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June 13, 2016

Mr. Joel Peterson
Legal Assistant
Departmental Disciplinary Committee
Supreme Court, Appellate Division
First Judicial Department
61 Broadway
New York, New York 10006

Re: Complaint of Harry Dorvilier
Docket No. 2016.0713

Dear Mr. Peterson:

What follows is my answer to the referenced complaint.

The complainant is not a client or former client of mine. He was a defendant (and the principal of the corporate defendant) in a case in which I represented the plaintiffs, *Gayle v. Harry's Nurses Registry*, 07 Civ. 4672, 2009 U.S. Dist. LEXIS 17768 (E.D.N.Y.), *aff'd*, 594 Fed. Appx. 714 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2059 (2015). Mr. Dorvilier was represented by counsel at all stages of the proceedings. Nearly all of Mr. Dorvilier's allegations are reformulations of arguments that were rejected by the federal district court, Second Circuit Court of Appeals and/or U.S. Supreme Court. That is, the complaint primarily sets forth discredited substantive-law contentions rather than purported ethics violations.

The district court granted partial summary judgment to the plaintiffs with respect to liability and damages four times. Attached hereto as Exhibit 1 is a copy of the summary judgment opinion of the late Judge Sifton, 2009 U.S. Dist. LEXIS 17768. What follows is the LEXIS Case Summary:

> PROCEDURAL POSTURE: Pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq., and state law, plaintiff nurse, individually and on behalf of others, filed a purported collective action alleging that defendants, her employer and its principal, failed to pay overtime wages. Defendants moved for summary judgment. The nurse cross-moved for partial summary judgment as to liability; she also moved to distribute notices to

potential class members.

OVERVIEW: The employer referred temporary nurses to patients in their private homes. These field nurses, who could hold other jobs, were not required to accept a particular referral, but were required to complete a full shift when they accepted a position. A supervisory nurse observed and assessed each nurse's skills and conducted monthly reviews. Nurses were responsible for maintaining a professional license and basic supplies; they purchased their own uniforms and paid for their own travel expenses. Nurses had no investment in defendants' business, and defendants could unilaterally terminate them. The nurses were not paid overtime. Employing the economic realities test, and based on these facts, the court granted the nurse's motion for partial summary judgment as to liability, finding that the nurses were employees entitled to overtime pay under the FLSA. The court further found that defendants were jointly and severally liable. In addition, the court granted the nurse's motion for notice of a collective action under the FLSA, finding that the she had made the required factual showing that others were similarly situated and should be notified of their opportunity to join the lawsuit.

OUTCOME: The court granted the nurse's motion for partial summary judgment on the issue of liability and denied defendants' motion for summary judgment. In addition, the court granted the nurse's motion for leave to circulate a notice of pendency of a collective action, and directed defendants to disclose the names, last known addresses, dates of employment, and telephone numbers for all persons employed as field nurses from November 7, 2004.

The Second Circuit Court of Appeals's opinion is attached hereto as Exhibit 2. That opinion begins as follows:

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED, and DECREED that the orders and judgment of the district court be and hereby are AFFIRMED.

Defendants-Appellants Harry's Nurses Registry, Inc.("Harry's") and Harry Dorvilien appeal from a September18, 2012 judgment of the United States District Court for the Eastern District of New York (Garaufis, J.), which followed four orders (Garaufis, J. and Sifton, J.) that culminated in a grant of summary judgment to the plaintiff class on their unpaid overtime claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. A fifth order (Garaufis, J.) adopted in full a magistrate judge's report and recommendation to correct the judgment and grant attorneys' fees, yielding an amended judgment dated October 16, 2013.

As to the specific allegations of the Statement of Facts:

The allegations set forth on the first page of the Statement of Facts (a partial description of the nature of Harry's Nurses Registry) are admitted.

As to the first allegation on the second page of the Statement of Facts (Mee Chak): I have no knowledge of Ms. Chak's complaint. I played no role in the Department of Labor investigation alleged.

The second allegation on page 2 (Willie Evans) was raised in the Court of Appeals, which found that "an investigator declined to pursue Evans's complaint, but that is far different from the full adjudication on the merits required for collateral estoppel." Ex. 2 at 3 (2014 U.S. App. LEXIS 23029 at * 8).

The third allegation, that I commenced an action under the Fair Labor Standards Act and New York Labor Law § 190, is admitted. However, it should be noted that, although the action was brought under both statutes, I voluntarily withdrew the state-law claim early in the litigation. Ex. 1 at 1 (2009 U.S. Dist. LEXIS at *2 fn. 1). The reason for the withdrawal is explained in the paragraph beginning "the tenth allegation" on page 5-6 below.

The fourth allegation, regarding the case caption and the date on which issue was joined, is admitted.

The fifth allegation, that I litigated the matter from 2008 until 2015 in the federal courts, is admitted. However, the allegation that I "should have litigated this matter in the New York State Courts under Article 36 of the New York State Public Health Law" is denied. The

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allegation was rejected by the Court of Appeals:

> The appellants' fourth subsidiary argument is that the New York State Public Health Law should govern the outcome because Harry's is governed by Article 36 whereas Superior Care was governed byArticle 28. But state law does not trump FLSA, which permits states and localities to exceed its protections with higher minimum wages or lower maximum workweeksbut not to weaken its protections in the other direction. See 29 U.S.C. § 218(a).

Ex. 2 at 3; (2014 U.S. App. LEXIS 23029 at * 8).

The sixth allegation, that Harry's was never found to have committed a willful violation, is admitted. It should be noted, however, that I did not seek to extend the limitations period on the basis of a willful violation but rather on the basis of a stipulated tolling agreement with defense counsel (statutes of limitations were tolled to accommodate defense counsel's proposed motion practice). Moreover, Harry's raised this argument in its petition for Supreme Court certiorari, which was denied. As noted, the district court authorized circulation of a notice of pendency of the action to all persons employed between November 7, 2004 and March 31, 2009.

The seventh allegation, that I "manipulated" the nurses, is denied. As noted, I sought and received permission from the Court to circulate a notice of pendency of the action. The nurses whose affidavits are annexed to the complaint each opted into the action, as was their right.

In April and May 2009, I received phone calls from three persons who had opted into the action. Each caller told me that a supervisory employee of defendants had told her that she would not be permitted to work over 40 hours per week unless she withdrew from the lawsuit. On June 18, 2009, then-defense counsel delivered to me the five affidavits appended to the complaint (including affidavits of the three callers described above) who had opted into the action stating that they no longer wished to participate in the lawsuit. I suspected that the affidavits had been coerced. I therefore attempted to contact the affiants. I spoke to the two affiants who returned my calls to ask whether the affidavits were the product of coercion. I also spoke to a number of current employees of defendant who had not executed affidavits regarding their communication with defendant regarding the subject matter of the lawsuit and their knowledge of the circumstances of the affidavits.

Accordingly, I believed that Mr. Dorvilier had coerced the five affiants. I thereupon

obtained an order from Magistrate Judge Go permitting a 30(b)(6) deposition with respect to, *inter alia*, the affidavits (which is the reason that the affidavits are marked "Plaintiff's Exhibit 3-7"). In his testimony, Mr. Dorvilier disclaimed knowledge of the circumstances surrounding production of the affidavits. Several months later, however, one of the affiants, having determined to sever her employment relationship with Harry Dorvilier, phoned me to tell me that her affidavit had indeed been coerced.

Although I did not move to amend the complaint to allege unlawful retaliation, I took the position that the affiants remained part of the lawsuit unless and until I determined that the affidavits had been freely given. I did not so determine, primarily because most of the affiants did not take my phone calls and one recanted her affidavit. I reasoned that, if indeed the affiants wished not to participate in the lawsuit, they were free to return their checks uncashed. However, the affiants each cashed their checks.

The seventh allegation, that Claudia Gayle was in the United States illegally and was deported to Jamaica, is denied. Even if Ms. Gayle had been in the U.S. illegally, she would remain entitled to overtime premium pay (although it would be unlawful for Mr. Dorvilier to employ her (*Affordable Housing Found., Inc. v. Silva*, 469 F.3d 219, 243 (2d Cir. 2006)). Ms. Gayle currently lives in Georgia. We remain in occasional telephone contact.

The eighth allegation, that I have not remitted to the nurses the entirety of the money judgment collected, is admitted. It is, however, respectfully averred that my conduct in that respect is fully compliant with the applicable rules of ethics and substantive law. Of the $760,496.96 collected (representing the judgment for the plaintiffs exclusive of attorney's fees, which were awarded separately pursuant to 29 U.S.C. § 216(b)), $13,719.04 remains in my firm's trust account. That is because we have been unable to locate several of the plaintiffs. In addition, one of the plaintiffs, who says that she fears identity theft, refuses to provide her social security number (so that I can issue her a 1099, as required) notwithstanding my efforts to persuade her that I have no nefarious purpose. If money remains in my firm's trust account after efforts have been exhausted, I will move the court for permission to make a *cy pres* donation to charity. If the court denies the application, I will dispose of the money in accordance with the Abandoned Property Law. In any event, the money is fully accounted for in my firm's trust account, documentation of which is, of course, available to the Committee.

The ninth allegation, that I harassed Mr. Dorvilier's company by notifying the Department of Labor of the failure to pay overtime, is denied. I have no doubt that many of Mr. Dorvilier's employees complained to the Department of Labor(because Mr. Dorvilier did not

pay overtime). However, I did not initiate any Department of Labor complaint.

The tenth allegation, that I reported Mr. Dorvilier to the District Attorney, is denied. In fact, what happened was that, in addition to not paying overtime, Mr. Dorvilier deducted $1.00 per hour per employee for "workers' compensation insurance" from the nurses' paychecks. I elected not to pursue a claim under the New York Labor Law for that deduction, since the New York law distinction between employees and independent contractors (the principal disputed issue in the lawsuit) was not the same as the FLSA distinction and I feared that a complex issue of state law might destroy supplemental jurisdiction. I later learned that Mr. Dorvilier pocketed the money rather than remit it to the insurance carrier. Accordingly, he was convicted of third-degree grand larceny in May 2012. A copy of the District Attorney's press release announcing the conviction is annexed hereto as Exhibit 3.

I trust that this addresses the Committee's concerns.

Respectfully submitted,

Jonathan A. Bernstein

JAB:jb
Encl.

Claudia Gayle, individually and on behalf of all others similarly situated as a class representative, Plaintiff, - against - Harry's Nurses Registry, Inc., and Harry Dorvilier a/k/a Harry Dorvilien, Defendants.

CV-07-4672(CPS)(MDG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 17768

March 9, 2009, Decided
March 9, 2009, Filed

SUBSEQUENT HISTORY: Reconsideration denied by, Summary judgment granted, in part, summary judgment denied, in part by *Gayle v. Harry's Nurses Registry, Inc., 2010 U.S. Dist. LEXIS 137498 (E.D.N.Y., Dec. 23, 2010)*

COUNSEL: **[*1]** For Claudia Gayle, Individually, On Behalf of All Others Similarly Situated and as Class Representative, Plaintiff: Jonathan A. Bernstein, LEAD ATTORNEY, Levy Davis & Maher LLP, New York, NY.

For Harry's Nurses Registry, Inc., Harry Dorvilien, Defendants: Mark Lance Hankin, LEAD ATTORNEY, Hankin, Handwerker & Mazel, PLLC, New York, NY; Milo S. Silberstein, Dealy & Silberstein, LLP, New York, NY.

JUDGES: Charles P. Sifton, Senior Judge, United States District Judge.

OPINION BY: Charles P. Sifton

OPINION

MEMORANDUM AND ORDER

SIFTON, Senior Judge.

Plaintiff Claudia Gayle, individually and on behalf of all others similarly situated, commenced this purported collective and class action on November 7, 2007, alleging that Harry's Nurses Registry, Inc. ("Harry's Nurses") and its principal, Harry Dorvilier ("Dorvilier"), (collectively "defendants") violated provisions of the Fair Labor Standards Act, *29 U.S.C. § 201 et seq.* ("FLSA") and the New York Minimum Wage Act, *N.Y. Labor Law §§ 190 et seq.* and *650 et seq.* ("MWA") by failing to pay overtime wages. [1] Plaintiff seeks overtime premium pay, liquidated damages, reimbursement for amounts withheld from pay as workers' compensation, pre-judgment interest, a permanent injunction, **[*2]** certification of this action as a class action, costs, and attorneys' fees. Now before the Court is the defendants' motion for summary judgment, the plaintiff's cross-motion for partial summary judgment on the issue of liability, and the plaintiff's motion to distribute notice to potential class members. The motion also effectively asks the Court to decide whether plaintiff's action may be maintained as a collective action under the FLSA. For the reasons set forth below, the defendants' motion is denied and the plaintiff's motions are granted.

1 In her complaint, plaintiff also made a claim under *N.Y. Labor Law § 193*, alleging that defendants had deducted the cost of workers' compensation insurance coverage. Plaintiff has withdrawn this claim.

BACKGROUND

The following facts are taken from the complaint and the parties' submissions in connection with this motion. The facts are undisputed except as noted.

Structure of Harry's Nurses

Harry's Nurses is a corporation organized under the laws of the State of New York, and has its principal place

of business in Queens, New York. Dorvilier is the president and chief executive officer. Plaintiff is a registered nurse and resides in Nassau County, [*3] New York.

Harry's Nurses refers temporary healthcare personnel, including Registered Nurses ("RNs") and Licensed Practical Nurses ("LPNs") (collectively, "field nurses") to patients in their private homes in and around New York City. Affidavit of Harry Dorvilier at P 5 ("Dorvilier Aff."). This is Harry's Nurses' only business. Deposition of Harry Dorvilier at 9:16-10:22 ("Dorvilier Dep."). Harry's Nurses has from seven to ten full-time employees, who hold the offices of director of patient services, office manager, accountant, field nurse staffer, homecare nurse staffer, staff coordinator, billing/payroll clerk, and nursing supervisor. Dorvilier Aff. at P 58.

Harry's Nurses maintains a referral list or "registry" of field nurses. *Id.* at P 6. At any given time, Harry's Nurses may have as many as five hundred field nurses on its referral list. *Id.* at P 7. In order to be listed on the referral list, a nurse must fill out an application, sit for an interview, consent to a background check, provide documentation that she or he is covered by his or her own liability insurance, possess a valid LPN or RN license, read Harry's Nurses orientation information, and complete a test of basic nursing [*4] knowledge. *Id.* at P 8. Harry's Nurses provides the field nurses with an in-service document pertaining to various basic procedures including emergency and disaster planning, treating a patient with Alzheimer's Disease, the stages of dying, New York State laws regarding proxy decision making power, and hepatitis/HIV information and confidentiality. *Id.* at P 10. Nurses must certify that they have read and understood this document, which has a blank line for "employee's signature." *Id.* at 32:22-25, 34:15-20. When field nurses care for patients, they are expected to perform twelve categories of assessments, each category being described with particularity in the documents issued by defendants, and to note their findings in the patient's chart. *Id.* at 125:23-126:19.

Patients typically come into contact with Harry's Nurses via advertising on the radio and in newspapers, and advertising directed towards social workers and doctors. Dorvilier Dep. at 14:9-18:2. When a client contacts Harry's Nurses seeking a nurse placement, Harry's Nurses generates a pool of field nurses from the referral list whose qualifications it determines best coincide with the needs of the patient. Dorvilier Aff. at [*5] P 11. The Nursing Supervisor calls the nurse from the pool to inform her of the placement opportunity, including the hours and number of days of the placement. *Id.* at P 12. The details of the nursing services to be rendered are determined by the patient's needs and condition. *Id.* at P 18. If a patient is unhappy with the nurse, the patient may contact Harry's Nurses and ask for a replacement. *Id.* at P 30. Field nurses have no contractual or economic relationships with patients to whom they are referred through Harry's Nurses. P. Ex. B at 2.

Field nurses on the referral list are not discouraged from holding other jobs. Dorvilier Aff. at P 19-20. Many nurses on the referral list wait days, weeks, or months between placements. *Id.* at P 26. The nurses commonly work at one or several other jobs, including putting their names on other referral lists. *Id.* at P 27. Defendants require that field nurses arrange their schedules to avoid conflicts with assignments from Harry's Nurses. Dorvilier Dep. at 110:13-111:12. In the case of a conflict, a nurse may not send another nurse in his or her stead. *Id.* at 40:18-41:13. A nurse is under no obligation to accept a work placement and may decline at [*6] her discretion, without suffering negatively with respect to future placement opportunities. *Id.* at P 13-14. A nurse must work a full shift rather than a portion of a shift. Dorvilier Dep. at 74:3-75:12.

Within 90 days of the time that a nurse is placed in service by Harry's Nurses, a nursing supervisor goes to the patient's home. *Id.* at P 2. Affidavit of Cherriline Williams-West at P 1 ("Williams-West Aff."). The supervisor observes and assesses the nurse's skills, including hand washing. *Id.* She also checks the book of doctor's orders relating to the patient to ensure that the orders regarding medication and dosage are up-to-date. *Id.* The supervisor or one of her colleagues performs an assessment within 48 hours of the time that Harry's Nurses begins to care for a patient. *Id.* Harry's nursing coordinator phones the patient at least once per day to verify that the assigned nurse has reported for duty. *Id.* at 68:19-70:11.

Nursing supervisors are responsible for reviewing assessments performed by nurses in the field. Williams-West Aff. at P 3. Nursing supervisors conduct monthly reviews with the nurses in the field that last 4-5 hours, for which the nurses are not paid. *Id*; Dorvilier [*7] Aff. at 85:2-86:4. Nurses are taught how to perform a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, and sound of the lungs. *Id.* The supervisor also talks to the nurses about infection control and legal issues in nursing. *Id.* On occasion, supervisors are accompanied on the in-the-field assessments by vendors of medical equipment or their technicians to assist the supervisor in instructing the nurses on the use of medical equipment. *Id.*

The nursing supervisor reports to the nursing director. [2] Dorvilier Dep. at 28:18-20. The nursing director creates a progress notes form, which must be completed by the nurse and submitted with her time sheet. If any note is "not in compliance," the nursing supervisor directs the nurse to rewrite the note or attend

an in-service continuing education session. *Id.* at 26:25-30:12. After the time sheets and progress notes are turned in, Harry's Nurses pays the nurses a set hourly rate for hours worked. Dorvilier Aff. at P 48.

2 The current nursing director is Dorvilier's sister. Dorvilier Dep. at 28:6-13.

Approximately 95% of Harry's Nurses' placements are for the care and treatment **[*8]** of Medicaid patients. *Id.* at P 46. Harry's Nurses follows Medicaid's rules and regulations in all of its business activities. *Id.* at P 46. Harry's Nurses submits the nurses' time sheets and progress notes to Medicaid on a bi-weekly basis, after which Medicaid pays Harry's Nurses a "reimbursement rate" for the hours worked by field nurses on Medicaid cases. *Id.* at P 49. The reimbursement rate for LPNs is currently a fixed rate of $ 24.00 an hour, regardless of overtime hours worked. *Id.* at P 52. Harry's Nurses pays LPNs the reimbursement rate less $ 5.00 per hour for Harry's Nurses' expenses and profit. *Id.* at P 51.

All field nurses on the referral list are required to carry their own professional liability insurance and each individual nurse is responsible for maintaining his or her professional license. *Id.* at P 55. Nurses must furnish and maintain their own basic supplies, including a blood pressure meter and stethoscope. *Id.* at P 57. Nurses must also purchase their own uniforms and pay for their own travel expenses. *Id.* at P 57.

Field nurses have no investment in defendants' business. Dorvilier Dep. at 43:13-15. A nurse cannot lose money providing services to patients and cannot profit **[*9]** beyond the hourly fee paid. *Id.* at 43:16-45:13. Harry's Nurses takes charge of billing and collections from the field nurses' patients' insurance carriers; Harry's Nurses pays its nurses promptly regardless of whether the carriers pay promptly. *Id.* 118:21-120:9. Field nurses are covered by Harry's Nurses' commercial liability insurance policy. *Id.* at 118:14-20.

Defendants may unilaterally end their association with a field nurse. Dorvilier Dep. at 109:22-110:12. If they do so, they owe the nurse for hours actually worked, but do not owe contract damages. *Id.* The "Confidentiality of Patient" form generated by defendants states that "[f]ailure to maintain patient confidentiality may lead to discharge." *Id.* at 108:14-25; P. Ex. P. Nurses applying for a position on the registry acknowledge their understanding that false information on the application may result in discharge. P. Ex. D. at 4. A discharged nurse may not seek employment directly from her patient. P. Ex. H. Other reasons for which a nurse may be discharged include failure to appear for work punctually and at the request of the patient. Dorvilier Dep. at 23:19-24:1, 108:14-25.

Plaintiff's Work Situation

On February 20, 2007, plaintiff **[*10]** entered into a "Memorandum of Agreement" with Harry's Nurses, whereby she agreed to retain Harry's Nurses' services to coordinate placement opportunities. Dorvilier Aff. P 65. Plaintiff's relationship with Harry's Nurses lasted for nine months, until November, 2007. *Id.* at P 70. Plaintiff agreed that she would be responsible for payment of income taxes for the work performed and that she would carry her own professional liability insurance. Id. Harry's Nurses did not deduct any federal or state income taxes on her behalf. *Id.* at P 75. Defendants treated plaintiff as an independent contractor. Gayle Aff. at P 3.

Plaintiff and her similarly situated co-workers regularly worked in excess of 40 hours in the work week, and were not paid overtime premium pay for this work. Complaint at P 19 ("Compl."); Dorvilier Dep. at 75:13-19, 87:8-13. Defendants state that plaintiff never demanded overtime pay. Dorvilier Aff. at P 76.

Defendants paid plaintiff directly for her services; plaintiff formed no corporation or other business entity. Affidavit of Claudia Gayle at P 5 ("Gayle Aff."). She has no business cards, has never advertised, and has never solicited a patient directly. *Id.* at P 4. She is **[*11]** dependent on referrals from Harry's Nurses and other registries. *Id.*

DISCUSSION

I. Summary Judgment Standard

A court must grant a motion for summary judgment if the movant shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).* Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).*

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987).* In order to defeat such a motion, the non-moving party must raise a genuine issue of material fact. "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Elec. Inspectors, Inc. v. Vill. of E. Hills, 320 F.3d 110, 117 (2d Cir. 2003).* A fact is material when it "might affect the outcome of the suit under the governing law." *Id.* Although all facts and inferences therefrom are to be construed in the light **[*12]** most favorable to the non-moving party, the non-moving party must raise more than a "metaphysical doubt" as to the material facts. *See Matsushita, 475 U.S. at 586; Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 498 (2d Cir. 2001).* The non-

moving party may not rely on conclusory allegations or unsubstantiated speculation. *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990)*. Rather, the non-moving party must produce more than a scintilla of admissible evidence that supports the pleadings. *First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Niagara Mohawk Power Corp. v. Jones Chem. Inc., 315 F.3d 171, 175 (2d Cir. 2003)*. In deciding such a motion the trial court must determine whether "after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000)*.

II. Employment Status

In their motion for summary judgment, defendants claim that plaintiff was an independent contractor, not subject to the FLSA.

A. The FLSA Economic Reality Test

The overtime provision of the FLSA states that "no employer shall employ **[*13]** any of his employees... for a workweek longer than 40 hours" unless the employee receives overtime pay. *29 U.S.C. § 207(a)(1)*. The FLSA's definition of an employee "is necessarily a broad one in accordance with the remedial purposes of the Act." *Brock v. Superior Care, 840 F.2d 1054, 1058 (2d Cir. 1988)* (citing *United States v. Rosenwasser, 323 U.S. 360, 363, 65 S. Ct. 295, 89 L. Ed. 301 (1945)*). "Employee" refers to "any individual employed by an employer." *29 U.S.C. § 203(e)(1)*. To "employ" means "to suffer or permit to work." *Id. § 203(g)*. The second circuit has treated employment for FLSA purposes "as a flexible concept to be determined by a case-by-case review of the totality of the circumstances." *Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132, 141-42 (2d Cir. 2008)*. "Several factors are relevant in determining whether individuals are 'employees' or independent contractors for purposes of the FLSA." *Superior Care, 840 F.2d at 1058*. These factors are known as the "economic reality test," and include the following: "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) **[*14]** the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business." [3] *Id. at 1058-59* (citing *United States v. Silk, 331 U.S. 704, 716, 91 L. Ed. 1757, 67 S. Ct. 1463, 1947-2 C.B. 167 (1947)*. "No one of these factors is dispositive; rather, the test is based on a totality of the circumstances." *Id. at 1059*. "Any mechanical application of the test is to be avoided." *Id.* The ultimate concern is whether the worker is in business for herself. *See id.* Where work done in its essence follows usual path of employee, affixing an 'independent contractor' label does not remove the worker from the protection of Fair Labor Standards Act. *Rutherford Food Corp. v McComb 331 US 722, 91 L Ed 1772, 67 S Ct 1473 (1947)*.

3 Defendants acknowledge the applicability of the economic realities test, but contend that in addition to this test, the Internal Revenue Service has utilized a more expansive set of twenty-four factors to aid in its determination as to whether a person should be considered an independent contractor or an employee. Defendants' Memorandum of Law in Support **[*15]** of Summary Judgment at 13 ("Def. Mem."). Defendants claim that these factors are helpful in "narrowing the scope" of the six factors named above. *Id.* Plaintiff responds that the IRS test is not applicable, citing the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581*; *503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)* (the FLSA definition of 'employee' "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.") Accord *Frankel v. Bally Inc., 987 F.2d 86, 89 (2d Cir. 1993)*. Plaintiff cites numerous cases that apply the six factor economic realities test, rather than the IRS test. *See Ling Nan Zheng v. Liberty Apparel Co., 355 F.3d 61, 67 (2d Cir. 2003)*; *Schwind v. EW Assocs., 357 F.Supp.2d 691, 700 (S.D.N.Y. 2005)* ("[t]he Supreme Court has specifically declined to apply the well-established agency law concepts of 'employee' and 'independent contractor' when interpreting congressional labor statutes"). In light of these precedents, I apply the six-factor test.

In *Superior Care*, the Second Circuit found that a registered nurse was an employee within the meaning of the FLSA. **[*16]** The defendant in *Superior Care* was engaged in the business of referring temporary healthcare personnel, including nurses, to individual patients. *840 F.2d at 1057*. Nurses wishing to work for Superior Care were interviewed and placed on a roster. *Id. At 1057*. As work opportunities became available, the company would assign nurses from the referral list. *Id.* Nurses were not required to accept any proposed referral. *Id.* Once an assignment was accepted, the treatment was prescribed by the patient's doctor. *Id.* The company supervised its nurses through visits to job sites once or twice a month. *Id.* Nurses were required to submit patient care notes to comply with state and federal law. *Id.* The length of an assignment depended on the needs of the patient. *Id.* The nurses were prohibited from entering into

private arrangements with patients. *Id.* The nurses were paid an hourly wage. *Id.* Nurses were permitted to hold other jobs, and many were listed on other nurse registries. *Id.* Many of the nurses worked for Superior Care for less than a year, and employment placements were sporadic. *Id.* The one difference of note between this case and *Superior Care* was that some of the nurses in *Superior Care* **[*17]** were classified as employees, for whom the employer paid taxes. *Id. At 1059.* However, the Court did not rely on this factor to determine that Superior Care owed back wages to the nurses it had classified as independent contractors. *Id.* The Court applied the economic reality factors and determined that they fully supported the District Court's conclusion that the nurses were employees. *Id.* The facts of the case before me differ in no material respect from those of *Superior Care.* I apply the economic reality factors below in order to determine whether plaintiff must be deemed an employee entitled to overtime.

1. Degree of Control Exercised by Defendants

In *Carter v. Dutchess Comm. Coll., 735 F.2d 8, 12 (2d Cir. 1984)*, the Second Circuit stated that the following factors should be used to determine whether an entity has exercised formal control over its workers: "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." [4] (cited in *Barfield, 537 F.3d at 142-43*). Applying these factors to the plaintiff, **[*18]** I find that defendants exercised control over plaintiff. Defendants had the power to end their association with plaintiff unilaterally for failure to maintain patient confidentiality or for providing false information on the application, as well as other reasons. If she is fired, plaintiff would be unable to contact clients directly to continue working for them. Plaintiff was required to create progress notes, which were scrutinized every two weeks. Plaintiff's work was supervised by a nursing supervisor who spent 4-5 hours per month with her in the field. Plaintiff had no economic relationship with their patients, nor could she negotiate her rate of pay with them. Defendants set the rate of pay for plaintiff based on the Medicaid reimbursement rate less Harry's Nurses' expenses and profit. Plaintiff was not permitted to assign her shift to others. Plaintiff was free to accept or reject shifts, but she did accept a placement, she was required to perform for the entire duration of the placement rather than a portion.

> 4 The Second Circuit has also stated that an entity that lacks formal control over workers may nevertheless be considered their employer based on its exercise of functional **[*19]** control. *Zheng v. Liberty Apparel Company, 355 F.3d 61 (2d Cir. 2003). Zheng* lists the following six factors: "(1) whether [defendant's] premises and equipment were used for the [plaintiff's] work; (2) whether the [plaintiff] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which [plaintiff] performed a discrete [job] that was integral to [defendant's business]; (4) whether responsibility under the contracts could pass from one [nurse] to another without material changes; (5) the degree to which the [defendants] or their agents supervised [plaintiff's] work; and (6) whether [plaintiff] worked exclusively or predominantly for [defendants]." *Id. at 72.* Because I conclude that defendants exercised formal control over plaintiff, it is not necessary to analyze her work situation under the functional control test.

In *Superior Care*, the Court stated that Superior care exercised control over its nurses, because it unilaterally dictated the nurses' hourly wage, supervised the nurses by monitoring their patient care notes and visiting the job sites, and limited work hours to 40 hours per week where nurses claimed they were owed overtime. **[*20]** *840 F.2d at 1060.* Although the supervisor made job site visits only once or twice a month, the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. *Id.* The Court noted that "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control." *Id.* Control may be restricted or exercised only occasionally without removing the employment relationship from the protections of the FLSA. *See Herman v. RSR Sec. Servs., 172 F.3d 132, 139 (2d Cir. 1999).*

Defendants make a number of arguments against a conclusion that they exercised control over plaintiff, none of which are persuasive. Defendants state that plaintiff signed a document during her initial interview indicating that she was retaining Harry's Nurses to coordinate placement opportunities for her as an independent contractor. The fact that plaintiff signed a form describing her as an independent contractor does not make her an independent contractor; the economic realities test assesses the realities of the work situation rather than job titles.

Defendants maintain that the patients and their families and doctors were the ones who dictated **[*21]** the instructions for care. This claim is belied by the affidavit of Ms. Williams-West, a nursing supervisor for Harry's Nurses who attests that she did supervise the field nurses' work. [5] Defendants further claim that the patients alone possess the power to fire the nurses. [6] This claim is contradicted by the fact that Harry's Nurses explicitly reserves the power to unilaterally fire nurses for a number of reasons, *e.g.*, failing to comply with

confidentiality requirements.

5 Defendants previously maintained that no one from Harry's Nurses ever observed or evaluated plaintiff's performance in carrying out her nursing duties. Def. Mem. at 25. Plaintiff then offered the affidavit of Ms. Williams-West, a former nurse supervisor with Harry's Nurses, which stated that, once a month, Ms. Williams-West would visit nurses in the field and review certain procedures with them in order to ensure that they were being properly performed. Defendants thereafter explicitly admitted that Harry's Nurses supervises the nurses once a month. Defendants' Reply to Plaintiff's Cross-Motion for Summary Judgment at 3 ("D. Reply"). However, defendants continue to maintain that Harry's Nurses has "no stake in patient **[*22]** 'progress' beyond maintaining its contractual relationship with the client's insurance provider." *Id.*

6 Defendants state that "Harry's does not discharge nurses; like any other subcontractor, the nurse will simply not be invited to work on future assignments." D. Reply at 4. This claim begs the question. If the nurses are employees, defendants' decision not to 'invite them back' constitutes a firing.

Defendants claim that progress notes are necessary in order to be in compliance with Medicaid standards, and they are not collected for the purpose of monitoring nurses. *Id.* at P 45. Defendants state that because they have no intention of monitoring nurses for their own purposes, this exercise of control should not be significant for the purpose of determining employee status under the FLSA. Assuming this claim were true, the fact that defendants do not profess an interest in monitoring the nurses' work but require them to prepare paperwork in order to comply with government regulations does not change the result, which is is that defendants do supervise field nurses' work, thereby enabling them to control that work. *See Barfield, 537 F.3d at 147.*

Defendants acknowledge that they maintained **[*23]** "functional control over the nurses," but argue that the "ultimate arbiter of formal control" was the patient, and therefore this factor cannot weigh against defendants. D. Reply at 5. Defendants misconstrue the law. An employee may be jointly employed where, *inter alia*, two or more employers arrange to share the employee's services or where one employer acts directly or indirectly in the interest of another in relation to the employee. *29 C.F.R. § 791.2(b).* The fact that the patients may have exercised a good deal of control over nurses does not lead to the conclusion that defendants did not exercise such control. Defendants cite *Barfield, 537 F.3d at 146*, for the proposition that because the patients have ultimate control over various aspects of the work, they are the employers. However, *Barfield* stands for the proposition that one joint employer may not disclaim liability by arguing that another joint employer exercises a greater degree of control. *Id. at 141, 146.*

2. Plaintiff's Opportunity for Profit or Loss and her Investment in the Business

In his deposition, defendant Dorvilier noted that field nurses have no investment in the defendants' business, that nurses cannot lose money **[*24]** providing services, and that nurses cannot profit beyond the hourly fee paid. Dorvilier Dep. at 43:13-15; 43:16-45:13. Defendants now argue that plaintiff made a significant investment by purchasing and maintaining equipment (such as her stethoscope and nursing scrubs) and securing a means of transportation. Defendants argue that plaintiff was able to maximize profit by choosing how much equipment to purchase and what form of transportation to use, taking into account how many hours she worked. That plaintiff would 'profit' more if she had worked more hours does not mean that she had an opportunity for profit. Her pay was not contingent on the success of the company or the excellence of her work. She was paid an hourly wage. The argument that her stethoscope and nursing scrubs were an investment would render every worker who purchases basic clothing and tools for a job an independent contractor. Such investments are "negligible." *Superior Care, 840 F.2d at 1059.*

3. Degree of Skill

Plaintiff concedes that nurses are skilled workers. However, "the fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant **[*25]** initiative in locating work opportunities have been held to be employees under the FLSA." *Superior Care, 840 F.2d at 1060.* In this case, nothing in the record indicates that plaintiff exercised initiative in finding job assignments. "As a matter of economic reality, the [plaintiff's] training does not weigh significantly in favor of independent contractor status." *Id.*

4. Permanence or Duration of the Working Relationship

Plaintiff worked for defendants for nine months. Defendants state that plaintiff's relationship with Harry's Nurses was irregular and unstructured, as there were no regular shifts or typical number of hours work, and that the schedule for placement was determined by the needs of the patient. In *Superior Care*, the Court held that the transient nature of the nursing work force, including seeking placement through referral services, was "not dispositive of independent contractor status." *840 F.2d at 1060.* Employees may work for more than one employer without losing their benefits under the FLSA. *Id.* Further,

"workers have been deemed employees where lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business [*26] initiative." *Id. at 1060-61.* Following the Second Circuit's holding, the irregular nature of plaintiff's work for defendants is no bar to a finding that she was an employee within the meaning of the FLSA. [7]

7 Defendant cites an unreported case from a District Court in Tennessee, which found that nurses who often worked less than 40 hours a week for a referral service, simultaneously performed other nursing work, and worked only those shifts to which they agreed in advance were a transient work force. *See Wilson v. Guardian Angel Nursing, Inc., 2008 U.S. Dist. LEXIS 59623 (M.D.Tenn. 2008).* This holding is contrary to the law in the Second Circuit.

5. Whether Plaintiff's Work is an Integral Part of Defendants' Business

Defendants' only business is to place nurses in homes to provide patient care. Plaintiff performed this function. "The services rendered by [plaintiff] constituted the most integral part of [defendant's] business, which is to provide health care personnel on request." *Superior Care, 840 F.2d at 1059.* Nevertheless, defendants claim that the "actual services rendered by plaintiff during placement for any particular client were not an integral part of Harry's Nurses." Def. Mem. [*27] at 26. Defendants argue that, had plaintiff declined to accept any of her placement offers from defendants, defendants would have offered those opportunities to other qualified nurses. The question is not whether plaintiff's individual services were essential to the business, but whether the type of work performed by plaintiff was integral to the defendants' business, which it clearly was. *See id.*

B. Application of the Economic Realities Factors

Under the economic realities test, plaintiff is an employee within the meaning of the FLSA. Defendants admit that they exercise "functional control" over the nurses, [8] and other indicia of control are present. Even taking defendants' claim as true that they required nurses to submit progress notes and to be supervised by the supervising nurse once a month only to comply with government regulations and to ensure that the patients needs were being met, the fact remains that defendants exercised control over plaintiff's nursing activity by reviewing the notes and training her once a month to ensure that she was complying with proper nursing procedures. Plaintiff invested minimal funds in the business, and had no opportunity for profit or loss. Plaintiff [*28] is a skilled employee, but exercised no independent initiative in locating work opportunities. Defendants do not dispute this. Accepting as true defendants' claim that plaintiff and her colleagues were a transient working population, this factor does not weigh against her in the context of a field of work where all employees are transient. *See Superior Care, 840 F.2d at 1060.* The Second Circuit has determined that work performed by home healthcare workers for nursing referral agencies is an integral part of the employer's business. *Id. at 1059.*

8 *See* Def. Mem. at 5.

Accepting all of defendants' statements as true for the purposes of this motion, no reasonable fact finder could find that plaintiff was not an employee under the FLSA. Each of the elements of plaintiff's work situation cited by defendants in support of their claim has been specifically addressed in prior case law, which has concluded that persons such as plaintiff are employees.

Under the FLSA, "no employer shall employ any of his employees... for a workweek longer than 40 hours" unless the employee receives overtime pay. *29 U.S.C. § 207(a)(1).* Defendants have admitted that plaintiff was not paid overtime wages when she worked [*29] more than forty hours in one week, in violation of the FLSA. Plaintiff's motion for partial summary judgment on the question of liability is accordingly granted.

III. Joint and Several Liability

Plaintiff also seeks partial summary judgment on the question of liability against both Harry's Nurses and Mr. Dorvilier. Courts have found that the FLSA definition of "employer" includes individual principals of corporate employers. *RSR Security Servs., 172 F.3d at 139-40* (chairman who was 50% owner of corporate defendant, who had the power to hire and fire, was individually liable for overtime violations). "The 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 liability under the FLSA for unpaid wages." *Keun-Jae Moon v. Joon Gab Kwon, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002)* (citing *Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983)* (citing cases)). *See also 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 was individually liable); *Chao v. Vidtape, Inc., 196 F.Supp.2d 281 (E.D.N.Y. 2002)* [*30] (president had power to hire, fire, supervise, and determine pay rate and was individually liable); *Lopez v. Silverman, 14 F.Supp.2d 405, 412-13 (S.D.N.Y. 1998)* (president had "dominant" role over daily operations and was individually liable).

Defendant Dorvilier has stated that he is the CEO of Harry's Nurses, and that he "oversee[s] the whole operation, make[s] sure that the service has been provided." Dorvilier Dep. at 9:10-15. Dorvilier operates

the business himself. *Id.* at 12:7-10. Accordingly, because Harry's Nurses is liable for violations of the FLSA, and defendant Dorvilier was a corporate officer with operational control of the corporation, Dorvilier is jointly and severally liable to plaintiff.

IV. Plaintiff's Motion for Notice of Collective Action

I turn to plaintiff's request for court-authorized notice informing potential plaintiffs of their opportunity to "opt-in" to the present lawsuit. This motion derives from *216(b) of the FLSA*, which provides a right of action to recover unpaid overtime compensation and liquidated damages from employers who violate the Act's overtime provisions. *29 U.S.C. 216(b). Section 216(b)* provides, in relevant part:

> An action to recover [for unpaid **[*31]** overtime wages] may be maintained against any employer... in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Thus, under the FLSA potential plaintiffs must 'opt in' to a collective action to be bound by the judgment. Moreover, only if plaintiffs 'opt in' will the statute of limitations on potential plaintiffs' claims be tolled. *Hoffmann v. Sbarro, Inc., 982 F.Supp. 249, 260 (S.D.N.Y. 1997).*

"It is well settled that district courts have the discretionary power to authorize the sending of notice to potential class members in a collective action brought pursuant to *216(b) of the FLSA*." *Id. at 261*; *see also Braunstein v. E. Photographic Lab., Inc., 600 F.2d 335, 336 (2d Cir. 1979).* "Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin **[*32]** its involvement early, at the point of the initial notice, rather than at some later time." *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 171, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989).* Court authorized notice "comports with the broad remedial purpose of the [FLSA]." *See Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978).*

In order to receive authorization for class notice in an FLSA action, plaintiff must demonstrate that potential class members are "similarly situated" to plaintiff. *See 29 U.S.C. § 216(b).* The threshold for demonstrating that potential plaintiffs are similarly situated is "very low at the notice stage." *Lynch v. United Servs. Auto. Ass'n, 491 F.Supp.2d 357, 368. (S.D.N.Y. 2007).* Plaintiff can meet this burden "by making a modest factual showing sufficient to demonstrate that [she] and potential plaintiffs together were victims of a common policy or plan that violated the law." [9] *Hoffmann, 982 F.Supp at 261* (collecting cases). This first review is "merely a preliminary finding," and does not require a determination that the persons being notified are, in fact, similarly situated to the plaintiff. *Lynch, 491 F.Supp.2d at 368.* After discovery, the Court reviews the **[*33]** collective action certification more rigorously, at which point it may decertify the collective action if it determines that the plaintiffs are not similarly situated. *Dumitrescu v. Mr. Chow Enters., 2008 U.S. Dist. LEXIS 49881, at *11 (S.D.N.Y. 2008).*

> 9 Unlike *Rule 23, section 216(b) of the FLSA* requires no showing of numerosity, typicality, commonality, or representativeness. As a result, "the 'similarly situated' standard for certifying a *216(b)* collective action is considerably more liberal than class certification under *Rule 23*." *Lynch, 491 F.Supp.2d at 369.*

Plaintiff has made the modest factual showing needed to support a preliminary determination that there are others similarly situated who should be notified of their opportunity to join this suit as plaintiffs. First, plaintiff states that she worked in excess of forty hours a week without receiving one and one-half times her normal compensation in accordance with the FLSA's overtime rules. Gayle Aff. at P 3. Second, plaintiff alleges that all field nurses are paid in the same manner as plaintiff. Gayle Aff. at P 7. Third, Defendants admit that they treat all of their nurses as independent contractors, including plaintiff. Dorvilier **[*34]** Dep. at P 33:12-16. [10] Plaintiff and Ms. Patricia Robinson ("Robinson"), who also worked as a nurse for defendants, have submitted affidavits stating their belief that other field nurses are unaware that defendants' classification of them as independent contractors is unlawful. Gayle Aff. at P 8; Robinson Aff. at P 8. If plaintiff has a viable FLSA claim against defendants as the result of their classification of her position, it is likely that there are other similarly situated employees who have similarly viable claims. *See Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 368 (S.D.N.Y. 2007)* (plaintiffs met their burden where they relied on their own pleading and declarations to show they were subject to certain practices at defendant's workplace and, to the best of their knowledge, their experience was shared by members of the proposed class).

> 10 At any given moment, Harry's Nurses

Registry may have up to five hundred nurses on its referral list.

I accordingly grant plaintiff's application to circulate a notice of pendency to other persons similarly situated to herself pursuant to *29 U.S.C. § 216(b)*. I find it is appropriate to do so at this stage, rather than awaiting the **[*35]** completion of discovery, because this will facilitate "the Act's broad remedial purpose and promot[e] efficient case management," *Hoffmann, 982 F.Supp. at 262*, and will preserve the rights of potential plaintiffs whose rights might become time-barred during the discovery phase of this case. This is a preliminary determination that may be revised upon the completion of discovery.

Plaintiff requests that the class be defined as "all persons who have been employed by Harry's Nurse Registry and/or Harry Dorvilier as field or per diem nurses at any time since November 7, 2004." This definition is accepted for the purpose of authorizing notice.

Plaintiff seeks an order compelling production of a list of names, last known addresses, dates of employment, telephone numbers, and social security numbers of all nurses registered with defendants' registry since November 7, 2004 to facilitate discovery of similarly situated persons. Courts often direct an employer defendant to disclose the names and addresses of similarly situated potential plaintiffs. *See Patton v. Thomson Corp., 364 F. Supp. 2d 263, 266 (E.D.N.Y. 2005)*; *Cano v. Four M Food Corp., 2009 U.S. Dist. LEXIS 7780, at *35 (E.D.N.Y. February 3, 2009)*; **[*36]** *Chowdhury v. Duane Reade, Inc., 2007 U.S. Dist. LEXIS 73853, at *6 (S.D.N.Y. October 2, 2007)*; *see also Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 169-170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)* (authorizing disclosure for the purposes of notice in an ADEA action).

Most of the information requested by plaintiff is essential to identifying and notifying potential "opt-in" plaintiffs, and should be disclosed. However, plaintiff has not made a showing that disclosure of confidential social security numbers is necessary in order to facilitate the delivery of notices. *See Chowdhury, 2007 U.S. Dist. LEXIS 73853, at *21*. The request for disclosure of social security numbers is denied without prejudice to its renewal after disclosure of the other information from defendants on a more ample showing of how the information is necessary to identify class members.

CONCLUSION

For the reasons stated above, plaintiff's motion for partial summary judgment on the issue of liability is granted, and defendants' motion for summary judgment is denied. In addition, plaintiff's motion seeking leave to circulate a notice of pendency pursuant to *29 U.S.C. § 216(b)* is granted. Defendants are directed to **[*37]** disclose the names, last known addresses, dates of employment, and telephone numbers for all persons employed as field or per diem nurses from November 7, 2004 to the present on or before April 9, 2009. Plaintiff is directed to settle a proposed Notice of Pendency and consent form on or before the same date.

SO ORDERED.

Dated: Brooklyn, New York

March 9, 2009

By: /s/ Charles P. Sifton (electronically signed)

United States District Judge

2014 U.S. App. LEXIS 23029, *; 165 Lab. Cas. (CCH) P36,294;
23 Wage & Hour Cas. 2d (BNA) 1635

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated, and as Class Representative, ALINE ANTENOR, ANNE C. DEPASQUALE, ANNABEL LLEWELLYNHENRY, EVA MYERS-GRANGER, LINDON MORRISON, NATALIE RODRIGUEZ, JACQUELINE WARD, DUPONT BAYAS, CAROL P. CLUNIE, RAMDEO CHANKAR SINGH, CHRISTALINE PIERRE, LEMONIA SMITH, BARBARA TULL, HENRICK LEDAIN, MERIKA PARIS, EDITH MUKANDI, MARTHA OGUNJANA, MERLYN PATTERSON, ALEXANDER GUMBS, SEROJNIE BHOG, GENEVIEVE BARBOT, CAROLE MOORE, RAQUEL FRANCIS, MARIE MICHELLE GERVIL, NADETTE MILLER, PAULETTE MILLER, BENDY PIERRE-JOSEPH, ROSE-MARIE ZEPHIRIN, SULAIMAN ALI-EL, DEBBIE ANN BROMFIELD, REBECCA PILE, MARIA GARCIA SHANDS, ANGELA COLLINS, BRENDA LEWIS, SOUCIANNE QUERETTE, SUSSAN AJIBOYE, JANE BURKE HYLTON, WILLIE EVANS, PAULINE GRAY, EVIARNA TOUSSAINT, GERALDINE JOAZARD, NISEEKAH Y. EVANS, GETTY ROCOURT, CATHERINE MODESTE, MARGUERITE L. BHOLA, YOLANDA ROBINSON, KARLIFA SMALL, JOAN-ANN R. JOHNSON, LENA THOMPSON, MARY A. DAVIS, NATHALIE FRANCOIS, ANTHONY HEADLAM, DAVID EDWARD LEVY, MAUD SAMEDI, BERNICE SANKAR, MARLENE HYMAN, LUCILLE HAMILTON, PATRICIA ROBINSON, Plaintiffs-Appellees, v. HARRY'S NURSES REGISTRY, INC., HARRY DORVILIEN, Defendants-Appellants.***

** The Clerk of Court is directed to amend the caption.

No. 12-4764-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2014 U.S. App. LEXIS 23029*; *165 Lab. Cas. (CCH) P36,294*; *23 Wage & Hour Cas. 2d (BNA) 1635

December 8, 2014, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Petition for certiorari filed at, 03/09/2015

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of New York (Garaufis, J. and Sifton, J.).
Gayle v. Harry's Nurses Registry, 2012 U.S. Dist. LEXIS 133279 (E.D.N.Y., Sept. 14, 2012)

COUNSEL: For Plaintiffs-Appellees: JONATHAN ADAM BERNSTEIN, Levy Davis & Maher LLP, New York, NY.

For Defendants-Appellants: RAYMOND NARDO, Mineola, NY, (Mitchell L. Perry, White Plains, NY, on the brief).

JUDGES: Present: ROBERT A. KATZMANN, Chief Judge, RALPH K. WINTER, Circuit Judge, VICTOR MARRERO, District Judge.*

* Hon. Victor Marrero, United States District Judge for the Southern District of New York, sitting by designation.

OPINION BY: CATHERINE O'HAGAN WOLFE

OPINION

SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the orders and judgment of the district court be and hereby are **AFFIRMED**.

Defendants-Appellants Harry's Nurses Registry, Inc. ("Harry's") and Harry Dorvilien appeal from a September 18, 2012 judgment of the United States District Court for the Eastern District of New York (Garaufis, *J.*), which followed four orders (Garaufis, *J.* and Sifton, *J.*) that culminated in a grant of summary judgment to the plaintiff class on their unpaid overtime claims under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. §§ 201-219*. A fifth order (Garaufis, *J.*) adopted in full a magistrate judge's report **[*2]** and recommendation to correct the judgment and grant attorneys' fees, yielding an amended judgment dated October 16, 2013. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review de novo a district court's grant of summary judgment, resolving all ambiguities and drawing all reasonable inferences in favor of the non-moving party. *See Wrobel v. Cnty. of Erie, 692 F.3d 22, 27 (2d Cir. 2012)*. Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

The appellants' principal contention is that the district court erred in determining that the nurses listed and placed by Harry's were employees rather than independent contractors. We find that the district court was correct. Whether a worker is treated as an employee or an independent contractor under FLSA is determined not by contractual formalism but by "economic realities." *See Rutherford Food Corp. v. McComb, 331 U.S. 722, 727, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)* (internal quotation marks omitted). Our analysis of the relationship turns on the economic-reality test, which weighs

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or **[*3]** loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988). "No one of these factors is dispositive; rather, the test is based on a totality of the circumstances." *Id. at 1059*.

The relationship between Harry's and the nurses who are plaintiffs here is nearly indistinguishable from the relationship between Superior Care and the plaintiffs in *Brock*, whom we held to be employees under FLSA. *See id. at 1057-58*. The district court here explored the first factor at length, finding that Harry's exercises significant control over the nurses, both economically and professionally. We agree. Indicia of economic control present here include Harry's policies that: prohibit a nurse from contracting independently with placements, although its nurses may be listed with other agencies; prohibit a nurse from subcontracting a shift to another nurse; prohibit a nurse from taking a partial shift, although a nurse may decline a whole shift; and prohibit a nurse who is unilaterally terminated from collecting contract damages, **[*4]** expectation damages, or liquidated damages, permitting only unpaid wages as damages. Furthermore, the hourly rate paid is not negotiated but is fixed by Harry's. Indicia of professional control present here include: the work of Harry's nursing director and nursing supervisors, who monitor the nurses' daily phone calls reporting to shifts, collect documents and conduct on-site training four to five hours each month, communicate with doctors to ensure that their prescribed care is being carried out, and handle emergencies; the ability of a nursing supervisor to require a nurse to attend continuing education to maintain their licenses; an inservice manual that nurses had to certify having read and understood; training by Harry's covering HIV confidentiality, ventilators, oxygen, and other medical subjects; and a requirement that each shift include a comprehensive assessment of the patient in the form "progress notes," which nurses had to submit to get paid.

Another critical factor is that the nurses have no opportunity for profit or loss whatsoever; they earn only an hourly wage for their labor and have no downside exposure. The nurses have no business cards, advertisements, or incorporated **[*5]** vehicle for contracting with Harry's, and they are paid promptly regardless of whether the insurance carrier pays Harry's promptly. We agree with the district court that this second factor weighs heavily in favor of the nurses' status as employees. That the nurses are skilled workers in a transient workforce "reflects the nature of their profession and not their success in marketing their skills independently." *Id. at 1061*. Finally, the appellants cavil that the nurses are not integral to Harry's Nurses

Registry, notwithstanding that "Nurses" is--literally--Harry's middle name. But placing nurses accounts for Harry's only income; the nurses are not just an integral part but the sine qua non of Harry's business. Considering all these circumstances, we agree with the district court that these nurses are, as a matter of economic reality, employees and not independent contractors of Harry's.

The remainder of the appellants' arguments merit less discussion. First, Harry's again fights its name by arguing that its nurses were not nurses but instead home health aides and were therefore unprotected by FLSA because of its exemption for domestic companionship workers. *See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 161-62, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007)*. Having not been raised in the **[*6]** district court, this affirmative defense is waived on appeal, *see Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003)*, but it is also wrong: The plaintiffs are all registered nurses (RNs) or licensed practical nurses (LPNs) who do not perform a "companionship service" within the meaning of the exemption at issue. *See 29 C.F.R. § 552.6* ("The term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse."). A related argument advanced by the appellants is that the nurses are not covered by FLSA because they do not meet the threshold requirement of having performed overtime "work," having often left jobs at hospitals caring for 40 patients to now care only for one patient in a home, a "97.5% reduction in task responsibility." Appellants' Br. 43. This argument does violence to the dictionary definition of work as well as to the dignity of nurses, and we reject it emphatically.

Second, the appellants misunderstand FLSA's liquidated damages provision, which presumptively awards "an additional equal amount as liquidated damages," *29 U.S.C. § 216(b)*, but provides for an affirmative defense in the event that a liable defendant had a **[*7]** reasonable, good-faith belief of compliance. *See Brock v. Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1987)* ("Double damages are the norm, single damages the exception." (internal quotation marks and alteration omitted)). The defendants failed to carry their "difficult" burden to prove this affirmative defense; the nurses' failure to argue that defendants willfully violated FLSA has no bearing on the entirely proper liquidated-damages award. *Id.*

Third, the appellants suggest that the class of nurses should be decertified because its members lack commonality. This argument contains no citation to the record, and it is unpersuasive in any event. The district court found commonality among the class based on affidavits from some but not all of its members, the kind of "sensible" approach that we endorsed in *Myers v. Hertz Corp., 624 F.3d 537, 554-55 (2d Cir. 2010)*. Using affidavits from five of the thirty-five class members whose time records demonstrated overtime violations was well within the bounds of reason and practicality. *See Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 67 (2d Cir. 1997)*. The defendants took no discovery directed at commonality, which accounts for the appellants' lack of citations to the record and leaves us without a basis on which to disturb the district court's initial finding of commonality.

The appellants' fourth subsidiary argument **[*8]** is that the New York State Public Health Law should govern the outcome because Harry's is governed by *Article 36* whereas Superior Care was governed by *Article 28*. But state law does not trump FLSA, which permits states and localities to exceed its protections with higher minimum wages or lower maximum workweeks but not to weaken its protections in the other direction. See *29 U.S.C. § 218(a)*.

A fifth and final quibble that we discuss arose in the appellants' reply brief concerning one plaintiff, Willie Evans, who had lodged an unsuccessful complaint alleging overtime violations with the New York State Department of Labor. This argument was not adequately presented in the appellants' opening brief, which cited Evans as an example but made no argument concerning collateral estoppel. *See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)*. And its merits fail in any event-an investigator declined to pursue Evans's complaint, but that is far different from the full adjudication on the merits required for collateral estoppel. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 106, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*.

We have considered the appellants' remaining arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED**.

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FOR IMMEDIATE RELEASE
FRIDAY, MAY 11, 2012

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NURSING AGENCY OWNER AND CORPORATION CONVICTED OF STEALING MORE THAN $25,000 FROM EMPLOYEES

Unlawfully Deducted Money From Employee Paychecks For Workers' Compensation Insurance

Queens District Attorney Richard A. Brown today announced that the owner of a Jamaica, Queens, nursing agency and his corporation have been convicted of third-degree grand larceny, among other charges, for unlawfully deducting a dollar per hour from the payroll checks of approximately 13 of his employees for workers' compensation insurance when, by law, as their employer he was required to pay for the insurance himself.

District Attorney Brown said, "The defendant has been found guilty of illegally withholding more than $25,000 from more than a dozen low-earning employees by fraudulently telling them that the Workers' Compensation Board had authorized the deductions for their workers' compensation insurance when, in fact, he was mandated to pay for the insurance. In these difficult economic times when employees are trying to stretch every dollar as far as possible, such duplicity cannot go unpunished."

The District Attorney identified the defendants as Harry Dorvilier, 52, of 88-25 163rd Street in Jamaica, Queens and his company, Harry Nurses Registry, Inc., located at the same address. Dorvilier and his corporation were convicted yesterday of two counts of third-degree grand larceny and eleven counts of fourth-degree grand larceny following a two-week jury trial presided over by Acting Queens Supreme Court Justice Joel L. Blumenfeld. The defendants are scheduled to be sentenced on June 25, 2012, at which time Dorvilier faces up to seven years in prison and his corporation faces a fine of up to $10,000 or double the amount of the illegal gain.

District Attorney Brown said that, according to trial testimony, Dorvilier, through his corporation, unlawfully deducted a dollar an hour from the payroll checks of approximately 13 employees between September 2006 and December 2007. To facilitate his scheme, Dorvilier told his employees, as well as indicated on their paychecks, that the money was being withheld to pay for the cost of workers' compensation insurance.

Assistant District Attorney Rosemary Buccheri, of the District Attorney's Economic Crimes Bureau, is prosecuting the case under the supervision of Gregory C. Pavlides, Bureau Chief, and Christina Hanophy, Deputy Bureau Chief, and under the overall supervision of Executive Assistant District Attorney for Investigations Peter A. Crusco and Deputy Executive Assistant District Attorney Linda M. Cantoni.

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Note to Editors: E-version of press release posted at www.queensda.org.