> not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA. The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way. Rather, they depended entirely on referrals to find job assignments, and Superior Care in turn controlled the terms and conditions of the employment relationship. As a matter of economic reality, the nurses' training does not weigh significantly in favor of independent contractor status.

Superior Care, 840 F.2d at 1060. As noted, Harry's nurses exercised none of the initiative deemed important by the Superior Care court. In that case, the court found that this factor weighed "slightly" in favor of independent contractor status but did not "tip the balance." Id.

4. Permanency of the Working Relationship

Plaintiff worked at Harry's for nine months. Def. 56.1 ¶ 71. Patricia Robinson worked at Harry's for 2 ½ years. Affidavit of Patricia Robinson, sworn to August 1, 2008 (the "Robinson Aff.") ¶ 2.

Defendants contend that plaintiff's ability to work for other employers bespeaks independent contractor status. DMOL at 16-17. Defendants are simply wrong.

> With respect to permanence of the working relationship, the record indicates that the nurses are a transient work force. They typically work for several employers, most work for Superior Care only a small percentage of the time (78% worked 13 weeks or less in 1982), they earn relatively little from Superior Care (88 % earned less than $ 5,000 from Superior Care in 1982), and few maintain continuing relationships with Superior Care (90% turnover rate in three-year period). Nevertheless, these facts are not dispositive of independent contractor status. We have previously said that employees may work for more than one employer without losing their benefits under the FLSA. Nor has the fact that the worker does not rely on the employer for his primary source of income require a finding of independent contractor status. Finally, even

> where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative. In the present case, the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently.

Superior Care, 840 F.2d at 1060-61 (citations and quotations omitted).

5. Integral Part of Operation

Plaintiff was a field nurse for Harry's, i.e., defendants placed her in patients' homes to perform nursing services. Ex. C 40:6-17. Defendants' only business is to place nurses in homes. Id. 9:16-10:22. Yet defendants argue that this factor favors independent contractor status.

Defendants appear to believe that "integral part of operation" means that, if the plaintiff were not part of the operation, it could not function (DMOL at 26). This is not what courts mean when they say "integral part of operation," however. The full name of the factor is "the extent to which the work is an integral part of the employer's business." Superior Care, 840 F.2d at 1059. This means that the more workers perform the primary work of the alleged employer, the more likely they are to be employees. Donovan v. DialAmerica Marketing, 757 F.2d 1376, 1384-85 ("whether the service rendered is an integral part of the alleged employer's business"), cert. denied, 474 U.S. 919 (1985). Accordingly, "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request." 840 F.2d at 1059 (adopting DialAmerica standards).

Defendants argue that "the actual services rendered by Plaintiff during placement for any particular client were not an integral part of Harry's Nurses." DMOL at 26. This argument, like

defendants' argument that Harry's in-house supervisory and clerical employees "handle all the day-to-day activities of the business" (id. at 9) is simply not credible. Harry's derives 95% of its revenue from Medicaid at $24.00 per hour of LPN time, from which Harry's pays $19.00 per hour to the nurse. Dorvilier Aff. ¶¶ 46, 51. Surely Medicaid pays Harry's for providing nursing services, not for mere placement. If not, plaintiff can only express dismay at the waste of government funds.

6. Other Indicia of the Employment Relationship

Defendants paid plaintiff directly for her services, i.e., plaintiff did not form a corporation or other business entity. Gayle Aff. ¶ 5. This bespeaks employee status. Frankel v. Bally, Inc. 987 F.2d 86, 91 (2d Cir. 1993) (ADEA plaintiff's formation of corporate entity to receive payment from defendant favors independent contractor status under common-law agency principles). Similarly, plaintiff was covered under defendants' general commercial liability insurance policy, which bespeaks employee status. Ex. C 118:14-20.

Plaintiff has never had business cards, has never advertised, and has never solicited a patient directly. She and Patricia Robinson are entirely dependent upon referrals from Harry's and similar placement agencies. Gayle Aff. ¶ 4; Robinson Aff. ¶ 4. As noted, the Superior Care court deemed significant the nurses' lack of business initiative and dependence on the employer. 840 F.2d at 1060.

Defendants provided in-service training to the nurses, which bespeaks employee status. As the court is aware, a law firm provides continuing legal education to its associates, not to the independent contractors it hires on a per-project basis to review discovery materials.

F. The Parties' Representations

1. The "Independent Contractor" Document

It is not relevant to this analysis that defendants directed plaintiff to sign a document (Ex. G) designating her an independent contractor. Tax treatment appears on the list of common-law factors, not on the list of economic realities factors. Accordingly, "[t]hough an employer's self-serving label of workers as independent contractors is not controlling, an employer's admission that his workers are covered by the FLSA is highly probative." Superior Care, 840 F.2d at 1059. Defendants generated many documents (set forth at 7-8 above) designating the plaintiff an employee – and ratified those documents at his deposition. It is respectfully submitted that these "highly probative" admissions alone defeat summary judgment.

2. The Nurses' Malpractice Insurance Coverage

It is not significant to economic realities analysis that the field nurses obtain their own malpractice insurance coverage. Only last week, the Second Circuit held that a hospital and a nurses referral agency were joint employers, although the hospital required the field nurses to carry private malpractice coverage if they were unable to obtain it such coverage through their referral agencies. Barfield v. New York City Health & Hosps. Corp., 2008 U.S. App. LEXIS 16731 at * 4 (2d Cir. Aug. 8, 2008).

3. Plaintiff's Failure to Demand Overtime Pay

Although defendants regard it as significant that Ms. Gayle never demanded overtime pay (Dorvilier Aff. ¶ 76), their position is contrary to law. Brooklyn Savings Bank v. O'Neil, 324

U.S. 697 (1945) (waiver of overtime premium pay void as a matter of law); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (emphasizing "nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act"); Spanos Painting Contractors, Inc. v. Union Bldg. & Constr. Corp., 334 F.2d 457, 459 (2d Cir. 1964) ("[t]o permit a laborer to waive his rights under the act would undermine the very purpose of fair labor legislation"); Holzapfel v. Town of Newburgh, 145 F.3d 516, 524 (2d Cir. 1998) ("once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours").

G. Neither Industry Custom nor a Registry's Inability to Extract Overtime Payments from Third-Party Payors Excuses Violation of the FLSA

Defendant claims that a finding of employee status in this case would cause it and similar nurses registries to go out of business or to restrict nurses' hours, which it asserts would be bad health care policy. Dorvilier Aff. ¶¶ 53-54.[15] Defendant asserts that Medicaid, which supplies 95% of Harry's revenue, does not provide overtime premium pay. Def. 56.1 ¶¶ 44, 50. However, none of this can justify Harry's failure to pay overtime.

In Chao v. Gotham Registry, Inc., 514 F.3d 280 (2d Cir. 2008), the Second Circuit considered a nurses registry arrangement much like the one at issue in this case.[16] Gotham did

[15] As noted, Mr. Dorvilier claims that his business is nurse placement, not nursing. He alleges no knowledge of the patient care aspects of nursing. His allegation that limiting nurses to 40 hours per workweek "could have negative ramifications for patients and their continuity of care" is incompetent and should be stricken. Fed. R. Civ. Pro. 56(e). One might just as easily argue that forbidding nurses to work 80-hour weeks would improve the quality of patient care.

[16] The Gotham Registry nurses were placed in hospitals, rather than homes, but the arrangement was otherwise substantially identical to Harry's. 514 F.3d at 284.

not pay overtime because it viewed the nurses as independent contractors. In 1992, the Department of Labor commenced an enforcement action. Id. at 284. Gotham ultimately consented to a judgment including an injunction requiring it to pay nurses time and a half for overtime. It adopted a policy requiring nurses to notify it in advance and receive authorization for any shift or partial shift that would bring the nurse's total hours to more than 40 in any workweek. Id. However, it was unable to enforce the policy, inasmuch as hospital staff not answerable to Gotham would sometimes ask nurses to work overtime.[17] In such situations, Gotham would attempt to negotiate with the hospital to obtain an enhanced fee for the overtime hours already worked. When Gotham succeeded, as it did 10% of the time, it paid the nurse time and a half. That is, Gotham did not pay overtime 90% of the time. Accordingly, the DOL brought contempt proceedings. Id. For reasons particular to the law of contempt, the Circuit denied the petition. Id. at 292. It did not, however, relieve Gotham from the injunction. Id. at 284.

Chief Judge Jacobs issued a concurring opinion arguing that it would be better, for reasons of economic policy, if registry nurses could lawfully elect to be treated as independent contractors and lamented that, under Second Circuit law, they cannot. Id. at 296.[18] In other words, this business model requires a finding of employee status under the FLSA.

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[17] There is no evidence before the court that this situation could arise in Harry's business, and it probably does not, because the home-care patients' needs are predictable.

[18] "Industry custom" is not a defense to liquidated damages under 29 U.S.C. § 260, which requires good faith and objectively reasonable grounds for an employer's belief that it need not pay overtime . Reich v. SNET, 121 F.3d 58, 71 (2d Cir. 1997). As such, it can hardly be a defense to liability in the first instance. Moreover, industry custom may be attributable to "widespread evasion of labor laws." Ling Nan Zheng, 355 F.3d at 74.

Accordingly, in Barfield v. New York City Health & Hosps. Corp., 2008 U.S. App. LEXIS 16731 at * 18 (2d Cir. Aug. 8, 2008), a joint employment case, the court accepted without discussion the now settled proposition that a nurses referral agency was an employer for FLSA purposes.

II. Plaintiff Is Entitled to Partial Summary Judgment Against Both Defendants

A. Plaintiff Is Entitled To Judgment as a Matter of Law

As is discussed above, the parties' only genuine dispute is the inference to be drawn from the defendants' requirement of progress notes. It is respectfully submitted, however, that even if this question were to be resolved, on this cross-motion, in defendants' favor, that plaintiff's showing of employee status (together with defendants' admissions that field nurses are not paid overtime premium pay) is sufficient, under the economic realities standard, to entitle her to partial summary judgment on liability.

B. Harry Dorvilier is Jointly and Severally Liable

Plaintiff seeks partial summary judgment against both defendants. Mr. Dorvilier admits that he is the "principal" of the corporate defendant. Ex. W ¶ 7. He testified that he is the CEO who "oversee[s] the whole Harry's operation [who] make[s] sure that the service has been provided" and operates the business. Ex. C 9:8-15; 12:7-10.

The FLSA defines "employ" as "suffer or permit to work." 29 U.S.C. § 203(g). An employer is, inter alia, "any person acting directly or indirectly in the interest of an employer in relation to an employee...." Id. § 203(d). Courts therefore agree that the FLSA definition of

"employer" includes individual principals of corporate employers. RSR, 172 F.3d 132 (2d Cir. 1999) (economic realities determination that chairman-50% owner of corporate defendant, who had the power to hire and fire, was individually liable for overtime violations) (citing Falk v. Brennan, 414 U.S. 190, 195 (1973)). Accordingly, "[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." Moon v. Kwon, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002) (Lynch, J.) (citing Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983;) RSR, 172 F.3d at 139-41; Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965-66 (6th Cir. 1991); Donovan v. Grim Hotel Co., 747 F.2d 966, 971-72 & n.7 (5th Cir. 1984)).

District courts in the Second Circuit generally look both to the individual's equity in the corporate defendant and control over the plaintiff's work. Samborski v. Linear Abatement Corp., 1999 U.S. Dist. LEXIS 14571 (S.D.N.Y. 1999) (president and sole owner of company had "operational control" and certified payrolls; individual liability); Moon, supra , (hotel president played intimate role in day-to-day operations; individual liability); Chao v. Vidtape, Inc., 196 F. Supp. 2d 281 (E.D.N.Y. 2002) (president/sole shareholder had power to hire, fire, supervise, set schedules, determine pay rate; individual liability); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, aff'd on reconsideration, 255 F. Supp. 2d 197 (S.D.N.Y. 2003) (individual owners of delivery contracting business exercised operational control; individual liability); Lopez v. Silverman, 14 F. Supp. 2d 405, 412-13 (S.D.N.Y. 1998) (president/sole shareholder had "dominant" role over daily operations; individual liability).

III. Plaintiff Has Made the Showing Necessary for This Court to Authorize Notice of the Action to Similarly Situated Persons

A. Standard for Authorizing Notice

The Fair Labor Standards Act gives this Court discretionary power to authorize the sending of notice of the pendency of this action to potential class members. 29 U.S.C. § 216(b). Defendants' admissions that plaintiff worked overtime hours, that they do not pay time and a half and that some 500 field nurses are on their registry at any given time (Dorvilier Aff. ¶¶ 7, 72), together with plaintiff's and Patricia Robinson's affidavits, satisfy the threshold showing that potential class members are "similarly situated" so as to warrant court-authorized notice.

Court-authorized notice to similarly situated persons in the early stages of the litigation is within this Court's discretion. Hoffmann-LaRoche v. Sperling , 493 U.S. 165 (1989). Early notice is favored because it "comports with the broad remedial purpose of the [FLSA] ... as well as with the interest of the courts in avoiding multiplicity of suits." Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1979).

Notice is appropriate upon a showing by plaintiff that potential class members are similarly situated. Realite v. Ark Restaurants Corp..,7 F. Supp. 2d 303, 307 (S.D.N.Y. 1998) (collecting cases); Roebuck v. Hudson Valley Farms, 239 F. Supp. 2d 234, 237 (N.D.N.Y. 2002); Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (Sotomayor, J.). Generally, only a "modest factual showing" that plaintiff and others were victims of a common policy that violated the law is sufficient to demonstrate that plaintiff and others are similarly situated. Id. (collecting cases).

The "similarly situated" standard is significantly less demanding than are the Rule 23

requirements of adequacy, commonality, numerosity, etc. Id.; Brzychnalski v. Unesco, Inc., 35 F. Supp. 2d 351, 353 (S.D.N.Y. 1999).

B. Plaintiff Has Adequately Shown, and Defendants Do Not Dispute, That the Field Nurses Were Classified as Independent Contractors On a Class-Wide Basis

Ms. Gayle's and Ms. Robinson's affidavits allege that many of defendants' employees may be unaware that their misclassification violates the FLSA, lack sufficient resources to hire private counsel and would opt into this action if given the opportunity. Courts regularly credit similar allegations on a motion for notice in the early stages of the litigation. See Hoffman, 962 F. Supp. at 261-62; Allen v. Marshall Field & Co., 93 F.R.D. 438, 442-45 (N.D. Ill. 1982) (allegations in complaint sufficient); Roebuck, 239 F. Supp. 2d at 238.

Accordingly, plaintiff respectfully submits that the class should be defined as "all persons who have been employed by Harry's Nurses Registry and/or Harry Dorvilier as field or per diem nurses at any time since November 7, 2004" and that all such persons should receive notice of their right to opt in to this action.

C. Notice And Consent Forms Should Issue in the Form Proposed

The proposed notice and consent forms (Ex. R; S) are similar to those that courts regularly approve in similar cases. See, e.g., Hoffman, 982 F. Supp. at 263.

D. This Court Should Direct Defendants to Provide a List of All Persons Similarly Situated

Courts in this district regularly order FLSA defendants to produce lists of the names, addresses and other identifying information to facilitate discovery of similarly situated persons. For example, in Patton v. Thomson Corp., 364 F. Supp. 2d 263 (E.D.N.Y. 2005), Magistrate Judge Orenstein granted the plaintiff's motion for notice to client service managers who allegedly worked over 40 hours per week without receiving overtime pay. Id. at 267 (citing Rodolico v. Unisys Corp., 199 F.R.D. 468, 480 (E.D.N.Y. 2001); Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp.2d 91 (S.D.N.Y. 2003); Schwed v. GE, 159 F.R.D. 373 (N.D.N.Y. 1995)). M.J. Orenstein directed defendant to produce the names, addresses, social security numbers, and employment dates of all potential class members. Id. Plaintiff accordingly seeks an order compelling production of a list of the names, last known addresses, dates of employment and telephone and social security numbers [19] of all nurses registered with defendants' registry since November 7, 2004. [20]

E. The Notification Procedure Should Provide for Attempts to Locate Missing Class Members

The notification procedure should anticipate the possibility that some class members may

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[19] Counsel is mindful of the potential for abuse of social security numbers, and undertakes to place the information in an attorney's-eyes-only file and to use such information only for the purpose of locating similarly situated persons.

[20] The FLSA statute of limitations is 2 years (3 years in case of a willful violation.) 29 U.S.C. § 255(a). The parties have stipulated that the Collective Action Period begins on November 7, 2004 (Ex. U) and to toll all statutes of limitations from January 29, 2008 until the day following docketing of an order adjudicating the instant motions (Ex. T).

no longer reside at the addresses previously known to defendants, especially since some class members may have had no contact with defendants for three years.

Plaintiff requests that the Court designate a deadline for the filing of opt-in notices 120 days after the disposition of this motion. E.g., Roebuck, 239 F. Supp. 2d at 241 (nine-month opt-in period). One hundred twenty days is sufficient time for undeliverable mail to be forwarded or returned and for plaintiff's counsel to research missing class members' current whereabouts.

IV. The Claims for Workers' Compensation Premiums and Rule 23 Class Certification Are Withdrawn

Plaintiff consents to the dismissal of her Fourth Cause of Action to recover the cost of workers' compensation premiums withheld from her paychecks. Gayle Aff. ¶ 9. Accordingly, plaintiff no longer seeks certification of a class of persons seeking recovery of workers' compensation premiums under state law.

Conclusion

For the foregoing reasons, plaintiff respectfully requests that this Court issue an Order: (1) denying defendants' motion for summary judgment in its entirety; (2) granting plaintiff partial summary judgment on liability; (3) directing defendants to produce a list of names, addresses, telephone numbers and social security numbers of all persons employed as field or per diem nurses since November 7, 2004 and (4) authorizing plaintiff to notify all such persons of the pendency of this action and granting such other and further relief as to this Court may seem just, fair and equitable.

Dated: New York, New York
August 13, 2008

Respectfully submitted,

_____/s/_____

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