21-1463

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CLAUDIA GAYLE, Individually and
On Behalf of All Others Similarly Situated
and as Class Representative, et. al.
Plaintiffs

v.

HARRY'S NURSES REGISTRY, INC. and
HARRY DORVILIER
Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

VOLUME 1: PAGES 1-100 (OF 257 TOTAL APPENDIX PAGES)

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UNITED STATES COURT OF APPEALS
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DEFENDANT'S
Plaintiffs

v.

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Defendants

APPENDIX TO BRIEF
SCHEDULE OF ORDERS

APPEAL OF EDNY ORDER
REFUSING TO RE-OPEN CASE

Second Circuit Court of Appeals
Case No. 21-1463

SCHEDULE OF ORDERS, OPINIONS AND JUDGMENTS BEING APPEALED

	Case Caption	Exhibit Reference	Court	Civil Action No.	Docket Document Reference No. Judge and Filing Date
1.	**Plaintiffs:** Claudia Gayle, and others similarly situated (59 named plaintiffs) **Defendants:** Harry's Nurses Registry, Inc. and Harry Dorvilier	A-1 A-2 A-3 A-4 A-5 A-6 A-7	Eastern District of New York (EDNY)	07-cv-4672	a. 53 (Sifton; 3/9/2009) b. 127 (Garaufis; 12/23/2010) c. 162 (Garaufis:3/1/2012) d. 179 (Garaufis: 9/18/2012 e. 211 (Garaufis: 9/30/2013 f. 225 (Garaufis: 4/14/2015 g. 280 (Garaufis: 7/14/2020)

2.	**Plaintiffs:** Claudia Gayle, and others similarly situated (59 named plaintiffs) **Defendant:** Harry's Nurses Registry, Inc. and Harry Dorvilier	A-8 A-9	2nd Circuit Court of Appeals	12-4764cv 18-3472	a. 153,157 (Panel, Katzmann, Winter, Marrero: 12/8/2014 and 1/5/2015) b. 133,136 (Panel, Winter, Hall, Cote: 1/24/2020 and 2/14/2020)
3.	**Plaintiffs:** McFarlane, Palmer and Williams **Defendant:** Harry's Nurses Registry, Harry's Homecare, Inc. and Harry Dorvilier	A-10 A-11 A-12	EDNY	1:17-cv-06350	a. 61 (Chen: 4/2/2020) b. 68 (Chen: 12/7/2020) c. 72 (Palmer/ Chen: 1/8/2021)
4.	**Plaintiff:** Roselyn Isigi **Defendants:** Harry's Nurses Registry, Harry Drovilier	A-13	EDNY	1:16-cv-2218	a. 56 (Block: 10/4/2017)
5.	**Plaintiff:** Roselyn Isigi **Defendants:** Harry's Nurses Registry, Harry Dorvilier	A-14	2nd Circuit Court of Appeals	18-1343	a. 136 (Jacobs, Carney, Park: 12/19/2019)

5.	**Plaintiff:** Roselyn Isigi **Defendants:** Harry's Nurses Registry, Harry Dorvilier	A-14	2nd Circuit Court of Appeals	18-1343	a. 136 (Jacobs, Carney, Park: 12/19/2019)
6.	**Petitioner:** H. Dorvilier (In Re: Dorvilier and Harry's Nurses Registry)	A-15	EDNY	1:16-cv-01765	a. 16 (Donnelly: 5/31/17)
7.	**Other Judgments And Orders Awarding Attorney Fees And Damages**				
	Plaintiffs: Claudia Gayle, and others similarly situated (59 named plaintiffs) **Defendants:** Harry's Nurses Registry, Inc. and Harry Dorvilier	A-16 A-17 A-18 A-19	EDNY EDNY EDNY EDNY	07-cv-4672	a. 214 (Garaufis) b. 226 (Garaufis, Palmer) c. 271 (Garaufis) d. 281 (Garaufis, Palmer)
	Plaintiffs: McFarlane, Palmer and Williams **Defendant:** Harry's Nurses Registry, Harry's Homecare, Inc. and Harry Dorvilier	A-20	EDNY	1:17-cv-06350	a. 79 (Chen)

A-1: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 53

Sifton 3/9/09

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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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.

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CV-07-4672(CPS)(MDG)

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, certification of this action as a class action, costs, and attorneys' fees. Now before the Court is the defendants' motion

[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.

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.

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, 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 ¶ 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 ¶ 58.

Harry's Nurses maintains a referral list or "registry" of field nurses. *Id.* at ¶ 6. At any given time, Harry's Nurses may have as many as five hundred field nurses on its referral list. *Id.* at ¶ 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 knowledge. *Id.* at ¶ 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 ¶ 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 ¶ 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 ¶ 12. The details of the nursing services to be rendered are determined by the patient's needs and condition. *Id.* at ¶ 18. If a patient is unhappy with the nurse, the patient may contact Harry's Nurses and ask for a replacement. *Id.* at ¶ 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 ¶ 19-20. Many nurses on the referral list wait days, weeks, or months between placements. *Id.* at ¶ 26. The nurses commonly work at one or several other jobs, including putting their names on other referral lists. *Id.* at ¶

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 her discretion, without suffering negatively with respect to future placement opportunities. *Id.* at ¶ 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 ¶ 2. Affidavit of Cherriline Williams-West at ¶ 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 ¶ 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 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 ¶ 48.

Approximately 95% of Harry's Nurses' placements are for the care and treatment of Medicaid patients. *Id*. at ¶ 46. Harry's Nurses follows Medicaid's rules and regulations in all of its

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

business activities. *Id.* at ¶ 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 ¶ 49. The reimbursement rate for LPNs is currently a fixed rate of $24.00 an hour, regardless of overtime hours worked. *Id.* at ¶ 52. Harry's Nurses pays LPNs the reimbursement rate less $5.00 per hour for Harry's Nurses' expenses and profit. *Id.* at ¶ 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 ¶ 55. Nurses must furnish and maintain their own basic supplies, including a blood pressure meter and stethoscope. *Id.* at ¶ 57. Nurses must also purchase their own uniforms and pay for their own travel expenses. *Id.* at ¶ 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 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 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. ¶ 65. Plaintiff's relationship with Harry's Nurses lasted for nine months, until November, 2007. *Id.* at ¶ 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 ¶ 75. Defendants treated plaintiff as an independent contractor. Gayle Aff. at ¶ 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 ¶ 19 ("Compl."); Dorvilier Dep. at 75:13-19, 87:8-13. Defendants state that plaintiff never demanded overtime pay. Dorvilier Aff. at ¶ 76.

Defendants paid plaintiff directly for her services; plaintiff formed no corporation or other business entity. Affidavit of Claudia Gayle at ¶ 5 ("Gayle Aff."). She has no business cards, has never advertised, and has never solicited a patient directly. *Id.* at ¶ 4. She is 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 (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 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 (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 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, L. Ed. 301, 65 S. Ct. 295 (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) 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. 157, 67 S. Ct. 1463 (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

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[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 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 (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.

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).

In *Superior Care*, the Second Circuit found that a registered nurse was an employee within the meaning of the FLSA. 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* 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

[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 control. *Zheng v. Liberty Apparel Company*, 355 F.3d

at 142-43). Applying these factors to the plaintiff, 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.

In *Superior Care*, the Court stated that Superior care

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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.

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. 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 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.

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 ¶ 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

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[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 '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.

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 "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 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 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 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]

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. 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

[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.

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 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.

Accepting all of defendants' statements as true for the

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[8] *See* Def. Mem. at 5.

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 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) (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 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 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 (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] *Hoffman*, 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 collective action certification more rigorously, at which point it may decertify the collective action if it determines that the

[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.

plaintiffs are not similarly situated. *Dumitrescu v. Mr. Chow Enters.*, 2008 U.S. Dist. LEXIS 49881, at *11 (S.D.N.Y. 2008).

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 ¶ 3. Second, plaintiff alleges that all field nurses are paid in the same manner as plaintiff. Gayle Aff. at ¶ 7. Third, Defendants admit that they treat all of their nurses as independent contractors, including plaintiff. Dorvilier Dep. at ¶ 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 ¶ 8; Robinson Aff. at ¶ 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)

[10]At any given moment, Harry's Nurses Registry may have up to five hundred nurses on its referral list.

(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).

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 completion of discovery, because this will facilitate "the Act's broad remedial purpose and promot[e] efficient case management," *Hoffman*, 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); *Chowdhury v. Duane Reade, Inc.*, 2007 U.S. Dist. LEXIS 73853, at *6 (S.D.N.Y. October 2, 2007); *see also Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169-170; 107 L. Ed. 2d 480; 110 S. Ct. 482 (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 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

A-2: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 127

Garaufis

12/23/2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CLAUDIA GAYLE, et al.,

Plaintiffs,

-against-

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.
----------X

MEMORANDUM & ORDER

07-CV-4672 (NGG) (MDG)

NICHOLAS G. GARAUFIS, United States District Judge.

Plaintiffs, nurses who were employed by Defendant Harry's Nurse Registry, Inc. ("Harry's Nurses"), bring this action for overtime pay and liquidated damages under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. ("FLSA"). (Complaint (Docket Entry # 1).) Plaintiffs move for summary judgment with respect to damages. (Docket Entry # 107.) Harry's Nurses and its principal, Defendant Harry Dorvilier ("Dorvilier") (collectively, "Defendants") cross-move (Docket Entry # 113) for reconsideration of Judge Charles P. Sifton's determination that Plaintiff Claudia Gayle ("Gayle") was entitled to partial summary judgment on the question of liability. As set forth below, the court finds that Gayle is entitled to summary judgment with respect to damages, but that summary judgment for the remaining Plaintiffs is not appropriate at this time. Defendants' motion for reconsideration is denied.

I. FACTUAL BACKGROUND[1]

Harry's Nurses is a corporation with its principal place of business in Queens, New York. (Liability Decision at 2.) Dorvilier is Harry's Nurses' president and chief executive officer. (Id.)

[1] This abbreviated statement of the facts is drawn from portions of Judge Sifton's order ("Liability Decision" (Docket Entry # 53)) that are not in dispute.

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. (Id.)

Harry's Nurses maintains a referral list or "registry" of field nurses. (Id. at 3.) At any given time, Harry's Nurses may have as many as five hundred field nurses on its referral list. (Id.) Harry's Nurses screens and selects nurses before placing them on the referral list. (Id.) Harry's Nurses also has between seven and ten full-time employees who are responsible for company administration and supervision. (Id. at 3.)

Gayle, who is an RN, entered into a "Memorandum of Agreement" with Harry's Nurses on February 20, 2007. (Id. at 8.) In doing so, she agreed to retain Harry's Nurses to coordinate placement opportunities. (Id.) The Memorandum of Agreement purported to classify Gayle as an "independent contractor." (Id. at 8-9.) Gayle's relationship with Harry's Nurses lasted for nine months, ending in November 2007. (Id. at 8.) Plaintiff regularly worked in excess of forty hours a week on assignments she received through Harry's Nurses and did not receive overtime premium pay for her excess hours. (Id. at 9.)

II. PROCEDURAL HISTORY

Gayle filed this action, on behalf of herself and others similarly situated, on November 7, 2007. (See Complaint (Docket Entry # 1).) Defendants filed an answer on January 22, 2008. (Answer (Docket Entry # 10).) In their Answer, Defendants asserted, as an affirmative defense, that Gayle was properly compensated as an independent contractor. (Id. at 6.) Defendants did not assert that Gayle, or other nurses affiliated with Harry's Nurses, were otherwise exempt from the FLSA.

By stipulation dated January 31, 2008, the parties agreed that they would first conduct discovery "bearing upon plaintiff's status as an employee or an independent contractor" and that, if Defendants' anticipated summary judgment motion on that basis was denied, the parties would then conduct discovery "as to the merits of plaintiff's claims." (Docket Entry # 16.) By letter dated June 13, 2008, the parties advised Judge Sifton that Defendants were prepared to move for summary judgment on "the threshold issue of whether the Plaintiff had been properly classified as an independent contractor," and that Gayle was "similarly prepared to move for class certification and/or to authorize notice to similarly situated persons of one collective action." (See Docket Entry # 18.) Judge Sifton so-ordered the parties' proposed briefing schedule. (Id.)

On August 13, 2008, Gayle filed a memorandum of law, as envisioned by the schedule the parties proposed. (Docket Entry # 32.) In addition to arguing against a grant of summary judgment in Defendants' favor, and moving for notice to potential class members, Gayle also cross-moved for summary judgment on the issue of liability. (See id. at 27.) It does not appear that Gayle previously sought – or was granted – permission to make a motion for summary judgment.

Nonetheless, on March 9, 2009, Judge Sifton denied Defendants' motion for summary judgment and granted Gayle's motion for partial summary judgment as to liability. (Liability Decision.) Specifically, Judge Sifton concluded that there was no genuine issue of material fact as to Gayle's employment status and that Harry's Nurses was Gayle's employer under the FLSA. (Id. at 23.) Because the parties did not dispute that Gayle was not paid overtime wages when she worked more than forty hours in one week, Judge Sifton found that Gayle was entitled to summary judgment on the question of liability. (Id.) Judge Sifton also found that Harry's Nurses and Dorvilier were jointly and severally liable to Gayle. (Id. at 23.) Finally, Judge Sifton

concluded that Gayle had 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." (Id. at 27.) Judge Sifton further noted that "[t]his is a preliminary determination that may be revised upon the completion of discovery." (Id. at 28.) Following Judge Sifton's order, approximately 55 other Plaintiffs opted into this action.

On August 18, 2009, Defendants – then between their second and third set of lawyers – filed a *pro se* motion to renew and reargue Judge Sifton's prior order.[2] (Docket Entry # 82.) On August 19, 2009, Dorvilier agreed to withdraw that motion. (Docket Entry # 81.) The case was re-assigned to this court on November 24, 2009.

The court held a pre-motion conference on June 23, 2010. (See Docket Entry # 99.) Counsel for Defendants failed to appear at that conference. (Id.) The court nonetheless set a briefing schedule for Plaintiffs' anticipated motion for summary judgment regarding damages. (Id.) On July 21, 2010, Defendants served Plaintiffs with a "Memorandum in Opposition to Plaintiff's Motion for Summary Judgment." (Docket Entry # 113.) Despite the title of that submission, it did not address Plaintiffs' arguments regarding an award of damages. Instead, Defendants' submission was, in substance, a motion for reconsideration of the Liability Decision.

At a conference on August 9, 2010, Defendants reiterated their desire for reconsideration of the Liability Decision and further stated that their arguments in support of reconsideration were fully set forth in their previous submission. (See Docket Entry # 116.) With the consent of the parties, the court converted Defendants' opposition into a motion for reconsideration. (Id.) Plaintiffs indicated that their arguments in opposition to that motion were fully set forth in their

[2] Defendants' changes in representation and delays in complying with discovery orders have undoubtedly prolonged and complicated the final resolution of this case.

reply (Docket Entry # 115). (Id.) Accordingly, the court ordered Defendants to file a sur-reply regarding their motion for reconsideration. (Id.)

Defendants filed a sur-reply on August 29, 2010. The sur-reply consisted of an (1) an attorney affirmation, with attached exhibits (Docket Entry # 121); (2) a memorandum of law (Docket Entry # 122), and (3) a "Rule 56.1 Statement" (Docket Entry # 123) that did not contain any citations to evidence, in violation of Local Civil Rule 56.1. Plaintiff moved to strike various portions of the sur-reply on the grounds that they were procedurally improper. (See Docket Entry # 124.) Plaintiffs also explained why they believed that the substance of the sur-reply was without merit. (Id.)

III. APPROPRIATENESS OF RECONSIDERATION

A. Standard for Reconsideration

Defendants rely on Federal Rule of Civil Procedure 60(b) as the basis for their motion for reconsideration. (See Def. Sur-Reply (Docket Entry # 122) at 8.) Specifically, Defendants argue that the court should revisit Judge Sifton's Liability Decision under Rule 60(b)(1), which covers situations of "mistake, inadvertence, surprise, or excusable neglect," and Rule 60(b)(6), a catch-all provision that covers "any other reason justifying relief." (Id.)

As a general matter, reconsideration is an exceptional remedy and "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995). The moving party must also demonstrate that any available factual matters or controlling precedent "were presented to [the court] on the underlying motion." In re N.Y. Cmty. Bancorp, Inc. Sec. Litig., No. 04-CV-4165 (ADS), 2007 U.S. Dist. LEXIS 47405, at *7 (E.D.N.Y. 2007). Moreover,

"Rule 60(b) is no substitute for an appeal." Martin v. Chemical Bank, 940 F. Supp. 56, 59 (S.D.N.Y. 1996).

A motion under Rule 60(b)(1) must be made within a year of the challenged order. See Fed. R. Civ. P. 60(c)(1). Relief under Rule 60(b)(6) is not subject to a specified time limit, but its applicability is even more narrow than Rule 60(b)(1), and it "is properly invoked only when there are extraordinary circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in clauses (1)-(5) of the Rule." Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986).

The Second Circuit has explained that it "*very* rarely grants relief under Rule 60(b)(6) for cases of alleged attorney failure or misconduct." Harris v. United States, 367 F.3d 74, 81 (2d Cir. 2004) (emphasis in original). To constitute "extraordinary circumstances" under Rule 60(b)(6), a lawyer's failures must be "so egregious and profound that they amount to the abandonment of the client's case altogether, either through physical disappearance or constructive disappearance." Id. (internal citations omitted).

B. Reconsideration is Not Warranted

Defendants' arguments in favor of reconsideration are barely coherent, and in many instances are internally contradictory. For example, even as Defendants argue that reconsideration is appropriate, they state that "there are no extraordinary circumstances justifying relief from judgment." (Def. Sur-Reply at 13.) So far as the court can understand, Defendants' primary argument for reconsideration is that they were unable to make certain legal arguments to Judge Sifton because of conflicts with their previous counsel. Defendants state:

> In the matter at hand, it could be claimed that there were differences between defendants and his prior attorney. There were enough of differences that made the Defendants' prior attorneys office make a motion to withdraw as counsel for the defendants herein, then withdrawn said motion and then make said motion anew.

> Said problems between the defendants and the prior attorneys, office may have caused such an circumstance to prevent the prior attorneys' office from making the motion to renew in a timely fashion.

(Def. Sur-Reply at 14-15.)

There is, however, no actual evidence that Defendants fired their first two sets of attorneys because their attorneys refused to advance certain arguments. Indeed, the record suggests otherwise. Defendants' previous lawyers both sought permission from the court to withdraw from their representation. (See Docket Entry ## 36, 61, 71.) Defendants' first lawyer withdrew before briefing on the parties' initial motions was even complete. He simply stated that "circumstances have arisen which will make it impossible for this firm to effectively represent the Defendants." (Docket Entry # 36 at 2.) Counsel also indicated that he had informed Defendants of his decision. (Id. at 3.)

Defendants' second lawyer detailed the difficulty of dealing with Defendants due to Dorvilier's refusal to comply with discovery orders and to return counsel's calls. (Docket Entry # 71 ¶¶ 6-9.) He also cited Dorvilier's efforts "to make *ex parte* contact with Magistrate Go regarding the merits of this case without [his] knowledge or consent." (Id. at 10.) Thus, there is no basis for inferring that prior counsel withdrew because they were unwilling to advance certain arguments, or that Defendants were otherwise prevented from making any arguments to Judge Sifton.

Because Defendants' motion for reconsideration comes well over a year after the Liability Decision, it is untimely under Rule 60(b)(1). Defendants' unsupported claims of conflicts involving their former attorneys do not even approach the showing of "extraordinary circumstances" required under Rule 60(b)(6). Further, reconsideration is not appropriate because all of the arguments and evidence that Defendants now wish to submit was available to them at

the time of the Liability Decision. Finally, none of Defendants' substantive arguments undermine Judge Sifton's analysis. Thus, for a multitude of reasons, Defendants' motion for reconsideration must be denied.

III. SUMMARY JUDGMENT

A. Standard for Summary Judgment

A motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its existence or non-existence "might affect the outcome of the suit under the governing law," and an issue of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the [non-moving] party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, "the court must draw all reasonable inferences in favor of the nonmoving party." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000).

Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. A grant of summary judgment is proper "when no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight." Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1224 (2d Cir. 1994).

B. Appropriateness of Summary Judgment for Opt-In Plaintiffs

Plaintiffs seek an award of summary judgment of damages to Gayle and to fifty-five other individuals who have opted into this case. (Pl. Mem. (Docket Entry # 111) at 5.) Plaintiffs assert that, in light of the Liability Decision, "the calculation of damages is a matter of arithmetic." (Id.) As explained below, however, the court finds that summary judgment on damages is appropriate for Gayle, but not for the other Plaintiffs.

At the time of the Liability Decision, Gayle was the only Plaintiff in this action. Accordingly, the parties' discovery and motion practice was targeted to the question of whether Gayle was an employee or an independent contractor. (See, e.g., Docket Entry ## 16, 18.) Although some of Judge Sifton's conclusions about the legal implications of Defendants' business model were framed broadly, Judge Sifton only awarded summary judgment on liability to Gayle. (See Liability Decision at 23.)

Judge Sifton never concluded that all of the individuals who subsequently opted into this action would be entitled to summary judgment on liability, nor could he reasonably have done so. To the contrary, Judge Sifton only made a "preliminary determination" that there might be other similarly situated individuals, and expressly stated that his determination might be revised once discovery was complete. (Id.) Accordingly, there have been no liability findings with respect to Plaintiffs other than Gayle.

Moreover, Plaintiffs have not submitted any evidence regarding the identities of the individuals who have opted into this action, or the extent to which they are similarly situated to Gayle. Plaintiffs did provide a statement in accordance with Local Civil Rule 56.1 in connection with their instant motion. (Docket Entry # 110.) It comprises fifty-seven numbered paragraphs, the first fifty-six of which consist solely of the name of an individual plaintiff, his or her

effective opt-in date, and the amount of unpaid overtime premium pay that Plaintiffs assert that individual is owed. For example, paragraph 2 states, "Sulaiman Ali-El opted into this action on May 8, 2009. His effective opt-in date is March 27, 2006. He is entitled to $7,105.95 in unpaid overtime premium pay." (Pl. Rule 56.1 Statement ¶ 2 (internal citations omitted).) Plaintiffs simply have failed to meet their burden of demonstrating the absence of a material fact regarding Defendants' liability to the opt-in Plaintiffs.[3] Accordingly, Plaintiffs are not entitled to summary judgment regarding damages for those individuals.

The court is mindful that Plaintiffs have been waiting for some time for the resolution of this case, and that the vast majority of delays are attributable to Defendants' conduct. It is also entirely possible that – because Judge Sifton's conclusions are the law of the case – there is very little that the court still needs to address prior to finally resolving Plaintiffs' claims. Accordingly, the court will hold a status conference as soon as possible to formulate a streamlined way to resolve the remaining issues.

C. Appropriateness of Summary Judgment for Gayle

Summary judgment on damages is, however, appropriate with respect to Gayle. The FLSA requires covered employers to pay non-exempt employees 1.5 times the regular rate of pay for all hours worked in excess of forty hours for any given workweek. 29 U.S.C. § 207(a)(1). Plaintiffs have submitted Gayle's time and pay records. (See Aff. of Jonathan Bernstein (Docket Entry # 110), Ex. 3.) Those records show that Gayle is owed $7,390 in unpaid overtime. (See Pl. 56.1 (Docket Entry #110) ¶ 1.) Defendants do not challenge these

[3] It is somewhat mystifying that Defendants failed to argue that summary judgment as to damages was inappropriate in the absence of liability findings and chose instead to pursue a misguided and baseless motion for reconsideration. If additional liability findings are somehow *not* required in collective actions under the FLSA – and it is hard to imagine why that might be – Plaintiffs have not provided relevant authority in support of that proposition, nor is the court aware of any.

calculations in any way or dispute the accuracy of the records on which they are based. Accordingly, Gayle is entitled to summary judgment regarding her unpaid overtime.

D. Liquidated Damages

An employer who violates the compensation provisions of the FLSA is liable for unpaid wages "and an additional equal amount as liquidated damages." 29 U.S.C. § 216(c). Liquidated damages under the FLSA are presumed in every case where violation of the statute is found. 29 U.S.C. § 260. The presumption may be overcome if an employer proves, as an affirmative defense, both that it acted in good faith and that it had objectively reasonable grounds for believing that its conduct did not violate the FLSA. Brock v. Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1987). That burden "is a difficult one to meet" and "double damages are the norm, single damages the exception." Id.

To establish good faith, a defendant must produce "plain and substantial evidence of at least an honest intention to ascertain what the [FLSA] requires and to comply with it." Wilamowsky, 833 F.2d at 19. "Good faith requires more than ignorance of the prevailing law or uncertainty about its development." Reich v. S. New Eng. Telcoms. Corp., 121 F.3d 58, 71 (2d Cir. 1997). An employer must "first take active steps to ascertain the dictates of the FLSA and then act[] to comply with them." Id.

Defendants have not demonstrated good faith sufficient to overcome the presumption in favor of liquidated damages. Indeed, they essentially ignore the issue of good faith altogether. Even if this were not the case, it appears that Defendants would be hard-pressed to demonstrate good faith. There is no evidence in the record that would have supported a reasonable belief on Defendants' part that Gayle was not covered by the FLSA. Defendants appear to have continued not to properly compensate nurses for overtime *after* Judge Sifton's decision. (See Aff. of

Jonathan Bernstein, Ex. 3.) Consequently, Gayle is entitled to summary judgment on Defendants' affirmative defense of good faith and is entitled to $7,390 in liquidated damages.

IV. CONCLUSION

Defendants' motion for reconsideration is DENIED. Plaintiffs' motion for summary judgment is GRANTED with respect to Gayle and DENIED without prejudice with respect to the remaining Plaintiffs. Gayle is awarded $7,390 in unpaid overtime and the same amount as liquidated damages, for a total of $14,780. Defendants shall be jointly and severally liable for those damages.

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
December 23, 2010

NICHOLAS G. GARAUFIS
~~United States~~ District Judge

A-3: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 162

Garaufis

3/1/2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

CLAUDIA GAYLE, et al.,

Plaintiffs,

-against-

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIER *a/k/a HARRY DORVILIEN*,

Defendants.

----------X

MEMORANDUM & ORDER

07-CV-4672 (NGG) (MDG)

NICHOLAS G. GARAUFIS, United States District Judge.

Plaintiffs, nurses who were employed by Defendant Harry's Nurses Registry, Inc. ("Harry's Nurses"), bring this action for overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 ("FLSA"). (Compl. (Docket Entry # 1).) Plaintiffs move for certification of a collective action under 29 U.S.C. § 216(b), summary judgment under Federal Rule of Civil Procedure 56, and to enforce sanctions against Defendants. (Docket Entry # 135.) Defendants oppose Plaintiffs' motion and cross-move to strike it. (Docket Entry ## 148, 158.) As set forth below, the court grants Plaintiffs' motion for certification of a collective action, for summary judgment as to liability, and to enforce sanctions. Defendants' motion to strike is denied.

I. BACKGROUND[1]

Defendant Harry's Nurses is a corporation with its principal place of business in Queens, New York. (Liability Decision (Docket Entry # 53) at 2.) Defendant Harry Dorvilier is Harry's Nurses' President and Chief Executive Officer. (Id.) Harry's Nurses refers temporary healthcare

[1] This abbreviated statement of facts is drawn from portions of Judge Charles P. Sifton's Order of March 9, 2009 (Docket Entry # 53) ("Liability Decision"), and this court's Order of December 30, 2010 (Docket Entry # 127) ("Damages Decision"). These findings of fact are the law of the case and are not in dispute. In its discussion of Plaintiffs' motion for summary judgment in Part II.C, infra, the court articulates additional undisputed facts upon which it relies.

personnel, including registered nurses and licensed practical nurses (collectively, "field nurses"), to work in patients' private homes in and around New York City. (Id.)

Harry's Nurses maintains a referral list or "registry" of field nurses. (Id. at 3.) At any given time, Harry's Nurses may have as many as five hundred field nurses on its referral list. (Id.) Harry's Nurses screens and selects nurses before placing them on a referral list. (Id.) Harry's Nurses also has between seven and ten fulltime employees who are responsible for company administration and supervision. (Id.)

Field nurses have no contractual or economic relationship with patients to whom they are referred. (Id. at 4.) A nursing supervisor observes and assesses field nurses' skills and phones the patients at least once per day to verify that the assigned nurse has reported for duty. (Id.) Field nurses submit progress notes and time sheets to the nursing supervisor. (Id. at 6.)

All field nurses enter into a "Memorandum of Agreement" with Harry's Nurses as part of Harry's Nurses' procedures. (Id. at 8; see also Samedi Aff. (Docket Entry # 140); Ledain Aff. (Docket Entry # 137); Y. Robinson Aff. (Docket Entry # 139); Sankar Aff. (Docket Entry # 141); P. Robinson Aff. (Docket Entry # 138) (collectively, "Plaintiffs' Affidavits").)[2] By entering into this Agreement, field nurses agree to retain Harry's Nurses to coordinate placement opportunities. (Liability Decision at 8; see also Plaintiffs' Affidavits.)

On November 7, 2007, Plaintiff Claudia Gayle filed this action, on behalf of herself and others similarly situated, against Harry's Nurses and Dorvilier, alleging that she regularly worked in excess of forty hours a week on assignments she received through Harry's Nurses and

[2] These affidavits were submitted with Plaintiffs' instant motion for summary judgment. Defendants do not dispute the facts alleged in the affidavits.

did not receive overtime premium pay for her excess hours, in violation of the FLSA.[3] (See Compl. ¶¶ 22-24.) On July 9, 2008, Defendants moved for summary judgment as to Gayle. (Docket Entry # 19.) On August 13, 2008, Gayle cross-moved for summary judgment on the issue of liability and to authorize notice to potential class members of a FLSA collective action. (Docket Entry # 27.)

On March 9, 2009, Judge Sifton denied Defendants' motion for summary judgment and granted Gayle's motion for partial summary judgment as to liability. (See Liability Decision.) Judge Sifton found that there was no genuine issue of material fact as to Gayle's status as an "employee" under FLSA, and that Gayle indisputably was not paid overtime wages when she worked more than forty hours in one week. (Id. at 23.) He also found that Harry's Nurses and Dorvilier were jointly and severally liable to Gayle. (Id.) Finally, Judge Sifton conditionally certified a class under the FLSA after concluding that Gayle had made the "modest factual showing needed to support a preliminary determination that there [we]re others similarly situated who should be notified of their opportunity to join this suit as plaintiffs." (Id. at 27-28 (noting that "[t]his is a preliminary determination that may be revised upon the completion of discovery").)[4] Subsequently, fifty-five other Plaintiffs opted into this action. (Docket Entry ## 55-59, 62, 66-73, 79-80, 85, 88-89.)

The case was reassigned to this court on November 24, 2009. Plaintiffs filed a motion for summary judgment as to damages on June 25, 2010. (Docket Entry # 107.) On July 21, 2010, Defendants served Plaintiffs with a "Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment." (Docket Entry # 113.) Despite its title, Defendants' submission did not

[3] A fuller account of the procedural history of this case appears in the Damages Decision. (See Damages Decision at 2-5.)

[4] As will be discussed below, certification of a FLSA collective action proceeds in two stages: one in the early stages of the litigation and one after discovery is complete. (See Part II.B., infra.)

address Plaintiffs' arguments regarding an award of damages. (See id.) Instead, Defendants' submission was, in substance, a motion for reconsideration of the Liability Decision. (See id.) With the consent of the parties, the court converted Defendants' opposition into a motion for reconsideration. (See Order of Aug. 10, 2010 (Docket Entry # 116).)

On December 23, 2010, the court issued its Damages Decision. The court denied Defendants' motion for reconsideration. (Damages Decision at 5-8.) The court granted Plaintiffs' motion for summary judgment on damages with respect to Gayle and awarded her $14,780. (Id. at 11-12.) But the court denied Plaintiffs' motion for summary judgment on damages as to the opt-in Plaintiffs, reasoning that Judge Sifton had "never concluded that all of the individuals who subsequently opted into this action would be entitled to summary judgment on liability." (Id. at 9-10.)

Defendants appealed the Damages Decision to the United States Court of Appeals for the Second Circuit. (Notice of Appeal (Docket Entry # 128).) The Second Circuit dismissed the appeal on the grounds that it lacked jurisdiction because there was no final order issued by this court. (Mandate of USCA (Docket Entry # 160).)

On April 15, 2011, Plaintiffs submitted the instant motion for certification of a collective action, summary judgment, and to enforce sanctions. (Docket Entry # 135.) On June 21, 2011, Defendants filed a motion to strike Plaintiffs' motion, arguing that Plaintiffs had failed to comply with Local Rule 56.2 of the United States District Court for the Eastern District of New York, which governs the provision of notice to pro se litigants; Defendants requested that their motion be considered together with Plaintiffs'. (Docket Entry # 158.)

I. DISCUSSION

A. Defendants' Motion to Strike

Defendants assert that the court should deny Plaintiffs' motion without prejudice because Plaintiffs failed to comply with Local Rule 56.2.[5] For the reasons that follow, Defendants' motion is denied.

Under Local Rule 56.2, "any represented party moving for summary judgment against a party proceeding *pro se* shall serve and file as a separate document, together with the papers in support of the motion, a Notice To Pro Se Litigant Opposing Motion For Summary Judgment." The purpose of this rule is to ensure that a party acting pro se "understands its burden in responding to a motion for summary judgment, and the consequences of failing to do so." Hartford Life Ins. Co. v. Einhorn, 452 F. Supp. 2d 126, 129 (E.D.N.Y. 2006). "The failure to include a Rule 56.2 Statement with a motion for summary judgment is grounds for the denial of the motion *if* it is not otherwise clear from the record that the *pro se* litigant understood the nature of the summary judgment motion." Id. (first italics added) (citing Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620-21 (2d Cir. 1999); M.B. # 11072-054 v. Reish, 119 F.3d 230, 232 (2d Cir. 1997)); see also Forsyth v. Fed. Empl. & Guidance Serv., 409 F.3d 565, 572 (2d Cir. 2005) (where "plaintiff's opposition papers . . . indicated that he understood his responsibilities under Rule 56 . . . , neither the district court nor defendants were required to provide plaintiff with notice under Rule 56.2"), abrogated on other grounds by Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2009); Venable v. Reed Elsevier, Inc., No. 04-CV-3532, 2009 WL 2516844, at *2 (S.D.N.Y. Aug. 17, 2009) (failure to serve Rule 56.2 notice was "harmless" where plaintiff

[5] Defendants also argue that Plaintiffs failed to serve Defendants with a statement of material facts as required by Local Rule 56.1. (Def. Mot. to Strike at 1.) They are incorrect. As the record indicates, Plaintiffs did properly file their Rule 56.1 statement with the court and served it on Defendants. (See Pl. R. 56.1 Statement (Docket Entry # 143) (cc-ing Defendants); Bernstein Ltr. of Apr. 15, 2011 (Docket Entry # 159, Ex. A).)

had "demonstrated her knowledge of all obligations and consequences stemming from the Defendant's motion for summary judgment").

Although Dorvilier was proceeding pro se at the time Plaintiffs filed their instant motion,[6] Plaintiffs' failure to include a Rule 56.2 statement with their motion is not grounds for denial of the motion because it is clear from the record that Defendants understood the nature of the motion at the time they filed their opposition papers. On May 10, 2011—after Plaintiffs filed their motion but before Defendants filed their opposition papers—Defendants retained attorney Bernard Alter. (Def. Mot. to Strike at 1.) Alter prepared and filed Defendants' opposition on his clients' behalf, which was timely and addressed all of the substantive issues raised by Plaintiffs' motion. (Docket Entry # 148.) Moreover, even before Dorvilier retained counsel, Dorvilier appeared in person before this court and the court explained the nature and import of the instant motion to him. (See Docket Entry of Feb. 23, 2011.) Indeed, Defendants do not argue that they did not understand the nature of Plaintiffs' motion; they argue only that a Local Rule 56.2 Statement "would have heightened defendants to the nature of the motion and caused the defendants to move quickly to protect their rights." (Def. Mot. to Strike at 3.) Local Rule 56.2 does not require this kind of "heightened" notice.

In sum, because Defendants were informed by this court of the nature of Plaintiffs' motion, and then filed timely and detailed opposition papers with the assistance of counsel, it is "clear from the record that [they] understood the nature of the summary judgment motion." Hartford, 452 F. Supp. 2d at 129. Accordingly, Plaintiffs' failure to provide a Local Rule 56.2

[6] Over the course of this litigation, Dorvilier has retained and terminated the services of several different attorneys, and has at times purported to be directing this litigation on behalf of himself and Harry's Nurses. At the time Plaintiffs filed their instant motion, Dorvilier was acting pro se after having once again requested that his attorney be relieved. (See Schirtzer Ltr. of Feb. 17, 2011 (Docket Entry # 129); Docket Entry of Feb. 23, 2011.) But as the court has repeatedly instructed Dorvilier, despite his interest in Harry's Nurses, there are *two* separate Defendants in this case—Dorvilier and Harry's Nurses—and Harry's Nurses, as a corporate party, cannot act pro se. See Grace v. Bank Leumi Trust Co., 443 F.3d 180, 192 (2d Cir. 2006). At the pre-motion conference in advance of Plaintiffs' instant motion, the court again reminded Dorvilier of this rule. (See Docket Entry of Feb. 23, 2011.)

statement does not mandate dismissal of their motion, and Defendants' motion to strike is denied. See Forsyth, 409 F.3d at 572; Venable, 2009 WL 2516844, at *2.

B. Plaintiffs' Motion for Certification of a Collective Action

Plaintiffs move for second-stage class certification of Gayle and fifty-five other individuals who have opted into this case. For the reasons that follow, the motion is granted.

Courts follow a two-stage process to determine whether a matter should proceed as a FLSA collective action under 29 U.S.C. § 216(b). Ayers v. SGS Control Servs., Inc., No. 03-CV-9077, 2007 WL 646326, at *4 (S.D.N.Y. Feb. 27, 2007). In the first stage, which typically occurs early in the litigation, the named plaintiffs bear the "minimal" burden of proof to show that there are other employees who are similarly situated to them. Id. (quoting Torres v. Gristede's Operating Corp., No. 04-CV-3316, 2006 WL 2819730, at *7 (S.D.N.Y. Sept. 29, 2006)); see also Prizmic v. Armour, Inc., No. 05-CV-2503, 2006 WL 1662614, at *2 (E.D.N.Y. 2006). "If the court finds that they are similarly situated, it may conditionally certify the class and authorize notice to be sent to putative class members." Prizmic, 2006 WL 1662614, at *2. As discussed above, prior to the end of discovery in this action, Judge Sifton ruled that Plaintiff Gayle had met the modest factual showing needed to support a first-stage determination—revisable upon completion of discovery—that there were other individuals who were similarly situated to Gayle and who should be notified of their opportunity to join this suit as Plaintiffs. (Liability Decision at 27-28.)

The second stage of the certification inquiry occurs after discovery closes. See Ayers, 2007 WL 646326, at *4. At the second stage, the court must determine whether the class should be decertified or continue to trial as a collective action. See Prizmic, 2006 WL 1662614, at *2. Second-stage certification requires the court to exercise "a more heightened scrutiny" in

determining whether the potential plaintiffs are similarly situated. Jacobs v. NY Foundling Hosp., 483 F. Supp. 2d 251, 265 (E.D.N.Y. 2007). Still, even at this stage, Plaintiffs may support their claims through "generalized proof" and "need show only that their positions are similar, not identical." Ayers, 2007 WL 646326, at *5.

Plaintiffs argue that they satisfy the heightened scrutiny necessary for second-stage class certification. (Pl. Mem. (Docket Entry # 144) at 13-18.) Defendants make three arguments in opposition: (1) that a determination of second-stage class certification is premature because discovery is incomplete; (2) that Plaintiffs cannot obtain class certification because they have failed to present affidavits from all of the opt-in Plaintiffs; and (3) that opt-in Plaintiffs are not similarly situated to Plaintiff Gayle. (Def. Opp. at 5-13.) The court will address each of these arguments in turn.

1. Timing of Motion

Defendants argue that discovery is incomplete—and certification is premature—because they have not had the opportunity to depose any opt-in Plaintiffs or subpoena all relevant documents. (Id. at 6.) They are incorrect. Magistrate Judge Marilyn D. Go supervised discovery in this matter. On March 29, 2010, Judge Go issued an Order stating that "[d]iscovery is completed" with the exception of "*defendants'* failure to produced payroll records at the present date."[7] (Docket Entry of Mar. 29, 2010 (emphasis added).) In other words, there was no discovery left to be taken of Plaintiffs.

Moreover, Defendants have had ample opportunity to seek discovery from opt-in Plaintiffs, several of whom opted into this case as early as April 10, 2009. (See Docket Entry # 56.) Defendants have not, however, taken advantage of this opportunity; indeed, according to

[7] This failure comports with Defendants' history of causing delays in this case. For instance, on December 11, 2009, and February 5, 2010, the court sanctioned Defendants for failing to comply with discovery orders. (See Damages Decision at 10 (noting that the "vast majority of delays are attributable to Defendants' conduct").)

Plaintiffs, Defendants have sought *no* discovery from opt-in Plaintiffs. (Pl. Reply (Docket Entry # 149) at 3.) Nor have Defendants raised with the court any difficulties obtaining discovery from opt-in Plaintiffs. The court will not allow Defendants to benefit from their own inaction.

2. Sufficiency of Evidence

Defendants next contend that Plaintiffs' motion must fail because they have submitted affidavits from only five of the fifty-five opt-in Plaintiffs. Defendants suggest that Plaintiffs must present evidence from "each and every" opt-in Plaintiff to show that they are similarly situated to Plaintiff Gayle. (Def. Opp. at 7.)

The court disagrees. Plaintiffs need not present evidence from "each and every" opt-in Plaintiff so long as they can show that Defendants engaged in a unified policy, plan, or scheme of FLSA violations. See Alonso v. Uncle Jack's Steakhouse, No. 08-CV-7813, 2011 U.S. Dist. Lexis 106356, at *10-12 (S.D.N.Y. Sept. 21, 2011); Ayers, 2007 WL 646326, at *5; Rodolico v. Unisys., 199 F.R.D. 468, 481-83 (E.D.N.Y. 2001). Even where plaintiffs have "otherwise varied circumstances," courts frequently find members of a putative class similarly situated where the plaintiffs were all impacted by a "single decision, policy, or plan." E.g., Ayers, 2007 WL 646326, at *5. As discussed in Part II.B.3, infra, Plaintiffs have established that Defendants engaged in a unified policy of not paying overtime premiums to field nurses. Accordingly, Defendants' contention regarding the sufficiency of Plaintiffs' evidence is mistaken.[8]

3. Similarly Situated

Finally, Defendants argue that Plaintiffs' motion must be denied because the opt-in Plaintiffs are not similarly situated to Plaintiff Gayle. (Def. Opp. at 8-13.) In order to determine

[8] Plaintiffs request that the court admit facts alleged in Plaintiffs' Request for Admissions. (Pl. Mem. at 21.) Because the court need not rely on those facts in order to grant Plaintiffs' motion for certification of a collective action, Plaintiffs' request is denied as moot.

whether Plaintiffs are similarly situated, the court considers three factors: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." Jacobs, 483 F. Supp. 2d at 265. Each of these factors supports second-stage certification of a collective action.

a. *Similarity of Plaintiffs' Factual and Employment Settings*

According to the Vendor List produced by Defendants, the deposition taken of Dorvilier, and Plaintiffs' Affidavits, all of the opt-in Plaintiffs, like named-Plaintiff Gayle, were employed by Harry's Nurses as field nurses on or after November 7, 2004. (See Vendor List (Docket Entry # 136, Ex. 9); Dorvilier Dep. Tr. (Docket Entry # 136, Ex. 5) at 6-9, 22-23; Plaintiffs' Affidavits at 1.) Gayle and the opt-in Plaintiffs were subject to the same hiring, working, supervision, compensation, and termination procedures. (See Liability Decision at 2-8;[9] Plaintiffs' Affidavits; Williams-West Aff. (Docket Entry # 142); Dorvillier Dep. Tr. (Docket Entry # 136, Ex. 4) at 19-20, 33.) Finally, each of the opt-in Plaintiffs challenges the same employment practice as Gayle: Harry's Nurses' failure to pay field nurses earned overtime pay. Each of these factors weighs strongly in favor of a finding that Gayle and opt-in Plaintiffs are similarly situated. See, e.g., Rodriguez v. Almighty Cleaning, Inc., 784 F. Supp. 2d 114, 130-31 (E.D.N.Y. 2011) (holding that plaintiffs were similarly situated because they shared the same job title and job functions); Scott v. Aetna Serv., Inc., 210 F.R.D. 261, 264-65 (D. Conn. 2002) (denying a motion to decertify because plaintiffs' job duties and responsibilities were substantially similar); Rodolico v. Unisys., 199 F.R.D. 468, 481-83 (E.D.N.Y. 2001) (fact that the challenged employment practice was the same for each of the potential class members

[9] The Liability Decision recites facts about the structure of Harry's Nurses that Judge Sifton found were undisputed.

weighed "very strongly" in favor of a collective action).[10] Accordingly, opt-in Plaintiffs and Gayle are similarly situated with respect to their factual and employment settings.

b. *Defenses Applicable to Individual Plaintiffs' Claims*

The court next considers whether Defendants have asserted affirmative defenses that can be asserted collectively or whether their defenses require individualized determinations that warrant decertification. Defendants assert three defenses in this action: (1) that the nurses were independent contractors; (2) that Harry's Nurses is exempt from FLSA coverage because it is organized under Article 36 of the N.Y. Public Health Law; and (3) that the nurses are exempt from the FLSA because they were bona fide professionals. (See Def. Opp. at 12.) Defendants concede that the second and third defenses are capable of being asserted collectively. (Id.)

The court finds that Defendants' first defense is also capable of being asserted collectively. As discussed above, Harry's Nurses subjected all field nurses to the same hiring, working, supervision, compensation, and termination procedures. (See Part II.B.3.a, supra.) Thus, Defendants' argument that the nurses were independent contractors does not require individualized determinations, and the second factor favors a finding that opt-in Plaintiffs and Gayle are similarly situated.

[10] Defendants argue that opt-in Plaintiffs' factual and employment settings varied because they had different opportunities for profit or loss. (Def. Opp. at 9-11.) The court rejected a similar argument in its Liability Decision. (See Liability Decision at 19-20.) A plaintiff's opportunity for profit or loss is one factor in the "economic realities" test applied by courts to determine whether an individual qualifies as an employee or an independent contractor under the FLSA. See, e.g., Brock v. Sup. Care, 840 F.2d 1054, 1058 (2d Cir. 1988). But Defendants offer no legal support for their assertion that this test has any significance in the context of a second-stage certification determination (see Def. Opp. at 10-11), and the court is aware of none. In any event, even if differences in opportunities for profit and loss could be considered in the analysis of the potential Plaintiff class, there is no evidence that opt-in Plaintiffs and Gayle differed in this regard; neither Gayle nor the other field nurses had any opportunity for profit or loss at Harry's Nurses beyond collecting an hourly fee. (See Liability Decision at 19; Plaintiffs' Affidavits.)

c. *Fairness and Procedural Considerations*

The third factor—fairness and procedural considerations—also weighs in favor of class certification. Certification is favored where a collective action would lower costs to the Plaintiffs by pooling resources, efficiently resolving common issues of law and fact, and coherently managing the class in a manner that will not prejudice any party. See Ayers, 2007 WL 646326, at *6. Here, there are common issues of law and fact that are better resolved through collective action, including Plaintiffs' employment status and Defendants' policies toward nurses. Moreover, at least twenty-one of the opt-in Plaintiffs seek an award of less than $5,000;[11] the pooling of resources will enable Plaintiffs to adjudicate these small claims in a cost-effective manner. Finally, Defendants have not suggested that they will be prejudiced by collective action, nor is the court aware of any reason that they would be.

* * * * *

In sum, because each of the above three factors favors a determination that Gayle and opt-in Plaintiffs are similarly situated within the meaning of 29 U.S.C. § 216(b), and because Defendants' arguments with respect to timing and sufficiency of evidence lack merit, Plaintiffs' motion for second-stage certification of a collective action is granted.

C. Plaintiffs' Motion for Summary Judgment

As discussed above, the court has already granted summary judgment to Plaintiff Gayle and awarded her $7,390 in damages. (Damages Decision at 11-12.) The remaining Plaintiffs now move for summary judgment as to liability. (As explained in footnote 12 below, the court does not construe Plaintiffs' motion as a motion for summary judgment with respect to

[11] Nineteen of the fifty-five opt-in Plaintiffs have not submitted time and pay records to show that they suffered any damages.

damages.[12]) For the reasons set forth below, the court grants summary judgment on liability as to opt-in Plaintiffs.[13]

1. Legal Standard for Summary Judgment

Summary judgment is appropriate only when the record reflects 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). There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the nonmoving party, no reasonable trier of fact could find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Initially, the party moving for summary judgment must demonstrate the absence of any genuine issues of material fact. As to issues on which the party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence that would entitle it to a directed verdict if such evidence were uncontroverted at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). As to issues on which the nonmoving party bears the burden of proof at trial,

[12] It is not entirely clear whether Plaintiffs seek summary judgment with respect to damages. On the one hand, Plaintiffs' memorandum of law in support of their instant motion contains a two-sentence section entitled "Plaintiffs Have Proven Their Damages" and asks for the court to "order[] defendants to pay [Plaintiffs] $362,793.96 and an equal amount as liquidated damages." (Pl. Mem. at 18, 22.) But after Defendants' counsel asked the court for an extension of time to review a CD containing Plaintiffs' time and pay records and damage calculations (Alter Ltr. of May 30, 2011 (Docket Entry # 152) at 2)—which Defendants claimed in their opposition papers that they had not yet received (see Def. Opp. at 13-14)—Plaintiffs stated in a letter to the court that an extension of time was unnecessary because "[t]he motion currently before the court concerns certification of the collective action, *not damages*" (Bernstein Ltr. of May 31, 2011 (Docket Entry # 153) at 1 (emphasis added)). On the day of that letter, Defendants' counsel admittedly received Plaintiffs' CD (see Alter Ltr. of June 1, 2011 (Docket Entry # 154) at 1 n.1), and has therefore had over nine months to review Plaintiffs' time and pay records and damages calculations.

The court finds the statement in Plaintiffs' letter to be perplexing in light of the clear request for damages in Plaintiffs' opening brief. In an abundance of caution, the court will not construe Plaintiffs' motion as a motion for summary judgment with respect to damages but will give Plaintiffs an opportunity to file such a motion incorporating the evidence and memoranda they submitted in connection with their instant motion, according to the schedule set forth at the end of this Memorandum and Order.

[13] In assessing Plaintiffs' instant motion, the court relies in part on the findings of fact and determinations of law in prior orders, which are the law of the case. See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003).

the moving party must demonstrate the absence of evidence supporting the nonmoving party's claim.

If the moving party succeeds in its showing, the burden shifts to the nonmoving party to show that there is a genuine issue for trial. Id. at 322-23. The nonmoving party may not rest on mere allegations or denials of the adverse party's pleadings as a means of establishing a genuine issue worthy of trial, but must demonstrate by affidavit or other admissible evidence that there are genuine issues of material fact or law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).

2. Application

The court concludes that there is no genuine issue of material fact with respect to Defendants' liability under the FLSA. The FLSA requires covered employers to compensate their employees at one and one-half times the employees' regular pay rate for any work that exceeds forty hours in a week. 29 U.S.C. § 207(a)(1). Here, it is undisputed that the opt-in Plaintiffs were employed by Harry's Nurses as field nurses on or after November 7, 2004, and were not paid overtime wages when they performed over forty hours of work per week. (See Vendor List; Dorvilier Dep. Tr. (Docket Entry # 136, Ex. 5) at 6-9, 22-23; Plaintiffs' Affidavits; Liability Decision at 9.) Defendants assert, however, that Harry's Nurses is exempt from the FLSA for three reasons: (1) the field nurses were independent contractors; (2) Harry's Nurses is organized under Article 36 of the New York Public Health Law; and (3) the field nurses were bona fide professionals. (Def. Opp. at 1.) The court addresses each of these arguments in turn.

First, the court holds that Plaintiffs were employees, not independent contractors, within the meaning of the FLSA. In ruling on Defendants' liability as to Gayle, Judge Sifton held that Gayle was an "employee" under the FLSA, relying on undisputed facts about the structure of

Harry's Nurses that are applicable to all opt-in Plaintiffs, who, as discussed above, were subject to the same hiring, working, supervision, compensation, and termination procedures as Gayle. (See Liability Decision at 11-23.) Defendants have submitted no evidence to dispute these findings.[14] Plaintiffs, on the other hand, have submitted five affidavits from individual Plaintiffs and an affidavit from a nursing supervisor (see Williams-West Aff.) supporting Plaintiffs' contention that the opt-in Plaintiffs' employment statuses were the same as Gayle's. Thus, the court rejects Defendants' first affirmative defense and holds that the opt-in Plaintiffs, like Gayle, are "employees" under FLSA.

Defendants' second affirmative defense is also meritless. Article 36 of the New York Public Health Law describes the procedures and regulations for establishing and maintaining a home care services organization. See N.Y. Code Art. 36. But no section of Article 36 exempts home care services organizations from the FLSA and, in any event, no provision of the FLSA permits a state to opt out of the statute.

Finally, the bona fide professional exemption applies only if an employee is paid on a salary basis. 29 C.F.R. § 541.300(a)(1). Harry's Nurses indisputably paid Plaintiffs on an hourly basis. (See Dorvilier Dep. Tr. (Docket Entry # 136, Ex. 4) at 20; Pay Records (Docket Entry # 108, Exs. 1, 3).) Thus, the bona fide professional exemption does not apply to Plaintiffs.

In sum, the court finds that Defendants failed to pay opt-in Plaintiffs overtime wages as required by the FLSA, and that Defendants have asserted no valid defense. Plaintiffs' motion for summary judgment is therefore granted with respect to liability.

[14] Although Defendants submitted three affidavits in support of their opposition to summary judgment (Docket Entry ## 145-47), none of these documents disputes facts from Judge Sifton's decision or otherwise creates a genuine issue of material fact with respect to Plaintiffs' employment status.

D. Plaintiffs' Motion to Enforce Sanctions

On December 11, 2009, Judge Go ordered Defendants to pay a discovery sanction of $764.17 to Plaintiffs' counsel and an additional $500.00 to the court by December 21, 2009. (Docket Entry of Dec. 11, 2009.) On February 8, 2010, Judge Go ordered Defendants to pay an additional $764.50 to Plaintiffs' counsel. (Docket Entry of Feb. 8, 2010.) Defendants have not paid any part of these sanctions to date. Defendants are ordered to pay these sanctions within fourteen days of this Order. Failure to do so may result in additional sanctions, including a finding of contempt of court.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to strike Plaintiffs' motion is DENIED. Plaintiffs' motion for certification of a collective action is GRANTED. Plaintiffs' motion for summary judgment as to liability is GRANTED. Plaintiffs' motion to enforce sanctions is GRANTED and Defendants are ordered to pay the previously imposed sanctions within fourteen days. Plaintiffs are given leave to file a motion for summary judgment with respect to damages within fourteen days of the filing of this Order, which will incorporate the memoranda of law and evidence they submitted in connection with their instant motion. (Plaintiffs are not to submit an additional opening memorandum of law with respect to damages.) If Plaintiffs file such a motion, Defendants will file any opposition to Plaintiffs' motion within twenty-eight days of the filing of this Order; if Defendants do not file a timely response, the court will rule on Plaintiffs' motion without an opposition. Plaintiffs may file a reply to

Defendants' opposition within thirty-five days of this Order.

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
March 1, 2012

NICHOLAS G. GARAUFIS
~~United States~~ District Judge

A-4: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 179

Garaufis

9/18/2012

D/f

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

CLAUDIA GAYLE, et al.,

Plaintiffs,

-against-

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIER *a/k/a HARRY DORVILIEN*,

Defendants.

----------X

MEMORANDUM & ORDER

07-CV-4672 (NGG) (MDG)

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court are Plaintiffs' motion for summary judgment as to damages, Defendants' motion to strike Plaintiffs' reply memorandum of law, and Plaintiffs' motion for sanctions to be imposed upon Defendants. For the reasons set forth below, Plaintiffs' motion for summary judgment on damages is GRANTED, and Plaintiffs are awarded a total of $619,071.76 in damages; Defendants' motion to strike is DENIED; Plaintiffs' motion for sanctions is DENIED.

I. BACKGROUND

Plaintiffs, nurses who were employed by Defendant Harry's Nurses Registry, Inc. ("Harry's Nurses"), brought this action for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19. (Compl. (Docket Entry # 1).) On March 1, 2012, this court granted Plaintiffs' motion for certification of a FLSA collective action and for summary judgment as to liability, and gave Plaintiffs leave to file a motion for summary judgment as to damages that would incorporate the memoranda of law and evidence they submitted in connection with their motion for summary judgment on liability. (Liability Order (Docket Entry # 162).)

On April 4, 2012, Plaintiffs moved for summary judgment on damages pursuant to Federal Rule of Civil Procedure 56. (Pl. Damages. Mot. (Docket Entry # 165); Pl. Damages Aff. (Docket Entry # 166).) Defendants submitted an affidavit in opposition to Plaintiffs' motion (Def. Damages Aff. (Docket Entry # 167)) and Plaintiffs filed a reply affirmation and memorandum of law in further support of their motion (Pl. Damages Reply (Docket Entry # 169)).

On April 10, 2012, Defendants filed a motion to strike Plaintiffs' reply memorandum of law on the grounds that it raised new arguments that should have been included in Plaintiffs' original papers in support of their motion for summary judgment as to liability. (Def. Mot. to Strike (Docket Entry # 170); Def. Strike Mem. (Docket Entry # 173-2).) Plaintiffs opposed Defendants' motion to strike and cross-moved for sanctions. (Pl. Sanctions Mot. (Docket Entry # 174); Pl. Strike Opp'n (Docket Entry # 174-5).) Defendants filed a reply regarding their motion to strike and in opposition to Plaintiffs' cross-motion for sanctions. (Def. Strike Reply (Docket Entry # 175-1).)

II. DISCUSSION

A. Defendants' Motion to Strike

Defendants argue that the court should strike Plaintiffs' reply memorandum of law in support of their motion for summary judgment on damages because it "raises new arguments and assertions which should have been included in plaintiff[s'] original motion papers in support of their summary judgment motion." (Def. Strike Mem. at 5.) Defendants are wrong.

Although "new issues may not be raised for the first time in reply," Sabre v. First Dominion Cap., LLC, No. 01-CV-2145 (BSJ) (HP), 2002 WL 31556379, at *3 (S.D.N.Y. Nov. 15, 2002), "reply papers may properly address new material issues raised in the opposition

papers so as to avoid giving unfair advantage to the answering party," Kowalski v. YellowPages.com, LLC, No. 10-CV-7318 (PGG), 2012 WL 1097350, at *10 (S.D.N.Y. Mar. 31, 2012). Plaintiffs' reply is limited to issues newly raised in Defendants' opposition papers, including the sufficiency of the timesheet and payroll records Plaintiffs provided to the court (Def. Damages Aff. ¶¶ 14, 16, 20-21; Pl. Damages Reply at 1-2), the individual calculation discrepancies for four Plaintiffs (Def. Damages Aff. ¶¶ 22-30; Pl. Damages Reply at 4-6), and the alleged exclusion of Plaintiffs' calculation methodology (Def. Damages Aff. ¶¶ 33-34; Pl. Damages Reply at 7-8). Indeed, Defendants themselves state in their brief in support of their motion to strike "that the explanations included in Plaintiffs' reply papers are *exactly* what Defendants cited as lacking in the Plaintiffs' original motion papers in support." (Def. Strike Mem. at 6.) In other words, Defendants admit that Plaintiffs' reply responded to issues that Defendants raised for the first time in their opposition. Plaintiffs did not have an obligation to anticipate in their opening papers the specific arguments Defendants raised in their opposition; their response to those arguments was properly raised in their reply. Defendants' motion to strike is therefore denied.

B. Plaintiffs' Motion for Sanctions

Plaintiffs argue that Defendants should be sanctioned for bringing their motion to strike, pursuant to 28 U.S.C. § 1927, on the grounds that their motion was brought in bad faith for the sole purpose of delay. (Pl. Strike Opp'n at 8-10.) The court disagrees.

Under § 1927, "[a]ny attorney who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "Bad faith is the touchstone of an award under this statute." United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1345

(2d Cir. 1991). The court "must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes." Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 79 (2d Cir. 2000). Plaintiffs are required to show with a "high degree of factual specificity" that Defendants acted to "harass, delay, or for other improper purposes, and/or in bad faith." Star Mark Mgmt., Inc. v. Koon Chun Hing Soy & Sauce Factory, Ltd., No. 07-CV-3208 (KAM) (SMG), 2010 WL 3924674, at *5 (E.D.N.Y. Sept. 30, 2010), aff'd, 682 F.3d 170 (2d Cir. 2012).

Here, Plaintiffs assert that Defendants acted in bad faith because their motion to strike discussed only de minimus ambiguities and discrepancies in the documentary evidence submitted by Plaintiffs. (See Pl. Strike Opp'n at 8.) But as discussed in Part II.C.2.a, some of Defendants' assertions do indeed have merit. Nor is the court aware of any case law suggesting that a party may be sanctioned for making a *meritorious* argument on a relatively inconsequential issue—particularly one that will have an effect (even if a small one) on the total amount of damages to be awarded. Accordingly, Plaintiffs' motion for sanctions is denied.

C. Plaintiffs' Motion for Summary Judgment

This court has already granted summary judgment on liability and damages to Plaintiff Claudia Gayle. (Docket Entry ## 53, 127.) It has also certified a collective action and granted summary judgment on liability to the persons who opted into this action pursuant to 29 U.S.C. § 216(b). (Liability Order.) In accordance with the Liability Order, Plaintiffs have moved for summary judgment on damages, and request both unpaid overtime premiums and an equal amount in liquidated damages. (See Pl. Damages Reply at 9.) Plaintiffs' motion will be granted.

1. Summary Judgment Standard

Summary judgment is appropriate only when the record reflects 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). There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the nonmoving party, no reasonable trier of fact could find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Initially, the party moving for summary judgment must demonstrate the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When a party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence that would entitle it to a directed verdict if such evidence were uncontroverted at trial. See id. at 323. As to issues on which the nonmoving party has the burden of proof at trial, the moving party must demonstrate the absence of evidence supporting the nonmoving party's claim. See id. at 323-24.

If the moving party succeeds in its showing, the burden shifts to the nonmoving party to show that there is a genuine issue for trial. Id. at 322-23. The nonmoving party may not rest on mere allegations or denials of the adverse party's pleadings as a means of establishing a genuine issue worthy of trial, but must demonstrate by affidavit or other admissible evidence that there are genuine issues of material fact or law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).

2. Application

a. *Unpaid Overtime Premiums*

The FLSA requires covered employers to compensate their employees at one and one-half times the employees' regular pay rate for any work that exceeds forty hours in a week.

29 U.S.C. § 207(a)(1). Plaintiffs bear the burden of proving that they performed overtime work and the amount of overtime work that they performed. See Seever v. Carrols Corp., 528 F. Supp. 2d 159, 170 (W.D.N.Y. 2007).

Pursuant to court order, Defendants produced thousands of pages of time and pay records during discovery. (Pay Records (Docket Entry # 108, Ex. 3).) Plaintiffs submitted these records by CD to the court and Defendants' counsel incident to Plaintiffs' June 25, 2010, motion for summary judgment.[1] (See Bernstein Aff. (Docket Entry # 108) ¶ 6.) Plaintiffs also submitted a Microsoft Excel spreadsheet with overtime premium calculations for each opt-in Plaintiff, which contains a detailed break-down of the number of hours each opt-in Plaintiff worked and the applicable pay rate.[2] (Pay Spreadsheet (Docket Entry # 108, Ex. 1).)

Defendants respond to Plaintiffs' evidence in two ways.

First, they argue that the time and pay records that Defendants produced during discovery—and that Plaintiffs submitted to the court in support of their motion for summary judgment on liability—are insufficient to discharge Plaintiffs' burden of proving that they performed uncompensated overtime work. (Def. Damages Aff. ¶ 14.) This argument is inconsistent with Second Circuit case law holding that, "[w]hen the employer has kept proper and accurate records, the employee may easily discharge his burden [to prove that he performed work for which he was not properly compensated] by securing the production of those records." Kuebel v. Black & Decker, Inc., 643 F.3d 352, 362 (2d Cir. 2011).

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[1] Plaintiffs supplied the records of their overtime work by CD rather than by electronic filing because of the voluminous size of the records. (See Bernstein Aff. (Docket Entry # 108) ¶ 6.) Defendants' counsel admittedly received Plaintiffs' CD on May 31, 2011. (Alter Ltr. of June 1, 2011 (Docket Entry # 154) at 1 n.1.)

[2] Plaintiffs' spreadsheet contains tabs for each opt-in Plaintiff along with a tab that summarizes all of the opt-in Plaintiffs' overtime premium calculations.

Second, Defendants assert that Plaintiffs committed errors in calculating overtime premium pay for four Plaintiffs. (See Def. Damages Aff. ¶¶ 22-27.) The court responds to Defendants' arguments as follows.

Defendants assert that the number of hours worked and the applicable pay rate are inaccurate for Lindon Morrison's February 20, 2009 time sheet. (Def. Damages Aff. ¶ 22.) The parties dispute whether Morrison worked on the Saturday of that week. (Id.) The court concludes that Morrison did not work that Saturday because the time sheet has a line through the Saturday time box (see Pay Records at 45); thus, she will not be compensated for overtime that day. There is also no documentation to show the applicable hourly wage for the weeks of February 20 to April 10, 2009. The records show that Harry's Nurses routinely paid Morrison $19 or $20 per hour depending on the client. As the court must draw all reasonable inferences in favor of the Defendants, the court will award Morrison damages for the hours she worked from February 20 to April 10, 2009, at a rate of $19 per hour.[3]

Defendants next assert that Souciane Querette's April 18 and April 25, 2008, time sheets fail to identify the applicable pay rate because a handwritten mark over the pay rate is inexplicable. (Def. Damages Aff. ¶¶ 23-24.) Although Plaintiffs correctly assert that Querette was paid $19.50 per hour in May 2008 (Pay Records at 10), she was paid at a rate of $19 per hour earlier in April 2008 for the same client for whom she worked on April 18 and 25, 2008 (id. at 12). Therefore, the court awards Querette damages in accordance with an hourly rate of $19.00.

Both parties now agree that Willie Evans' applicable pay rate was $19.50 rather than $21.00, although Plaintiffs had originally used the latter amount to calculate Evans' damages.

[3] An approximation of damages is permissible. See Kuebel, 643 F.3d at 362.

(See Def. Damages Aff. ¶ 26; Pl. Damages Reply at 5.) The Court will award Evans at the $19.50 pay rate.

Defendants assert that Henrick Ledain's applicable pay rate is unclear for May 18 and May 25, 2007, and for January 16, January 23, January 30, March 23, March 30, April 3, July 11, and July 18, 2009. (Def. Damages Aff. ¶ 27.) For May 18 and May 25, 2007, the record is clear that the applicable pay rate was $20 per hour. For January 16, January 23, and January 30, 2009, Ledain's hourly rate is omitted from his pay records. During those weeks, Ledain worked for a patient named Ameer Atkinson whom he had previously charged $20 per hour. As such, the applicable pay rate is $20 per hour for January 2009. Plaintiffs do not seek damages for the weeks of March 23, March 30, April 3, July 11, and July 18, 2009, so any ambiguity with respect to those weeks is irrelevant. The court will award Ledain accordingly.

After its own review of the evidence, the court finds that the evidence generally supports Plaintiffs' request for damages as they set forth in the Pay Spreadsheet, but with a few exceptions. Plaintiff Getty Rocourt claims that he was due overtime pay for work conducted in 2006 but he produced no pay or time records from 2006. Plaintiff Yolanda Robinson claims that she was due overtime pay from 2006-2010 but produced records only from 2008-2010. Plaintiff Jane Hylton Burke claims that she was due overtime pay for work in January and March 2010 but did not produce records to support that claim. Plaintiff Samedi Maud claims that he was due overtime pay for the week of October 17, 2008, but did not work any overtime that week. The court will award only damages established by pay or time records. Plaintiff Anthony Headlam's August 21 and November 6, 2009, pay calculations used an incorrect pay rate. The court will recalculate his damages using the appropriate pay rate of $19.00. Plaintiff Lena Thompson's pay calculations omitted hours from her April 20 and April 27, 2007, pay records, amounting to a

deficiency of $40.00. Finally, Plaintiffs' overall calculations omitted Plaintiffs Sussan Ajiboye's and Catharine Modeste's damages from the total damages sum. Because Plaintiffs included these two individuals' damages calculations in the Pay Spreadsheet under each individual's personal tab sheet, Plaintiffs' failure to include these individuals' damages in the total calculation appears to have been inadvertent, and the court will therefore include them in its total damages sum.

Based on the evidence in the record, opt-in Plaintiffs are entitled to a total of $309,535.88 in unpaid overtime premiums. The Appendix to this Memorandum and Order contains a table listing individual awards for each Plaintiff.

b. *Liquidated Damages*

An employer who violates the compensation provisions of the FLSA is liable for unpaid wages "and an additional equal amount as liquidated damages." 29 U.S.C. § 216(c). Liquidated damages under the FLSA are presumed in every case where violation of the statute is found. Id. § 260. The presumption may be overcome if an employer proves, as an affirmative defense, both that it acted in good faith and that it had objectively reasonable grounds for believing that its conduct did not violate the FLSA. Brock v. Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1987). To establish good faith, a defendant must produce "plain and substantial evidence of at least an honest intention to ascertain what the [FLSA] requires and to comply with it." Id. "Good faith requires more than ignorance of the prevailing law or uncertainty about its developments." Reich v. So. New. Eng. Telcoms. Corp., 121 F.3d 58, 71 (2d Cir. 1997). An employer must "first take active steps to ascertain the dictates of the FLSA and then act[] to comply with them." Id. The burden "is a difficult one to meet"; "double damages are the norm, single damages the exception." Brock, 833 F.2d at 19.

The court has previously found that Defendants had not demonstrated good faith with respect to Plaintiff Gayle sufficient to overcome the presumption in favor of liquidated damages; indeed, Defendants essentially ignored the issue of good faith altogether. (See First Damages Decision (Docket Entry #127) at 11 ("[T]here is no evidence in the record that would have supported a reasonable belief on defendants' part that Gayle was not covered by the FLSA.").) That is equally true of the opt-in Plaintiffs. Defendants have not submitted any new evidence to show that there is a genuine issue of material fact with respect to Defendants' good faith. As such, the opt-in Plaintiffs are entitled to liquidated damages pursuant to 29 U.S.C. § 216(c) in a sum equal to the amount of their unpaid overtime premiums.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment on damages is GRANTED. Plaintiffs shall be awarded $309,535.88 in unpaid overtime wages and the same amount in liquidated damages, for a total of $619,071.76; Defendants shall be jointly and severally liable for these damages. Defendants' motion to strike Plaintiffs' reply memorandum of law is DENIED. Plaintiffs' motion for sanctions is DENIED.

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
September 14, 2012

NICHOLAS G. GARAUFIS
United States District Judge

APPENDIX

Plaintiff Name	Award
Ajiboye, Sussan	$690.00
Ali-El, Sulaiman	$7,105.95
Barbot Geneviene	$320.00
Bernice, Sankar	$8,744.00
Brenda, Lewis	$60.00
Bhola, Margarite	$292.50
Burke Hylton Jane	$68,660.00
Clunie, Carol	$1,640.00
Depasquale, Anne	$6,473.25
Davis, A. Mary	$3,838.61
Evans, Willie	$16,560.00
Evans, Niseekah	$61.25
Francois, Nathalie	$574.38
Gervil, Michelle	$960.00
Gumbs, Alexander	$245.00
Hamilton, Lucille	$490.00
Headlam, Anthony	$6,834.14
Hyman, Marlene	$2,646.00
Ledain, Hendrick	$16,634.00
Llewellyn, Annabel	$210.00
Miller, Paulette	$1,190.00
Modeste, Catharine	$40.00
Morrison, Lindon	$22,960.50
Mukandi, Edith	$2,031.33
Ogunjana, Martha	$326.50
Paris, Merika	$27,021.00
Pierre-Joseph, B.	$5,725.02
Pierre, Christa	$195.00
Patterson, Merlyn	$49.00
Querette, Soucianne	$18,724.93
Recourt, Getty	$0.00
Robinson, Yolanda	$46,176.00
Robinson, Patricia	$8,040.00
Samedi, Maud	$18,541.02
Thompson, Lena	$14,382.75
Ward, Jacqueline	$1,093.75
GRAND TOTAL	**$ 309,535.88**

A-5: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 211

Garaufis

9/30/2013

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated as Class Representatives,

Plaintiffs,

-against-

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.
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MEMORANDUM & ORDER

07-CV-4672 (NGG) (MDG)

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court are Defendants' objections to Magistrate Judge Marilyn D. Go's Supplemental Report and Recommendation that advised granting Plaintiffs' motion to reconsider and amend the court's order on summary judgment, denying Defendants' motion to reconsider and amend the court's order on summary judgment, and granting Plaintiffs' motion for attorneys' fees and costs. For the reasons set forth below, the R&R is ADOPTED in full.

I. BACKGROUND

Plaintiffs brought this action against Defendants for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. On March 2, 2012, the court granted Plaintiffs' motion for class certification and for summary judgment as to liability. (Mar. 2, 2012, Mem. & Order (Dkt. 162).) Plaintiffs' subsequent motion for summary judgment on damages was granted, and Defendants were found liable to Plaintiffs jointly and severally in the amount of $619,071.76. (Sept. 18, 2012, Mem. & Order (Dkt. 179).) Plaintiffs and Defendants then each moved to correct the judgment and in opposition to the other's motions; additionally, Plaintiffs moved for an award of attorneys' fees and costs, which Defendants

opposed. (Dkts. 184, 185, 186, 188, 198, 199, 200.) On January 10, 2013, all pending motions in the case were referred to Magistrate Judge Marilyn D. Go for a Report and Recommendation. (Jan. 10, 2013, Order Referring Motions.)

On August 27, 2013, Judge Go issued a Supplemental Report and Recommendation (the "R&R") (Dkt. 208), following the issuance of an initial R&R (Dkt. 206) and Plaintiffs' letter motion to correct it (Dkt. 207), recommending that the court grant Plaintiffs' motion to amend the court's order on summary judgment, deny Defendants' motion to amend the court's order on summary judgment, and grant Plaintiffs' motion for attorneys' fees and costs. On September 10, 2013, Defendants filed written objections to the R&R (Def. Obj. (Dkt. 209)), to which Plaintiffs filed an opposition, requesting adoption of the R&R, on September 12, 2013 (Dkt. 210). The full procedural history of the case is discussed in detail in the R&R. (R&R at 2-3.)

II. STANDARD OF REVIEW

When a magistrate judge issues an R&R and that R&R has been served on the parties, a party has fourteen days to object to the R&R. Fed. R. Civ. P. 72(b)(2). If the district court receives timely objections to the R&R, the court makes "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. [The district court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). However, to obtain this de novo review of a magistrate judge's R&R, an objecting party "must point out the specific portions of the report and recommendation to which [he] object[s]." U.S. Flour Corp. v. Certified Bakery, Inc., No. 10-cv-2522 (JS), 2012 WL 728227, at *2 (E.D.N.Y. Mar. 6, 2012); see also Fed. R. Civ. P. 72(b)(2) ("[A] party may serve and file specific written objections to the [R&R].").

If a party "makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error." Pall Corp. v. Entergris, Inc., 249 F.R.D. 48, 51 (E.D.N.Y. 2008); see also Mario v. P&C Food Markets, Inc., 313 F.3d 758, 766 (2d Cir. 2002) (holding that plaintiff's objection to an R&R was "not specific enough" to "constitute an adequate objection under [ ] Fed. R. Civ. P. 72(b)"). Portions of the R&R to which a party makes no objection are also reviewed for clear error. U.S. Flour, 2012 WL 728227, at *2.

III. DISCUSSION

Defendants purport to object to:

> those parts of the [R&R] that: (1) allowed consideration of additional records originally not submitted by plaintiffs' counsel which resulted in an additional award of $164,688 to plaintiff Yolanda Robinson, for a total award of $210,864; and (2) imposes personal liability on the individual defendant Dorvilier; (3) that double damages should not have been awarded; (4) that legal fees are excessive to the extent over what my initially stated in my motion [sic] . . . .

(Def. Obj. at 5.) Of the 17 paragraphs in Defendants' submission, objections are actually conveyed in just nine paragraphs, all of which raise no new issues, are highly generalized, and cite a total of two cases—both of which protest consideration of additional information by asserting a purported need for finality in judgments. (Id. ¶ 8-17.) To the extent Defendants' objections can charitably be construed as specific, they will be analyzed de novo; those objections that are wholly conclusory and general require clear error review.

A. Consideration of Additional Records

Defendants "formally object to those parts of the [R&R] that allowed consideration of those additional records originally not submitted by plaintiffs' counsel" resulting in an additional award to Plaintiff Yolanda Robinson. (Id. ¶ 8.) Defendants note that Plaintiffs moved multiple

times for summary judgment on liability and damages and "had ample opportunity on multiple occasions to include the records . . . and failed to do so," and cite two cases in support of the proposition that Plaintiffs' records should not have been considered due to the need for finality in judgments and that judicial economy encourages an end to litigation. (Id. ¶ 9-11.)

However, both cases cited by Defendants are utterly inapposite. In Crist v. Bretz, 437 U.S. 28 (1978), the Supreme Court addressed the importance of finality of judgments in the context of the Fifth Amendment guarantee against double jeopardy. Indeed, the court in Crist was concerned with preventing injustice, a goal that is served here by including the relevant evidence, not preventing its consideration. Defendants' lone other authority is Reilly v. Reid, 45 N.Y.2d 24, 28 (1978), a 35-year-old New York State case that addresses res judicata, which prevents re-litigation of adjudicated disputes. Here, there is no such final judgment and no conceivable need for preclusion as a matter of procedural or substantive fairness.

As noted by Judge Go in the R&R, "district courts may alter or amend judgment to . . . prevent manifest injustice." (R&R at 6 (citing Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004).) In the court's prior decision awarding damages, it awarded Ms. Robinson overtime wages and liquidated damages for the hours supported by time records submitted, and certainly would have awarded her damages for the overtime hours reflected in the omitted records as well. This kind of issue is wholly appropriate for a motion for reconsideration, which is what Plaintiffs filed just two days after the judgment was entered. Because Defendants were in possession of the records and make no argument against their accuracy, Defendants are not prejudiced by the court's consideration of the records. It would be unfair for Ms. Robinson to be punished for the carelessness of her attorneys, and so the records should be considered. See Rollins v. N.Y. State Div. of Parole, No. 03-CV-5952 (NGG), 2007 WL 539158, at *1 (E.D.N.Y.

Feb. 16, 2007) (granting motion for reconsideration of summary judgment to consider a 56.1 statement that counsel negligently failed to serve and file); Crews Trading Co., Inc. v. Terral Farm Serv., Inc., No. 05-CV-0040, 2005 WL 3555918, at *2-3 (W.D. La. Dec. 28, 2005) (granting motion for reconsideration of summary judgment in the interest of justice to consider affidavits not previously submitted). Accordingly, it is appropriate to consider Plaintiffs' additional records, and Defendants' objection is overruled.

B. Personal Liability of Dorvilier

Defendants object "to the finding of personal liability of the individual defendant Dorvilier," claiming "[t]here has been no showing . . . that any of the alleged violations of the [FLSA] were due to actions taken individually by [Dorvilier]." (Def. Obj. ¶ 13-14.) Defendants cite no cases or new information or arguments to support this position, which has been thoroughly litigated and previously ruled upon by the court. Moreover, as Judge Go noted in the R&R, in Defendants' motion for reconsideration of the court's ruling on this issue in its decision on summary judgment, "Defendants have not identified any matters or controlling decisions that the court overlooked. Indeed, defendants did not cite a single case in support" of this argument. (R&R at 16.)

As the R&R explains, and as Judge Sifton noted in granting partial summary judgment for Plaintiff Gayle on the issue of joint and several liability, the FLSA's definition of "employer" includes individual principals of corporate employers. (See Mar. 9, 2009, Mem. & Opinion (Dkt. 53) at 23 (collecting cases).) Judge Sifton's thorough and cogent analysis further found that "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 plaintiffs." (Id. at 24.) Quite simply, Defendants have offered no authority or evidence

to support their claim at any stage of this case. Dorvilier's liability has been thoroughly established, and Defendants' objection is overruled.

C. Good Faith and Damages

A single paragraph in Defendants' objection states: "In addition, my client's Rule 60 motion on the issue of good faith should have been granted based upon the record and an award of double damages should not have been awarded." (Def. Obj. ¶ 16.) This assertion does not point to any specific portion of the R&R to which Defendants object, except simply to object that Defendants should have prevailed generally on their motion for reconsideration on the issue of good faith.

As explained by this court in its prior ruling on summary judgment, an "employer who violates the compensation provisions of the FLSA is liable for unpaid wages 'and an additional equal amount as liquidated damages'" that are "presumed in every case where violation of the statute is found." (Sept. 18, 2012, Mem. & Order at 9 (citing 29 U.S.C. §§ 216(c), 260).) This presumption may be overcome if an employer proves *as an affirmative defense* that it acted in good faith and that it had objectively reasonable grounds for believing that its conduct did not violate the FLSA. (Id. (citation omitted).) As Judge Go noted in the R&R, "Defendants have not identified any evidence" to contest the presumptive finding of a lack of good faith. (R&R at 17.) The court finds no clear error in Judge Go's analysis of this issue, nor any new authority or evidence to disturb the court's original ruling on this issue; accordingly, Defendants' objection regarding "good faith" is overruled.

D. Attorneys' Fees

Also in a single paragraph, Defendants object: "Finally, given the multiple and unnecessary motions, the defendants object to the legal fees awarded as excessive. In in [sic] the

defendants' motion to correct, I set out the legal fees at a proper standard and asserted that there were too many correction motions by plaintiffs which resulted in excessive and unnecessary fees." (Def. Obj. ¶ 17.) Here too, Defendants' objection simply restates in general and conclusory fashion the arguments made in their original motion. Defendants cite no additional case law or evidence, and, moreover, their arguments are utterly without merit.

Indeed, Judge Go's R&R addressed this very point at great length and with great care. Among other things, Judge Go recommended reducing counsel's requested fee by more than $31,000 due to inefficiency and redundancy, including reductions in counsel's hourly fees and denial of any compensation for certain additional hours. (R&R at 22-27.) To the extent Defendants object to Plaintiffs' proposed fees because of duplicative briefings and inefficiencies, Judge Go has already addressed that issue and made the appropriate reductions and adjustments. (Id.) To the extent Defendants object to the award of attorneys' fees in their entirety, those objections are conclusory and generalized, and the court finds no clear error in Judge Go's analysis of attorneys' fees. Accordingly, Defendants' objection regarding attorneys' fees is overruled.

E. Remainder of Recommendations

Portions of the R&R to which a party makes no objection are also reviewed for clear error. U.S. Flour Corp. v. Certified Bakery, Inc., No. 10-CV-2522 (JS), 2012 WL 728227, at *2 (E.D.N.Y. Mar. 6, 2012). The court therefore reviews for clear error the portions of Judge Go's R&R that were not objected to, including the calculations of hours worked by Ms. Robinson and of attorneys' billings and hourly rates. The court has reviewed Judge Go's well-reasoned R&R for clear error and finds none. Accordingly, the court also adopts those portions of the R&R.

IV. CONCLUSION

For the reasons set forth above, Judge Go's R&R is ADOPTED in full. Defendants' motion to amend the court's order on summary judgment is DENIED; Plaintiffs' motion to amend the court's order on summary judgment is GRANTED as follows: (a) an award of damages of $300 to Ramdeo Chankar Singh for overtime wages of $150 and liquidated damages of $150 is added; (b) an award of damages of $1,140 to Getty Rocourt for overtime wages of $570 and liquidated damages of $570 is added; (c) an additional award for overtime wages for Jane Burke Hylton of $3,256 and liquidated damages of $3,256 for a total amended award of damages of $143,712 is added; (d) the award for overtime wages and liquidated damages owed to Yolanda Robinson is recalculated, awarding overtime wages of $105,432 and liquidated damages of $105,432, for an amended award of damages of $210,864; and Plaintiffs' motion for attorneys' fees and costs is GRANTED as calculated by Judge Go's R&R, totaling fees of $127,754.17 and costs of $2,460.29. The court's memorandum and opinion entered on September 19, 2012, is thereby amended to reflect these judgments and the R&R as adopted in full.

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
September 27, 2012

NICHOLAS G. GARAUFIS
United States District Judge

A-6: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 225

Garaufis

4/14/2015

D/F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CLAUDIA GAYLE, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIER a/k/a HARRY DORVILIEN,

Defendants.
----------X

MEMORANDUM & ORDER

07-CV-4672 (NGG) (MDG)

NICHOLAS G. GARAUFIS, United States District Judge.

This Order is yet another chapter in a long-running litigation brought by Plaintiffs under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. The court assumes familiarity with the underlying facts, but provides a brief summary of the litigation's lengthy procedural history. For the reasons discussed below, the court GRANTS IN PART Plaintiffs' motion for attorneys' fees and AWARDS to Plaintiffs $41,429.17 in post-judgment attorneys' fees and costs.

I. BACKGROUND

Plaintiff Claudia Gayle filed the original Complaint in this action on November 7, 2007. (Compl. (Dkt. 1).) Additional Plaintiffs subsequently filed consents to become part of the action. On March 1, 2012, the court granted summary judgment to Plaintiffs as to liability (see Mar. 1, 2012, Mem. & Order (Dkt. 162)), and on September 18, 2012, the court granted summary judgment to Plaintiffs as to damages (see Sept. 18, 2012, Mem. & Order (Dkt. 179)). On September 30, 2013, the court amended its summary judgment decision to provide additional damages to certain Plaintiff class members, and also granted Plaintiffs' motion for attorneys' fees and costs. (See Sept. 30, 2013, Mem. & Order (Dkt. 211).) The court subsequently entered

an amended judgment reflecting the revised damages awards, as well as a total of $127,754.17 in attorneys' fees and $2,460.29 in costs. (Am. J. (Dkt. 214).)

Defendants appealed to the U.S. Court of Appeals for the Second Circuit. (See Am. Not. of Appeal (Dkt. 213); First Am. Not. of Appeal of Supplementary J. (Dkt. 215).) In a summary order dated December 8, 2014, the Court of Appeals affirmed the courts' various decisions, and a mandate issued on January 5, 2015. (Mandate (Dkt. 217).) Following the issuance of the mandate, counsel informed the court that the parties have been unable to resolve Plaintiffs' demand for post-judgment attorneys' fees under the FLSA. (Joint Ltr. Mot. for Leave to File Mot. for Attys.' Fees (Dkt. 218).) During a pre-motion conference, the court entered a briefing schedule for Plaintiffs' motion for attorneys' fees. (See Feb. 23, 2015, Min. Entry.) On March 20, 2015, Plaintiffs filed the fully-briefed motion, consisting of a Notice of Motion (Dkt. 221); a Declaration in Support of Plaintiffs' Motion for Post-Judgment Attorney's Fees and Costs ("Bernstein Decl.") (Dkt. 222); an Affirmation in Opposition to the Motion ("Irizarry Aff.") (Dkt. 223); and a Reply Declaration in Further Support of Plaintiffs' Motion for Post-Judgment Attorney's Fees and Costs ("Bernstein Reply Decl.") (Dkt. 224).

II. DISCUSSION

The parties appear to agree that Plaintiffs are entitled to reasonable post-judgment attorneys' fees under the FLSA, and that the district court has the authority to award post-judgment attorneys' fees. See 29 U.S.C. § 216(b) (authorizing attorneys' fees and costs to prevailing plaintiff in FLSA action); Young v. Cooper Cameron Corp., 586 F.3d 201, 208 (2d Cir. 2009) (holding that an FLSA plaintiff's "entitlement to fees and costs extends to [an] appeal"). In an FLSA case, an application for attorneys' fees following affirmance of a district court judgment should be made to the district court in the first instance. See Young, 586 F.3d

at 208 ("We therefore remand this [FLSA] matter to the district court for the proper determination of appellate fees and costs owed to [plaintiff]."); cf. Cush-Crawford v. Adchem Corp., 234 F. Supp. 2d 207, 209-10 (E.D.N.Y. 2002) ("Because the award of attorneys' fees may involve extensive factfinding and a large degree of discretion, a district court generally decides this issue in the first instance.").

Accordingly, the court now turns to the proper supplemental award in this case, on which the parties disagree. Plaintiffs bear the burden of proving the reasonableness of the fees sought. See Savoie v. Merchs. Bank, 166 F.3d 456, 463 (2d Cir. 1999). The standard method for determining the amount of reasonable attorneys' fees is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," or a "presumptively reasonable fee." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 188-90 (2d Cir. 2008) (amended op.); see also Perdue v. Kenny A. ex. rel. Winn, 559 U.S. 542 (2010) (discussing lodestar methodology). In reviewing a fee application, the district court must examine the particular hours expended by counsel with a view to the value of the work product to the client's case. See Lunday v. City of Albany, 42 F.3d 131, 133 (2d Cir. 1994) (per curiam). If any expenditure of time was unreasonable, the court should exclude these hours from the calculation. See Hensley, 461 U.S. at 434; Lunday, 42 F.3d at 133. The court should thus exclude "excessive, redundant or otherwise unnecessary hours, as well as hours dedicated to severable unsuccessful claims." Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999) (amended op.). A party seeking attorneys' fees bears the burden of supporting its claim of hours expended by accurate, detailed, and contemporaneous time records. N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983).

Including fees and costs incurred in connection with Plaintiffs' application, Plaintiffs claim that a total of $42,363.34 in attorneys' fees and costs are due. (See Bernstein Reply Decl. ¶ 18.) Defendants, on the other hand, claim that any amount over $24,962.00 in attorneys' fees and $3,260.83 in costs and attorney travel time (a total of $28,222.83) is unreasonable (see Irizarry Aff. ¶ 10), and that any award of attorneys' fees should be deferred until after the Supreme Court has resolved Defendants' pending petition for a writ of certiorari (id. ¶ 11; see also Harry's Nurses Registry, Inc. v. Gayle, No. 14-1094 (U.S.) (pet. filed Mar. 9, 2015).) The court finds that with a limited exception (discussed below), Plaintiffs have made an adequate factual showing that the post-judgment attorneys' fees and costs that they seek are reasonable, and that there is no basis to delay the award of the fees until after the Supreme Court resolves Defendants' petition for a writ of certiorari.

As an initial matter, Plaintiffs have utilized the billing framework and hourly rates approved by this court's original Memorandum and Order awarding attorneys' fees. (See Bernstein Decl. ¶ 10; Aug. 26, 2013, Report and Recommendation (Dkt. 206) at 21-22, adopted, Sept. 30, 2013, Mem. & Order (Dkt. 211).) Thus, the hourly rates underlying the attorneys' fee application are presumptively reasonable. Indeed, Defendants have not objected to them.

The key issue is whether the post-judgment legal work performed by Plaintiffs' counsel was unreasonable, excessive, and/or redundant. Upon a review of itemized billing records submitted by Plaintiffs (see "Itemized Billing Records" (Bernstein Decl., Exs. 2 (Dkt. 222-3), 3 (Dkt. 222-4); Bernstein Reply Decl., Ex. 4 (Dkt. 224-1))), the court finds that subject to the limited exception discussed below, the work performed and the amount of time billed by Plaintiffs' counsel was fair and reasonable, and finds Defendants' arguments—consisting

primarily of hand-marked line-edits to the Itemized Billing Records (see "Proposed Revised Itemized Billing Records" (Irizarry Aff., Ex A (Dkt. 223-1)))—unavailing.

Plaintiffs' counsel billed approximately 125 hours in connection with the Second Circuit appeal, enforcing the district court judgment, post-judgment briefing in the district court not covered by the court's previous award of attorneys' fees, communicating various matters to the approximately 50 individual Plaintiff opt-ins, making the instant fee application, and preparing Plaintiffs' response to Defendants' petition for a writ of certiorari.[1] (See generally Itemized Billing Records.) The amounts of time Plaintiffs' counsel dedicated to these various matters generally appear reasonable; for example, Plaintiffs' counsel spent nine hours preparing for oral argument before the Second Circuit (see Bernstein Reply Decl. ¶ 8(c); Itemized Billing Records (Dkt. 222-2) at 17), and approximately nineteen hours on judgment enforcement (Bernstein Decl. ¶ 15; see generally Itemized Billing Records). These amounts of time are particularly reasonable considering that (a) Defendants appealed every ruling made by the district court (see Bernstein Reply Decl. ¶ 8), and (b) Defendants failed to post bond pending the appeal, complicating Plaintiffs' counsel's efforts to enforce the judgment and to communicate with Plaintiffs (see id. ¶¶ 6, 17).

Defendants claim that "many of the time units billed by Plaintiff[s'] counsel are excessive" (Irizarry Aff. ¶ 6), and that "Plaintiffs[] repeatedly billed multiple items . . . which, added together, resulted in an unreasonable amount of time spent making revisions" (id. ¶ 8). These arguments are unpersuasive. For example, Defendants apparently criticize that Plaintiffs' counsel spent 31 hours drafting, revising, editing, and proofreading the merits brief before the

[1] The instant fee application includes 4.5 hours billed as legal fees related to Defendants' petition for a writ of certiorari. (See Bernstein Reply Decl. ¶ 16.) Should Plaintiffs later seek additional attorneys' fees in connection with litigation before the Supreme Court, Plaintiffs must exclude these 4.5 hours so as not to seek fees twice for the same legal work.

Second Circuit, and cut these time entries in half. (See id. & Proposed Revised Itemized Billing Records at 16). Defendants provide little support for this contention (nor do they disclose the amount of time their attorneys spent on their own Second Circuit merits brief), and the court agrees with Plaintiffs that the time billed to the Second Circuit appeal was reasonable.[2] Defendants also make illogical changes to the billing entries of Plaintiffs' counsel. For example, Defendants halved a twelve-minute entry corresponding to Plaintiffs' counsel's review of the Second Circuit's decision in the case and research regarding deadlines for seeking review by the Supreme Court (see Proposed Revised Itemized Billing Records at 18); but, as Plaintiffs' counsel suggests, "no responsible lawyer would try to accomplish these tasks in six minutes" (Bernstein Reply Decl. ¶ 4).

Defendants' remaining objections are also unpersuasive. Noting that Defendants object to the number of telephone calls between Plaintiffs' counsel and Plaintiffs, Plaintiffs respond that the high volume of calls was due in large part to Defendants' failure to post a bond pending appeal.[3] (See id. ¶ 7; Bernstein Decl. ¶ 17.) Second, Plaintiffs clarify that certain entries to which Defendants object, including time dedicated to a joint motion with Defendants before this court, are marked as "unbilled time"; in other words, they are not included in the calculation of the total attorneys' fees owed. (Bernstein Reply Decl. ¶¶ 10, 11; see also, e.g., Itemized Billing Records (Dkt. 222-2) at 4 (indicating "No Charge" for entry number 41357); id. at 19 (totaling all unbilled time).) Third, Plaintiffs correctly observe that Defendants' objections based on the

[2] As a further example, without explanation, Defendants strike as "repetitive" five hours billed by Mr. Bernstein on November 24, 2014, with the accompanying description "Prepare for oral argument," because Mr. Bernstein billed four hours under the same description the prior day. (See Proposed Revised Itemized Billing Records at 18.) Considering that Mr. Bernstein appeared at oral argument before the Second Circuit on November 25, 2014, these two entries (the two days before the oral argument) are hardly duplicative or unreasonable.

[3] To the extent Defendants object to the single, de minimis redaction of a client confidence in the Itemized Billing Records, Defendants' argument is unavailing. Plaintiffs' counsel need not provide a copy of the unredacted records for the court's review. (See Bernstein Reply Decl. ¶ 7 n.3 (offering to provide unredacted version for in camera review).)

purported "superfluous" motion practice of Plaintiffs prior to judgment is improper; the court has already awarded reasonable attorneys' fees related to pre-judgment litigation, and, in fact, reduced those hours and fees as appropriate. (See Bernstein Reply Decl. ¶ 13.) Finally, Plaintiffs concede that Defendants identified two errors in Plaintiffs' calculations, each related to billing attorney travel time at the full hourly rate instead of half of the hourly rate. (Id. ¶ 15.) Plaintiffs account for this error in their final calculation of the attorneys' fees owed. (See id. ¶ 18 (claiming a grand total of $42,363.34 in attorneys' fees and costs).)

Based upon its review of the Itemized Billing Records, however, the court excludes from the award of attorneys' fees a minimal number of entries related to an apparent search for certain Plaintiffs' contact information. (See Bernstein Decl. ¶ 7 ("We have lost contact with nine persons who have opted into the action. We continue to search for those persons and will hold their awards in our trust account until we are able to locate them.").) These entries total 2.58 in attorney hours billed by Damon Maher at a rate of $350 per hour, amounting to $904.17 when accounting for rounding (see id. ¶ 15; Itemized Billing Records (Dkt. 222-2) at 4-5 (entry numbers 41696, 41698, 41700, and 41702)), and $30 in costs associated with Mr. Maher's searches for the missing Plaintiffs (see Itemized Billing Records (Dkt. 222-3) at 2 (entry numbers 41697, 41699, 41701, and 41703)). Thus, in addition to the errors related to travel time identified in Plaintiffs' reply, the court deducts $934.17, and AWARDS $41,429.17 in post-judgment attorneys' fees and costs to Plaintiffs.

Finally, Defendants fail to cite any authority requiring or cautioning the court to delay awarding post-judgment attorneys' fees in an FLSA case until after the Supreme Court's disposition of the petition for writ of certiorari. Indeed, considering that a district court need not delay the award of attorneys' fees during the pendency of a mandatory appeal to the Court of

Appeals, absent a stay, there is no basis for withholding attorneys' fees during the pendency of a discretionary petition for a writ of certiorari. Similarly, Defendants' contentions that the award should be reduced because they are "struggling to get back on [their] feet and assist [their] community," and the award as requested by Plaintiff "would be overly burdensome and negatively affect the business's ability to service the community," are unconvincing. (Irizarry Aff. ¶¶ 2, 4.)

III. CONCLUSION

Accordingly, for the reasons discussed above, Plaintiffs' motion for additional attorneys' fees and costs related to post-judgment proceedings and the appeal to the U.S. Court of Appeals for the Second Circuit is GRANTED IN PART. Pursuant to 29 U.S.C. § 216(b), the court AWARDS to Plaintiffs $41,429.17 in post-judgment attorneys' fees and costs.

SO ORDERED

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
April 6, 2015

NICHOLAS G. GARAUFIS
United States District Judge

A-7: EDNY

Gayle Civil Action No. 07-cv-4672

Docket No. 280

Garaufis

7/14/2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, Individually, on Behalf of All Others Similarly Situated and as a Class Representative, ALINE ANTENOR, ANNE C. DEPASQUALE, ANNABEL LLEWELLYN-HENRY, 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 MUKARDI, MARTHA OGUN JANCE, 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,

-against-

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER,

Defendants.

ORDER
07-CV-4672 (NGG) (PK)

NICHOLAS G. GARAUFIS, United States District Judge.

In 2007, Plaintiffs brought suit against Defendants seeking to recover unpaid overtime pay and damages under the Fair Labor Standards Act. (Compl. (Dkt. 1).) Pending before the court is

Plaintiffs' motion for attorney's fees and costs, which the court referred to Magistrate Judge Peggy Kuo for a report and recommendation ("R&R"). (Mot. for Atty's Fees ("Mot.") (Dkt. 276); Feb. 26, 2020 Order Referring Mot.) Judge Kuo issued the annexed R&R on July 14, 2020, recommending that the court grant Plaintiffs' motion for attorney's fees and costs in the amount of $11,944.50. (R&R (Dkt. 279) at 10.)

No party has objected to Judge Kuo's R&R, and the time to do so has passed. *See* Fed. R. of Civ. P. 72(b)(2). Therefore, the court reviews the R&R for clear error. *See Gesualdi v. Mack Excavation & Trailer Serv., Inc.*, No. 09-CV-2502 (KAM) (JO), 2010 WL 985294, at *1 (E.D.N.Y. Mar. 15, 2010); *La Torres v. Walker*, 216 F. Supp. 2d 157, 159 (S.D.N.Y. 2000). Having found none, the court ADOPTS the R&R in full.

SO ORDERED.

Dated: Brooklyn, New York
July 31, 2020

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as a Class Representative, ALINE ANTENOR, ANNE C. DEPASQUALE, ANNABEL LLEWELLYN-HENRY, 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 MUKARDI, MARTHA OGUN JANCE, 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,

-against-

HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER,

Defendants.

REPORT AND RECOMMENDATION
1:07-cv-04672 (NGG)(PK)