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 STAES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
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Plaintiffs

v.

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Defendants

BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S APPEAL OF EDNY ORDER REFUSING TO RE-OPEN CASE

SECOND CIRCUIT COURT OF APPEALS
CASE NO. 21-1463

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1. Brock v. Superior Care, Inc.
   840 F.2d 1054 (2d Cir. 1988) Cited 393 times
   Holding that health care agency was employer of nurses whom it referred for various placements

2. Chevron U.S.A. v. Natural Res. Def. Council
   467 U.S. 837 (1984) Cited 14,685 times
   Holding that courts should defer to an agency's reasonable interpretation of ambiguous statutes

3. Long Island Care at Home v. Coke

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4. Berry v. N.Y. State Dept. of Corr.

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5. Caldwell v. City of San Francisco

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6. Smith v. Campbell

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7. *Brown v. U.S. Department of Justice*

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Holding liable any state actor who "subjects, or causes [a person] to be subjected" to a constitutional violation

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CORPORATE DISCLOSURE STATEMENT

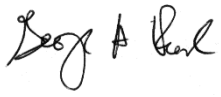
Defendant Harry's Nurses Registry, Inc. has no parent corporations and no publicly held corporations that own 10% or more of its stock.

JURISDICTIONAL STATEMENT

An Appeal was duly filed with the Second Circuit of Appeals to challenge the Text Order dated May 13, 2021, issued by Hon. N. Garaufis, District Court Judge, Eastern District Court of New York (EDNY), in the case styled as *Gayle et. al v. Harry's Nurses Registry, Inc. and Harry Dorvilier*, EDNY Case No. 07-cv-4672 (hereinafter referred to as the "*Gayle* Case"). A copy of said Text Order is attached hereto as **Exhibit B.** The issues raised in this appeal concern decisions rendered by EDNY and the Second Circuit in connection with claims arising under the Fair Labor Standards Act (FLSA) set forth at 29 U.S.C Section 201, et. seq. EDNY and the Second Circuit Court of Appeals have jurisdiction of claims arising under said FLSA and the instant appeal has been assigned **Case No. 21-1463** by the Second Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with 30 page limit specified in Fed. R. App. P. *32(a)(7)(B)* and other requirement set forth therein



Attorney for Defendants
Dated: September 28, 2021

I. PRELIMINARY STATEMENT

This Memorandum Of Law (hereinafter referred to as "the Memorandum") is submitted to the U.S. Court of Appeals for the Second Circuit (hereinafter referred to as the "Court") in support of an appeal of the Eastern District of New York (EDNY) text order decision of Judge Garaufis dated May 13, 2021 refusing to "re-open" the instant case (hereinafter referred to as the "Order"). This appeal has been filed on behalf of Harry's Nurses Registry, Inc. and Harry Dorvilier (hereinafter referred to as the "Defendants").

It is important to clarify from the outset that Defendants are now represented by the undersigned as counsel. I have been retained by Defendants for only the past year, but have been a practicing member of the bar for 44 years. I have reviewed the record of this case from a fresh perspective and hopefully this brief summarizes the issues in a fair and straightforward manner that is firmly based on the facts of this case. Though other counsel were involved in portions of the early litigation on this case, for the most part, the litigation herein has been pursued on a *pro se* basis by Defendants and it is the objective opinion of Defendant's current counsel, that the adverse rulings rendered against Defendants over a period of fourteen (14) years – can be attributed to one thing and one thing only: Defendant's *pro-se* status. Simply put: the judgments rendered over this exceptionally lengthy period of time **DO NOT** reflect the merits of Defendant's case and Defendants request that the case be reopened in the interests of justice (emphasis added). It is the position of Defendants that justice demands that the Second Circuit Court of Appeals take a fresh look at the issues raised therein and vacate the EDNY decisions and judgment orders totaling $942,763.79 that were issued therein and were paid by Defendants.

The purpose of this appeal is to set the record straight on what can only be aptly referred to as "bad law" that currently remains on record in the Second Circuit dockets; to do so, Defendants ask that a series of court decisions be corrected because the decisions currently on record are not supported by law and cannot be allowed to stand. If these decisions are not addressed forthwith, the Second Circuit's reputation for excellence, integrity and a bastion built on sound legal analysis and just outcomes -- will be seriously tarnished and jeopardized.

The text order that is the subject of this appeal summarizes the EDNY and Second Circuit litigation in this case and concludes that this case "is closed because the merits have been conclusively litigated to judgment." It further states that "in light of this substantive and procedural history, defendants provide no valid reason to reopen this case." It is Defendant's position that the foregoing statements provide the basis for the appeal herein and that there are **no less than ten (10) separate, valid reasons to reopen this case**. It is further Defendant's position that these ten (10) reasons are not only legally valid but they clearly demonstrate that the "litigation to judgment" by EDNY and the Second Circuit was far from conclusive, was not supported by applicable federal and state law and **DID NOT** reach just verdicts that properly addressed the merits of federal employment law and personal liability and criminal liability law that are at the heart of this case (emphasis added).

With due respect to the federal court system, it is also Defendants' position that the appeal of this case also raises issues of "systemic racism" as that term has come to understood in the wake of post "George Floyd"/civil rights developments calling into question various federal and state programs and institutions. Defendants believe that the current EDNY and Second Circuit Court of Appeals *pro se* program is an example of same: too little attention is provided to

minority litigants that have a deep distrust of federal institutions and the legal profession and certainly, the Second Circuit did not do enough in the instant case to articulate and support the critical rights and liberties that were at issue and/or are at the core of employment litigation. A review of how the instant case was handled, overlooked ten significant legal deficiencies and resulted in judgments against Defendant of $942,763.79 -- is indeed telling in this regard. Further, when viewed in the context of related cases that in large part relied on the erroneous rulings reached in the instant case, Defendant was faced with expanded legal theories of liability (e.g. *McFarlane* interstate commerce analysis that ignores pleading deficiencies; erroneously states assumptions regarding the interstate origin of goods that is nowhere supported in the record; and seeks to rely on information raised in the Gayle case that is not in evidence in the McFarlane docket), additional monetary judgements of $418,068.53 (*McFarlane v. Harry's Nurses Registry et al.* [EDNY Case No. 1:17-cv-06350] : $95,841.25; and *Isigi* v. *Harry's Nurses Registry, Inc. et al.* [EDNY Case No. 1:16-cv-02218] : $322, 227.28) and a criminal conviction that was not only unwarranted, but was prohibited by statute (*In Re: Dorvilier and Harry's Nursery a/k/a Harry Nurses Registry, Inc.* [EDNY Case No. 1:16-cv-01765]), all of which have been paid by Defendants.

When taken together, the civil liability of $1,360,832.20 (942,763.79 + 418,068.53 = $1,360,832.20); the failure of the court to recognize ten (10) separate, significant legal issues; and the personal and felony conviction of Dorvilier for corporate actions -- constitute a massive injustice for which the Second Circuit is compelled to accept accountability and address. After spending considerable time reviewing the litigation in these cases, it is my view that the judicial system in this case failed to provide justice: it chewed up the minority *pro se* litigant and

"spit him out" in disarray. I respectfully submit that justice is long overdue in this case and it is up to the Second Circuit to pick up what remains in the tattered docket record, and fashion a reasonable and fair outcome that is based on law and reason.

II. CONCISE FACTUAL AND PROCEDURAL BACKGROUND

On June 9, 2021 a notice of appeal was filed in this case. The legal issues raised herein are significant and important: said issues affect over 140 million American workers (the U.S. Department of Labor Wage and Hour Division estimates that 143 Million workers are protected by the FLSA in 2021) and tens of millions of employers.

Defendants seek a ruling that the "litigation to judgment" rendered in the instant case to date is flawed and must be re-examined and corrected because it either ignored or failed to properly consider substantive, applicable legal precedent and case law; and the egregious nature and extent of the legal errors in this case point to the need for a fundamental, in-depth assessment and overhaul of the second circuit *pro se* program – to ensure that such errors are not repeated in the future.

It is further Defendant's position that the important legal and *pro se* issues raised herein go well beyond the instant case and will ultimately provide the legal grounds for vacating the decisions issued by the Second Circuit Court and EDNY in the following cases:

> *Gayle et al. v. Harry's Nurses Registry, Inc. and Harry Dorvilier* [Second Circuit Court of Appeals Case Nos. 11-253, 12-4764, 18-3472, 21-1463; and EDNY Case No. 1:07-cv-04672];
>
> *Isigi v. Dorvilier, Harry's Nurses Registry* [Second Circuit Court of Appeals Case No. 18-1343; and EDNY Case No. 1:16-cv-02218];
>
> *McFarlane v. Harry's Nurses Registry and Harry Dorvilien (sp)*[EDNY Case No. 1:17-cv-06350]; and

In Re: Dorvilier and Harry's Nursery a/k/a Harry's Nurses Registry, Inc. [EDNY Case No. 1:16-cv-01765]

Exhibit C provides of schedule of these cases and copies of the Orders, Opinions and Judgments that are appealed herein. Specific Decisions referenced herein are identified therein as Appendices C-1 through C-15.

In sum: this is a case of significant legal import that demands the attention of the Second Circuit Court Of Appeals.

III. ARGUMENT

POINT 1

The Significant Number Of Substantive Legal Errors In This Case Warrant A Full And Complete Review By the Second Circuit

In the interests of transparency, it should be noted that Defendants filed a motion with the Second Circuit earlier in 2021 to vacate not only the judgments in the instant case, but in related cases raising identical issues. Before considering the motion to vacate, the Second Circuit required Defendants to file a motion to recall mandate in those cases. Though Defendants were unable to find anything in the federal rules of civil procedure to require such a motion, Defendants filed the motion as requested and did not challenge the recall mandate procedure. Upon information and belief, the denial of the recall mandate motion was based perhaps , in whole or in part, on the premise (similar to the Judge Garaufis Order at issue) that this case was decided in a final judgment and final judgments are not to be disturbed.

The instant appeal is based on the very clear statements provided in the Order that were previously discussed. The Order clearly states that because this matter was "litigated to

judgment," and that only a compelling showing that legal issues were not properly addressed will allow the EDNY court to re-open the case. In direct response to the Court's Order, the following is a list of ten (10) compelling reasons on which Defendants base the instant appeal to re-open the *Gayle* case. For ease of reference each of the legal challenges set forth herein are identified as separate counts:

1. Count One: Defective Consent
2. Count Two: Fraud and Fraud on the Court
3. Count Three: Absence Of Engagement In Commerce And Violation Of Protections Provided By The 14th Amendment Of The United States Constitution
4. Count Four: Individual Liability Of Defendant Harry Dorvilier Violates New York State Law and the14th Amendment Of The United States Constitution
5. Count Five: Criminal Liability Of Defendant Harry Dorvilier Violates Federal and State Law and the 14th Amendment Of The United States Constitution
6. Count Six: US DOL Regulations Exempted Defendants From FLSA Liability
7. Count Seven: Statute of Limitations Not Properly Applied
8. Count Eight: Defendants Were Denied Their Right To Jury Trial To Determine Amount Of FLSA Liquidated Damages Under The 6th Amendment Of The U.S. Constitution And Unlawfully Denied Good Faith Affirmative Defense As A Matter Of Law
9. Count Nine: Flawed Discovery
10. Count Ten: US DOL Did Not Make A Determination That An FLSA Violation Occurred And Said Determination Is Required by FLSA Section 216(b).

A comprehensive brief discussing each of the foregoing grounds for appeal is attached hereto as Exhibit A. This information is presented to confirm that Defendants have raised meritorious and compelling legal arguments that warrant the reversal of *Gayle* case rulings by

the court. In this regard, the Court will find the following:

1. Two of the legal issues raised are jurisdictional, indicating that a fundamental jurisdictional defect existed that should have been identified at the outset of this litigation and should have resulted in the case being dismissed on that basis. The two jurisdictional legal issues are summarized below:

    a. No consent was obtained from the representative Plaintiff in this case (Claudia Gayle) and no such consent was filed with the Court. Such consent is mandatory and required by 29 USC Section 216(b). This is easily verified by inspecting the *Gayle* Court docket. See Exhibit A, Count One discussion at pages 6-13.

    b. The minimum interstate commerce nexus was not properly pled in the complaint and the record does not satisfy statutory requirements to establish Individual and Enterprise FLSA coverage. Again, this jurisdictional defect is discussed in Exhibit A, Count Three at pages 23-34.

2. Other legal issues that were not properly identified or addressed by the Court include the following:

    a. Count Six: a legal exemption was in place under applicable DOL regulations at the time of this litigation. This exemption was raised by Defendants in its *pro se* affidavit and expressly recognized as applicable by the U.S. Supreme Court in the *Long Island Care* case; yet it was overlooked and never properly addressed by the Court. See Exhibit A, Count Six at pages 73 to 80 and Exhibit A, Attachment 1 confirming revised USDOL regulations did not take effect until October 15, 2015; and Appendices A-3, page 15 and A-8, page 5

which incorrectly ignores the applicable exemption(s) claimed by Defendants, codified at 541.3. 541.109(a) and 541.313(d) as affirmed in *Fazekas v. Cleland Clinic Fndn Health Care* 204 F 3d 673 (6th Cir 2000).

b. Count Two: it is Defendants position that Defendants were a victim of a fraud on the Court, that allowed a person without a confirmed identity and stolen information, to provide the basis for the Court records relied upon in determining the *Gayle* judgments. See Exhibit A, Count Two, at pages 14-22.

c. Count Four: the court's determination that Mr. Dorvilier was individually liable for a corporate employer obligation is incorrect and should not be allowed to stand. This ruling violates NYS Law, is contrary to case law precedent and improperly disregards the applicable domestic worker exemption recognized by the U.S. Supreme Court in the aforementioned *Long Island Care* case. See Exhibit A, Count Four, at pages 35-46; and Appendix A-8, page 5.

d. Count Five: the Court improperly held Mr. Dorvilier liable for felony convictions even though the employer actions in question were previously approved by two different Department of Labor administrative law judges that specialized in the unemployment withholding issues at issue and felony convictions under the NYS Penal Law were pre-empted by the FLSA and NYS Labor Law that limit prosecution to misdemeanors only. See Exhibit A, Count Four, at pages 58-72; and Appendix A-15, page 17 (no discussion is provided regarding the failure or counsel and the Court to apply federal and state laws establishing misdemeanor limitations for the alleged violations).

e. Count Seven: the Court improperly authorized damages for periods that were precluded by statute of limitations provisions set forth in FLSA, Section 255. A finding that Defendants' acted "willfully" did not take into account prior ALJ determinations regarding the employee/independent contractor status of HNR employees and the regulatory exemption that applied to the persons in question; it failed to recognize that an existing NYS DOL Wage Audit that had been conducted for the period 2005 -2010 and was readily available at the time this issue was decided in 2012; it failed to recognize and apply applicable DOL guidance on this point; the Court's "willfulness" determination relied in large part on Defendants poor attitude toward Plaintiff's counsel and its failure to adhere to discovery demands and wholly failed to consider whether the failure to pay wages in this case was "willful" or based in a good faith belief that prior ALJ and DOL rulings in his favor had merit with respect to the wage issues in dispute; and further the Court's reliance on the "general support" standard is not appropriate for a finding of willfulness and the statute of limitation provisions set forth in FLSA Section 255. See Exhibit A, Count Seven , at pages 79 – 81; and Appendix A-10, page 28 and 35-37 (Sifton broad discovery order exceeds 2 year discovery period that is applicable absent a "willfulness" finding).

f. Count Eight: the Court unlawfully awarded liquidated damages in violation of FLSA statutory requirements and the 6th Amendment of the U.S. Constitution and failed to consider the two (2) separate ALJ determinations in evaluating

Defendant's right to successfully invoke the good faith affirmative defense that is expressly authorized by FLSA, Section 260. See Exhibit A, Count Eight, at pages 82 - 87. See also Appendix A-4, page 9 and A-9, pages 25-28 (liquidated damages award does not consider Defendant's "good faith" reliance on two prior ALJ decisions).

g. Count Nine: the Court authorized discovery in lieu of the more efficient and accurate DOL audit procedures that are routinely engaged in by federal courts in the second circuit as well as other judicial districts (e.g. see *Long Island Care, Brock* (2nd Circuit), *Crouch* (6th Circuit), *LeMaster* (6th Circuit), *Wilson* (6th Circuit) cases). If done in the manner, the cumbersome and difficult discovery process would have been avoided and replaced with a more accurate and efficient wage documentation process that could be readily relied upon by all parties and the Court. See Exhibit A, Count Nine, at pages 87-91; and Appendix A-1, page 28.

h. Count 10: the court improperly failed to adopt a strict statutory analysis approach to FLSA, Section 216(b). If it had done so, it would have relied on the specific expertise of the federal and or state DOL to determine whether the conduct of either Defendant HNR and/or Defendant Dorvilier constituted violations under the FLSA and the extent to which the domestic worker exclusion applied. The U.S. Supreme Court had indicated in Long Island care that the specialized skills of DOL in this regard warranted *Chevron* deference. See Exhibit A, Count Ten, at pages 92-101.

In sum, it is Defendant's position that ten (10) compelling reasons exist to re-open this case and Judge Garaufis' Order was in error and should be reversed. It is further Defendant's position that the second circuit should engage in a full and complete review on the merits of the Gayle case and all related cases to rectify the "bad law" that currently exists in the Second Circuit.

POINT 2

The Second Circuit *Pro Se* System Constitutes Systemic Racism That Is Prohibited By The Equal Protection Guarantees Set Forth In The 14th Amendment Of The U.S. Constitution And Said Systemic Racism Tainted The Outcome Of the *Gayle* Case

Defendant HNR is a small minority business earning annual revenues of approximately $7.4 million per year. The founder and President of HNR is Mr. Harry Dorvilier, a U.S. citizen of Afro-American descent who was born in Haiti and holds a degree in accounting from Pace University. As noted earlier, he filed *pro se* documents in the Gayle case on behalf of Defendants, including but not limited to Defendant's *pro Se* affidavit (Gayle Docket, Document 83) which calls attention to all of the legal issues recited in Counts 1 to 10 above. This latter point is important: upon information and belief, the information offered by Defendants in its *pro se* affidavit and which are part of the Gayle docket were essentially ignored by the Court in rendering its determinations.

HNR is licensed to do business by the New York State Department of Health (hereinafter referred to as "DOH") Office of Health Systems Management, as a Home Care Services Agency. By the terms of its license it is only authorized to do business in New York State. For the past 30 years, HNR and Mr. Dorvilier have been providing home care health services to some of the poorest residential, ethnic minority communities in the New York City metropolitan area and 100%

of its 8 person full time staff have minority status. Under current guidance issued by the United States Department of Labor, the DOL no longer attempts to distinguish between "independent contractors" and "employees" but rather considers HNR and many other types of employers as a "joint employer" of the nurses in question. See 29 CFR Part 791.

For those interested in getting a better sense of the medical needs of HNR patients and the valuable services provided by HNR to the minority communities of New York City, the following link is provided to an ad hoc, unsolicited interview of Mr. Dorvilier by Mr. Christopher Alvarez that was conducted on or about August 25, 2021; a public link to the interview is: https://drive.google.com/drive/folders/1V-ccGq0gAsFCaEqMtDns60fSxgKYT7IR?usp=sharing . Mr. Alvarez is a 23 year old New York City journalist who was born on October 28, 1997 with a serious medical impairment and has received health care services from HNR since January 2000. He has managed to overcome very long odds to keep his health situation stable and, among other things, credits HNR with providing him the opportunity to live a relatively independent life and obtain his degree in journalism. Upon information and belief, as suggested by Mr. Alvarez in his interview, over the past thirty years HNR has established a positive reputation in the underserved communities of New York City for its integrity in providing quality home care services its patients.

The leading case providing an analysis of allegations of "systemic racism" is *Caldwell v. City of San Francisco* Case no. 12-cv-01892-DMR (N.D. Cal. December 23, 2020). In that case two causes of action centered on such allegations, calling into question a number of practices engaged in by the City of San Francisco police department. Among other things, the plaintiffs contended that San Francisco had a "decades-long practice of not disciplining SFPD officers so

they believed that could violate the rights of people of color," and that "systemic racism" in the police department "permitted officers to knowingly violate constitutional rights of people of color with no consequences." Other relevant cases raising similar claims include *Baker v. Brockmeyer* Civil No. 5:21-cv-05013 (W.D. Ark. Feb. 22, 2021); *Brown v. U.S. Department of Justice* Civil Action No. 1:17CV144 (N.D.W. Va Mar 18, 2019); *Nel v. Unknown El Paso Police Dept. Chief* NO EP-20-CV-242 FM (W.D. Tex. April 29, 2021); *Berry v. N.Y. State Sept. of Correction* 808 F. Supp 1106 (S.D.N.Y. 1992).

It is appellant's position that the *pro se* process as implemented in the Second Circuit is tainted by systemic racism as outlined below:

A. *Pro Se* Affidavit Not Properly considered. In the *Gayle* case, the *pro se* affidavit submitted by Defendants was not properly considered by the Court. As noted previously, all of the ten (10) substantive issues raised herein were raised by the *pro se* defendants in their affidavit to no avail. Upon information and belief, said issues were either ignored by the Court or given only cursory consideration in its written decisions. This is not acceptable in one of the most respected courts in the nation. (e.g. see Appendix A-9)

B. Statistics. A law suit has not been commenced by Defendants to address this issue as civil rights equal protection claim. However, upon information and belief, if one were to do so by tracking the success rate of *pro se* claims in the second circuit, the statistics would make a convincing case that *pro se* claims correlate well with minority parties and the success rate for those cases would be far lower than claims filed or defended by minority parties with counsel. Upon information and belief, this type of statistical analysis is typically used to prove systemic racism claims in the leading cases cited

previously.

C. The current practice of *pro se* office administration in the Second Circuit is not sufficient. It is Defendant's position that the Second Circuit should be more pro-active in providing substantive support and oversight to its *pro-se* program. It is not enough to merely provide forms to a *pro-se* minority litigant and enter those forms into the docket. Some guidance should be prepared and provided by the Chief Judge of the Court to *pro se* litigants, Court clerks and second circuit justices, specifying steps to be taken and actions to be engaged in, after a *pro se* complaint or affidavit is filed, including but limited to the following:

1. having a representative of the *pro se* office and/or a court clerk assigned to the judge handling the case, to conduct an interview with the *pro se* party and confirm that legal issues are properly framed and legal/regulatory requirements are articulated with sufficient specificity (e.g. illegal or fraudulent conduct alleged, available regulatory exemptions identified by the pro-se party and legal defenses identified by the *pro se* party);

2. having the person conducting the interview prepare a written record of same that is in turn shared with the Court and opposing counsel, to ensure that the court the *pro se* party and opposing counsel are aware of the *pro se* nature of the complaint and the legal issues and sensitivities identified by the *pro se* office that require attention and/or rebuttal;

3. providing written notice to *pro se* parties that they have a burden to prove allegations that may be generally referenced in an affidavit or complaint; and the risks they face if they fail to participate in discovery, or offer alternative proof to rebut information obtained through discovery, or provide a written brief summarizing their case or challenging a magistrate report and recommendation -- in a timely manner;

4. assigning a court clerk as appropriate, to engage in legal research as needed and prepare a legal memorandum to document applicable findings. This would ensure that a particular issues (e.g. applicability of an exemption, statute of limitations or critical jurisdictional issues raised by a pro se party) is articulated and given proper weight and that said research/findings are not only properly vetted and evaluated, but also shared with the Court, the *pro se* party and opposing counsel; and

5. providing some reasonable oversight of the case as it progresses to provide a reasonable degree of certainty that critical legal issues, legal claims, legal defenses and regulatory exemptions identified by the *pro se* party and/or specified in the *pro se* office written record or research memorandum are properly presented to the Court and the *pro se* party is provided with a "level playing field" on which a just legal outcome is likely to result.

D. It is also Defendant's position that the nonchalant, flippant manner in which the Court has chosen to deliver its written opinions to Defendant in the *Gayle* case and related cases -- suggests an arrogance and a willingness to "bully" or "pile on" to a less sophisticated party or a party less familiar with the legal process, that is sometimes associated with persons or organization that promote a workplace culture of superiority and privilege relative to minority parties. It also suggests a lack training or sensitivity among Court representatives to cultural, financial or racial inequalities of *pro se* parties that in turn result in Court decisions that overlook or discount *pro se* legal arguments; demonstrate a limited awareness of legal concerns raised by *pro se* parties; and favor represented parties and/or give rise to unwarranted assumptions or bias suggesting that minority litigants are engaged in intentional, deliberate or fraudulent attempt to improperly manipulate or influence the legal process (e.g. Appendix A-8, page 5: Court summarily discounts exemption applicability: "…Harry's again fights its name by arguing that is nurses were not nurses but instead home health aides…;" and the Court goes on to quickly dismiss the domestic worker exemption by refencing an exemption not raised by Defendant and also ignoring the specific exemptions that (a) were raised by Defendants [29 CFR 552.3 and 552.109(a)] (b) were endorsed by the U.S. Supreme Court in the *Long Island Care* case and the *Fazekas* case, *supra*) and (c) in the case of

the section 552.3 exemption, specifically refers to "nurses" as qualifying thereunder; see Exhibit A, Count Six, pages 74 - 78]; See also *Exhibit* foot note 25 which "piles on" by referencing Defendant Dorvilier's felony conviction [which Defendant contends was both wrongful and barred by statute; see Exhibit A, Count 5, pages 47 - 73] and Appendix A-10 [confirming Second Circuit's failure to address this matter in its *Habeus Corpus* decision and relying on Appendix A-15 findings as "proof" of Defendant's lack of good faith and the imposition of *McFarlane* liquidated damages despite the fact that those findings suggest only poor respect for the litigation process and abysmal observance of litigation protocol but have no probative value on the question as to whether Defendants was able to demonstrate that its failure to pay overtime wages was reasonably based on two (2) ALJ determinations and its actions constituted a valid "good faith" FLSA defense.

E. It is further Appellant's position that the actions and discretionary assumptions reached by the Court with regard to the instant case is similar to the "profiling" assumptions often attributed to a police department that repeatedly pulls over cars simply because the driver is black and he is driving through a community that is predominantly white. Some examples of inappropriate Court actions and assumptions include but are not limited to the following:

    i. A *pro se* complaint lacks merit because it is not well written and organized in a manner that is consistent with documents provided by counsel (e.g. Appendix A-2, page 6, which apparently finds it good sport to embarrass Defendant for his poor language skills in justifying its decision to deny reconsideration); and

ii. References to general regulatory exemption or statutory references that do not specify a particular paragraph or subparagraph of a law or regulation lack merit (e.g. Appendix A-4 at pages 9 and 10, the Court ignores Defendant's "good faith" reliance on prior ALJ decisions in state DOL hearings that was provided in his *pro se* affidavit, when concluding that Defendants were not entitled to a good faith defense against liquidated damages based on a finding that "Defendants essentially ignored the issue of good faith altogether.")

iii. Better educated employers or minority parties with counsel are entitled to deference and respect but *pro se* parties don't necessarily receive the same trust or respect (e.g. despite the fact that the *McFarlane* Complaint at paragraph on pages 2 and 3 [*McFarlane* docket, document 1] contain no reference to interstate commerce (which is a jurisdictional requirement to bring an FLSA claim thereunder), the Court goes out of its way in its 41 page decision, (Appendix A-10, page 22), to rule not only that *McFarlane* Plaintiff has established interstate commerce but that it also has done so based on the Court's **assumption** that stethoscopes purchased by the nurses were involved in interstate trade; that is the ruling, despite there being **NOTHING** in the *McFarlane* record to prove that assumption (Appendix A-10, page 23). It is of interest in this regard that HNR's NYSDOH license strictly limits HNR to doing business within New York State; and it is also of interest that though the *McFarlane* Court in its analysis correctly concludes that the

Gayle Court "did not address the commerce requirement, " no question is raised regarding the sufficiency of interstate commerce nexus in the *Gayle* case.

iv. The failure of *pro se* parties to provide rebuttal evidence or a written brief waives their right to raise critical legal issues, even though the legal issues were previously raised in a *pro se* complaint or affidavit and the *pro se* party was not advised as to the importance of providing rebuttals to evidence introduced into the record through discovery or the significant role that the submittal of a separate summary "brief" or memorandum addressing the legal issues raised by the case can have on the Court's verdict (e.g. Appendix A-14, page 5: the Court rules that Defendants have waived their right to "appellate review" by failing to object to a 2018 Report and Recommendation of Magistrate Gold, and its finding that the standard language in the last line of the report [i.e. "Failure to object to this Report may waive the right to appeal the District Court's Order"] satisfies the "clear notice of consequences" standard specified in *Smith v. Campbell*, 782 F. 3rd 93,102 (2d Cir. 2015), notwithstanding that the notice was equivocal (i.e. "may") and was provided to a *pro se* party.

IV. CONCLUSION

Based on the foregoing Defendants respectfully submit that they have demonstrated that the facts of this case and relevant case law warrant the reopening of the *Gayle* case and that the significant errors and legal issues raised herein merit review and reconsideration by the Second Circuit court of Appeals.

Dated: Buffalo, New York
September 27, 2021

George A. Rusk
Attorney for Defendants

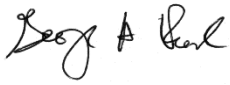


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EXHIBIT A

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENTS/ ORDERS

18-3472 2d Cir Court of Appeals Summary Order
(filed 02/18/2020)

ROSELYN ISIGI,

Plaintiff-Appellee

v.

HARRY DORVILIER, HARRY'S NURSES REGISTRY

Defendants-Appellants

18-1343 2d Cir Court of Appeals Summary Order
(12/19/2019)

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

HARRY'S NURSES REGISTRY, INC.,
and Harry Drovilier Defendants

12-4764 2d Cir Court of appeals Summary Order
(filed 12/8/2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: DORVILIER AND HARRY'S NURSERY a/k/a
HARRY'S NURSES REGISTRY, INC.,

Petitioner

16Civ.01765 (AMD) (LB) EDNY Memorandum Decision and Order
(*Habeus Corpus* Petition decision/ order filed 05/31/2017)

McFARLANE

v.

Harry's Nurses Registry
and Harry Dorvilien (sp)

17-CV-06350 (PKC) (PK) EDNY
Decided April 2, 2020

Table of Contents

CORPORATE DISCLOSURE STATEMENT

Defendant Harry's Nurses Registry, Inc. has no parent corporations and no publicly held corporations that own 10% or more of its stock.

Table Of Authorities

From

Cases

1. Hazel-Atlas Co. v. Hartford Co.

322 U.S. 238 (1944) Cited 952 times

2. Ashcroft v. Iqbal

556 U.S. 662 (2009) Cited 177,832 times

3. Curiano v. Suozzi

63 N.Y.2d 113 (N.Y. 1984) Cited 775 times

4. Daubert v. Merrell Dow Pharmaceuticals, Inc.

509 U.S. 579 (1993) Cited 20,494 times

Holding that Fed. R. Evid. 702 authorizes a "preliminary assessment of whether the reasoning or methodology underlying the testimony [of an expert] is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"

5. Edwards v. Arizona

451 U.S. 477 (1981) Cited 5,835 times

6. Miranda v. Arizona

384 U.S. 436 (1966) Cited 52,465 times

7. Savino v. City of New York

331 F.3d 63 (2d Cir. 2003) Cited 955 times

8. Staples v. United States

511 U.S. 600 (1994) Cited 916 times

9. United States v. Dotterweich

320 U.S. 277 (1943) Cited 671 times

10. AHA Sales, Inc. v. Creative Bath Prods., Inc.

58 A.D.3d 6 (N.Y. App. Div. 2008) Cited 257 times

11. Archie v. Grand Central Partnership, Inc.

997 F. Supp. 504 (S.D.N.Y. 1998) Cited 83 times

12. Brock v. Superior Care, Inc.

840 F.2d 1054 (2d Cir. 1988) Cited 393 times

Holding that health care agency was employer of nurses whom it referred for various placements

13. Chevron U.S.A. v. Natural Res. Def. Council

467 U.S. 837 (1984) Cited 14,685 times

Holding that courts should defer to an agency's reasonable interpretation of ambiguous statutes

14. Donovan v. Agnew

712 F.2d 1509 (1st Cir. 1983) Cited 376 times

15. East Hampton v. Sandpebble

66 A.D.3d 122 (N.Y. App. Div. 2009) Cited 279 times

16. Fazekas v. Cleveland Clinic Fndn. Health Care

204 F.3d 673 (6th Cir. 2000) Cited 25 times

Holding that nurses, who were paid various agreed-upon sums for each home care visit regardless of time spent on each visit, were employed on a fee basis and engaged in bona fide professional capacity, so as to be exempt from FLSA overtime requirements

17. Field v. Mans

516 U.S. 59 (1995) Cited 2,278 times

18. Gateway I Group, Inc. v. Park Avenue Physicians, P.C.
General Refractories v. Fireman's Fund Ins. Co.

337 F.3d 297 (3d Cir. 2003) Cited 264 times

Holding that a civil conspiracy claim requires a valid underlying tort claim

19. Gleason v. Jandrucko

860 F.2d 556 (2d Cir. 1988) Cited 135 times

20. Hadges v. Yonkers Racing Corp.

48 F.3d 1320 (2d Cir. 1995) Cited 223 times

Holding that the "concept of 'fraud on the court' embraces 'only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases'" (quoting Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972))

21 Home Care Assn. of America v. Weil

799 F.3d 1084 (D.C. Cir. 2015) Cited 47 times

"

21. In re Intl Nutronics, Inc.

28 F.3d 965 (9th Cir. 1993) Cited 108 times

22. Jacobs v. N.Y. Foundling Hosp.

577 F.3d 93 (2d Cir. 2009) Cited 76 times

23. Jacobs v. N.Y. Foundling Hosp.

483 F. Supp. 2d 251 (E.D.N.Y. 2007) Cited 50 times

Discussing individual and enterprise coverage

24. James River Insurance v. Rapid Funding, LLC
Jered Contr. Corp. v. N.Y.C. Tr. Auth

22 N.Y.2d 187 (N.Y. 1968) Cited 235 times

25. King v. First American Investigations, Inc.

287 F.3d 91 (2d Cir. 2002) Cited 122 times

26. Kupferman v. Consolidated Res. Mfg. Corp.

459 F.2d 1072 (2d Cir. 1972) Cited 142 times

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27. Lawlor v. Hoffman

59 A.D.3d 499 (N.Y. App. Div. 2009) Cited 14 times

28. Leber-Krebs, Inc. v. Capitol Records

779 F.2d 895 (2d Cir. 1985) Cited 32 times

Sustaining claim based on "fraud on the court" where the defendant had submitted a false garnishee's statement in an earlier action that it did not hold property of, or owe a debt to, the earlier defendant, and as a result of the false statement, the district court denied the motion to confirm the attachment at a hearing that the garnishee did not attend

29. Long Island Care at Home v. Coke

551 U.S. 158 (2007) Cited 270 times

Holding that an "Advisory Memorandum" of the Department of Labor, issued only to Department personnel and written in response to the litigation, should be afforded deference because it reflected the Department's fair and considered views developed over many years and did not appear to be a "post hoc rationalization" of past agency action

30. Millsaps v. Thompson

259 F.3d 535 (6th Cir. 2001) Cited 22 times

31. People v. Roscoe

169 Cal.App.4th 829 (Cal. Ct. App. 2008) Cited 32 times

Applying reasonable corporate officer doctrine where state tank laws applied

32. Reagor v. Okmulgee Cnty. Family Res. Ctr., Inc.

501 F. App'x 805 (10th Cir. 2012) Cited 18 times

Holding that plaintiff bears the burden of showing either individual or employer coverage under § 207

33. Saks v. Franklin Covey Co.

316 F.3d 337 (2d Cir. 2003) Cited 220 times

34. Scott v. K.W. Max Investments

256 F. App'x 244 (11th Cir. 2007) Cited 34 times

35. Shady Grove Orthopedic v. Allstate Ins. Co.

559 U.S. 393 (2010) Cited 824 times

Holding that a Federal Rule of Civil Procedure governs the circumstances to which it applies unless it is unconstitutional or exceeds the scope of the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right [28 U.S.C.] § 2072(b)"

36. Thorne v. All Restoration Services, Inc.

448 F.3d 1264 (11th Cir. 2006) Cited 250 times

Holding that an employee's purchases of goods and materials for work using an employer's credit card did not show that the employee was "engaged in commerce"

37. U.S. v. Wallace
United States v. Williams

104 F.3d 213 (8th Cir. 1997) Cited 29 times

38. Walach v. Shineski

CASE NO. 11-80412-CIV-HURLEY (S.D. Fla. Feb. 28, 2012) Cited 4 times

39.Alexander v. Sandoval,
532 U.S. 275, 121 S. Ct. 1511,
149 L. Ed. 2d 517 (2001)

40. Brooklyn Sav. Bank v. O'Neil,
324 U.S. 697, 65 S. Ct. 895,
89 L. Ed. 1296 (1945)

41. Bros. v. Portage Nat. Bank,
No. CIV A 306-94, 2007 WL 965835
(W.D. Pa. Mar. 29, 2007)

42. Donovan v. Univ. of Texas at El Paso,
643 F.2d 1201 (5th Cir. 1981)

43. E.E.O.C. v. Pan American World Airways, Inc., 897 F.2d 1499 (9th Cir.), cert. denied,
498 U.S. 815, 111 S. Ct. 55,
112 L.Ed.2d 31 (1990)

44. Hodgson v. Wheaton Glass Co.,
446 F.2d 527 (3d Cir. 1971)

45. Hoffmann-La Roche v. Sperling,
493 U.S. 165, 110 S. Ct. 482,
107 L.Ed.2d 480 (1989)

46. Marshall v. Coach House Rest., Inc.,
457 F. Supp. 946 (S.D.N.Y. 1978)

47. Michigan Corr. Org. v. Michigan Dep't of Corr.,
774 F.3d 895 (6th Cir. 2014)

48. Oral v. Aydin Corp.,
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(E.D. Pa. Oct. 31, 2001)

49. Rossi v. Associated Limousine Servs., Inc.,
438 F. Supp. 2d 1354 (S.D. Fla. 2006)

50. San Antonio Metro. Transit Auth. v. McLaughlin,
876 F.2d 441 (5th Cir. 1989)

Stoneridge Inv. Partners, LLC v. Sci.-Atlanta,
552 U.S. 148, 128 S. Ct. 761,
169 L. Ed. 2d 627 (2008)

51. Will v. Mich. Dep't of State Police
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105 L.Ed.2d 45 (1989)

52. Wirtz v. Robert E. Bob Adair, Inc.,
224 F. Supp. 750 (W.D. Ark. 1963)

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39. Willie McCormick & Assocs., Inc. v. Lakeshore Eng'g Servs., Inc.

Case No. 12-15460 (E.D. Mich. Dec. 20, 2013)

40. Worth v. Universal Pictures, Inc.

5 F. Supp. 2d 816 (C.D. Cal. 1997) Cited 26 times

Regulations

1. N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.3.3

2. 29 C.F.R. § 541.3

Providing that in order to qualify as a "learned professional" an employee's primary duties must consist of: "Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes."

3. 29 C.F.R. § 552.3

In 29 C.F.R. § 552.3, the DOL defined the term "domestic service employment" to refer "to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed."

4. 40 Fed. Reg. 7405

5. 29 U.S.C. § 203r-s

Statutes

1. Fed. R. Civ. P. 1

Recognizing that the Federal Rules of Civil Procedure "should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"

2. Fed. R. Civ. P. 26

Adopting Fed.R.Civ.P. 37

3. Fed. R. Civ. P. 60

Granting relief from the operation of a judgment

4. 18 U.S.C. § 1015

Penalizing false statement in naturalization proceeding

5. 18 U.S.C. § 1028A

Requiring sentence be served consecutively to any other sentence and prohibiting courts from placing defendants convicted under this provision on probation

6. 29 U.S.C. § 203

Defining "enterprise engaged in commerce or in the production of goods for commerce" to require the .enterprise to have "annual gross volume of sales made or business done . . . not less than $500,000"

7. 28 U.S.C. § 2072

29 U.S.C. § 216

8. Vesting enforcement power in Secretary of Labor

N.Y. Workers' Comp. Law § 31

PRELIMINARY STATEMENT

This Memorandum Of Law (hereinafter referred to as "the Memorandum") is submitted pursuant to Rules 60(b)3, 60(b)6 and 60(d)3 of the Federal Rules of Civil Procedure (FRCP) in support of Defendants' motion to vacate judgments, orders, decisions and rulings (collectively referred to herein as "Decisions")issued in the following cases filed in the Second Circuit Courts:

(a) the captioned *Claudia Gayle* Case (hereinafter referred to as the "*Gayle Case*") Decisions that have been filed in the U.S. Second Circuit, Eastern District of New York and the Second Circuit U.S. Court of Appeals. Said *Gayle Case* involves a Collective Action brought on behalf of approximately 55 persons who worked for Defendants, under Section 216(b) of the Federal Labor Standards Act (hereinafter referred to as the "FLSA"), with Claudia Gayle identified as the Collective Action named, lead Plaintiff;

(b) the captioned *In Re: Dorvilier* criminal case Decision that was issued by the Eastern District Court of New York in response to a *Habeus Corpus* petition (hereinafter referred to as the "*Dorvilier Criminal Case*"). Said Dorvilier Criminal Case relates to facts, events and legal issues that are identical to those addressed by the Court in the *Gayle Case*;

(c) the captioned *Isigi* and *McFarlane* case Decisions identifying Rosalyn Isigi and Marjorie McFarlane respectively as Plaintiffs (hereinafter referred to as the *Isigi Case* and the *McFarlane Case*). Said cases are actions brought under the FLSA alleging that Defendants failed to pay overtime wages owed thereunder and have been filed in the U.S. Second Circuit, Eastern District of New York. Though these two cases were filed more recently and relate to facts and events from a different time frame from those raised in the *Gayle Cases* and the *Dorvilier Criminal Case*, the *Isigi* and *McFarlane Cases* involve the same lead counsel for Plaintiff that participated in the *Gayle Case*, the same defendants and identical legal issues to those raised in the *Gayle Cases* and the *Dorvilier Criminal Case*. For judicial economy purposes,

Defendants seek to vacate the Decisions in the *Isigi* and *McFarlane Cases* on the same legal grounds that are raised herein. It should be noted the issues discussed herein remain timely and continue to be relevant: the latest *McFarlane Case* decision was filed just days ago by U.S. District Court Chen on December 7, 2020.

The *Gayle Case*s and the *Dorvilier Criminal Case* relate to a common set of facts and events that occurred after November 7, 2004, for alleged willful violations of the FLSA; and after November 7, 2005 for alleged non-willful FLSA violations. All the alleged violations at issue in the latter two cases include but are not limited to Defendants' alleged failure to pay overtime wages and provide workers' compensation contributions after said dates (i.e. after November 7, 2004 or November 7, 2005). These are the operative dates for the commencement of FLSA violations in these cases because FLSA, section 255(a) establishes a three year statute of limitations for willful violations and a two year statute of limitations for non-willful violations, that prevent consideration of violations that occur more than two or three years prior to the date that an FLSA complaint is filed. For purposes of this motion, the FLSA Complaint at issue in the *Gayle Cases*, was filed was November 7, 2007 and therefore only willful violations occurring after November 7, 2004 or non-willful violations occurring after November 7, 2005 fall within the applicable statute of limitations and may be considered.

It is Defendants' position that in all of the captioned cases identified in this Motion, a number of key FLSA considerations were not properly scrutinized and evaluated and a number of statutory and regulatory provisions were overlooked. It is also Defendants' position that some elements of the Decisions challenged herein were prohibited by the protections provided to Defendants under the 6th and 14th Amendments to the U.S. Constitution. Specific legal arguments in support of this motion are provided in the next Section of this Memorandum.

ARGUMENT

I. INTRODUCTION

Defendants' Motion to Vacate is based on several legal grounds, as specified below. For ease of reference each of the legal challenges set forth herein are identified as separate counts:

1. Count One: Defective Consent
2. Count Two: Fraud and Fraud on the Court
3. Count Three: Absence Of Engagement In Commerce And Violation Of Protections Provided By The 14th Amendment Of The United States Constitution
4. Count Four: Individual Liability Of Defendant Harry Dorvilier Violates New York State Law and the14th Amendment Of The United States Constitution
5. Count Five: Criminal Liability Of Defendant Harry Dorvilier Violates Federal and State Law and the 14th Amendment Of The United States Constitution
6. Count Six: US DOL Regulations Exempted Defendants From FLSA Liability
7. Count Seven: Statute of Limitations Not Properly Applied
8. Count Eight: Defendants Were Denied Their Right To Jury Trial To Determine Amount Of FLSA Liquidated Damages Under The 6th Amendment Of The U.S. Constitution And Unlawfully Denied Good Faith Affirmative Defense As A Matter Of Law
9. Count Nine: Flawed Discovery
10. Count Ten: US DOL Did Not Make A Determination That An FLSA Violation Occurred And Said Determination Is Required by FLSA Section 216(b)

Before discussing each of the foregoing counts addressed in this Motion in greater detail, an overview of pertinent sections of the FLSA are provided to provide historical context.

A. FLSA HISTORICAL PERSPECTIVE

The FLSA is an arcane, older statute with subtleties, implications and undercurrents

that are sometimes difficult to identify and interpret. It is the product of another era and care is required to ensure that statutory intent is honored and all applicable provisions are properly applied.

1. *Collective Actions Under Section 216(b) FLSA*

The FLSA was initially passed by Congress in 1937 as a key component of Roosevelt administration New Deal legislation that was intended to promote a worker's right to fair pay for services rendered.

It is important to recognize however that its pro-worker agenda was offset by significant pro-employer retrenchment when several "pro-business" amendments were enacted by the Republican controlled Eightieth congress in 1947. Senator Forrest C. Donnell sponsored amendments to the FLSA, including modifications to sections 216(b) (collective action) and 255 (Portal to Portal Act, statute of limitations). The net effect of these changes was to rein in a number of employee rights that had been granted only 10 years before and to offer employers relief from harassment that otherwise could result from the proliferation of potentially expensive, burdensome employment litigation. Among other things, these 1947 amendments made it more difficult for employees to represent other employees in collective actions under FLSA section 216(b) by limiting collective action members to only "aggrieved employees;" establishing written consent/court filing requirements for named plaintiffs and opt-in plaintiffs with the intent of preventing the proliferation of collective action suits and to significantly limit the number of collective action members; and reducing the statute of limitations for bringing

collective actions to two years, unless the actions taken by the employer were deemed to be "willful," in which case a three year limit was established. Congress enacted the foregoing collective action amendments to establish a more deliberate and controlled process designed to accomplish two primary objectives: (a) to prevent employees from pursuing employee suits by a collective action "representative"; and (b) to reduce the number of plaintiffs participating in collective actions. See "Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act," *Hastings Law Journal*, Volume 61, issue 1, pages 281-284.

2. *Employer Obligations Under Federal And State Labor Laws*

The FLSA and analogue state labor laws establish three primary obligations of an employer that are relevant to the instant Motion:

a. Employer Duty Number 1: Maintain Workers' Compensation Insurance. Section 3 of the New York State Workers' Compensation Law (hereinafter referred to as the "WCL") **requires an employer to provide workers' compensation insurance** to its employees that will provide coverage for job related injuries. This is done by securing a Workers' Compensation Insurance Policy that meets statutory and regulatory requirements.

b. Employer Duty Number 2: Pay Workers' Compensation Insurance Contributions. The employer is also required to make **"employer contributions" payments for its employees** to cover the required workers' compensation insurance (see item 1 above). Employer liability for such contributions is established under Section 560 of the New York State Labor Law (hereinafter referred to as "LL"). Further, under

WCL, Section 31, the employer is prohibited from entering into an agreement **with its employees** that requires an employee "to pay any portion of the premium paid by his employer" for unemployment insurance and if such an agreement is entered into, "any employer who makes a deduction for such purpose from the wages or salary of any employee…shall be guilty of a misdemeanor."

c. Employer Duty Number 3: Pay Overtime Wages**.** The FLSA requires employers to pay time and a half for overtime in accordance with FLSA, Section 207.

It is important to note that all three of the foregoing employer obligations hinge on whether the persons working for an employer are classified as either an employee or independent contractor. If the worker is classified as an "employee" all three duties apply; but if classified as an "independent contractor" these duties are **not applicable** (emphasis supplied). Further, if classified as an employee, it still is necessary to determine whether an exemption applies that excuses the employer from the foregoing obligations. In sum, employer/independent contractor classification and the applicability of available exemptions are key issues that must be resolved in all the Decisions that are addressed by this Motion.

B. DISCUSSION OF LEGAL GROUNDS FOR MOTION TO VACATE

Set forth below in this section I(B) are the legal grounds on which each count of the instant motion are based.

1. COUNT ONE: DEFECTIVE CONSENT

A. *Overview Considerations*

FLSA Section 216(b) authorizes collective action suits to be brought by private parties. Though US Department of Labor (hereinafter referred to as "US DOL") has the authority to pre-empt a collective action, absent such action by the US DOL, the private party collective action may proceed.

Among other things, a primary purpose of these Collective Action provisions set forth in section 216 and section 255 of the FLSA is to provide employees the legal right to go to court to redress disputes regarding an Employer's failure to make overtime payments and to establish the statutory time frame in which such actions must be filed with the court (See page 7 of this Memorandum, Employer Duty 3: Pay Overtime Wages).

The collective action provisions that were amended in 1947 and are now set forth in FLSA, Section 216(b) make it clear that all named plaintiffs in a collective action case must provide written opt-in consent and file that consent with the Court, at the time the complaint is filed:

> …An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer…by any one or more employees for and on 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 the such action is brought (emphasis supplied).

B. *Claudia Gayle's Failure to File Consent With Court Is A Fatal Defect*

Plaintiff's failure to file the statutorily required opt-in consent of collective Action named plaintiff Claudia Gale at the time the complaint was filed, rendered the Collective Action void as of the November 7, 2007 filing date. A review of the docket in the *Gayle Cases* confirms that Claudia Gayle did not file an opt-in consent either at the time the complaint was filed, or thereafter. Because the named Plaintiff, Claudia Gayle did not file her written consent to participate in the Collective Action, it was reversible error to allow the Collective Action to proceed. Said failure to file said consent constitutes a jurisdictional defect that nullified, *ab initio*, the commencement of Plaintiff's Collective Action. For legal purposes, the failure to file a written consent barred the named Plaintiff from participating in the Collective Action proceeding. Lacking a named Plaintiff, the Collective Action was never commenced and, the *Gayle Cases* must be vacated.

Additional support to the jurisdictional significance of and need for the filing of the consent of the named opt-in plaintiff concurrently with the complaint is the fact that this basic requirement was met in all the leading FLSA cases ruling on section 216(b) collective actions. See Crouch v. Guardian Angel Nursing, Inc., case no. 3:07-cv-0051(U.S. District Court, Middle District TN), Amended Complaint filed June 27, 2007, 132 consents filed); Lemaster

v. Alternative Healthcare Solutions, Inc. case no. 3:08-cv-01101 (U.S. District Court, Middle District TN), complaint filed November 14, 2008, 3 consents filed); Wilson v. Guardian Angel Nursing, Inc. case no.3:07-0069 (U.S. District Court, Middle District TN), complaint filed January 18, 2007, 287 consents filed; and Brock v. Superior Care, Inc. 840 F. 2d 1054 (U.S. Court of Appeals, 2nd Cir. 1988), 776 consents filed. It should be noted that the above referenced Crouch, Lemaster and Wilson cases are collective action cases brought under FLSA section 216(b) and in all those cases, the opt-in, named plaintiffs attached written consents to the complaints filed with the Court.

It also should be noted that Collective Actions are not representative actions. This has been made clear by the Second Circuit Court of Appeals in Scott v. Chipotle Mexican Grill, Inc. Case Nos. 172208-cv and 18-359-cv (April 1, 2020), when it compares the original FLSA with the amendments thereto that are commonly referred to as the Portal to Portal Act:

> Indeed, Congress amended § 216(b) in 1947 expressly to put an end to representational litigation in the context of actions proceeding under §216(b), and at the same time required that workers affirmatively opt-in by filing written consent as a condition to proceeding as a collective. *Compare* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (1938) (codified at 29 U.S.C. § 216(b)) (providing that employees proceeding under § 216(b) may "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated"), *with* Portal to Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87 (1947) (codified at 29 U.S.C. § 216(b) (1946 Supp. II)) (banning representative actions and providing that "[n]o employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought").

A collective action cannot proceed without a named plaintiff who has filed a written consent when the action is commenced and therefore it is a fatal defect to Plaintiff's case.

The only document filed with the court by Plaintiffs purportedly to satisfy this essential requirement is a consent dated some 4 months after the November 7, 2007 filing of the Gayle compliant, that is signed by a person named "Patricia Robinson" (*Gayle* Docket, Document 15). The failure to commence this case with the filed consent of the named plaintiff is a fundamental collective action defect that invalidated the complaint and the commencement of the collective action legal proceeding as a matter of law: because this case was not commenced with a filed written consent as required by FLSA, Section 216(b), all that follows cannot stand.

It is Defendants' position that lacking a legally recognized named plaintiff with a consent filed with the Court at the commencement of the collective action, all Court decisions relating thereto must be vacated.

C. *Consent Defect of Named Plaintiff Is Fatal To All Collective Action Plaintiffs*

Additionally, under these circumstances, the conditional and final Collective Action certifications granted by the Court in the *Gayle Case*, are nullified as well. Because the legal status of the Collective Action representative was defective based on her failure to file opt-in consent when the action was commenced, the legal status of all plaintiffs who subsequently filed written consents are defective as well. This result

is unavoidable because thelegal status of all plaintiffs is equivalent to the defective legal status of the named Collective Action plaintiff:

> …If the court grants … certification and the collective action proceeds to trial, the opt-in litigants **will enjoy all the same rights, privileges and benefits as the original plaintiff.** "Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions and the Rules Enabling Act," *Hastings Law Journal*, Vol 61, Issue 1, November 2009, page 289 (emphasis supplied).

This is consistent with the conclusions reached by leading FLSA commentators, based on their review of the congressional intent of these provisions:

> By referring to them as 'party plaintiff[s], Congress indicated that opt-in **plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.** Allan G. King & Camille C. Ozumba, "Strange fiction: the 'Class Certification' Decision in FLSA Collective Actions," 24 Lab Law 267, 268 n.6 (2009; emphasis supplied).

Further, as stated in Ellis v. V. Edward D. Jones, 527 F. Supp. 2d 583,587-88 (E.D. Pa 2008) and other FLSA certification decisions, once certified, all Collective Action members "enjoy the full privileges of the named Plaintiff at trial." It therefore follows that in this case because the Collective Action named plaintiff's legal status was defective, the "similarly situated" collective action members have no legal proceeding to join and without such a pending legal proceeding it was error for the Court to allow their consents to be filed. Stated another way, the defective consent cannot be cured by consents filed by other individual opt -in plaintiffs several years later because those Plaintiffs had no legally recognized proceeding to opt into. See also Michigan Corr. Org. v. Michigan Dep't of Corr., 774 F.3d 895, 902–03 (6th Cir. 2014) which

determined that: "No underlying lawsuit means no jurisdiction." (and citing Skelly Oil, 339 U.S. at 671–72, 70 S. Ct. 876).

D. *Waiver of Defect Would Violate Rules Enabling Act*

It is also important to note in this regard that if the Court were to interpret its Court approved procedures as allowing consents by subsequently named parties to be deemed valid even though in this case they were filed some **two (2) years** after the commencement of a legal proceeding (emphasis supplied) – such a result would violate the following two "substantive" legal rights afforded by FLSA section 216(b) that have been recognized by courts in multiple jurisdictions:

1. The substantive right of employers to limit liability to mass suits; and
2. The substantive right of employees to receive notice and provide consent to "opt-in" before or concurrently with being named as a 'party plaintiff" to a collective Action proceeding. See Ellis, supra.

To allow the two step Collective Action Certification procedure used in the 2nd Circuit as justification for abridging said substantive rights would violate the Rules Enabling Act (28 U.S.C. section 2072, et. seq). See James River Insurance v. Rapid Funding, LLC,658 F. 3d 1207 (10 Cir Court of Appeals, 2011), quoting from Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance Co., 130 S. Ct. 1431 at 1451:

> …"the court must decide whether application of the federal rule represents a valid exercise of the rulemaking authority [under] the Rules Enabling Ac (quotations and citation omitted. That Act requires, *inter alia*, that federal rules 'not abridge, enlarge or modify any substantive right' " *id*. (quoting the Rules Enabling Act, 28 U.S.C. Section 2072(b)). *Supra*, page 1218.

It is also Defendant's position that any such abridgment of the foregoing substantive rights would also constitute a separate violation of 14th amendment due process rights. Congress established opt-in consent as a statutory pre-requisite to the implementation of a collective action and because Plaintiffs failed to file the requisite consent with the Court to commence the *Gayle Case*, the collective action proceeding brought under FLSA, Section 216(b) must be declared void and the *Gayle Case* vacated.

E. *Isigi And McFarlane Cases Also Lack Required Consent*

The failure of the Plaintiffs in *Isigi* and *McFarlane* to file consents is also fatal to the successful prosecution of those cases. Section 216(b) FLSA makes it clear that private causes of action under the FLSA can only proceed if the parties pursuing claims thereunder file consents with the court. Though the complaint in *McFarlane* (*McFalrlane* Docket, Document 1) at least references that critical statutory provision, the *Isigi* complaint (Isigi Docket, Document 1) fails to even mention FLSA, section 216(b). It is Defendants position that the failure of the *Isigi* complaint to do so constitutes a pleading defect that justifies vacatur on that ground alone.

In any case, the failure of the plaintiffs in either of those cases to file consents with the court as required by FLSA, section 216(b) requires the court to vacate the decisions rendered in those cases.

F. *Conclusion*

In sum, Plaintiffs' failure to timely file the required consent of the representative plaintiff with the Court when the complaint was filed and as required by FLSA section 216(b), warrants the vacatur of judgment in the *Gayle Cases*; and the vacatur of the *Isigi and McFarlane Cases*, to the extent that those cases relied on defective consent and/or *Gayle Case* legal precedents.

2. COUNT TWO: FRAUD AND FRAUD ON THE COURT

This count of the instant motion is also brought as a challenge to the Collective Action brought by Plaintiff to address allegations that Defendants did not discharge its employer duty to make overtime payments. It is brought under both FRCP Rule 60 (b) and Rule 60(d)3.

Plaintiffs claims in the *Gayle Case* were made under FLSA, Section 216(b). Claudia Gayle is the named representative plaintiff therein. Upon scrutiny, the identity of Claudia Gayle is nowhere established in the record. Indeed, information provided by Defendants and shared with Plaintiffs' counsel, call attention to the fact that the collective action lead representative, Claudia Gayle, does not exist for legal purposes. This issue was raised by Defendants in Defendant Dorvilier's *pro se* Affidavit (*Gayle* Docket, Document Number 83).

A. *Failure to Establish Representative Plaintiff Identity Constitutes Fraud and Fraud on the Court*

Information in the record (*Gayle* Docket, Document Number 83) establishes that Plaintiffs submitted contradictory and inconsistent identity information to the Court, including conflicting social security documentation; proof of residency; and citizenship information. This contradictory identity information was provided on the record and establishes questions of fact that were not addressed by the court (*Gayle*, Document 83, pages A-706 to A-71). It is Defendants' position that the fraud engaged in by Plaintiff Gayle rendered her non-existent for legal purposes and said fraud is documented by the following facts that are set forth in the *Gayle* record:

1. Her employment application states her name as Claudia Gayle with a Covington GA address, social security number of 125-82 -9064, a date of birth of 10/30/1967 (pages A-706, A-707) and attached copies of her purported NYS LPN license issued by NYS Education Department (hereinafter referred to as "NYS ED") as bearing license no. 282455 -1 (page A-708); social security card (page (A-710); and NYS driver's license No. 386-954-912 with birth date 10-30-67 and residence at 198 Main Street, Mountaindale, NY.
2. In contrast to the foregoing information provided by "Claudia Gayle," the July 22, 2009 Social Security Administration (SSA) E-

Verify notice confirmed that SSA had no record of issuing social security number 125-82-9064 to a Claudia Gayle (pages A-711/ A-713) indicating that the purported social security card provided on page A-710 is a forgery;

3. Further, in contrast to the information set forth in paragraph (i) above, a search of the NYS ED professional licensing records (http://www.op.nysed.gov/opsearches.htm#nme) confirms that NYS LPN license no 282455 was in fact issued to a Claudia Cecile Williams on 10-27-2005, residing in Covington GA, indicating that the Gayle LPN license provided on page A-708 is a forgery.

4. Further the deposition of Claudia Gayle (*Gayle* Docket, Document 22-5, page A-268) further confirms that she had used a married name of Mathias but did not use any other names (which would also exclude the name "Claudia Cecile Williams" mentioned above).

5. Under federal law, fraud is committed if a person knowingly makes "any false statement or claim that he is…a citizen or national of the United States, with the intent to obtain on behalf of himself, or any other person, any Federal or State benefit or service, or **to engage unlawfully in employment** in the United States (18 U.S.C. section 1015; see also 18 U.S.C 1028A (a)1["Aggravated identity theft"]. Such false statements authorize a two (2) year sentence for knowingly possessing or using identification of another person). In this case, the aforementioned

> conduct engaged in by Plaintiff Gayle constituted fraud within the meaning of the above referenced statutory provisions.

It is of interest to note that more in depth searches conducted by Defendants on the foregoing names (Claudia Gayle a/k/a Claudia Mathias, social security numbers and addresses) -- link Claudia Gayle to no less than fourteen (14) different residences in four (4) states (Florida, GA, MD and NY) sixteen (16) mobile phone numbers, three (3) different birth dates and four (4) different social security numbers (including one person who is deceased (Note: the more in-depth searches referenced above were not obtained until recently, are not the in the *Gayle* record; they are summarized here only to call additional attention to the nature of the fraud and to confirm Defendants commitment to enter such evidence into the record if this matter is vacated) and new legal action is properly initiated. See also *Gayle* Docket, Document 83, page A-695 regarding circumstances by which Plaintiff Gayle was hired and the purposeful withholding of relevant identity documentation by Ms. Gayle at the time she was hired by Defendant HNR.

In any case, it is Defendants' position that the identity issues raised by Defendant were in the record, were known by the Court and should have been known by Plaintiffs' counsel; and that the information introduced by Defendants, establish that the *Gayle Case* was based on critical, fraudulent information and raised questions of fact that should have been assessed by the court and provide grounds for vacating the judgment as requested on the instant Motion.

If fraud is proven, the typical judicial response is to vacate the judgment. See Field v. Mans 516 U.S. 59 (1995) vacating judgment in bankruptcy case for fraud; Hazel -Atlas Co. v. Hartford Co. 322 U.S. 238 (1944) authorizing a federal appellate court to vacate its own judgment because of fraud; and U.S. v. Wallace 403 F. App'x 868 (4th Cir. 2010) vacating a criminal sentence based on identity fraud.

Further, the failure by Plaintiffs' Counsel, as an officer of the Court, to address this fraud by disclosing same to the Court and engaging in corrective action; and its deliberate misrepresentation to the court that Claudia Gayle filed a consent -- constitute a fraud on the court. Fraud on the court occurs when a "plan or scheme" exists to interfere with the judicial machinery or process. The Second Circuit has spoken on motions to vacate for a fraud upon the court. Gleason v. Jandrucko, 860 F.2d 556, 558-559 (2d Cir. 1988); Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972); Leber-Krebs, Inc. v. Capitol Records, 779 F.2d 895 (2d Cir. 1985); King v. First Am. Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002); and, Hodges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995). The Supreme Court has, as well. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).The Second Circuit's Gleason case, *supra*, provides the best summary of the law to be applied here. There it said:

> "Relief from a final judgment may also be obtained at any time by way of an independent action to set aside a judgment for "fraud upon the court." *Id*., and advisory committee note thereto ("under the saving clause, fraud may be urged as a

> basis for relief by independent action"). Although both clause (3) and the saving provision of Rule 60(b) provide for relief from a judgment on the basis of fraud, the type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion." (Citations omitted.)
>
> "Indeed, "fraud upon the court" as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication. See Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972)."
>
> "In *Hazel-Atlas*, the Supreme Court set aside a twelve-year old judgment on account of new evidence of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but [a] Circuit Court of Appeals" in order to obtain a patent. 322 U.S. at 245-46. The *Hazel-Atlas* Court explained that fraud on the court involves "far more than an injury to a single litigant" because it threatens the very integrity of the judiciary and the proper administration of justice. Id. at 246. **Proof of a scheme to defraud together with the complicity of the offending party's lawyers in *Hazel-Atlas* was, in the Court's judgment, conclusive evidence of fraud on the court"** (emphasis supplied).

In addition to establishing a Fraud on the Court as stated above, the failure of Plaintiffs' counsel to inform the Court in this case also violated FRCP Rule 26(e)1 (which requires supplementation to be provided to the Court) and New York Rules of Professional Conduct at 22 NYCRR, section 1200.3.3(a)3, 3.3(b) and 3.4(a) (which require an attorney to "take reasonable remedial measures, including, if necessary, disclosure" to the Court in a pending case).

In the instant case, the Collusion and Abuse of Process outlined in Count 7 herein coupled with the Fraud referenced in this Count 2, constituted a scheme that impugned the integrity of the judicial process so as to constitute a fraud on the

court. As noted in Gleason v. Jandruco, *supra*, attorney complicity with a party's scheme to defraud can be conclusive evidence of fraud on the court.

B. Use of Stolen Computer Data to Meet Burden of Proof Constitutes Fraud on the Court

On or about April 1. 2008, the theft of computer records and electronic data were reported to police authorities as having been stolen from Defendants' offices. This theft and the prejudicial impact it had on Defendants and the discovery process are set forth in the Defendant Dorvilier's *pro se* Affidavit, paragraph 48, and exhibits (which are referenced in the *Gayle* Docket under Document 83 as having been delivered in hard copy to the Court but are not included in the Record) which is further discussed below. See *Gayle* Docket, Document 83, page A-696.

Upon information and belief, Plaintiff and its counsel used stolen computer records and electronic data to compile the amount of hours worked by Plaintiffs ; calculate the amounts of overtime pay allegedly owed by Defendants; and submit electronic "evidence" to the Court (see HNR time sheets set forth in *Gayle* Docket, Document 26-18). Plaintiffs' use of such stolen records and the failure of Plaintiffs' counsel to disclose that the records relied upon to calculate overtime and liquidated damages were indeed tainted as "fruit of the poisonous tree"/and/or resulted from criminal conduct -- constituted a fraud upon the court. See Gleason v. Jandruco, *supra* to address fraud situations. See also the well known cases establishing the poisonous tree doctrine in criminal matters set forth in Miranda v. Arizona (1966), 384 U.S.436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 and Edwards v.

Arizona (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. which Defendants submit should apply in a civil setting to bar the introduction of evidence tainted by criminal conduct engaged in on behalf of an adverse party to which an adverse party benefits. It should be noted in this regard that the determination that the information provided by Defendant on the "Compact Disk" provided by Plaintiffs can nowhere be found in the *Gayle* Docket and was apparently accepted by the Garaufis Court in reliance on what Defendants believe were false representations of Plaintiffs' counsel. See *Gayle* Docket, Document 108, paragraph 6 discussing "13 inch stack" of records that were assembled by Plaintiffs; and Document 179 (September 18, 2012 Memorandum & Order of Judge Garaufis), page 6, Footnote 1 referencing the "voluminous size of the records" supplied by Plaintiffs that purportedly documented Plaintiffs' "overtime work." Defendant Dorvilier's *pro se* affidavit indicates that said information was "the information Plaintiff's attorney was looking for." Said information was not provided by Defendants but rather, upon information and belief, ended up in the possession to Plaintiffs' counsel by some means unrelated to the normal discovery process (*Gayle* docket, Document 83, paragraph 48). The court should bear in mind that the summary judgment determinations in the Garaufis decision regarding damages were based on a finding that no questions of fact existed in connection thereto, when in fact (a) significant questions of fact were raised by Defendants (as outlined above in this Count 2 above) that Defendants believe, should have precluded a summary judgment on the damage issue; and (b) court precedent in the second circuit requires FLSA, section 216 liability and damage issues be determined by jury trial

under the protections afforded by the 6th Amendment of the U.S. Constitution FLSA. See Brock v. Superior Care, No. 407, Docket 87-6195 (Second Circuit Court of Appeals, February 16, 1988) at page 26, confirming that "actions at law" brought under FLSA, Section 216 to determine "liability for and amount of back pay damages," have a right to be decided by jury trial.

It is Defendants position that the Court's failure to (a) recognize that such questions of fact existed in the record and (b) recognize Defendants right to a jury trial on the liability and damage issue -- constitute grounds for vacating the damage awards. It is also Defendants' position that the tainted nature of the evidence provided by Plaintiffs in support thereof, when challenged on remand, will result in the reversal and/or significant reduction in any such damage awards previously authorized by the *Gayle* decisions.

C. Conclusion

The foregoing fraudulent conduct engaged in by Plaintiffs and their counsel; the failure of Plaintiffs' counsel to disclose the fraudulent conduct of Claudia Gayle to the Court; and with respect to the *Gayle* damages previously awarded, the misapplication of the summary judgment standard and the violation of Defendants right to a jury trial as afforded by the 6th Amendment -- warrant the vacatur of judgment in the *Gayle Cases*; and the vacatur of the *Isigi* and *McFarlane Cases*, to the extent that those cases relied on *Gayle Case* legal precedents.

3. COUNT THREE: ABSENCE OF ENGAGEMENT IN COMMERCE VOIDS FLSA APPLICABILITY AND DEFENDANTS' LIABILITY THEREUNDER

Section 207(a)1 of the FLSA subjects an employer to overtime wage requirements if either (i) their employee is individually "engaged in commerce" (adopting the terminology used in Jacobs v. New York Foundling Hospital 483 F.supp.2d 251 (E.D.N.Y. 2007) at page 257, this is referred to herein as "FLSA Individual Coverage") or (ii) the employer is an "enterprise engaged in commerce" (again, adopting the Jacobs terminology *supra*, is hereinafter referred to herein as "FLSA Enterprise Coverage") :

> [N]o employer shall employ any of his employees who in any workweek is **engaged in commerce** or in the production of goods for commerce, **or is employed in an enterprise engage in commerce** or in the production of good for commerce for a workweek longer than forty hours unless such employee receives an overtime premium wage. Section 207(a)1 FLSA (emphasis supplied).

Section 203(b) FLSA defines commerce as meaning "trade, commerce… among the several states" thus requiring a demonstration that the individual or the enterprise in question are engaged in what is commonly referred to as "interstate commerce" before FLSA jurisdiction can be established. In addition, Section 203(b)1 FLSA also makes it clear that to establish FLSA Enterprise Coverage, it is required to establish both that it has employees who are engaged in interstate commerce *and* the employer has an annual gross volume of sales greater than $500,000.

Absent such commerce among the several states, FLSA liability for overtime wage payments does not apply and the cases that are the subject of this Motion which allege such liability must be vacated.

A. The Decisions That are the Subject of this Motion Lack Substantiation Of Both FLSA Individual And Enterprise Coverage And Must Be Vacated

The pleadings in all the cases that are the subject of the instant Motion fail to establish a sufficient commerce nexus and therefore do not state a claim under the FLSA. The legal basis for this relief is set forth below:

1. Pleadings and Record Are Not Sufficient to State a Claim

To prevail on a motion for summary judgment, the pleadings and record must contain sufficient information to state and support the critical elements of the claim. Jian Chen Liu v. Kueng Chan , *supra, page 7:*

> To survive a motion to dismiss …a plaintiff must plead facts that, if accepted as true, "state a claim to relief that is plausible on its face -- citing Bell At. Corp v. Twombly 550 U.S. 570 (2007); and a complaint is facially plausible when the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" – citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) .

Similarly, in Rivera v. Deer Run Realty & Mgmt.., Inc. (U.S. District Court Middle District Florida Orlando division case no. 5:15-cv-79-Orl-41DAB the court noted that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statement, do not suffice. Numerous other FLSA cases have ruled on the need to have adequate information to support a particular cause of action in the pleadings and in the record; see Darowski v. Wojewoda No. 3:15-cv-00803 (MPS) (D.Conn 2016), [interstate commerce individual liability

requires sufficient information in pleadings and record at page 3]; and Jacobs v. New York Foundling Hospital, 577 F.3d 93, (2d Cir. 2009) [216(b) collective action requires Plaintiff to provide a "properly supported" motion for summary judgment, at page 56]. For ease of reference in this Memorandum, the requirement that pleadings include substantive information adequate to support a particular cause of action as set forth in the cases cited above, is hereinafter referred to as the "Substantive Pleading and Record Standard."

Regarding the substantive aspect of this standard case law requires that to establish Individual FLSA Coverage an employee must directly and regularly participate in commerce and use the "instrumentality" of such commerce in his work for the employer in question. The court in Darowski v.Wojewoda, *supra,* page 8, articulated this requirement as follows:

> …[Plaintiff] merely used items that were shipped from another state. An employee who used items that have traveled across state lines is not "an employee engaged in commerce." See McLeod 319 U.S. at 494 (employees who handle goods after acquisition by a merchant for general local disposition are not [engaged in commerce]. Reagor v. Okmulgee Cty. Family Res. Ctr., 501 F. App'x 805. 810 ()10th Cir. 2012) holding that an employee was not "engaged in commerce" when she handled goods that had traveled in interstate commerce); Thorne v. All Restoration Srvs., Inc. 448 F. 3d 1264, 1267 (11th Cir. 2006) (holding that an employee was not engaged in commerce" when he purchased tools for his job that may have crossed state lines). Here [Plaintiff] did not "engage in commerce" simply by using tools and supplies that were shipped from another state.

Similarly, see also Scott v. K.W. Max Investments, 256 F. App'x 244 (11th Cir 2007) at page 3 which also added that the employees must also "regularly" use the goods that originated out of state,:

> To qualify as 'engaged in commerce" under the FLSA, an employee must "directly participate in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce… or (ii) by **regularly using the instrumentalities of interstate commerce in his work**.(emphasis supplied)

Regarding FLSA Enterprise Coverage, case law also requires that it is not sufficient to merely show employer annual sales of $500,000. Rather, it is also necessary to show that at least two employees are engaged in commerce and that their interstate nexus is based on "regular and recurrent" activity:

> …regulations interpreting the FLSA clarify that "an enterprise …will be considered to have employees…handling, selling or otherwise working on goods that have been move in or produced for commerce by any person, if during the annual period which it uses in calculating it annual sales for purposes of the other conditions of these sections, it **regularly and recurrently** has at least **two or more employees, engaged in such activities**[,]…but it is plain that an enterprise that has employees engaged in such activities only in isolated or sporadic occasions, will not meet this conditions. Scott v. K.W. Max Investments, s*upra*, at page 3 (emphasis added by Court).

This latter requirement of having at least two employees engaged in "regular, recurrent" interstate commerce activities is also specified in Darowski v. Wojewoda, *supra* at page 6, which also cites Jacobs v. New York Foundling Hospital , *supra*, and other cases cited therein.

a. *Gayle Case Does Not Meet Substantive Pleading and Record Standard*

Applying the forgoing to the Gayle Case, it is apparent that Substantive Pleading and Record Standard was not met. In this regard, the court in *McFarlane* correctly notes (*supra*, page 13) that the Second Circuit District Court in the *Gayle Case* "does not address" the commerce requirement [i.e. In *Gayle* Document 1

(Complaint), Individual FLSA Liability is not properly addressed in paragraph 18: "Plaintiff was engaged in commerce within the meaning of 29 U.S.C. Section 203(b) in that Plaintiff works for Defendants as a licensed practical nurse"; Enterprise FLSA Coverage is also not properly addressed in paragraph 8: "Defendants were, at all relevant times and are, in an industry affecting commerce within the meaning of 29 U.S.C. Section 203(b)"; further, the Complaint makes no mention of HNR annual sales or that employees are engaged in commerce. Though subsequent filed document do refer to the annual sale threshold, the statements provided are similarly inconclusive and lack sufficient substance to establish either individual or enterprise coverage by documenting regular employee engagement in interstate activities or regular or recurrent use of goods obtained through interstate commerce by two or more employees in their employment with HNR. The *Gayle* record is similarly devoid of any substantive information in this regard].

Based on the foregoing, it is Defendants' position that the *Gayle Case* fails to state a claim under the FLSA as a result of its failure to establish Individual and Enterprise FLSA Coverage in its pleadings and in the record.

b. Isigi and Dorvilier Criminal Cases Do Not Meet Substantive Pleading and Record Standard

Similarly, in the *Isigi* and *Dorvilier Criminal Cases* – the complaints and relevant pleadings do not even assert that HNR nurses are engaged in commerce which is a necessary pre-requisite to establishing Individual FLSA Coverage [see *Isigi Case,* Document 1: no mention; *Dorvilier Criminal Case* Indictment no.

1709/2010 and Bill of Particulars dated October 19, 2010: no mention]. In addition, the pleadings in both of these cases do not state facts sufficient to establish Enterprise FLSA Coverage [*Isigi* Document 1, Paragraph 10*:* "Defendants were, at all relevant times, and are, in an industry affecting commerce with the meaning of 29 U.S.C. Section 203" , but nothing is presented to establish that HNR engaged in any out of state commerce (which, as noted *infra*, would be a violation of HNR's license from the Department of Health, which has never been alleged) or that two or more employees were engaged in such commerce, as required by Scott v. K.W. Max Investments, 256 F. App'x 244 (11th Cir 2007) *supra*; *Isigi*, Document 1,Paragraph 11: does state annual gross sale $500,000 threshold, but there is no mention in the complaint that HNR is engaged in commerce; and *Dorvilier Criminal Case* Indictment No. 1709/2010 and Bill of Particulars dated October 19, 2010: no mention. The records in the *Isigi* and *Dorvilier Criminal Cases* are also devoid of substantive information to establish individual or enterprise coverage.]

c. McFarlane Case Does Not Meet Substantive Pleading and Record Standard

The *McFarlane Case*, also fails to meet the Substantive Record and Pleading Standard to support a determination that Individual or Enterprise FLSA Coverage exists.

The pleadings in this regard are "threadbare" and "conclusory" and do not establish the engagement in commerce by at least two employees regularly using goods involved in interstate commerce, as required by Scott v. K.W. Max Investments, *supra*. to establish FLSA Individual Coverage (see Paragraph 53:

"Defendants engaged in commerce or an industry or activity affecting commerce."). Similarly the pleadings are not sufficiently detailed to establish Enterprise coverage. The pleadings do not establish that HNR Nurses were employed in an Enterprise engaged in commerce. The pleadings in this regard are merely conclusory and do not provide a reasonable basis to establish that HNR nurses were employed in an enterprise engaged in commerce. See *McFarlane* Document Number 1, Paragraph 54: "Defendants constitute an enterprise within the meaning of FLSA, 29 U.S.C. 203r-s"].

Similarly, the *McFarlane* record is also not sufficient to establish FLSA Enterprise Coverage. Case law requires that to establish such coverage, regular and recurrent activity of at least two or more employees engaged in commerce is required and no such information is provided in the record. Information indicating that HNR's business surpassed $500,000 in annual sales alone is not sufficient to establish Enterprise FLSA Coverage.

As a final point regarding Plaintiffs' failure to establish Enterprise FLSA Coverage. There is nothing in the pleadings or in the record to establish that Defendant HNR was engaged in commerce. Indeed, the record in the *Gayle Case* indicates that Defendant HNR operates its business pursuant to Article 36 of the New York State Public Health Law (see *Gayle Case* Docket, Document 83, *pro se* Affidavit, paragraph 28) and as such is licensed by the NYS Department of Health to operate in New York State. By the terms of that license HNR is not even authorized to do business out of state and there is nothing in the *Gayle, Isigi*

or *McFarlane* records to indicate that HNR violated the terms of its license in this regard.

2. *McFarlane Case Analysis Does Not Establish Required Commerce Nexus For All TheCases That Are The Subject Of This Motion*

The limitations of the commerce analysis set forth in *McFarlane Case* warrants further discussion. It is Defendants' position that the *McFarlane* court's interstate commerce analysis falls short of establishing the requisite commerce nexus for the *McFarlane* plaintiffs and in any case, has no bearing or impact on the *Gayle* Case for the reasons set forth below:

a. As discussed in this Count 3, section A(1) above, the pleadings and record in all the cases that are the subject of this Motion, do not meet the Substantive Pleading and Record Standard.
b. The *McFarlane* court is a district court with no jurisdiction over the appeal of the *Gayle, Isigi or Dorvilier Criminal Cases* or decisions rendered therein. The interstate analysis provided in *McFarlane* only applies to the *McFarlane* case and, with due respect to the *McFarlane* Court, the analysis set forth therein has no legal affect on the *Gayle, Isigi* or *Dorvilier Criminal Cases*. Its review of the Gayle record and the conclusions it reached regarding the possible interstate origin of medical equipment purchased by HNR nurses is no better than a gratuitous interpretation of facts that has no binding effect on the *Gayle, Isigi or Dorvilier Cases* and nothing more.
c. Assuming *arguendo* that the *McFarlane* Court has the right to import records

from the Gayle case and use those records to bolster the *McFarlane* record (which Defendants do not agree with for the reasons set forth in this Count 3, paragraph 2(d) below), it is Defendants' position that the following determination by the *McFarlane* court is unreasonable, based entirely on conjecture, prejudicial to Defendants and contrary to relevant case law:

> …Plaintiffs have separately stated that they "maintained [their] own basic supplies including a blood pressure meter and stethoscope and [that they] purchased [their] own uniforms and paid for travel expenses…These facts alone are adequate to establish that Defendant were engaged in interstate commerce (*McFarlane* decision, *supra*, page 13).

Whereas the *MacFarlane* court relies on Archie v. Grand Cen. P'ship, Inc, 997 F. supp 504, 530 (S.D.N.Y. 1998), the Archie case interpretation of what constitutes commerce for FLSA purposes is at odds with the conclusion reached by the court in Darowski v. Wojewoda, *supra,* page 8 and the cases cited therein (see Section 3(A) of this Memorandum above, which holds that to establish that an employee is engaged in commerce, it is necessary to prove that the tools and supplies in question "crossed state lines" and that they are used for the employee's work.

The *McFarlane* courts conclusions in this regard are also not consistent with the previously cited case of Scott v. K.W. Max Investments, *supra*, at page 3 reiterates the foregoing , making it clear that interstate commerce requires (a) direct participation of employees in actual movement of persons or things in interstate commerce or the regular use of

"instrumentalities of interstate commerce" (e.g. regular use of medical equipment proven to originate from out of state sources); and (b) "regular" use of the goods originating from out of state sources, in the employee's work.

> There is nothing in the either the *Gayle* or *McFarlane* record to suggest that the nurses in question regularly used instrumentalities of interstate commerce; regularly used the equipment that originated from out of state sources in the work performed for HNR; or, on the contrary, perhaps used such equipment for other employers since the record shows that the nurses in question did not provide services exclusively to HNR. At the very least, surely further information is required in the *McFarlane r*ecord to properly determine whether items in question originated out of state and/or the nurses in question regularly used said items or instrumentalities of commerce for the work conducted on behalf of HNR.

d. It is also Defendant's position that it was improper for the *McFarlane* court to review and rely on information provided in the *Gayle* record to establish the requisite commerce nexus in the *McFarlane* case: relevant information is required to be entered into the record of the *McFarlane* case before it can be ruled upon by the McFarlane court. Federal Rules of Civil Procedure (FRCP) establish procedures for federal district courts to follow when considering motions for summary judgment. FRCP, Rule 1

establishes that these rules "apply in all civil actions and proceedings." More specifically, Rule 56(c)3 states that the court "need consider only the cited materials, but it may consider **other materials in the record**" (emphasis added). Clearly the intent of this rule is to require a district court to limit its review to evidence in the record of the pending case and not to import records from another proceeding.

Further, the district court rendering its summary judgment ruling in the *McFarlane Case* was not acting in the capacity of an appellate court sitting in review of the *Gayle Case* and therefore its review and reliance on selective information taken from the *Gayle* record was not authorized by the FRCP. It should be noted that appellate courts also are limited to the record of the case they are reviewing and cannot import records from other proceedings. See Federal Rules of Appellate Procedure (FRAP), Rule 10(a) which limits the record on appeal to the "original papers and exhibits filed in the district court."

The rationale for limiting a court's review to the record in the particular case brought before it, is articulated well in Bishop v. Warden, Richland Corr. Instit. Case no. 2:19-cv-4780 (U.S. District Court, Southern District of Ohio, Columbus Eastern Division 2020). In that *habeus corpus* case the Court denied the petitioner's motion to introduce a State Court record because of concerns regarding authentication, unsworn statements contained therein and the inability of a reviewing court to

properly review "credibility questions…reserved for the trier of fact…"

e. In closing and to provide further support for Defendants' position that Plaintiffs in all the cases that are the subject of this Motion do not establish Individual or Enterprise FLSA Coverage -- the domestic service exemption discussed in Count 6 below provides independent grounds to support this position. Because such coverages require a finding that the HNR nursing staff were **employees** involved in commerce (emphasis supplied), no such finding can be made if the nurses in question are determined to be exempt from the "employee" definition for FLSA purposes. It necessarily follows that the Court Decisions in all the cases that are identified in this instant Motion must be vacated on the independent grounds set forth in Count 6 because regardless of whether interstate nexus is established, the FLSA does not authorize liability for overtime wage payments under Section 207(a) if the nurses in question are determined to be exempt from the FLSA definition of "employee".

B. *Conclusion*

Based on the foregoing, the failure of Plaintiff's to affirmatively establish Individual FLSA Individual Coverage or FLSA Enterprise Coverage as required by the FLSA to satisfy applicable commerce requirements, warrants the vacatur of the decisions in the *Gayle, Isigi, McFarlane and Dorviler Criminal Cases*.

4. COUNT FOUR: INDIVIDUAL LIABILITY OF DEFENDANT HARRY DORVILIER VIOLATES CASE LAW PRECEDENT, NEW YORK STATE LAW AND IS NOT AUTHORIZED BY THE FLSA

Judge Sifton in his 2009 Memorandum and Order in the *Gayle Case* at CV-07-4672 (CPS) (MDG) (United District Court, E.D. New York, March 9, 2009), indicates that the FLSA authorizes the Court to hold Defendant Dorvilier personally liable for FLSA overtime payment 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 … 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 operated the business himself… 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. *Supra*, page 8.

It is Defendants' position that the Sifton Decision and all subsequent *Gayle Case, Isigi Case and MacFarlane Case* decisions that held Defendant Dorvilier personally and individually liable for FLSA overtime wage violations -- are unsupportable on their face and cannot be allowed to stand. Defendants agree with the *MacFarlane* court that this issue of individual liability was not foreclosed by the collateral estoppel doctrine. See *McFarlane* Decision, *supra*, page 13. The specific legal ground for vacating the foregoing determinations is set forth below in this section.

A. Economic Reality Test Ignored by Court

As a preliminary matter, the foregoing Decisions on this matter do not comport with the rule generally applied in the Second Circuit with respect to such claims. The proper rule is not to rely on general information regarding an officer's authority and "oversight" responsibilities, but rather to focus on the four pronged "economic reality" test that looks in greater detail at the "economic realities" of the situation. See Jian Chen Liu v. Kueng Chan 18-CV-5044 (KAM)(SJB), United States District Court, E.D. New York (2020), page 6 [collective action brought under FLSA 216(b)]. The economic reality test to establish individual liability as an employer under this section for payment of overtime wages requires sufficient evidence to be provided to demonstrate that the individual:

i. Had the power to hire and fire the employees;
ii. Supervised and controlled employee work schedules or conditions of employment;
iii. Determined the rate and method of payment, and
iv. Maintained employment records.

As stated in the Count 3 discussion, to prevail on a motion for summary judgment, the Substantive Pleading and Record Standard must be met. See Chen Liu v. Kueng Chan *supra, page 7* and other cases cited therein. Applying the Substantive Pleading and Record Standard to Judge Sifton's analysis in the *Gayle Case*, or the courts' analyses in the *Isigi* or *MacFarlane Cases*, there is nothing provided in therein that suggest that these 4 criteria were met in those cases or that supporting evidence exists in the record. Lacking such information, it was error to hold Defendant Dorvilier individually liable under FLSA, Section 216(b).

In the *Gayle Case*, the pleadings provided by Plaintiff and other documents filed with the Court only reference to Defendant Dorvilier in a repetitive abbreviated and cursory fashion and nowhere address the economic reality criteria that are required by the Second Circuit. Plaintiffs Complaint in the *Gayle Case* (Docket, Document 1) indicates only that "Harry Dorvilien" (sp) is the "principal" of Harry's Nurses Registry; Harry Dorvilien (sp) "directed plaintiff's work"; and Harry Dorvilien (sp) "oversees the whole Harry's operation" (*Gayle* Docket, Document 1, Complaint, paragraph 7). See also the references to Defendant Dorvilier in Plaintiff's Response to Defendants' Statement of Material Facts, indicating that "Harry Dorvilier is the "principal" of the Harry's Nurses Registry, Inc. ; and Harry Dorvilier is the CEO who "oversee[s] the whole Harry's operation [who] make[s] sure that the service has been provided" and "operated the business" (*Gayle* Docket, Document 28, paragraphs 142 and 143). Plaintiffs provided no additional information that addresses the 4 economic reality criteria specified above.

The *Isigi* and *McFarlane* cases are individual plaintiff cases that were also brought under FLSA, 216(b). Though the complaints in those cases do allege overtime non-payment by Defendants, it is Defendants' position that the same failure to establish the 4 economic reality factors in these latter two cases also warrants the vacatur of any determinations of Defendant Dorvilier's individual liability in those cases. The *Isigi and McFarlane Case* pleadings and record provide only cursory and vague information regarding Defendant Dorvilier's

position within HNR and nowhere provide information necessary to address the 4 economic reality criteria (e.g. *Isigi* Docket, Document 1 and McFarlane Docket, Document 1, Complaints, at paragraph 8 use identical language: "At all relevant times, Dorvilier was and is the principal of Harry's. At all relevant times, Dorvilier directed plaintiff's work for defendants.")

By way of contrast, the Court in Jian Chen Liu v. Kueng Chan, *supra,* makes it clear that it is necessary to scrutinize the pleadings and if they do not include required information, they are to be viewed defective on their face. The significance of this deficiency is reinforced by the fact that the record is silent in this regard as well in the *Gayle Case* collective action and the Isigi and McFarlane Cases individual actions. Based on the foregoing the *Gayle, Isigi and McFarlane Case* Decisions must be vacated to the extent that they determine that Defendant Dorvilier was individually liable for any FLSA violations.

B. FLSA Cases Must Be Interpreted to Include An Assessment of Whether the Corporate Form of Doing Business Was Respected

In addition to the foregoing, the leading case of Donovan v. Agnew. 712 F. 2d 1509 (U.S. Court of Appeals, 1st Cir. 1983) which is normally cited in favor of the application of the economic reality test, warrants further scrutiny and provides further support of Defendants' position. In that case, the three judge panel of Judges Coffin, Breyer and Selya, also focused on an FLSA overtime wage claim involving an employer. The court in Donovan *supra,* at page 1514, takes issue with idea of using the employer definition as the basis for ignoring

common law doctrines that are intended to protect the corporate form of doing busines, in cases involving both the National Labor Relations Act (NLRA) and Social Security Act (SSA); the court's stated concern is that Congressional amendments to both of these laws were enacted in the late 1940's **to limit the "expansive view" of employer liability** that previously was associated with those statutes (emphasis supplied). The court in Donovan notes that Congress had passed laws in 1947 (Taft Hartley Act, amening the NLRA) and 1948 (amending the SSA) to take a limit the scope of the "employer-employee relationship" and suggests that individual employer liability under the NLRA and SSA would require "circumstances equivalent to those that would justify piercing the corporate veil at common law."

Defendants submit that the 1947 FLSA amendments to the Section 216(b) provisions at issue here were similarly intended to insulate the employer from Collective Action litigation brought by employees under that section:

> …the substantive portions of the Portal to Portal Act embody the Eightieth Congress' pro-business leaning. The [FLSA] Act totally barred retrospective FLSA portal pay claims and greatly limited prospective suits. Importantly, the Act eliminated "representative actions in 216(b) by banning non-employee "agents" or "representatives. The amended version of Section 216(b) created the modern day collective action…**Under the new language, only aggrieved employees** may represent a class of fellow co-workers. Those who wish to join the suit must opt-in to the collective action by giving their consent "in writing"… Senator Donnell also questioned the theoretical underpinnings of representative actions. In his view, it would be "unwholesome" if these employees suddenly appeared in droves to collect a favorable judgment well after the statute of limitation had passed…. and **restricted the potential for FLSA claims against employers.** Daniel C. Lopez, "Collective Confusion, FLSA Collective Actions, Rule 23 Class Actions and the Rules Enabling Act 61 Hastings L.J. 275(2009) (emphasis supplied)

Given the foregoing, Defendants submit that it is indeed appropriate in the the *Gayle Case*, *Isigi Case*, *MacFarlane Case* and the *Dorvilier Criminal Case*, for this Court to adopt the Donovan Court's more restricted view of individual employer liability not only for NLRA and SSA cases, but for FLSA overtime pay cases under 216(b) as well. Such a determination would limit liability to circumstances equivalent to what would be required to pierce the corporate veil under common law and require the following findings:

1. The corporate form of doing business had been abused;
2. The individual to be held liable has corporate officer status;
3. Said individual has significant ownership interest; and
4. Said individual has "operations control of a significant aspects of day to day functions, including compensation of employees and who personally made decisions to continue operations despite financial adversity during the period of non-payment" (see Donovan, *supra*, page 1514).

C. Conflict Pre-emption Analysis Is Warranted And Requires New York State Law To Be applied In Determining Employer Liability Under Section 207(a), FLSA

Defendants further suggest that the FLSA definition of employer in Section 207(a), does not pre-empt New York State law and a conflict pre-emption analysis is required:

> …conflict preemption occurs when a state law conflicts with federal statutes or the Constitution. Worth v. Universal Pictures, Inc. 5 F. Supp. 2d 816 C.D. Cal 1997) at page 819.

The court in Millsaps v. Thompson 259 F. 3d. 535 (6th Cir. 2001) engages in an extensive conflict preemption analysis and concludes that state and federal laws must be interpreted harmoniously if express preemption is not intended by the federal statute:

> …Under conflict preemption principles, federal law preempts State law when the two actually conflict… In this case, compliance with both the [state and federal] statutes does not present a "physical impossibility." Nor does the [state law] "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress…(Millsaps v. Thompson, *supra*, at page 549)

In the cases that are the subject of this Motion, because the federal FLSA statute offers no suggestion of federal pre-emption of state requirements that would stand as an "obstacle" to the purposes of the FLSA -- state requirements can easily be reconciled by adding a fifth prong to the Second Circuit's four-pronged economic realities test that requires the application of New York State law. Under well-established New York State corporate law, an individual cannot be held personally responsible for the acts of the company he works for unless the "corporate veil" has been pierced based on a finding by the Court that (a) the individual exercised complete domination over the corporate entity in the transaction at issue and (b) abused its privilege of doing business as a corporation:

> **A plaintiff seeking to pierce the corporate veil must demonstrate that** a court in equity should intervene because **the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form**…(Matter of Morris v. New York State Dept. of Taxation Fin 82NY 2d at 142; see Gateway I Group, Inc. v. Park Ave. Physicians, P.C. 62 AD 3d 141; Lawlor v. Hoffman, 59 AD 3d 499; Love v. Rebecca Dev. Inc., 56AD 3d at 733). **Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use**

> **of corporate funds for personal use** (Millennium Constr., LLC v. Loupolover, 44 AD 3d at 1016-1017; see Gateway I Group, Inc. v. Park Ave. Physicians, P.C. 62 AD3d 141; AHA Sales, Inc. v. Creative Bath Prods., Inc. 58 AD 3d 6,24). East Hampton v. Sandpebble 66 A.D. 3d 122 (N.Y. App. Div 2009), at pages 126, 127 (emphasis supplied).

In the *Gayle Case*, *Isigi Case*, *MacFarlane Case* and *Dorvilier Criminal Case* (to the extent that FLSA violations were addressed therein) – if we assume *arguendo* that there was a violation of the FLSA, it is Defendants' position that the company, not a corporate officer, is legally responsible for said violation and any fines resulting therefrom. Individual liability for such a violation would only attach if there are findings that (a) the 4 economic reality test criteria specified in this Count 4 discussion above have been met; and (b) the individual corporate officer has also been determined to have both dominated the corporate entity with respect to the transaction at issue (i.e. overtime payment matters) and also abused the privilege of doing business in the corporate form. There is no evidence in the record to demonstrate that either of the latter two necessary New York State law requirements specified in (b) above have been satisfied. Indeed, the *Gayle Case* Sifton Decision, *supra*, and the subsequent *Gayle Case* court decisions on this matter do not even mention or consider whether Defendant Dorvilier (a) exercised complete domination over HNR on overtime payment matters and (b) engaged in any conduct that would suggest that HNR abused its privilege of doing business in the corporate form.

It should be noted, with due respect to the legal analysis conducted in Donovan and other leading FLSA cases holding an individual liable for overtime wages,

that those cases did not consider the state law pre-emption doctrine in their analysis and New York state corporate law requirements specifically.

Based on the foregoing, it is Defendants' position that the Courts' failure to conduct a state law pre-emption analysis and make specific determinations as to whether Defendant Dorvilier exercised complete domination over HNR on overtime payment matters and engaged in conduct that would establish that HNR abused its privilege of doing business in the corporate form, warrants the vacatur of all the Decisions that are the subject of this Motion to the extent that those decisions determined Defendant Dorvilier to be individually liable for FLSA violations.

D. *The Imposition of Individual Liability Is Contrary to Case Law Precedent and the Employee Domestic Worker Exemption And Other FLSA Exemptions*

Defendants also seek a ruling that the imposition of individual liability on Defendant Dorvilier for actions taken by HNR is not appropriate in this case. Though Defendants agree with the *McFarlane* court determination that the doctrine of collatoral estoppel does not apply with regard to the question of whether Defendant Dorvilier was engaged in commerce (*supra*, at page 13), Defendants do take issue with the *McFarlane's* Court's conclusion that the question of Defendant Dorvilier's individual liability has been properly decided and is barred from reconsideration by the same collatoral estoppel doctrine (*supra,* at page 9).

The individual liability determinations by Judge Sifton in his *Gayle* Decision and by Judge Chen in *McFarlane* are flawed and must be vacated. The only basis for determining that Defendant Dorvilier is individually liable is based on a determination that he exercised "control" over the nurses in question and that this control somehow qualifies as an "employer" as that term is defined by FLSA, section 203(d) and liable for overtime wage payments under FLSA, section 207(a). Simply put, this is not the case.

Even if we assume *arguendo* that Defendant exercised sufficient control to satisfy the economic reality test as outlined above (which Defendant disputes in the discussion set forth in this Count 4, Section A above), such control is still is not sufficient to establish individual liability for the reasons set forth in this Count 4, Sections B and C above. Further it also fails based on a straightforward interpretation pertinent FLSA provisions: regardless of the degree of control exercised by an individual, to qualify as an "employer" that is individually liable for overtime payments, it is necessary for the Court to determine that the individual meets the employer definition under the FLSA. It is Defendants' position that to satisfy this statutory definition, the same analysis engaged in Count 3 of this Memorandum is required, and Defendant Dorvilier does not meet this definition for the same reasons set forth in that section:

1. FLSA definition of "employer" and his liability for overtime wage payments hinges on the actions of its employees and their involvement in regular and routine interstate commerce activities. Because such activity has

not been properly pled or established in the record, no Individual FLSA Coverage has been established by Plaintiffs and Defendant Dorvilier cannot be held to be individually liable as an employer for overtime wages on that basis.

2. similarly, there has been nothing properly pled or introduced into the record to establish that HNR nurses were routinely and regularly "employed in anenterprise engaged in commerce." Failing to do so, no Enterprise FLSA Liability has been established and Defendatn Dorvilier cannot be held to be individually liable as an employer for overtime wages on that basis.

In the interests of avoiding repetition, the Court is referred to the discussion set forth in Count 3 and the Court is asked to take notice that the same arguments presented there to demonstrate that Plaintiffs failed to establish a sufficient nexus to interstate commerce, apply here as well. The same legal arguments and case law that prevents a finding that Defendant Dorvilier was an "employer" for interstate commerce jurisdictional purposes, also prevent a finding that Defendants was an "employer" for purposes of establishing his individual liability. It is the same statutory definition that governs both the question of interstate commerce and individual liability and Dfendants submit that the Court cannot have it both ways. Again, we concur that the *McFarlane* court got it right when it determined that "the district court's decision in Gayle…does not address the commerce requirement" (*supra*, page 13) and this defect provides legal justification for vacating Defendant Dorvilier's indvidual liability in the *Gayle Case*.

As a final point to support Defendant's position that Defendant Dorvilier cannot be held individually liable in all the cases that are the subject of this Motion, such liability under Section 207(a) is precluded by the employee exemption discussed in Count 6 of this Memorandum below. Because HNR nursing staff involved in all of the cases identified in this Motion are exempted from the employee definition, Defendant Dorvilier (as well as Defendant HNR) is also excluded from individual liability for overtime wage payments under FLSA, Section 207(a). It necessarily follows that the Court Decisions in all the cases that are identified in this instant Motion must be vacated.

E. *Conclusion*

Based on the legal grounds summarized below, it is Defendants' position that the imposition of individual liability on Defendant Dorvilier was unlawful, improper and warrants the vacatur of judgment in the *Gayle, Isigi and McFarlane* Cases to the extent that said cases determined Defendant Dorvilier to be individually liable for alleged FLSA violations, for the reasons summarized below:

1. The Economic Realities test required by the Second Circuit was not applied by the Court;
2. No evidence is contained in the record to demonstrate that Plaintiffs satisfied the Economic Realities test;
3. All the Cases that are the subject of the instant Motion failed to recognize that individual employer liability under FLSA, Section 207(a) is to be treated in the same manner as individual employer liability under the NLRA and SSA, and as such required specific findings of abuse of the corporate form, corporate officer status, significant ownership and operations control;
4. The decisions in all the cases that are the subject of this Motion failed

to conduct a conflict pre-emption analysis that required New York State law to be applied in a "harmonious manner" with federal FLSA requirements; and failed to issue specific findings under New York State Law which determined that Defendant Dorvilier engaged in the "complete domination" of HNR and HNR "abused the corporate form;"

5. Plaintiffs failed to establish in their pleadings or provide evidence introduced into the record that: HNR employees were engaged in interstate commerce activity or that HNR Nurses were employed by an enterprise engaged in interstate commerce and this defect prevents the Court from imposing individual liability on Defendant Dorvilier; and
6. The HNR properly proved that it was entitled to an affirmative defense against individual liability based on the employee exemption discussed in Count 6 herein.

COUNT FIVE: **CRIMINAL LIABILITY OF DEFENDANT HARRY DORVILIER VIOLATES THE NEW YORK STATE LABOR LAW, FEDERAL LAW AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION**

A. BACKGROUND

1. *Employer Obligation Number 1: Duty to Provide Workers' Compensation Insurance*

As stated in Section I(A)2 of this Memorandum, one of the primary duties of an employer is to provide Workers Compensation Insurance. Section 3 of the state Workers' Compensation Law (hereinafter referred to as the "WCL") requires an employer to provide workers' compensation benefits to its employees. This is done by securing a Workers' Compensation Insurance Policy that meets statutory and regulatory requirements. In New York State, WCL, Section 54 allows an employer to obtain this insurance coverage from the New York State sponsored State Insurance Fund (hereinafter referred to as "SIF") or from private insurance carriers authorized by the state to provide this coverage.

On or about February 7, 2006 HNR purchased workers' compensation insurance from the New York State Insurance Fund (hereinafter referred to as "SIF"). During the first year that the SIF policy was in effect, SIF dramatically increased the cost of their worker's compensation insurance coverage, resulting in increases of up to 70%. Defendants successfully challenged what it considered exorbitant premiums charged by SIF and cancelled its SIF policy effective June 19, 2007.Defendants' then replaced the SIF policy with an insurance policy issued by AIG to achieve savings of roughly 50%, amounting to over $150,000 in reduced premium costs. After extended litigation, the New York State Supreme Court confirmed Defendants' right to do so in clear and unequivocal terms and its ruling was in part based on a finding that the services provided by Defendants were provided by "numerous independent contractors:"

> Plaintiff State Insurance Fund issued and maintained a worker's compensation insurance policy covering defendants' employees commencing February 7, 2006…When Plaintiff conducted a mid-term audit to ascertain the adequacy of the estimated premium, it discovered that despite representations to the contrary, Defendant **in fact employed numerous "independent contractors"** who were paid an aggregate of $2,257,483 from February 7 to June 30, 2006. After a complex process of audits, recalculations and document amendments, Plaintiff determined that the final balance due under the policy was $122,729.01…Defendant contends that plaintiff charged such exorbitant rates for its policy despite negotiated rate reductions, that defendant was forced to cancel Plaintiff's policy and replace it with a policy issued by AIG (for nearly half the price)…Despite the AIG policy, Plaintiff would not let Defendant cancel its duplicative coverage until nearly a month after the date requested, and then imposed an early cancellation penalty….**Another justice of this court has decried such practice by plaintiff** and found it precludes summary judgment in plaintiff's favor…This court sees no reason to disagree…Accordingly, **Plaintiff's motion for summary judgment is denied in its entirety** (emphasis supplied) Commissioners of the State Insurance Fund v. Harry's Nurses Registry, Inc. Index No. 406555/07 (N.Y. Supp. Ct. Aug. 8, 2011); hereinafter referred to as the "*Tingling Decision*"; emphasis supplied.

It is also important to note that during the period 2005-2007, HNR continued to pay the full amount of workers' compensation premiums owed and kept its workers' compensation insurance coverages current (see *Gayle* Docket, Document 274, page 2 indicating Defendant HNR continued to pay over 1 million dollars for workers' compensation insurance for its nurses during the period in question; the exact amount was $1,047,499.61 over the period February 7, 2006 through June 19, 2007). Though not strictly required for the HNR nurses because of the *ALJ Bell Decision* in effect at that time, HNR applied the full amount of the deductions withheld from HNR nurses' paychecks to supplement premiums paid for their benefit by HNR. By doing so, HNR kept this insurance coverage in full force and effect. This is significant because during this entire period, all HNR employees and HNR "independent contractors" remained fully covered by the workers' compensation policy purchased by HNR. Indeed, an audit conducted by the U.S. Internal Revenue Service in 2008 for the 2007 calendar year confirmed that no additional amounts were owed by HNR for unpaid workers' compensation premiums and further that HNR was entitled to an adjustment of $491 in its favor, due to its overpayment of workers' compensation premium payments. The results of this IRS audit are included in the *Gayle* record as part of Defendants' p*ros se* filings (see *Gayle* Docket, Document 83).

2. *Employer Obligation Number 2: Duty To Pay Workers' Compensation Insurance Contribution*

As noted in Section I (A) 2 of this Memorandum of Law, an employer is also required to provide "employer contributions" to pay for the required workers'

compensation insurance (see item 1 above) for its employees. Civil liability can result under LL, Section 560 and Criminal liability (misdemeanor) can result if an employer deducts any portion of the employer's contribution from paychecks of its employees under WCL, Section 31.

The foregoing provisions only require employer contributions and prohibit/ criminalize the deduction of contributions **from employees**; no such contributions are required, nor are contribution deductions prohibited, from **independent contractors** (emphasis supplied). There is no dispute regarding the law on this point: if the nursing staff workers are classified as independent contractors, as opposed to employees, no workman's compensation contributions are due from the employer The foregoing conclusion regarding independent contractors is based on a plain reading of the foregoing provisions and has been confirmed by the Office of General Counsel of the New York State Insurance Department (Informal Opinion Re: Independent Contractors and Workers' Compensation Coverage, March 11, 2005), which also states that **employee/independent contractor classification decisions for purposes of employer contribution responsibilities are to be determined by the Workers' Compensation Board** (hereinafter referred to as the "WC Board"; emphasis supplied).

For purposes of the instant motion, it is important to note that Defendants challenged two specific employer contribution assessments made by NYS DOL in two separate administrative cases brought before the WC Board, in 1999 and in 2014: in both cases **two different administrative law judges ruled on behalf of**

the WC Board that Defendant did not owe the assessments for employer contributions that were sought by NYS DOL (emphasis supplied). See Decision of Administrative Law Judge Jean Bell, on behalf of the Unemployment Insurance Appeal Board, ALJ Case No. 099-03419, June 9, 1999, rejecting NYS DOL employer contributions assessments against Defendants for the period January 1993 through December 1995 (hereinafter referred to as the "*ALJ Bell Decision"*); and the Decision of Administrative Law Judge Manuel Marks , on behalf of the Unemployment Insurance Appeal Board, ALJ Case no. 013-35860, November 6, 2014, rejecting NYS DOL employer contribution assessments against Defendants for the period January 2008 to December 2010 in the amount of $273,230.12 (hereinafter referred to as the "*ALJ Marks Decision"*). The *ALJ Bell Decision* made it clear that she had classified HNR's Nursing staff as independent contractors:

> …The credible evidence establishes that the **employer did not exercise sufficient supervision, direction, or control, over the services performed by the nurses to establish their status as employees**…the nurses were free to work at their own job or for competing employers and agencies…**the determination of the Commissioner of Labor is overruled.** ALJ Case No. 013-07916 (emphasis supplied).

Despite the *ALJ Bell Decision* and the resolution of the SIF case in New York State Supreme Court in favor of HNR in the *JSC Tingling Decision*, the New York State Department of Labor (hereinafter referred to as "NYS DOL") conducted an audit focused on workmans' compensation insurance contributions for the period beginning with the first quarter of 2008 through the fourth quarter of 2010 (hereinafter referred to as the " NYS DOL WC Audit") and assessed $273,230.12 in unpaid worker's compensation contributions against HNR. Again, the legal basis for this assessment claim was that these contributions

were due because the nursing staff in question were considered HNR employees. Though it took some time to legally resolve the issue of whether NYS DOL and the NYS Workers Compensation Board (hereinafter referred to as "NYS WCB") had the right to assess said worker's compensation contributions against HNR, a decision was rendered by NYS DOL Administrative Law Judge Manuel Marks on November 6, 2014 (hereinafter referred to as the "*ALJ Marks Deci*sion"), based on his determination that under the facts presented, HNR nursing staff were not employees and no such workers' compensation contributions were due from HNR:

> …[HNR] is an employment agency providing primarily nurses and licensed practical nurses to hospitals, nursing homes and private individuals…the agency provides no supervision to those from the list placed at hospitals, nursing homes or with private individuals…those on the list provide their own transportation and supplies and are not reimbursed by the agency for any expenses. The Agency provides no training or instruction. Those registered with the agency can work with other agencies at the same time as they are working with the agency herein…Sometime at or about 1999, the Department of labor issued a determination assessing a contribution charge of $22,585.33 against the agency. The assessment was based on payments made by the agency to nurses registered with it for the period from 1993 to 1995...Hearings were held and in a decision issued on June 9, 1999 (i.e. the *ALJ Bell Decision*), the assessment was overruled. No appeal was taken from the decision issued…[D]uring the contribution period at issue the agency functioned and operated essentially as it had been operating when the decision from 1999 was issued…I fail to see how such a circumstance compels a conclusion that the individuals registered with the agency during the contribution period at issue are employees…As such, the Department finding an additional contribution due of $27,230.12 has concluded too much from too little and relied on evidence—the audit report—that is too general and too vague. Accordingly, the Department has failed to provide sufficient evidence to support the additional contribution and the determination at issue must be overruled…**The employer's objection, contending that the individuals included in the audit were independent contractors, is sustained.** ALJ Case No. 013-3586 (emphasis supplied).

It is significant to note that the *ALJ Bell Decision* was not appealed, whereas the ALJ Marks decision was appealed but was **not overturned until April 25, 2019** by decision of the Third Department of the New York State Supreme Court Appellate Division in Matter of Harry's Nurses Registry, Inc. (Commissioner of Labor), 2019 Slip Opinion 03114, N.Y. A.D. Third Department (April 25, 2019); hereinafter referred to as the "*Appellate Division Decision*"). The *Appellate Division Decision* affirmed the WC Board's 2017 reversal of long standing NYS DOL policy and the WC Board's reversal of the *ALJ Marks Decision*; and also determined that the *ALJ Bell Decision* could be distinguished on its facts. Based on the foregoing timeline, the time required to gather necessary information (i.e. the NYS DOL WC Audit focused on workers' compensation insurance contributions for years 2007-2010) and obtain a final agency determination reversing a long standing agency policy (Third Department court decision in April 2019), **in this case took 12 years** (emphasis supplied).

Beginning in 1999, in reliance on the *ALJ Bell Decision*, HNR began the practice of deducting $1 for each hour of work performed and applied those deductions toward payment of HNR's Workers' Compensation insurance (hereinafter referred to as "the Withholding Practice"). As indicated previously, it is not in dispute that an employer can refrain from making any workers' compensation contributions to independent contractors; conversely, it is also well understood, as a matter of law, that an employer is lawfully authorized to make deductions from payroll payments to cover workers' compensation insurance payments -- so long as the deductions are

made against wages earned by persons that are **NOT classified as employees** (emphasis supplied). In this case, Defendant HNR subsequently continued the Witholding Practice based on the fact that the *Gayle Cases* opinion of Judge Sifton on HNR home care/domestic worker classification was undergoing appeal (Note: that case did **not** specifically address the issue of workers' compensation contribution, but dealt with the relevant issue before the court of employee / independent contractor classification and employer liability for overtime wage payments under FLSA, Section 207(a)) and the favorable decisions rendered by the *ALJ Marks Decision* and the *JSC Tingling Decision,* which both ruled **directly** on the issues of:

1. workers' compensation contribution and
2. employee/independent contractor classification as specifically related thereto .

ALJ Marks and JSC Tingling both concluded that HNR was **NOT** required to make workers' compensation insurance contributions for its home care/domestic workers (emphasis supplied).

Significantly, in the unsigned letter from William Gurin, Inspector General of the NYS WCB that requested the Queens County District Attorney (hereinafter referred to as the "DA") to prosecute Defendant Dorvilier under the New York State Penal Law (hereinafter referred to as the "Referral Letter"; see *Gayle* Docket, Document 274-1pages 3287 and 3288) failed to mention several relevant facts as set forth below, and these omissions seriously prejudiced Defendants:

1. The Referral Letter is silent with regard to the 1999 ALJ determination

by Judge Bell referenced in paragraph E(2) above, holding that **HNR nurses had NOT been classified as employees by NYS DOL and that the NYS DOL had determined thatHNR was not legally responsible to pay $22,585.33 in workers' compensation insurance contributions** (Note: the *ALJ Bell Decision* did not address whether the $1 per hour deduction by HNR to cover a workers' compensation insurance but by implication and well established law, because the nurses were NOT classified as employees, the HNR deduction in question was lawful; emphasis supplied).

2. Similarly, no mention is made in the Referral Letter to the fact that an open case remained on the hearing docket at NYSDOL relating to the same issue that had already been decided by NYS DOL and which would again employee classification issue that resulted in the 2014 decision by NYSDOL ALJ Manuel Marks referred to in paragraph E(4) hereinabove. The ALJ Marks Decision affirmed ALJ Bell's holding that **HNR nurses were NOT HNR employees and that HNR was not legally responsible to pay $273,320.12 in workers' compensation insurance contributions** (Note: the *ALJ Marks Decision* also did not address whether the $1 per hour deduction by HNR to cover a workers' compensation insurance but by implication and well established law, because the nurses were **NOT** classified as employees for Workers' compensation insurance contribution purposes, the HNR deduction in question was lawful; emphasis supplied).

3. No mention or legal justification is provided to clarify the legal basis for

identifying “Harry Dorvielien” (sp) as a named party to the proposed criminal prosecution. Up to this point the *ALJ Bell Decision* named only HNR as the “employer;” and both NYS WCB and NYS DOL in the administrative hearings likewise claimed that HNR (and not Defendant Dorvilier) was responsible for the workers’ compensation insurance contributions that were in dispute.

Though identical issues regarding employee classification are raised in the *Gayle Case*, that case focused primarily on overtime pay obligations of HNR. Because the *Gayle Case* only addresses the worker’s compensation contribution issue in a peripheral manner, the *Gayle Cases* are not discussed in this section.

It is also significant to note that up until the time that the NYS WCB Referral Letter was sent to the DA, the NYS WCB claims raised in connection with the legal obligation of HNR to make workers’ compensation insurance contribution was (a) strictly handled as a civil matter and indeed was the subject of two (2) separate NYS DOL civil, administrative proceedings; (b) did not involve Defendant Harry Dorvilier personally; and (c) was “all about money” and did not in any way involve even a hint or suggestion that the workers’ compensation contributions in dispute carried criminal conduct ramifications.

On or about February 4, 2010, Defendant Dorvilier was arrested. The

Arrest summary report (*Gayle* Docket, Document 197-6, page 2) indicates that the date the incident/crime that provided the basis for the arrest, was November 1, 2007, which coincides closely to the date that the FLSA, Section 216(b) complaint was filed against Defendant Dorvilier. See discussion in Count 8 regarding evidence of collusion between various parties engaged in litigation against Defendants to further their respective aligned interests, which was prejudicial to Defendants.

On or about October 19, 2010, a Bill of Particulars was issued in the case of the People of the State of New York v. Harry Dorvilier and Harry's Nurses Registry, Inc., 2010WL 11264714 (N.Y. Supreme Court, Queens County) providing a summary of the specific charges to be prosecuted against the named Defendants including multiple violations of PL Sections 155 and 190.65 and NYS Workers' Compensation Law Section 31. On or about August 31, 2012, an indictment setting forth 43 counts of alleged illegal activity by Defendant Dorvilier was filed by the Queens County District Attorney's Office (hereinafter referred to as "the DA"). The ensuing trial conducted in May 2012 resulted in the conviction of Defendant Dorvilier on 13 counts (count 14 (scheme to defraud) resulted in an acquittal; counts 15-43 were dismissed by the prosecution), resulting in a sentence to Defendant Dorvilier of 13 concurrent five-year terms of probation, a fine of $2,000 on each of the 13 counts and 13 days of community service.

As of the date of the filing of this Motion, Defendant Dorvilier remains on probation and the Court retains jurisdiction over the *habeus corpus* Petition previously filed by Defendants.

B. LEGAL BASIS FOR VACATUR OF DORVILIER CRIMINAL CASE

Set forth below is a summary of the legal grounds that warrant the vacatur of the *Dorvilier Criminal Case*:

1. *Individual Employer Criminal Liability Is Not Authorized In New York State*

Defendant Dorvilier cannot be held to be individually and criminally liable based solely on the definition of "employer" as set forth in section 190 (3) of the NYS LL. All the reasons set forth in Count 4 hereinabove that require vacatur of individual employer civil liability under FLSA Section 216(b), also require vacatur of individual employer criminal liability of criminal charges brought by the DA for for FLSA violations. Similary, the reasons set forth in Section 4 hereinabove that require vacatur of individual civil liability based on finding that a conflict pre-emption analysis was not conducted and applied, also require vacatur of all criminal charges brought against Defendant Dorvilier by the DA under the NYS Penal Law because the DA did not provide evidence and the jury did not find that Defendant Dorvilier exercised complete dominion over payroll activities and Defendants abused the corporate form, as required by New York State law.

2. *The NYS LL And WCL Are Not Strict Liability Statutes*

Under the well established principles articulated in United States v. Dotterweich 323 U.S. 277, 64 S. Ct. 134 (U.S. Sup. Crt. 1943) the responsible corporate officer doctrine only allows criminal liability to be assessed against a corporate representative if harm results from a corporate breach of a strict liability statute. Such liability is authorized if harm results from the improper distribution of adulterated pharmaceutical and misbranded drugs under the Federal Food, Drug, and Cosmetic Act or from violations of environmental laws such as those requiring proper maintenance of hazardous waste storage or disposal facilities or tanks containing hazardous substances. See also People v. Roscoe 169 Cal. App. 4th 829 (Cal Ct App, Third District 2008) 87 Cal. Rptr. 3d 187; and Staples v. United States 511 U.S. 600 114 S.Ct. 1793 9 (U.S. Sup Crt, 1994). The New York State Supreme Court was in error by holding Defendant Dorvilier, in his individual capacity, criminally liable for HNR's non-payment of workers' compensation insurance contributions.

3. *The DA Abused Discretion by Bring Suit Against Defendant Dorvilier Under the NYS Penal Law*

The issuance of a 43 count criminal indictment in New York State Supreme Court Case No. 1709/2010, for the purpose of securing civil payment of employer contributions of workers compensation contributions was an abuse of discretion by the District Attorney's Office. Said action was based on incomplete information provided in the NYS WCB Referral Letter; improperly motivated by a misguided NYS WCB referral;

personally directed against Defendant Dorvilier in his individual capacity, as a means of leveraging criminal sanctions to secure payments that were not awarded in civil administrative proceedings convened by the NYS DOL; and was politically motivated as suggested by the press release issued by the District Attorney of Queens County immediately after the criminal conviction of Defendant Dorvilier on May 11, 2012 which touted his criminal conviction associated with his "theft" of $25,000 from HNR nurses (see *Gayle* Docket, Document 197-6, page 1).

4. *The District Attorney Unlawfully Overcharged Defendant Dorvilier*

The only relevant section of the NYS WCL that should have been applied here was the specific provision contained in Section 31 of the NYS WCL which states that "any employer who makes a deduction …from the wages or salary of any employee … **shall be guilty of a misdemeanor**" (emphasis supplied). In this case, the filing of a 43 count indictment (of which 29 counts were voluntarily dismissed by the prosecution and one that resulted in an acquittal) consisting of 14 **felony** counts, was a serious overcharge of the section 31 misdemeanor count that in fact was relevant to the facts at issue. Further, the fact that all 21 of the section 31 NYS WCL misdemeanor charges were included in the charges that were voluntarily dismissed, only reinforces the conclusion that the District Attorney's indictment in this case consisted of a significant overcharge

relative to the conduct at issue. See U.S. v. Johnson, 171 F.3rd 139 (2nd Cir. 1999) referencing the practice of prosecutorial overcharge but declining to censure such actions based on policy considerations.

5. *NYS Penal Law Criminal Liability Is Pre-empted by FLSA and NYS LL*

FLSA Section 216(a) sets forth the criminal liability penalties for FLSA Violations. Before FLSA criminal liability can be assessed, a finding of **"willful" intent** must be found (emphasis supplied). Further, upon conviction, the fine is limited to $10,000; and imprisonment is limited to no more than 6 months and is only allowed in cases where the guilty party is determined to be a repeat offender. Similarly, under the NYS LL criminal penalties for violations of the state analogue of the FLSA may only be imposed on "employers" who have violated a legal responsibility to make workers' compensation contributions and are limited to misdemeanor sanctions only:

> …any employer who makes a deduction for [the purpose of paying for workers' compensation insurance] from the wages or salary of any employee entitled to the benefits of this chapter **shall be guilty of a misdemeanor**. Section 31 of the *New York State Workers' Compensation Law* (hereinafter referred to as NYS WCL; emphasis supplied).

Under the New York State Criminal Procedures Law (hereinafter referred to as the "NYS CPL"), two types of misdemeanors are allowed: Class A misdemeanors which allow up to 1 year of imprisonment and Class B misdemeanors which allow up to 3 months of imprisonment (see section

70.15 CPL). It is well established that state labor laws may be more stringent than the FLSA but they must be reasonable. Indeed the 1 year imprisonment allowed in New York for such a violation would most likelybe considered reasonable. However, in this case, Defendant Dorvilier faced individual, felony liability allowing fines in excess of $10,000 and imprisonment greater than one year.

It is Defendants' position that the Conflict Pre-emption Analysis referenced in Count 4 of this Memorandum is warranted and its application requires vacatur of the felony convictions of Defendant Dorvilier. As noted in that discussion, Worth v. Universal Pictures, Inc., *supra,* conflict pre-emption occurs when a state law conflicts with fderal statues or the Constitution and the analysis articulated in Millsaps v. Thompson, *supra,* is then required to interpret the conflicting federal and state provisions "harmoniously." Applying the foregoing analysis to the conflict between the federal FLSA provisions that limit criminal protections to misdemeanors only and state criminal provisions which provide a choice between the general felony grand larceny provisions pursued by the District Attorney and the more specific state misdemeanor provision which is clearly intended to govern the crime alleged against Defendant Dorvilier (i.e. withholding of workers' compensation payments under Section 31 of the NYS WCL), the more general state law in conflict must be rejected and determined to be pre-empted in favor of the more specific state law provision, to achieve harmony between federal and state

laws.

Based on the foregoing, Defendants respectfully request a ruling as follows:

a. That the Court's decision in the *Dorvilier Criminal Case* to impose **individual, felony liability** against Defendant is to be vacated based on the Court's application of Conflict Pre-emption Analysis and its determination that the more general felony charges brought by the DA's Office against Defendant Dorvilier, are pre-empted in favor of the more specific and relevant misdemeanor provisions set forth in Section 31 of the NYS WCL.

b. That all misdemeanor criminal convictions against Defendant Dorvilier be vacated based on a *per se* determination of the Court that Defendant Dorvilier's reliance on the *ALJ Bell Decision* was done in good faith and the Withholding Practice engaged in by Defendant Dorvilier , to cover a portion of the workers' compensation insurance that HNR maintained for the HNR nurses' benefit, was **not willful as a matter of law.**

c. That any criminal imprisonment sentences assessed against Defendant Dorvilier under Section 31 NYS WCL be reversed based on the fact that Defendant Dorvilier is not a repeat offender and as such, prison sentences are barred by FLSA Section 216(a).

d. That any criminal penalties assessed under FLSA Section 216(a) or Section 31 NYS WCL be limited to $10,000.

e. That the Witholding Practice was lawful when engaged in by Defendant Dorvilier during the 2006-2007 period, was specifically authorized by NYS WCB and remained lawful under WCB regulations until an WCB amended regulation took effect in April 2019.

Other equitable factors that Defendants warrant judicial notice with regard to the foregoing request to vacate the individual criminal conviction of Defendant Dorvilier are set forth below:

a. During the period 1999 to 2019 three separate adjudicated decisions authorized Defendants to continue the Witholding Practice (i.e. the 1999 ALJ Bell Decision; the 2011 *JSC Tingling Decision* ; and the 2014 *ALJ Marks Decision* in 2014).

b. NYS WCB had specialized expertise and administrative jurisdiction to address all questions relating to continued validity of the Practice and continued approval of the Withholding Practice during the period 1999-201; and

c. During the period of 2006 to 2007, which is the same period that the State of New York alleges that the Witholding Practice constituted criminal conduct (this period is confirmed as the relevant period in the October 2010 Bill of Particulars in the *Dorvilier Criminal Case*), all of the total deductions

withheld from HNR nurse paychecks were applied toward the cost of HNR's Workers' Compensation Insurance premiums; and were supplemented by HNR's voluntary payments on their behalf. Further, as indicated previously, during that same period, HNR maintained Workers' Compensation Insurance policies and said policy coverage remained in full force and effect. It should be noted that HNR maintained this workers' compensation insurance coverage for the benefit of the nurses even though he believed them to be independent contractors for whom such coverage was not required by law.

d. The Sifton Decision in the *Gayle Case* which was not issued until **2009,** held that HNR nurses were "employees" for purposes of FLSA, Section 207(a) overtime wage purposes, and therefore had no bearing on Defendant Dorvilier's state of mind in the **2006-2007** period in question, as to whether the Witholding Practice constituted a willful violation of FLSA. Section 216(a) (emphasis supplied).

6. *NYS WCB ALJ Decisions and NYS Supreme Court Decision Insulate Defendant Dorvilier From Criminal Liability*

At the time the indictment was filed by the District Attorney in August 2010, the only relevant and binding determination governing the issue of whether workers' compensation contributions were owed by HNR during the period 2006 to 2007, was the *ALJ Bell Decision* that NYS WCB and NYS DOL declined to appeal. Under these circumstances it was entirely

reasonable and lawful for Defendant Dorvilier and HNR to rely on that decision with regard to establishing its workers' compensation contribution procedures. The fact that the 2014 *ALJ Marks Decision* later affirmed the 1999 *ALJ Bell Decision* in this regard and the 2011 *JSC Tingling Decision* later determined (for the third time) that the HNR nurses qualified as independent contractors -- reinforces the foregoing conclusion that the actions taken by Defendant Dorvilier and HNR were reasonable, lawful and made in good faith as a matter of law. To rule otherwise would chill compliance with the due process of law and would result in a grave injustice to Defendants in this case. [**Note**: it was not until the New York State Appellate Division 3rd Department issued its decision in Matter of Harry's Nurses Registry, Inc. (Commissioner of Labor) 2019/522982 that the administrative appeal of the *ALJ Bell* and *ALJ Marks Decisions* was completed and an administrative decisions by the NYS Unemployment Insurance Board (hereinafter the "NYS WCB") seeking to overturn those Decisions was affirmed; thus it was **not until April 2019 that NYS WCB** had the legal right to assess unemployment insurance contributions from HNR and had legal authority to classify the HNR nurses as employees as opposed to independent contractors **for unemployment insurance/workers' compensation contribution purposes**] (emphasis supplied).

7. *Collusion and Abuse of Process*

It is Defendants' position that significant collusion occurred between and among the attorney for the Plaintiff in the 216(b) Collective Action proceeding; NYS DOL; NYS WCB investigators who referred a civil non-payment of workers' compensation contributions to the Queens County District Attorney for criminal prosecution; and the Queens County District Attorney that prosecuted the criminal case against Defendant Dorvilier. It is also Defendants' position that said collusion resulted in extreme prejudice to Defendant Dorvilier and constituted an abuse of process that justifies vacatur of the *Dorvilier Criminal Case*. Supporting detail to justify this relief is provided below:

a. Upon information and belief, at some point in 2010, representatives of NYS DOL and the NYS WCB became frustrated with Defendants because the *ALJ Bell Decision* prevented them from assessing HNR for what it considered unpaid workers' compensation contributions that were due for HNR nursing staff. Apparently someone at these agencies decided on a "work around" of sorts to address these frustrations.

   Rather than commence a time-consuming rule making proceeding and seeking a reversal of the ALJ Bell decision, NYS DOL and WC Board (which in this case ultimately would take 12 years to implement) these agencies decided to take a "short cut" to force

Defendant to pay WC contributions to nursing staff and have HNR discontinue its Withholding Practice, even though the WC Board ALJ had determined this practice to be lawful. It is of note that **the WC Board** is the duly designated state agency that **has statutory authority to ensure that employers obtain a and maintain required workers'compensation insurance**, pursuant to WCL, Section 50 (emphasis supplied).

b. To accomplish this objective, on or about February 2, 2010, the Office of the Inspector General for the NYS WCB initiated the previously referenced "referral" to The Office of the District Attorney for Queens County. The NYS WCB Referral Letter requested that a **criminal prosecution be commenced** against both HNR **AND** "Harry Dovielien" (sp) under the New York State Penal Law (hereinafter referred to as the "PL"), with specific requests that the following provisions be included in the prosecution, including PL section 155.40 (Grand Larceny), PL section 190.65 (scheme to defraud) and NYS Worker's Compensation Law, Section 31 (illegal deduction misdemeanor). The contested workers' compensation contributions were specifically identified in the NYS WCB Referral Letter as those relating to the period August 2006 to November 2007. These dates are significant because they **overlap** with the time frame of the NYS DOL WC Audit period of 2007 – 2010 referenced in the *ALJ Bell Decision;* this referral period appears to have been selected

because it **also overlapped** with the period of 2004-2007 and the November 7, 2007 date (which is the date that the FLSA 216(b) complaint was filed) and the November 1, 2007 date that appears on documentation served on Defendant at the time of his arrest (*Gayle* Docket, Document Number 197-6, page 2; hereinafter referred to as the "Incident Arrest Document").

c. The Incident Arrest Document specifically indicates that the criminal activity alleged by the District Attorney occurred on November 1, 2007 and suggests that the referral by the NYS WCB and the DA's criminal prosecution were both coordinated with the Plaintiff's civil FLSA Collective Action that commenced on November 7, 2007. It is of further interest to note that the civil FLSA Collective Action Complaint [*Gayle* Docket, Document 1, paragraph 20: "At all relevant times, defendants maintained a policy of deducting $1.00 per hour, purportedly representing the cost of Workers' Compensation insurance, from the wages of the plaintiff and her similarly situated co-workers."]

e. Upon information and belief, the interaction between DOL, the DA and the attorneys for the Plaintiffs in the FLSA Collective Action was extensive and involved the exchange of tainted electronic employment records that had been stolen from Defendants (see Count 2 of this Memorandum above).

f. Further, the criminal prosecution of Defendant based on tainted documents, incomplete referral information and a failure to take

into account applicable LL, Section 31provision that **limited criminal liability** for the specific offense in question (i.e. the Witholding Practice) **to misdemeanors only** and made no mention of regulatory exemptions (emphasis supplied) — constituted an abuse of process that was designed to accomplish ulterior motives of the various agencies and counsel involved, including but not limited to the following:

1. place undue pressure on Defendants in the criminal litigation;
2. distract Defendants from their defense of the pending civil collective action;
3. discredit Defendants to maximize damage awards in the civil collective action; and
4. allow NYS WCB and NYS DOL representatives to accomplish their stated goal of forcing Defendants to cease from the Witholding Practice that had been authorized by the 1999 unappealed *ALJ Bell Decision* , of continuing to deduct $1 per hour from the wages of HNR Nurses (Note: the NYS WCB unsuccessful commitment to this goal is stated in the papers filed in connection with the *ALJ Bell* and *ALJ Marks Decisions* that ruled in favor of Defendants); NYS DOL took the lead in appealing those decisions and joined in the successful appeal and reversal of said Decisions in Matter of Harry's Nurses Registry, Inc. (Commissioner of Labor) , *supra*, issued in April 2019; and issuing guidance on prohibited employer deductions from wages under section 193 of the NYS Labor Law (issued August , 2020).
5. Allow NYS DOL representatives to accomplish their stated goal of requiring Defendants to pay overtime wages to HNR nurses (Note: the NYS DOL's commitment to this goal is clearly stated in numerous letters to Defendant HNR in connection with their audit focused on wages paid to HNR Nurses for the period 2005-2010 (hereinafter referred to as the "NYS DOL Wage Audit") and refenced by the court in the Matter of Harry's Nurses Registry, Inc. (Commissioner of Labor) decision, *supra;* and included in the *Gayle* Docket, Document 274-1, pages 46 -86.
6. Allow US DOL the luxury of deferring the commitment of time and resources to implement a cumbersome rule making promulgation that eventually was engaged in to overturn the *ALJ Bell, ALJ Marks* and *JSC Tingling Decisions* regarding

HNR's employer obligation to provide workers' compensation insurance contributions and the amendment of the DOL regulations to limit the application of the Domestic Worker Exemption in accordance with the federal rule change that went into effect in October 2015. A copy of the history of the latter DOL regulatory amendment is attached hereto as **Exhibit A**.

7. Allow the DA to issue a self-congratulatory press release that lauded District Attorney Brown as the protector and defender of HNR nurses from whom Defendant Dorviier had "stolen" more the $25,000 from his "illegal" practice of "deducting a dollar per hour" from their "payroll checks." (*Gayle* Docket, Document 197-6, page 1)

Upon information and belief, the diverse objectives/ulterior motives outlined above fostered a collaboration among these parties. Further, though these objectives were diverse they all had the same, common result of purposefully wreaking havoc on Defendants.

Numerous cases have alleged unlawful collusion in a variety of contexts: anti- trust claims impacting bids In Re Intl Nutronics 28 F. 3d 965 (9th Cir. 1993),Willie McCormick & Assocs., Inc v. Lakeshore Eng'g Servs. Case No. 12-1460 (E.D. Mich Dec. 20, 2013); agency collusion with bidders adversely impacting competitive procurements Jered Contr. Corp. v. N.Y.C. Tr. Auth 22 N.Y. 2d 187 (N.Y. 1968); alleged coordinated federal and state prosecutions United States v. Williams 104 F. 3d 213 (8th Cir. 1997). Relief awarded in Abuse of Process cases is also variable and dependent on the facts presented and proven Savino v. City of New York (overtime issue motivating factor in prosecution)331 F. 3d 63 (2d Cir. 2003), General Refractories v. Fireman's fund Ins. Co.(discovery abuse) 337 F.3d 297 (3d Cir. 2003), Curiano v. Suozzi

(defining abuse of process use of process after it is issued to achieve improper objectives) 63 N.Y. 2d 113 (NY 1984) are also fact and proof dependent. In these cases, judicial relief to address these legal claims will vary. It is Defendants position that the unlawful collusion between US DOL, NYS WCB, the DA and counsel for the Gayle Plaintiffs, and the abuse of process engaged in by representatives of those agencies and officers of the court, warrants vacatur of the decisions in the *Dorvilier Criminal Case* and a reversal of Defendant Dorvilier's criminal verdict. To make an analogy to make this position more clear, the conduct engaged in this case was improper if not illegal and similar to what our current president recently did by using the power and prestige of the president to call into question the integrity of a public officials such as Dr. Fauci (and others in the State Department) to achieve political ends.

C. Conclusion

Based on the foregoing, Defendants request that the 2012 Memorandum Decision and Order issued in the *Dorvilier Criminal Case* be vacated; and all Decisions in the *Dorvilier Criminal Case* and convictions in The People Of The State of New York v. Harry Dorvilier and Harry's Nurses Registry, Inc., (New York State Supreme Court, Queens County, case number 170/2010, 2010; hereafter referred to as the "*NYS Criminal Case*"), be reversed to the extent that they determined Defendant Dorvilier to be criminally and personally liable for HNR's non-payment of workers' compensation contributions.

6. COUNT 6: US DOL REGULATIONS EXEMPTED DEFENDANTS FROM FLSA LIABILITY

In 1975 US DOL promulgated FLSA final regulations to address the extent to which FLSA overtime payment requirements applied to third party providers of domestic services. These regulations were addressed comprehensively by two leading cases: Long Island Care at Home v. Coke 551U.S. 158 (U.S. Supreme Court 2007) and Home Care Association of America v.Weil 799 F.3d 1084 (D.C. Cir. 2015). In the Long Island Care case, the U.S.Supreme Court reversed the Second Circuit Court of Appeals and determined thatChevron deference (citing Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837) to the U.S. Department of Labor was appropriate in interpreting the 1975 US DOL domestic service exemptions set forth at 29CFR552.3 and 552.109(a) et. seq.. Among other things, the U.S. Supreme Court determined that the US DOL was well qualified to interpret its own promulgated regulations:

> …this latter regulation (which we shall call the "third party regulation") **has proved controversial in recent years. On at least three separate occasions during the past 15 years, the Department considered changing the regulation and narrowing the exemption** in order to bring within the scope of the FLSA's wage and hour coverage companionship workers paid by third parties (citing 1993, 1995 and 2001 proposed rule changes that were not adopted, leaving the 1975 domestic worker exemption in place; Long Island Care, *supra* at page 163; emphasis supplied).

Significantly, during the relevant time period that the *Gayle Case* was litigated, 29 CFR 552.3 defined domestic service employment as follows:

> …services of a household nature performed by an employee in or about a private home.. such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, **nurses,** janitors, laundresses, …on other than a casual basis (40 Fed. Reg. 7405 (1975), codified 29 CFR 552.3; Long Island Care

supra, page 163, emphasis supplied)

The "third party regulation" referenced above makes it clear that the foregoing exemption extends to third party employers or agencies "other than the family or household using their services" (which includes HNR) and the U.S. Supreme Court expressly ruled that this exemption as written in these two sections were valid and enforceable:

> …we conclude that the Department's interpretation of the two regulations falls well within the principle that an agency's interpretation of its own regulations is "controlling" unless 'plainly erroneous or inconsistent with the …regulations being interpreted…Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination (Long Island Care *supra*, at pages 167 and 169).

It should be noted that the latter case and the applicability of the domestic service exemption was raised By Defendant Dorvilier in his *pro se* June 24, 2009 letter to Judge Marilyn Go (*Gayle* Docket, Document 75, page 2 and specifically paragraph 19 of his letter that discusses the applicability of the Long Island Care case).

In 2013 (after the *Gayle* case decision on liability was decided) US DOL issued a proposed new regulation that would no longer allow third party employers to qualify for the domestic service exemption and required third party domestic service providers such as HNR to provide FLSA overtime pay to its workers. The proposed US DOL 2013 regulation was reviewed in the Home Care case. The Home Care court again referred to the long history of attempted changes to the1975 domestic services exemption rule and the social changes that warranted

this regulatory change in its decision. The Home Care court decision affirmed the validity of the revised rule in clear and precise language:

> …This case concerns the scope of the exemptions for domestic service workers providing either companionship services or live-in care for the elderly, ill or disabled…The supreme court 's decision in Long Island Care at Home, Ltd…confirms that the Act vests the Department with discretion to apply (or not to apply) the companionship-services and live-in exemption to employees of third-party agencies. In 1975 the Department of Labor adopted implementing regulations … Subsequently, in 1993, 1995 and 2001, the Department, citing dramatic changes in the provision of home care services, proposed regulatory amendments to remove third party- agency employees from the scope of the companionship-service and live-in worker exemptions… for the foregoing reasons, we reverse the district court's judgments and remand for the entry of summary judgment in favor of the Department. Home Care Association of America v.Weil, *supra*, pages 2,4 and 12.

A. Legal Grounds For Vacatur Based on Domestic Service Exemption

Based on the foregoing, if we accept *arguendo*, that the decision rendered in the *Gayle Case* that HNR nurses were employees, the US DOL regulation in effect from the date of the complaint thru October 15, 2015, **exempted Defendants from FLSA overtime pay requirements** (emphasis supplied; **see Exhibit A** for clarification of October 15, 2015 effective date).

The cursory determination of the Second Circuit Court of Appeals in its December 14, 2014 Summary Order did not give proper consideration to a longstanding regulation that was specifically determined to be valid by the U.S. Supreme Court. It cannot be allowed to stand for the reasons set forth below:

1. The Court provided as justification for its ruling, that it is not entitled to the exemption because "it fights its name," suggesting flippantly that nurses do not qualify for the exemption. This is not correct. As noted above, the term "domestic worker" is specifically defined as including "nurses" and that definition is explicitly re-stated in the Long Island Care at Home Ltd. U.S. Supreme Court decision. See

paragraph H(2) above.

2. The Court further based its refusal to consider this affirmative defense based on its determination that said defense was "waived on appeal" because it had not been raised below, citing Saks v. Franklin Covey Co, 316 F.3d 337, 350 (2d circuit 2003). In response, Defendants note that the latter case did not involve claims of inadequate defense by a *pro-se* party and if anything, the failure to raise this defense by Defendants' retained counsel appears to support the fact that Defendants were correct in their assessment that their legal counsel indeed did not present a viable and adequate defense.

3. Defendants explicitly reserved their right to raise additional defenses on page 6 of their filed Answer and Affirmative Defenses to the complaint in this matter (*Gayle* docket, Document Number 10):
   "Affirmative Defenses
   9. Defendants reserve the right to amend their Answer to raise additional affirmative defense or pursue any available counter claims against Plaintiffs or any putative class member who joins in this action as those claims become known during the litigation."

4. Further, Defendants in paragraphs 19 and 33 of their Affidavit in Support, filed with the *pro se* office on August 18, 2009 (*Gayle Docket*, Document Number 83), specifically raised the domestic service exemption (as well as others authorized under New York State and Federal Law):

   > "33. the Plaintiff's attorney Mr. Jonathan A. Bernstein called the New York State Department of Labor to conduct an investigation on federal overtime for nurses. After the **investigation, they concluded that the registered nurses were exempted from federal overtime under professional exemption under Miscellaneous Wage Order (see Exhibit "J"). Licensed practical Nurses were considered to be domestic service employees under the FLSA, that is, when employees in or about private households are exempt from overtime regulation under 13(b)(21)." (see Exhibit "K")** (emphasis supplied).

Paragraph 19 is similarly specific and provides reference to the Long Island Care case and specific regulatory citations. It also should be noted that the applicability of the Bonafide Professional Exemption FLSA employee exemption (authorized by FLSA, Section 213 and 29

CFR Section 541.3 and 541.313(d) and affirmed as applicable in Fazekas v. Cleveland Clinic Fndn. Health Care 204 F 3d 673 (6th Cir. 2000) was raised in the June 24, 2009 *pro se* letter of Defendant Dorvilier (*Gayle* Docket, Document 75, pages 2 and 3 and paragraphs 17 and 22-33).

B. Conclusion

Based on the foregoing, Defendants request that *Gayle Case*, the I*sigi Case* and the *MacFarlane* Case be vacated to the extent that the claims asserted in those cases related to periods prior to October 15, 2015 and warrant reversal based on the domestic worker affirmative defense exemption; that the *Dorvilier Criminal Case* be vacated; and the *Dorvilier Criminal Case* conviction be reversed on the grounds that said exemption was applicable during the entire relevant 2006-2007 time period that the criminal conduct alleged therein occurred and constituted a valid affirmative defense to the crimes for which Defendant Dorvilier was convicted. Further it was fundamental error for the *Dorvilier Criminal Case* jury not to be advised that this defense was available as was the Jury's failure to consider said defense before rendering its verdict, particularly in the instant situation where the Supreme Court of the United States has already ruled conclusively on this issue.

7. COUNT 7: STATUTE OF LIMITATIONS NOT PROPERLY APPLIED AND DAMAGE AWARD STANDARD APPLIED WAS LEGALLY DEFICIENT AND PREJUDICIAL TO DEFENDANTS

A. *Legal Grounds For Vacatur Based On Statute of Limitations*

Section 255 of the FLSA establishes a two year statute of limitations for collective action damages, unless the violations are determined to be willful, in which case a three year statute of limitations applies. See Preliminary Statement of this Memorandum, page 1.

Judge Garaufis in his *Gayle Case* Memorandum & Order, 07-CV-4672 (NGG) MDG) filed September 18, 2012, relying on Plaintiff's electronic submissions, finds that said evidence "generally supports" Plaintiffs' request for damages. Based on this finding of "general support," the court held that Defendants were liable to Plaintiffs' in the amount of $309,535.88 for unpaid overtime wages damages. Based on that award of actual damages, double that amount in liquidated damages were awarded as well.

Upon information and belief, the foregoing award is not limited to applicable statute of limitation time frames. In this case based on the November 7, 2007 filing date of the complaint in the *Gayle Cases,* damages must be limited to overtime violations occurring on or after November 7, 2005 for non-willful overtime violations and November 7, 2004 for willful violations. Specific dates for willful and non-willful overtime violations can also be established for the *Isigi Case* and the *MacFarlane Case*.

Further, it is Defendants' position that the "general support" standard used by the court to quantify actual damages awarded to Plaintiffs, was not an appropriate judicial standard for that purpose. Surely, a more specific evidentiary standard is needed to quantify such damages to the *Gayle* plaintiffs. See Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 57, 113 S. Ct. 2786 (1993) where the U.S. Supreme Court rejected the Frye "general acceptance" test for the evaluation of admissibility of expert testimony, in favor or the more rigorous standard that has since been integrated into Rule 702 of the Federal Rules of Evidence to provide greater assurance that expert opinions are both reliable and relevant. See also Walach v. Shineski Case No. 11-80412-civ-Hurley, at 2, (S.D. Fla. Feb. 28, 2012) where the appellate court reversed the lower court ruling that had been issued in favor of the Plaintiff in a discrimination case, holding that the board's rejection of the "generally supportive" contrary findings of a supervisor was appropriate and did not justify a ruling that the actions of Defendant constituted workplace discrimination. Further, it should be noted that in the *Gayle Case* there was no need to approximate the damages by using such a standard: as indicated previously, the NYS DOL Wage Audit for the period 2005-2010 provided a detailed, professional audit on wages paid to HNR nurses during this entire period and therefore provided the exact information sought by Plaintiffs. In any case the NYS DOL audit could have easily been subpoenaed by Plaintiffs' counsel to provide accurate wage payments made by Defendant HNR to each employee so that "generally supportive" approximations of wage payments would have been unnecessary. Under these circumstances, the court's reliance on an inaccurate and inappropriate standard to assess actual and liquidated FLSA

damages provides a sound legal basis to vacate the *Gayle* damage awards.

As a final point in this regard, though not mandatory, it would have constituted good practice for the Court to have consulted US DOL Guidance as to how the agency vested with primary statutory responsibility over the determination of FLSA enforcement, determines if particular conduct is willful. It is Defendants position that the Court's willful determination in this case was not consistent with said US DOL Guidance as set forth in 81 Federal Register, No. 165, pages 58687 [paragraph 3(b)] and 58757- 62] based on the fact that US DOL did not in this case, issue a prior "administrative merits determination" that sought or assessed "monetary penalties for a willful violation." See discussion of Long Island Care case in count 7 hereinabove referencing the holding of the U.S. Supreme Court that the US DOL was well qualified to interpret its own agency procedures.

B. *Conclusion*

Defendants request that any and all damages awarded in the *Gayle Cases*, the *Isigi Case* and the *MacFarlane Case* be vacated to the extent that they do not conform to the foregoing statute of limitation requirements or are based on the "general support" standard used by the court in the *Gayle Case*.

8. COUNT 8: **DEFENDANTS WERE DENIED THEIR RIGHT TO JURY TRIAL TO DETERMINE AMOUNT OF FLSA LIGQUIDATED DAMAGES UNDER THE 6TH AMENDMENT OF THE U.S. CONSTITUTION AND UNLAWFULLY DENIED GOOD FAITH AFFIRMATIVE DEFENSE AS A MATTER OF LAW**

A. *Legal Grounds For Vacatur Based On Statute of Limitations*

FLSA court precedent requires that FLSA section 216(b) liability and damages be assessed by a jury at trial. See Brock v. Superior Care, Inc. 840 F.2d 1054 (U. S. Court of Appeals, Second Circuit 1988):

> The jury is required only to determine liability for and **the amount of an award of back pay** (at page 880; emphasis supplied)

In the *Gayle Cases*, the amount of FLSA damages owed by Defendants were determined by Judge Garaufis in the aforementioned Memorandum & Order filed September 18, 2012. In that Memorandum & Order, the Court determined that evidence provided by Plaintiff justified an award of $309,535.88 for unpaid overtime wages damages. Applying the traditional Summary Judgment standard of review and finding no "genuine issue as to any material fact" the Court took it upon itself to issue a summary judgment ruling based on its determination that "the record taken as a whole could not lead a rational trier of fact to find for the Defendants." See *Gayle Cases* Memorandum and Order of Judge Sifton, CV-07-4652 (CPS) (MDG) filed March 9, 2009. The more recent December 2020 award of actual and liquidated damages in the *McFarlane Case* also does not recognize Defendants right to a jury trial.

Set forth below are the legal grounds relied upon which Defendants motion to vacate the Decision to award actual and liquidated damages to Plaintiffs in the *Gayle* and *McFarlane Cases* :

1. The award of actual and liquidated damages by the court in a legal action violated the Brock v. Superior Care ruling that damages are to be determined by a jury trial.

2. FLSA Section 260 provides that Defendants are entitled to rebut a presumption that liquidated damages are appropriate, by presenting evidence that Defendants were acting "in good faith and had reasonable grounds for believing that Defendants acts or omissions did not a violate the FLSA."
3. Said Memorandum & Order was in error by concluding that "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" (at page 10). On the contrary, at the time that the Memorandum & Order was filed the record (i) contained considerable evidence that raised genuine, material questions of fact with regard to Defendants' state of mind sufficient to defeat a summary judgment motion and require the issue to be decided by jury trial ; and (ii) also contained evidence to mandate a finding that Defendants acted in good faith based and had reasonable grounds for believing that the acts or omissions in question did not violate the FLSA.

Some of the material facts not recognized or considered in the ruling on these jury trial/good faith affirmative defense issues include but are not limited to the following:

a. Facts recited in the unappealed *ALJ Bell Decision* (Filed June 9, 1999) which determined that for Workers' Compensation contribution purposes, no such contribution was required based on a finding that HNI nurses were classified by ALJ Bell as independent contractors;

b. Facts recited in the open DOL administrative proceeding that resulted in the *ALJ Marks Decision* (November 6, 2014) confirming the *ALJ Bell Decision* and independently determining that for Workers' Compensation contribution purposes, no such contribution was required based on a finding that HNR nurses were classified by ALJ Bell as independent contractors;

c. The *JSC Tingling Decision* (August 8, 2011) classified the HNI nurses as "independent contractors;"

d. The U.S. Supreme Court ruling in Long Island Care at Home v. Coke 551 U.S. 158 (2007) which announces deference to the DOL in FLSA regulatory interpretation matters;

e. The DOL regulatory exemption for domestic workers applied to HNR nurses until October 15, 2015 and it was reasonable for Defendants to rely on said exemption until that date. In this regard it is important to note that October 15, 2015 is the

effective date of regulations proposed by US DOL in 2013 governing overtime pay requirements for domestic worker (See Exhibit A attached hereto regarding October 14, 2015 effective date of revised regulation); when they became effective they reversed the long standing position of US DOL that domestic workers were exempt from FLSA overtime pay regulations. These changes are the result of long standing and controversial efforts to extend FLSA protections. US DOL acknowledges this significant change in policy and the shift in political views that was required to effect these changes:

> There has been a growing demand for long-term home care for persons of all ages, and as a result the home care industry has grown dramatically. Despite this industry's growth and the fact that many direct care workers perform increasingly skilled work previously done by trained personnel, direct care workers remain among the lowest paid in the service industry, impeding efforts to improve both jobs and care (U.S DOL "Domestic Service Final Rule, Frequently Asked Questions, https://www.dol.gov/agencies/whd/direct-are/faq#cs1). See also Home Care Association of America v. Weil 799 F.3d 1084 (U.S Court of Appeals, D.C. Circuit)

f. The *Gayle Case* Memorandum and Order of Judge Sifton, CV-07-4652 (CPS) (MDG) filed March 9, 2009 which ruled that that the HNR nurses in question were classified as employees was undergoing appeal until December 8, 2014 when the *Gayle Case* Summary Order 12-4764 of the United States Court of Appeals for the Second Circuit was filed.

4. Based on the foregoing, Defendants request that the vacatur order requested herein resolve the following issues as set forth below to provide guidance on remand:

    a. the acts or omissions engaged in by Defendants with respect to HNR health care/domestic workers in reliance on an administrative decision--is to be considered *de facto* evidence of good faith, as a matter of law -- for purposes of establishing an affirmative defense under FLSA Section 260;

    b. the effective period of said affirmative defense in this case extend from the June 9, 1999 (i.e. the date that the *ALJ Bell Decision* was filed) through December 14, 2014 (i.e. the date that the Second Circuit Court of Appeals finalized Defendants appeal by filing its decision on this issue);

    c. The acts or omissions engaged in by Defendants with respect to HNR health care/domestic workers in reliance on a US DOL regulation is to be considered *de facto* evidence of good faith, as a matter of law – for purposes of establishing an affirmative defense under FLSA Section 260;

    d. the effective period of said affirmative defense in this case extend from 1975 (i.e. the year that the FLSA Domestic Service exemption took effect) through October 15, 2015 (i.e. the date that the revised US DOL Domestic Worker Exemption rule became final (see section 6 hereinabove for additional background on the domestic worker

exemption affirmative defense); and

e. evidence of genuine questions of fact exist on the record that warrant a trial by jury to resolve the two (2) following issues:

    1. Did Defendants act in good faith and

    2. Did Defendants establish an FLSA section 260 affirmative defense to the presumption that liquidated damages are warranted.

B. *Conclusion*

In sum, Defendants request that *Gayle Case*, the I*ssigi Case* and the *MacFarlane Case* be vacated on the grounds that liquidated damages awarded in those cases were not determined by a jury at trial; and that the *Gayle Cases* be vacated on the grounds that liquidated damages awarded in that case failed to recognize that Defendants' good faith affirmative defense was valid as a matter of law.

9. COUNT 9**:** FLAWED DISCOVERY

A. *Legal Grounds For Vacatur Based On Flawed Discovery*

Judge Garaufis in his Memorandum & Order filed September 18, 2012 affirms the validity of the discovery process in the *Gayle Cases*, noting that the actual damage calculations were based on "thousands of pages of time and pay records produced by Defendants during discovery pursuant to court order." After reviewing the summaries provided by Plaintiffs and finding several errors, he concludes that "the evidence generally supports Plaintiffs' request for damages as they are set forth in the Pay Spreadsheet, but with a few exceptions" which he then outlines in detail.

It is Defendants' position that the approach to discovery as outlined above was flawed for a number of reasons:

1. Upon information and belief, Defendant in fact **did not** produce "thousands of pages of records." That information was incorrectlyintroduced into the record by the attorney for Plaintiffs in his Affirmation (*Gayle* Docket, Document Number 108). That affirmation inaccurately states that Defendant produced time and pay records of plaintiff and persons who opted into the action; that "the records form a stack nearly 13 inches thick;" and that the records provided by Defendant resulted in a "compact disk" that was provided to the Court in lieu of an ECF filing.

   After diligent search, Defendants have been unable to find this in the *Gayle Case* docket. As indicated earlier, in Count 2 hereinabove, upon information and belief, Plaintiffs relied upon information stolen from Defendants to compile the wage and payroll information submitted to the Court and knowingly and intentionally engaged in a fraud on the court.

2. Defendants' *pro se* Affidavit Support referenced above (*Gayle* Docket, Document Number 83) refers to the NYS DOL investigation that was requested by plaintiff's attorney. Defendants confirm that NYS DOL conducted regular investigations of Defendant and that a number of those investigations included the assessment of Defendants time and pay records.

3. As indicated previously the NYS DOL Wage Audit covered the period June 2005 to June 2010. This period coincided with the same period that was the subject of the *Gayle Case* collective action and such audits are conducted by DOL auditors who are able to **accurately** establish total amounts of overtime wages owed by employers (emphasis supplied). In other words, it provides a detailed accounting of wages earned by employees and has a high degree of accuracy because it is performed by trained DOL agency representatives who are expert in gathering and analyzing payroll information.

4. The direction of Judge Garaufis to conduct extensive discovery when identical information had been gathered or was in the process of being prepared as part of the NYS DOL Wage Audit referenced previously, placed an inordinate burden on Defendants that is not in conformance with judicial economy practices that are well recognized by our federal courts. The more efficient practice or using detailed audit records as the basis for awarding damages was routinely followed in the leading FLSA Collective Action Cases including Crouch v. Guardian Angel Nursing, Inc., case no. 3:07-cv-0051(U.S. District Court, Middle District TN); Lemaster v.Alternative Healthcare Solutions, Inc. case no. 3:08- cv-01101 (U.S. District Court,Middle District TN); Wilson v. Guardian Angel Nursing, Inc. case no.3:07-0069 (U.S. District Court, Middle District TN). In all those collective action cases brought under FLSA section 216(b), the Court based its damages on accurate audits conducted by the state DOL.

5. As discussed in Count 7 above, the "generally supportive" standard used by

the Court to calculate damages is not appropriate for litigation conducted in our federal courts, especially when such information is readily available. As suggested therein, apparently counsel for the Plaintiffs determined that compelling the DOL to provide such records to prove damages in the *Gayle Case* raised significant risks to Plaintiffs' successful recovery of overtime wage damages: if NYS DOL representatives were called on to provide the results of their NYS DOL Wage Audit, they would also be likely to confirm that their own regulations (and federal DOL regulations) still recognized the domestic worker exemption discussed in Count 6.

It is of interest to note that apparently the collusion and abuse of process detailed in **Count 5**, item B(7) of this Memorandum, had carefully proscribed limits: though the Gayle Plaintiffs' Counsel deemed it fit to provide selective information to help the NYS WCB investigators and the DA to help them prosecute a criminal case against Defendant Dorvilier, Plaintiffs' Counsel did not see an advantage in issuing a subpoena to NYS DOL to obtain readily available, accurate audited HNR payroll information that generated pursuant to the NYS DOL Wage Audit. Upon information and belief, this reluctance is attributable to the likely damaging testimony NYS DOL representatives would offer as expert witnesses with respect to Plaintiffs' claim for overtime wage payments based on the facts that (1) until October 15, 2015 the state and federal domestic worker regulatory exemption remained in effect [Note: this would have resulted in a conclusive affirmative defense that would have been extremely damaging to Plaintiffs' collective action case; see **Count 6** of

this Memorandum]; and (2) the *ALJ Bell, ALJ Marks* and *JSC Tingling Decisions* remained in full force and effect [Note: those decisions were the result of administrative proceedings in which NYS DOL participated directly; the rulings in those decisions determined that HNR nurses were independent contractors for purposes of workmans' compensation contributions, which would have been extremely damaging to the DA's criminal case since they held that the Witholding Practice engaged in by Defendants was lawful; and as the case title suggests, NYS DOL participated directly in the case of Matter of Harry's Nurses Registry, Inc. (Commissioner of Labor), *supra*, which verified that these rulings remained in effect until they were overturned on April 19, 2019] .

B. *Conclusion*

Based on the foregoing, Defendants request that *Gayle Case*, the I*sigi Case* and the *MacFarlane* Case be vacated to the extent that discovery procedures mandated by in those cases prevented the effective implementation of judicial efficiency practices and recognized accuracy standards -- by utilizing information available from the NYS DOL Wage Audit to accurately determine overtime wages owed to employees.

10. COUNT 10: US DOL DID NOT MAKE A DETERMINATION THAT AN FLSA VIOLATION OCCURRED AND SAID DETERMINATION IS REQUIRED BY FLSA, SECTION 216(b)

A. *Legal Grounds For Vacatur Based On Failure of USDOL To Make A Determination That An FLSA Violation Occurred*

This count is based on strict statutory construction of FLSA, Section 216(b). It is Defendants' position that this provision requires a determination by US DOL that an FLSA violation has occurred, as a necessary pre-requisite to filing a collective action in federal court. The following is provided in support thereof.

Enacted in 1938, the FLSA, § 201 et seq., was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n. 18, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

There are two main provisions in this regard: FLSA, section 206, an employer must pay its employees at least a specified minimum hourly wage for work performed, and per FLSA, section 207, an employer must pay its employees one and one-half times the regular wage for hours worked in excess of 40 hours per week.

These provisions are enforced, first and foremost, by the Department of Labor's Wage and Hour Division's enforcement section in charge of the FLSA, carried out for uniform and consistent implementation by

investigators across the United States. These investigators gather data on wages, hours, and other employment conditions and practices in order to determine an employer's compliance with the FLSA's governing provisions. Where violations are found, these investigators may recommend changes in employment practices to bring an employer into compliance. Willful violations of an employer may be prosecuted criminally with fines up to $10,000.

In this regard, the statutory construction of FLSA, section 216(a) requires US DOL to make the determination as to whether a violation of the following FLSA sections 206 or 207 has been committed:

> Any employer **who violates the provisions of section 206 or section 207** of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages…An **action to recover the liability prescribed** in the preceding sentences may be maintained against any employer (including a public agency) 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 (FLSA, sections 216 (b); emphasis supplied).

Defendants urge the court to find that the highlighted language of these provisions require an initial determination by US DOL that the employer has violated FLSA, sections 206 or 207 of the Act, **before** an employee has the legal right "to recover the liability prescribed" by the FLSA from his or her employer (emphasis supplied). It is further Defendants' position that this prior US DOL determination that an FLSA violation has occurred is a condition precedent before the employee's private right of action is triggered.

Section 216(b) is an enforcement mechanism. In other words, an employee filing a claim under this section does so to have the Court review the US DOL determination; establish the amount of actual and liquidated damages owed by the employer; and generally enforce the provisions of the FLSA to see that the parties to the proceeding are treated in a fair and appropriate manner consistent with statutory requirements. Indeed, in all the major Collective Action proceedings (i.e. Crouch v. Guardian Angel Nursing, Inc.; Lemaster v. Alternative Healthcare Solutions, Inc.; and Wilson v. Guardian Angel Nursing, Inc., *supra*), the courts assumed this well established FLSA enforcement role only **after** an initial US DOL violation determination had been made (emphasis supplied).

The foregoing construction is supported by the statutory language conditioning an employee's right of action on an employer "who violates" Sections 206 or 207, rather than language providing (for example) an employer "alleged to have" or "charged with" violating Sections 206 or 207. The following language of the Act -- "Any employer who violates … shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages" – also supports the conclusion that the U.S. DOL must first determine if an employer has committed an FLSA violation, as

a condition precedent, before the employee's private right of action to collect damages is statutorily triggered.

So construed, plaintiffs' Complaint filed in this action was f fundamentally flawed because there was not a prior finding by US DOL that Mr. Dorvilier and his company violated Section 206 or Section 207 when plaintiffs instituted their lawsuit. Plaintiffs only alleged that defendants violated Section 207's overtime pay provision. There was not a finding made by US DOL beforehand in this regard with respect to nurse Gayle or any of the other nurses ultimately named as plaintiffs in the Complaint filed.

Because that condition precedent of the employer's violation of Section 206 or Section 207 did not occur-- there was no private right of action "to recover the liability" prescribed by the FLSA; the District court lacked subject matter jurisdiction over plaintiffs' Complaint; and the resulting judgment entered in this action against defendants and all subsequent orders premised on the judgment (including more recent orders regarding collection of the judgment by plaintiffs' counsel), should be vacated by this Court. Cf. Michigan Corr. Org. v. Michigan Dep't of Corr., 774 F.3d 895, 902–03 (6th Cir. 2014):

> The FLSA does not provide a basis for this declaratory judgment action. The statute, to be sure, provides a private right of action for compensatory damages to remedy wage-and- hour violations. *See* FLSA, section 216(b). But that action exceeds the plaintiffs'

> reach. They sued Director Heyns in his official capacity, and an official-capacity lawsuit for money damages counts as a lawsuit against the State. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989). As just noted, we lack jurisdiction over money damages lawsuits against a State to enforce the FLSA. When a court lacks jurisdiction over the underlying right of action, it lacks jurisdiction over a related declaratory judgment action as well. Skelly Oil, 339 U.S. at 671–72, 70 S. Ct. 876. *** All in all, neither the FLSA nor § 1983 nor Ex parte Young provides the private right of action the officers need to obtain declaratory relief against Director Heyns. This stops their declaratory judgment action in its tracks. No private right of action means no underlying lawsuit. No underlying lawsuit means no jurisdiction. Skelly Oil, 339 U.S. at 671–72, 70 S. Ct. 876. And no jurisdiction means no declaratory relief.

It is important for this Court to clarify the scope of the private right of action that Congress provided in Section 216(b) because this affects thousands of employees and employers throughout our Country. Such private rights of action must be construed carefully. In Alexander v. Sandoval, 532 U.S. 275, 121S. Ct. 1511, 149 L. Ed. 2d 517 (2001), which involved the interpretation of Title VI of the Civil Rights Act of 1964, the Court observed that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." Alexander, 532 U.S. at 286. Unless the statute evinces an intent to create a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute," the Court stressed. Id. at 287:

> A statute explicitly creates a private right of action when the

> statute contains language that defines a cause of action. *** Statutes that expressly provide for a private right of action identify the person(s) able to bring suit, those that are potentially liable, the forum for suit, and the potential remedy available." See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 166, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008) (holding that 15 U.S.C. § 77k provides an express private right of action because it says that "any person acquiring such security ... may, either at law or in equity, in any court of competent jurisdiction, sue ... every person who signed the registration statement.

The language that Congress employs is the touchstone for assessing the existence of and, in this case, the scope of the private right of action. Here, when Congress enacted the FLSA in 1938, it gave employees the right to bring actions to recover unpaid compensation due pursuant to the Act. Hoffmann–La Roche v. Sperling, 493 U.S. 165, 173, 110 S. Ct. 482,107 L.Ed.2d 480 (1989). In 1947, however, Congress enacted FLSA amendments [also known as the Portal–to–Portal Act, Pub.L. No. 80–49,§ 5(a), 61 Stat. 84, 87 (1947], which made changes to the FLSA's procedures. One such change was to abolish representative actions by plaintiffs not themselves possessing a claim, *Id*:

> The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions" *Id*. Congress changed the language of the statute in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome. Hoffmann-La Roche Inc., 493 U.S. at 173.

Likewise, Congress inserted a requirement that similarly situated employees must affirmatively "opt in" to an ongoing FLSA suit by

filing express, written consents in order to become party plaintiffs. This change in statutory language further restricted the private right of action provided by the FLSA, *Id*.

Congress has lessened the power of individual employees to enforce the minimum wage and overtime provisions of the FLSA, also, by making employees' enforcement powers dependent upon the actions of the Secretary of Labor. Under FLSA, section 216(b), an employee's right to bring an action for unpaid minimum wage or overtime compensation "terminate[s] upon the filing of a complaint by the Secretary of Labor in an action under FLSA, section 217 ... in which ... restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation[.]" Similarly, under FLSA, section 216(c), an individual employee's enforcement right "terminate[s] upon the filing of a complaint by the Secretary in an action ... in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation [.]"

Private lawsuits by employees are secondary, Congress instructed, to government enforcement actions. Cf. E.E.O.C. v. Pan American World Airways, Inc., 897 F.2d 1499, 1505 (9th Cir.), cert. denied, 498 U.S. 815, 111 S. Ct. 55, 112 L.Ed.2d 31 (1990) ("private lawsuits are secondary in the statutory scheme"); San Antonio Metro. Transit Auth. v. McLaughlin, 876 F.2d 441, 445 (5th Cir. 1989) (FLSA "allows suits involving the Secretary to take precedence over employee actions involving the same employer."); Wirtz v. Robert E. Bob Adair, Inc., 224 F. Supp. 750, 755 (W.D. Ark. 1963) ("the filing of the

suit [by the Secretary of Labor] terminates the section 16(b) rights of employees"). Congress inserted these provisions Into the FLSA to "relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same violations of the act by an employer." 1961 U.S.C.C.A.N. at 1659. They also serve to "substantially reduce the possibility of inconsistent adjudications[.]" Donovan v. Univ. of Texas at El Paso, 643 F.2d 1201, 1207 (5th Cir. 1981); E.E.O.C., 897 F.2d at 1506.

Congress has provided for other limitations on private actions, too, which courts have recognized. Though one of the FLSA's main provisions is its recordkeeping requirements [per FLSA, sections 206, q 207, 211(c)], federal courts have held that the statute does not provide a private right of action to enforce claimed record keeping violations. See, e.g., Oral v. Aydin Corp., No. 98-CV-6394, 2001 WL 1735063, at *1 (E.D.Pa. Oct. 31, 2001) ("there is no private right of action to enforce the recordkeeping provisions of the FLSA"); Rossi v. Associated Limousine Servs., Inc., 438 F. Supp. 2d 1354, 1366 (S.D. Fla. 2006). Federal courts have held, also, that Congress did not empower an employee to maintain a private right of action under the FLSA for alleged unpaid non-overtime compensation for an employee who was paid at least the minimum wage, even if the employee was paid less than his or her hourly rate. Bros. v. Portage Nat. Bank, No. CIV A 306-94, 2007 WL 965835, at *5 (W.D. Pa. Mar. 29,2007). "The vast majority of federal courts hold that" these so-called "gap-

time" claims "do not come within the FLSA's purview." *Id.* (collecting cases).

This Motion presents a similar question of statutory construction. We submit that construing FLSA, section 216(b) to require as a condition precedent to a private action, a determination by US DOL that the employer has violated FLSA, sections 206 or 207 is consistent with the FLSA's purpose to "secur[e] to employees restitution of statutorily mandated wages" (Marshall v. Coach House Rest., Inc., 457 F. Supp. 946, 951 (S.D.N.Y. 1978)), as well as the Act's emphasis on elevating the role of DOL to be the primary regulator of labor violations and to rely on the courts to adjudicate and enforce statutory requirements with respect to private 216(b) collective action claims brought by employees.

The FLSA ensures that individual employees will be compensated within the dictates of federal law. Under the FLSA statutory scheme, agency legal actions brought by the Secretary of Labor take precedence over private collective actions brought by employees. The 1961 amendments to the FLSA (which granted more power to the Secretary of Labor) reflect that Congress changed the "governmental policy toward enforcement... from reliance primarily on private enforcement to reliance on enforcement by the Secretary." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971). Legal remedies to enforce federal statutes must stem from the legislatively enacted

statute, not from court- created doctrines. The choice to provide "private rights of action to enforce federal law," like the choice to enact "substantive federal law itself," rests in Congress's hands. Alexander, 532 U.S. at 286. Federal courts may not create what Congress did not. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., supra, 552 U.S. at 164–65.

B. *Conclusion*

The Court should vacate the Decisions that are the subject of this Motion, based on a proper construction of Section 216(b) that is consistent with the language set forth in therein. We submit, that the statutory language requires an intital determination by US DOL that an FLSA, section 206 or 207 violation has occurred before an affected employee may file an FLSA legal claim to recover damages resulting from employer "liability" under the Act . In the *Cases* that are the subject of this motion, no prior US DOL determination has been made and therefore the Decisions in those *Cases* must be vacated.

***

II. RELIEF REQUESTED BY DEFENDANTS

Plaintiff respectfully requests an Order of this Court

a) Vacating the judgment in the *Gayle Case,* the *Isigi Case.* the *MacFarlane Case*

and the *Dorvilier Criminal Case*;

b) Reversing all Decisions inconsistent with the rulings of the Court herein, including the *NYS Criminal Case* conviction of Defendant Dorvilier and any determinations holding Defendant Dorvilier individually liable for FLSA damages;

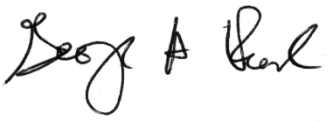
c) Returning to Defendants all damages awarded in the *Gayle Case*, the *Isigi Case*, the *MacFarlane Case* and the *Dorvilier Criminal Case* to the extent that the Decisions in those cases:

   i. Were premised on legal error, constitutional violations or lack of jurisdiction/statutory authority;
   ii. Awarded damages that were not consistent with applicable statute of limitation requirements and/or determined without affording Defendant his constitutional right to a jury trial;
   iii. Awarded liquidated damages that were precluded by the good faith affirmative defense provisions set forth in FLSA, Section 260;
   iv. Are determined to be inconsistent with the rulings of the Court made pursuant to the instant Motion;

d) Awarding attorneys' fees for the preparation, filing and hearing of this motion and the reimbursement of attorneys' fees incurred by Plaintiff in this case; and

e) Such other and further relief as this Court deems just and proper.

Dated: January 5, 2021
Buffalo, New York



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ATTACHMENT 1

Location:
LABOR - LAW AND LEGISLATION;

OLR RESEARCH REPORT

NEW FEDERAL DOMESTIC WORKER REGULATIONS

By: Lee Hansen, Associate Analyst

History of Domestic workers under the FLSA

According to USDOL (U.S. Department of Labor), when Congress enacted the Fair Labor Standards Act (FLSA) in 1938, it exempted workers employed directly by households in domestic service, such as cooks, housekeepers, maids, and gardeners. In 1974, Congress generally extended the FLSA's coverage to include domestic service workers, but also exempted casual babysitters and workers employed to provide "companionship services" from its minimum wage and overtime provisions. It also exempted live-in domestic workers from its overtime pay requirements.

For more information on federal minimum wage and overtime requirements for domestic workers, see: http://www.dol.gov/whd/homeca

ISSUE This report describes recent changes to federal regulations on domestic workers, legal challenges and subsequent federal court decisions on them, and their impact on Connecticut's minimum wage and overtime laws. The Office of Legislative Research is not authorized to issue legal opinions and this report should not be considered one.

SUMMARY

In 2013, the U.S. Department of Labor (USDOL) revised its regulations regarding minimum wage and overtime requirements for certain domestic workers to (1) eliminate provisions that exempted third-party employers (e.g., home care agencies and state Medicaid programs) from paying the minimum wage and overtime to domestic workers providing "companionship services" and (2) tighten the definition of "companionship services" under which all employers can claim an exemption to minimum wage and overtime requirements. In general, these changes extended federal minimum wage and overtime requirements to cover significant numbers of previously exempted domestic workers.

The revisions were originally scheduled to take effect at the start of 2015, but a group of trade associations representing third-party agencies delayed their implementation by challenging them in federal court. In August 2015, the U.S. Court of Appeals upheld the revised regulations in *Home Care Association of America v. Weil*, (No.15-5018) which subsequently took effect on October 15, 2015.

Because Connecticut's minimum wage and overtime law for domestic workers is tied to federal law, the court's decision will entitle more domestic workers in Connecticut to minimum wage and overtime pay. (This could change if the U.S. Supreme Court considers an appeal and subsequently overturns the decision.) To a large extent, however, this must be determined on a case-by-case basis, subject to the type of employer employing the domestic worker and the worker's duties. Third-party employers, individual consumers or their families ("consumer employers") who employ domestic workers, joint employers, and home care registries may all have roles as employers that require case-specific determinations of their status under the new regulations.

REVISED REGULATIONS

The federal Fair Labor Standards Act (FLSA) generally sets federal minimum wage and overtime pay requirements that all states must at least meet. However, the FLSA does not require (1) minimum wage and overtime pay for domestic workers who provide "companionship" or (2) overtime pay for live-in domestic workers. Domestic workers who do not qualify for the "companionship" or "live-in" exemptions must be paid minimum wage and overtime pay regardless of who their employer is (unless they are considered bona fide independent contractors or casual babysitters).

In 2013, the USDOL issued revised regulations that (1) eliminate the companionship and live-in exemptions for third-party employers and (2) tighten the definition of "companionship services" under which an employer could claim the companionship exemption (29 CFR Part 552). USDOL indicated that the revisions reflect changes in the homecare industry and workforce since the regulations were originally issued in 1975.

Under the new definition, "companionship services" means the provision of fellowship and protection to an elderly person or a person with an illness, injury, or disability who requires assistance in caring for him or herself. Companionship can include providing assistance with activities of daily living (e.g., preparing meals, driving, light housework, managing finances, assisting with medications, and intimate personal care such as dressing or bathing) as long as it does not exceed 20% of the total hours worked per week. It cannot include (1) general domestic services performed primarily for the benefit of other household members or (2) medically-related services typically performed by trained personnel (e.g., registered nurses, licensed practical nurses, or certified nursing assistants).

COURT CHALLENGES

The revised regulations were scheduled to take effect on January 1, 2015; however the Home Care Association of America challenged the regulations in court. In December 2014 and January 2015, a U.S. District Court issued two rulings in favor of the association and vacated the revised regulations. The USDOL appealed.

Court of Appeals Decision

On August 21, 2015, the U.S. Court of Appeals, District of Columbia Circuit, ruled in favor of the USDOL and reversed the district court's decision. It found that in 2007, the U.S. Supreme Court acknowledged the USDOL's discretion whether to apply the FLSA's companionship and live-in exemptions to third-party employers. Thus, the agency did not overstep its bounds (as the district court had ruled) and its interpretation of statute was not arbitrary or capricious.

Following the decision, the home care association asked the U.S. Supreme Court to stay the lower court's decision. However, on October 8th the Supreme Court denied the request and the revised regulations subsequently took effect on October 15, 2015. The association filed an appeal with the U.S. Supreme Court in November, but the Court has not yet announced whether it will hear the case.

Implementation

The USDOL indicates that until January 1, 2016, it will exercise prosecutorial discretion in determining whether to bring enforcement actions and give particular consideration to the extent to which states and other entities have made good faith efforts to comply with the revised regulations since they were finalized in October 2013.

WHAT THE DECISION MEANS FOR CONNECTICUT

Connecticut's minimum wage and overtime laws cover "employees," which include:

any individual employed or permitted to work by an employer, but shall not include any individual employed...in domestic service in or about a private home, except any individual in domestic service employment as defined in the regulations of the federal Fair Labor Standards Act (CGS § 31-58).

This definition means that domestic workers who must be paid the minimum wage and/or overtime under the FLSA must be paid the state's minimum wage and overtime. Domestic workers who are exempt from the FLSA's minimum wage and overtime requirements are also exempted from Connecticut's minimum wage and overtime requirements.

Thus, unless the U.S. Supreme Court ultimately overturns the *Home Care Association of America v. Weil* decision, domestic workers who must be paid minimum wage and/or overtime under the new regulations must also be paid under the state's minimum wage and overtime requirements. However, the status of the worker's employer and the worker's duties each play important roles in determining (1) whether the worker must be paid minimum wage and overtime and (2) who must pay. Third-party employers, consumer employers, joint employers, and home care registries may all have roles as employers that require case-specific determinations of their status under the new regulations.

Third-Party Employers

Third-party employers that directly employ domestic workers will no longer be able to claim the companionship exemption to minimum wage and overtime requirements or the live-in exemption to overtime requirements. Thus, they must pay their domestic workers the state minimum wage and time-and-a-half for weekly hours worked beyond 40.

Now that the federal regulations are effective, CGS § 31-76b allows third-party employers and their employees who provide companionship services to agree to exclude a regularly scheduled sleep period from the work hours used to determine the employee's overtime pay if (1) the employee is required to be present at a worksite for at least 24 consecutive hours, (2) adequate on-site sleeping facilities are provided to the employee, and (3) the employee receives at least five hours of sleep time. Thus, under such an agreement, the employee's sleep time would not be included when determining whether the employee qualified for overtime pay and the employee would not have to be paid overtime for their sleep time.

Existing law also allows for meal period exclusions unless an employee is required or permitted to work during the meal period (CGS § 31-76b).

Consumer Employers

Consumer employers who employ a domestic worker to provide "companionship services" remain exempt from minimum wage and overtime requirements. However, the tightened definition of "companionship services" will presumably make it more difficult for consumer employers to qualify for the exemption. Such employers will have to ensure that their domestic workers (1) spend 20% or less of their work time providing care to the consumer, (2) do not perform any services that primarily benefit other household members, and (3) do not perform any medically related services typically performed by trained personnel.

Consumer employers who employ a live-in domestic worker do not have to pay overtime rates, but must meet federal and state minimum wage requirements (unless the worker qualifies for the companionship exemption).

Consumer employers who employ a domestic worker who does not qualify for the companionship or live-in exemptions must pay the worker the state minimum wage and overtime requirements unless the worker is a bona fide independent contractor or casual babysitter.

Joint Employers

Under the new regulations, joint employers are considered third-party employers and cannot claim the companionship or live-in exemptions. However, consumer employers can still claim these exemptions even if they are joint employers with a third-party. Thus, if a consumer and a state agency are deemed joint employers of the same worker providing companionship services, the consumer would not have to pay the worker minimum wage and overtime pay, but the state agency would.

Under the FLSA, "joint employment" occurs when a single individual is considered an employee of more than one employer for the same employment. The regulations do not state a clear rule for making such a determination, but instead refer to federal case law, which makes determinations on a case-by-case basis by examining and weighing all the facts in a particular case and assessing the "economic realities" of the work relationship at issue. The factors considered include:

1. whether the third-party can direct, control, or supervise the worker or the work being performed;

2. whether the third-party can hire or fire, modify employment conditions, or determine pay rates or payment methods;

3. the degree of permanency and duration of the relationship;

4. where the work is performed and whether the tasks require special skills;

5. whether the work performed is an integral part of the third-party's overall business operation;

6. whether the third-party undertakes responsibilities that are commonly performed by employers;

7. whose equipment is used; and

8. who performs payroll and similar functions.

The following USDOL example illustrates an instance when a public entity (i.e., the state) would be considered a domestic worker's joint employer:

Example: In a consumer-directed program, a public entity collectively bargains with a union representing home care providers. The public entity exercises control by providing extensive required training, offering paid time off, furnishing equipment, creating grievance procedures, setting wage rates, and offering benefits. The public entity also retains some control over hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance. A fiscal intermediary processes payroll and tax withholding but would not be considered a joint employer.

It appears that this example presents a situation similar to that of domestic workers employed as personal care attendants in various state-funded Medicaid waiver programs. If so, the state would be deemed the workers' joint employer and thus subject to state minimum wage and overtime requirements.

Home Care Registries

The new regulations do not specifically address home care registries, which generally operate under a business model that refers domestic workers to consumers and sees the workers as either independent contractors or the consumer employer's employees. However, under existing law, a registry could be deemed a domestic worker's employer or joint employer using the same case-by-case test applied to joint employers above. A registry deemed a third-party employer or joint employer would be required to meet state minimum wage and overtime requirements. A consumer employer who employs a domestic worker referred by a registry could claim the companionship or live-in exemptions.

LH:bs

The Fair Labor Standards Act (FLSA): An Overview

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Benjamin Collins
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David H. Bradley
Specialist in Labor Economics

June 4, 2013

Congressional Research Service
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www.crs.gov
R42713

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Fair Labor Standards Act (FLSA) provides workers with minimum wage, overtime pay, and child labor protections. The FLSA covers most, but not all, private and public sector employees. In addition, certain employers and employees are exempt from coverage.

Provisions of the FLSA that are of current interest to Congress include the basic minimum wage, subminimum wage rates, exemptions from overtime and the minimum wage for persons who provide companionship services, the exemption for employees in computer-related occupations, compensatory time ("comp time") in lieu of overtime pay, and break time for nursing mothers.

Basic Minimum Wage

- The FLSA requires employers to pay covered, nonexempt employees at least the minimum wage. In 2007, the basic minimum wage was raised, in steps, from $5.15 to $7.25 an hour. The basic minimum wage was raised to $7.25 an hour effective July 24, 2009. As of January 1, 2013, 19 states and the District of Columbia have minimum wage rates that are higher than the federal minimum wage rate.
- Basic minimum wage rates in American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI) are lower than in the continental United States. In 2007, Congress passed the Fair Minimum Wage Act of 2007 (P.L. 110-28), which mandated annual increases of $0.50 an hour in the minimum wages of American Samoa and CNMI. In 2010, Congress temporarily suspended these increases. The minimum wage in CNMI increased by $0.50 an hour to $5.55 on September 30, 2012. In July 2012, Congress delayed the increases in American Samoa. The next minimum wage increases in American Samoa are scheduled for September 30, 2015.

Subminimum Wage Rates

- Tipped employees may be paid less than the basic minimum wage, but their cash wage plus tips must equal at least the basic minimum wage of $7.25. Employers may pay tipped workers $2.13 an hour in cash wages, provided the employees receive at least $5.12 an hour in tips. The latter amount is called a "tip credit."
- Employers may pay special minimum wages (SMWs) to workers with disabilities. The purpose of the SMWs is to provide persons with disabilities the opportunity to work.

Overtime

- The FLSA requires employers to pay at least time-and-a-half to covered, nonexempt employees who work more than 40 hours in a week at a given job.
- The FLSA allows covered, nonexempt state and local government employees to receive compensatory time off (comp time) for hours worked over 40 in a workweek. Comp time is time off with pay in lieu of overtime pay.

> (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

Finally, the 1992 regulations stated that "While such employees commonly have a bachelor's or higher degree, no particular academic degree is required for this exemption."[47]

When the final regulations implementing the 1990 legislation went into effect, the basic federal minimum wage was $4.25 an hour. Thus, computer employees who were paid by the hour were exempt if they met the new job duties test and were paid at least $27.63 an hour (i.e., 6½ times $4.25).

In 1996, Congress added Section 13(a)(17) to the FLSA. Section 13(a)(17) applies specifically to employees in computer-related occupations. Under Section 13(a)(17), the minimum hourly wage for computer professionals was fixed at $27.63 an hour. The exemption includes in statute much of the language from the 1992 regulations that defined the primary duties of exempt computer professionals.

In 2004, DOL issued new regulations that revised the salary and duties tests for the EAP exemption. The regulations also simplified the duties tests for computer professionals to reflect the 1996 amendments to the FLSA. Under the 2004 regulations, computer professionals are exempt from the minimum wage and overtime standards of the FLSA if they meet the job duties test provided in regulations and, if they are paid an hourly wage, are paid at least $27.63 an hour or, if they are paid a salary, are paid at least $455 a week.[48] The same duties tests apply to both salaried and hourly computer employees.[49]

Skilled computer workers are not necessarily exempt from the minimum wage or overtime requirements of the FLSA. Employees engaged in the manufacture or repair of computer hardware are not exempt. Employees whose work is highly dependent on the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming, are not exempt computer professionals.[50]

Domestic Service Employees

When the FLSA was enacted in 1938, it did not cover domestic service employees. The Fair Labor Standards Amendments of 1974 (P.L. 93-259) extended minimum wage and overtime coverage to include domestic service workers who are employed in private households.[51] Domestic service workers include housekeepers, cooks, full-time babysitters, and others.[52]

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[47] U.S. Department of Labor, Wage and Hour Division, "Fair Labor Standards Act: Computer-Related Occupations; Exemption from Minimum Wage and Overtime Compensation Requirements; Final Rule," *Federal Register*, vol. 57, October 9, 1992, p. 46744.

[48] The minimum weekly salary of $455 may be paid in periods longer than a week (e.g., $910 biweekly or $1,971.66 a month). 29 C.F.R. §541.600(b).

[49] 29 C.F.R. §541.400(b).

[50] 29 C.F.R. §541.401.

[51] The 1974 amendments added Sections 6(f) and 7(l) to the FLSA. Section 6(f) extended minimum wage coverage to domestic service employees. Section 6(f) states that

> Any employee (1) who in any workweek is employed in domestic service in a household shall be

(continued...)

In addition to extending minimum wage and overtime coverage to domestic service employees, the 1974 amendments added two exemptions that affect two types of domestic service workers: domestic service workers who provide companionship services and live-in domestic service workers. Under Section 13(a)(15) of the FLSA, domestic service workers who provide companionship services in private homes are exempt from both the minimum wage and overtime standards of the act. Section 13(b)(21) of the act exempts from overtime, but not the minimum wage, domestic service workers who provide live-in domestic services.

On December 27, 2011, DOL issued a Notice of Proposed Rulemaking (NPRM) that would change the definition of companionship services.[53] Under current regulations:

- Companionship services are defined as "those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs."
- Companionship services may include household work related to the care of the aged or infirmed individual, such as preparing meals, bed making, or washing clothes. General household work (such as housecleaning) may also be included in companionship services. However, general household work must be "incidental" to providing companionship services. Current regulations define incidental as 20% or less of the total hours worked.
- Companionship services do not include services performed by trained personnel, such as registered or practical nurses.[54]

(...continued)

> paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act (42 U.S.C. 409(a)(6)) constitute wages for the purposes of title II of such Act (42 U.S.C. 401 et seq.), [i.e., the employee's pay must be wages for purposes of Social Security] or (2) who in any workweek (A) is employed in domestic service in one or more households, and (B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section. [Note: Section 6(b) requires employers to pay employees at least the minimum wage rate required in Section 6(a) of the FLSA.]

Section 7(l) extended overtime coverage to domestic service employees. Section 7(l) states that

> No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section. [Note: Section 7(a) requires employers to pay covered employees at least one-and-a-half times their regular rate of pay for overtime.]

[52] DOL, *Coverage Under the Fair Labor Standards Act.*

[53] U.S. Department of Labor, Wage and Hour Division, "Application of the Fair Labor Standards Act to Domestic Service," *Federal Register*, vol. 76, December 27, 2011, pp. 81190-81244. (Hereafter cited as DOL, *Application of the Fair Labor Standards Act to Domestic Service.*) DOL twice extended the comment period on the proposed rule. Comments were due on or before March 21, 2012. U.S. Department of Labor, Wage and Hour Division, "Application of the Fair Labor Standards Act to Domestic Service," *Federal Register*, vol. 77, March 13, 2012, pp. 14688-14689.

[54] 29 C.F.R. §552.6. DOL, *Application of the Fair Labor Standards Act to Domestic Service,* p. 81195. A registered nurse may be exempt from the minimum wage and overtime standards of the FLSA as a professional employee under section 13(a)(1) of the act.

The NPRM would narrow the exemption for companionship services. Under the proposed rule:

- The definition of companionship services would be limited to fellowship and protection (eliminating the reference to "care"). Fellowship and protection may include activities such as conversation, reading, watching television, going for walks, or visiting with friends of the person being cared for. A companion may also help the person use a wheelchair or walker and help the person move from one area of the home to another.
- Companions could spend up to 20% of total hours worked on incidental "intimate personal care" services. These services must be performed in conjunction with providing companionship services and may include occasional feeding, dressing, bathing, or grooming. A companion may occasionally drive the person to run errands or to appointments or social events. Incidental intimate personal care services would not include household work that benefits other members of the household, such as housekeeping, making meals, or doing laundry.
- Companionship services would not include medical care provided by persons with specialized training.[55]

The proposed rule would also extend minimum wage and overtime coverage to companions employed by a third party employer, and extend overtime coverage to live-in domestic workers employed by a third party. The exemption for companions would continue to apply to companions employed directly by an individual or family (provided the companions meet the new definition of companionship services). Live-in domestic workers employed directly by individuals or families would still be exempt from overtime.[56]

DOL's target date for issuing a final rule is April 2013.[57]

Child Labor

The FLSA sets minimum age requirements for youth employed outside of school hours in agricultural and nonagricultural occupations. In nonagricultural occupations, the act sets a general minimum age for employment of 16. In agricultural occupations, the general minimum age to work is 14.[58]

The FLSA includes a number of exceptions to the general minimum age requirements of the act. Under a parental exemption, a child of any age may be employed by his or her parent (or person standing in the place of a parent) in any occupation in a business, including a farm, owned or operated by the parent. But, youth under 18 cannot be employed in mining or manufacturing, including in a business owned or operated by a parent.[59]

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[55] DOL, *Application of the Fair Labor Standards Act to Domestic Service,* pp. 81193-81195, 81244.

[56] Ibid., pp. 81195-81196.

[57] Office of Information and Regulatory Affairs, Office of Management and Budget, *Application of the Fair Labor Standards Act to Domestic Service*, RIN1235-AA05, http://www.reginfo.gov/.

[58] For more information on child labor, see CRS Report RL31501, *Child Labor in America: History, Policy, and Legislative Issues*, by Gerald Mayer.

[59] Information on the age limits for youth employment are from U. S. Department of Labor, Wage and Hour Division, (continued...)

EXHIBIT B

Screen shot of Garaufis text order issued 5/13/2021

05/13/2021	293	Letter by Harry's Nurses Registry (Rusk, George) (Entered: 05/13/2021)
05/13/2021		ORDER: Defendants' 292 motion to reopen the case is denied. This case is not administratively closed, as defense counsel appears to believe, but rather is closed because the merits have been conclusively litigated to judgment. On September 18, 2012, this court 179 granted summary judgment for plaintiffs, and the clerk 180 entered the judgment on September 19, 2012. Defendants moved to amend the summary judgment decision, and on September 30, 2013, this court 211 adopted Magistrate Judge Marilyn Go's 206 Report & Recommendation, which recommended that this court deny defendants' motion to amend the summary judgment decision; grant plaintiffs' motion for additional damages; and grant plaintiffs' motion for attorneys' fees. On October 22, 2013, the clerk 214 entered judgment on this court's September 30, 2013 order. On October 23, 2013, defendants filed a 215 notice of appeal. On January 7, 2015, the Second Circuit 217 affirmed this court's orders and judgments. The parties then continued to litigate the issue of attorneys' fees and costs, and this court 280 adopted Magistrate Judge Peggy Kuo's 279 Report & Recommendation on July 31, 2020, which recommended that this court grant plaintiffs' renewed motion for attorneys' fees. On August 3, 2020, the clerk 281 entered judgment on the attorneys' fee award. Plaintiffs then filed motions [284, 285] to enforce the judgment, which this court referred to Magistrate Judge Peggy Kuo on January 15, 2021 and which are currently pending. (See Jan. 15, 2021 Order Referring Motions.) In light of this substantive and procedural history, defendants provide no valid reason to reopen this case. Ordered by Judge Nicholas G. Garaufis on 5/13/2021. (Baron, Laura) (Entered: 05/13/2021)
06/09/2021	294	NOTICE OF APPEAL as to Order,,,,,,, by Harry's Nurses Registry. Appeal Record due by 6/12/2021. (Rusk, George) (Entered: 06/09/2021)