm'r*, 127 Conn. App. 780, 778–88 (2011), and followed similar court decisions from around the country that have rejected arguments that a different or stricter test for employee status would apply to "franchisee" workers claiming that they are actually employees. *See Williams v. Jani-King of Philadelphia Inc.*, 837 F.3d 314, 325 (3rd Cir. 2016); *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1160-61 (10th Cir. 2018); *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1050, 1051 (9th Cir. 2019); *De Giovanni v. Jani-King Int'l, Inc.*, Civ. A. No. 07-10066-MLW (D. Mass. June 6, 2012) (JA386-419); *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010).

[7] Former Department of Labor Wage and Hour Director David Weil has written extensively about these abuses. *See* David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard Univ. Press, Feb. 3, 2014), at 197-199; *see also* David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. REL. REV. 2, at 33-54 (July 2011).

"paying for the privilege of going to work and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity." *Awuah*, 460 Mass. at 498 (quoting *Adams v. Tanner*, 244 U.S. 590 (U.S. 1917) (Brandeis, J., dissenting)). This is a critical case to determine whether the laws of Connecticut will likewise protect workers from these abuses and whether paying for a job is illegal in Connecticut, just as it has been determined to be in Massachusetts under the same factual circumstances and very similar statutory provisions.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1332(d)(2)(A), the Class Action Fairness Act ("CAFA"). JA3 at ¶¶ 7-12. The district court granted summary judgment to Jani-King on December 21, 2019, and it entered judgment on December 30, 2019. Add.023, JA1871.[8] Plaintiffs timely filed a notice of appeal on January 10, 2020, appealing from the Order on Jani-King's Motion for Summary Judgment, as well as the court's earlier Order on Jani-King's Motion to Dismiss. JA1872. This Court has jurisdiction under 28 U.S.C. § 1291.

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[8] Plaintiffs moved for reconsideration of the Order on Summary Judgment on December 30, 2019, which the district court denied on January 3, 2020. Add.063-64.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court erred in dismissing Plaintiffs' wage claim, brought under Conn. Gen. Stat. § 31-71e, in which they alleged that they had to pay various fees to Jani-King out of their wages in order to obtain and perform their jobs?
2. Whether the district court erred in granting Jani-King's Motion for Summary Judgment and dismissing Plaintiffs' unjust enrichment claim, in which they alleged that they had to make payments to Jani-King to obtain and perform their jobs, in violation of Connecticut's "anti-kickback" statute, Conn. Gen. Stat. § 31-73b?

STATEMENT OF THE CASE

I. Plaintiffs' Complaint

On December 5, 2016, Plaintiffs Indrit Muharremi and Simon Mujo filed this case on behalf of a class of Connecticut cleaning workers for Defendants Jani-King International Inc. and Jani-King of Hartford Inc. (referred to collectively as "Jani-King"). JA1-3. Plaintiffs alleged that they were misclassified as independent contractor "franchisees" when, in reality, they are Jani-King's employees under Connecticut state law. *See Tianti, ex rel. Gluck v. Williams Raveis Real Estate, Inc.*, 231 Conn. 690, 697-98 fn. 8 (1995) (describing three-part

"ABC" test for employee status under Connecticut law, Conn. Gen. Stat. § 31-222). JA1-7.

Plaintiffs and other Jani-King franchisees provide cleaning and janitorial services to Jani-King's customers, commercial businesses that negotiate and enter into cleaning services contracts with Jani-King. JA488, ⁋⁋ 92-93, JA490, ⁋ 101. In order to work for Jani-King, cleaning workers must enter into form "franchise agreements" which purports to classify the janitors as independent contractors. JA198 at § 12.6; JA163 at § 12.7. Under this agreement, the janitors first must pay Jani-King a significant up front "franchise fee" (which is typically thousands of dollars) in order to purchase a "franchise." JA142 at §§ 4.3-4.3.1; JA176 at § 4.3. The amount of this up-front franchise fee dictates how much cleaning work the worker will receive. JA770-72. Franchisees are also charged many other fees, which are taken out of their pay, including "finder's fees" in order to obtain additional cleaning work (often to replace lost accounts), insurance payments (known as "business protection plan" fees), the cost of cleaning supplies, and "charge-backs" (amounts deducted from the workers' pay when the customer does not pay their bill to Jani-King). JA774-77; JA183 at § 4.13.4; JA178 at § 4.6;

JA181 at § 4.8.1; JA1797-1802; JA1089-90 at 130:24-132:4; JA1094 at 135:1-15; JA1120-22 at 161:12-163:21.[9]

Jani-King's entire structure essentially creates a system of indentured servitude for the cleaning workers, many of whom are immigrants and who do not speak English fluently if at all.[10] Because they have to pay so much money up front to obtain the cleaning work, Jani-King's janitors must keep working for the company in order to earn back the money they have paid to get the work. If they continue working for Jani-King but lose their initial customers (either because the customer fires Jani-King or requests a different worker), the workers must pay Jani-King even more money in the form of "finder's fees" in order to obtain additional cleaning work.[11]

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[9] Other fees include royalty fees, accounting fees, technology fees, and complaint fees. JA776, JA782-83; JA1091-92 at 132:23-133:23.

[10] For instance, Plaintiff Simon Mujo does not read English and testified in this matter through a translator. JA1724.

[11] There have been allegations against Jani-King and similar cleaning franchise companies that they purposely "churn" cleaning accounts, by encouraging or inducing clients to request new workers or by simply taking accounts away from workers. *See, e.g.*, JA1643:23-1647:25; JA1760 at 149:22-150:17; JA1747-48 at 97:24-101:14. In both situations, the company can then charge another worker for the job (or count the job against the guaranteed work the company promised to provide based upon the worker's payment of franchise fees and additional business "finder's" fees). *See* David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard Univ. Press, Feb. 3, 2014), at 197-199; *see also* David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. REL. REV. 2, at 33-54 (July 2011). Those claims are not directly addressed by the

Plaintiffs here contend that they and other cleaning workers were misclassified as independent contractors when they should have been recognized as employees under Connecticut's strict, conjunctive "ABC" test for employee status.[12] The Complaint pled two separate counts: one under the Connecticut Minimum Wage Act, Conn. Gen. Stat. § 31-71e, based on Jani-King's practice of making various unlawful deductions from their pay, such as to buy their jobs ("franchise fees") and purchase additional work ("finder's fees"), as well as fees for such items as insurance, cleaning supplies, and "charge-backs"; and a second claim for unjust enrichment premised on Jani-King's violation of Conn. Gen. Stat.

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complaint in this case, which focuses instead on the problem underlying these issues, which is that workers are made to pay for their jobs.

[12] A number of courts have found cleaning "franchisees" like Plaintiffs were misclassified employees under similar state laws, including Jani-King franchisees in Massachusetts. *See De Giovanni v. Jani-King Int'l, Inc.*, Civ. A. No. 07-10066-MLW (D. Mass. June 6, 2012) (JA386-419). *See also Da Costa v. Vanguard Cleaning Sys., Inc.*, 2017 WL 4817349, at *7 (Mass. Super. Sept. 29, 2017) (finding Connecticut and Massachusetts franchisees were misclassified under state wage laws); *Coverall N. Am., Inc. v. Com'r of Div. of Unemployment Assistance*, 447 Mass. 852, 858, 857 N.E.2d 1083, 1087 (2006) (finding Massachusetts franchisee was misclassified under state unemployment law); *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80, 82 (D. Mass. 2010) (finding Massachusetts franchisees were misclassified under state wage law); *System4, LLC v. Ribeiro*, 275 F. Supp. 3d 297 (D. Mass. 2017) (confirming arbitrator award, reproduced at JA421-451, holding that Massachusetts franchisee was misclassified); *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 923 F.3d 575 (9th Cir.), *reh'g granted, opinion withdrawn*, 930 F.3d 1107 (9th Cir. 2019), and *on reh'g,* 939 F.3d 1045 (9th Cir. 2019), and *opinion reinstated in part on reh'g,* 939 F.3d 1050 (9th Cir. 2019) (reversing summary judgment entered against cleaning franchisees alleging misclassification under California law).

§ 31-73b (the "anti-kickback" statute), which makes it unlawful to require an employee to pay for a job. JA8-10 at ¶¶ 23-26; JA12-13 at ¶¶ 36-43.[13]

II. The Court's Dismissal of Plaintiffs' Wage Claim, Brought Under Conn. Gen. Stat. § 31-71e

On March 31, 2018, the district court granted in part Jani-King's motion to dismiss and dismissed Count I of Plaintiffs' Complaint under the Connecticut Minimum Wage Act, Conn. Gen. Stat. § 31-71e. Add.001-2. In dismissing this claim, the court agreed with Jani-King's argument that its agreement with the workers expressly allowed it to charge them various fees and take those fees out of their pay. The court concluded that, because these fees were allowed under Jani-King's mandatory contract that the workers had to sign, the workers' "wages" were comprised of only the net money that remained *after* the various deductions had been taken out. Add.017.[14]

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[13] Plaintiffs filed an amended complaint several month later in March 2017 pleading the same two counts. JA22 at ¶¶ 23-27; JA27-28 at ¶¶ 37-46.

[14] In its order on Jani-King's motion to dismiss, the district court denied Jani-King's request to dismiss Count II of Plaintiffs' Complaint, recognizing that a claim for violation of Conn. Gen. Stat. § 31-73(b) is cognizable as an unjust enrichment claim.

The district court also recognized that Plaintiffs could be Jani-King's employees, notwithstanding their classification as "franchisee" independent contractors. The Court noted that "Jani–King has not cited nor has the Court identified any Connecticut decisions precluding application of the independent contractor test to a franchise agreement. [Section 31–222] makes no express exemption for franchises, nor can [the Court] imply an exemption, particularly when, as is the case here, the legislature has created numerous exemptions from coverage under the act." Add.012 (internal citation omitted).

III. The Court's Dismissal of Plaintiffs' Unjust Enrichment Claim, Based on Conn. Gen. Stat. § 31-73b

Following discovery and class certification[15], on summary judgment, the district court dismissed Plaintiffs' remaining claim for unjust enrichment, which was based on Conn. Gen. Stat. § 31-73b. Add.058-61.[16] In dismissing this claim,

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[15] In January 2019, the district court certified a class of approximately 165 Jani-King franchisees who had worked in the state of Connecticut. *Mujo v. Jani-King Int'l, Inc.*, 2019 WL 145524 (D. Conn. Jan. 9, 2019).

[16] In its summary judgment order, the district court again rejected Jani-King's argument that Plaintiffs' claim of employment status was incompatible with their being franchisees. The court noted that Connecticut law "includes a lengthy list of services excluded from 'employment' within the meaning of the Minimum Wage Act" and yet, it makes no mention of franchisees or the Connecticut Franchise Act. Add.041.

The court also denied Jani-King's motion for summary judgment on employee status, holding that Jani-King had failed to meet its burden to prove any of the three prongs of the Connecticut "ABC" test for employee status. Add.042-55. Plaintiffs submit that the court should have granted summary judgment *to plaintiffs* on employee status, just as the Massachusetts court did in *De Giovanni v. Jani-King Int'l, Inc.*, Civ. A. No. 07-10066-MLW (D. Mass. June 6, 2012) (JA386-419). *See also Da Costa v. Vanguard Cleaning Sys., Inc.*, 2017 WL 4817349 (Mass. Super. Sept. 29, 2017) (granting summary judgment to Connecticut franchisees on employee status, based on all but identical facts). However, the court declined to consider Plaintiffs' cross-motion for summary judgment, finding that it was filed after the summary judgment deadline. *See Mujo*, Civ. A. No. 3:16-cv-01990 (D.Conn.), Dkt. 149. In any event, the court could nonetheless have entered judgment for Plaintiffs on their claim of misclassification, based on the record before the court, because "where one party moves for summary judgment, the Court may enter judgment in favor of the non-moving party so long as the parties have had an opportunity to address the issues." *Kaiser v. Dialist Co. of Texas*, 603 F. Supp. 110, 110 (W.D. Pa. 1984); *see also Sparaco v. Lawler, Matusky, Skelly Engineers LLP*, 60 F. Supp. 2d 247, 255 (S.D.N.Y. 1999) ("If it is clear that all of the evidentiary material a party might submit in response to a motion for summary judgment are before the court, that there are no disputed issues of fact and that a non-moving party is entitled to judgment as a matter of law, the district court is free to enter judgment accordingly.").

the court reasoned that "even if the franchise agreement is an employment agreement, it does not follow that any payments under the franchise agreement are 'in violation of public policy.'" Add.058-59. In so holding, the court refused to consider that misclassifying cleaning workers as independent contractors and charging them for their jobs would violate public policy. It also refused to recognize that charging workers for their jobs is exactly what the anti-kickback statute, Conn. Gen. Stat. § 31-73b, prohibits. *See* Conn. Gen. Stat. § 31-73b ("No employer …shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment.").[17]

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[17] In its order on Jani-King's motion to dismiss, the district court appeared to recognize that Plaintiffs could prevail on their unjust enrichment claim for having been required to pay for their jobs, should they succeed in showing they were misclassified as independent contractors. The court noted that "Section 31–73 represents a clear public policy prohibiting an employer from taking advantage of the employment relationship by using the acquisition or continuation of employment as a mechanism for exacting sums of money from an employee." Add.020 (*quoting Lockwood v. Prof'l Wheelchair Transp., Inc.*, 37 Conn. App. 85, 94, 654 A.2d 1252 (1995)). The court held that "Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a [franchise fee] down payment or any number of other fees and is therefore void as a matter of law." Add.021. However, inexplicably, the court reversed course in dismissing the unjust enrichment claim on summary judgment.

Although Plaintiffs had noted to the court that Massachusetts' highest court had held such payments to be illegal, based upon extremely similar statutory provisions and in this exact circumstance in which cleaning workers were forced to pay for their jobs under the guise that they are "franchisees", the district court nonetheless declined to consider this argument because it was based on a court ruling from Massachusetts, rather than Connecticut.[18] Plaintiffs urged the district court to certify the issue to the Connecticut Supreme Court, so that it could decide whether it would follow the same reasoning as its sister court in Massachusetts, when confronting the same situation and a similar statutory framework. Although the court acknowledged at oral argument that doing so might be a good idea,[19] it issued its ruling without granting the request for certification.[20]

The court entered judgment in full against Plaintiffs on December 30, 2019, and Plaintiffs timely filed their Notice of Appeal on January 10, 2020. JA1871-72.

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[18] The court summarily dispensed with *Awuah* in a footnote, holding that "while instructive, [the Massachusetts decisions] nevertheless are not binding on this Court, sitting in diversity and bound to apply Connecticut law." Add.019, n. 6.

[19] At oral argument, the court asked: "[W]hy aren't I certifying [these questions] to the Connecticut Supreme Court to resolve? Why would I resolve it as first impression as a court sitting here in a case in diversity?" JA82:3-7.

[20] Plaintiffs moved for reconsideration, urging that at the very least, the district court should not have granted summary judgment against Plaintiffs, but the court denied the motion for reconsideration. Add.070.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's order granting a motion to dismiss a complaint for failure to state a claim upon which relief may be granted. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Likewise, the Court reviews *de novo* a district court's order granting summary judgment. *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 27 (2d Cir. 2012). Because Jani-King's motion is the one "under consideration" on this appeal, "all reasonable inferences [must be] drawn against" it. *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011). Summary judgment is improper if Plaintiffs produced evidence "such that a reasonable jury could return a verdict" in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 243. "[I]n ruling on a motion for summary judgment, [t]he evidence of the non-movant is to be believed . . . ." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (*quoting Anderson*, 477 U.S. at 255) (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing Plaintiffs' wage claim under Conn. Gen. Stat. § 31-71e, and their claim for unjust enrichment premised on them being forced to pay for their jobs, in violation of Connecticut's "anti-kickback" statute, Conn. Gen. Stat. § 31-73b.

First, with respect to Plaintiffs' claim under Conn. Gen. Stat. § 31-71e, the district court erroneously rejected Plaintiffs' challenge to having to pay Jani-King various fees, which were deducted (or effectively deducted) from their pay, based on the court's conclusion that these payments were authorized by the mandatory independent contractor franchise agreements that the workers had to sign in order to work for Jani-King. The court reasoned that, because these payments were "authorized" by the agreements, they could not count as improper deductions from wages because the workers' "wages" were the net amount they received after these payments were deducted.

This conclusion was in error. If the workers were misclassified, then Jani-King could not deduct these payments from their pay, even if the workers had "agreed" to the payments in their contract. Just as employees may not "agree" to receive less than minimum wage (and thus a contract is not a defense to a statutory minimum wage claim), employees in Connecticut may not have deductions taken from their pay, except for enumerated exceptions not pertinent here; further, any

such deductions must be "knowing and voluntary", on a form approved by the Department of Labor, and for the employee's benefit. *See infra* at n. 29 (describing authorized deductions from pay).

Moreover, in other misclassification cases, courts have recognized that the parties' contract cannot be used to circumvent state laws prohibiting unlawful deductions. *See, e.g.*, *Martins v. 3PD Inc.*, No. CIV.A. 11-11313-DPW, 2014 WL 1271761, at *2, *5 (D. Mass. Mar. 27, 2014); *Camp v. Bimbo Bakeries USA, Inc.*, No. 18-CV-378-SM, 2018 WL 6606243, at *4 (D.N.H. Dec. 17, 2018); *Johnson v. Diakon Logistics*, 2018 WL 1519157, *8-9 (N.D. Ill. March 28, 2018); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 953-54 (S.D.N.Y. 2013); *Awuah*, 460 Mass. 484 (2011). Here, Jani-King effectively argued that the parties' agreement, purporting to authorize certain deductions, should protect it from liability even if those deductions would have been otherwise unlawful if Plaintiffs were its employees. The district court erroneously credited this reasoning, holding that Plaintiffs had "authorized" the deductions that were taken and that their "wages" were comprised of only what was left over after paying these fees. However, such a ruling would upend the prohibition on illegal deductions from wages by allowing companies like Jani-King to create an end-run around the Connecticut wage statute and contract for what would otherwise be contrary to public policy.

In reaching its flawed conclusion, the district court relied on a pair of Connecticut Supreme Court cases, *Mytych v. May Dep't Stores Co.*, 260 Conn. 152, 793 A.2d 1068 (2002), and *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 142 A.3d 227 (2016). However, neither of these cases address the situation raised here. Both cases involved commissioned workers, who were acknowledged to be employees. The Court held in both cases that employers could expressly create a formula defining an employee's commissioned wages by contract. In contrast, the workers here were not commissioned workers. And neither *Mytych* nor *Geysen* cases involved independent contractor misclassification, nor did they address contracts that violate public policy, such as a contract that misclassifies workers as independent contractors and purports to authorize payments that employees cannot lawfully be required to make.

Notably, Massachusetts law, just like Connecticut law, allows for only certain enumerated deductions from pay[21] – and likewise allows employers to

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[21] *See infra* note 29; *see also Camara v. Attorney Gen.*, 458 Mass. 756, 761, 941 N.E.2d 1118, 1122 (2011); Mass. Gen. Laws c. 154 § 8 (authorizing "the deduction…from wages of an employee by an employer … of labor or trade union or craft dues or obligations, or making deposits in, … any credit union established under the laws of the commonwealth or of the United States, or deposits in any savings bank, trust company, national banking association or co-operative bank, or subscriptions to a non-profit hospital service corporation … or to a charitable corporation, or payments … toward the cost of or the premiums on any insurance policy or annuity contract or purchase of government bonds, or purchase of stock pursuant to an employee stock purchase plan…").

define wages for commissioned employees based upon a formula.[22] Nonetheless, when asked, the Massachusetts Supreme Judicial Court held in *Awuah* that the types of deductions at issue here constituted illegal wage violations under Massachusetts wage law, Mass. Gen. L. c. 149 § 148, which contains broad language (just like Connecticut law) requiring that employees be paid their full wages.

Here, the Connecticut Supreme Court should be given the opportunity to address this issue, as the Massachusetts Supreme Judicial Court was in *Awuah*, so that it can decide whether it would reach the same result as Massachusetts when faced with misclassified janitorial franchisees, or whether it would follow caselaw developed in the very different context of commissioned employees.

Just as in *Awuah*, Plaintiffs here allege that they were misclassified as independent contractors, rendering the fees they paid to Jani-King contrary to public policy. Plaintiffs submit that the Connecticut Supreme Court, like the Massachusetts Supreme Judicial Court, would not countenance a company charging employees for their work and requiring them to pay for their own necessary business expenses like cleaning supplies and insurance or forcing them to pay back their earnings when a cleaning customer does not pay their bill. The

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[22] *See, e.g., Wiedman v. The Bradford Group, Inc.*, 444 Mass. 698, 708-709, 831 N.E.2d 304, 312 (Mass. 2005), *superseded on other grounds by statute*, Statute 1993, c. 110, § 182, codified M.G.L. c. 149 § 150.

district court's reasoning below overlooked the critical fact of the workers' misclassification and failed to recognize that, if the workers are employees, their agreement with Jani-King and these fees and deductions it purports to authorize are contrary to public policy.

Second, with respect to Plaintiffs' unjust enrichment claim, based upon the workers being forced to pay for their jobs in violation of Connecticut's "anti-kickback" statute, Conn. Gen. Stat. § 31-73b, the district court erroneously granted summary judgment to Jani-King. The court, again, failed to recognize the public policy implications of cleaning workers being misclassified as independent contractors and thereby being required to pay for their jobs (including both up-front payments, before they even began working, as well as various fees taken out of their pay). The court based its reasoning on the assumption that the "franchise" agreements were themselves valid, and those agreements authorized the payments. But, again, if the workers were misclassified as independent contractors, those agreements violate public policy and could not justify a situation that directly violates the anti-kickback statute, Conn. Gen. Stat. § 31-73b, requiring workers to pay for their jobs.

As noted, in its earlier order on Jani-King's motion to dismiss, the district court appeared to recognize that, if Plaintiffs prevailed on their misclassification claim and showed they had to pay these fees in order to work, then the payments

they made would violate Conn. Gen. Stat. § 31-73b.[23] But on summary judgment, the district court reversed course and dismissed this claim (even after denying Jani-King's motion for summary judgment on the misclassification issue). Add.055-58.[24] Thus, on summary judgment, the district court's reasoning again overlooked the critical fact of the workers' misclassification. Given that Connecticut has an even more express statutory prohibition than Massachusetts has on requiring payment to obtain work, it seems clear that the Connecticut Supreme Court would not countenance this situation and would follow the reasoning of the Massachusetts Supreme Judicial Court in *Awuah* which found payments for work to violate public policy and be illegal.[25]

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[23] The court held on its order on the motion to dismiss that "Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a [franchise fee] down payment or any number of other fees and is therefore void as a matter of law." Add.021.

[24] The Court reasoned that, because franchises are "legal", in order to prevail on their unjust enrichment claim, the workers would need to prove that they had to pay an amount beyond what their "franchises" were worth. Add.060-61. However, this conclusion missed the entire point of Plaintiffs' claim under Conn. Gen. Stat. § 31-73b, that they should not have to pay *any amount* in order to obtain or maintain their jobs.

[25] At oral argument, Jani-King claimed that the workers could be both an employee and a franchisee and could derive some value from the franchise in terms of the right to use trademarks, etc. JA1810 at 8:2-13; JA1811-12 at 9:20-10:20. The district court appears to have endorsed this reasoning in its decision, finding that by paying franchise fees, the workers were not just paying for a job but were also paying for certain value associated with "owning" a Jani-King franchise. This argument is nonsensical. If the workers were misclassified employees of Jani-King, then the franchise fees and other fees they paid were in exchange for a job

ARGUMENT

I. The District Court Erred in Granting Jani-King's Motion to Dismiss Plaintiffs' Wage Claim Brought Under Conn Gen. Stat. § 31-71e

As set forth above, in their Complaint, Plaintiffs alleged that Jani-King violated Conn. Gen. Stat. § 31-71e, which prohibits employers from diverting any portion of an employee's wages unless the employer obtains knowing, intelligent, voluntary and written authorization from the employee for the deductions on a form approved by the Commissioner of the Department of Labor. JA27 at ¶ 38.[26] Specifically, Plaintiffs alleged that Jani-King "illegally shifted their business costs to Plaintiffs" by taking deductions for items like cleaning supplies, insurance, "charge-backs" when customers failed to pay their bill, and payments to obtain the cleaning work itself. JA21-22, JA24 at ¶¶ 23, 27.[27]

(as the Massachusetts SJC recognized in *Awuah*). Employees of Target do not pay their employer for the privilege of wearing a Target uniform with the trademarked Target brand on their shirt. There is no difference here.

[26] Conn. Gen. Stat. § 31-71e states in relevant part: "No employer may withhold or divert any portion of an employee's wages unless … the employer has written authorization from the employee for deductions on a form approved by the commissioner…" The other provisions of the statute providing for lawful deductions from wages do not apply here.

[27] The Connecticut Department of Labor has created a form for employers to use to ensure compliance with § 31-71e(2). This form is a document published by the agency charged with promulgating regulations to enforce the statute and as such, is entitled to deference. *See, e.g., Amaral Bros., Inc. v. Dep't of Labor*, 325 Conn. 72, 91, 155 A.3d 1255, 1265 n. 11 (2017) (referring favorably to a "guide" published by the Department of Labor and indicating that it is entitled to deference by the courts); *Bucchere v. Brinker Int'l, Inc.*, 2006 WL 3361403, at *5-6 (Conn.

The district court erroneously dismissed Plaintiffs' wage claim, holding that "[b]ecause all of the[] deductions [plaintiffs complain of]… are expressly provided for in the agreement between Plaintiffs and Defendants, these deductions do not constitute 'wages' within the meaning of the Minimum Wage Act," Conn. Gen. Stat. § 31-71e. Add.017. According to the district court, because the agreement explicitly allowed for these various deductions and defined Plaintiffs' compensation as being comprised of whatever was left over after the deductions were taken out, Plaintiffs' claim failed as a matter of law. It made no difference to the district court that the deductions at issue would otherwise be unlawful if Plaintiffs were Jani-King's employees because they were not knowing, voluntary, or for the benefit of the Plaintiffs and were in clear violation of Connecticut public policy (insofar as they required Plaintiffs to pay for their work, as well as their own insurance and supplies, etc.).

Super. Ct. Nov. 8, 2006) (rejecting defendant's argument that Department of Labor's Guide should be given no weight and applying the principle of affording judicial consideration to the construction given by the agency responsible for the enforcing the statute and regulations at issue).

This form lists eight specific permitted deductions: A. Life Insurance Premium; B. Loan (define type and dollar amount); C. Employee purchases (define items purchased and dollar amount); D. Pension Plan Employee Contribution; E. Payroll Savings Plan to be deposited into employee's individual savings bank account; F. United Way Contribution; G. Christmas/Hanukkah Club to be deposited into employee's individual savings bank account; H. Credit Union. *See* JA33-34. Notably, *none* of these types of deductions confer any benefit on the employer.

In reaching its flawed conclusion below, the district court relied primarily on a pair of distinguishable Connecticut Supreme Court decisions in *Mytych v. May Dep't Stores Co.*, 260 Conn. 152, 793 A.2d 1068 (2002), and *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 142 A.3d 227 (2016).[28] These cases both involved acknowledged commissioned employees who alleged that their employers had unfairly shorted them on their commissions. The question in *Mytych* was whether a particular formula for calculating commissions, which included a provision for deducting the cost of returned items from a sales commission, violated Connecticut General Statutes Sections 31-71e and 31-73b. *Mytych*, 260 Conn. at 154. The Court concluded that the statute did not determine how commissions were to be calculated and that the employer was free to determine that commissions were not "earned," and therefore did not become wages, until the *pro rata* share of returns had been subtracted. *Id.* at 160. Similarly, in *Geysen*, the Court held that where the parties' employment agreement specified that commissions were not "earned" until the sale had been invoiced, the employee had no claim to the money as "wages" prior to the invoicing. *Geysen*, 322 Conn. at 387, 395-96.

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[28] In declining to certify questions to the Connecticut Supreme Court, the district court decided that these two decisions controlled the analysis and already provided the necessary authority to support its decision. *See* JA113. However, these decisions are plainly distinguishable because they involved *acknolwedged employees*, paid by commission, not misclassified independent contractors who alleged that the deductions at issue were contrary to public policy.

However, these cases concerned a completely different situation. The workers at issue here are certainly not commissioned workers. (They were paid to perform cleaning work, not *sell* cleaning work.) And they were misclassified as independent contractors. These two Connecticut Supreme Court decisions − involving acknowledged employees and the formula for calculating their commissions − are plainly distinguishable from the instant case where Plaintiffs contend they were misclassified as independent contractors and were forced to pay for their jobs, as well as have deductions taken from their pay, covering costs that should be borne by their employer.

The district court's decision in this case misread the Connecticut Supreme Court's holdings in *Mytech* and *Geysen*; in no way do these cases suggest that an employer can exempt itself from the requirements of § 31-71e(2) by simply drafting a contract to include the right to make otherwise unlawful deductions. While the Connecticut wage statute is a remedial statute, it does more than simply enforce whatever agreement as to wages is entered into by the parties. The statute also embodies Connecticut public policy, and it declares certain agreements to be unlawful. Thus, for example, an employee cannot agree to be paid less than the minimum fair wage. *See* Conn. Gen. Stat. § 31-60. An employer may not enforce an agreement to withhold a portion of wages in lieu of an employee providing notice before leaving employment. *See* Conn. Gen. Stat. § 31-70. An employee

may not agree to be paid less frequently than once a month. *See* Conn. Gen. Stat. § 31-71i. And, as is relevant here: (1) no employer may enforce an agreement to withhold or take deductions from an employee's wages unless that agreement is *informed, voluntary*[29] and *to the benefit of the employee*,[30] *see* Conn. Gen. Stat. § 31-71e; and (2) no employer may receive money or take deductions from a worker's pay as a condition of securing or continuing in employment. *See* Conn. Gen. Stat. § 31-73b.[31]

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[29] These deductions cannot be considered knowing and voluntary, when they are based on an independent contractor agreement that falsely conveys to the workers that they are independent contractors and not employees. If the entire agreement was premised on the false assumption that the workers were independent contractors, and the agreement did not provide for them to receive "wages" at all, the workers could not have knowingly authorized deductions from "wages." *Cf. Crocker v. Townsend Oil Co.*, 464 Mass. 1, 3, 979 N.E.2d 1077, 1079 (2012) (holding that release signed by worker who had been misclassified as an independent contractor could not be knowing and voluntary with respect to wage claims, since the worker had no reason to believe that he was an employee).

[30] *See Awuah*, 460 Mass. at 498 (citing 29 C.F.R. § 531.35 (2010), which considers whether payments are for the benefit of the employer or the benefit of the employee, and concluding that similar payments made by workers to those made here were for the benefit of the employer).

[31] There should be no question that if Plaintiffs were Jani-King's employees, these deductions would violate Connecticut law, regardless of whether they were explicitly provided for in the contract. For one, the deductions were not provided for on a form approved by the commissioner of the Department of Labor as required by § 31-71e. For another, the deductions are plainly not for the benefit of the employees.

In its briefing below, Jani-King cited *Weems v. Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008), for the proposition that under Connecticut law, it is the authorization of the deduction that must be "informed and voluntary," not the workers' employment status. This argument is clearly erroneous because even if Plaintiffs were Jani-King's employees, they could not have authorized these deductions to the extent they violated public policy. *Weems* does not hold

Further, a contract cannot be enforced if it violates public policy or Connecticut state law. *See Haynes Const. Co. v. Cascella & Son Const., Inc.*, 36 Conn. App. 29, 39, 647 A.2d 1015, 1020 (1994) ("A well recognized principle of contract law is that agreements in violation of public policy will not be enforced by the courts."); *State v. Lynch*, 287 Conn. 464, 477–78, 948 A.2d 1026, 1034 (2008) (refusing to enforce agreement that "would nullify § 31–71b by permitting parties, by contract, to disregard the statutory requirement that [] wages be paid promptly once due."). The district court erred in holding that *Mytych* and *Geysen* controlled, because there, the challenged provisions of the agreements were not against public policy, whereas here, Jani-King's agreement clearly *does* violate public policy by

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otherwise; in *Weems*, employees sued for the return of deductions made from their wages, which they had expressly authorized in writing, to be invested in a restricted stock investment plan because the Plaintiffs claimed the authorizations were not made on a form approved by the commissioner. *Id*. at 772-74. The *Weems* Court "conclude[d] that the defendants' failure to seek the department's approval of the plan election form does not, ***by itself***, require the invalidation of the authorized payroll plan deductions." *Id*. at 794. The Court specifically discussed the fact that these deductions were made *for the benefit of the employees* and that they received those benefits. *Id.* at 793. Later, the Court distinguished *Engle v. Personnel Appeal Board*, 175 Conn. 127, 394 A.2d 731, 733 (1978): "If the employee has knowingly and voluntarily consented to the deduction at issue and even ***benefited*** from it, then invalidating deductions because of a technical violation does not further the purpose of the wage collection statutes." (emphasis added). *Id.* n. 26. In other words, the Court in *Weems* was concerned with deductions knowingly authorized *for the benefit of employees* resulting in a windfall to those employees. Here, in contrast to *Weems*, the workers did not receive a benefit from various of the deductions but rather had Jani-King's business costs shifted onto them. The *Weems* decision makes clear that this distinction is critical under Connecticut law.

misclassifying the workers and requiring them to bear costs that should be borne by their employer.[32]

In this case, Plaintiffs alleged that they were actually employees of Jani-King, and if that were the case, the terms of the agreement − which allowed Jani-King to charge the workers for their jobs, for supplies necessary to do their jobs, for their own workers' compensation insurance, and to deduct money from the workers' pay when a customer failed to pay their bill− would all violate Connecticut law by shifting the costs of doing business onto the employee. *See Bokanoski v. Lepage Bakeries Park St., LLC*, 2016 WL 11547577, at *5 (D. Conn. June 29, 2016) (emphasis added) ("[T]he Complaint may fairly be construed to allege that the provisions of the Agreements that purported to require the plaintiffs to 'buy their jobs,' and that allowed the defendants to 'shift business costs' to the

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[32] The district court erroneously reasoned that the Connecticut Supreme Court's decision in *Geysen* espoused a public policy in favor of freedom of contract, which dictated that determination of a worker's "wage is left to the employer-employee agreement." Add.018-19. But *Geysen* itself acknowledges that "[i]f a contract violates public policy, this would be a ground to not enforce the contract." *See Geysen*, 322 Conn. At 392-93. The *Geysen* Court held that the contract provision at issue there -- an agreement that commissions "will be paid only if the work had been invoiced prior to termination of the employee" -- did not violate public policy. *Id.* at 398. The Court specifically held that "we do <u>not</u> believe that this commission provision on its face negate[s] laws enacted for the common good or is designed to evade statutory requirements...." *Id.* at 397 (internal citation omitted). Similarly, the challenged provision in *Mytech* simply dictated that the employees' commissions would be calculated in a particular way. *See supra*, p. 22. The same is not true here where the workers have been misclassified and thus Jani-King's contract itself is in clear violation of public policy.

plaintiffs violated public policy such that they were unenforceable as having violated Connecticut statutory law, thereby permitting recovery under a theory of unjust enrichment…*Should the plaintiffs be considered "employees,"* [of the Defendant,] Connecticut wage law prohibits the defendants' alleged conduct…").[33]

In sum, the district court misapplied the holdings of *Mytych* and *Geysen* by failing to recognize that those cases involved acknowledged commissioned employees who entered into employment agreements defining the formula for calculating their commissions, whereas, here, the workers entered into "franchise agreements" that purported to purported to classify them as independent contractors and deduct the costs of doing business from their pay -- provisions that would be contrary to public policy if they were actually Jani-King's employees.

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[33] It was error for the district court to hold that the fees that Plaintiffs had to pay that they are challenging here were not contrary to public policy. Plaintiffs have also shown that Jani-King required them to pay for a job and to bear the costs of performing their job that should be borne by their employer by taking deductions out of their pay for franchise fees, finder's fees, insurance, charge-backs, and the like. JA489, ¶¶ 97-98, JA183 at § 4.13.1 through § 4.13.5 (describing required insurance payments); JA178 at § 4.6 (describing finder's fees); JA181 at § 4.8.1 (describing other fees including "charge-backs on past due invoices"); *see also* JA1089-90 at 130:24-132:4; JA1094 at 135:1-15; JA1120-22 at 161:12-163:21. This conduct *does* "negate laws enacted for the common good [and] *is* designed to evade statutory requirements" dictating that employees receive certain benefits and protections not applicable to independent contractor franchisees. *See Geysen*, 322 Conn. at 397 (emphasis added); *see also Lynch*, 287 Conn. at 477–78 (distinguishing *Mytych* and holding that an agreement to defer back wages was contrary to public policy such that the parties' contract authorizing the deferral did not provide a defense from liability). As the court in *Bokanoski* acknowledged, if Plaintiffs' allegation that the workers here are misclassified is true, then these deductions would violate various provisions of Connecticut state law, as set forth above. *See Bokanoski*, 2016 WL 11547577, at *5.

As the district court in *Bokanoski* seemed to recognize, there is no reason that Connecticut law would not follow Massachusetts law and determine that, when workers are misclassified as independent contractors, payments that are purportedly authorized by independent contractor agreements (and that workers must pay, or are taken out of gross sums presented to the workers as listed deductions) violate state wage law. This Court should so hold, or certify this case to the Connecticut Supreme Court, so that it can address the question.

II. The District Court Erred in Dismissing on Summary Judgment Plaintiffs' Claim for Unjust Enrichment Based on Jani-King Requiring Plaintiffs to Pay for a Job in Violation of Conn Gen. Stat. § 31-73b

In their second claim, Plaintiffs alleged that they were required to buy their jobs in violation of the public policy of Connecticut as expressed in Conn. Gen. Stat. § 31-73. *See Lockwood v. Prof'l Wheelchair Transp., Inc.*, 37 Conn. App. 85, 94, 654 A.2d 1252 (1995) ("Section 31–73 represents a clear public policy prohibiting an employer from taking advantage of the employment relationship by using the acquisition or continuation of employment as a mechanism for exacting sums of money from an employee.").[34] Section 31-73 makes it illegal to demand

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[34] This statute provides, in relevant part:

> No employer, contractor, subcontractor, foreman, superintendent or supervisor of labor, acting by himself or by his agent, shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages

any "fee, sum of money or contribution" in order to secure or continue in employment. *See* Conn. Gen. Stat. § 31-73; *Lockwood*, 37 Conn. App. at 94-95 ("The statute is written in broad and sweeping language").

Here, as the Massachusetts Supreme Judicial Court held in *Awuah*, the workers paid for their jobs. *See Awuah*, 460 Mass. at 498 ("In substance, [these franchise fees] operate to require employees to buy their jobs from employers, and in that respect we think they violate public policy."). The workers paid an initial and non-refundable franchise fee down payment as a condition for Jani–King providing them with the opportunity to perform cleaning services, as well as other fees on an ongoing basis, such as "finder's fees" in exchange for additional cleaning work. JA176 at § 4.3; JA178 at § 4.6. These fees were plainly paid in exchange for cleaning work (i.e. in exchange for a job).

In Massachusetts, the Supreme Judicial Court determined in a case raising these same facts that paying for jobs violates Massachusetts wage law and public

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> agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such person shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment.

See Conn. Gen. Stat. § 31-73.

policy.[35] In that case, the Court had to read this prohibition into the broadly-worded Massachusetts wage law, which simply requires employers to pay employees their earned wages. Mass. Gen. L. c. 149 § 148. In Connecticut, however, the statute upon which Plaintiffs base their unjust enrichment claim, Conn. Gen. Stat. § 31-73, is much more to the point in prohibiting an employer from charging money for a job. Thus, it is not a leap for the Connecticut Supreme Court to reach such a conclusion.

In its earlier order on Jani-King's motion to dismiss, the district court appeared to agree with Plaintiffs and accept the reasoning of *Awuah*, noting that "[b]ecause, … [Connecticut courts] recognize that a failure to comply with § 31–

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[35] The phenomenon of selling jobs is not new. A discussion of similar abuses related to the purchasing of jobs can be found in Lochner-era cases. For example, in *Adams v. Tanner*, 244 U.S. 590 (1917) (expressly abrogated in *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37, (1949)), a Lochner era decision in which the United States Supreme Court struck down a Washington State law regarding employee abuses by employment agencies on due process grounds, Justice Brandeis, in his dissent, describes the abuses that the law at issue was intended to remedy. These abuses included private employment agencies taking advantage of "men and women with only a dollar or two, which they are eager to give up for the opportunity of earning more" by "[c]harging exorbitant fees, or giving up jobs to such applicants as contribute extra fees, presents, etc." *Id.* at 601. Justice Brandeis also quoted a report to Congress by the U.S. Commission on Industrial Relations, describing a "general feeling that the whole system of paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable." *Id.* at 603. The Massachusetts Supreme Judicial Court quoted Justice Brandeis' dissent when it held in *Awuah* that cleaning franchisees who had been misclassified as independent contractors could recover as damages the amounts they paid for their cleaning jobs, as well as amounts they paid for insurance and other fees. *See Awuah*, 460 Mass. at 498 ("[P]aying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity").

73(b) violates public policy, Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law. As a result, Plaintiffs have pled a plausible claim of unjust enrichment." Add.021.

However, the court changed course at the summary judgment stage, dismissing the claim in a ruling that cannot be squared with its earlier reasoning. In its summary judgment order, the district court denied Jani-King's motion on the issue of misclassification, recognizing that the workers could be Jani-King's employees.[36] However, the district court went on to hold that, even if the workers were Jani-King's employees, they had not shown that any of the fees they had to pay were void as against public policy. Add.059-61. This reasoning flatly ignores § 31–73b, the Connecticut "anti-kickback" statute, which prohibits conditioning employment on payments to the employer.[37]

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[36] The court held that Jani-King had failed to carry its burden on all three prongs of the "ABC" test for employee status. Add.042-55. Jani-King bears the burden under the statute, and its failure to satisfy even one prong of the test means that Plaintiffs are its employees. As noted earlier, the district court did not consider Plaintiffs' cross-motion for summary judgment, determining that in filing a cross-motion in response to Jani-King's motion, Plaintiffs had missed the summary judgment filing deadline. *See Mujo*, Civ. A. No. 3:16-cv-01990 (D. Conn.), Dkt. 149.

[37] The court held that franchise agreements are not "*per se* invalid under Connecticut law," meaning that they have to have some value, and Plaintiffs had not adequately distinguished between the fees that were unlawful if they were Jani-

The district court appears to have credited Jani-King's claim at oral argument that the workers could be simultaneously both employees of Jani-King and franchisees of Jani-King and therefore could derive some value from the franchise fees they paid apart from buying a job (such as the right to use trademarks, etc.). JA1810-12. This argument makes little sense. If the workers were misclassified employees of Jani-King, then the franchise fees they paid were paid in exchange for a job (as the Massachusetts SJC recognized in *Awuah*), not for the licensing of Jani-King trademarks. Indeed, employees of other Fortune 500 companies do not pay their employer for the privilege of wearing a uniform with the company's licensed trademarks emblazoned on their chest.

The reasoning of the Massachusetts Supreme Judicial Court in *Awuah* reveals the flaw in the district court's rationale:

> We emphasize that our concerns over 'franchise fees' relate to the potentially exploitative nature of payments ***by an employee to an employer for the purpose of securing employment***. We expressly do not conclude that

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King's employees and the fees that were legitimately paid and from which they derived some value. Add.060-61 ("Plaintiffs … have provided no basis for distinguishing their claims for relief from legitimate fees within the franchise agreement, which the Court must presume exist…"). Having reached this conclusion, which makes no sense in the context of § 31–73(b), rather than distinguishing between the fees which it may have thought were "legitimate", and the fees that were beyond "the value" of Plaintiffs' "franchises", or leaving this as a damages issue for the jury, the district court simply dismissed the entire claim, thus concluding that <u>none</u> of the fees paid under the agreement were unlawful, despite the fact that the workers are almost certainly Jani-King's employees under Connecticut law.

> franchise fees violate public policy when they are agreed to by parties who are not in an employer-employee relationship.

460 Mass. at 498, n. 23 (emphasis added). The same is true here; while Connecticut law may recognize that franchises have value, *see* Add.061, this is only true when those agreements provide a *bona fide* franchise; when franchise fees are paid "by an employee to an employer for the purpose of securing employment," they violate public policy. *Id.* Plaintiffs should not have had to "identify th[e] value [of the franchise] or conversely, identify the fees that have been added beyond that value", *see id.* at Add.061, where they have shown that they are employees and that the purported franchise agreement was actually an employment agreement masquerading as a contract to sell a franchise.

In sum, the district court erred in dismissing Plaintiffs' unjust enrichment claim, which was based on § 31–73b. If the Court has any question on this point, it should certify this issue to the Connecticut Supreme Court, along with the wage claim under § 31-71e, to determine whether Connecticut law would follow Massachusetts law on this point.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's orders granting Jani-King's Motion to Dismiss on Plaintiffs' § 31-71e claim and granting Jani-King's Motion for Summary Judgment on Plaintiffs' unjust enrichment claim based on the workers' having been improperly charged for a job

under § 31-73b. Plaintiffs urge this Court to certify this case to the Connecticut Supreme Court to address the important issues of state law raised here.

Dated: June 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(d), I hereby certify that this brief contains 9,564 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point size Times New Roman font.

Dated: June 2, 2020

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ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SIMON MUJO and INDRIT MHARREMI, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

JANI-KING INTERNATIONAL, INC., JANI-KING INC., and JANI-KING OF HARTFORD, INC.,
Defendants.

No. 3:16-cv-1990 (VAB)

RULING ON DEFENDANT'S MOTION TO DISMISS

Simon Mujo and Indrit Muharremi, on behalf of a putative class of over 100 Jani-King franchisees (collectively "Plaintiffs"), have sued Jani-King International, Inc., Jani-King, Inc., and Jani-King of Hartford, Inc. (collectively "Jani-King"). In this diversity action, Mr. Mujo and Mr. Muharremi allege that Jani-King has unlawfully classified them as independent contractors under Connecticut Wage Laws, Conn. Gen. Stat. § 31-58 *et seq.*, and that the various fees, costs, client sales tax, and charge backs under Jani-King's franchise agreement violate Sections 31-71(e) and 31-73(b) of the Connecticut General Statues.

Jani King now moves to dismiss Plaintiffs' class-action complaint.

For the reasons that follow, Jani-King's motion to dismiss is **GRANTED** in part and **DENIED** in part.

Even if the parties' franchisor-franchisee agreement constitutes an employment agreement, any deductions for royalty fees, advertising fees, finder's fees, accounting fees, technology fees, complaint fees, services fees, non-reported business fees, client sales tax, lease

deductions, and various other fees do not constitute "wages" within the meaning of Conn. Gen. Stat. § 31-71e and thus, Plaintiffs' claim under Conn. Gen. Stat. § 31-71e must be dismissed.

Nevertheless, any initial and non-refundable franchise fee down payment made or continuing to be paid by Plaintiffs or any of the various other fees required from Plaintiffs may, if proven to be a condition for Jani-King providing them with initial or continuing employment, constitute an improper payment in violation of § 31-73(b). As a result, Plaintiffs' unjust enrichment claim survives and Jani-King's motion to dismiss this claim is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Allegations

Jani-King provides commercial cleaning services to its customers.[1] Am. Compl. ¶ 15. Jani-King franchisees, two of whom are Mr. Mujo and Mr. Muharremi, conduct these cleaning services. *Id.* To carry out their business, Jani-King, under the terms of a franchise agreement ("Agreement"), allegedly enters into independent contractor relationships with individuals who then perform janitorial work for Jani-King customers. *Id.* Jani-King allegedly required all members of the putative class to sign substantially similar agreements before working for Jani-King. *Id.* ¶ 16.

Under the terms of these agreements, Jani-King allegedly required Plaintiffs to pay an initial and non-refundable franchise fee down payment, as a condition for Jani-King providing them with the opportunity to perform cleaning services under Jani-King's cleaning contracts

[1] Jani-King International, Inc., owns Jani-King, Inc., which, in turn, owns Jani-King of Hartford, Inc., all of whom are incorporated and maintain their principal place of business Addison, Texas. Am. Compl. ¶ 4–6, ECF No. 41.

between Jani-King and their customers.[2] *Id.* ¶ 17. Mr. Mujo and Mr. Muharremi and a subset of the putative class members allegedly paid the down payment to Jani-King as a lump sum at the time of entering into the contract. *Id.* A second subset of putative class members allegedly paid a portion of the down payment at the time of entering into the contract and paid or are paying the outstanding balance as monthly deductions drawn from the compensation paid to them by Jani-King. *Id.*

1. Freedom from Control and Direction Allegations

Plaintiffs allege that they are not free from Jani-King's control and direction with respect to Plaintiffs performance of services, under the terms of the Agreement. *Id.* ¶ 20. Plaintiffs also maintain that Jani-King's methods, procedures, and policies with which Jani-King requires Plaintiff to comply "are numerous and detailed and control the manner in which Plaintiffs and the putative class members must perform their tasks." *Id.*

For example, the franchise agreement allegedly requires that Plaintiffs complete a training program including an exam; comply with the Jani-King Manual, which, among other things, requires Plaintiffs to: abide by Jani-King's operating systems, procedures, policies, methods, standards, specifications, and requirements; wear a Jani-King uniform and nametag; obtain a personal digital assistant or smart phone to use when corresponding with Jani-King and

[2] On July 11, 2007, Mr. Mujo allegedly entered into a franchising agreement ("Mujo Agreement") with Jani-King. Am. Compl. ¶ 2, ECF No. 41. The agreement allegedly required an initial down payment and finder's fee, totaling $44,175. Mujo Agreement at 1, Defs.' Br., Ex. B, ECF No. 45-3. Mr. Mujo stopped performing cleaning services for Jani-King in 2016. Compl. ¶ 2.

Mr. Muharremi allegedly entered into a separate franchising agreement ("Muharremi Agreement") with Jani-King on April 23, 2014, on behalf of his limited liability company, Luli & Son, LLC. Compl. ¶ 3. The Muharremi Agreement allegedly required Luli & Son, LLC, to pay an initial down payment of $16,250. Muharremi Agreement at 1, Defs.' Br., Ex. A, ECF No. 45-2. Mr. Muharremi is still an active franchisee of Jani-King. Compl. ¶ 3.

its customers; communicate with customers in a certain way and on a schedule Jani-King determines; perform services consistent with a cleaning schedule associated with the contract between Jani-King and its customers; and allow Jani-King to perform quality control inspections to ensure compliance with Jan-King standards. *Id.* ¶ 20.

The Agreement allegedly prohibits franchisees from engaging in or having a financial interest in other cleaning services within the territory covered by the Agreement. *Id.* Indeed, the Agreement allegedly contain a non-compete clause that prohibit Plaintiffs from engaging in any cleaning service-related work during the term of the Agreement and for two years after its termination. *Id.* ¶ 22.

Plaintiffs also allegedly do not perform services outside of the usual course of Jani-King's business or outside of all Jani-King's places of business. *Id.* ¶ 21. Indeed, Plaintiffs are allegedly "entirely dependent" upon Jani-King for their work assignments, and Plaintiffs do not and, under the terms of the Agreement, cannot maintain their own clients or customers. *Id.*

2. Wage Deductions

Plaintiffs also maintain that Jani-King deducts monthly various sums of money from their wages, including royalty fees, advertising fees, finder's fees, accounting fees, technology fees, complaint fees, services fees, non-reported business fees, client sales tax, lease deductions, and various other fees. *Id.* ¶ 23.

For example, in September 2016, Mr. Muharemmi allegedly earned a net revenue of $4,508.72. *Id.* ¶ 24. From this amount, Jani-King allegedly deducted: (1) a royalty fee of $425.75; (2) an accounting fee of $127.72; (3) a technology fee of $106.44; (4) a finder's fee of $162.42; (5) franchisee supplies costs in the amount of $49.98; (6) an advertising fee of $63.86; (7) a lease cost in the amount of $27.21; (8) a business protection plan ("BPP") deduction of

$276.73; (9) a "BPP" administrative fee of $7.00; (10) client sales tax in the amount of $251.30; and (11) charge backs in the amount of $1,261.50. *Id.* In total, Jani-King allegedly deducted $2,761.90 from Mr. Muharremi's compensation, leaving him with $1,746.80 in gross income for the month *Id.*

During July 2015, Mr. Mujo allegedly earned $1,403.83 in revenue. *Id.* ¶ 25. From that amount, Jani-King allegedly deducted: (1) a royalty fee in the amount of $132.00; (2) an accounting fee of $66.00; (3) a finder's fee in the amount of $714; (4) an advertising fee of $13.20; (5) a business protection plan deduction of $77.35; (6) a business protection administration fee of $7; and (7) client sales tax in the amount of $83.83. *Id.* In total, Jani-King allegedly deducted $1,093.38 from Mr. Mujo's compensation, leaving him with $310.45 gross income. *Id.*

Jani-King allegedly has made these deductions without obtaining a knowing and intelligent authorization for those deductions on a form approved by the Commission of the Department of Labor, as allegedly required under Section 31-71e of the Connecticut General Statutes. *Id.* ¶ 26. Plaintiffs maintain that the Agreement does not constitute written authorization, as required under Connecticut law, because, at the time of execution, Jani-King represented to Plaintiffs that they were not Jani-King's employees and Jani-King was not their employer within the meaning of the Connecticut Minimum Wage Act ("Minimum Wage Act"). *Id.* Plaintiffs alleged that these deductions were solely for Jani-King's benefit and did not confer a benefit on Plaintiffs. *Id.*

3. Class Allegations

Plaintiffs allege that the putative class members are similarly situated "individuals in Connecticut who, pursuant to a contract with Jani-King, have performed cleaning services for

Jani-King at any time during the two years immediately preceding this lawsuit and continuing until final judgment of the case." *Id.* ¶ 29. The putative class is allegedly so numerous that joinder of all parties is impracticable, given that more than fifty individuals in Connecticut meet the class definition. *Id.* ¶ 32.

Plaintiffs allege that there are common questions of law and fact, including whether: (1) Jani-King has improperly categorized Plaintiffs as independent contractors; (2) the wage deductions under the Agreement were lawful; (3) the down payment and wage deductions Jani-King required violate Section 31-73 of the Minimum Wage Act; and (4) whether Jani-King was thereby unjustly enriched. *Id.*

Plaintiffs' claims are allegedly typical of the class in that the claims are identical and arise from the same course of conduct and practice. *Id.* ¶ 34. Mr. Mujo and Mr. Muharremi allege that they will fairly and adequately protect the interests of the class and that common questions of law and fact predominate over questions affecting only individual members. *Id.* ¶ 35–36. Plaintiffs allege that, because Plaintiffs will prove their claims by a common body of evidence, a class action is superior to other available methods for the fair and efficient adjudication of this matter. *Id.* ¶ 36.

B. Procedural Background

Plaintiffs filed this lawsuit on December 5, 2016, and, on February 9, 2017, filed an Amended Complaint alleging two counts: (1) Jani-King has violated the Minimum Wage Act; and (2) Jani-King has been unjustly enriched. ECF Nos. 1, 41.

Plaintiffs seek: (1) injunctive relief; (2) compensatory damages under the Minimum Wage Act; (3) penalty damages under Section 31-72 of the Connecticut General Statutes; (4) attorney's fees as appropriate under Section 31-72 of the Connecticut General Statutes; (5)

common law punitive damages; (6) disgorgement; (7) and interest and costs. *Id.* at 14. The Court has jurisdiction under 28 U.S.C. § 1332. Defendants move to dismiss the Amended Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Mot. to Dismiss. ECF No. 45.

II. STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Any claim that fails "to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), must be dismissed. In reviewing a complaint under Rule 12(b)(6), a "plausibility standard" is applied, guided by "two working principles." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal citations omitted)). Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679. Thus, a complaint must contain "factual amplification . . . to render a claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009)).

At this stage, all of the factual allegations in the complaint must be accepted as true. *Iqbal*, 556 U.S. at 678. And the factual allegations in the complaint must be viewed in the light most favorable to the plaintiff, drawing all inferences in favor of the plaintiff. *Cohen v. S.A.C.*

Trading Corp., 711 F.3d 353, 359 (2d Cir. 2013); *see also York v. Ass'n of the Bar of the City of New York*, 286 F.3d 122, 125 (2d Cir. 2002) ("On a motion to dismiss for failure to state a claim, we construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true."), *cert. denied*, 537 U.S. 1089 (2002).

Courts considering motions to dismiss under Rule 12(b)(6) generally limit its review "to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The court, however, may also consider "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 144 (D. Conn. 2005).

III. DISCUSSION

Plaintiffs argue that an employer may not classify workers as independent contractors, unless the employer satisfies the applicable test under Conn. Gen. Stat. § 31-222(a)(1)(B). Without this showing, Plaintiffs argue that Jani-King has unlawfully categorized them as independent contractors and illegally made deductions from Plaintiffs' wages and unjustly enriched itself. Jani-King argues that the Connecticut Franchise Act (the "Franchise Act") provides its own protections to franchisees and that agreements entered into under the authority of the Franchise Act are fundamentally at odds with Plaintiffs' contention that Jani-King is an employer under Conn. Gen. Stat. § 31-222. Jani-King also argues that Plaintiffs' theories of liability would have catastrophic consequences for the franchise business model in its entirety.

The Court first addresses the threshold question of whether the franchisees of a business can be considered employees, rather than independent contractors, under Connecticut law. If they can be considered employees, at least at this stage of the case, the Court then must determine whether any deductions made from the pay of the Plaintiffs would violate Conn. Gen. Stat. § 31-71e. While the issue of whether the franchisees can be considered employees cannot be resolved at this stage, the Court nevertheless determines that Jani-King's deductions, with the exception of the down payment, do not constitute wages within the meaning of Conn. Gen. Stat. § 31-71e and thus, Plaintiffs' claim under Conn. Gen. Stat. § 31-71e must be dismissed.

Plaintiffs claim for unjust enrichment, however, survives. While Section 31-73 of the Minimum Wage Act does not provide a private right of action, Connecticut law recognizes that the payments alleged here may violate public policy, which would make any underlying agreement for these payments void. Plaintiffs' unjust enrichment claim therefore remain viable, at least for now.

A. Applicability of the Employee Status Test to Franchise Agreements

Plaintiffs contend that they are, as a matter of law and fact, "employees" under Conn. Gen. Stat. § 31-222. Pls.' Sur Reply Br. at 4. Jani-King contends that there is no way to harmonize the necessary control required under a franchise agreement with the elements of the applicable test governing the employer-employee relationship. Defs.' Reply Br. at 2. The Court disagrees.

Under Connecticut law, subject to rebuttal, the provision of services by an individual is, presumptively employment. *Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act*, 134 A.3d 581, 586 (Conn. 2016) ("Because the provision is in the conjunctive, the party

claiming the exception to the rule that the service is employment must show that all three prongs of the test have been satisfied." (citation omitted)). The Minimum Wage Act provides:

> Service performed by an individual shall be deemed to be employment . . . unless and until it is shown . . . that (1) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .

Conn. Gen. Stat. § 31-222(a)(1)(B)(ii). The statute includes a lengthy list of services excluded from "employment" within the meaning of the Minimum Wage Act. *See, e.g.*, Conn. Gen. Stat. § 31-222(a)(5)(A) (providing that "services performed by an individual in the employ of such individual's son, daughter or spouse, and services provided by a child under the age of eighteen in the employ of such child's father or mother" are exempted subject to record keeping requirements).

The Franchise Act exists in a separate chapter of the Connecticut General Statutes and requires a different inquiry to determine whether a franchise-franchisee relationship exists. The statute defines "franchise" as

> an oral or written agreement or arrangement in which (1) a franchisee[3] is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor[;] . . . and (2) the operation of the franchisee's business . . . is substantially

[3] "'Franchisee' means a person to whom a franchise is granted . . . authority under a franchise to use a trademark, tradename, service mark or other identifying symbol or name." Conn. Gen. Stat. § 42-133e(d).

> associated with the franchisor's[4] trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor . . . a retailer . . . .

Conn. Gen. Stat. § 42-133e(b) (footnotes added). The remedial purpose of the Franchise Act—*i.e.*, "to prevent a franchisor from unfairly exerting economic leverage over a franchisee"—indicates the statute should be read liberally construed in favor of the class sought to be benefited. *Hartford Elec. Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334, 345 (1999). Under the Franchise Act, by definition, a franchisor has a substantial level of control over the franchisee. The Connecticut Supreme Court has identified factors relevant to determining "whether the alleged franchisee conducted its business under a marketing plan substantially prescribed by the alleged franchisor are whether the franchisor had control over the hours and days of operation, advertising, lighting, employee uniforms, prices, hiring of staff, sales quotas and management training." *Edmands v. CUNO, Inc.*, 277 Conn. 425, 440 (2006) (citing *Hartford Elec.*, 250 Conn. at 350). The court also has considered "whether the alleged franchisor provided the franchisee with financial support and had the right to audit its books or to inspect its premises." *Hartford Elec.*, 250 Conn. at 350.

This list is not exhaustive. There is no precise formula as to how many of these factors must be present to find the level of control indicative of a franchise. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1180 (2d Cir. 1995) (citing *See Sorisio v. Lenox, Inc.*, 701 F. Supp. 950, 960 (D. Conn.), *aff'd*, 863 F.2d 195 (2d Cir.1988) (per curiam). "When present to a sufficient degree, however, these factors reflect that the franchisor has deprived the franchisee of the right to exercise independent judgment in conducting its business." *Edmands*, 277 Conn. at 440 (citing

[4] "'Franchisor' means a person who grants a franchise to another person . . . the authority to use a trademark, tradename, service mark or other identifying symbol or name under a franchise . . . ." Conn. Gen. Stat. § 42-133e(c).

Petereit, 63 F.3d at 1181; *Aurigemma v. Arco Petroleum Products Co.*, 698 F. Supp. 1035, 1040 (D. Conn. 1988)).

Nothing in the text or the purpose of either the Minimum Wage Act or the Franchise Act, however, would preclude the application of the relevant independent contractor test under § 31-222 to the franchisor-franchisee relationship. "[T]he starting point for interpreting a statute is the language of the statute itself . . . ." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The express exclusion from § 31-222 of certain services supports this conclusion. *See, e.g.* § 31-222(a)(1)(O)(iv) ("The operator [of an escort motor vehicle] is treated as an independent contractor for all purposes, including, but not limited to, federal and state taxation, workers' compensation, choice of hours worked and choice to accept referrals from multiple entities without consequence . . . .").

Jani-King has not cited nor has the Court identified any Connecticut decisions precluding application of the independent contractor test to a franchise agreement. "[Section 31-222] makes no express exemption for franchises, nor can [the Court] imply an exemption, particularly when, as is the case here, the legislature has created numerous exemptions from coverage under the act." *Jason Roberts, Inc. v. Adm'r*, 127 Conn. App. 780, 787 (2011). Absent express statutory language to the contrary or any textual ambiguity, §§ 31-222 and 42-133e should not be presumed to be inimical to one another. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citation omitted).

Indeed, in *Jason Roberts*, the Connecticut Appellate Court considered whether an independent business with a license to deal the products of another company was an "employee" of that company within the meaning of the Minimum Wage Act. 127 Conn. App. at 782.

Applying Section 31-222's test, the court ruled in the affirmative, finding that the licensor was liable for unemployment compensation contributions with regard to the licensor. *Id.* at 788.

There, the licensed dealer agreement provided:

> [T]he [licensor] would do all of the scheduling when a job was sold on its contract; [the licensee] had to contact the [the licensor] on a daily basis for a status report on each job; [the licensee] had to purchase the [licensor's] uniforms and wear the uniform each day; the [licensor] retained the right to cancel the agreement if [the licensee] engaged in certain conduct, which included, inter alia, use of drugs, use of alcohol during the workday, intoxication on the job, continued absence or tardiness, failure to meet installation goals and insubordination; [the licensee] had to notify the [licensor] one hour prior to his normal arrival time if he was to be absent on that day; [the licensee] had to lease a truck from the [licensor] and was required to maintain the truck, which included waxing the exterior of the vehicle and cleaning the interior of the vehicle; and [the licensee] could not compete, directly or indirectly, with the [licensor] for the term of the agreement and for a period of two years thereafter.

Id. at 782–83.

As in *Jason Roberts*, Jani-King argues "that a finding that a franchise agreement exists between the parties [would] exempt[] the relationship from the purview of the [CMWA]." *Id.* at 787. But in *Jason Roberts*, while the court recognized that franchises are business arrangements that "can differ in many ways from a traditional employment relationship," the court nonetheless ruled that it must "construe and apply the statute as [the court found] it, without reference to whether [the court thinks] it would have been or could be improved by the inclusion of other provisions." *Id.* at 788 (citation omitted).

Because Connecticut law does not foreclose the possibility of a franchisee also being an employee, the issue then turns to whether Plaintiffs' factual allegations under Section 31-22 are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted). The answer is yes.

Jani-King's methods, procedures, and policies "are numerous and detailed and control the manner in which Plaintiffs and the putative class members must perform their tasks." Am. Compl. ¶ 20. The applicable franchise agreement allegedly requires that Plaintiffs: complete a training program including an exam; comply with the Jani-King policy manual; wear a Jani-King uniform and nametag; obtain a personal digital assistant device; communicate with customers in a certain way and on a schedule Jani-King determines; perform services consistent with a cleaning schedule associated with the contract between Jani-King and its customers; and allow Jani-King to perform quality control inspections to ensure compliance with Jan-King standards. *Id.* ¶ 20.

Plaintiffs allegedly also do not perform services outside the usual course of Jani-King's business or outside of all Jani-King's places of business. *Id.* ¶ 21. Finally, Plaintiffs further allege that they are not customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the services they performed under the Agreement. *Id.* ¶ 22.

These allegations are sufficient to state a claim under § 31-222. *See, e.g.*, *Jason Roberts*, 127 Conn. App. at 787, ("Having applied this law to the extensive facts found, the [Employment Security Board of Review] properly determined that the [the licensor] failed to satisfy all of the prongs of the ABC test and, consequently, that [the licensee] was an employee.").

B. Count One: Unlawful Wage Deductions

While, at this stage, the Court cannot and should not determine whether Plaintiffs are employees within the meaning of the Minimum Wage Act, the Court nevertheless can determine the validity of Plaintiffs' claim of the improper deduction of wages, if Plaintiffs are employees. Plaintiffs argue that Jani-King took deductions from their wages for royalty fees, advertising

fees, finder's fees, accounting fees, technology fees, complaint fees, services fees, non-reported business fees, client sales tax, and lease deductions after they were earned, Pls.' Opp. Br. at 7, ECF No. 50, and that these deductions violated Conn. Gen. Stat. § 31-71e. *Id.* Jani-King argues that the various deductions Jani-King withheld from Plaintiffs do not constitute wages under the Minimum Wage Act. The Court agrees.

Under the Minimum Wage Act, a wage is "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation." Conn. Gen. Stat. § 31-71a(3). Section 31-71e of the Act governs wage withholdings, providing, in relevant part:

> No employer may withhold or divert any portion of an employee's wages unless (1) the employer is required or empowered to do so by state or federal law, or (2) the employer has written authorization from the employee for deductions on a form approved by the commissioner, or (3) the deductions are authorized by the employee, in writing, for medical, surgical or hospital care or service, without financial benefit to the employer . . . .

The Act also instructs that "[n]o employer . . . shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person. . . deduction [] necessary to secure employment or continue in employment." Conn. Gen. Stat. § 31-73(b).

In *Mytych v. May Department Stores Co.*, 260 Conn. 152 (2002), the Connecticut Supreme Court ruled that the Minimum Wage Act does "not provide substantive standards as to how wages are calculated. [Its] purpose is remedial; to prevent the employer from taking advantage of the legal agreement that exists between the employer and the employee." *Id.* at 160–61. Simply put, "the formula by which an employee's wage is calculated is determined by the agreement between the employer and the employee." *Id.* at 160.

As a result, the Connecticut Supreme Court in *Mytych* rejected a wage claim under Section 31-71, where the employer entered into a commission agreement with the plaintiffs, which provided that the plaintiffs' wages were based on a certain percentage of gross sales. *Id.* at 154–55. The agreement defined gross sales with consideration to a number of factors, including, for example, any applicable customer or employee discount, identified returns, and unidentified returns. *Id.* at 156.

In their lawsuit, the plaintiffs did not claim that the employer failed to pay them their earned wages as calculated under the commission agreement; rather, they argued that the calculation the employer used was an illegal refund or deduction from their earned wages under §§ 31-71e and 31-73(b). *Id.* at 156. But the commission agreement provided that the plaintiffs' wages were to be calculated after the deduction for unidentified returns, and therefore, the deductions themselves were not, as a matter of law, wages within the meaning of the Minimum Wage Act. *Id.* at 166.

Even more recently, the Connecticut Supreme Court in *Geysen v. Securitas Sec. Services USA, Inc.*, 322 Conn. 385 (2016), addressed whether an at-will employment agreement providing that an employee's commissions would not be paid, unless the employer had invoiced commissionable amounts to the client prior to the employee's termination, violated the Minimum Wage Act.[5] *Id.* at 387–88. "Because the plaintiff was not due his commissions under the express

[5] Section 31–72 of the Connecticut General Statutes provides: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31–71a to 31–71i, inclusive, or fails to compensate an employee in accordance with section 31–76k or where an employee or a labor organization representing an employee institutes an action to enforce an arbitration award which requires an employer to make an employee whole or to make payments to an employee welfare fund, such employee or labor organization shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the

and enforceable terms of his agreement with the defendant, and the agreement does not violate public policy," *Geysen*, 322 Conn. at 398, the Minimum Wage Act had not been violated.

Here, Plaintiffs have not alleged that the employer failed to pay them their earned wages, as calculated under the Agreement. Instead, Plaintiffs seek as "wages" amounts deducted from their pay under the franchisor-franchisee agreement. *See, e.g.*, Luli & Son LLC, Franchise Agreement, Defs.' Br. Ex. A at 6, ECF No. 45-2 ("Franchisee agrees to pay to Franchisor . . . a royalty fee equal to 10% of the monthly Gross Revenue."). Plaintiffs argue that the calculation the employer used was an illegal refund or deduction from their earned wages under §§ 31-71e. *See, e.g.*, Am. Compl. ¶ 26 ("Defendants have taken said deductions from Plaintiff's wages without obtaining an[] intelligent written authorization for those deductions . . . .").

Because all of these deductions, except for any related to a down payment, are expressly provided for in the agreement between Plaintiffs and Defendants, these deductions do not constitute "wages" within the meaning of the Minimum Wage Act. *See Mytych*, 260 Conn. at 164 (recognizing that the definition of "wages" under § 31-71a(3) "leaves the determination of the wage to the employer-employee agreement, assuming some specific conditions, such as a minimum hourly wage, are met.").

At oral argument, Plaintiffs nevertheless argued that these deductions, wholly consistent with the parties' franchisor-franchisee agreement, violate § 31-71a(3) because the parties' agreement should be rendered void as a matter of public policy. The Court disagrees.

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underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. Any agreement between an employee and his or her employer for payment of wages other than as specified in said sections shall be no defense to such action . . . ."

In essence, Plaintiffs construe § 31-71a(3) as conferring substantive rights and not just remedial rights. Connecticut law, as discussed above and further discussed below, is to the contrary. *See, e.g.*, *Capuano v. Island Computer Prod., Inc.*, 382 F. Supp. 2d 326, 346–47 (D. Conn. 2005) ("*Mytych*, in stating that 'our wage payment statutes expressly leave the timing of accrual to the determination of the wage agreement between the employer and employee,' . . . emphasized that the [Connecticut] wage statutes [are] remedial, not substantive, and that the terms of the employee wage agreement should be honored." (quoting *Mytych*, 260 Conn. at 165)).

The Connecticut Supreme Court's decision in *Geysen* made clear that: "There is a strong public policy in Connecticut favoring freedom of contract . . . . This freedom includes the right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, . . . a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability . . . . If a contract violates public policy, this would be a ground to not enforce the contract. . . . A contract . . . however, does not violate public policy just because the contract was made unwisely . . . [C]ourts do not unmake bargains unwisely made." *Geysen*, 322 Conn. at 392–93 (quoting *Schwartz v. Family Dental Grp., P.C.*, 106 Conn. App. 765, 772–73 (2008)).

Indeed, in *Geysen*, under the principle that "the formula by which an employee's wage is calculated is determined by the agreement between the employer and the employee" and that in light of the public policy embodied and § 31-71a and the freedom of contract "determination of

the wage [is left to] to the employer-employee agreement," the court ruled in favor of the employer. *Id.* at 394 (citing *Mytych*, 260 Conn. at 163).

Connecticut law also embraces the principle that "all employer-employee relationships not governed by express contracts involve some type of implied 'contract' of employment." *McAllister v. East*, 611 Fed. App'x 17, 19 (2d Cir. 2015) (internal citation omitted) (quoting *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 13 (1995)). This Court therefore "must enforce the contract as drafted by the parties and may not relieve [Plaintiffs] from anticipated or actual difficulties undertaken pursuant to the contract." *Geysen*, 322 Conn. at 392.

Because the various fees deducted from Plaintiffs' compensation were provided for in the franchisor-franchisee agreement entered into by the parties, Plaintiffs' claim for relief under § 31-71e fails as a matter of law.[6]

However, as discussed further below, even if these fees are not wages under § 31-71e, *Mytych* leaves open the possibility that that the fees and deductions required under the Agreement may nonetheless violate public policy.

C. Count Two: Unjust Enrichment

Alternatively, Plaintiffs seek relief under § 31-73(b). Jani-King allegedly requires Plaintiffs both to pay fees on an ongoing basis, and to pay an initial and non-refundable, franchise-fee down payment as a condition for Jani-King providing them with the opportunity to perform cleaning services under cleaning contracts between Jani-King and their customers.

[6] In the absence of applicable Connecticut law for their claim under § 31-71e, Plaintiffs rely on Massachusetts law. *See, e.g., Crocker v. Townsend Oil Co.*, 979 N.E.2d 1077 (Mass. 2012); *Awuah v. Coverall N. Am., Inc.*, 952 N.E.2d 890 (Mass. 2011). These cases, while instructive, nevertheless are not binding on this Court, sitting in diversity and bound to apply Connecticut law. *Stephens v. Norwalk Hosp.*, 162 F. Supp. 2d 36, 39 (D. Conn. 2001) ("[A] federal court sitting in diversity applies the substantive law of the forum state . . . ." (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 (1938)).

Plaintiffs, at least some of them, also argue that the down payments due on the Agreement was or has been deducted from their wages. Pls.' Opp. Br. at 7; *see also* Am. Compl. ¶ 23(p) ("Jani-king deducts various sums of money each month from the wages that is pays Plaintiffs . . . including . . . monthly deductions for any portion of the required down payment not already paid to Jani-King"). These payments allegedly violate § 31-73(b) and provide a basis for an unjust enrichment claim. Jani-King argues that § 31-73(b) does not provide for a private right of action and Plaintiffs' § 31-73(b) claim therefore should be dismissed. Defs.' Br. at 14. The Court disagrees.

As the Connecticut Appellate Court has held, "Section 31-73 represents a clear public policy prohibiting an employer from taking advantage of the employment relationship by using the acquisition or continuation of employment as a mechanism for exacting sums of money from an employee." *Lockwood v. Prof'l Wheelchair Transp., Inc.*, 37 Conn. App. 85, 94 (1995). "The statute is written in broad and sweeping language to prohibit such actions by an employer." *Id.* at 94–95. In *Lockwood*, "[t]he discharge of an employee for, as here, refusing to refund a portion of his wages violates public policy as expressed in §31-73." *Id.* at 95. As a result, to the extent that Plaintiffs establish an employer-employee relationship within the meaning of § 31-73(b), then the underlying franchisor-franchisee agreement between the parties may violate this provision, to the extent that any required fees violate public policy. *See Mytych*, 260 Conn. at 166 ("The Appellate Court properly concluded that the language of §31-73(b) was clear and unambiguous in that it prohibits an employer from demanding any . . . sum of money or contribution from any person . . . upon the representation or the understanding that such . . . sum of money . . . is necessary to secure employment or continue in employment.") (internal citation and quotation marks omitted).

Although Defendant rightly argues that § 31-73(b) "does not furnish a private right of action for an employer's refund of wages to secure or continue employment," *Bokanoski v. LePage Bakeries Park St., LLC*, No. 3:15-cv-21 (JCH), *slip op.* at 7 (D. Conn. June 29, 2016), ECF No. 103 (citing *Quiello v. Reward Network Establishment Servs., Inc.*, 420 F. Supp. 2d 23, 33–34 (D. Conn. 2006)), this argument does not foreclose Plaintiffs' unjust enrichment claim, at least at this stage of the case.

Because, as discussed above, *Lockwood* and *Mytych* recognize that a failure to comply with § 31-73(b) violates public policy, Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law. As a result, Plaintiffs have plead a plausible claim of unjust enrichment. *See Bokanoski*, No. 3:15-cv-21, at 9 ("[T]he Complaint may fairly be construed to allege that the provisions of the Agreements that purported to require the plaintiffs to 'buy their jobs,' and that allowed the defendants to 'shift business costs' to the plaintiffs violated public policy such that they were unenforceable as having violated Connecticut statutory law, thereby permitting recovery under a theory of unjust enrichment.") (citations omitted).

Indeed, as Chief Judge Hall recognized in *Bokanoski*, "[s]uch facts, as alleged, plead a claim for unjust enrichment, irrespective of whether section 73 of title 31 of the Connecticut General Statutes provides for a private right of action." *Id.* at 10; *see also Horner v. Bagnell*, 324 Conn. 695, 707 (2017) ("[W]herever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract, restitution of the value of what has been given must be allowed . . . .") As a result, Plaintiffs' unjust enrichment survives for now and Defendants' motion to dismiss is denied.

IV. CONCLUSION

For the reasons discussed above, Jani-King's motion to dismiss is **GRANTED** in part and **DENIED** in part. Plaintiffs' claim for relief under Conn. Gen. Stat. § 31-71e is dismissed. Plaintiffs' claim for relief under Conn. Gen. Stat. §31-73(b) remains.

SO ORDERED at Bridgeport, Connecticut, this 31st day of March, 2018.

/s/ Victor A. Bolden
VICTOR A. BOLDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SIMON MUJO and INDRIT MUHARREMI, *on behalf of themselves and all others similarly situated,* *Plaintiffs,* v. JANI-KING INTERNATIONAL INC., et al., *Defendants.*	No. 3:16-cv-1990 (VAB)

RULING AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Simon Mujo and Indrit Muharremi, on behalf of a class of over 100 Jani-King franchisees (collectively "Plaintiffs"), allege that Jani-King International, Inc., Jani-King, Inc., and Jani-King of Hartford, Inc. (collectively "Defendants" or "Jani-King") unlawfully classified them as independent contractors and were unjustly enriched in violation of Conn. Gen. Stat. § 31-73(b).

Jani-King moves for summary judgment.

For the following reasons, Jani-King's motion for summary judgment is **GRANTED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Plaintiffs signed Jani-King franchise agreements to "operate a Jani-King franchise cleaning and maintenance services company" and to provide commercial cleaning services using Jani-King's trademarks and system. Pls.' Local Rule 56(a)(2) Statement of Material Facts in Opp. to Jani-King Mot., ECF No. 155 ¶ 1 (Aug. 2, 2019) ("Pls.' SMF"); Ex. 2: Luli & Son LLC[1] Franchise Agreement, ECF No. 136-5 at § 4.1 (Apr. 23, 2014) ("Luli & Son Franchise Agmt.");

[1] Luli & Son LLC is the entity through which Mr. Muharremi entered the Jani-King franchise agreement. The Luli & Son Franchise Agreement and the Mujo Franchise Agreement are substantially similar.

Ex. 1: Simon Mujo Franchise Agreement, ECF No. 136-4 at § 4.1 (July 11, 2007) ("Mujo Franchise Agmt."). Plaintiffs' claims arise out of the Jani-King franchise agreement and the ensuing business relationship between the parties. The parties dispute whether Jani-King's franchise agreements permit the Plaintiffs to operate as independent contractors with their own commercial cleaning businesses, or whether Plaintiffs are employees. Pls.' SMF ¶ 1.

Jani-King's Franchise System and Model

Jani-King sells commercial cleaning service-based franchises, and requires franchisees to operate under its franchise system in a particular geographic area. Pls.' SMF ¶¶ 54, 56. Jani-King provides janitorial services to commercial entities. *Id.* ¶ 89. Jani-King's workers are classified as independent contractor franchisees. *Id.* ¶ 91 (citing Luli & Son Franchise Agmt. at § 12.6).

Jani-King owns all contracts with its cleaning customers and is solely responsible for drafting all cleaning contracts. *Id.* ¶ 93; *see also* Mujo Franchise Agmt. at § 4.7.1 ("All monies received from clients are the property of Franchisor."). Jani-King has the exclusive right to "secure commercial cleaning and maintenance contracts." Pls.' SMF ¶ 99 (citing Luli & Son Franchise Agmt. at § 4.3.1); *see also* Ex. 24: Jani-King Uniform Offering Circular, ECF No. 156-5 at JKCT00001104 (Apr. 30, 2007) ("UOC") ("All proposals for services made by [franchisees] to either current or prospective clients must be reviewed and approved by [Jani-King] staff. Any solicitation for services made by [franchisee] must be approved by [Jani-King]."). Additionally, franchisees are limited to accepting or rejecting Jani-King's offered business. Pls.'s SMF ¶ 100 (citing UOC at JKCT00001110). Along with the customer, Jani-King sets the terms of the cleaning services to be provided by franchisees, so franchisees must accept the contract negotiated between Jani-King and the customer. *Id.* ¶ 101.

Once franchisees pay an initial franchise fee down payment and initial finder's fee down payment, they operate under Jani-King's marketing system and use Jani-King's intellectual property. *Id.* ¶¶ 55, 57. Plaintiffs deny that they acquire rights to operate the franchise and allege that "[a]t all times, Jani-King controls the operation." *Id.* at ¶ 55. Plaintiffs note that among other indices of control, their franchise agreements state that:

> Franchisor has developed and used, and continues to develop, use and control in connection with its System, certain confidential information, programs, devices, methods, techniques and processes which are not generally known to the public pertaining to franchising, promotion, marketing, operation and management of a business, . . . which includes but is not limited to information regarding the operational, sales, promotional methods and techniques, and marketing methods and techniques of Franchisor and the Jani-King program.

Id. (citing Mujo Franchise Agmt. at § 4.1.2; Luli & Son Franchise Agmt. at § 4.1.3). Plaintiffs also allege that some franchisees pay the entirety of the initial fee upfront, while others pay it over time, with the fee being deducted from their pay. *Id.* ¶ 96.

According to the franchise agreement, Jani-King has the "exclusive right to perform all billing and accounting functions for the services." Luli & Son Franchise Agmt. at § 4.8. The franchisee must pay 3% of gross revenue as an accounting fee to Jani-King. *Id.* Plaintiffs allege they must agree to these support services even if they would rather forgo them. Pls.' SMF ¶ 58.

According to the franchise agreement, franchisees pay various fees: a 10% royalty fee on monthly gross revenue, subject to certain minimum accounts, *id.* ¶ 59 (citing Luli & Son Franchise Agmt. at § 4.5.1); an advertising fee of 1.5% gross revenue for specified marketing programs intended to "maximize general public recognition and acceptance of the registered trademarks and enhance the collective success of all [Jani-King] franchises," *id.* ¶ 61 (citing Luli & Son Franchise Agmt. at § 4.5.2(1)); and a finder's fee for additional cleaning work—over and

above the initial business purchased—referred by Jani-King, *id.* ¶ 62 (citing Luli & Son Franchise Agmt. at § 4.6). Other fees include insurance fees (otherwise known as the "business protection plan"), complaint fees, miscellaneous fees, and charge-backs. *Id.* ¶ 97; *see also id.* ¶ 98 (explaining that a charge-back occurs when a customer fails to pay Jani-King for work already performed by Plaintiffs; Jani-King deducts this amount from Plaintiff's earnings); Luli & Son Franchise Agmt. at § 4.8.1 ("Any money not collected in an account for any reason will be charged back to Franchisee."). These contractual fees are all deducted monthly from the gross revenue generated by franchisees. *Id.* ¶ 64. Plaintiffs deny that the franchise agreement defined "compensation," but Jani-King alleges that Plaintiffs "expressly agreed that their compensation would exclude all fees set out in their respective agreements." *Id.*

Under the franchise agreement, franchisees are responsible for providing and maintaining worker's compensation and liability insurance. *Id.* ¶ 66.

In order to ensure continuous service and client communication, Jani-King has required franchisees to notify the regional office of vacations and contact information for the people who will be responsible for servicing the accounts. *Id.* ¶ 67. Subject to customer requirements, franchisees set their own schedules. *Id.* ¶ 68. Franchisees could exchange customer accounts with other franchisees, subject to Jani-King approval, and franchisees also could decline or stop servicing customer accounts, but they risk not getting additional work to make up the difference in revenue. *Id.* (citing UOC at JKCT00001057).

Jani-King requires franchisees to "purchase certain professional products and equipment . . . under specifications in the Franchise Agreement and operating manuals." UOC at JKCT00001090; *see generally id.* at JKCT00001090-91 (describing restrictions on sources of products, supplies, and equipment for the cleaning services). Jani-King also determines the

advertising and promotional materials used by franchisees, Pls.' SMF ¶ 106 (citing UOC at JKCT00001098),

Franchisees are responsible for inspecting their customer accounts, Pls.' SMF ¶ 70, and Jani-King also conducts "quality control inspections of accounts . . . from time to time in order to insure [sic] that the service is performed in accordance with the cleaning schedule or instructions associated with the contract between Franchisor [Jani-King] and the customer and to the performance standards of Jani-King," Luli & Son Franchise Agmt. at § 4.19.3.

Jani-King requires franchisees to "meet brand standards addressing everything from cleaning results, to the appearance of people cleaning (e.g., that cleaners should wear clean uniforms with name tags . . .), to how the service is associated with Jani-King trade names and advertising." Pls.' SMF ¶ 71; *see also id.* ¶ 108 (cleaners must wear Jani-King branded uniforms). Additionally, franchisees are prohibited from bringing extra items or non-employees (including children and animals) to the customer site.

Jani-King requires franchisees to agree not to hold themselves out as an agent, servant, or employee of Jani-King, so that franchisees may not, without prior written approval, obligate Jani-King for any expenses, liabilities, or other obligations. *Id.* ¶ 72 (citing Mujo Franchise Agmt. at § 12.7; Luli & Son Franchise Agmt. at § 12.6).

Franchisees may sell their businesses, subject to Jani-King's right of first refusal and written consent. Pls.' SMF ¶ 74. Franchisees are subject to non-compete and non-solicitation provisions after leaving the Jani-King franchise system for a period of two years (within the originally-contracted territory) or one year (outside the territory); during that period, franchisees may not engage in an "independently established trade, occupation, or business" in the commercial cleaning industry. *Id.* ¶¶ 75, 117 (citing Luli & Son Franchise Agmt. at § 5.2.3).

Jani-King's franchise agreements have ten or twenty year terms, *id.* ¶ 76, and may be terminated upon the occurrence of any of the sixteen conditions of default, *id.* (citing Luli & Son Franchise Agmt. § 8.1). Plaintiffs allege that the "highly subjective conditions in Section 8.1 effectively provide Jani-King with the right to terminate franchisees at will, since it can decide whether Franchisees have engaged in 'conduct which reflects unfavorably upon . . . Jani-King[.]'" *Id.* (citing Luli & Son Franchise Agmt. at § 8.1(g)(iii)). For many of the conditions for default and termination, Jani-King may terminate the franchise agreement upon thirty (30) days notice. *Id.* ¶ 114 (citing Luli & Son Franchise Agmt. at § 8.1(g)(i)-(ix)).

Jani-King provides mandatory initial training, as well as training manuals. *Id.* ¶ 77. Plaintiffs allege the cleaning methods in the training manuals are not simply recommended techniques, because the franchise agreement may be terminated if franchisees "fail[] to maintain the standards that Franchisor requires in this Agreement or any other standards in Jani-King manuals." *Id.* (citing Luli & Son Franchise Agmt. at § 8.1(g)(ii)). Additionally, Jani-King may suspend franchisees or require additional training until they meet Jani-King's minimum standards. *Id.* ¶ 81. Jani-King may also charge more fees to these franchisees who fail to correct deficiencies to the client or Jani-King's satisfaction. *Id.* ¶ 83.

According to the franchise agreement between the parties:

> Franchisee understands and agrees that Franchisee is required to maintain a good relationship with each customer serviced by Franchisee, and that Franchisor may inspect any premises serviced by Franchisee at any time to ensure that the quality of service being rendered is in accordance with Jani-King standards.

Id. ¶ 82 (quoting Luli & Son Franchise Agmt. at § 4.19; Mujo Franchise Agmt. at § 4.17).

Although Jani-King alleges it may only terminate franchise agreements "for cause and subject to both contractual notice and any additional requirements imposed by the Connecticut

Franchise Act," Conn. Gen. Stat. § 42-133(f)(a), Defendants' Local Rule 56(a)(1) Statement of Undisputed Facts, ECF No. 136-2 ¶ 84 (June 10, 2019) ("Jani-King SMF"), Plaintiffs allege that the broad and subjective conditions for default in Section 8.1, along with the fact that "Jani-King does not continuously guarantee any level of work or accounts," "effectively provide Jani-King with the right to terminate franchisees at will," Pls.' SMF ¶ 84; *see also id.* ¶ 86 (citing Luli & Son Franchise Agmt. at § 6.1.2 ("Franchisor does not guaranty that the Initial Business will reach or remain at the level stated on the Franchise Summary throughout the term of this Agreement.") (emphasis omitted)). Jani-King does allow franchisees to pursue additional business, provided that they submit all sales proposals for Jani-King's prior approval. *Id.* ¶ 87; *see also* UOC at JKCT00001104. In addition, although franchisees may sell extra services to customers, franchisees must still receive prior approval from Jani-King. *Id.* ¶¶ 88, 102.

Jani-King employs staff to monitor customer satisfaction and field customer inquiries, including complaints. Additionally, Jani-King's centralized computer system stores call logs, which Plaintiffs allege demonstrate Jani-King's "extensive involvement" with Plaintiffs and Jani-King customers. *Id.* ¶ 105.

Mr. Mujo's Relationship with Jani-King

On July 11, 2007, Mr. Mujo entered into a franchise agreement with Jani-King. *See* Mujo Franchise Agmt. Mr. Mujo claims he "was only a worker" for Jani-King and was not a franchise owner. Ex. 31: Deposition of Simon Mujo, ECF No. 156-12 at 26:7-13 (July 27, 2018) ("Mujo Depo."); *see also* Pls. SMF ¶ 2 (admitting that Plaintiff Mujo "performed the manual labor of cleaning the offices per Jani[-]King's specifications" beginning in 2007). Mr. Mujo admits that his Franchise Agreement obligated him to "act at all times as an independent contractor," but he alleges that notwithstanding this language, he was a Jani-King employee. Pls. SMF ¶ 3 (citing

Mujo Franchise Agmt. at § 12.7, but noting generally the numerous controls exercised by Jani-King).

Mr. Mujo paid $44,175 as an initial franchise fee down payment and initial finder's fee down payment in exchange for his use of the Jani-King "System, Property Marks, and Confidential Information." *Id.* ¶ 4 (citing Mujo Franchise Agreement at 1, § 4.3). Mr. Mujo had no prior sales experience. *Id.* ¶ 5. Mr. Mujo understood that "Jani-King was obligated to offer [him] at least $15,000 in monthly revenue during the first 480 days of [his] agreement period," Mujo Depo. at 105:2-9, and that Jani-King would keep a certain percentage of revenue equal to its fees, Pls. SMF ¶ 6. Mr. Mujo received Monthly Franchise Reports, which disclosed both customer revenue and Jani-King fees and deductions. *Id.* ¶ 7. According to Mr. Mujo, "[o]nly Jani-King representatives communicated with the customer accounts such that [he] did not have any contact with customers at all." *Id.* ¶ 8 (citing Mujo Depo. at 143:1-24). Mr. Mujo claims that he did not receive training to clean specialized accounts, like hospitals and restaurants, *id.* ¶ 9 (citing Mujo Depo. 1211:18-123:33), and he asserts the "Jani-King representatives were unknowledgeable and unable to answer questions about what kind of cleaning tools he should use for new customer accounts," *id.* ¶ 10.

According to Jani-King policies and his franchise agreement, Mr. Mujo's cleaning work had to be performed "in accordance with the cleaning schedule or instructions associated with the contract between [Jani-King] and the client to [Jani-King's] performance standards." *Id.* ¶ 11 (citing Mujo Franchise Agmt. § 4.17). Mr. Mujo claims that he only declined customer accounts offered by Jani-King when Jani-King instructed him to do so. *Id.* ¶¶ 12-13 (citing Mujo Depo. at 109:4-110:9). Mr. Mujo could and did hire employees, but he only hired one part-time employee, his cousin, and Mr. Mujo disputes that he supervised his cousin because his cousin also had to

"follow current established Jani-King polices, practices, and procedures." *Id.* ¶ 14 (citing Mujo Franchise Agmt. At § 4.2.2).

Mr. Mujo provided his own equipment and transportation for cleaning jobs, and he sometimes purchased supplies at Wal-Mart or Lowe's, which lowered his costs. *Id.* ¶ 15 (noting that Mr. Mujo also purchased supplies where Jani-King told him to go). Although Mr. Mujo allegedly did not know his franchise agreement allowed him to solicit potential clients, *id.* ¶ 18, he notes that "[a]ll contracts under which terms services are provided by any Jani-King franchisee are the sole property of Jani-King," Mujo Franchise Agmt. § 4.19.2. Mr. Mujo admits he "did not believe he could improve the speed or efficiency of cleaning work, . . . that a customer account would take just as long to clean the first time as it would the twenty-fifth time." Pls.'s SMF ¶ 19.

Mr. Mujo "never communicated" with customers directly, but admits that customers made complaints to Jani-King. *Id.* ¶ 21 (citing Mujo Depo. at 143:16-24). One customer complained to Jani-King that Mr. Mujo had inappropriately touched an employee, and requested that a new franchisee clean their office. Ex. 6 March 15, 2011 Incident Report, ECF No. 136-8 at 2 (July 19, 2017). Mr. Mujo denies the incident occurred, but admits the complaint was made. Pls. SMF ¶ 22. Another customer, a physician's group, cancelled their Jani-King contract after complaining that Mr. Mujo's franchise did not adequately clean their premises, even after the group spoke to Mr. Mujo. *Id.* ¶ 23. Mr. Mujo has no memory of speaking to anyone at the physician's group about the alleged problem, but admits the complaint was made. *Id.*

Mr. Mujo provided cleaning services for Jani-King until early 2016. *Id.* ¶ 120. Throughout the term of his franchise agreement, Mr. Mujo paid finder's fees for new accounts, and paid the many other fees as well. *Id.* ¶ 121.

Mr. Muharremi's Relationship with Jani-King

On April 23, 2014, on behalf of his limited liability company, Luli & Son, LLC, Mr. Muharremi entered into a franchise agreement with Jani-King. Luli & Son Franchise Agmt. Mr. Muharremi admits that his Franchise Agreement stated that "Franchisee will be at all times an independent contractor," but alleges that notwithstanding this language, Mr. Muharremi was a Jani-King employee and was not permitted to operate as an independent contractor. Pls. SMF ¶ 25 (citing Luli & Son Franchise Agmt. at § 12.6, and noting the many indices of control throughout the Franchise Agreement).

Mr. Muharremi paid $16,250 as an initial franchise fee down payment and initial finder's fee down payment in exchange for his use of the Jani-King "System, Property Marks, and Confidential Information." *Id.* ¶ 26 (citing Luli & Son Franchise Agreement at 1, § 4.3-4.3.1). Mr. Muharremi understood that he (through Luli & Son LLC) was contracting to receive offers of initial business that would generate $4,000 of gross revenue per month, less specified fees, and acknowledges that "part of what [he] purchased with [his] franchise was access to the Jani-King system, for example, training programs that trained [him] in how to clean accounts according to Jani-King standards." *Id.* ¶¶ 27-28. Although Mr. Muharremi performed his daily duties without supervision, Jani-King personnel sometimes inspected his work for quality control. *Id.* ¶ 29 (citing Luli & Son Franchise Agmt. at § 4.19.3 and various depositions of Jani-King personnel). Mr. Muharremi "held himself out as an owner of a Jani-King franchise through the use of his business card." *Id.* ¶ 30; *see also* Ex. 19: Luli & Son LLC Business Card, ECF No. 136-22 (June 10, 2019) (noting that it was an authorized franchisee of Jani-King, and including Jani-King's logo).

Consistent with Jani-King's constraints and customer schedules, Mr. Muharremi decided when to perform his cleaning services and provided his own equipment. *Id.* ¶ 31. Mr. Muharremi decided "both whether to accept any customer account referred by Jani-King, . . . and whether to use his own or employee labor to provide cleaning services." *Id.* ¶ 32. In the span of four years, Mr. Muharremi is aware of three or fewer quality-control inspections by Jani-King, and none occurred while cleaning services were being performed. *Id.* ¶ 33. Months would pass where Mr. Muharremi had no contact with Jani-King. *Id.* ¶ 34.

Mr. Muharremi recognized that he could "minimize expenses by providing services to nearby customers." *Id.* ¶ 35. Before accepting a new account, Mr. Muharremi collected information about the square footage, fixtures, and any time constraints. *Id.* ¶ 36. He sometimes sold additional services, like stripping floors and carpet extractions, to existing customers. *Id.* ¶ 37. He "individually assessed whether each customer space required an initial deep cleaning, . . . and always inspected work performed by family members before leaving a job." *Id.* ¶ 38.

Mr. Muharremi never tried to "grow" his business or hire employees; never considered what factors made accounts profitable; and never devised strategies to improve efficiency, such as tracking hours spent on different accounts. *Id.* ¶ 39. Mr. Muharremi personally serviced the accounts "90 percent of the time." *Id.* (citing Ex. 7: Deposition of Indrit Muharremi, ECF No. 136-10 at 230:6-10 (Apr. 18, 2018) ("Muharremi Depo.")). Mr. Muharremi shopped for the lowest price on cleaning supplies and equipment, but noted that "there [are] better deals but not [for] Jani-King approved supplies." *Id.* (citing Muharremi Depo. at 143:11-144:5).

Mr. Muharremi continues to perform cleaning services for Jani-King under his franchise agreement. *Id.* ¶ 118. As a result, he alleges he pays finder's fees "as a condition of securing

more cleaning work with Jani-King" for new accounts, and continues to pay the many fees and charge-backs deducted from his account. *Id.* ¶ 119.

Other Jani-King Franchisees

Jani-King submits evidence of profitable businesses run by other franchisees, which Plaintiffs do not dispute. *See* Pls.' SMF ¶¶ 40-53. Plaintiffs do emphasize that "customer contracts are between the customer and Jani-King," that "Jani-King must approve all bids to provide cleaning services," and "that Jani-King does have involvement in determining the schedule and frequency for cleaning accounts." Pls.' SMF ¶ 53.

These other franchisees ensure the profitability of their businesses by: providing cleaning services through teams of employees hired, paid, and scheduled without any involvement from Jani-King, *id.* ¶ 41; buying cleaning supplies from different sources to minimize costs, *id.* ¶ 42; evaluating profitability before accepting new customer accounts by, *inter alia*, ensuring that new customers' location, scheduling requirements, difficulty, and pricing will turn a profit, *id.* ¶¶ 43, 45; communicating with customers directly about their needs, *id.* ¶ 46; and providing extra services, *id.*

Jose Mendez, a Jani-King franchisee, has managed his business remotely for a year by providing cleaning services entirely through the labor of his employees. *Id.* ¶ 48.

Michael Champigny, another franchisee, has generated as much as $14,000 in gross revenue a month, while working with eight part-time employees. *Id.* ¶ 50.

B. Procedural History

On December 5, 2016, Plaintiffs filed this lawsuit, and on March 9, 2017, they filed an Amended Complaint alleging that: (1) Jani-King violated the Minimum Wage Act; and (2) Jani-

King has been unjustly enriched. Compl., ECF No. 1 (Dec. 5, 2016); Am. Compl., ECF No. 41 (Mar. 9, 2017).

On March 30, 2017, Jani-King moved to dismiss both the wage and unjust enrichment claims in the Amended Complaint under Rule 12(b)(6) for failure to state a claim. Mot. to Dismiss, ECF No. 45 (Mar. 30, 2017).

On March 31, 2018, the Court granted in part and denied in part Jani-King's motion to dismiss. *Mujo v. Jani-King Int'l, Inc.* (*Mujo I*), 307 F. Supp. 3d 38 (2018); *see also* Order and Ruling on Defs.' Mot. to Dismiss, ECF No. 82 (Mar. 31, 2018).

The Court dismissed the state-law wage claim, but preserved the unjust enrichment claim because "Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law." *Mujo I*, 307 F. Supp. 3d at 51.

On April 23, 2018, Plaintiffs moved to certify the class. Mot. to Certify Class, ECF No. 87 (Apr. 23, 2018).

On January 9, 2019, the Court granted Plaintiffs' motion and certified the class. Ruling and Order on Class Certification, ECF No. 130 (Jan. 9, 2019).

On June 10, 2019, Jani-King timely moved for summary judgment, and filed a supporting memorandum, a statement of material facts, and twenty other exhibits. Mot. for Summ. J., ECF No. 136 (June 10, 2019) ("Jani-King Mot."); Defs.' Mem. in Supp. of Mot. for Summ. J., ECF No. 136-1 (June 10, 2019) ("Jani-King Mem."); Defs.' Local Rule 56(a)(1) Statement of Undisputed Facts, ECF No. 136-2 (June 10, 2019) ("Jani-King SMF").

On July 15, 2019, Plaintiffs filed a cross-motion for summary judgment. Cross-Mot. for Summ. J. and Opp. to Jani-King Mot., ECF No. 143 (July 15, 2019).

On July 24, 2019, the Court *sua sponte* struck Plaintiffs' cross-motion for being untimely and without authorization from the Court. Order, ECF No. 149 (July 24, 2019). Accordingly, the Court ordered Plaintiffs to file a response by August 2, 2019, to Jani-King's motion for summary judgment, which was properly pending before the Court. *Id.*

On August 2, 2019, Plaintiffs timely opposed Jani-King's motion for summary judgment. Pls. Opp. to Jani-King Mot., ECF No. 154 (Aug. 2, 2019) ("Pls.' Opp."). Plaintiffs also filed their response to Jani-King's statement of material facts, a supporting memorandum, and fourteen exhibits. *See* Docket Entries, ECF Nos. 155-56 (Aug. 2, 2019).

On August 16, 2019, Jani-King timely replied. Defs. Reply in Support of Jani-King Mot., ECF No. 161 (Aug. 16, 2019) ("Jani-King Reply").

On November 19, 2019, the Court held a hearing on Jani-King's motion for summary judgment. Minute Entry, ECF No. 172 (Nov. 19, 2019).

II. STANDARD OF REVIEW

A court will grant a motion for summary judgment if the record shows no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323 (1986). The non-moving party may defeat the motion by producing sufficient specific facts to establish that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise

properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247–48.

"[T]he substantive law will identify which facts are material." *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*; *see Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996) ("[M]ateriality runs to whether the dispute matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law.") (citing *Anderson*, 477 U.S. at 248).

"The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. When a motion for summary judgment is supported by documentary evidence and sworn affidavits and "demonstrates the absence of a genuine issue of material fact," the nonmoving party must do more than vaguely assert the existence of some unspecified disputed material facts or "rely on conclusory allegations or unsubstantiated speculation." *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44 (2d Cir. 2015) (citation omitted).

The party opposing the motion for summary judgment "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Id.* "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 250 (citing *Dombrowski v. Eastland*, 387 U.S. 82, 87 (1967); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

When deciding a motion for summary judgment, a court may review the entire record, including the pleadings, depositions, answers to interrogatories, admissions, affidavits, and any other evidence on file to determine whether there is any genuine issue of material fact. *See* Fed.

R. Civ. P. 56(c); *Pelletier*, 2007 WL 685181, at *7. In reviewing the record, a court must "construe the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences in [his] favor." *Gary Friedrich Enters., L.L.C. v. Marvel Characters, Inc.*, 716 F.3d 302, 312 (2d Cir. 2013) (citation omitted). If there is any evidence in the record from which a reasonable factual inference could be drawn in favor of the non-moving party for the issue on which summary judgment is sought, then summary judgment is improper. *See Security Ins. Co. of Hartford v. Old Dominion Freight Line Inc.*, 391 F.3d 77, 83 (2d Cir. 2004).

III. DISCUSSION

Plaintiffs' class-wide unjust enrichment claims are based on Jani-King's purported violation of Connecticut's anti-kickback statute, Conn. Gen. Stat. § 31-73(b), which provides:

> No employer, contractor, subcontractor, foreman, superintendent or supervisor of labor, acting by himself or by his agent, shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such person shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment. A payment to any person of a smaller amount of wages than the wage set forth in any written wage agreement or the repayment of any part of any wages received, if such repayment is not made in the payment of a debt evidenced by an instrument in writing, shall be prima facie evidence of a violation of this section.

Section 31-73(b).

Jani-King argues that Plaintiffs' unjust enrichment claims fail, as a matter of law, because (1) Plaintiffs are not employees; and (2) the payment of franchise fees, which Jani-King alleges are the sole payments made by Plaintiffs to Jani-King, does not violate any public or legislative policy. Jani-King Mem. at 1-2.

The Court will address each of these arguments in turn.

Ultimately, while there is a genuine issue of material fact as to whether Plaintiffs are employees rather than independent contractors under Connecticut law, this record lacks the evidence necessary to create a genuine issue of fact as to their entitlement to relief on their unjust enrichment claim.

A. Applicability of the Employee Status Test to Franchise Agreements

Jani-King argues that Plaintiffs' status as franchisees under the Connecticut Franchise Act, Conn. Gen. Stat. §§ 42-133e – 42-133h ("CFA"), cannot create employment under Connecticut's wage statutes. Jani-King Mem. at 15. In other words, as they argued similarly in their motion to dismiss, Jani-King contends that being a franchisee is mutually exclusive with being an employee, and reading the wage and franchise statutes "to regulate broadly overlapping economic arrangements would both contradict the legislature's purpose and bring the CFA and Connecticut wage statutes . . . into avoidable conflict." *Id.*

In Jani-King's view, these two sets of statutes impart different remedial schemes that—according to Jani-King—are "incompatible" and "irreconcilable." *Id.* at 18 ("Layering employee onto franchise protections for small or owner-operated franchises could upend the regulatory scheme and legislative judgment enacted by the CFA."). Instead, Jani-King argues that the Court should exclude contractual standardization of quality, which is inherent in franchise agreements, from its analysis of employer control in the ABC[2] test. *Id.* at 18-19.

To Plaintiffs, Connecticut's ABC test for independent contractor misclassification "creates a presumption that 'any service provided by an individual is considered employment,

[2] Connecticut General Statutes § 31-222(a)(1)(B)(ii) is "commonly referred to as the 'ABC test,' with parts A, B and C corresponding to clauses I, II and III respectively." *Sw. Appraisal Grp. LLC v. Adm'r Unemployment Compensation Act*, 324 Conn. 822, 832 (2017) (internal citations omitted).

unless and until the recipient of the services' can prove all three prongs of the test." Pls.' Opp. at 1-2 (citing *Tianti ex rel Gluck v. Williams Raveis Real Estate, Inc.*, 231 Conn. 690, 697-98 n.8 (1995)). Plaintiffs argue that they provide commercial cleaning work, which is part of Jani-King's regular business, and that the record demonstrates Jani-King's right to control Plaintiffs' work, both under the contract and in fact, *id.* at 21-22 (explaining why Plaintiffs satisfy part A of the ABC test); that the customer premises where Plaintiffs provide their cleaning services are part of Jani-King's usual places of business, *id.* at 12-18 (explaining why Plaintiffs satisfy part B of the ABC test); and that they are not engaged in a distinct business from Jani-King, *id.* at 18-20 (explaining why Plaintiffs satisfy part C of the ABC test). As a result, Plaintiffs argue that "[a]llowing Jani-King to hide behind the franchise label to avoid the consequences of its misclassification of the plaintiffs would seriously weaken and undermine an important, remedial statute, and . . . does a disservice to . . . franchise systems that do not control every aspect of their franchisees' work." *Id.* at 25.

In reply, Jani-King argues that quality standards are fundamental in a franchise agreement, and these quality standards are different from employer supervision. Jani-King Reply at 7-10. According to Jani-King, "[f]ranchisees with the right to decline to provide services and to provide service with no supervision whatsoever are not employees." *Id.* at 11 (emphasis omitted).

The Court disagrees.

As this Court has already held, *see Mujo I*, 307 F. Supp. 3d at 45, under Connecticut law, the provision of services by an individual is presumptively employment. *See Standard Oil of Conn., Inc. v. Adm'r, Unemployment Comp. Act*, 320 Conn. 611, 616 (Conn. 2016) ("Because the provision is in the conjunctive, the party claiming the exception to the rule that the service is

employment must show that all three prongs of the test have been satisfied." (citation omitted)).

The Minimum Wage Act provides:

> Service performed by an individual shall be deemed to be employment . . . unless and until it is shown . . . that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .

Conn. Gen. Stat. § 31-222(a)(1)(B)(ii) (setting forth Connecticut's ABC test). The statute includes a lengthy list of services excluded from "employment" within the meaning of the Minimum Wage Act. *See, e.g.*, Conn. Gen. Stat. § 31-222(a)(5)(A) (providing, *inter alia*, that "service[s] performed by an individual in the employ of such individual's son, daughter or spouse, and services provided by a child under the age of eighteen in the employ of such child's father or mother" are exempted subject to record keeping requirements).

This Court has also previously found that nothing in the text, purpose, or caselaw of either the Connecticut Minimum Wage Act or the Connecticut Franchise Act precludes the application of the relevant independent contractor test under § 31-222 to the franchisor-franchisee relationship. *See Mujo I*, 307 F. Supp. 3d at 46 ("Jani-King has not cited nor has the Court identified any Connecticut decisions precluding application of the independent contractor test to a franchise agreement."). Significantly, "[§ 31-222] makes no express exemption for franchises, nor can we imply an exemption, particularly when, as is the case here, the legislature has created numerous exemptions from coverage under the act." *Jason Roberts, Inc. v. Adm'r*, 127 Conn. App. 780, 787 (2011); *see also Standard Oil*, 320 Conn. at 616 ("When interpreting

provisions of the act, we take as our starting point the fact that the act is remedial and, consequently, should be liberally construed in favor of its beneficiaries. . . . Indeed, the legislature underscored its intent by expressly mandating that the act shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases." (internal quotation marks and citations omitted)).

Accordingly, Connecticut's ABC test is the appropriate one for determining if there is a genuine issue of material fact as to whether Plaintiffs were unlawfully misclassified as independent contractors.

1. Part A of Connecticut's ABC Test

Part A of Connecticut's ABC test focuses on the purported employer's "right to control the means and methods of work." *Standard Oil*, 320 Conn. at 623 (internal citations omitted). The question is "who has the right to direct what shall be done and when and how it shall be done?" *Id.* "The determination of general control is not always a simple problem. Many factors are ordinarily present for consideration, no one of which is, by itself, necessarily conclusive." *Tianti*, 231 Conn. at 698 (citing *Silverberg v. Great Sw. Fire Ins. Co.*, 214 Conn. 632, 639 (1990); *Bourgeois v. Cacciapuoti*, 138 Conn. 317, 321 (1951)). An independent contractor "contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." *Tianti*, 231 Conn. at 697. The purported employer "bears the burden of showing that the workers hired as independent contractors have been and will continue to be free from control and direction in connection with the performance of services, both under their contract for the performance of services and in fact." *Standard Oil*, 320 Conn. at 624 (internal quotation marks and formatting omitted).

Connecticut courts have emphasized the right to discharge or terminate an individual and the right of intervention as indicative of a general right to control. *See Latimer v. Adm'r, Unemployment Compensation Act*, 216 Conn. 237, 251 (1990) (The "right of intervention . . . evinces a right to control and direct[.]"); *Standard Oil*, 320 Conn. at 630 ("The right to terminate [an employment] relationship without liability is not consistent with the concept of an independent contract[or]." (citing *Tianti*, 231 Conn. at 698)).

Here, Jani-King emphasizes the franchise agreement between the parties. Jani-King Mem. at 22. Jani-King submits that the express terms of the contract allow Plaintiffs to decide how to perform cleaning services, when the services would be performed, by whom, and whether Plaintiffs would provide services at all. *Id.* Furthermore, Jani-King argues that Plaintiffs were free to chose customer accounts; free to set their schedules; free to hire employees; provided with opportunities for profit and loss; paid by the customer account instead of an hourly rate; not subject to termination without cause; and, most importantly, expressly classified as independent contractors. *Id.* at 23-25.

In response, Plaintiffs argue that "Jani-King exercises extensive control over nearly every aspect of the Plaintiffs' cleaning work, including, but not limited to: providing customer service, accounting, collections and billing functions in connection with Plaintiffs' cleaning services;" negotiating contracts with customer accounts that are then offered to Plaintiffs to accept or reject; requiring prior approval for any customer accounts solicited by Plaintiffs; controlling all advertising and promotional materials related to Plaintiffs' services; requiring Plaintiffs to wear Jani-King branded uniforms and use other Jani-King branded items; requiring Plaintiffs to meet Jani-King standards in training and on the job; inspecting Plaintiffs' work for "quality-control"; and dictating who and what Plaintiffs may bring to a customer's premises. Pls.' Opp. at 21-22.

Significantly, Plaintiffs emphasize that it is Jani-King, not the Plaintiffs, who enters into contracts with customers seeking commercial cleaning services. *Id.* at 25.

In reply, Jani-King argues that the contractual quality standards inherent in its franchise agreements along with Jani-King's right to enforce its quality standards do not rise to the level of employer supervision required for part A, nor do they give Jani-King a general right of control. Jani-King Reply at 8-10.

The Court disagrees.

The mere existence of a franchise agreement is not dispositive as to whether individuals are independent contractors or employees. *See, e.g.*, *Jason Roberts*, 127 Conn. App. at 787 ("The plaintiff neither cites, nor does our research reveal, any legal support for this argument" that the existence of a franchise agreement exempts the relationship from purview of § 31-222(a)(1)(B).). "The determination of the status of an individual as an independent contractor or employee . . . is a question of fact." *Tianti*, 231 Conn. at 696 (citation omitted).

Here, significantly, Jani-King has formalized its right to intervene and its right to terminate the franchise agreement with Plaintiffs. First, Jani-King retains the right to conduct "quality control inspections of accounts" to ensure that Plaintiffs' service (1) adheres to "the contract between Franchisor [Jani-King] and the customer" and (2) meets Jani-King's "performance standards." Luli & Son Franchise Agmt. at § 4.19.3. Although Jani-King submits that it only conducts these inspections "from time to time," Connecticut courts have repeatedly held, "[i]t is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant and agent." *Id.* at 697 (citing *Latimer v. Adm'r, Unemployment Compensation Act*, 216 Conn. 237, 248 (1990); *see also Caraher v. Sears, Roebuck & Co.*, 124 Conn. 409, 413-14 (1938)). As a result, it is not the

frequency with which Jani-King exercises its right to intervene in the form of quality control inspections, but the fact that Jani-King retains this right at all means a reasonable factfinder could conclude that Jani-King has general control over the Plaintiffs and their work.

Second, Jani-King may terminate the franchise agreement upon the occurrence of sixteen conditions of default, which include circumstances wherein Plaintiffs "fail[] to maintain [Jani-King] standards" as reflected in the franchise agreement or any of Jani-King manuals. Luli & Son Franchise Agmt. § 8.1(g)(ii). These conditions of default are extensive, and many allow Jani-King to terminate the franchise relationship within thirty (30) days after written notice. *See id.* § 8.1(g). Furthermore, many of these conditions of default are highly subjective, as the Plaintiffs allege, and "effectively provide Jani-King with the right to terminate franchisees at will, since it can decide whether Franchisees have engaged in 'conduct which reflects unfavorably upon . . . Jani-King[.]'" Pls.' SMF ¶ 76 (citing Luli & Son Franchise Agmt. at § 8.1(g)(iii) (delineating as a condition of default when franchisee "engages in conduct which reflects unfavorably upon the operation or reputation of the Jani-King franchise business or System")). As a result, a reasonable factfinder could find that Jani-King's "right to terminate [the] relationship without liability is not consistent with the concept of an independent contract[or]." *See Standard Oil*, 320 Conn. at 630 (internal citation omitted).

In addition to these two major indicators of general control, Jani-King's level of control and involvement in nearly every aspect of Plaintiffs' provision of cleaning services extends beyond merely ensuring quality standards. The record shows that Jani-King controls the manner and means of its franchisees' work through its training, inspections, and detailed policies and procedures that franchisees must follow. *See* Jani-King SMF ¶ 77 ("Jani-King provides mandatory initial training . . . manuals with information about recommended techniques for

operating, marketing, and managing a franchise business, as well as general specifications for the equipment needed to perform the work."); *id.* ¶ 81 ("Jani-King may address *repeated* deficiencies by suspending the franchise owner's contractual right to serve customer accounts . . . or by providing additional training[.]" (emphasis in original)); *id.* ¶ 82 ("The franchise agreement provides that: 'Franchisee understands and agrees that . . . Franchisor may inspect any premises serviced by Franchisee at any time to ensure that the quality of service being rendered is in accordance with Jani-King standards.'" (quoting Luli & Son Franchise Agmt. at § 4.19; Mujo Franchise Agmt. at § 4.17)). If Plaintiffs fail to meet Jani-King standards in any way, Jani-King may terminate their franchise agreement with limited notice. *See* Luli & Son Franchise Agmt. at § 8.1 (listing sixteen conditions of default wherein Jani-King may terminate the franchise agreement); *see also id.* ("Franchisee shall be deemed to be in default, and Franchisor may, at its option, terminate this Agreement . . . (g) . . .(ii) If Franchisee fails to maintain the standards that Franchisor requires in this Agreement or any other standards contained in Jani-King manuals.").

In *Standard Oil*, the Connecticut Supreme Court held that the individual installers/technicians were not employees, and emphasized the following facts: they all had an independent business that provided the same type of service as they provided for the plaintiff's purported employer; they had their own business cards; advertised their own business; derived income from other sources; and could accept or reject the plaintiff's assignments without any adverse consequences. 320 Conn. at 633.

As already detailed, that is not the case here: all of Plaintiffs' income derives directly from customers contracted for or first approved by Jani-King, *see* UOC, ECF No. 156-5 at JKCT00001104 ("All proposals for services made by [Franchisees] to either current or

prospective clients must be reviewed and approved by [Jani-King] staff. Any solicitation for services made by [Franchisee] must be approved by [Jani-King]."); Plaintiffs' advertising and marketing must follow Jani-King policy, *see* Jani-King SMF ¶ 71 ("Franchise owners agree to meet brand standards addressing everything from cleaning results, to the appearance of people cleaning . . . , to how the service is associated with Jani-King trade names and advertising."); and although Plaintiffs may reject customer accounts, there is no guarantee that they will get additional customers or that their proposals or bids will be accepted by Jani-King, *see* Luli & Son Franchise Agmt. at § 6.1.2 ("Franchisor does not guaranty that the Initial Business will reach or remain at the level stated on the Franchise Summary throughout the term of this Agreement.") (emphasis omitted)). The court in *Standard Oil* also noted that the individuals were not required to wear branded shirts and hats, but were compensated based on the project instead of hourly. 320 Conn. at 635. Although Plaintiffs are also compensated by account, and not hourly, Plaintiffs in contrast are required to wear Jani-King branded uniforms when performing cleaning services. Pls.' SMF ¶¶ 71, 108. Furthermore, unlike the installers/technicians in *Standard Oil*, 320 Conn. at 639, Plaintiffs were trained by Jani-King, and Plaintiffs must operate according to Jani-King manuals and policies.

Thus, Plaintiffs have submitted evidence of Jani-King's control over nearly every aspect of Plaintiffs' cleaning work. A reasonable factfinder thus could find that Jani-King possesses the right of control over the means and methods of Plaintiffs' work.

In order to successfully move for summary judgment, Jani-King must show that all three prongs of the ABC test are met. *See Standard Oil*, 320 Conn. at 616 ("Because [§ 31-222(a)(1)(B)(ii)] is in the conjunctive, the party claiming the exception to the rule that the service is employment must show that all three prongs of the test have been satisfied."). Because the

Court has determined that Jani-King cannot satisfy part A of Connecticut's ABC test, the Court must deny summary judgment.

Nevertheless, the Court will analyze the remaining two prongs of the ABC test.

2. Part B of Connecticut's ABC Test

Part B of Connecticut's ABC test focuses on whether the services performed are either outside the purported employer's "usual course of business" or the purported employer's "places of business." § 31-222(a)(1)(B)(ii). A purported employer may thus satisfy part B by establishing either of these two requirements. The Connecticut Supreme Court noted the lack of clarity and consensus in defining "places of business," and after reviewing the case law and the broader statutory scheme, decided that two principles should govern a court's construction of Part B of the ABC test. *Standard Oil*, 320 Conn. at 645-52.

First, the court emphasized "the harmonious construction of related statutes," and noted that the statutory scheme in Connecticut has always provided "that an independent contractor may be considered an employee under the act if the contractor worked 'on or about the premises under such employer's control." *Id.* at 652-53. Thus, "a reviewing court should consider the extent to which the employer exercised control over the location where the independent contractor worked when construing part B of the ABC test." *Id.* at 653.

Second, the court emphasized the "conjunctive nature of the test, which suggests that no one part of the test should be construed so broadly . . . that the other two parts of the test are rendered superfluous." *Id.* at 654. As a result, the court rejected the broad interpretation adopted by some states that "the meaning of 'places of business' . . . should extend to all locations where [individuals] perform[] their services . . . or regularly represented the interests of the [purported employer]." *Id.*

Jani-King contends that customer premises are distinguishable from Jani-King's place of business. Jani-King. Mem. at 27. Plaintiffs submit that an employer's place of business is not limited to its own corporate offices, and should include the premises of commercial cleaning customers. Pls.' Opp. at 15-16. In support, Plaintiffs cite to nonbinding precedent for the proposition that a purported "employer's 'place of business is not limited only to its own offices,' but can extend to any location where workers regularly represent an employer's interest." *Id.* at 15 (collecting cases). Plaintiffs also seek to prevail under the first option for part B by arguing that commercial cleaning work is part of Jani-King's usual course of business, *id.* at 12-15, but Jani-King notes that it relies on the second option, Jani-King Reply at 11. Consequently, Jani-King argues that because it does not control the premises of individual customers, no reasonable factfinder could conclude that Plaintiffs performed cleaning services at Jani-King's usual place of business. *Id.* at 11-12.

The Court disagrees.

Jani-King, as the purported employer, may satisfy part B of the ABC test by establishing either the first or second option, *see* § 31-222(a)(1)(B)(ii) (allowing an enterprise to satisfy part B by establishing either requirement), and Jani-King has chosen the second option, which ascertains whether the services performed are outside the purported employer's "places of business."

Connecticut courts avoid a broad interpretation of "places of business" "because of certain undesirable, practical consequences that might follow," including tax liabilities.[3] *Standard Oil*, 320 Conn. at 654-56. In *Standard Oil*, the Connecticut Supreme Court concluded that the "meaning of 'places of business' . . . should not be extended to the [customer] homes in

[3] When a federal court sits in diversity, as this Court does here, it "must predict how that state's highest court would resolve a question of state law." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 402 (2d Cir. 2000).

which the installers/technicians worked, unaccompanied by the [purported employer or his employees] and without the [purported employer's] supervision." *Id.* at 655. The court noted that the homeowner customers' homes were under the homeowners' control, in contrast to the purported employer's business offices, warehouse and other facilities. *Id.* Integral to the court's conclusion were the following: it was the homeowner customers who "(1) determined when access to their homes was convenient; (2) brought the installers/technicians to locations inside their homes and elsewhere on their property where equipment was to be installed; and (3) identified problems with the installation process or with the newly installed equipment during the warranty period." *Id.*

Here, Plaintiffs performed their cleaning services at the workplaces of cleaning customers, and it is the cleaning customers who determine when Plaintiffs could clean and communicated any complaints with Plaintiffs' performance (usually to Jani-King). The cleaning customers also determined whether to admit Plaintiffs to their premises. But unlike in *Standard Oil*, 320 Conn. at 654-56, Plaintiffs here worked in commercial spaces, not residential homes. Additionally, although Jani-King did not accompany the Plaintiffs or directly supervise their regular cleaning, Jani-King could and did perform quality control inspections and required Plaintiffs to adhere to Jani-King standards and policies while cleaning. Furthermore, Jani-King directly tracked and addressed customer complaints, and was present at the site during the initial walk-through and bid process for the cleaning customer contract.

Although "individual job sites are not necessarily synonymous with 'places of business of the enterprise for which the service is performed,'" *Standard Oil*, 320 Conn. at 656, based on this record, a reasonable factfinder could conclude that the premises of commercial cleaning customers were within Jani-King's "places of business."

Accordingly, there is a genuine dispute of material fact as to whether Jani-King satisfies part B of the ABC test.

3. Part C of Connecticut's ABC Test

Part C of Connecticut's ABC test focuses on whether the "putative employee 'is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." *Sw. Appraisal Grp. LLC v. Adm'r Unemployment Compensation Act*, 324 Conn. 822, 834 (2017) (citing § 31-222(a)(1)(B)(ii)(III)). "Put differently, part C 'seeks to discern whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise.'" *Id.* at 835 (internal quotations omitted) (citing *Athol Daily News v. Bd. of Review of the Div. of Emp't & Training*, 439 Mass. 171, 181 (2003)).

Importantly, "part C must be considered in relation to the totality of the circumstances, with that inquiry guided by a multifactor test" that "evaluates the dynamics of the relationship between the putative employee and the employer; there is no dispositive single factor or set of factors." *Sw. Appraisal Grp.*, 324 Conn. at 838-39 (citations omitted). "[T]he degree to which a putative employee provides similar services for [other] third parties cannot be considered in isolation from, or given primacy over, the other factors." *Id.* at 840.

A court analyzing part C should consider the following nonexhaustive list of factors:

> (1) the existence of state licensure or specialized skills;
> (2) whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising;
> (3) the existence of a place of business separate from that of the putative employer;
> (4) the putative employee's capital investment in the independent business, such as vehicles and equipment;
> (5) whether the putative employee manages risk by handling his or her own liability insurance;

> (6) whether services are performed under the individual's own name as opposed to the putative employer;
> (7) whether the putative employee employs or subcontracts others;
> (8) whether the putative employee has a saleable business or going concern with the existence of an established clientele;
> (9) whether the individual performs services for more than one entity; and
> (10) whether the performance of services affects the goodwill of the putative employee rather than the employer.

Id. at 839-40; *see also id. at* 833-34 ("In applying the ABC test, we must balance preventing the use of sham independent contractor agreements to avoid unemployment insurance obligations against hampering those who undertake to do business together as independent contracting parties, rather than as employer and employee, on a legitimate basis." (internal quotation marks and citations omitted)).

Jani-King submits that by operating a franchise, Plaintiffs are customarily engaged in an independently established business, and not working as employees. Jani-King Mem. at 28. Consistent with their franchise agreements, Jani-King submits that Plaintiffs made capital investments in the form of franchise fees; provided their own equipment and transportation; hired or knew they could hire employees; provided cleaning services to multiple customers; generated customer goodwill or suffered consequences of poor service; owned potentially saleable businesses; and held themselves out as owners of Jani-King franchisees through their business cards. *Id.* at 29-30. According to Jani-King, "[t]reating the hallmarks of franchising as proof of employment would transform franchisees into employees, upending the legislative policy enacted by the CFA." *Id.* at 29. Jani-King emphasizes that Plaintiffs' entrepreneurial choices, and specifically lack of interest in expanding or increasing efficiency, had economic consequences that do not indicate employment.[4] *Id.* at 29.

[4] Jani-King provides examples of other franchisees with more successful franchises than Plaintiffs. These franchisees' experiences are summarized above, *supra* at 1-12.

In response, Plaintiffs contend that they are not actively supplying cleaning services to third parties. Pls.' Opp. at 18. They submit that they are not engaged in a distinct business of commercial cleaning: not only are the cleaning customers supplied or approved by Jani-King, but Plaintiffs are subject to a non-compete provision for at least one year after termination of the Jani-King franchise agreement. *Id.* at 19-20. Plaintiffs ask this Court to consider, like courts in Massachusetts have done, whether "'the worker is capable of performing the service to anyone wishing to avail themselves of the services, or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.'" *Id.* at 19 (citing *Coverall North America, Inc. v. Com'r of Div. of Unemployment Assistance*, 447 Mass. 852, 858 (2006) (quoting *Athol Daily News v. Bd. of Review of Div. of Emp't and Training*, 439 Mass. 174, 181 (2003))). According to Plaintiffs, "when they are cleaning, they are wearing Jani-King's 'hat,' rather than the hat of their own distinct businesses," and they note that Connecticut's wage laws contains no exemption for franchisors. *Id.* at 20.

In reply, Jani-King emphasizes that it is obligated under the franchise marketing plan to contract directly with cleaning customers to standardize basic services and pricing, but Plaintiffs may "decide whether to accept any account, retain the right to specified account revenue, and, subject to a rarely withheld approval, have the right to solicit new customers and contract with existing customers to perform additional work." Jani-King Reply at 12. According to Jani-King, "[f]ranchise owners who can work without supervision, never supply their personal labor, set their own schedules, and reject any customer account any time are independent contractors, not employees." *Id.* at 13.

The Court disagrees.

Although "evidence of the performance of services for third parties is not required to

prove part C of the ABC test," the inquiry requires the Court to consider the totality of the circumstances. *Sw. Appraisal Grp.*, 324 Conn. at 741. Admittedly, Plaintiffs have provided initial capital investments, have the ability to hire employees, and provide worker's compensation and liability insurance, but Plaintiffs have also pointed to significant evidence that there is a genuine dispute of material fact as to whether Jani-King can satisfy its burden under part C of the ABC test. As franchisees of Jani-King, all of Plaintiffs' cleaning services are provided as part of that franchise agreement for at least the duration of the agreement and one year afterwards, and thus not as part of any distinct business of Plaintiffs'.

First, the third parties for which Plaintiffs provide services are either obtained or approved by Jani-King, and even though Plaintiffs may reject customer accounts offered by Jani-King, there is no guarantee that Jani-King will continue to offer them more work. *See* Luli & Son Franchise Agmt. at § 6.1.2 ("Franchisor [Jani-King] does not guaranty that the Initial Business will reach or remain at the level stated on the Franchise Summary throughout the term of this Agreement.").

Second, even if Mr. Muharremi and other Plaintiffs may have business cards, those business cards do not indicate that Plaintiffs hold themselves out as independent businesses. *Compare* Ex. 19: Luli & Son LLC Business Card (noting that it was an authorized franchisee of Jani-King, and including Jani-King's logo), *with Sw. Appraisal Grp.*, 324 Conn. at 839 (listing as one factor in the part C analysis "whether the putative employee holds himself or herself out as an independent business through the existence of business cards, printed invoices, or advertising").

Third, all advertising and marketing must meet Jani-King policy.

Fourth, in conjunction with this, services are not performed solely in Plaintiffs' names,

because of the marketing limits and the fact that Jani-King negotiates the customer contracts.

Fifth, and perhaps most importantly, Plaintiffs do not provide cleaning services for or through any other entity besides Jani-King.

This Court has previously held that "Connecticut law does not foreclose the possibility of a franchisee also being an employee." *See* MTD Order at 13. Here, there is a genuine dispute of material fact as to whether Plaintiffs have independent business enterprises in commercial cleaning outside of their work for Jani-King.

Accordingly, there is a genuine dispute of material fact in their favor as to parts A, B, and C of the ABC test, so the Court must deny summary judgment on that basis.

B. The Elements of Plaintiffs' Unjust Enrichment Claim

Even if a reasonable factfinder could conclude that Jani-King unlawfully misclassified Plaintiffs as independent contractors instead of employees under § 31-222(a)(1)(B)(ii), there still is another outstanding issue with respect to Plaintiffs' unjust enrichment claims: whether there is a genuine issue of material fact as to their entitlement to relief.

Unjust enrichment is "a broad and flexible remedy," "[w]ith no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable." *Vertex, Inc. v. City of Waterbury*, 278 Conn. 557, 573 (2006). In order to recover for unjust enrichment, a plaintiff "must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." *Id*.

"A claim for unjust enrichment is an equitable claim. In matters of equity, the court is one of conscience which should be ever diligent to grant relief against inequitable conduct, however ingenious or unique the form may be." *Town of New Hartford v. Connecticut Res. Recovery*

Auth., 291 Conn. 433, 459 (2009). In analyzing a claim of unjust enrichment, the Court must "examine the circumstances and the conduct of the parties" and determine "what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable." *Id.* at 451 (internal citations and quotations omitted); *see also Greenwich Contracting Co., Inc. v. Bonwit Constr. Co., Inc.*,, 156 Conn. 123, 130 (1968) ("[T]he word 'unjustly' as used in the equitable maxim that one shall not be allowed unjustly to enrich himself at another's expense means unlawfully.").

"'Although unjust enrichment typically arises from a plaintiff's direct transfer of benefits to a defendant, it also may be indirect, involving, for example, a transfer of a benefit from a third party to a defendant when the plaintiff has a superior equitable entitlement to that benefit.'" *Geriatrics, Inc. v. McGee*, 332 Conn. 1, 25 (2019) (quoting *Town of New Hartford*, 291 Conn. at 468). The standard for alleging a defendant's indirect benefit is "highly restrictive," and "the plaintiff must prove that it has 'a better legal or equitable right' to the disputed benefit than the defendant." *Id.* (quoting 2 Restatement (Third), Restitution and Unjust Enrichment § 48 at 144 (2011)). "The plaintiff must prove that its right is both recognized, and accorded priority over the interest of the defendant, under the law of the jurisdiction." *Id.* (internal citations and quotations omitted).

As the Court noted previously in allowing Plaintiffs' unjust enrichment claim to survive, "Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law." *Mujo*, 307 F. Supp. 2d at 51.

As a preliminary matter, Jani-King argues that Mr. Mujo's claim is time-barred, because he paid his initial franchise fee on July 11, 2007, but did not file this action until December 5,

2016. Jani-King Mem. at 35. According to Jani-King, any payments made before December 5, 2010, which is six years prior to the filing of this lawsuit, is time-barred. *Id.*

Plaintiffs contend that although Mr. Mujo paid his initial down payment in 2007, he continued making payments of various other fees to Jani-King until he ceased working for them in 2016. Pls.' Opp. at 40. Because these fees were paid continuously into the relevant timeframe, Plaintiffs argue Mr. Mujo's claims are not subject to dismissal. *Id.*

The Court agrees.

Jani-King did not raise the statute of limitations issue in their Answer or in their prior filings. *See, e.g.*, Mot. to Dismiss, ECF No. 45 (Mar. 30, 2017). They cite to Connecticut law that provides that "[n]o action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section," Conn. Gen. Stat. § 52-576(a). But Jani-King only argues that "some courts have held that under a court's equitable powers, a court may provide a remedy (in unjust enrichment) even though the governing statute of limitations has expired." *Corbett v. Petrillo*, 2008 WL 726373, at *4 (Conn. Super. Ct. Feb. 29, 2008) (citing *Vissa v. Pagano*, 2005 WL 1088926, at *3 (Conn. Super. Ct. Apr. 2, 2005), *aff'd*, 100 Conn. App. 609 (2007)). In this case, the relevant date is the last date when Mr. Mujo continued making payments of various franchise fees to Jani-King. Because Mr. Mujo continued providing cleaning services to Jani-King until early 2016, he necessarily made the monthly payments at issue in the unjust enrichment claim throughout this time as well. Because his lawsuit was filed the same year, on December 5, 2016, there is no statute of limitations issue and the claims fall within the minimum six-year limit.

Accordingly, the Court will not dismiss Mr. Mujo's claim for unjust enrichment on this

basis.

Next, Defendants argue that any fees allegedly paid by Plaintiffs could not constitute unjust enrichment. As an initial matter, they note that any franchise fees were authorized under Connecticut law and therefore, could not be void as a matter of public policy. Additionally, any other fees could not constitute "wages" within the meaning of Section 31-73(b) because "revenue designated as 'fees' by Plaintiffs' franchise agreements flows directly to Jani-King under contracts with third parties (i.e., cleaning contracts)." Jani-King Mem. at 35.

Plaintiffs argue, however, that "the franchise fees explicitly require cleaning workers to pay large sums in exchange for cleaning work in violation of public policy." Pls.' Opp. at 38 (citations and footnote omitted). And, as Plaintiffs argue, "[b]ecause they have to pay so much money upfront to obtain their cleaning work, the franchisees must keep working for Jani-King to earn back the money they have been paid." *Id.* at 39. In addition, Plaintiffs argue that "[o]ther ongoing fees such as insurance, advertising, accounting, and technology fees, also must be paid as a condition of continued employment, or Jani-King has the right to terminate the franchise." *Id.* (citation omitted).

The Court disagrees.

At this stage of the case, Plaintiffs must do more than "state[] a plausible claim for relief" to survive a motion for summary judgment. *Compare Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."); *with Anderson*, 477 U.S. at 247-48 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (emphasis in original)). And, as the Court stated in its motion to dismiss ruling, even if the franchise

agreement is an employment agreement, it does not follow that any payments under the franchise agreement are "in violation of public policy," as Plaintiffs argue. Indeed, "[b]ecause the various fees deducted from Plaintiffs' compensation were provided for in the franchisor-franchisee agreement entered into by the parties, Plaintiffs' claim for relief under § 31-71e fails as a matter of law." *Mujo*, 307 F. Supp. 2d at 50.

Now, the Court also stated that "even if these fees are not wages under § 31-71e, *Mytych* [*v. May Department Stores Co.*, 260 Conn. 152 (2002)], leaves open the possibility that the fees and deductions required under the Agreement may nonetheless violate public policy." *Id*. at 51. As a result, under § 31-73(b), "Plaintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law." *Id.*

But in order to have a viable claim, Plaintiffs must do more than show that the franchise agreement is an employment agreement and then conclusorily assert that any fee or payment required by the franchise agreement is void as a matter of law. As an initial matter, and as indicated above, the Court already rejected that argument when it dismissed Plaintiffs' § 31-71c wage claim. *See Mujo*, 307 F. Supp. 2d at 49-50 ("At oral argument, Plaintiffs nevertheless argued that these deductions, wholly consistent with the parties' franchisor-franchisee agreement, violate § 31-71a(3) because the parties' agreement should be rendered void as a matter of public policy. The Court disagrees."). As a result, to the extent that Plaintiffs' § 31-73(b) claim rests solely on the already rejected notion that the franchise agreement violates public policy, that claim fails as a matter of law. *See, e.g.*, *Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc.*, 250 Conn. 334, 368-370 (1999) (affirming trial court's decision, which

emphasized "the public policy of Connecticut to promote fairness among businesses behind the franchise act"); *see also* Conn. Gen. Stat. §§ 42-133e – 42-133h (detailing regulation of franchises in Connecticut).

Based on this record, Plaintiffs' § 31-73(b) claim rests solely on the franchise agreement being an employment agreement in violation of public policy. As they have argued in their opposition, "the franchise fees explicitly require cleaning workers to pay large sums in exchange for cleaning work in violation of public policy." Pls.' Opp. at 38 (citations and footnote omitted). They also argue that "[b]ecause they have to pay so much money upfront to obtain their cleaning work, the franchisees must keep working for Jani-King to earn back the money they have been paid." *Id.* at 39. Additionally, Plaintiffs submit that "[o]ther ongoing fees such as insurance, advertising, accounting, and technology fees, also must be paid as a condition of continued employment, or Jani-King has the right to terminate the franchise." *Id.* (citation omitted). Finally, Plaintiffs argue that Jani-King's practice of deducting "charge-backs" from Plaintiff's gross revenue is also violative of public policy. *See id.* at 39-40 ("A 'charge-back' occurs when a customer fails to pay Jani-King for work already performed by [P]laintiffs.").

Plaintiffs, however, have provided no basis for distinguishing their claims for relief from legitimate fees within the franchise agreement, which the Court must presume exists, given the applicable caselaw. *See Mujo*, 307 F.Supp.3d at 50 ("This Court therefore 'must enforce the contract as drafted by the parties and may not relieve [Plaintiffs] from anticipated or actual difficulties undertaken pursuant to the contract.'") (quoting *Geysen v. Securitas Sec. Services USA, Inc.*, 322 Conn. 385, 392 (2016)).

Put another way, under the Plaintiffs' view of the law—at least on this record—the franchise agreement has no value and any fee paid by them to Jani-King is "necessary to secure

employment or continue in employment." *See Mytych*, 260 Conn. at 166 ("The Appellate Court properly concluded that the language of § 31-73(b) was clear and unambiguous in that it prohibits an employer from demanding 'any . . . sum of money or contribution from any person . . . upon the representation or the understanding that such . . . sum of money . . . is necessary to secure employment or continue in employment."). But franchise agreements are not *per se* invalid under Connecticut law, *see* Conn. Gen. Stat. §§ 42-133e – 42-133h (detailing regulation of franchises and franchise agreements under the Connecticut Franchise Act); *see id.* § 42-133e(b) (defining "franchise" as "an oral or written agreement or arrangement . . ."); and therefore must have some value.

Plaintiffs, however, have failed to identify that value or conversely, identify the fees that have been added beyond that value. *See Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 285 (1994) ("Where damages are appropriate but difficult to prove . . . all that can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier of fact to make a fair and reasonable estimate."[5] (internal citation and quotation marks omitted)); *see also* Luli & Son Franchise Agmt. § 4.3 ("In consideration of the franchise herein granted . . . and the initial services to be performed by Franchisor in connection with Franchisee's use in the Territory of the System, Property Marks and Confidential Information . . . Franchisee shall pay the [Initial Franchise Fee]."); *id.* § 4.1.2 ("Franchisor has developed and used, and continues to develop, use, and control in connection with its System certain Proprietary Marks [i.e. all trademarks,

[5] In *Hartford Whalers*, the Connecticut Supreme Court affirmed that the trial court had sufficient evidence to determine a remedy for unjust enrichment for advertising and merchandising services "based upon a contract price on the same order as the price that they had paid the previous year for a less extensive advertising program, and based upon the same price that Brass City, which the defendants had designated to sign the contract for the year in question, had agreed to pay." 231 Conn. at 286.

trade names, trade dress, service marks, slogans, and logos] that have become associated with its System so as to impart to the public superior standards of quality and service."); *id.* § 4.5.2 ("Franchisee agrees to pay Franchisor an advertising fee . . . [which] will be used by [Jani-King to] . . . direct all advertising programs . . . satisfy any and all costs of maintaining, administering, directing, and preparing advertising . . . defray any of [Jani-King's] administrative costs incurred in activities reasonably related to advertising programs."); *id.* § 4.8 ("Franchisee agrees to pay . . . an accounting fee . . . to cover Franchisor's administrative costs and expenses for this service."). As a result, this record lacks the evidence necessary to create a genuine issue of fact as to their entitlement to relief on their §31-73(b) unjust enrichment claim.

Accordingly, the Court will grant summary judgment and dismiss Plaintiffs' unjust enrichment claim.

IV. CONCLUSION

For the foregoing reasons, Jani-King's motion for summary judgment is **GRANTED**.

The Clerk of Court is respectfully directed to close this case.

SO ORDERED at Bridgeport, Connecticut, this 21st day of December, 2019.

/s/ Victor A. Bolden
VICTOR A. BOLDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SIMON MUJO and INDRIT MUHARREMI, *on behalf of themselves and all others similarly situated,* *Plaintiffs,* v. JANI-KING INTERNATIONAL INC., et al., *Defendants.*	No. 3:16-cv-1990 (VAB)

RULING AND ORDER ON MOTION FOR RECONSIDERATION

On December 30, 2019, Simon Mujo and Indrit Muharremi, on behalf of a class of over 100 Jani-King franchisees (collectively "Plaintiffs"), moved for reconsideration of this Court's December 21, 2019 Ruling and Order on a motion for summary judgment filed by Jani-King International, Inc., Jani-King, Inc., and Jani-King of Hartford, Inc. (collectively "Defendants" or "Jani-King"). Pls.' Mot. for Reconsideration, ECF No. 176 (Dec. 30, 2019) ("Pls.' Mot."), Pls.' Mem. in Support of Pls.' Mot., ECF No. 176-1 (Dec. 30, 2019) ("Pls.' Mem."); *see also* Ruling and Order on Mot. for Summ. J., ECF No. 175 (Dec. 21, 2019) ("Ruling and Order").

Under Local Rule 7(c), Plaintiffs ask the Court to reconsider its decision granting summary judgment for Jani-King and dismissing Plaintiffs' unjust enrichment claim. Pls.' Mot. at 1 (citing D. Conn. L. Civ. R. 7(c)).[1]

[1] While Plaintiffs filed this motion under Local Rule 7(c), the Court recognizes that Plaintiffs' motion also warrants consideration under Rule 59 of the Federal Rules of Civil Procedure, although there is no difference in the underlying legal standard in reviewing either motion. *See Kelly v. Honeywell Int'l, Inc.*, No. 3:16-cv-00543 (VLB), 2017 WL 6948927, at *2 (D. Conn. May 25, 2017) ("A motion for reconsideration filed under Local Rule 7(c) is equivalent as a practical matter to a motion for amendment of judgment under Fed. R. Civ. P. 59(e)." (citing *City of Hartford v. Chase*, 942 F.2d 130, 133 (2d Cir. 1991)). "[E]ach seeks to reopen a district court's decision on the theory that the court made mistaken findings in the first instance." *City of Hartford*, 942 F.2d at 133.

For the reasons discussed below, the motion for reconsideration is **DENIED**.

I. BACKGROUND

The Court will assume familiarity with the underlying record of this case and will only discuss matters relevant to resolving this motion.

On June 10, 2019, Jani-King timely moved for summary judgment, and filed a supporting memorandum, a statement of material facts, and twenty other exhibits. *See* Docket Entries, ECF No. 136 (June 10, 2019) (containing the referenced filings).

On August 2, 2019, Plaintiffs timely opposed Jani-King's motion for summary judgment, and filed their supporting memorandum of law, response to Jani-King's statement of material facts, a supporting memorandum, and fourteen exhibits, *see* Docket Entries, ECF Nos. 154-56 (Aug. 2, 2019 (containing the referenced filings). Jani-King timely replied, *see* Defs. Reply in Support of Jani-King Mot., ECF No. 161 (Aug. 16, 2019), and on November 19, 2019, the Court held a hearing on Jani-King's motion for summary judgment, Minute Entry, ECF No. 172 (Nov. 19, 2019).

The parties' filings focused primarily on the employment/independent contractor issue, i.e., whether Plaintiffs were unlawfully misclassified as independent contractors, but there was no discussion of the value of the various fees paid by Plaintiffs under the franchise agreement.

On December 21, 2019, the Court granted Jani-King's motion for summary judgment and dismissing Plaintiffs' remaining unjust enrichment claim. The Court applied Connecticut's ABC test for independent contractor misclassification, Conn. Gen. Stat. § 31-222(a)(1)(B)(ii), and found that a reasonable factfinder could conclude that Jani-King unlawfully misclassified Plaintiffs as independent contractors. Ruling and Order at 17-33.

Plaintiffs, however, did not have a viable claim for relief under unjust enrichment,

because they argued only that the franchise agreement is an employment agreement, so any fees made under the franchise agreement are void as a matter of law. *Id.* at 33-37 ("But in order to have a viable claim, Plaintiffs must do more than show that the franchise agreement is an employment agreement and then conclusorily assert that any fee or payment required by the franchise agreement is void as a matter of law."). The Court had already rejected this argument when it dismissed Plaintiffs' § 31-71c wage claim.

> Based on this record, Plaintiffs' § 31-73(b) claim rests solely on the franchise agreement being an employment agreement in violation of public policy. As they have argued in their opposition, "the franchise fees explicitly require cleaning workers to pay large sums in exchange for cleaning work in violation of public policy." Pls.' Opp. at 38 (citations and footnote omitted). They also argue that "[b]ecause they have to pay so much money upfront to obtain their cleaning work, the franchisees must keep working for Jani-King to earn back the money they have been paid." *Id.* at 39. Additionally, Plaintiffs submit that "[o]ther ongoing fees such as insurance, advertising, accounting, and technology fees, also must be paid as a condition of continued employment, or Jani-King has the right to terminate the franchise." *Id.* (citation omitted). Finally, Plaintiffs argue that Jani-King's practice of deducting "charge-backs" from Plaintiff's gross revenue is also violative of public policy. *See id.* at 39-40 ("A 'charge-back' occurs when a customer fails to pay Jani-King for work already performed by [P]laintiffs.").

Id. at 38.

Based on Connecticut law, specifically the Connecticut Franchise Act, Conn. Gen. Stat. §§ 42-133e – 42-133h, the Court found that the fees paid under the franchise agreement could not be *per se* invalid and must have some value. *Id.* at 39. Yet, despite the various filings, Plaintiffs did not identify the value of the franchise agreement itself, nor did they identify the fees that were added beyond that value. *Id.* Instead, Plaintiffs' arguments focused on the independent contractor misclassification issue and rehashed the same argument as before—that all the fees paid were unjust because the franchise agreement was an employment agreement.

Accordingly, the Court found that "this record lacks the evidence necessary to create a genuine issue of fact as to their entitlement to relief on their §31-73(b) unjust enrichment claim," and dismissed the claim, thereby granting summary judgment to Jani-King. *Id.* at 40.

Plaintiffs now move for the Court to reconsider its decision. Pls.' Mot. at 1.

II. STANDARD OF REVIEW

"The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (citations omitted). Indeed, "[m]otions for reconsideration shall not be routinely filed and shall satisfy the strict standard applicable to such motions." D. Conn. L. Civ. R. 7(c); *see also Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 108 (2d Cir. 2013) ("It is well-settled that a party may move for reconsideration and obtain relief only when the defendant identifies 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

"Reconsideration is not intended for the court to reexamine a decision or the party to reframe a failed motion." *Fan v. United States*, 710 F. App'x 23, 24 (2d Cir. 2018) (citing *Questrom v. Federated Dep't Stores, Inc.*, 192 F.R.D. 128, 130 (S.D.N.Y. 2000)). "A motion for reconsideration 'is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple'[.]" *Mandell v. Doloff*, No. 3:17-cv-01282-MPS, 2018 WL 3677895, at *1 (D. Conn. Aug. 2, 2018) (quoting *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012), *as*

amended (July 13, 2012)); *accord Shrader*, 70 F.3d at 257 ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided.").

III. DISCUSSION

This Court found that there was a genuine issue of material fact as to whether Plaintiffs were unlawfully misclassified as independent contractors, Ruling and Order at 17-33, but ultimately held that the record "lacks the evidence necessary to create a genuine issue of fact as to [Plaintiffs'] entitlement to relief on their §[]31-73(b) unjust enrichment claim," *id.* at 40.

Plaintiffs argue that the Court's Ruling and Order "overlooked evidence in the record and was clearly erroneous and, if not reversed, would result in manifest injustice." Pls.' Mot. at 1. More specifically, Plaintiffs argue that:

> [t]he court's decision went beyond the arguments made by Defendants and required Plaintiffs to clear two hurdles that the law simply does not place in front of them: (1) that Plaintiffs must show the initial and continuing fees were deductions from wages, when the plain language of Conn. Gen. Stat. Sec. 71-73(b) is clearly broader than just wages (including "wages, fee, sum of money or contribution"), and (2) that Plaintiffs must do more than simply show that the fees were paid to secure employment – they must show what percentage of the fees related to the job and what percentage related to the franchise.

Pls.' Mem. at 10.

Plaintiffs first argue that "any 'fee, sum of money or contribution' from Plaintiffs is against Connecticut's public policy so long as it was 'necessary to secure employment or continue in employment.'" *Id.* at 4 (citing Conn. Gen. Stat. § 31-73(b)). In support of this argument, Plaintiffs state that they "clearly provided evidence that their franchise fee down payments and continued payments under the contract were 'necessary to secure employment or continue in employment.'" *Id.*; *see also id.* at 5 (referencing deposition testimony indicating that

Plaintiffs had to sign and pay the fees under the franchise agreement). Under Plaintiffs' view of the law, "[i]f Plaintiffs show that they were employees [under the ABC test], and that they had to sign the agreement to become employees, then any payments required in the agreement are required to 'secure employment.'" *Id.* at 6.

Plaintiffs also argue that their "claims do not rest solely on the 'already rejected notion that the franchise agreement violates public policy,'" but "rest on the claim that, to the extent that Plaintiffs were at least in part employees . . . , they obtained that status only if they paid 'sums of money' from their pockets (franchise fees) and agreed to further payments that were clearly required parts of the deal." *Id.* at 7.

Finally, Plaintiffs argue that the Court conflated proof of damages with liability. *Id.* at 8. Plaintiffs request 100% of the fees paid if they are found to be employees and not franchisees, and offer a couple methods of calculation for if they are found to be both franchisees and employees, including using Connecticut's minimum wage rate. *Id.* at 9 ("For example, if a Plaintiff worked 40 hours in 2017, when the minimum wage rate was $10.10, his 'job' portion of his status would have been worth at least $404 per week."). Plaintiffs note that at trial, "they can and will provide the court with a record from which it can fashion an equitable remedy," and repeatedly emphasize that the record "amply proves" that "the payments they made were necessary to obtain their franchise/job." *Id.*

The Court disagrees.

At the motion to dismiss stage, Plaintiffs argued that any fees paid under the franchise agreement were unjust because the franchise agreement was an employment agreement, and the Court rejected that argument. *See Mujo v. Jani-King Int'l, Inc.* (*Mujo I*), 307 F. Supp. 3d 38, 49-50 (D. Conn Mar. 31, 2018) ("At oral argument, Plaintiffs nevertheless argued that these

deductions, wholly consistent with the parties' franchisor-franchisee agreement, violate § 31-71a(3) because the parties' agreement should be rendered void as a matter of public policy. The Court disagrees.").

At the motion for summary judgment stage, Plaintiffs again advanced the same argument, citing inapplicable and non-binding precedent from Massachusetts in support of their claims. *See* Pls.' Opp. to Def.'s Mot. for Summ. J., ECF No. 154 at 36 (Aug. 2, 2019) ("If the plaintiffs did not in fact purchase a bona fide franchise but instead are found to have purchased the right to work as a janitor for Jani-King . . . , then the franchise fees amount to nothing more than a payment 'to secure and continue in employment.' This finding is consistent with the analysis of the Massachusetts Supreme Judicial Court[.]").

At this stage of the case, following the Court's Ruling and Order and in their motion for reconsideration, Plaintiffs must point to any "controlling decisions or data that the court overlooked in the initial decision or order." D. Conn. L. Civ. R. 7(c); *see also Shrader*, 70 F.3d at 257 ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided.").

Plaintiffs instead simply argue again that "the payments they made were necessary to obtain their franchise/job," Pls.' Mem. at 9, without delineating the value of the franchise agreement, *id.* at 6 ("The Court wrote in its ruling that some portion of the fees must have been for the franchise . . . but by the same logic, some portion must also have been for the job if the fees were necessary to secure that franchisee/employee status."). Plaintiffs fail again to "distinguish[] their claims for relief from legitimate fees within the franchise agreement, which the Court must presume exists, given the applicable caselaw." Ruling and Order at 38 (citing *Mujo I*, 307 F.Supp.3d at 50 ("This Court therefore 'must enforce the contract as drafted by the

parties and may not relieve [Plaintiffs] from anticipated or actual difficulties undertaken pursuant to the contract.'" (quoting *Geysen v. Securitas Sec. Services USA, Inc.*, 322 Conn. 385, 392 (2016))).

Because, as the Court held, "franchise agreements are not *per se* invalid under Connecticut law, . . . and therefore must have some value," Ruling and Order at 39 (citing the Connecticut Franchise Act, Conn. Gen. Stat. §§ 42-133e – 42-133h), the absence of any evidence in the record regarding their value meant that Plaintiffs' legal theory rested solely on whether the franchise agreements had any value, *id.* at 38-39 ("[U]nder the Plaintiffs' view of the law . . . the franchise agreement has no value and any fee paid by them to Jani-King is 'necessary to secure employment or continue in employment' . . . Plaintiffs . . . have failed to identify th[e] value [of the franchise agreement] or conversely, identify the fees that have been added beyond that value."). In other words, rather than the Court conflating liability with damages, Plaintiffs made liability for their unjust enrichment claim wholly contingent on the franchise agreement being nothing more than an employment agreement. *See, e.g.*, Pls.' Mem. at 6 ("Plaintiffs have presented evidence . . . for a factfinder to conclude that Defendants exacted their down payments and continuing fees on the representation that such fees were necessary in order to secure the employment relationship."). As discussed above, Connecticut law, however, does not allow for that narrow approach to the law.

Significantly, if anything, Plaintiffs' motion for reconsideration is a recognition that the record lacks the evidence necessary to sustain the narrower claim provided for under Connecticut law. Indeed, Plaintiffs argue that the Court could take judicial notice of minimum wages and other data in fashioning an equitable remedy, *see* Pls.' Mem. at 9 (offering various methods under which Plaintiffs could "present evidence from which the Court . . . can fashion an

equitable remedy"), none of which are in this record.

In any event, for purposes of this motion, Plaintiffs provide no citation for the proposition that any of these alleged calculations, none of which are present in or supported by this record, could be probative of their claim. Put another way, Plaintiffs have pointed to no "controlling decisions or data that the court overlooked in the initial decision or order" that would lead to a finding of clear error or manifest injustice, *see* D. Conn. L. Civ. R. 7(c), and, at best, are "presenting the case under new theories," *Analytical Surveys, Inc.*, 684 F3d at 52 (internal citations and quotations omitted). *See also Sankar v. City of N.Y.*, No. 07-cv-4726 (RJD)(SMG), 2012 WL 2923236, at *2 (E.D.N.Y. July 18, 2012) (denying reconsideration because the motion was "in substance and form," "an appeal; to wit, defendants argue that the Court simply came out the wrong way on each of plaintiff's claims . . . . [and] present only repetitive arguments on issues that have already been considered fully by the court" (internal citations and quotation marks omitted)).

In short, Plaintiffs' arguments for reconsideration are based on rejected arguments from prior filings, and Plaintiffs fail to discern controlling decisions or data that the Court overlooked.

Accordingly, the Court will not reconsider its earlier Ruling and Order dismissing Plaintiffs' unjust enrichment claim as a matter of law.

IV. CONCLUSION

For the reasons explained above, the motion for reconsideration is **DENIED**.

SO ORDERED at Bridgeport, Connecticut, this 3rd day of January, 2020.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2020, true and correct copies of the foregoing Opening Brief and Addendum was served on counsel of record for each of the Defendant-Appellees, via the CM/ECF system.

Dated: June 15, 2020

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