# 12-4764-cv

## United States Court of Appeals

*for the*

## Second Circuit

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

*Plaintiff-Appellees*

-against-

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

*Defendant-Appellants*

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

# BRIEF FOR DEFENDANT-APPELLANTS

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## PRELIMINARY STATEMENT

Defendant-Appellants Harry's Nurses Registry, Inc. ("Appellant HNR") and Harry Dorvilier a/k/a Harry Dorvilien ("Appellant Dorviler") (collectively, "Appellants") respectfully submit this Memorandum of Law in Support to Defendants' Renewed Motion to Recall the Mandate. For the reasons stated below, it is respectfully submitted that this Court should recall the Mandate issued on January 5, 2015, for its order entered on December 8, 2014 (the "Mandate"). Annexed hereto as **Exhibit A,** is a true and correct copy of this Mandate.

## NOTIFICATION AND DISCLOSURE OF APPELLANTS' POSITION

In accordance with Local Rule 27.1, Appellants notified counsel for Plaintiff-Appellees ("Appellees") of Appellants' intention to file this motion, via email message on October 4, 2023. In response, Appellees' counsel advised that Appellees intend to submit a response.

## ARGUMENT

## POINT I – LEGAL STANDARD

The Circuit Court of Appeals will grant a motion to recall a mandate when there are "exceptional circumstances" including when, *inter alia*, "the governing law is unquestionably inconsistent with the earlier decision . . . and "the equities strongly favor relief." *United States v. Tapia*, 816 F. App'x 619, 620 (2d Cir. 2020) (summary order) (internal quotations and citations omitted).

**POINT II – APPELLANTS' PRIOR MOTION TO RECALL MANDATE DOES NOT PRECLUDE THE INSTANT MOTION**

Appellants previously filed motion to recall a mandate which this Court denied does not preclude Appellants from bringing the instant renewed motion to recall mandate based on different legal theories (i.e., forfeiture of right to unpaid wages; lack of case or controversy; and violation of Due Process). *See United States v. Riggi*, 308 F. App'x 514, 516 (2d Cir. 2009) (summary order) (noting that the correct motion to be filed after denying a motion to recall a mandate is a "renewed motion to recall the mandate" and adjudicating on same); *see also United States v. Emeary*, 794 F.3d 526, 529-30 (5th Cir. 2015) (granting renewed motion to recall mandate since, *inter alia*, the court failed to properly interpret precedent at the time of denying original motion to recall mandate); *United States v. King*, No. 1:08CR00041, 2014 U.S. Dist. LEXIS 65365, at *9, *55 (W.D. Va. May 13, 2014) ("[Defendant] filed in the court of appeals a [] Motion to Recall the Mandate. . . . the court of appeals issued an order stating that '[u]pon consideration of submissions relative to the motion to recall the mandate, the court denies the motion.' . . . [Defendant] is advised, however, that he might use [a new non-party] affidavit and my findings here to support a renewed motion to recall the mandate."); *United States v. Williams*, 790 F.3d 1059, 1083-84 (10th Cir. 2015) (noting that the court previously granted a "second motion to recall the

mandate"); *Perez v. Mukasey*, 289 F. App'x 213, 214 (9th Cir. 2008) (granting "second motion to recall the mandate"); *cf. Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, No. 12-CV-8852 (JMF), 2018 U.S. Dist. LEXIS 25217, at *5-6 (S.D.N.Y. Feb. 15, 2018) (Noting parties have not been precluded from contesting subject matter jurisdiction even after "a prior [appellate] ruling [and mandate] that subject-matter jurisdiction existed where 'the substantive questions' analyzed in the first ruling were 'distinct' and 'different from' the appellant's new arguments") (internal quotations omitted).

## POINT III – THE MANDATE SHOULD BE RECALLED BECAUSE ALL DAMAGES WERE AWARDED IN VIOLATION OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

The United States Supreme Court in *Hoffman Plastics Compounds v. National Labor Relations Board*, 535 U.S. 137 (2002), held that the Immigration Reform and Control Act of 1986 ("IRCA") prohibits the award of unpaid wages to an undocumented noncitizen that obtained their employment through identity fraud. 535 U.S. at 151 ("to award backpay to [undocumented non-citizens] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."); *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 38 (2d Cir. 2011) ("After Hoffman, it is now clear that undocumented immigrants are

ineligible for backpay"); *c.f. Macedo v. J.D. Posillico, Inc.*, 68 A.D.3d 508, 511 (1st Dep't 2009) (analyzing whether the IRCA precluded undocumented non-citizen plaintiff from recovering unpaid wages based on whether the employer "was induced to hire [plaintiff] because plaintiff produced false documentation"). In fact, after this Court's decision in *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), there is an open question whether the IRCA would preclude recovery for wages for any undocumented non-citizen, even if they never engaged in any identity fraud. *Id.*, 723 F.3d at 184 ("Given petitioners' presence in the United States without documentation, their seeking damages stemming from an unlawful employment relationship, . . . awards of backpay would have the same ill-advised propensity discussed in Hoffman Plastic for condoning prior violations of the immigration laws and encouraging future violations."); *see also Bermudez v. Karoline's Int'l Rest. Bakery Corp.*, No. CV 12-6245 (LDW) (GRB), 2013 U.S. Dist. LEXIS 169066 (E.D.N.Y. Nov. 21, 2013):

> [I]n *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), the Second Circuit determined that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) — which prohibited recovery of backpay awards under the National Labor Relations Act ("NLRA") by undocumented workers who had submitted fraudulent immigration documents to obtain employment — is "equally applicable to [undocumented noncitizens] who did not gain their jobs through such fraud but who are simply present in the United States unlawfully." 723 F.3d at 183. The Second Circuit's decision raises a question as to whether undocumented workers are precluded from seeking backpay awards in actions, such as this one, brought pursuant to the Federal Labor Standards Act

> ("FLSA"), even in absence of immigration fraud on the part of the employee. . . . in the wake of the Second Circuit's ruling, inquiry into plaintiffs' immigration status is . . . information which is not only relevant, but potentially dispositive.

2013 U.S. Dist. LEXIS 169066, at *1-2.

Annexed as **Exhibit B**, is the Affidavit of private investigator Michael Morgan. Therein, Mr. Morgan attests that (i) he was retained by Appellant Dorvilier to conduct a "background / Social Verification" on Ms. Gayle, the lead Plaintiff in this action; (ii) after a search of Social Security Administration records, Investigator Morgan ascertained that Ms. Gayles Social Security Number "isn't associated with a Legal U.S. Citizen;" (iii) Furthermore, Mr. Morgan,"(t)hrough Lexis Nexis confirmed , according to Public Records ,[] the Social is associated with this name [of Claudia Gayle], but there [is] no U.S. Citizenship status associated with it or legal work status;" (iv) also, "(u)pon A Search with the New York State Office of Professions of License Number [] for [Claudia Gayle's] license for Practical Nursing[,] The License Belongs to the name of Claudia Cecil Williams and is NOT ACTIVE/ NOT REGISTERED currently in NYS;" and finally, (v) "(o)ther records show Secondary Names and No Marriage Record or Legal Name Change Records were found according to a preliminary search to substantiate the various names

associated with this search."[1] Accordingly, it is submitted that the award of unpaid wages under the FLSA based on the employment of Gayle allegedly violated the IRCA because the facts sworn to in the above private investigator affidavit constitute the circumstances upon which wages would be prohibited under the IRCA; and, it is further submitted, that the aforementioned alleged violation of the IRCA constitutes "exceptional circumstances" warranting that this Court recall its Mandate and reverse said award. *Tapia*, 816 F. App'x at 620 (summary order).

## POINT IV – THE MANDATE SHOULD BE RECALLED BECAUSE THE FEDERAL COURTS THAT ADJUDICATED ON THIS MATTER LACKED A CASE OR CONTROVERSY

Article III, § 2, of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," which restricts the authority of federal courts to resolving "the legal rights of litigants in actual controversies," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). In order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or "'personal stake,'" in the outcome of the

[1] Mr. Morgan's Affidavit includes the following disclaimer: "This Statement is based on several public sources and the accuracy or truthfulness of the information is the subject of the information provided, but that it is accurately copied from Public records. Information generated as a result of identity theft, including evidence of criminal activity may be inaccurately associated with this report summary and is of no liability to the searcher who followed due diligence."

action. *See Camreta v. Greene*, 563 U.S. 692, 701 (2011) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)). This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved. *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013)

A corollary to this case-or-controversy requirement is that "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401(1975)). If an intervening circumstance deprives the plaintiff of a "personal stake in the outcome of the lawsuit," at any point during litigation, the action can no longer proceed and must be dismissed as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (internal quotation marks omitted).

Here, as specified below, there is ample evidence that the lead Plaintiff in this FLSA collective action never filed the statutory application for appearance in the action. In an FLSA 216(b) collective action like this one, "*No* employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (emphasis added). Here, the lead Plaintiff, Gayle, never filed a consent in this case. The district court docket indicates incorrectly that Gayle filed a

consent labeled "CONSENT to become party in a class action by Claudia Gayle" in Docket Entry Document # 15. Annexed as **Exhibit C**, is an accurate screenshot of this docket entry. Annexed as **Exhibit D**, is a true and correct copy of the Docket Entry Document # 15. This document was labeled inaccurately: it is a consent filed by Patricia Robinson—not Claudia Gayle—and it was filed on March 19, 2008 in any case. No consent by Gayle exists: she filed nothing in the docket on November 7, 2007 and nothing thereafter.

When this failure to consent is considered together with the Affidavit of the private investigator, Mr. Morgan, discussed above, it becomes clear that the mandate must be vacated and the lower court action dismissed for lack of case or controversy, and, therefore, a lack of subject matter jurisdiction under 42 U.S.C. § 1331. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) (dismissing FLSA collective action for lack of subject matter jurisdiction because the named plaintiff's case was moot rendering the entire collective action without a case or controversy); *Aleman v. Innovative Elec. Servs. L.L.C.*, No. 14-cv-868 (KBF), 2014 U.S. Dist. LEXIS 139008, at *7 (S.D.N.Y. Sep. 15, 2014) (same); *Franco v. Allied Interstate LLC*, No. 13 Civ. 4053, 2014 WL 1329168, at *3 (S.D.N.Y. Apr. 2, 2014) (same) (reversed on other grounds); *Ndrecaj v. 4 A Kids LLC*, No. 17-cv-00639 (AJN), 2017 U.S. Dist. LEXIS 101537, at *4 (S.D.N.Y. June 27, 2017) (dismissing FLSA collective action for lack of subject matter jurisdiction when the

named plaintiff withdrew their claims at an early stage, holding that "because there is no named plaintiff in this case, the action lacks a live case or controversy" (internal quotations omitted); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("if the claims of the named plaintiff's become moot prior to class certification, the entire action becomes moot.") (citing *Board of Sch. Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128, 129-30 (1975) (per curiam); *Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 384 (2d Cir. 2021) ("[a]bsent a plaintiff with legal existence, there can be no Article III case or controversy"); *Billino v. Citibank, N.A.*, 123 F.3d 723, 725 (2d Cir. 1997) (explaining that it was a jurisdictional error for the appeal to be brought only in the name of a nonliving party as a "non-living plaintiff simply [] has [no] cognizable interest in the outcome of litigation"); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 389 F.3d 61, 65 (2d Cir. 2004) (granting motion to recall mandate for lack of subject matter jurisdiction); *see also Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 894 (2d Cir. 1983) (dismissing ERISA claims for lack of subject matter jurisdiction because the plaintiff was not an authorized party to bring claims under the federal statute).

## POINT V – THE MANDATE SHOULD BE RECALLED BECAUSE APPELLANT DORVILIER'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED

It is well-settled that the Due Process clause of the Fourteenth Amendment of the United States Constitution protects an individual's right of access to the civil courts. *Woodard v. Mennella* 861 F.Supp. 192, 198 (E.D.N.Y. 1994) (citing *Chambers v. Baltimore Ohio R.R.*, 207 U.S. 142 (1907) and *Boddie v. Connecticut*, 401 U.S. 371 (1971)). Here, it is apparent that Appellant Dorviler's right of access to the civil courts was denied.

Appellant Dorvilier timely filed a *pro se* motion to reargue on August 18, 2009. Annexed as **Exhibit E**, is a copy of this *pro se* motion to reargue and its supporting affidavit. Appellant Dorvilier never withdrew this motion. However, in the district court's decision entered on December 23, 2010, the court erroneously deemed the motion withdrawn. Annexed as **Exhibit F**, is a copy of the decision. On page 4 of this decision, the district court wrote: "On August 18, 2009, Defendants - then between their second and third set of lawyers - filed a *pro se* motion to renew and reargue Judge Sifton's prior order. (Docket Entry # 82.). On August 19, 2009, Dorvilier agreed to withdraw that motion. (Docket Entry # 81.)" This is incorrect: Appellant Dorvilier never withdrew his *pro se* motion to reargue. The document for Docket Entry # 81 that the district court cites in reference to the supposed withdrawal is a Minute Order by Magistrate Judge Marilyn Go granting Appellants' prior

counsel's motion to withdraw. Annexed as **Exhibit G**, is a copy of this Minute Order. Nowhere in the Minute Order does it mention that Appellant Dorvilier agreed to withdraw his *pro se* motion to reargue. Annexed as **Exhibit H**, is a screenshot of Docket Entry #s 79 through 85 of the district court. Nowhere does that docket indicate that the *pro se* motion to reargue was withdrawn. Although the text for Docket Entry # 81 mentions that Appellant Dorvilier had "advised that he had just filed a new motion to dismiss[, apparently in addition to his *pro se* motion to reargue, and], agreed to withdraw that motion [to dismiss,]" the text provides no indication that Appellant Dorvilier ever withdrew his motion to *reargue*.

Moreover, annexed as **Exhibit I**, is an excerpt from a letter from Appellees' counsel to Appellant Dorviler, dated August 26, 2009—five days subsequent to the above August 19, 2009 date when the district court claims Appellant withdrew his *pro se* motion to reargue—wherein Appellees' counsel, *inter alia*, acknowledges Appellant Dorviler's current "intention to seek reconsideration of summary judgment": a clear reference to Appellee Dorvilier's *pro se* motion to reargue. Thus, the fact that Appellee's counsel was still addressing Appellee Dorvilier's *pro se* motion to reargue days after he supposedly withdrew it, demonstrates that Appellant Dorvilier never did withdraw it. Finally, annexed as **Exhibit J**, is the Affidavit of Appellant Dorviler confirming that he never withdrew his *pro se* motion to reargue.

Thus, the district court erroneously failed to address Appellant Dorvilier's motion to reargue by assuming it was withdrawn—without any remote basis in the record for such an assumption—and thereby denied Appellant Dorviler right of access to the civil courts. The foregoing constitutes a gross violation of Appellants' Due Process rights, and therefore, exceptional circumstances warranting recall of the Court's mandate and reversal of the lower court's decision. *See Faretta v. California*, 422 U.S. 806, 836 (1975) (holding the trial court's refusal to allow the defendant to represent himself by submitting *pro se* arguments violated his Due Process rights under the Fourteenth Amendment); *Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 47 (2d Cir. 1975) (reversing trial court decision because of the trial judge's "refusal to entertain a number of motions", holding "the trial court cannot refuse to tender [a motion] or attempt to exclude it from the record"); *People v. Renaud*, 145 A.D.2d 367, 370 (1st Dep't 1988) (vacating judgment entered because the court had not considered the represented defendant's *pro se* motion to dismiss, holding "The court, [] may not simply disregard a motion filed directly by the defendant because there is an attorney on the scene. A motion, whether made by counsel or a *pro se* defendant, mandates a ruling or else the court must clearly state its reasons for refusing to decide the motion"); *Wolff v. 969 Park Corp.*, 86 A.D.2d 519, 520 (1st Dep't 1982) (holding lower court erred when it "ignored [a party's] motion in chief and instead adjudicated the entire action."); *Cassano v.*

*Shoop*, 1 F.4th 458, 468 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2051, 2053 (2022) (vacating judgment because the court failed to adjudicate on *pro se* motions) (citing *Johnson v. Williams*, 568 U.S. 289, 298 (2013)); *People v. Session*, 206 A.D.3d 1678, 1682 (4th Dep't 2022) ("where, as here, the record does not reflect that the court ruled on a part of a motion, the failure to rule on that part cannot be deemed a denial thereof) (citing *People v Concepcion*, 17 N.Y.3d 192, 197-198 (2011)) (internal quotations omitted)

## CONCLUSION

For these reasons, Appellants respectfully request that the instant motion be granted in its entirety.

Dated: New York, New York
October 11, 2023

By: s/*Marshall B. Bellovin*

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

I certify that this memorandum of law complies with FRAP 32(a)(7)(B)(ii) and Local Rule 32.l(a)(4)(B) because it contains 2,988 words, as determined by the word count function of Microsoft Word, excluding the parts of the memorandum of law exempted by FRAP 32(a)(7)(B)(iii); and this memorandum of law complies with the typeface requirements of FRAP 32(a)(5) and the typestyle requirements of FRAP 32(a)(6) because this memorandum of law has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: New York, New York
October 11, 2023

By: s/*Marshall B. Bellovin*

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## CERTIFICATE OF SERVICE

I hereby certify that on October __, 2023, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, thereby effecting electronic service on counsel for all parties.

Dated: New York, New York
October 11, 2023

By: s/*Marshall B. Bellovin*

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12-4764-cv
*Gayle v. Harry's Nurses Registry, Inc.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of December, two thousand fourteen.

Present:

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

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CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated, and as Class Representative, ALINE ANTENOR, ANNE C. DEPASQUALE, ANNABEL LLEWELLYN-HENRY, EVA MYERS-GRANGER, LINDON MORRISON, NATALIE RODRIGUEZ, JACQUELINE WARD, DUPONT BAYAS, CAROL P. CLUNIE, RAMDEO CHANKAR SINGH, CHRISTALINE PIERRE, LEMONIA SMITH, BARBARA TULL, HENRICK LEDAIN, MERIKA PARIS, EDITH MUKANDI, MARTHA OGUNJANA, MERLYN PATTERSON, ALEXANDER GUMBS, SEROJNIE BHOG, GENEVIEVE BARBOT, CAROLE MOORE, RAQUEL FRANCIS, MARIE MICHELLE GERVIL, NADETTE MILLER, PAULETTE MILLER, BENDY PIERRE-JOSEPH, ROSE-MARIE ZEPHIRIN, SULAIMAN ALI-EL, DEBBIE ANN BROMFIELD, REBECCA PILE, MARIA GARCIA SHANDS, ANGELA COLLINS, BRENDA LEWIS, SOUCIANNE QUERETTE, SUSSAN AJIBOYE, JANE BURKE HYLTON, WILLIE EVANS, PAULINE GRAY, EVIARNA TOUSSAINT, GERALDINE JOAZARD, NISEEKAH Y. EVANS, GETTY ROCOURT,

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

**Exhibit A**

CATHERINE MODESTE, MARGUERITE L. BHOLA, YOLANDA ROBINSON, KARLIFA SMALL, JOAN-ANN R. JOHNSON, LENA THOMPSON, MARY A. DAVIS, NATHALIE FRANCOIS, ANTHONY HEADLAM, DAVID EDWARD LEVY, MAUD SAMEDI, BERNICE SANKAR, MARLENE HYMAN, LUCILLE HAMILTON, PATRICIA ROBINSON,

*Plaintiffs-Appellees*,

v. No. 12-4764-cv

HARRY'S NURSES REGISTRY, INC., HARRY DORVILIEN,

*Defendants-Appellants*.**

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

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

Appeal from the United States District Court for the Eastern District of New York (Garaufis, *J.* and Sifton, *J.*).

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

Defendants-Appellants Harry's Nurses Registry, Inc. ("Harry's") and Harry Dorvilien appeal from a September 18, 2012 judgment of the United States District Court for the Eastern District of New York (Garaufis, *J.*), which followed four orders (Garaufis, *J.* and Sifton, *J.*) that culminated in a grant of summary judgment to the plaintiff class on their unpaid overtime claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219. A fifth order (Garaufis, *J.*) adopted in full a magistrate judge's report and recommendation to correct the judgment and

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

grant attorneys' fees, yielding an amended judgment dated October 16, 2013. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

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

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

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

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

The relationship between Harry's and the nurses who are plaintiffs here is nearly indistinguishable from the relationship between Superior Care and the plaintiffs in *Brock*, whom we held to be employees under FLSA. *See id.* at 1057–58. The district court here explored the

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

Another critical factor is that the nurses have no opportunity for profit or loss whatsoever; they earn only an hourly wage for their labor and have no downside exposure. The nurses have no business cards, advertisements, or incorporated vehicle for contracting with Harry's, and they are paid promptly regardless of whether the insurance carrier pays Harry's promptly. We agree with the district court that this second factor weighs heavily in favor of the

nurses' status as employees. That the nurses are skilled workers in a transient workforce "reflects the nature of their profession and not their success in marketing their skills independently." *Id.* at 1061. Finally, the appellants cavil that the nurses are not integral to Harry's Nurses Registry, notwithstanding that "Nurses" is—literally—Harry's middle name. But placing nurses accounts for Harry's only income; the nurses are not just an integral part but the sine qua non of Harry's business. Considering all these circumstances, we agree with the district court that these nurses are, as a matter of economic reality, employees and not independent contractors of Harry's.

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

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

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

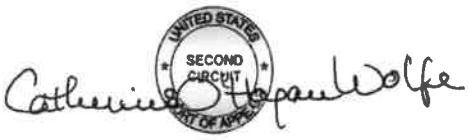
The appellants' fourth subsidiary argument is that the New York State Public Health Law should govern the outcome because Harry's is governed by Article 36 whereas Superior Care was governed by Article 28. But state law does not trump FLSA, which permits states and

localities to exceed its protections with higher minimum wages or lower maximum workweeks but not to weaken its protections in the other direction. *See* 29 U.S.C. § 218(a).

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

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

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK




A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

# MORGAN RESEARCH

**I, Michael Morgan, do hereby state and attest the following:**

1) **I was hired by Harry Dorvilier on August 11th, 2022 to do a background / Social Verification;**
2) **The subject of this verification was Claudia Gayle, Social Security Number [redacted]9064;**
3) **Through initial E-Verify via The US Social Security Administration, The Social Security Number isn't associated with a Legal U.S. Citizen ;**
4) **Through Lexis Nexis Confirmed , according to Public Records , that the Social is associated with this name, but there are no U.S. Citizenship status associated with it or legal work status;**
5) **That Upon A Search with the New York State Office of Professions of License Number [redacted] for subjects license for Practical Nursing . The License Belongs to the name of Claudia Cecil Williams and is NOT ACTIVE/ NOT REGISTERED currently in NYS;**
6) **Other records show Secondary Names and No Marriage Record or Legal Name Change Records were found according to a preliminary search to substantiate the various names associated with this search.**
7) **This Statement is based on several public sources and the accuracy or truthfulness of the information is the subject of the information provided, but that it is accurately copied from Public records> Information generated as a result of identity theft, including evidence of criminal activity may be inaccurately associated with this report summary and is of no liability to the searcher who followed due diligence.**

**This is accurate and true to the best of this researchers information.**
**Sworn to Before me this 16 Day of August 2022**

**Notary Stamp:** **Michael Morgan**

KRISTOFF L JACKSON
Notary Public - State of New York
NO. 01JA6391225
Qualified in Kings County
My Commission Expires Apr 29, 2023

Exhibit B

| | | |
|---|---|---|
| 03/24/2008 | 15 | CONSENT to become party in a class action. by Claudia Gayle (Bernstein, Jonathan) (Entered: 03/24/2008) |

Exhibit C

LEVY DAVIS & MAHER, LLP
Jonathan A. Bernstein (JB 4053)
Attorneys for Plaintiff
880 Third Avenue
New York, New York 10022
(212) 371-0033

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,

Plaintiff,

- against -

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

Defendants.

07 Civ. 4672 (CPS) (KAM)

**CONSENT TO JOIN COLLECTIVE ACTION**

To: Clerk of the Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

I was employed by Harry's Nurses Registry, Inc. and/or Harry Dorvilier on or after November 15, 2004. I understand this suit is being brought under the Federal Fair Labor Standards Act for unpaid overtime. I consent to become a party plaintiff to this lawsuit, to be represented by Levy Davis & Maher, LLP (retainer agreement on file at the above address) and to be bound by any settlement of this action or adjudication of the Court.

I declare under penalty of perjury that the foregoing is true and correct.

Patricia Robinson

Patricia Robinson

3/19/08

Date

**Exhibit D**

ORIGINAL

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

----------X

CLAUDIA GAYLE, Individually, On Behalf of All Other Similarly Situated and as Class Representative

07 CV 4672 (CPS)

Plaintiffs,

-against-

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

Defendants.

**AFFIDAVIT IN SUPPORT**



----------X

1. That I am HARRY DORVILIER, the defendant in this action, and as such, am fully familiar with the circumstances surrounding the matter.

2. I submit this Affidavit in support of defendants' motion to renew and/or reargue the court's prior decision denying defendant's motion, dismissing the plaintiff's complaint to pursuant to Rule 56 of the Federal Rules of the Civil Procedure, granting the plaintiff's cross-motion for summary judgment and class certification, (See Court Order attached hereto as Exhibit "A")

3. This action was commenced by the plaintiff under the Fair Labor Standards Act, 29 U.S.C. 201 ("FLSA") and the New York State Minimum Wage Act, New York Labor Law 190 to recover alleged overtime pay due to plaintiff and those similarly situated in her class.

4. This action was commenced by the filing of a Summons and Complaint

with the Clerk's Office of the United States District Court, Eastern District of New York on or about November 7, 2007. (See Summons and Complaint attached hereto as Exhibit "B")

5. Defendants filed its Answer on or about January 22, 2008. (See Answer attached hereto as Exhibit "C")

6. On or about July 8, 2008, defendants made its motion seeking an Order for summary judgment (See Motion, Affidavits and Memorandum of Law attached hereto as Exhibit "D")

7. On or about August 13, 2008, plaintiff made a cross-motion seeking an Order granting partial summary judgment and to authorize notice pursuant to 29 U.S.C 216(b). (See Plaintiff's motion, Affidavits and Memorandum or Law attached hereto as Exhibit "E")

8. On or about August 13, 2008, plaintiff filed its Affidavit of Opposition to defendants' motion as well. (See Plaintiff's Affidavit in Opposition and Memorandum in Opposition attached hereto as Exhibit "F")

9. On or about November 21, 2008, defendants filed its Reply papers in support of Defendants motion and in opposition to plaintiff's cross-motion. (See Defendants Reply papers attached hereto as Exhibit "G")

10. On or about November 26, 2008, plaintiff filed her Reply papers in support

of plaintiff's cross-motion. (See Plaintiff's Reply papers attached hereto as Exhibit "H")

11. On March 9, 2009, Honorable Justice Sifton handed down the decision of the aforementioned captioned case, ruling against the defendant motion seeking an Order granting Summary Judgment and in favor of the Plaintiff cross-motion seeking an Order granting summary judgment. (See Exhibit "A") The defendants are now seeking an Order to renew and/or reargue the court's decision.

12. This respectable court decision had indicated that defendant has violated the FLSA and that the plaintiff is entitled to overtime pay for their work.

13. Federal Rules 60. Relief from a Judgment or Order- provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); or

(6) any other reason that justifies relief.

14. It is well settled that a motion to **reargue** may not advance new facts, issues

or arguments not previously presented to the court. Rule 3(j) is not meant to serve as a chance for the losing party on a motion to try out an omitted argument, or to re-state its position. The rule serves only to allow a party to bring to the court's attention the "matters or controlling decision" which the court overlooked in ruling on the motion.

15. This court respectfully failed to properly apply New York State Public Health Law §3602, instead of applying Article 28 of the aforementioned law when determining whether the plaintiff and other similarly situated were employees of the defendant.

16. New York State Public Health Law § 3602 provides in pertinent part that:

> **As used in this article, the following words and phrases shall have the following meanings unless the context otherwise requires:**
>
> **1. "Home care services" means one or more of the following services provided to persons at home: (a) those services provided by a home care services agency; (b) home health aide services; (c) personal care services; (d) homemaker services; (e) housekeeper or chore services.**
>
> **2. "Home care services agency" means an organization primarily engaged in arranging and/or providing directly or through contract arrangement one or more of the following: Nursing services, home health aide services, and other therapeutic and related services which may include, but shall not be limited to, physical, speech and occupational therapy, nutritional services, medical social services, personal care services, homemaker services,**

**and housekeeper or chore services, which may be of a preventive, therapeutic, rehabilitative, health guidance, and/or supportive nature to persons at home.**

**3. "Certified home health agency" means a home care services agency which possesses a valid certificate of approval issued pursuant to the provisions of this article, or a residential health care facility or hospital possessing a valid operating certificate issued under article twenty-eight of this chapter which is authorized under section thirty-six hundred ten of this article to provide a long term home health care program. Such an agency, facility, or hospital must be qualified to participate as a home health agency under the provisions of titles XVIII and XIX of the federal Social Security Act and shall provide, directly or through contract arrangement, a minimum of the following services which are of a preventive, therapeutic, rehabilitative, health guidance and/or supportive nature to persons at home: nursing services; home health aide services; medical supplies, equipment and appliances suitable for use in the home; and at least one additional service which may include, but not limited to, the provisions of physical therapy, occupational therapy, speech pathology, nutritional services and medical social services.**

**4. "Home health aide services" means simple health care tasks, personal hygiene services, housekeeping tasks essential to the patient's health and other related supportive services. Such services shall be prescribed by a physician in accordance with a plan of treatment for the patient and shall be under the**

**supervision of a registered professional nurse from a certified home health agency or, when appropriate, from a provider of a long term home health care program and of the appropriate professional therapist from such agency or provider when the aide carries out simple procedures as an extension of physical, speech or occupational therapy. Such services may also be prescribed or ordered by a nurse practitioner to the extent authorized by law and consistent with the written practice agreement pursuant to subdivision three of section six thousand nine hundred two of the education law and not prohibited by federal law or regulation.**

**5. "Personal care services" means services to assist with personal hygiene, dressing, feeding and household tasks essential to the patient's health. Such services shall be prescribed by a physician in accordance with a plan of home care supervised by a registered professional nurse. Such services may also be prescribed or ordered by a nurse practitioner to the extent authorized by law and consistent with the written practice agreement pursuant to subdivision three of section six thousand nine hundred two of the education law and not prohibited by federal law or regulations.**

**6. "Homemaker services" means assistance and instruction in managing and maintaining a household, dressing, feeding, and incidental household tasks for persons at home because of illness, incapacity, or the absence of a caretaker relative. Such services shall be provided by persons who meet the standards established by the department of social services.**

**7. "Housekeeper services" or "chore services" means the provision**

**of light work or household tasks which do not require the services of a trained homemaker. Such services may be provided for persons at home because of illness, incapacity, or the absence of a caretaker relative by persons who meet the standards established by the department of social services.**

**8. "Long term home health care program" means a coordinated plan of care and services provided at home to invalid, infirm, or disabled persons who are medically eligible for placement in a hospital or residential health care facility for an extended period of time if such program were unavailable.**

**a. Such program shall be provided in the person's home or in the home of a responsible relative or other responsible adult.**

**b. Such program shall be provided in adult care facilities, other than shelters for adults, certified pursuant to section four hundred sixty-b of the social services law, provided that the person meets the admission and continued stay criteria for such facility. Services provided by the program shall not duplicate or replace those which the facility is required by law or regulation to provide.**

**c. Approved long term home health care program providers may include, as part of their long term home health care program, upon approval by the commissioner, a discrete AIDS home care program as defined in this section.**

**11. "Government funds" means funds provided under the provisions of title eleven of article five of the social services law.**

**12. "Construction" means the addition or deletion of services offered; a change in the agency's geographic service area; the**

**erection, building, or substantial acquisition or alteration of a physical structure or equipment; or a substantial change in the method of providing services.**

**13. "Licensed home care services agency" means a home care services agency, issued a license pursuant to section three thousand six hundred five of this chapter.**

**15. [Expires March 31, 2011] "Limited home care services agency" means a certified operator of an adult home or an enriched housing program which directly provides: personal care services authorized and provided in accordance with rules and regulations of the department of social services; and the administration of medications and application of sterile dressings by a registered nurse, provided, however, that the services provided by such agency are not services that must be provided to residents of such facilities pursuant to article seven of the social services law and rules and regulations of the department of social services. Such operator may provide these services only to residents of the adult home or enriched housing program governed by the terms of such limited license.**

17. In this matter, 30a of the New York State Department of Labor made the distinction between Article 28 and 36 institutions. The *Superior Care* case should only be applicable on Art. 28 institutions, while Harry's Nurses Registry, operating under Art. 3, should not be treated alike. The correct case for Art. 36 institutions should be *Fazekas*, which stated that home care nurses were employed on fee basis and engaged in bona fide professional capacity were exempted from the FLSA overtime requirements, where nurses were paid agreed-upon sum for each

home care visits regardless of time spend on each visit, written opinion letter of Department of Labor's Wage and Hour Division indicated that per-visit pay plan would qualify as compensation on a fee basis, nurses' undisputed deposition testimony demonstrated uniqueness of each home health care visit they made, and their duties required advance knowledge and discretion. (*Fazekas v Cleveland Clinic Found. Health Care* 204 F.3d 673 (6th Cir. 2000)

18. In the *Superior Care* case, the agency was not operating on Art. 36 but instead is a placement agency that place nurses in hospitals and nursing homes (institutions governed Art. 28). Nurses who worked at hospital through nursing referral agencies, signed in through multiple referral agencies, did not preclude nurses from recovering overtime compensation from hospital, her joint employer under FLSA. Nurses reported all of hours she worked on agency sign-in sheets, hospital collected these sheets and cross-referenced them on daily basis, hospital employees encouraged nurse to work additional shifts, and at least one hospital employee noticed that sometimes agency nurses worked for more than one agency. (*Barfield v New York City Health and Hospital Corp.*, S.D.N.Y. 2006, 432 F.Supp.2d 390)

19 HNR, who place nurses in patient's homes, was exempted from federal overtime. New York State Department of Labor conducted an audit and certified that LPNs are considered domestic service employees under FLSA (when employed in or about private households) and are therefore exempt from Fed. O.T. regs under 13(b)(21). According to the case of *Long Island Care at Home v Coke*, it was held that the DOL Regulation was valid and the companionship exemption includes those "companion worker employed by the agency … other than the family or household using their services". 29 C.F.R. s.552.109(a) The LPNs, who are placed in patients' homes but not employed by the patients, fall into such category and shall be exempted from federal overtime requirements as well. See again the New York State Legislation

s.8637/A.11711 which again stated that agencies under Art. 36 of the Public Health Law are exempted from federal overtime requirement.

21. It is clear, that based upon the prior testimony of the plaintiff that she is a home health care aide under Article 36 of the New York State Public Health Law.

22. Moreover, Claudia Gayle and all other similarly situated as a class were employed on fee basis and engaged in bona fide professional capacity, so as to be exempt from Fair Labor Standards Act (FLSA) overtime requirements, where nurses were paid agreed-upon sum for each home care visit regardless of time spend on each visit, written opinion letter from acting administrator of Department of Labor's Wage and Hour Division indicated that per-visit pay plan would qualify as compensation on a fee basis. Plaintiff's undisputed deposition testimony demonstrated uniqueness of each home health care visit they made, and their duties required advanced knowledge and discretion. As such these nurses (See Plaintiff's testimony attached hereto as Exhibit I")

23. The plaintiff and all other Registered Nurses formally employed by HNR, Inc. performed home care visits for patients in New York City and Naussau Metropolitan area from 1994 to the present time. There visit generally involve treating patients for diagnosed medical condition, designing health care protocols for individual patient educating the patients and their families regarding participation in ongoing treatment. The plaintiff and others also supervised home health care visits made by licensed practical nurses and kept administrative records for all visits to patients under their care.

24. The plaintiffs' individual employment relationships with HNR Inc. were defined by signed employment agreements. As set forth in each standard agreement, the scheduling of a registered nurse's home health care visits was governed by

different doctors' order according to their medical condition. The orders may require the nurses to make certain number of visits, each with varying hours. For example, a "25/15 Plan" requires each nurse to make at least 25 visits to patients and be on call at least 15 hours per week. Their schedule base upon their availability per week, however, the number of visits may vary. A visit may be 24, 16, 8 or 4 hours per visit base on the doctors' order.

25. Patients beginning a course of home health care treatments would be screened initially by a HNR, Inc. supervisor who is Mrs. Cherriline Williams-West, a good friend of the plaintiff, who would then assign each patient to one of the registered nurses performing home visits. Each nurse would then be responsible for developing an initial treatment plan for his or her new patient and scheduling all necessary home visits in accordance with that care plan. HNR, Inc. provided guidelines for the patients' home visit schedules, but the nurses themselves devised each patient's individual treatment plan and were responsible for subsequent revisions in treatment protocols.

26. The nurses were compensated on a "per-visit" basis. Pursuant to an attachment to the employment agreement, the nurses could receive up to $250, $300, $400, or even $500 based upon doctors' order prescribing the duration of the visits. The agreements were modified from time to time, so that eventually the nurses also received $70 for each visit involving home supervision, initial assessment of a new patient. These payments included compensation for all attendant transportation and administrative duties connected with the actual visits themselves.

27. The "25/15 Plan" was apparently designed to approximate a 40-hour work week. Nevertheless, the plaintiffs contended that they regularly made more than 25 total visits per week and generally documented between 50-90 hours per week of work done in conjunction with these visits. Regardless of whether the plaintiffs

worked more than 40 hours during any one week, they still received the standard per-visit fee for each home visit as proscribed by Article 36 of the Public Health Law.

28 HNR, Inc. is operated under Article 36 of the Public Health law and is fully exempt from Federal overtime requirements. The regulations require the Registered Nurse to comply as set forth in each standard agreement of scheduling of the Registered Nurse of the Home visit who is governed by the 25/15 plan. (See Home Care Service Agency License attached hereto as "J")

29. Labor Department regulations construing and enforcing the Act outline several requirements for employment purported to be "professional" in nature:

> **"The term *employee employed in a bona fide ... professional capacity* shall mean any employee:**
>
> **a. Compensated on a salary or fee basis at a rate of not less than $455 per week ..... exclusive of board, lodging, or other facilities; and**
>
> **b. Whose primary duty is the performance of work:**
>
> **i. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; ... ...**
>
> **(29 C.F.R. 541.300)**

30. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. (29 C.F.R. § 541.313(b)

31. In this case, the plaintiffs were paid an agreed-upon sum for each visit regardless of the time spent on each visit. It is our position that no employee will perform what is essentially a single repetitive task over and over. Each patient's needs and situation is different, and would be individually assessed and treated by the

employee as the employee deems necessary during each visit. The employees must use independent, professional and largely unsupervised judgment on a case-by-case basis.

32. The plaintiffs focus attention on the observation in the internal memorandum that the Department of Labor regulations' use of singers, artists, and illustrators as examples of professionals compensated on a fee basis suggests "that the character or nature of the job itself must be unique, and not simply that the performance of the job vary from day to day." The memorandum recognizes that the use of the examples in 29 C.F.R. § 541.313(d) was most likely intended to illustrate how the adequacy of a fee payment must be determined-by calculating whether each fee payment is at a rate which would, in the aggregate, amount to at least $455 per week-and that the regulations do not indicate that only professions with some relation to artistic endeavors may be compensated on a fee basis so as to qualify for the exemption.

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")

**Ground 2 – *Brock v Superior Care* 840 F.2d 1054 is not applicable**

34. Judge Sifton relied on the case of Superior Care in page 11 and other pages of his judgment to rule the case in favor of the plaintiff. However, we submit that the *Superior* case should not be applicable to home care nurses. The case is only applicable on hospitals and nursing homes operating under Art.28 of the Public Health

Law of the New York State Department of Health. The agency in the *Superior* case will place the nurses on those hospitals, nursing homes, diagnostic and treatment centers, facilities operating under Article 28. They have more than 40 patients per unit to care for. As compared to home care agency under Art. 36 (HNR), who only have one patient to care for and have to be governed by the "25/15 Plan", these 2 types of agencies must be distinguished from each other.

35. Firstly, in the *Superior Care* case, , the New York State Department of Labor did an audit and find the Defendants were violating the FLSA because the nurses were placed in hospitals and nursing homes which were institutions operating under Art. 28.

**Ground 3 - Method of payment to Home Care Nurses**

36. It is submitted that the method of payment to the plaintiff, home care Registered Nurses (RNs) was on fee-basis, instead of hourly rate. They were paid an agreed-upon sum for each home care visit. Attached please find record establishing a visit for the defendant. This document clearly shows that defendant is paid on a per visit basis.(Exhibit "L")

37. In the judgment, page 7 1st paragraph and page 19 1st paragraph have incorrectly stated the payment method. It is therefore submitted that the decision was made on wrong factual basis.

38. As the RNs are paid per visits to the homes of patients, it would be impossible to monitor the workings hours of them. Thus the overtime rates shall not be applicable in the present situation.

**Ground 4 - Home Care Nurses should be exempted from FLSA overtime requirements**

39. It is submitted that even the home care nurses are classified as an employee, they should be exempted from FLSA overtime requirements as they are

employed in a bona fide professional capacity. (FLSA section 13(a)(1))

40. According to the Labor Department Regulation, "employee employed in a bona fide professional capacity" shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week …… exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; … …

(29 C.F.R. 541.300)

41. The primary duty test is elaborated to include 3 elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(29 C.F.R. 541.301)

42. It is our position that home care nurses satisfy these 3 requirements. Home care visits require an expertise in the field of medicine and nursing. The nurses are required to posses advanced nursing knowledge and have to take care of the various needs of patients. They need to draft up nursing plans for patients and ensure that the doctors' orders are followed. Moreover, according to 29 C.F.R. 541.301 (e)(2), Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. The plaintiff, as a RN holding valid license, should qualify for the exemption.

43. Furthermore, it was stated in the regulation 29 C.F.R. 541.304 (a)(1) that "`employee employed in a bona fide professional capacity" in section 13(a)(1) of the

Act also shall mean: any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof ……".

44. Registered home care nurses holding valid license who practice in the home care industry should be considered as a branch of the practice of medicine. They should therefore be exempted as engaging in professional capacity.

**Ground 5 – Relationship between Cherriline Williams and the Plaintiff together with her attorney.**

45. The supervisor who has set forth in each standard agreement of the scheduling of Registered Nurses of the home visits were governed by the 25/15 plan have similar license as the plaintiff. In an organization nurses as different role, but in reality the training to receive the license from the State of New York is the same.

46. It doesn't matter what she observes and assesses the nursing skills, including watching and also checking the books of doctors' orders relating to the patients to ensure the medications and dosage are up to date. That is her job descriptions. Nursing supervisor is responsible for reviewing, assessing and service for the nurse and the field. It's the task for the agency.

47. She was hiring her friend, Miss Claudia Gayle, the plaintiff with

i. no proof of residency
ii. no proof of proper identification
iii. no proof of social security
iv. they both came from the same town in Jamaica

(See Exhibit 'M")

Please note that plaintiff's name does not match her social security number under the Homeland Security Act.

48. On April 1 2008, after the lawsuit was in place, the office was

burglarized, and the perpetrator got into the window to the office. They stole 2 computers. One have got the information for the patients' names, addresses, care plans etc. Another computer has got names of the employees, social security, date of birth, addresses and all other information that plaintiff's attorney was looking for. The police never replied to the defendant about the theft, and never looked into whether it was related to the plaintiff and the supervisor. Please be advised that the New York City Police Department 103rd precinct is still investigating this matter at this time.

49. Please be advised that on March 16, 2009, I went to visit my attorney's office to provide home with the necessary documentation to appeal or renew the prior court's decision. Ms. Deborah Harry went to attorney's office with me. (See Deborah Harry supporting affidavit attached hereto as Exhibit "N")

**Conclusion**

50. Base on the above grounds, we request the allegations of plaintiff and all the others should be dismissed.

Dated: August 14, 2009
Jamaica, New York

HARRY DORIVILIER

HARRY DORVILIER
Defendant Pro Se
88-25 163rd Street
Jamaica, New York 11432
(718) 739-0045

To:

LEVY, DAVID & MAHER, LLP
29 Broadway, 9th Floor
New York, New York 10006

ROBERT SCHIRTZER
Notary Public, State of New York
No. 02SC6057715
Qualified in Queens County
Commission Expires April 23, 20

Sworn to Me on
8/17/09

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

CLAUDIA GAYLE, et al.,

Plaintiffs,

-against-

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

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

**MEMORANDUM & ORDER**

**07-CV-4672 (NGG) (MDG)**

NICHOLAS G. GARAUFIS, United States District Judge.

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

## I. FACTUAL BACKGROUND[1]

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

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



Exhibit F

Harry's Nurses refers temporary healthcare personnel, including Registered Nurses ("RNs") and Licensed Practical Nurses ("LPNs") (collectively, "field nurses"), to patients in their private homes in and around New York City. (Id.)

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

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

## II. PROCEDURAL HISTORY

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

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

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

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

concluded that Gayle had made the "modest factual showing needed to support a preliminary determination that there are others similarly situated who should be notified of their opportunity to join this suit as plaintiffs." (Id. at 27.) Judge Sifton further noted that "[t]his is a preliminary determination that may be revised upon the completion of discovery." (Id. at 28.) Following Judge Sifton's order, approximately 55 other Plaintiffs opted into this action.

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

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

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

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

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

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

## III. APPROPRIATENESS OF RECONSIDERATION

### A. Standard for Reconsideration

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

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

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

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

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

**B. Reconsideration is Not Warranted**

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

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

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

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

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

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

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

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

## III. SUMMARY JUDGMENT

### A. Standard for Summary Judgment

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

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

**B. Appropriateness of Summary Judgment for Opt-In Plaintiffs**

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

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

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

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

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

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

**C. Appropriateness of Summary Judgment for Gayle**

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

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

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

**D. Liquidated Damages**

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

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

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

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

## IV. CONCLUSION

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

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
December 23, 2010

NICHOLAS G. GARAUFIS
United States District Judge

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

CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative,

Plaintiff,

ORDER

- against -

CV 2007-4672 (CPS)(MDG)

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

Defendants.

- - - - - - - - - - - - - - - - - - - -X

Mark L. Hankin, of the law firm Hankin & Mazel, PLLC has moved to withdraw as counsel for defendants Harry's Nurses Registry, Inc. and Harry Dorvilier (ct doc. 77). Defendant Harry Dorvilier, who appeared at the hearing held on August 18, 2009, and counsel for plaintiffs did not oppose the motion.

Mr. Hankin seeks leave to withdraw because "it has become impossible for [the] firm to represent Defendants effectively in this matter" without their cooperation. (Hankin Affirm. ¶5) Mr. Hankin also points out that "Defendant Dorvilier attempted to make *ex parte* contact with Magistrate Go regarding the merits of this case without [the] firm's knowledge or consent ... [thus] evincing their intent to forego further counsel by [the] firm." (Hankin ¶10).

The client's refusal to cooperate with counsel is clearly a "satisfactory reason[]" for counsel's withdrawal. See Local Civil Rule 1.4. Moreover, Mr. Dorvilier does not oppose Mr. Hankin's

Exhibit G

motion for withdrawal of counsel and agrees that he has reached an impasse with Mr. Hankin as to the defense of his case.

Therefore, it is hereby

ORDERED that the motion of Hankin & Mazel, PLLC to withdraw as counsel for defendants Harry's Nurses Registry, Inc. and Harry Dorvilier is granted, but subject to compliance with all the conditions of this Order; and it is further

ORDERED that although counsel is asserting a lien in the amount of an outstanding balance due of $8,367.50 against his clients' files, Mr. Hankin has agreed to release the files to his clients' upon the payment by defendants of expenses totaling $367.50. Upon such payment the firm must promptly provide all case files to defendants or their new counsel upon request; and it is further

ORDERED that discovery in this action is stayed the earlier of thirty (30) days (September 17, 2009) or the filing of notice of appearance, to give defendants an opportunity to obtain new counsel; and it is further

ORDERED that until such time as new counsel for defendants enters a notice of appearance, service of papers by mail upon them at the address below, shall be deemed sufficient service, and it is further

ORDERED that a status conference will be held in the above-captioned case on September 29, 2009 at 10:30 a.m. before Marilyn D. Go, United States Magistrate Judge, in Courtroom 11C at

the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York. No request for adjournment will be considered unless made at least seventy-two (72) hours before the scheduled conference.

Warnings to the Defendants

Defendants are advised that they are required to appear, in person or through counsel, at the next conference and that they must proceed in responding to discovery requests, including the interrogatories and document requests sent. They are warned that failure to appear at a conference or to comply with discovery requests could result in sanctions, including a fine. Continued failure to comply could ultimately result in entry of default judgment against them.

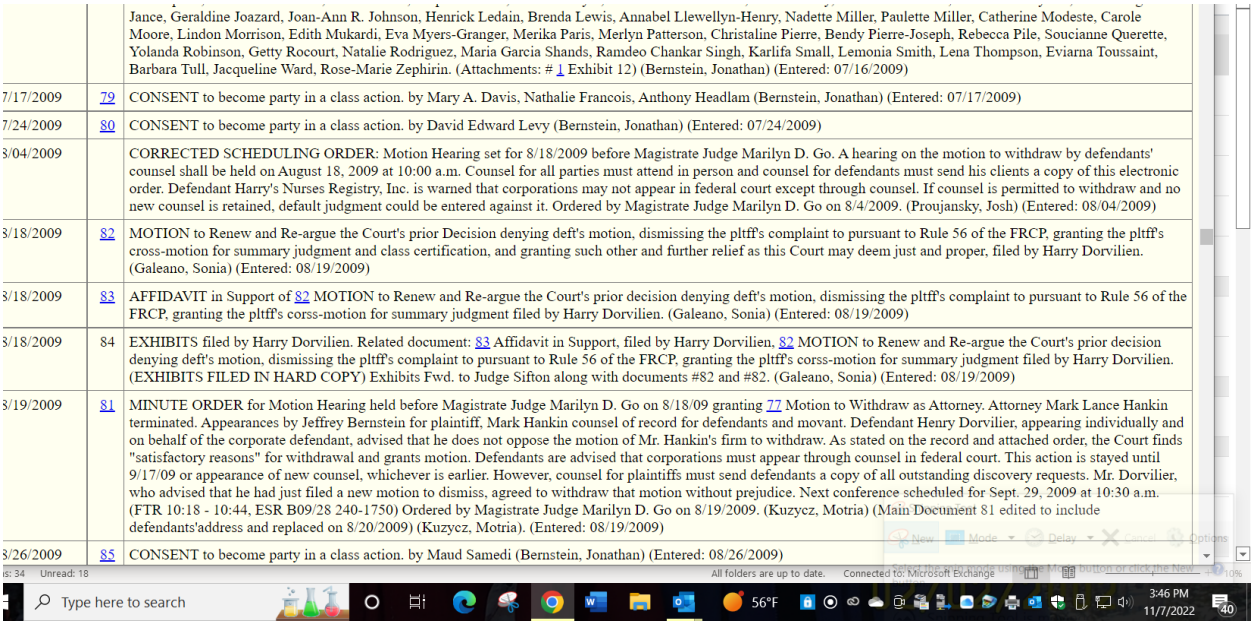
Defendants Harry's Nurses Registry, Inc. are also advised that corporations may appear in federal court proceedings only through counsel. If defendants fail to obtain counsel, the court shall enter default against them.

**SO ORDERED.**

Dated: Brooklyn, New York
August 19, 2009

/s/
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

To: Harry Dorvilier
Harry's Nurses Registry, Inc.
88-25 163 Street
Jamaica, NY 11432



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| | | Jance, Geraldine Joazard, Joan-Ann R. Johnson, Henrick Ledain, Brenda Lewis, Annabel Llewellyn-Henry, Nadette Miller, Paulette Miller, Catherine Modeste, Carole Moore, Lindon Morrison, Edith Mukardi, Eva Myers-Granger, Merika Paris, Merlyn Patterson, Christaline Pierre, Bendy Pierre-Joseph, Rebecca Pile, Soucianne Querette, Yolanda Robinson, Getty Rocourt, Natalie Rodriguez, Maria Garcia Shands, Ramdeo Chankar Singh, Karlifa Small, Lemonia Smith, Lena Thompson, Eviarna Toussaint, Barbara Tull, Jacqueline Ward, Rose-Marie Zephirin. (Attachments: # 1 Exhibit 12) (Bernstein, Jonathan) (Entered: 07/16/2009) |
| 7/17/2009 | 79 | CONSENT to become party in a class action. by Mary A. Davis, Nathalie Francois, Anthony Headlam (Bernstein, Jonathan) (Entered: 07/17/2009) |
| 7/24/2009 | 80 | CONSENT to become party in a class action. by David Edward Levy (Bernstein, Jonathan) (Entered: 07/24/2009) |
| 8/04/2009 | | CORRECTED SCHEDULING ORDER: Motion Hearing set for 8/18/2009 before Magistrate Judge Marilyn D. Go. A hearing on the motion to withdraw by defendants' counsel shall be held on August 18, 2009 at 10:00 a.m. Counsel for all parties must attend in person and counsel for defendants must send his clients a copy of this electronic order. Defendant Harry's Nurses Registry, Inc. is warned that corporations may not appear in federal court except through counsel. If counsel is permitted to withdraw and no new counsel is retained, default judgment could be entered against it. Ordered by Magistrate Judge Marilyn D. Go on 8/4/2009. (Proujansky, Josh) (Entered: 08/04/2009) |
| 8/18/2009 | 82 | MOTION to Renew and Re-argue the Court's prior Decision denying deft's motion, dismissing the pltff's complaint to pursuant to Rule 56 of the FRCP, granting the pltff's cross-motion for summary judgment and class certification, and granting such other and further relief as this Court may deem just and proper, filed by Harry Dorvilien. (Galeano, Sonia) (Entered: 08/19/2009) |
| 8/18/2009 | 83 | AFFIDAVIT in Support of 82 MOTION to Renew and Re-argue the Court's prior decision denying deft's motion, dismissing the pltff's complaint to pursuant to Rule 56 of the FRCP, granting the pltff's corss-motion for summary judgment filed by Harry Dorvilien. (Galeano, Sonia) (Entered: 08/19/2009) |
| 8/18/2009 | 84 | EXHIBITS filed by Harry Dorvilien. Related document: 83 Affidavit in Support, filed by Harry Dorvilien, 82 MOTION to Renew and Re-argue the Court's prior decision denying deft's motion, dismissing the pltff's complaint to pursuant to Rule 56 of the FRCP, granting the pltff's corss-motion for summary judgment filed by Harry Dorvilien. (EXHIBITS FILED IN HARD COPY) Exhibits Fwd. to Judge Sifton along with documents #82 and #82. (Galeano, Sonia) (Entered: 08/19/2009) |
| 8/19/2009 | 81 | MINUTE ORDER for Motion Hearing held before Magistrate Judge Marilyn D. Go on 8/18/09 granting 77 Motion to Withdraw as Attorney. Attorney Mark Lance Hankin terminated. Appearances by Jeffrey Bernstein for plaintiff, Mark Hankin counsel of record for defendants and movant. Defendant Henry Dorvilier, appearing individually and on behalf of the corporate defendant, advised that he does not oppose the motion of Mr. Hankin's firm to withdraw. As stated on the record and attached order, the Court finds "satisfactory reasons" for withdrawal and grants motion. Defendants are advised that corporations must appear through counsel in federal court. This action is stayed until 9/17/09 or appearance of new counsel, whichever is earlier. However, counsel for plaintiffs must send defendants a copy of all outstanding discovery requests. Mr. Dorvilier, who advised that he had just filed a new motion to dismiss, agreed to withdraw that motion without prejudice. Next conference scheduled for Sept. 29, 2009 at 10:30 a.m. (FTR 10:18 - 10:44, ESR B09/28 240-1750) Ordered by Magistrate Judge Marilyn D. Go on 8/19/2009. (Kuzycz, Motria) (Main Document 81 edited to include defendants'address and replaced on 8/20/2009) (Kuzycz, Motria). (Entered: 08/19/2009) |
| 8/26/2009 | 85 | CONSENT to become party in a class action. by Maud Samedi (Bernstein, Jonathan) (Entered: 08/26/2009) |

Exhibit H

LEVY DAVIS & MAHER, LLP
ATTORNEYS AT LAW



included in Plaintiff's First Request for Production of Documents dated February 5, 2008:

Document Request No. 7. All documents referring or relating to audits or investigations of defendants' payroll practices conducted by the New York State Department of Labor.

Document Request No. 9. All documents submitted to or received from the New York State Department of Labor in the course of or upon the completion of audits or investigations of defendants' payroll practices.

Document Request No. 11. All settlement agreements, investigative reports, court orders, correspondence or other documents referring or relating to the disposition of any and all wage claims and/or wage-hour complaints filed against defendants by any current or former employees.

Document Request No. 12. All documents identified in Defendants' Initial Disclosures.

Defendants stated in their responses (dated March 13, 2008) to each of these Document Requests that all responsive non-privileged documents in defendants' possession would be produced, subject to objections. Please note that the Federal Rules of Civil Procedure require production of all documents in defendants' custody, possession or control, not merely those in defendants' possession, as well as a privilege log.

We have a deposition notice outstanding. I suggest that your new counsel contact me to discuss this.

Finally, with respect to your insistence that the summary judgment motion in this case was decided incorrectly because state law distinguishes between home care and staffing agencies inasmuch as two sets of lawyers were apparently unable to persuade you that federal law displaces inconsistent state law, I acknowledge that nothing I say will make you realize the error of your argument. Please be aware that you are currently under court order to respond to discovery demands notwithstanding your intention to seek reconsideration of summary judgment.

Very truly yours,

Jonathan A. Bernstein

Exhibit
I

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

----------X

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

**Case No. 12-4764-cv**

***Plaintiff-Appellees,***

**-against-**

**AFFIDAVIT**

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

***Defendant-Appellants***

----------X

STATE OF NEW YORK )
) ss:
COUNTY OF Queens )

HARRY DORVILIER, being duly sworn, deposes and says:

1. I am the individual Defendant-Appellant, HARRY DORVILIER a/k/a HARRY DORVILIEN, in the above-captioned action.

2. I respectfully submit this Affidavit in support of Defendant-Appellants' instant Renewed Motion to Recall Mandate.

3. On August 18, 2009, I filed the *pro se* motion to reargue and supporting affidavit discussed in Point V of the accompanying brief in support of the instant Renewed Motion To Recall Mandate and annexed thereto as Exhibit E (the "*Pro Se* Motion")

4. I took great care in preparing that *Pro Se* Motion and under no circumstances would I have withdrawn it.

5. To be clear, I never withdrew the *Pro Se* Motion; never informed the court, opposing counsel, my then counsel, or anyone else that I wished to do so; and never otherwise authorized anyone to do so on my behalf.



Exhibit
J

6. My commitment to that *Pro Se* Motion is further reinforced by the fact that I elected to terminate prior counsel because they failed to articulate and present the arguments stated therein.

7. Accordingly, it has caused me severe prejudice to have my *Pro Se* Motion ignored.

By: HARRY DORVILIER

Sworn to before me on
this 10th day of October, 2023

Tracey Ramgattie
NOTARY PUBLIC,

TRACEY RAMGATTIE
Notary Public - State of New York
No. 01RA6248847
Qualified in Queens County
My Comm. Expires Oct. 17, 2023

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500**

**MOTION INFORMATION STATEMENT**

**Docket Number(s):** 12-4764-cv **Caption [use short title]** Gayle v. Harry's Nurses Registry, Inc.,

**Motion for:** Recall of Mandate

Set forth below precise, complete statement of relief sought:

Defendant-Appellants intend to file a renewed motion to recall the attached Second Circuit Court of Appeal's mandate issued in the above matter on January 5, 2015,

**MOVING PARTY:** Harry's Nurses Registry, Inc. and Harry Dorvilier **OPPOSING PARTY:** CLAUDIA GAYLE etal

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

**MOVING ATTORNEY:** Marshall B. Bellovin **OPPOSING ATTORNEY:** Jonathan Bernstein

[name of attorney, with firm, address, phone number and e-mail]

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917-693-7245 jb@lijblaw.com

Court- Judge/ Agency appealed from: U.S. Court of Appeals for the 2d Circuit

**Please check appropriate boxes:**

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:**

Has this request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

**Signature of Moving Attorney:**

**Date:** 10/19/2023 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]