New York State Department of Labor
Andrew M. Cuomo, *Governor*
Colleen C. Gardner, *Commissioner*

February 8, 2011

[redacted]

Re: Request for Legal Opinion
Definition of Employer (Corporate Officer)
File No. RO-11-0002

Dear [redacted]:

This letter is written in response to your e-mail of December 20, 2010 to Heather Buzzo in which you ask for a reconciliation of various decisions of the Industrial Board of Appeals (IBA) with a decision of the Fourth Department, all dealing with the liability of corporate officers for failure to pay wages and benefits; the IBA holding that the corporate officers were liable for such failure, and the Court holding that they were not. Please be advised that these decisions may be reconciled by noting that the IBA held that liability could be imposed on corporate officers due to their individual status as employers, while the Fourth Department held that liability could not be imposed upon corporate officers merely due to their status as corporate officers.

In *Matter of Franbilt, Inc., et. al.*, PR-07-019 (July 30, 2008), on which all other decisions provided to you were based, the IBA dealt with a situation in which the Commissioner of Labor issued an Order to Comply with Article 6 of the Labor Law[1] to a corporation and two corporate officers (Thomas J. Barnes and Michael J. Burns) requiring them to pay unpaid wages to employees. In its analysis, the IBA relied upon federal case law holding that the test for determining whether an entity or person is an "employer" under the New York Labor Law is the same as that used for analyzing employer status under the Fair Labor Standards Act, to wit: the "economic reality test."

> In answering that question [whether a given individual is or is not an employer], the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors

[1] Although it is not referenced in the IBA's decision, the specific violation of Article 6 referenced in the Order to Comply was of Labor Law §191 which, among other things, mandates that employees be paid wages within a certain period of time, *e.g.* manual workers weekly and clerical and other workers not less frequently than semi-monthly.

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> include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2nd Cir. 1999) (internal quotations and citations omitted)

In applying that test to the facts in *Franbilt*, the IBA held that Thomas J. Barnes was an "employer" under Article 6 of the Labor Law in that he had ultimate authority over hiring and firing, controlled the conditions of employment of the corporation's employees, and approved all hiring decisions, including pay rates. By further application of the economic reality test, the IBA also held that Michael J. Burns was not an employer under Article 6 of the Labor Law in that there was no evidence that he had the authority to hire and fire employees, controlled work schedules or conditions of employment or determined the rate and method of their payment.

In the case cited by you, *Stoganovic v. Dinolfo*, 92 A.D.2d 729 (4th Dept. 1983), the Court dealt with a situation in which two employees commenced private causes of action against the president of a corporation for unpaid wages pursuant to Sections 198-a and 198-c of the Labor Law.[2] The Court then held, in summary, that the penal sanctions that could be imposed under Sections 198-a and 198-c did not imply a legislative intent to grant the right to bring a civil cause of action for unpaid wages by employees against the officers and agents of a corporation. The Court further held that finding such a legislative intent would be thwarted by Section 630 of the Business Corporations Law, which makes the top ten shareholders of a corporation personally liable for unpaid wages, but only after certain procedures are followed.

In summary, therefore, the IBA in *Franbilt* held that an Order to Comply issued by the Commissioner of Labor could hold a corporate officer personally liable for wages not paid to employees under Labor Law §191 if that corporate officer could be found to be an "employer" of those employees under the economic reality test, while the Court in *Stoganovic* held that employees of a corporation could not bring a private cause of action against the officers and agents of that corporation under Labor Law §§198-a and 198-c as the Legislature did not intend that either statute grant such right.

Please further note that the difference between liability as an individual employer and liability as a corporate officer has been noted by the Southern District of New York, which has held that:

> *Stoganovic* does not affect the issue whether *employers* may be sued for violations of Article VI [of the New York State Labor Law]. In the instant case, plaintiffs bring suit against defendants, not as corporate officers or shareholders, but as employers. *The difference is dispositive.* Plaintiffs, in order to bring an action

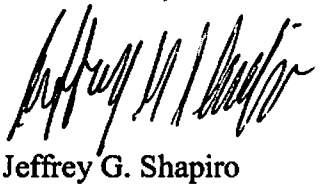
[2] As opposed to Order to Comply considered in *Franbilt*, which was issued by the Commissioner of Labor pursuant to her authority under Labor Law §21(1).

> under §196-d or §198-d of Article VI, must show that the defendant being sued is not merely a corporate officer or shareholder, but an employer. (*Chu Chung v. New Silver Palace Restaurants*, 272 F. Supp.2d 314, 318 (SDNY 2003) (emphasis added); *accord Vysovsky v. Glassman,* 2007 U.S. Dist. LEXIS 79725, 2007 WL 3130562 (SDNY 2007).

The IBA, therefore, held that the Commissioner of Labor could issue an Order to Comply against a corporate officer due to his/her actions as an individual employer, while the Fourth Department held that a private cause of action could not be commenced against a corporate officer merely due to his/her status as a corporate officer. Thus, the two cases are easily distinguishable and reconcilable as they deal with different types of actions based on separate statutes and separate grounds for liability.

This opinion is based exclusively on the facts and circumstances described in your e-mail dated December 20, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: 
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JGS:da
cc: Carmine Ruberto