APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

18-3472

[Filed January 24, 2020]

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 24th day of January, two thousand twenty.

PRESENT: RALPH K. WINTER,
PETER W. HALL,
Circuit Judges,
DENISE COTE,[*]
District Judge.

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 Mukardi, Martha Ogun Jance, Merlyn Patterson, Alexander Gumbs, Serojnie Bhog, Genevieve Barbot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre-Joseph, Rose-Marie Zephirin, Sulaiman Ali-El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard,

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[*] Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan-Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman,
Plaintiffs-Appellees,

v.

Harry's Nurses Registry, Harry Dorvilier,
Defendants-Appellants.[†]

For Appellant: MICHAEL CONFUSIONE, Hegge & Confusione, LLC, Mullica Hill, New Jersey.

For Appellee: JONATHAN A. BERNSTEIN, Meenan & Associates, LLC, New York, New York.

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

[†] The Clerk of Court is respectfully requested to amend the caption as stated above.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

Harry Dorvilier and Harry's Nurses Registry appeal from an order of the United States District Court for the Eastern District of New York (Garaufis, *J.*) dated September 30, 2018, denying Appellants' motion for sanctions against plaintiffs' counsel. We assume the parties' familiarity with the underlying facts, the record of prior proceedings, and the arguments on appeal, which we reference only as necessary to explain our decision to affirm.

I.

In 2007, plaintiffs sued defendants under the Fair Labor Standards Act ("FLSA"), seeking unpaid overtime pay and attorneys' fees. The district court granted plaintiffs' motion for summary judgment and entered judgments in favor of the plaintiffs for unpaid wages and liquidated damages and for attorneys' fees. Defendants-Appellants appealed, and we affirmed the judgment in *Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App'x 714 (2d Cir. 2014).

In September 2017, Appellants moved for sanctions against plaintiffs' counsel, arguing that counsel had not properly accounted for the monies collected in satisfaction of the judgments and had collected more than he was entitled to in attorneys' fees. Appellants specifically contended that plaintiffs' counsel "'double dipped' by charging his clients for contingency fees and also charging those same fees over to [Appellants]

amounting to an extra $171,643.73 paid by [Appellants] under the federal judgment." App. 275. Plaintiffs' counsel opposed Appellants' motion. In support of their respective positions, both parties submitted evidence, including affidavits signed by plaintiff nurses asserting they received less compensation than was awarded to them and financial records demonstrating that the funds were appropriately disbursed. Defendants-Appellants requested that the district court hold an evidentiary hearing to resolve this conflicting evidence and determine whether plaintiffs' counsel properly disbursed the money he collected from them.

The district court referred the motion for sanctions to Magistrate Judge Go. In September 2018, the magistrate judge issued a Report and Recommendation ("R & R"), recommending that the motion be denied. The magistrate judge found that the bank statements and copies of checks that were submitted by plaintiffs' counsel "provide persuasive evidence that appropriate funds were disbursed to the plaintiffs," SA 31, and called the allegation that plaintiffs' counsel had 'double dipped' a "bald assertion" unsupported by any evidence other than affidavits of the plaintiffs, many of which were contradicted by the bank statements and check copies. SA 32. The district court adopted the R & R over Appellants' objections and denied the motion for sanctions, specifically rejecting as "unsupported by any legal authority or factual basis" Appellants' argument that an evidentiary hearing should have been held. SA 6. Appellants appeal the district court's order.

II.

We review a district court's decision to deny a party's motion for sanctions for abuse of discretion. *Virginia Properties, LLC v. T-Mobile Northeast LLC*, 865 F.3d 110, 113 (2d Cir. 2017). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (internal quotation marks omitted).

III.

Federal Rule of Civil Procedure 78(b) allows a court to determine motions on briefs without the need for an oral hearing. Appellants argue that, though a district court is permitted to decide a motion for sanctions on submissions alone, it should have ordered an evidentiary hearing in this case because there were disputed facts. Appellants cite no authority for the proposition that a district court errs when it does not hold an evidentiary hearing for a non-dispositive motion in a civil case, and we have found no error even in a district court's *imposition* of sanctions without a full evidentiary hearing. *See, e.g.*, *In re 60 East 80th Street Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000) ("The opportunity to respond [to a motion for sanctions] is judged under a reasonableness standard: a full evidentiary hearing is not required . . . ."). Absent any caselaw to the contrary, we decline to find error in the district court's decision to rule on the motion for sanctions without holding an evidentiary hearing.

Nor do we think the district court abused its discretion in ultimately declining to impose sanctions

on plaintiffs' counsel. In its R & R, which the district court adopted, the magistrate judge carefully scrutinized the available evidence before recommending the motion be denied because "defendants have not presented sufficient evidence to support . . . their [contention] that [plaintiffs' counsel] pocketed monies that should have been distributed to the" plaintiffs. SA 32. Neither the district court's reliance on this thorough analysis nor that court's ultimate conclusion that the evidence did not warrant imposing sanctions on plaintiffs' counsel was error.

* * *

We have considered Appellants' remaining arguments and find them to be without merit. We hereby **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

07-CV-4672 (NGG) (MDG)

[Filed September 30, 2018]

CLAUDIA GAYLE, et al.,

Plaintiffs,

-against-

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

Defendants.

ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

On September 22, 2017, Defendant Harry Dorvilier, then proceeding pro se,[1] moved the court to order sanctions against counsel for Plaintiffs (the "Motion"). (See Sept. 22, 2017, Letter (Dkt. 233).) The undersigned referred the Motion to Magistrate Judge Marilyn D. Go for a report and recommendation ("R&R"). (Sept. 28, 2017, Order Referring Mot. (Dkt. 235).)

On September 11, 2018, Judge Go issued an R&R recommending that the court deny the Motion. (R&R (Dkt. 261).)[2] The R&R makes three legal recommendations. First, recognizing that federal courts are courts of limited jurisdiction, the R&R recommends that the court exercise ancillary jurisdiction over the Motion. (R&R at 19-21.) Second, the R&R recommends that the court deny as moot the portion of the Motion that rests on the claim that "[P]laintiffs' counsel failed to provide satisfactions for the judgments filed in Queens County." (Id. at 21-23.) Finally, the R&R recommends denial of the Motion because "[D]efendants have not presented sufficient evidence to support . . . their [contention] that [Plaintiffs' counsel] pocketed monies that should have been distributed to the Plaintiff-Affiants and the other plaintiffs." (Id. at 23-25.) Defendants—represented by counsel—objected

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[1] On July 9, 2018, Thomas F. Liotti entered an appearance on behalf of Defendants Dorvilier and Harry's Nurses Registry, Inc. (Notice of Appearance (Dkt. 244); see July 9, 2018, Defs. Letter (Dkt. 245) (adopting all "pro se submissions heretofore submitted to the [c]ourt" by Dorvilier).

[2] A full procedural history of this long-running action is set forth in Judge Go's R&R. (See R&R at 2-18.)

to the R&R (see Defs. Objs. (Dkt. 262)), and Plaintiffs replied to Defendants' objections (see Pls. Resp. to Defs. Objs. ("Pls. Reply") (Dkt. 263)).

For the following reasons, the court ADOPTS IN FULL the R&R and DENIES the Motion.

I. STANDARD OF REVIEW

In reviewing an R&R from a magistrate judge, the district court may adopt "those portions of [the R&R] to which no 'specific written objections' are made . . . as long as the factual and legal bases supporting the findings are not clearly erroneous." McCrary v. Marks, No. 17-CV-4368 (JFB), 2018 WL 4204244, at *1 (E.D.N.Y. Sept. 4, 2018) (citing, inter alia, Fed. R. Civ. P. 72(b)); see Gesualdi v. Mack Excavation & Trailer Serv., Inc., No. 09-CV-2502 (KAM), 2010 WL 985294, at *1 (E.D.N.Y. Mar. 15, 2010) ("Where no objection to the [R&R] has been filed, the district court need only satisfy itself that there is no clear error on the face of the record." (internal quotation marks and citation omitted)). "A decision is 'clearly erroneous' when the Court is, 'upon review of the entire record, left with the definite and firm conviction that a mistake has been committed.'" DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 339-40 (S.D.N.Y. 2009) (alteration adopted) (quoting United States v. Snow, 462 F.3d 55, 72 (2d Cir. 2006)).

The district court must review de novo "those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b)(1); see Fed. R. Civ. P. 72(b)(3). To obtain this de novo review, an objecting party "must point out the specific portions of the [R&R]" to which

objection is made. Sleepy's LLC v. Select Comfort Wholesale Corp., 222 F. Supp. 3d 169, 174 (E.D.N.Y. 2016); see also Fed. R. Civ. P. 72(b)(2) ("[A] party may serve and file specific written objections to the [R&R]."). If a party "makes only conclusory or general objections, or simply reiterates his original arguments, the [c]ourt reviews the [R&R] only for clear error." Pall Corp. v. Entegris, Inc., 249 F.R.D. 48, 51 (E.D.N.Y. 2008) (citations omitted); see also Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 766 (2d Cir. 2002) (holding that the plaintiff's objection to an R&R was "not specific enough" to "constitute an adequate objection under . . . Fed. R. Civ. P. 72(b)").

II. DISCUSSION

A. Defendants' Objections

Defendants' objections are short, unspecific, and conclusory. First, Defendants claim that there are four, rather than three, judgments that have not yet been satisfied. (Defs. Objs. ¶ 2.) Second, Defendants claim that the court never issued a decision on Dorvilier's August 18, 2009, motion for reconsideration of the court's denial of his motion for summary judgment. (Id. ¶ 3.) Third, Defendants object "to the entire report" on the grounds that Dorvilier's "due process rights were violated." (Id. ¶ 4.) Fourth, Defendants seemingly object to the fact that the R&R does not recommend that Plaintiffs' counsel be required to deposit $13,544.84, which he currently holds in an escrow account, with the court. (Id. ¶ 5.) Finally, Defendants argue that sanctions should be granted "because the satisfactions of judgment were not filed within [90] days after the judgment was entered." (Id. ¶ 6.)

B. Review of Defendants' Objections

Plaintiffs aver that the court should review the R&R for clear error because Defendants' objections "lack the requisite specificity to trigger de novo review." (Pls. Reply at 2.) The court agrees.

First, as to the debate over the number of judgments, Plaintiffs state that Defendants have not shown that the supposed fourth judgment exists. (Id. at 2-3.) Defendants have not appended the judgment to their objections, nor have they provided any identifying information, such as a docket number. (Id. at 3.) Defendants' contention that four judgments exist "inexplicabl[e]" and proceeded to set forth how "there were only three judgments entered in this action." (R&R at 22-23.) The court agrees that Defendants' objection to the R&R on this ground is conclusory and lacks both a factual basis and supporting legal authority. This portion of the R&R is thus only subject to review for clear error.

As to the motion for reconsideration, a review of the docket clearly shows that Dorvilier agreed to withdraw this motion at a hearing before Judge Go on August 19, 2009. (See Aug. 19, 2009, Min. Entry (Dkt. 81).) Accordingly, whatever objections Defendants may have stemming from the August 10, 2009, motion for reconsideration are inappropriate.

Next, the court agrees with Plaintiffs that Defendants' "due process" objections are unsupported by any legal authority or factual basis. (Pls. Reply at 3-4.) Indeed, Defendants cite no authority in support of their claim that "all the nurses should be required to

testify under oath regarding overtime payments to them and monies, if any, actually received by them." (Defs. Objs. ¶ 4.) Nor do Defendants offer any reason for the court to reject the R&R's findings that Plaintiffs' counsel did not engage in "double dipping," or for the court to suspect that the checks that were provided in satisfaction of the outstanding judgments were "fake." (Id.) As Plaintiffs point out, these objections are phrased as being what Dorvilier "believe[s]," not what the law or facts compel. (Pls Reply at 4 n.3.) A party's belief, without any legal or factual basis underlying that belief, cannot constitute a sufficiently specific objection such that de novo review is proper.

Next, Defendants' objection that Plaintiffs' counsel continues to hold $13,544.84 in his escrow account is not directed at any portion of the R&R (See Defs. Objs. ¶ 5.) In the R&R, Judge Go noted that "the question of disposition of the remaining funds in the Levy Davis escrow account has not been properly briefed with legal authority" and promised to set a schedule for disposition of those funds. (R&R at 25.) As Plaintiffs point out, Defendants do not object to this portion of the R&R (Pls. Reply at 4.) Without any objection to a specific portion of the R&R. Defendants' objection on this grounds functions more as a general observation, and cannot be used to apply de novo review to the R&R.

Finally, the court also rejects Defendants' objection as to the denial of the motion for sanctions. In the R&R, Judge Go explained that the motion for sanctions was "moot" because "there are no judgments entered in this action or any judgments docketed in Queens County that remain to be satisfied." (R&R at 23.)

Defendants, however, argue that the Motion should be granted because the satisfactions of judgment were not filed within 90 days of the entry of judgment. (Defs. Objs. ¶ 6.) Their only citation on this point is to N.Y. C.P.L.R. 5021(b). (Id.) Regardless of whether C.P.L.R. 5021(b) applies to the proceeding before the court, the court agrees with Plaintiffs that Defendants' objection fails because it does not "articulate [ ] any basis on which to challenge [the R&R's] recommendation that the motion for sanctions be denied as moot" (Pls. Reply at 5.)

Accordingly, the court reviews the R&R for clear error. The court finds no clear error in the R&R and adopts it in full.

III. CONCLUSION

For the foregoing reasons, the court ADOPTS IN FULL the R&R (Dkt. 261) and DENIES Defendant Harry Dorvilier's Motion for Sanctions (Dkt. 233).

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2018

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

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 07-4672 (NGG) (MDG)

[Filed September 11, 2018]

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

Plaintiffs,

-against-

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

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SANCTIONS

This is a collective action brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., in which the Court had entered three judgments in favor of plaintiffs for damages and attorneys' fees and costs against defendants HARRY'S NURSES REGISTRY, INC. ("Harry's Nurses") and HARRY DORVILIER a/k/a HARRY DORVILIEN ("Dorvilier"). See DE 180, 214, 225 (judgments entered on 9/19/2012,

10/22/2013 and 4/15/2015, respectively). Defendant Harry Dorvilier, originally proceeding pro se,[1] filed a letter dated September 22, 2017 entitled "Motion for Sanctions" which the Honorable Nicholas G. Garaufis has referred to me for report and recommendation. See DE 233 (Motion for Sanctions); DE 236 (sealed exhibits in support of motion); DE 235 (order referring motion).

PERTINENT BACKGROUND

The tortured history of this litigation spanning over eight and one-half years has been discussed at length in numerous opinions of the Court and is briefly summarized below.

Judgments Entered

Commencing this action on November 7, 2007 on behalf of herself and other similarly situated nurses employed by defendants, Plaintiff Claudia Gayle sought to recover unpaid overtime pay and liquidated damages under the FLSA for hours worked in excess of forty hours a week. See Complaint (DE 1) at ¶¶ 22-24. In a memorandum and order filed March 9, 2009, the late District Judge Charles P. Sifton granted partial summary judgment to Ms. Gayle as to liability and conditionally certified a class under the FLSA. See DE 53. Ultimately, fifty-five other nurses filed consents to join this action as party plaintiffs. See DE 15, 55-59, 62, 66-73, 79-80, 85, 88-89.

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[1] Thomas F. Liotti, Esq. filed a notice of appearances on behalf of both Mr. Dorvilier and Harry's Nurses Registry, Inc. on July 9, 2018. See DE 244.

After reassignment of this action to him, the Honorable Nicholas G. Garaufis granted four additional motions filed by the plaintiffs. Judge Garaufis granted partial summary judgment as to liability in favor of the other plaintiffs on March 2, 2012 (DE 162), and awarded damages to plaintiff Claudia Gayle on December 30, 2010 (DE 127) and to 34 other plaintiffs on September 18, 2012.[1] See DE 179. The Clerk of the Court entered judgment on September 19, 2012 (the "2012 Judgment") against defendants Harry's Nurses and Mr. Dorvilier, jointly and severally, in the amount of $14,780.00 in favor of Plaintiff Claudia Gayle and $619,071.76 in favor of 34 other plaintiffs listed in an appendix to the judgment. See DE 180. On September 30, 2013, Judge Garaufis adopted this Court's report and recommendation (DE 206) ("Aug. 2013 R&R") to grant the plaintiffs' motion to amend and for attorneys' fees and costs, thereby awarding damages to two additional plaintiffs, increasing damages to two other plaintiffs and awarding attorneys' fees and costs. See DE 211. The Clerk of the Court entered an additional judgment on October 22, 2013 (the "2013 Judgment") awarding damages of $300 and $1,140 to plaintiffs Ramdeo Chankar Singh and Getty Rocourt, respectively; additional damages of $6,512.00 to plaintiff Jane Burke Hylton and $118,512.00 to Yolanda Robinson;[2] and

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[1] Plaintiffs sought damages for 35 plaintiffs, but Judge Garaufis did not award damages for Getty Recourt, who had not submitted any pay records. See DE 179 at 8.

[2] This Court recommended in the Aug. 2013 R&R that the damages awarded to Yolanda Robinson in the 2012 judgment (DE

attorneys' fees and costs of $130,214.46 to plaintiffs. See DE 214.

After entry of the 2013 Judgment, the defendants filed a notice of appeal to the Second Circuit. See DE 215. The Second Circuit affirmed the prior decisions of this Court granting summary judgment, specifically rejecting defendants' contention that the plaintiff nurses were independent contractors rather than employees and finding defendants' other arguments meritless. See Gayle v. Harry's Nurses Registry, Inc., 594 Fed. Appx. 714, 718 (2d Cir. 2014). Defendants then filed a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, which the Supreme Court summarily denied. See Gayle v. Harry's Nurses Registry, Inc., 135 S. Ct. 2059 (2015). After Judge Garaufis granted plaintiffs' second motion for attorneys' fees and costs related to post-judgment proceedings (see DE 226), the Clerk of the Court entered a third and final judgment in favor of plaintiffs on April 15, 2015 in the amount of $41,429.17 (the "2015 Judgment"). See DE 226.

In sum, in three judgments entered against both defendants, this Court awarded plaintiffs damages amounting $760,315.76 for lost wages and liquidated damages under the FLSA, and fees and costs of

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180) be recalculated and increased to $210,864. See DE 206 at 15-16. Thus the second judgment entered on September 30, 2013 (DE 211) provided for damages of $118,512.00 in favor of Ms. Robinson, which was the difference between the recommended recalculated damages and the $92,352.00 in damages initially awarded to Ms. Robinson in the 2012 Judgment.

$171,643.39, for a total of $931.959.39. See DE 180, 214, 225.

Collection of Judgments

Central to the defendants' motion is the undisputed fact that plaintiffs' counsel successfully levied against defendants' assets and collected $931.959.39, the full amount of the three judgments entered. See DE 228 at 1 (9/5/2017 Letter); DE 232 at 1 (Bernstein letter dated 9/15/2017). This Court has prepared and is filing herewith as Appendix A a "Chronology of Judgments and Funds Collected" which sets forth the dates of each judgment, amounts collected and the aggregate amounts disbursed.

As indicated in Appendix A, after entry of the 2012 Judgment, the plaintiffs collected $633,851.76, the full amount of that judgment through levies on defendants' accounts on November 23, 2012 and January 2, 2013. Id., lns. 2, 3; DE 228 at 83, 95 (cashier checks for levied funds payable to the U.S. Marshal). On January 8, 2014, plaintiffs collected $256,678.46, the full amount of the 2013 Judgment entered on October 22, 2013. Id., ln. 7, DE 228 at 61. On August 5, 2015, plaintiff collected the full amount of the third judgment entered on April 15, 2015 for post-judgment fees and cost of $41,429.17.[1] Id., ln. 11; DE 228 at 74.

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[1] Plaintiffs have not sought to collect post-judgment interest pursuant to 28 U.S.C. § 1961.

Defendants' Motion

Since defendant Henry Dorvilier initially filed his motion without benefit of counsel, he set forth his claims and contentions in many different submissions before appearance of counsel. This Court will discuss some of his filings in order to set forth all of defendants' contentions, but will not reference subsequent filings which repeat arguments and allegations made in earlier submissions.

In his first post judgment submission filed on September 5, 2017 entitled "Satisfaction of Judgment" (the "9/5/2017 Letter"), Mr. Dorvilier complains, inter alia, that plaintiffs' counsel, Jonathan Bernstein of the firm Levy Davis & Maher, LLP ("Levy Davis"), had failed to provide satisfactions of judgments after collecting the full amount of the judgments entered; and had "double dipped" by appropriating funds collected that should have been paid to the plaintiffs and receiving more monies than what the Court awarded. See DE 228 at 1-2. As proof that Levy Davis did not pay the plaintiffs, Mr. Dorvilier submitted affidavits signed by plaintiffs Paulette Miller (DE 228-1 at 43), Lindon Morrison (DE 228-1 at 44) and Yolanda Robinson (DE 228-1 at 42) (hereafter, each will be referred to as "Plaintiff-Affiant") in which each attested that he or she received less compensation than was awarded in this action. In their affidavits, each Plaintiff-Affiant stated the amount he or she was entitled to receive and the actual (and lesser) check amount the affiant claimed to have receive from Levy Davis. See ¶¶ 7 and 8 of the affidavits of Miller, Morrison and Robinson (DE 228-1 at 42-43). The

affidavits are identical in form, with handwritten numbers inserted for the amounts awarded and received. Id. In a letter dated October 27, 2017 entitled "Motion for Sanctions" (DE 236), Mr. Dorvilier submitted an affidavit from a fourth plaintiff, Jane Burke Hylton, which was signed on October 27, 2017 using the same form as the affidavits signed by the other three Plaintiff-Affiants. See DE 268-1 at 2. In her affidavit, Ms. Burke Hylton also stated that she received only one check from Levy Davis for less than the full amount of damages awarded. See DE 268-1 at 2.

Mr. Dorvilier also submitted two unsigned form affidavits purportedly from plaintiffs Annabel Llewellyn and Brenda Lewis, which also had handwritten numbers for the amounts of compensation to be received and the smaller amount actually received. See DE 228 at 36, 38 (Exhibits to Def.'s 9/5/2017 Letter). He also provided a copy of a Notice of Levy issued by the Internal Revenue Service against plaintiff Sulaiman Ali-el and claimed that this plaintiff is deceased. See DE 228 at 4; 45 (notice of levy). Mr. Dorvilier also asserted his belief that plaintiff Claudia Gayle was likely not to have received any funds from Mr. Bernstein since she had been deported. See DE 236 at 1.

As further support for his argument that Levy Davis did not pay plaintiffs the amounts awarded, Mr. Dorvilier quoted a passage from a letter dated June 13, 2016 sent by Mr. Bernstein to the Grievance

Committee[1] of the Appellate Division of the First Judicial Department of the New York State Supreme Court ("Grievance Committee") stating that "of the $760,496.96 collected (representing the judgment for the plaintiffs exclusive of attorney's fees . . .), $13,719.04 remains in my firm's trust account." DE 228 at 5, 27 (excerpt of 6/13/2016 letter to the Department Disciplinary Committee). Mr. Dorvilier contended that any amounts remaining in escrow should be returned to him and seeks proof all proper tax filings were made and an accounting of the records of Mr. Bernstein's firm. Id. at 5-6.

Next, Mr. Dorvilier inexplicably claimed that the judgments filed by Levy Davis in Queens County is evidence of "double dipping" and points to eight transcripts of judgments from the Queens County Clerk's Office. See DE 228 at 3 (letter); at 12, 22, 24, 28, 29-32 (transcripts of judgment). Mr. Dorvilier did not provide any explanation how the docketing of these judgments in Queens County would constitute evidence of "double billing," or why he would otherwise be entitled to an audit or examination of the disbursements to plaintiffs by Levy Davis, which he has sought. The eight judgments docketed in Queens County simply correspond to the three federal judgments entered in this Court as follows: (1) two

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[1] The disciplinary proceedings apparently had been initiated by Mr. Dorvilier, but the Grievance Committee found after an investigation that there did not "appear to be a sufficient basis to conclude that [Jonathan Bernstein] failed to deliver judgment proceeds belonging to his client." Letter dated 4/28/2017 from the attorney Grievance Committee to Harry Dorvilier (DE 234-1) at 1.

judgments reflect the 2012 Judgment -- one in favor of Claudia Gayle for $14,780.00 and one for $619,071.76 in the name of for Susan Ajiboye, the first plaintiffs named in the appendix to the 2012 Judgment, as well as the other plaintiffs in an appendix annexed to the transcript; (2) five judgments reflect the 2013 Judgment -- four in the names of Yolanda Robinson, Jane Burke Hylton, Getty Recourt and Ramdeo Singh for damages awarded, and one in the name of Claudia Gayle for $130,214.46, for the amount of attorneys' fees and costs awarded; and (3) one judgment in favor of Claudia Gayle for $41,429.17 reflects the 2015 Judgment awarding fees and costs. Id.

In addition, Mr. Dorvilier contends in his 9/5/2017 Letter that the prior decisions of Judge Sifton and Judge Garaufis should be reversed. See 228 at 2. Insofar as he still seeks such relief, these contentions clearly are meritless in light of defendants' unsuccessful appeals in this case and will not be further discussed in this report and recommendation.

By order filed on September 14, 2017, Judge Garaufis directed Plaintiffs to file a letter by September 22, 2017 "(1) stating whether Plaintiffs have received from Defendants all amounts due under the court's judgments in this case; and (2) responding to Dorvilier's allegation that Bernstein has received payments from both the court-awarded attomeys' fees and from the amounts awarded to Plaintiffs and, if so, providing the legal basis . . ." DE 230 (Order dated 9/12/2017). In his letter dated September 15, 2017, Mr. Bernstein stated that Levy Davis had paid the Plaintiffs all amounts due under the judgments in the

case, except for $13,719.04, which was not paid to some plaintiffs who could not be located and to one plaintiff who refused to provide her Social Security number. See DE 232 at 1-2. He acknowledged that he had failed to issue satisfactions of judgment in a timely fashion, but claimed he provided the satisfactions a few days after being asked by Robert Schirtzer, an attorney who was representing defendants at a deposition in another FLSA case brought by different nurses and who had previously represented defendants for a period of time in this case. Id. at 1, n. 2 (referring to Isigi v. Harry's Nurses Registry, Inc., 16cv2218 (FB) (SMG))).

On September 22, 2017, Mr. Dorvilier filed a letter addressed to Judge Garaufis entitled "Motion for Sanctions" arguing that plaintiffs' counsel had not complied with Judge Garaufis's September 15th order, neither providing proper satisfactions of judgment nor presenting documentation showing that plaintiffs had been paid in accordance with the judgments and tax laws. See DE 233. Judge Garaufis then referred the motion to me for report and recommendation. See DE 235.

In an order electronically filed on November 2, 2017, this Court directed plaintiffs' counsel to file "an accounting which sets forth all the amounts collected to satisfy the judgments entered herein and all disbursements made [which] must include the amounts and dates of all checks disbursed to the individual plaintiffs and dates the checks were negotiated." In his response, Mr. Bernstein provided a chart setting forth the amounts received from levies by the U.S. Marshal and the aggregate distributions made to the plaintiffs

and to his firm for attorneys' fees and costs. See DE 237 at 1 (letter of Jonathan Bernstein dated November 13, 2017) and 237-1 (chart). Besides discussing the checks Levy Davis had issued to the four Affiant-Plaintiffs and the plaintiffs whose unsigned affidavits had been submitted by Mr. Dorvilier, Mr. Bernstein attached a spreadsheet containing information as to all the checks issued from his firm's escrow account to each plaintiff, including check numbers, dates and amounts of checks and the dates that checks were negotiated. See DE 237 at 3-5 (letter); DE 237-2 (spreadsheet).

As to plaintiff Sulaiman Ali-El, Mr. Bernstein stated that a check that Levy Davis mailed in 2014 was returned and that the balance of the award was later sent to taxing authorities after Levy Davis received a notice of levy from the New York State Department of Taxation. See DE 237 at 5. Mr. Bernstein also stated that plaintiff Martha Ogunjana had not negotiated a check sent to her in 2014 for full payment of her $653 damages award, and that his firm did not send checks to six plaintiffs who could not be located and to Brenda Lewis who had refused to provide her Social Security number. Id. at 2-4.

Following the appearance of Mr. Liotti on behalf of defendants, this Court held a conference on July 19, 2018 and ordered plaintiffs' counsel to provide copies of the fronts and backs of all checks issued by counsel to the four Plaintiff-Affiants and to submit for in camera inspection copies of all escrow checks issued to other plaintiffs during the same time frame. See DE 248 (Minute Order dated 7/19/2018). By letter dated July

24, 2018, Mr. Bernstein filed copies of the fronts and backs of the checks issued to the four Plaintiff-Affiants and copies of bank statements for the Levy Davis attorney trust account for the periods from January 1, 2013 through April 30, 2013 and January 1, 2014 through February 29, 2014 for in camera inspection. See DE 249 (letter); DE 250 (sealed checks and bank statements). By electronic order filed on July 25, 2015, this Court directed Mr. Bernstein, inter alia, to send the four Plaintiff-Affiants "copies of the fronts and backs of the checks made to each of them, respectively, together with a copy of their respective affidavits and this electronic order." See ECF Order filed on 7/25/2018. This Court further stated in the order that: "The plaintiffs are advised they may send a response to this Court, at 225 Cadman Plaza East, Brooklyn, NY 11201 or to Mr. Bernstein, who is responsible for filing any response received." Id.

On July 27, 2018, Mr. Bernstein filed a revised spreadsheet to add information regarding the dates that checks issued to three plaintiffs were negotiated, and bank statements for his firm's escrow account for March 2013 and March 2014 for in camera inspection. See DE 251 (letter); 251-1 (spreadsheet); 252 (sealed bank statements). Mr. Bernstein subsequently filed a status report on August 17, 2018 attaching copies of his letters to the four Plaintiff-Affiants in which he provided copies of canceled checks and the ECF Order filed July 25, 2018. See DE 257 and 257-1. He also filed a handwritten letter dated August 11, 2018 from plaintiff Jane Burke Hylton to Levy Davis stating that "the Two checks mentioned in your letter was [sic] received as mentioned" and apologized for not

remembering about the checks and for any inconvenience caused. See DE 257-2. Mr. Bernstein also stated he had not heard received any communication from plaintiffs Robinson, Miller or Morrison, nor received a response from plaintiff Martha Ogunjana to his letter regarding a $653 check to her that had not been cashed. See DE 257 at 1-2.

Findings regarding Funds Distributed to the Plaintiffs. This Court has examined the copies of the checks issued to Plaintiff-Affiants and the bank statements submitted, which also include copies of the fronts of all negotiated checks. As this Court advised at a conference held on August 17, 2018, "the dates and amounts of checks issued to the plaintiffs set forth in the spreadsheets and other documents filed by plaintiffs' counsel are consistent with the bank records examined." Minute entry for conference on 8/17/2018.

To assist in analyzing the checks disbursed by plaintiffs' counsel to the plaintiffs, this Court has prepared a new spreadsheet filed herewith as Appendix B which contains the same check data as in the revised spreadsheet filed by plaintiffs' counsel on July 27, 2018 (DE 251-1), but organizes the checks disbursed by year. Appendix B also includes three additional dates that checks were negotiated, based on information contained in the bank statements this Court examined. In addition, since plaintiffs' counsel states that the check issued to Martha Ogunjana for $653 has not been cashed, this Court has changed the information as to Ms. Ogunjana, reducing the amount paid to her to $0.00 and adding that $653 remains unpaid. This, in turn, increases the escrow balance from the amount in

plaintiffs' spreadsheets by $653 to $14,197.04. See Appendix B, col. P; see also, Appendix A, col F, ln. 13. This Court has highlighted and used red typeface the data in Appendix B that differ from the information contained in the by plaintiffs' spreadsheets. Contrast Appendix B with DE 251-1.

As reflected in columns D, H and L of Appendix B, Levy Davis issued checks to plaintiffs totaling $440,933.83 in 2013; checks totaling $288,722.93 in 2014; and 5 checks after 2014 totaling $17,114.96. With respect to the checks issued to the plaintiffs in 2013, Mr. Bernstein stated that after his firm collected the 2012 Judgment,[1] his firm decided to send each plaintiff only 75% of the damages awarded and to retain the balance for payment of fees, which had not yet been determined. See 9/15/2017 letter (DE 232) at 3. He said his firm did so, because of concern that any fees awarded might not be collectible once judgment was entered and because the retainer agreement with the Plaintiff provided for fees of the greater of "(a) one-third of the recovery or (b) monies designated by the Court as attorneys' fees . . . " Id. at 3-4. This Court has confirmed that the amount sent to each plaintiff in 2013, as set forth in column D of Appendix B, indeed equals 75% of the amounts awarded to each plaintiff. However, the aggregate amount distributed ($440,933.83) was only 70% of the 2012 Judgment of

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[1] Mr. Bernstein incorrectly stated in his letter that the judgment entered in 2012 was for $619,071. DE 232 at 3. That amount was the judgment for the plaintiffs other than Claudia Gayle, who was awarded damages of $14,780 in 2010. That damage award was included in the 2012 judgment.

$633,851.76, since checks to 14 of the plaintiffs either were returned or were not sent to plaintiffs whom Levy Davis could not locate. See DE 232 at 2 (noting that Levy Davis had not been able to locate several plaintiffs); 237 at 4, 5 (noting that checks mailed to Martha Ogunjana in 2012 and to Sulaiman Ali-El in 2014 had been returned by the Post Office).

After the Court entered the second judgment on October 22, 2013 awarding increased or new damages to certain plaintiffs and attorneys' fees and costs, Levy Davis issued a check to itself on October 25, 2013 for $130,214.46 for fees and costs, leaving an escrow balance of $62,703.47. See Appendix A, lns. 5, 6. Plaintiffs' counsel then collected the full 2013 judgment on January 8, 20144 and distributed checks to plaintiffs totaling $288,722.93 in January and February 2014, and four checks to plaintiffs totaling $17,114.96 after 2014. Id., lns. 8, 10.

This Court specifically finds, based on the bank statements and checks submitted, that all the information in plaintiffs' spreadsheets regarding the 25 checks issued by plaintiffs' counsel to 24 plaintiffs[1] in 2013 and the 26 checks issued to plaintiffs in 2014

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[1] The entry for plaintiff Claudia Gayle on the spreadsheets and Appendix B show that the two checks totaling $11,085.00 were issued to her in 2013. As explained by plaintiffs' counsel, Ms. Gayle had requested that a check for $1,000 be drawn to a creditor. See 11/17/2017 letter of J. Bernstein (DE 237) at 3. This Court confirmed from the bank statements that check # 16647 for $10,085.00 made to Ms. Gayle's order was negotiated on January 29, 2013 and check number 15548 for $1,000 check payable to the order of an attorney was negotiated on February 6, 2013.

accurately reflects the checks reviewed, except that corroborating information is lacking for three checks issued in 2013 to plaintiffs Willie Evans, Merlyn Patterson and Patricia Robinson, who apparently negotiated their checks after April 1, 2013, in months for which there were no bank statements submitted by plaintiffs.[1] The checks issued in these two years totaled $746,118.72. See Appendix A. In addition, the notice of levy and other documentation Mr. Bernstein has submitted adequately demonstrates that Levy Davis sent $5,802.98, the balance of the judgment owed plaintiff Sulaiman Ali-E, to the New York State Department of Taxation and Finance in response to a Tax Compliance Levy served on the firm regarding this plaintiff's tax obligations. See DE 237 at 5; 237-3 (notice of levy and 5/8/2017 letter from Jonathan Bernstein forwarding check to Department of Taxation). Thus, this payment is properly credited on plaintiffs' spreadsheets as a payment to Sulaiman Ali-E.

Plaintiffs also indicate in their spreadsheets that in 2015, Levy Davis sent checks totaling $11,311.98 to plaintiffs Ramdeo Charkar Singh, Mary Davis, Nathalie Francois and Jacqueline Ward. See Appendix B, col. L. Although Levy Davis did not submit the bank statements for the months that the four checks to these

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[1] The bank statement filed for March 2013 by plaintiff did not include a copy of the $8,408.92 check negotiated by Sulaiman Ali-El, but does indicate that check # 16762 for that amount was negotiated on March 5, 2013, as reflected in the spreadsheet plaintiff filed. Compare DE 250 at 1, 3 (bank statement) with DE 251-1 (spreadsheet, ln. 2)

plaintiffs were negotiated, this Court finds no reason to require submission of additional bank statements to verify the information on the plaintiffs' spreadsheets, given the accuracy of all the other information on the spreadsheet as to almost all other checks sent to plaintiffs, as discussed above, and given the absence of any indication from the plaintiffs to whom checks had been issued in 2015 that they did not receive full payment of their awards.

Even though the statements of the four Plaintiff-Affiants in their affidavits initially raised concerns that Levy Davis had not sent these plaintiffs their full awards, the checks and bank statements submitted by counsel dispel such concern. The submissions show that Levy Davis issued two checks to each Plaintiff-Affiant for the full amounts of their awards -- the first check for 75% of the award in 2013 and a second check for the balance in 2014. See DE 250 at 1-8 (checks); 13, 15-16 (1/2013 bank statements); 21-22, 24-26 (2/2014 bank statements); Appendix B.

Significantly, Jane Burke Hylton, one of the Plaintiff-Affiants, sent a letter to Levy Davis admitted that she had indeed received the two checks that Levy Davis said it had sent to her. See DE 257-2. Neither the defendants nor the other Plaintiff-Affiants, who have been provided copies of the fronts and backs of checks issued to the Plaintiff-Affiants, have disputed that accuracy of the checks sent to Plaintiff-Affiants and negotiated by them.

Moreover, the copies of the two checks that Levy Davis issued to each Plaintiff-Affiant bear signatures that are very similar to each other, as well as to the

signature on the affidavits of the Plaintiff-Affiants Compare DE 228-1 at 42-4 (affidavits of Yolanda Robinson, Paulette Miller and Lindon Morrison), DE 236-1 at 1 (affidavit of Jane Burke Hylton) and DE 249 (Bernstein letter); with DE 250 at 1-8 (copies of checks to the Plaintiff-Affiants). In the case of Yolanda Robinson, Paulette Miller and Jane Burke Hylton, each admitted to receiving one check in the same amount as reflected in the checks issued on January 29, 2013 to her. See DE 228-1 at 42-3 (affidavits of Yolanda Robinson and Paulette Miller), DE 236-1 at 1 (affidavit of Jane Burke Hylton) and DE 250 at 1, 3 and 7 (copies of checks plaintiffs Robinson, Burke Hylton and Miller). The signatures of these three Plaintiff-Affiants endorsed on backs of these checks are strikingly similar to the signatures on the backs of the checks issued in 2014 that the Plaintiff-Affiant do not acknowledge receiving. Compare DE 250 at 1, 3 and 7 (checks acknowledged to have received by plaintiffs Robinson, Burke Hylton and Miller, respectively) with DE 250 at 2, 4 and 8 (checks plaintiffs Robinson, Burke Hylton and Miller claim in their affidavits that they not receive).

The signature of Plaintiff-Affiant Lindon Morrison in his affidavit is also similar to his signatures on the backs of the two checks issued by Levy Davis. Compare DE 228 at 44 (affidavit) with DE 250 at 5, 6 (checks). However, the amount that Mr. Morrison acknowledged in his affidavit as having received ($38,321.00) is different from the amounts reflected in either of the two checks that Levy Davis issued to Mr. Morrison ($34,440.75 on June 19, 2013 and $11,480.25 on January 30, 2014). Id. Since this discrepancy in check

amounts is more than a typographical error, serious questions are raised whether Mr. Morrison's affidavit was accurate when signed, particularly since Jane Burke Hylton has already disclaimed the statements in her affidavit.[1]

LEGAL DISCUSSION

The Defendants raise two primary claims in their post-judgment motion for sanctions which center on the post-judgment conduct of plaintiffs' counsel: (1) that Levy Davis had failed to provide satisfactions of judgments after collecting the full amount of judgments, and (2) that counsel retained collected funds that should have been paid to individual plaintiffs.

Since federal courts are courts of limited jurisdiction, this Court first addresses the threshold issue whether the Court has subject matter jurisdiction the claims raised. Cf. Reno v. Am.-Arab Anti–Discrimination Comm., 525 U.S. 471, 488 n. 10 (1999) (a federal court is free to examine its subject-matter jurisdiction sua sponte). "As a general rule, once

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[1] The affidavits of Jane Burke Hylton and Lindon Morrison lend support for Mr. Bernstein's suspicions raised in his September 25, 2017 letter the affidavits produced were fraudulently procured by a private investigator employed by Mr. Dorvilier and are not accurate. See DE 234 at 1. Mr. Bernstein submitted an affidavit from plaintiff Bernice Sankar stating that she received a voice mail message from a person identifying himself as Ryan of Investigative Management who stated that if she could be eligible for more money if she signed an affidavit stating that she did not receive the amount of money she was entitled to receive. See letter (DE 234) at 1; Sankar affidavit (DE 234-2).

a federal court has entered judgment, it has ancillary jurisdiction over subsequent proceedings necessary to 'vindicate its authority, and effectuate its decrees.'" Dulce v. Dulce, 233 F.3d 143, 146 (2d Cir. 2000) (quoting Peacock v. Thomas, 516 U.S. 349, 354 (1996)). The Supreme Court in Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994), recognized that ancillary jurisdiction "existed in only two types of situations: 1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and, 2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority and effectuate its decrees." HBE Leasing Corp. v. Frank, 882 F. Supp. 60, 61-63 (S.D.N.Y. 1995) (citing Kokkonen at 378); see also Peacock, 516 U.S. at 354.

Although defendants' request to compel plaintiffs to provide satisfactions of judgment does not technically pertain to enforcement of any judgment or order of this Court, the only issue remaining, as discussed below, pertains to whether satisfactions of judgment have been filed in this Court. See 8/24/2018 letter of Thomas Liotti (DE 258) at 1. Since the determination of whether proper satisfactions of judgment have been filed in this Court concerns docket management and does not raise new issues of liability or claims, I respectfully recommend that this Court exercise ancillary jurisdiction to address this aspect of defendants' motion. Cf., Kokkonen, 511 U.S. at 378.

Second, the issue whether plaintiffs' counsel properly paid the funds collected to the plaintiffs clearly falls within the ancillary jurisdiction of this

Court to insure that the awards made to the plaintiffs and embodied in the judgments entered were properly paid. Cf. Grimes v. Chrysler Motors Corp., 565 F.2d 841, 843–44 (2d Cir. 1977) (affirming district court's jurisdiction to supervise the distribution of settlement funds). In any event, this Court may properly exercise jurisdiction over the issue of disbursement of funds under its "inherent authority to police the conduct of attorneys as officers of the court." In re World Trade Ctr. Disaster Site Litig., 754 F.3d 114, 125–26 (2d Cir. 2014). Notwithstanding the fact defendants lack standing to raise non-payment claims on behalf of any plaintiff, I recommend that the Court exercise ancillary jurisdiction, as well as its inherent power, to hear that aspect of the defendants' motion regarding the alleged failure of counsel to distribute funds to plaintiffs collected under judgments entered in this Court.

Satisfactions of Judgment. In his letter filed on September 5, 2017, Mr. Dorvilier complained that plaintiffs' counsel failed to provide satisfactions for the judgments filed in Queens County, as discussed above. See DE 228 at 2-3. As Thomas Liotti, counsel for defendants, noted in his letter dated July 9, 2018, those judgments still had not been satisfied as of the date of his letter. See DE 245 at 1. Mr. Bernstein advised in his letter dated August 6, 2018 that he had filed seven satisfactions of judgment with the Queens County Clerk, and submitted copies of the filed satisfactions. See DE 254 (letter); DE 254-1 (satisfactions of judgment). In a letter dated August 10, 2018, Mr. Bernstein provided a copy of a satisfaction of judgment filed in Queens County with respect to an eighth satisfaction of judgment in favor of plaintiff Getty

Recort. See DE 255 (letter); DE 255-1 (satisfaction of judgment).

Each satisfaction of judgment bears the stamp of the County Clerk, Queens County indicating that the satisfaction had been entered by the Queens County Clerk -- seven satisfactions were entered on August 2, 2018 (DE 254-1) and an eighth was entered on August 8, 2018 (DE 255-1). This Court has examined the satisfactions of judgment submitted and find that they properly dispose of the eight judgments docketed in Queens County noted on the transcripts of judgment filed by defendants. Compare DE 245-2 at 2 (transcript of judgment for Gayle for fees) with DE 254-1 at 2 (filed satisfaction); DE 245-2 at 7 (transcript of judgment for Getty Recourt) with DE 256-1 (filed satisfaction); DE 245-2 at 12 (transcript of judgment for Ramdeo Singh) with DE 254-1 at 3 (filed satisfaction); DE 245-2 at 15 (transcript of judgment for Claudia Gayle) with DE 254-1 at 6 (filed satisfaction); DE 245-2 at 20 (transcript of judgment for Claudia Gayle for fees) with DE 254-1 at 1 (filed satisfaction); DE 245-2 at 25 (transcript of judgment for Yolanda Robinson) with DE 254-1 at 7 (filed satisfaction); DE 245-2 at 30 (transcript of judgment for Jane Burke Hylton) with DE 254-1 at 4 (filed satisfaction); DE 245-2 at 34 (transcript of judgment for Susanna Ajiboye, et al.) with DE 254-1 at 5 (filed satisfaction).

Although defense counsel initially argued (incorrectly) that the satisfactions presented were defective because they had been signed by counsel rather than the plaintiffs (see 8/13/2018 letter (DE 256)), Mr. Liotti later acknowledged in his August 24,

2018 letter that he had confirmed with the Queens County Clerk that the judgments had been satisfied. See DE 258 at 1. However, Mr. Liotti inexplicably now contends that four judgments filed in this Court have not yet been satisfied. Id. As a preliminary matter, this Court notes that there were only three judgments entered in this action, as discussed above. See DE 180, 214 and 226; supra at 2-3. Defendants incorrectly refer to "Judgment 1" as a $619,071.76 judgment dated September 12, 2012 and "Judgment 2" as a $14,780 judgment dated December 31, 2017. See DE 258 at 1 (letter). Although Judge Garaufis awarded damages first to Claudia Gayle in on December 30, 2010 (DE 127 at 12) and then to the other plaintiffs on September 18, 2018 (DE 179 at 10), these damages awards are embodied in a single judgment entered on September 19, 2012. See DE 180. As plaintiffs' counsel correctly points out, satisfactions of judgment for this 2012 Judgment and the two judgments entered in this Court were filed on February 22, 2018. See letter of Jonathan Bernstein filed Aug. 26, 2018 (DE 259) at 1 (noting satisfactions of judgment filed (DE 240)).

Since there are no judgments entered in this action or any judgments docketed in Queens County that remain to be satisfied, that part defendants' motion for sanctions seeking to compel plaintiffs to file satisfactions of judgment is moot. See Westchester v. U.S. Dep't of Hous. & Urban Dev., 778 F.3d 412, 416–17 (2d Cir. 2015) (an action becomes moot when court is not able to grant any relief). Thus, I respectfully recommend that this prong of defendants' motion for sanctions be denied.

Disbursement of Funds to Plaintiffs. The bank statements and copies of checks submitted by Mr. Bernstein, as an officer of the Court, provide persuasive evidence that appropriate funds were disbursed to the plaintiffs. As discussed above, this Court finds from examining these records that the information about the checks listed in Appendix B and plaintiffs' spreadsheets are corroborated by the bank statements, except for three checks listed for 2013 and three in 2015. Accordingly, this Court finds that Levy Davis properly paid plaintiffs the amounts awarded to them by the Court.

Nonetheless, Mr. Liotti persists in his letter filed on August 24, 2018 in arguing that Levy Davis has "double dipped" and asserts that Mr. Bernstein has collected from funds that should have been paid to the plaintiffs a contingency fee in addition to the fees awarded under the federal judgments. See 8/24/2018 Letter (DE 258) at 2. However, other than making this bald assertion that Levy Davis collected a contingency fee, id., defendants have presented no evidence in support other than the affidavits from the four Plaintiff-Affiants. However, Levy Davis has produced copies of checks undermining the statements made in the affidavits that each Plaintiff-Affiants received only one of two checks issued. Defendants have not countered with any further evidence to cast doubt on the accuracy of the checks provided or otherwise to show that the four Plaintiff-Affiants did not actually receive the second check issued to them.

Defendants also have not contested the validity of the letter from Jane Burke Hylton retracting her

statement in affidavit that she received only one check. Although defendants complain that the three other Plaintiff-Affiants have not provided similar letters of retraction, what is more probative is that the other Plaintiff-Affiants have not disputed that they were sent the two checks after that Mr. Bernstein sent copies of them and this Court's order inviting them to respond.

Thus, this Court finds that defendants have not presented sufficient evidence to support this prong of their motion that Levy Davis pocketed monies that should have disbursed to the Plaintiff-Affiants and the other plaintiffs. Accordingly, I respectfully recommend that this second prong of defendants' motion for sanctions be denied.

Last, defendants seek return of any amounts not paid to individual plaintiffs remaining in the escrow account of Levy Davis. See DE 228 at 5. Mr. Bernstein has stated that Levy Davis will file a motion for leave to make a cy pres donation of remaining funds to charity. See DE 232 at 3. Since the question of disposition of the remaining funds in the Levy Davis escrow account has not been properly briefed with legal authority, this Court will issue in an order setting a schedule for disposition of those funds given the passage of time since those amounts were collected.

CONCLUSION

For the foregoing reasons, I respectfully recommend that defendants' motion for sanctions be denied in all respects.

This report and recommendation will be filed electronically. Any objections to this Report and

Recommendation must be filed by September 25, 2018 and a courtesy copy sent to Judge Garaufis. Failure to file objections within the specified time waives the right to appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

SO ORDERED.

Dated: Brooklyn, New York
September 11, 2018

/s/_____
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

[See Foldout Exhibit Next Page]

Appendix A: Chronology of Judgments Entered and Funds Collected

APPENDIX A - Chronology of Judgments Entered and Funds Collected

	A. Date(s)	B. Description	C. Total Judgment	D. Amt. Collected (pg #) DE 228	E. Amount(s) Disbursed*	F. Escrow Balance
1	9/19/2012	DE 180 Judgment	$ 633,851.76			
	1(a)	*Damages to Gayle: $14,780.00*				
	1(b)	*Damages to other plaintiffs: $619,071.76*				
2	11/23/2012	Amount Collected		(83) $ 619,071,76		$ 619,071,76
3	1/2/2013	Amount Collected		(95) 14,780.00		633,851.76
4	1/29-6/17/2013	Checks issued to Plaintiffs*			$ (440,933.83)	192,917.93
5	10/22/2013	DE 214 Judgment	$ 256,678.46			
	5(a)	*Add'l damages to Y.Robinson: $118,512.00*				
	5(b)	*Add'l damages to J. Burke Hylton: $6,512.00*				
	5(c)	*Damages to G. Recort: $1,140.00*				
	5(d)	*Damages to R. Charkar Singh: $ 300.00*				
	5(e)	*Attorneys' fees and costs: $130,214.46*				
6	10/25/2013	Check to attorneys (DE 237-1)			(130,214.46)	62,703.47
7	1/8/2014	Amount Collected		(61) 256,678.46		319,381.93
8	1/24-2/10/2014	Total checks to Plaintiffs*			(288,722.93)	30,659.00
9		Adjustment for uncashed Ogunjana check			653.00	31,312.00
10	1/31-2/28/2015	Total checks to Plaintiffs*			(17,114.96)	14,197.04
11	4/15/2015	DE 226 Judgment (fees and costs)	$ 41,429.17			
12	8/5/2014	Amount Collected		(74) 41,429.17		55 626.21
13	8/21/2015	Check to attorneys (DE 237-1)			(41,429.17)	$ 14,197.04
		TOTAL AMOUNT COLLECTED		$ 931,959.39		

Total Amount disbursed to plaintiffs:* $ 746,118.72 (not including uncashed check to M. Ogunjana)
Unpaid amounts to plaintiffs in escrow: 14,197.04
Total Judgments to Plaintiffs: $ 760,315.76
Total Judgments paid to attorneys: 171,643.63
Total amount Collected : $ 931,959.39

*** See Appendix B**

[See Foldout Exhibit Next Page]

Appendix B: Checks Issued to Plaintiffs (by year)

Appendix B: Checks Issued to Plaintiffs (by year)

NAME		JUDGMENTS 9/12/2012	JUDGMENTS 10/22/2013	CHECKS ISSUED IN 2013 No.	Amt.	Issued	Negotiated	CHECKS ISSUED IN 2014 No.	Amt.	Issued	Negotiated	CHECKS ISSUED AFTER 2014 No.	Amt.	Issued	Negotiated	Total Paid	Amount Unpaid
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
Sussan	Ajiboye	$ 1,380.00	$ -													0.00	$1,380.00
Sulaiman	Ali-El	$ 14,211.90	$ -	16762	$ 8,408.92	3/5/2013	3/7/2013					20374-NYSDTF	$ 5,802.98	5/8/2017	5/10/2017	$ 14,211.90	$0.00
Genevieve	Barbot	$ 640.00	$ -	16650	$ 480.00	1/29/2013	2/4/2013	17624	$ 160.00	1/27/2014	1/31/2014					$ 640.00	$0.00
Margarite	Bhola	$ 585.00	$ -	16649	$ 438.75	1/29/2013	2/27/2013	17625	$ 146.25	1/27/2014	2/11/2014					$ 585.00	$0.00
Jane	Burke Hylton	$ 137,320.00	$ 6,512.00	16667	$ 102,990.00	1/29/2013	2/4/2013	17626	$ 40,842.00	1/27/2014	1/31/2014					$ 143,832.00	$0.00
Ramdeo	Charkar		$ 300.00									18469	$ 300.00	1/23/2015	1/28/2015	$ 300.00	$0.00
Carol	Clunie	$ 3,280.00	$ -	16661	$ 2,460.00	1/29/2013	2/27/2013	17627	$ 820.00	1/27/2014	2/21/2014					$ 3,280.00	$0.00
Mary	Davis	$ 7,677.22	$ -									18788	$ 7,677.22	6/2/2015	6/9/2015	$ 7,677.22	$0.00
Anne	DePasquale	$ 12,946.50	$ -	16651	$ 9,709.87	1/29/2013	2/14/2013	17628	$ 3,236.63	1/27/2014	2/24/2014					$ 12,946.50	$0.00
Niseekah	Evans	$ 122.50	$ -														$122.50
Willie	Evans	$ 33,120.00	$ -	16744	$ 24,840.00	3/1/2013	4/10/2013	17629	$ 8,280.00	1/27/2014	2/3/2014					$ 33,120.00	$0.00
Nathalie	Francois	$ 1,148.76	$ -									18578	$ 1,148.76	3/23/2015	3/30/2015	$	$0.00
Claudia	Gayle	$ 14,780.00	$ -	16647-48	$ 11,085.00	1/28/2013	1/29, 2/6/13	17622	$ 3,695.00	1/27/2014	2/24/2014					$ 14,780.00	$0.00
Michelle	Girvel	$ 1,920.00	$ -	16652	$ 1,440.00	1/29/2013	3/1/2013	17630	$ 480.00	1/27/2014	*1/31/2014**					$ 1,920.00	$0.00
Alexander	Gumbs	$ 490.00	$ -	16653	$ 367.50	1/29/2013	2/4/2013	17631	$ 122.50	1/27/2014	2/4/2014					$ 490.00	$0.00
Lucille	Hamilton	$ 980.00	$ -	16654	$ 735.00	1/29/2013	2/1/2013	17632	$ 245.00	1/27/2014	2/10/2014					$ 980.00	$0.00
Anthony	Headlam	$ 13,668.28	$ -					17621	$ 13,668.28	1/24/2014	1/27/2014					$ 13,668.28	$0.00
Marlene	Hyman	$ 5,292.00	$ -	16655	$ 3,969.00	1/29/2013	1/31/2013	17634	$ 1,323.00	1/27/2014	3/19/2014					$ 5,292.00	$0.00
Henrick	Ledain	$ 33,268.00	$ -	16662	$ 24,951.00	1/29/2013	2/6/2013	17633	$ 8,317.00	1/27/2014	*1/30/2014**					$ 33,268.00	$0.00
Brenda	Lewis	$ 120.00	$ -														$120.00
Annabel	Llewellyn	$ 420.00	$ -	16656	$ 315.00	1/29/2013	2/4/2013	17635	$ 105.00	1/27/2014	2/10/2014					$ 420.00	$0.00
Paulette	Miller	$ 2,380.00	$ -	16657	$ 1,785.00	1/29/2013	2/5/2013	17636	$ 595.00	1/27/2014	1/29/2014					$ 2,380.00	$0.00
Catherine	Modeste	$ 80.00	$ -														$80.00
Lindon	Morrison	$ 45,921.00	$ -	17058	$ 34,440.75	6/17/2013	6/19/2013	17637	$ 11,480.25	1/27/2014	1/30/2014					$ 45,921.00	$0.00
Edith	Mukandi	$ 4,062.66	$ -					17671	$ 4,062.66	2/10/2014	2/18/2014					$ 4,062.66	$0.00
Martha	Ogunjana	$ 653.00	$ -					17638	$ 653.00	1/27/2014						*$ 0.00 **	*$ 653.00**
Merika	Paris	$ 54,042.00	$ -	16658	$ 40,531.50	1/29/2013	2/7/2013	17639	$ 13,510.50	1/27/2014	3/4/2014					$ 54,042.00	$0.00
Merlyn	Patterson	$ 98.00	$ -	16829	$ 73.50	4/1/2013	5/1/2013	17640	$ 24.50	1/27/2014	2/5/2014					$ 98.00	$0.00
Christa	Pierre	$ 390.00	$ -														$ 390.00
Bendy	Pierre-	$ 11,450.04	$ -														$11,450.04
Soucianne	Querette	$ 37,449.86	$ -	16659	$ 28,087.39	1/29/2013	2/9/2013	17641	$ 9,362.47	1/27/2014	2/4/2014					$ 37,449.86	$0.00
Getty	Recourt	$ -	$ 1,140.00					17642	$ 1,140.00	1/27/2014	*2/4/2014**					$ 1,140.00	$0.00
Patricia	Robinson	$ 16,080.00	$ -	16810	$ 12,060.00	3/20/2013	4/8/2013	17643	$ 4,020.00	1/27/2014	2/28/2014					$ 16,080.00	$0.00
Yolanda	Robinson	$ 92,352.00	$ 118,512.00	16665	$ 69,264.00	1/29/2013	2/4/2013	17644	$ 141,600.00	1/27/2014	2/3/2014					$ 210,864.00	$0.00
Maud	Samedi	$ 37,082.04	$ -	16666	$ 27,811.53	1/29/2013	2/4/2013	17645	$ 9,270.51	1/27/2014	2/3/2014					$ 37,082.04	$0.00
Bernice	Sankar	$ 17,488.00	$ -	16663	$ 13,116.00	1/29/2013	1/30/2013	17646	$ 4,372.00	1/27/2014	1/30/2014					$ 17,488.00	$0.00
Lena	Thompson	$ 28,765.50	$ -	16660	$ 21,574.12	1/29/2013	2/4/2013	17647	$ 7,191.38	1/27/2014	2/4/2014					$ 28,765.50	$0.00
Jacqueline	Ward	$ 2,187.50	$ -									18579	$ 2,186.00	3/21/2015	4/9/2015	$ 2,186.00	$1.50
		$ 633,851.76	$126,464.00		$ 440,933.83				$ 288,722.93				$ 17,114.96			$ 746,119.72	*$ 14,197.04**

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

12-4764-cv

[Filed December 8, 2014]

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.*

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 MUKARDI, MARTHA OGUN JANCE, MERLYN PATTERSON, ALEXANDER GUMBS, SEROJNIE BHOG, GENEVIEVE BARBOT, CAROLE MOORE, RAQUEL FRANCIS, MARIE MICHELLE GERVIL, NADETTE MILLER, PAULETTE MILLER, BENDY PIERRE-JOSEPH, ROSE-MARIE ZEPHIRIN, SULAIMAN ALI-EL, DEBBIE ANN BROMFIELD, REBECCA PILE, MARIA GARCIA SHANDS, ANGELA COLLINS, BRENDA LEWIS, SOUCIANNE QUERETTE, SUSSAN AJIBOYE, JANE BURKE HYLTON, WILLIE EVANS, PAULINE GRAY, EVIARNA TOUSSAINT, GERALDINE JOAZARD, NISEEKAH Y. EVANS, GETTY	)

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.[**]

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.*).

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

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 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 of Court