UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ORETHA BEH, RUBY CASON, BRIANA KINCANNON, and KIMBERLY BALKUM, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

COMMUNITY CARE COMPANIONS INC., ALEXANDER J. CARO, MARK GATIEN, INTERIM HEALTHCARE OF ROCHESTER, INC., and JAMES WATSON,

Defendants.

1:19-CV-01417- JLS (MJR)

REPORT and RECOMMENDATION

INTRODUCTION

This case has been referred to the undersigned by the Honorable John L. Sinatra, Jr., pursuant to Section 636(b)(1) of Title 28 of the United States Code, for all pretrial matters and to hear and report on dispositive motions for consideration by the District Court. Before the Court is a motion for approval of notice to Rule 23 class members (Dkt. No. 565), and a motion for leave to maintain an FLSA collective action (Dkt. No. 572), brought by plaintiffs Oretha Beh and Kimberly Balkum. Also before the Court is a counter motion to decertify the FLSA collective action (Dkt. No. 577), motion to decertify the Rule 23 class (Dkt. No. 601), and motion for summary judgment as to plaintiff's individual, class, and collective claims (Dkt. No. 608), brought by defendants Community Care Companions, Inc., Alexander J. Caro, and Mark Gatien. Lastly, before the Court are two motions to strike brought by defendants (Dkt. Nos. 591; 639), and three motions to strike brought by plaintiffs (Dkt. Nos. 587; 620; 651).

For the following reasons, it is recommended that plaintiffs' motion for approval of notice to class members (Dkt. No. 565) be granted; that plaintiffs' motion for leave to maintain an FLSA collective action (Dkt. No. 572) be granted; that defendants' counter motion to decertify the collective action (Dkt. No. 577) be denied; that defendants' motion to decertify the Rule 23 class action (Dkt. No. 601) be denied; that defendants' motion for summary judgment (Dkt. No. 608) be denied; and that plaintiffs' and defendants' motions to strike (Dkt. Nos. 587; 591; 620; 639; 651) be denied.

BACKGROUND and PROCEDURAL BACKGROUND[1]

Plaintiffs Oretha Beh, Ruby Cason, Briana Kincannon, and Kimberly Balkum ("plaintiffs" or "named plaintiffs") commenced this lawsuit against defendants Community Care Companions Inc. ("CCC"), Alexander J. Caro, Mark Gatien, Interim Healthcare of Rochester, Inc., and James Watson (collectively "defendants"). Plaintiffs are home care workers who have alleged that defendants violated the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, ("FLSA"), New York Codes, Rules and Regulations, 12 NYCRR § 142-2.2, and New York Labor Law, NYLL §§ 190, *et seq.*, relative to overtime compensation, wage payment, reimbursement of expenses, and employer notice provisions. (Dkt. No. 1). Plaintiffs sought to bring both an FLSA collective action under 29 U.S.C. § 216(b), and a class action under Rule 23 of the Federal Rules of Civil Procedure. (*Id.*). Following the Court's denial of a motion to dismiss (Dkt. No. 235), plaintiffs filed a second amended complaint on February 3, 2019, which is now the operative pleading. (Dkt. No. 242).

[1] Because the Court assumes familiarity with the factual background and extensive procedural history in this case, only facts relevant to the instant motions are included here. For a review of the past case history and allegations of the complaint, the Court refers to its prior Report and Recommendation dated September 29, 2022. (Dkt. No. 487).

Plaintiffs previously moved for certification of a Rule 23 class action based on defendants' alleged violations of NYCRR § 142-2.2 and NYLL §§ 198(3), 195(a) and 191(1)(a). (Dkt. Nos. 400-407). Plaintiffs' motion for class certification was granted in part and denied in part by the District Court based on the Report and Recommendation of this Court. (Dkt. Nos. 487; 505). The class certified by the District Court was defined as:

> All persons employed by CCC as home care workers in the Western District of New York on or after October 14, 2017 but on or before January 3, 2020 (exclusive of any persons who have filed an Acceptance of an Offer of Judgment in this action) who were not paid wages by CCC within seven (7) calendar days of the end of each workweek in which the wages were earned.

(Dkt. No. 505). Following the class certification decision, the Court entered a Case Management Order setting deadlines for merits-phase discovery on the FLSA and NYLL claims, FLSA collective action certification motions, and dispositive motions. (Dkt. No. 514).

On June 24, 2024, plaintiffs moved for Court approval of a Notice of Class Certification to be distributed to the approved Rule 23 class members. (Dkt. No. 565). Defendants filed a response in opposition to the motion (Dkt. No. 568), and plaintiffs filed a reply (Dkt. No. 569).

On August 7, 2024, plaintiffs filed a motion for leave to maintain an FLSA collective action. (Dkt. Nos. 572). On the same date, defendants filed a counter motion to decertify the conditionally certified FLSA collective action. (Dkt. Nos. 577). Defendants filed a response in opposition to plaintiffs' motion (Dkt. No. 590), and plaintiffs filed a response in opposition to defendants' counter motion (Dkt. No. 585). Defendants filed a reply (Dkt. No. 626), as did plaintiffs (Dkt. No. 673).

Additionally, plaintiffs move to strike declarations filed by defendants in support of their motion to decertify the FLSA collective action. (Dkt. Nos. 587; 620). Defendants responded to the motions to strike (Dkt. Nos. 628; 635), and plaintiffs replied (Dkt. Nos. 630; 654). Defendants also move to strike declarations by plaintiffs in support of their motion to maintain the FLSA collective action and in opposition to the counter motion to decertify the collective action. (Dkt. Nos. 591; 639). Plaintiffs responded to the motions to strike (Dkt. Nos. 618; 658), and defendants replied (Dkt. No. 632).

On October 2, 2024, defendants filed a motion to decertify the Rule 23 class. (Dkt. No. 601). Plaintiffs filed a response in opposition. (Dkt. No. 647). Defendants filed a reply. (Dkt. No. 662). Also on October 2, 2024, defendants filed a motion for summary judgment on plaintiff's claims. (Dkt. No. 608). Plaintiffs filed a response in opposition. (Dkt. No. 641). Defendants filed a reply. (Dkt. No. 663).

Lastly, plaintiffs move to strike declarations filed by defendants in support of their motion to decertify the Rule 23 class and motion for summary judgment. (Dkt. No. 651). Defendants responded to the motion to strike (Dkt. No. 659), and plaintiffs replied (Dkt. No. 666).

The Court heard oral argument as to the motion for approval of notice to class members, motion to maintain an FLSA collective action, and counter motion to decertify the FLSA collective on October 22, 2024.[2] The parties submitted supplemental briefing on December 4, 2024. (Dkt. Nos. 672; 673).

[2] At that time, the Court advised the parties that it would reserve its decision on these motions until briefing and oral argument on defendants' pending motion for summary judgment and motion to decertify the Rule 23 class was concluded.

The Court heard oral argument as to defendants' motion for summary judgment and motion to decertify the Rule 23 class on December 4, 2024. The Court requested additional briefing which was subsequently filed by both parties. (Dkt. Nos. 674; 676 – 680). At that time, the Court considered each of the pending motions submitted for decision.

DISCUSSION

The Court begins its discussion with defendants' motion for summary judgment on plaintiffs' individual, class, and collective claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on plaintiffs' remaining claims for overtime compensation under the Fair Labor Standards Act and untimely payment of wages under the New York Labor Law. (Dkt. No. 615). In the alternative, defendants seek a finding that defendants' acted in good faith in the recording of work time and paying of wages and that the Court grant summary judgment as to any claim for liquidated damages. (*Id.*). Defendants also seek a finding that defendants Caro and Gatien are not individually liable as "employers" of plaintiffs under the applicable wage statutes. (*Id.*).

1) Material Facts[3]

Defendant Community Care Companions Inc. ("CCC") is a home care and nurse staffing agency that specializes in hourly and live-in care. (Dkt. No. 614, ¶ 1). Plaintiffs were employed by CCC in the title of personal care assistants ("PCAs") and home health

[3] The facts described herein are taken from the pleadings, motion papers, statement of undisputed facts, and exhibits filed in this lawsuit. When citing a proposed fact within defendants' statement of material facts (Dkt. No. 614), the Court has confirmed that plaintiffs' responding statement (Dkt. No. 642) either admits the fact or fails to specifically controvert it with evidence. *See* W.D.N.Y. L.R. Civ. P. 56(a).

aides ("HHAs"), collectively referred to as "aides." (Id., ¶ 3). CCC aides – including all plaintiffs – work in the field, as they provide services to patients in individual and group residences throughout the Buffalo and Rochester areas. (*Id.*, ¶ 11).

Plaintiffs worked out of CCC offices located in Buffalo and Rochester from approximately October 2017 to February 2021. (*Id.*, ¶ 4; Dkt. No. 642, ¶ 4). Each office was staffed with a branch manager, scheduling coordinators, and payroll personnel. (Dkt. No. 614, ¶ 5). Each office was responsible for the scheduling of aides and processing time and pay at the branch. (*Id.*, ¶ 6). CCC maintains a corporate office in Smithtown, New York. (*Id.*, ¶ 9). The parties dispute when CCC first ran payroll for employees in Buffalo and Rochester. (*Id.*, ¶ 10; Dkt. No. 642, ¶ 10).

Plaintiff Beh worked her last shift for CCC on May 20, 2020. (Dkt. No. 614, ¶ 12). Plaintiff Balkum worked her last shift for CCC on January 18, 2019. (*Id.*, ¶ 13). The parties dispute when plaintiffs Beh and Balkum each worked their first shift for CCC. (*Id.*, ¶¶ 12-13; Dkt. No. 642, ¶¶ 12-13).

There are currently 56 opt-in plaintiffs in this case. (Dkt. No. 614, ¶ 14). There are 41 opt-ins remaining who worked for CCC and did not accept an Offer of Judgment pursuant to Fed. R. Civ. P. 68.[4] (*Id.*). Plaintiffs assert FLSA collective action claims on

[4] The 41 remaining opt-in plaintiffs who were employed by CCC are as follows: (1) Shanequa Austin; (2) Vernetta Brown; (3) Connie Burnett; (4) Jamika Cameron; (5) Raychelle Carmichael; (6) Gloria Chambers; (7) Ashley Cohen; (8) Linda Eaton; (9) Chanell Edwards; (10) Frances Gregg; (11) Sheri Harrison; (12) Tonya Hawkins; (13) Jacquline Hill; (14) Brian Hilton; (15) Catarra Howard; (16) Erica Huntley; (17) Tan'Ya Jackson; (18) Yolanda Lathrop; (19) Angella Ledgister; (20) Cynthia McAllister; (21) Veronica Mongeon; (22) Adeline Montgomery; (23) Jazmine Moss; (24) Denaijah Murray; (25) Kimberly Owes; (26) Teresa Palmo; (27) Markeshia Robbins; (28) Deonne Rudolph; (29) Alexus Scott; (30) Zaire Snow; (31) Ashley Taylor; (32) Wendolynne Thomas; (33) Helen Thornton; (34) Melika Usher; (35) Laticia Walker; (36) Tinesha Warren; (37) Ashley Washington; (38) Lorraine Williams; (39) Rina Wisotzke; (40) Velma Brinson; and (41) Daisy Ortiz. (Dkt. No. 614, ¶ 14).

behalf of 30 opt-ins, including plaintiffs Balkum and Beh.[5] (Dkt. Nos. 614, ¶ 16; 642, ¶ 16; Dkt. No. 576, pgs. 17-18). Plaintiffs also assert a late pay claim under NYLL § 191 on behalf of a Rule 23 class that includes over 1,100 class members who received at least one payment of wages more than seven days after the end of the workweek in which it was earned, during the relevant period. (Dkt. No. 614, ¶ 17).

CCC's payroll workweek ran from Saturday to Friday, and the regular payday for aides was the following Friday. (*Id.*, ¶ 18). CCC required aides to submit their time worked to their local office each week. (*Id.*, ¶ 19). The Buffalo and Rochester offices required aides to submit time slips by noon each Monday, though the time may have fluctuated by one or two hours during the relevant time period. (*Id.*, ¶ 20; Dkt. No. 642, ¶ 20). CCC states that it imposed the Monday deadline for submission of time slips because CCC was required to submit payroll data to its vendor, Viventium, by Wednesday each week. (Dkt. No. 614, ¶ 21). Plaintiffs dispute the reason the Monday deadline was imposed and whether submission of timesheets by employees was necessary for CCC to process payroll. (Dkt. Nos. 614, ¶¶ 22-23; Dkt. No. 642, ¶¶ 22-23). Time slips were generally accepted and CCC compensated aides for time reported, regardless of submission before or after the Monday deadline. (Dkt. No. 614, ¶ 24).

[5] The opt-in plaintiffs currently pursuing FLSA overtime compensation claims are as follows: Frances Gregg (Dkt. No. 20); Daisy Ortiz (Dkt. No. 27); Yolanda Lathrop (Dkt. No. 31); Zarie Snow (Dkt. No. 33); Cynthia McAllister (Dkt. No. 46); Rina Wisotzke (Dkt. No. 54); Velma Brinson (Dkt. No. 60); Laticia Walker (Dkt. No. 69); Tonya Hawkins (Dkt. No. 75); Ashley Washington (Dkt. No. 76); Denaijah Murray (Dkt. No. 82); Adeline Montgomery (Dkt. No. 143); Raychelle Carmichael (Dkt. No. 153); Brian Hilton (Dkt. No. 155); Jamika Cameron (Dkt. No. 170); Alexus Scott (Dkt. No. 177-2); Teresa Palmo (Dkt No. 187-1); Deonne Rudolph (Dkt. No. 179-8); Helen Thornton (Dkt. No. 179-9); Vernetta Brown (Dkt No. 180); Sheri Harrison (Dkt No. 180-2); Ashley Cohen (Dkt. No. 186-1); Gloria Chambers (Dkt. No. 207); Jazmine Moss (Dkt. No. 208); Wendolynne Thomas (Dkt. No. 209); Tanya Jackson (Dkt. No. 213); Connie Burnett (Dkt No. 217); and Lina Eaton (Dkt. No. 218). (Dkt. No. 614, ¶ 16).

Under CCC's policy or practice, an Employee Handbook and Supplemental Policies document was to be issued to each aide at the outset of their employment. (Dkt. No. 614, ¶ 25; Dkt. No. 642, ¶ 25). CCC required aides to accurately record and report to CCC all time worked each week pursuant to written company policy. (Dkt. No. 26). CCC's handbook policy states:

> All non-exempt employees are responsible to fill out a time slip on a daily basis. Time slips must be completed accurately for each client and must be submitted along with the appropriate client charting with all required signatures in order for pay to be processed.

(*Id.*, ¶ 27). CCC's Supplemental Policies instructed aides to "clock in/out on a daily basis and for each client," to retain a copy of their paper time slips, and to timely submit their paper time slips. (*Id.*, ¶ 28). The Supplemental Policies further state that "[a]ll time slips are due by Monday at 12:00 P.M. in order for employees to receive their paycheck that week. Any delay in providing us with the time slip by that time will result in a delay in getting the paycheck processed." (*Id.*, ¶ 30). The Supplemental Policies instructs aides to call their local office or the on-call hotline if "[t]he client asks you to work longer than your assigned times. All additional time worked must be approved by the office." (*Id.*, ¶ 32). Other guidance instructed aides not to call the on-call hotline unless they had an emergency. (Dkt. No. 642, ¶ 32).

From either October or November 2017 (the exact date is disputed) to September 2018, CCC used the Riversoft platform – a homecare software system. (Dkt. No. 614, ¶ 33; Dkt. No. 642, ¶ 33). From October 2018 through February 2021, CCC used the HHAeXchange ("HHAX") homecare software platform. (Dkt. No. 614, ¶ 34). Both systems contained most information related to CCC's business of servicing patients and permitted CCC to manage those services, schedule visits, and track aides' hours and activities. (*Id.*,

¶ 35). Once local offices inputted the details for a patient into Riversoft or HHAX and an aide was assigned to a shift, that information became part of a master schedule in Riversoft or HHAX. (*Id.*, ¶ 36). The master schedule contained the details for each scheduled shift, each patient, and each aide assigned, including the shift dates, times, patient names, locations, and rate of pay. (*Id.*, ¶ 37).

From a disputed date in 2017 until October 2018, paper time slips were the exclusive method by which aides could report their time to CCC. (*Id.*, ¶ 38; Dkt. No. 642, ¶ 38). Blank time slips were provided to aides by the local office. (Dkt. No. 614, ¶ 39). Each time slip had two carbon copies attached to the original. (*Id.*, ¶ 40). Aides were directed by CCC to retain a carbon copy of each time slip for their own records after submitting the original to their local CCC office. (*Id.*, ¶ 41). Each time slip could only contain the aide's time for one patient; if multiple patients were serviced in a workweek, the aide was required to submit a different time slip for each patient, though multiple days' time for the same patient could be included in a single time slip. (*Id.*, ¶ 42). CCC's local branch staff communicated, verbally and in writing, to aides the requirement to submit time by the Monday deadline during aides' orientation training, prior to aides working a shift, and during mandatory annual training. (*Id.*, ¶¶ 43-44). Aides submitted their time slips by placing them in a locked drop box outside of the local office or other location, by mailing or faxing them, or by dropping them off in-person. (*Id.*, ¶¶ 45-47; Dkt. Nos. 642, ¶¶ 45-47). The drop boxes were available to aides for time slip submission 24 hours per day and 7 days per week. (Dkt. No. 614, ¶ 48).

Between October and November 2018, the Buffalo and Rochester officers moved from the Riversoft platform to the HHAX platform. (*Id.*, ¶ 614, ¶ 49; Dkt. No. 642, ¶ 49).

Starting in October 2018, aides could submit their time electronically, through several methods in the HHAX system, as well as through paper slips. (Dkt. No. 614, ¶ 50). HHAX contained three methods of electronic time reporting (also known as "EVV") available to aides through or by: (1) the HHAX mobile App; (2) calling into HHAX from their mobile device; or (3) using a fob and calling from the patient's landline phone. (*Id.*, ¶ 51). CCC provided training to aides on each of these EVV methods, including how to use the EVV methods, and how to use and submit paper time slips. (*Id.*, ¶ 52). The parties dispute whether CCC "encouraged" or "required" aides to switch from paper time slips to EVV. (*Id.*, ¶ 53; Dkt. No. 642, ¶ 53).

If an aide encountered problems with time reporting, including EVV, CCC instructed aides to immediately call their local office. (Dkt. No. 614, ¶ 56). The parties dispute whether aides were instructed to call the on-call assistance hotline for a time reporting problem. (*Id.*; Dkt. No. 642, ¶ 56). If an aide had problems reporting time via EVV, they had to submit a paper time slip for that shift. (Dkt. No. 614, ¶ 57). More specifically, aides were instructed to "come to the office, collect a timesheet, go to the patient's home, get signatures and [then] return it back." (Dkt. No. 624, ¶ 57). The HHAX system allowed CCC to send messages to aides' cell phones and to provide reminders about time slip submissions and work assignments. (Dkt. No. 641, ¶¶ 58-59).

Each Monday afternoon, the local offices began collecting and collating paper time slips, including those placed by aides in the drop boxes. (Dkt. No. 614, ¶ 61). The parties dispute the frequency with which CCC staff checked the drop boxes each day and whether staff always returned to the drop box when an aide alerted them of an additional time slip submission outside of the window provided. (*Id.*, ¶ 62; Dkt. No. 642, ¶ 62).

Although staff testified that time slips were submitted by aides after the Mondays on which they were due, there are no records of when any aide submitted a time slip. (*Id.*, ¶¶ 64, 82).

Once time slips were collected Monday afternoons, CCC's local offices arranged the time slips in alphabetical order by patient and inputted them into the Riversoft or HHAX system, depending on the time period. (Dkt. No. 614, ¶ 63). Once organized, office staff began processing the time slips by entering the data into Riversoft or HHAX. Staff inputted the reported start and end times and the patient charting from the time slips. (*Id.*, ¶ 66). Any shifts that were reported via EVV were automatically integrated in the HHAX database. (*Id.*, ¶ 67). Next, each office began the process of identifying and resolving discrepancies related to time submissions. To do this, the offices ran a report in Riversoft or HHAX (depending on the time period) called a Pre-Billing Report (the "Report"), which was populated only with shifts for that workweek which contained discrepancies or had other issues. (*Id.*, ¶ 68). The Report showed each shift that had a variance in time reported versus scheduled, and included shifts containing other issues that prevented Riversoft or HHAX from showing it as a confirmed, or verified, shift. (*Id.*, ¶ 69).

CCC considered the shifts contained in the Reports as "unconfirmed" and in need of verification or resolution of issues in order to be compensable. (*Id.*, ¶ 70). A shift might show as unconfirmed in the Report for various reasons, including incomplete information, conflicting information with the master schedule, or a caregiver's noncompliance with NYS Department of Health requirements (i.e., a license or training requirement). (*Id.*, ¶ 72). Examples of incomplete information, include no time being reported by the aide, time slips that omit a clock in or clock out time, or a time slip missing the aide's signature. (*Id.*,

¶ 73). Conflicting information included, for example, two aides reporting overlapping time for the same patient which should not occur, the aide working different hours than those assigned in the master schedule without permission, or an aide submitting time for a shift not contained in the master schedule. (*Id.*, ¶ 74).

Pre-Billing Reports were run multiple times each week, typically beginning on Monday. (*Id.*, ¶ 75; Dkt. No. 642, ¶ 75). Just because a shift appeared on a Report does not mean that the aide was paid late for the visit. (Dkt. No. 614, ¶ 76). The parties dispute whether CCC attempted to resolve issues in the Reports prior to the Wednesday deadline to submit payroll data to Viventium. (*Id.*, ¶ 77; Dkt. No. 642, ¶ 77). Rochester Payroll Specialist Delilah Cruz attested that payroll sometimes did not even finish their initial review of the timesheets until Wednesday. (*Id.*). It is undisputed though, that local branch staff spent substantial time each week calling each aide who had a shift on the Report, in attempts to resolve whatever issue was preventing the shift from being confirmed. (*Id.*, ¶ 78). The parties further dispute the policies and practices used by CCC for resolving issues or verifying shifts worked by aides. (*Id.*, ¶ 79). If no time slip or EVV had been submitted, the aide typically had to submit a time slip for that shift. (Dkt. No. 614, ¶ 80). In the event of a lost time slip, the parties dispute whether CCC accepted a carbon copy of the slip or mandated a new original time slip be submitted, thus requiring an aide to go to a client and have the client sign a new time slip. (*Id.*, ¶ 81; Dkt. No. 642, ¶ 81).

Sometimes a glitch in HHAX's EVV system caused a missed time entry due to faulty geo-monitoring or other errors. (Dkt. No. 614, ¶ 85). Sometimes EVV time submissions were not "accepted" by HHAX. (*Id.*, ¶ 83-84). Plaintiffs assert that the glitches were a frequent and ongoing problem, and that even when an EVV time submission was

"accepted" by HHAX, on more than 1,000 occasions, aides were still not timely paid for their work. (Dkt. No. 642, ¶¶ 84; 85). When glitches arose with HHAX, CCC instructed aides to use a paper time slip, call their coordinator, and/or the on-call assistance line. (Dkt. No. 614, ¶ 86).

Sometimes CCC paid aides for work at a lower rate than had been agreed to for a particular shift, resulting in a retroactive change and additional compensation being paid after the regular payday. (*Id.*, ¶ 87; Dkt. No. 642, ¶ 87). In such situations, the aide would have received compensation for all hours worked on a timely basis, but an additional amount was subsequently paid once CCC made the rate change. (*Id.*). The parties dispute the number of these instances and whether the additional amounts were "small." (*Id.*). The parties also dispute the reason or reasons such wrong rate errors occurred. (*Id.*).

As CCC's local offices resolved issues on the Report, they updated the information in the Riversoft or HHAX system to mark the shift as a confirmed visit which would be paid. As subsequent Reports were run each day, they included less shifts, since the confirmed shifts no longer appeared on the Report. (Dkt. No. 614, ¶ 88). Reports were not retained in hard copy or via electronic means. Once a shift was verified, there would be no record of the shift having previously been on the Report, besides the printed Report which CCC shredded once an updated Report was printed. (*Id.*, ¶ 89). Depending on the nature of the issues and resolution, notes may or may not have been entered into the Riversoft or HHAX system. (*Id.*, ¶ 90). CCC staff were required to make a note whenever a timesheet was missing, when a shift was missing from a timesheet, or when an aide

failed to clock in or out electronically and had to be contacted by a coordinator. (Dkt. No. 642, ¶ 90).

CCC would sometime call aides to confirm their time or obtain additional information or documentation. (Dkt. No. 614, ¶ 91). Delays in confirming shifts resulted in delayed payments for those shifts. (*Id.*). The parties dispute whether aides frequently failed to respond to CCC's phone calls for long periods of time. (*Id.*; Dkt. No. 642, ¶ 91). Plaintiff also cites evidence reflecting that any variance between an aides' reported time and their scheduled shift could not be resolved by a phone call with the aide because CCC's policy or practice was to not pay the aide until CCC reached the patient and confirmed the reported work time with the patient. (*Id.*).

If processing of a given aide's time did not occur prior to the Wednesday deadline for CCC to submit payroll, aides had the option of being immediately provided a non-payroll check. (Dkt. No. 614, ¶ 95). The parties dispute whether issuance of manual checks was a "regular practice" for time issues. (*Id.*, ¶ 96-97; Dkt. No. 642, ¶ 96-97). There is no dispute that CCC required timesheets to be "verified" before they issued payment for them, even with manual checks. (*Id.*).

CCC's Buffalo and Rochester offices provided training to aides concerning time recording practices and policies, including how to use the HHAX application, how to use the various methods of EVV, and how to complete and submit a paper time slip. (Dkt. No. 614, ¶ 100). Aides were instructed verbally, and in writing, to record all time they work and to contact a coordinator immediately if they were having issues clocking in or clocking out. (*Id.*, ¶ 102-103).

CCC's management was aware of the requirement to promptly pay aides. (Id., ¶ 104). The parties dispute whether regular meetings were held by management with branch managers to address timekeeping and pay issues to prevent delayed payments. (*Id.*; Dkt. No. 642, ¶ 104).

CCC's Employee Handbook and Supplemental Policies contained provisions for overtime policy and payment of overtime wages. The Employee Handbook provides:

> All non-exempt employees who work more than forty (40) hours in one workweek are entitled to receive overtime pay computed at the rate of 1 and 1/2 times the employee's regular hourly rate for all hours worked in excess of forty (40) in any one workweek. Only those hours that are actually worked are added together to determine an employee's overtime pay.

(Dkt. No. 614, ¶ 107-108).

Beginning in October 2018, CCC programmed the HHAX system to compensate Aides for travel time between shifts when there was one hour or less between the end of the first shift and start of the second shift. (*Id.*, ¶ 110). Plaintiffs specify that CCC did not automatically compensate aides for such time, instead CCC staff had to run a travel report in HHAX in order for the aides to be paid for their travel time between those two shifts. (Dkt. No. 642, ¶ 110). CCC also compensated aides for travel time based on individual arrangements. (*Id.*, ¶ 111). From October or November 2017 to September 2018, CCC used the Riversoft system. During this period, CCC compensated aides for travel time based only upon individual arrangements. (*Id.*, ¶ 112).

Named and opt-in plaintiffs travelled between clients using various modes of transportation, including personal vehicles, buses, taxis, Uber, and walking. (*Id.*, ¶ 113-114). Depending on the amount of time between shifts, plaintiffs travelled directly or indirectly between clients. (*Id.*, ¶ 116-118).

All plaintiffs are HHAs, PCAs, or both, and worked under at least one of these certifications while employed by CCC. (Dkt. No. 614, ¶ 119). CCC required that all PCAs and HHAs working for it obtained a certification to work under that title, which included required training. (*Id.*, ¶ 120). New York State regulations require certification to become an HHA and PCA. (*Id.*, ¶ 122). The New York State Department of Health ("DOH") requires an individual to complete certain DOH-approved training and competency evaluations prior to being certified as a PCA or HHA. (*Id.*, ¶ 123). PCA's must preliminarily complete at least 40 hours of training from a DOH-approved program to be eligible to sit for a competency evaluation. (*Id.*, ¶ 124). HHA's must complete at least 75 hours of training before they are permitted to sit for the applicable certification exam. (*Id.*, ¶ 125). After certification, PCAs and HHAs were required to complete 12 hours of in-service training each year to maintain the certification.[6] (*Id.*, ¶ 137).

During training for certification as a PCA and HHA, individuals are trained on and practice specific skills needed to safely provide care for patients in a home setting. (*Id.*, ¶ 128). These skills include, but are not limited to, meal preparation and nutrition; safety and injury prevention; infection control (such as washing hands and other hygienic practices); how to safely position patients in bed or other seating situations; assist patients with walking; provide oral care and hygiene, (i.e., brushing teeth and denture care); make a bed, sometimes with a patient in it; dress and undress patients; bathe patients; assist patients with using the restroom; hold and lift objects when interacting with patients; use a Hoyer Lift; assist with ambulation and transfers; and groom patients as needed. (*Id.*, ¶

[6] The parties dispute whether DOH or CCC required said annual training. (Dkt. No. 614, ¶ 137; Dkt. No. 642, ¶ 137). It is undisputed that CCC provided mandatory training to aides on topics including reporting potential health issues, providing proper skin care, assisting with toileting, nutritional intake, and infection control measures. (*Id.*, ¶ 140-141).

129). In addition, CCC aides performed cleaning tasks such as washing and putting away dishes and cleaning up living spaces. (Dkt. No. 642, ¶ 129). HHA aides received additional training beyond what PCAs receive, including communicating with a patient's assigned nurse, observing and reporting bruises or skin issues to nurses, emptying a catheter bag, assisting patients with medication and oxygen administration, and taking vital measurements. (Dkt. No. 614, ¶ 131; Dkt. No. 642, ¶ 129-131).

The parties dispute whether aides were responsible for the health and welfare of CCC's patients. (*Id.*, ¶ 146). Defendants rely on evidence showing that a critical part of each aide's skillset and training is to identify and address potential health issues, including signs of infections, marks, bruising, and to ensure patients take the correct mediation at the appropriate time. (Dkt. No. 614, ¶¶ 148-150). Plaintiffs refer to evidence showing that aides had very limited training regarding identifying potential health issues, and were instead trained to call the office or a nurse if they saw a patient or client's condition changing. (Dkt. No. 642, ¶¶ 148-150). They were tasked only with reminding clients to take their medication and handing them a pre-filled medication case ("Mediset"). (*Id.*, ¶¶ 131, 150). The parties agree that CCC creates a plan of care for each patient or client. (Dkt. No. 614, ¶ 151). The plan of care is established by a registered nurse and designates tasks which an aide is permitted or required to perform when caring for that patient. (*Id.*, ¶ 152-153).

Defendants Alexander J. Caro and Mark Gatien purchased CCC in 2007. (*Id.*, ¶ 158). Caro and Gatien are each 50% owners of the business. (*Id.*, ¶¶ 2, 160). Caro has been CCC's President since 2007. (*Id.*, ¶ 161). Gatien has been CCC's Vice President

since 2007. (*Id.*, ¶ 189). Caro and Gatien are the only members on CCC's Board of Directors. (*Id.*, ¶ 188).

The parties dispute Caro's level of involvement in the business. Caro testified that he acts only as a financial party or investor, never operated CCC on day-to-day basis, and spent less than 10% of his time on the business. (*Id.*, ¶ 162-163). He states he reviewed profit and loss statements each month and looked at company tax returns. (*Id.*, ¶ 164-165). He does not know who decided rates of pay for CCC employees, he was not involved in setting pay rates or hiring aides, and was not involved with the payroll or accounting systems. (*Id.*, ¶ 167-170). He has never set or changed aides' wages or benefits, and does not know if he has the authority to do so. (*Id.*, ¶ 174). He has no knowledge of higher pay rate practices for certain shifts or holidays, no knowledge of the timekeeping apps used by CCC, and no knowledge of who aides reported to, who approved their overtime, or who disciplined them. (*Id.*, ¶ 175-176, 180-181). He did recall signing on behalf of CCC for a loan once. (*Id.*, ¶ 178). Caro stated he was not responsible for hiring or firing in the business. (*Id.*, ¶ 184). He went to the Rochester and Buffalo offices one time during the relevant period, but did not meet the branch managers or chief operating officer at CCC during the relevant period. (*Id.*, ¶ 186-187).

Plaintiffs rely on contrary evidence suggesting that Caro's involvement was more significant than claimed by defendants. Gatien testified that he and Caro "ran [CCC] together". (Dkt. No. 642, ¶ 162). Caro's tax returns reflect that he spent 50% of his time working on CCC business. (*Id.*). Under CCC's bylaws, Caro had "general charge of the entire business of the corporation." (*Id.*). Caro had authority to enter into contacts and did so during the relevant period. (*Id.*). He put together the "entire deal" to purchase Interim

Healthcare's operations in Buffalo and Rochester. (*Id.*). He negotiated CCC's worker's compensation policy contracts, and either Caro or Gatien signed leases for the Buffalo and Rochester offices. (*Id.*). Caro participated in decisions regarding terminating, disciplining, and demoting "C-suite" employees. (*Id.*). Caro and Gatien made decisions together about CCC's overtime policies applicable to HHAs and PCAs. (*Id.*). Caro was "primarily responsible for the finance side of the business," meaning that he regularly reviewed CCC's financial reports, including profit and loss statements, accounts payable, and accounts receivable. (*Id.*). Caro and Gatien examined how much money the company spent on wages and overtime, including an instance where Caro and Gatien observed that overtime costs were "taking profit from the business," and directed that overtime costs be decreased. (*Id.*). When Caro had questions about financial reports, he sometimes asked for, and reviewed, more detailed reports, such as reports showing the amount of travel time paid to aides at each of CCC's branches, including Buffalo and Rochester. (*Id.*). Caro and Gatien were the only two authorized signatories of the bank account CCC utilized to pay bills, payroll, vendors, accounts and other expenses or costs or fees associated with CCC's operations in Buffalo and Rochester. (*Id.*).

The parties also dispute Gatien's level of involvement in the business. It is undisputed that Gatien was the "hands-on" daily operator of CCC from 2007 to October 2017. (Dkt. No. 614, ¶ 190). However, defendants rely on evidence showing that following the acquisition of Interim Healthcare, CCC had a larger structure and Gatien was not involved in day-to-day business. (*Id.*). Gatien was responsible for acquisitions and mergers, attending conferences, growing and marketing the business, and high-level oversight. (*Id.*, ¶ 191). Gatien assisted with initial contact meetings with potential referral

sources, but that was the extent of his involvement in operations. (*Id.*, ¶¶ 191-192). A small group of directors reported to him on high-level issues, which typically included the chief financial officer, chief operations officers, and vice president of human resources. (*Id.*, ¶ 195). The CFO, COO, VP of HR, Gatien and Caro, would meet as needed to discuss the business. Potential candidates for jobs may have been discussed but those were limited to higher level positions. (*Id.*, ¶ 196). Gatien's signature appears on aides' paychecks. (*Id.*, ¶ 202). Gatien reviewed payroll after it had already been finalized and reviewed by accounts payable in their payroll department, to ensure there were no mistakes. (*Id.*, ¶ 203). Gatien did not schedule aides' work time. (*Id.*, ¶ 216). He had little involvement in the transition to HHAX timekeeping system and had no familiarity with the timekeeping app. (*Id.*, ¶¶ 220-221).

Plaintiffs relies on contrary evidence suggesting that Gatien's involvement was more significant than claimed by defendants. Despite the claim that his role changed in 2007, Gatien has testified that he was the "hands-on, daily in charge operator of all CCC divisions and services" during the relevant period. (Dkt. No. 642, ¶ 190). He was involved in CCC's billing and payroll. He reviewed and signed all CCC checks, including for payments to vendors and payroll checks for employees. (*Id.*, ¶ 192). He secured and negotiated contracts for the business. (*Id.*, ¶ 193). Although Gatien claims "C-suite" employees only reported to him on "high level issues," on at least one occasion Gatien received a list of PCAs and HHAs whose timesheets were missing information. (*Id.*, ¶ 195). In response, Gatien directed that coordinators should call the aides to obtain the missing information so that they could be paid for the work recorded on the timesheets. (*Id.*). Gatien was also directly involved in reviewing and revising the wording of text

message reminders that were sent to aides to remind them to submit electronic timesheets. (*Id.*). Further, when Caro and Gatien determined that there was "an overtime problem in Buffalo," Gatien testified that he "would have the conversation with the COO or CFO and then they would address it." (*Id.*). Gatien was also involved in hiring at the branch-level through approvals of certain employees. (*Id.*, ¶ 206).

From 2018 through 2020, CCC contracted with Portnoy, Messinger, Pearl & Associates, P.C. ("PMP"), an outsourced human resources firm to provide employment and human resources advice and to assist on various projects. (Dkt. No. 614, ¶¶ 222). PMP's human resources directors worked with CCC's human resources staff on policy matters including employee handbook policies and other employment and human resources guidance. (*Id.*, ¶ 223). CCC was not notified by PMP that CCC could be held liable in certain instances when an aide's wages were delayed, or paid more than seven days after the end of that workweek. (*Id.*, ¶ 224).[7] At no time did Viventium, CCC's payroll vendor, tell CCC it could be held liable in certain instances when an aide's wages were delayed, or paid more than seven days after the end of that workweek. (*Id.*, ¶ 225). Viventium did not notify CCC that aides could be considered "manual workers" under the NYLL. (*Id.*).

[7] Plaintiffs dispute defendants' claim that CCC retained PMP for the claimed services due to the fact that defendants failed to produce a retainer or any communications with the firm in response to plaintiffs' requests for documents evidencing whether or not acts by CCC in violation of the FLSA or NYLL were done in good faith, upon reasonable grounds for believing such acts or omissions were not a violation of FLSA or NYLLL, or if done in good faith in conformity with or reliance upon administrative regulations, guidance, etc. (Dkt. No. 642, ¶ 222).

2) *Rule 56 Standard*

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is to be granted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56. A genuine issue of material fact exists "where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. Cty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008). "[V]iewing the evidence produced in the light most favorable to the nonmovant, if a rational trier [of fact] could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Bay v. Times Mirror Magazine, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991). When a movant has met this burden, the burden shifts to the non-movant to bring forth evidence establishing the existence of an issue of material fact. *Linares v. McLaughlin*, 423 Fed. Appx. 84, 86 (2d Cir. 2011).

In evaluating a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party, and it is the burden of the moving party to demonstrate the absence of any material genuinely in dispute. *Hathaway v. Coughlin*, 841 F.2d 48, 50 (2d Cir. 1988). Importantly, a court must not "weigh the evidence, or assess the credibility of witnesses, or resolve issues of fact." *Victory v. Pataki*, 814 F.3d 47, 59 (2d Cir. 2016) (citation omitted). However, a party cannot defeat a motion for summary judgment by relying upon conclusory statements or mere allegations unsupported by facts. *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002). The nonmoving party "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011).

3) FLSA Claims

Defendants assert that they are entitled to summary judgment on plaintiffs' FLSA claims for several reasons. They submit that CCC's robust time and pay policies and practices were lawful and designed to ensure that plaintiffs received their wages promptly. Defendants further argue that when employee timekeeping issues arose, CCC had procedures to resolve them promptly.

a. FLSA Late Pay Claims

The FLSA requires an employer to compensate employees, other than those falling into specific exemptions, for all hours worked, at the prevailing minimum wage, and to provide overtime compensation for hours worked over 40 in a given workweek. *See* 29 U.S.C. §§ 206, 207. Unlike the NYLL, the FLSA does not contain an explicit requirement for payment of timely wages. However, courts have "long interpreted [the FLSA] to include a prompt payment requirement." *Coley v. Vannguard Urban Improv. Assn.*, 12-CV-5565, 2018 U.S. Dist. LEXIS 54609, at *13 (E.D.N.Y. Mar. 29, 2018) (quoting *Rogers v. City of Troy*, 148 F.3d 52, 55 (2d Cir. 1998)).

Despite the prompt payment requirement of the FLSA, the Second Circuit has no bright line rule for determining what qualifies as an "unreasonable" amount of time for an employer to delay paying its employees. *Coley*, 2018 U.S. Dist. LEXIS 54609, at *42-43. Courts have interpreted the FLSA's implicit timely payment obligation to ordinarily require employers to pay wages by "the employee's regular payday." *Avalos v. United States*, 54 F.4th 1343, 1349 (Fed. Cir. 2022); *see Rigopoulos v. Keran*, 140 F.2d 506, 507 (2d Cir. 1943) (the FLSA "plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day"). Nonetheless,

the Supreme Court has recognized that there are exceptions to paying overtime wages on a regular pay date, such as when overtime compensation cannot be determined until sometime after the regular pay period. *See Avalos*, 54 F.4th at 1350 (citing *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432-33 (1945)). As one district court explained, "the delay in payment must be minimized to the extent practicable." *See Parker v. City of New York*, 04-CV-4476, 2008 U.S. Dist. LEXIS 38769, at *43 (S.D.N.Y. May 13, 2008).

Defendants here argue that all payments of overtime wages to plaintiffs were made as soon as practicable in compliance with the FLSA and U.S. Department of Labor regulations.[8] Defendants ask this Court to hold, as a matter of law, that any overtime payment delayed less than 12 days is not actionable. Yet, the cases relied on by defendants do not stand for such a categorical rule. Instead, those cases involved court approval of payments that were made on an employee's regular payday. *See Arroyave v. Rossi*, 296 F. Appx. 835, 837 (11th Cir. 2008) (finding that 10-day gap between the end of the pay period and the scheduled payday was not unreasonable); *Farzana v. M and N Home Care Services, LLC*, 23-CV-6227, Dkt. No. 21, pg. 4 (E.D.N.Y. Sept. 18, 2024) ("Plaintiffs do not allege that Defendant failed to pay them as scheduled. Plaintiffs merely claim that Defendant's policy of paying wages twelve (12) days after the end of the pay period violates the FLSA."). Defendants also rely on *Nolan v. City of Chicago*, 162 F. Supp. 2d 999, 1005 (N.D. Ill. Sept. 6, 2001), for the holding that an employer's delay for

[8] The U.S. Department of Labor has interpreted the FLSA to mean that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. § 778.106. The DOL has further stated that "[w]hen the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirement of the act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computations can be made." *Id.*

reasonable processing time to compute overtime wages was lawful. However, in that case the court also noted that the period for the defendant's issuance of overtime checks was "no later than the last day of the FLSA period following the period in which the overtime was worked." *Id.* Defendants have not cited authority showing a bright line cut-off for late payments actionable under the FLSA. To the contrary, the applicable law focuses on the reasonableness of the timing of overtime wage payments.

Here, plaintiffs allege that overtime wages were often paid after their regular payday. Plaintiffs have met their burden at this stage to show that triable issues of fact exist as to the reasonableness of defendants' payment of late overtime wages. It is undisputed that, at all relevant times, CCC's workweek ran from Saturday to Friday, and the regular pay day for each week was the following Friday. Plaintiffs have shown that instances of overtime wage payments beyond that regular payday were common. For example, Viventium reports show that CCC initially paid plaintiff Beh for 51 hours of work in the week ending November 9, 2018, of which 25 hours were paid at $11/hour and 8 hours were paid at purported overtime rates. (Dkt. No. 643-6). Beh received another check for work performed in the week ending on November 9, 2018 on January 18, 2019, more than two months later. (*Id.*). The Viventium report shows other instances of payments to aides delayed by more than two weeks, including: (1) Jamika Cameron was paid overtime wages on February 14, 2020 for work that was performed in the week ending on January 24, 2020; (2) Connie Burnett attended in-service training on January 14, 2021, but was not paid wages for the time until February 5, 2021; (3) Gloria Chambers received a partial paycheck on September 11, 2020 for hours worked between August 30 and September 4, 2020, but she was not paid for hours worked on August 29, 2020 until

September 24, 2020. (*Id.*). In fact, plaintiffs' evidence reflects 65 weeks during the period of October 14, 2017 to February 3, 2021, in which at least one opt-in plaintiff was paid overtime wages late. (Dkt. No. 643, ¶ 23). Further, in the context of their Rule 23 class, plaintiffs have submitted evidence of 13,635 instances of payments made by CCC to employees more than 7 days after the end of the workweek in which the work was performed during the relevant period of October 14, 2017 to January 3, 2020. (Dkt. Nos. 624, ¶ 310; 643, ¶ 4, 669-1). Defendants have not provided undisputed evidence that some or all of those payments were not unreasonably late as a matter of law under the FLSA's "prompt payment" requirement. *See Lynch v. City of New York*, 291 F. Supp. 3d 537, 552 (S.D.N.Y. 2018) (denying summary judgment where "dueling evidence raises a triable issue as to why the payments in question were delayed").

Defendants also ask the Court to find that CCC has established a good faith defense to the liquidated damages provisions of the FLSA. "Under the FLSA, a district court is generally required to award a plaintiff liquidated damages equal in amount to actual damages." *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008) (citing 29 U.S.C. § 216(b)). A court may deny liquidated damages if defendants show that "the act or omission giving rise to [the FLSA] action was in good faith and that [defendants] had reasonable grounds for believing it was not a violation of the [FLSA]." *Bencosne v. Beautiful Paradise Rest. Corp.*, 22-CV-1567, 2024 U.S. Dist. LEXIS 48700, at *24-25 (S.D.N.Y. Mar. 18, 2024) (citing 29 U.S.C. § 260). Under *Barfield*, an employer can carry that burden by submitting substantial evidence showing that, despite any failure to pay appropriate wages, it acted "(1) in subjective 'good faith'" and "(2) with objectively 'reasonable grounds' for believing that its acts or omissions did not

violate the FLSA." *See* 537 F.3d at 150. For the first element, an employer must show that it took "active steps to ascertain the dictates of the FLSA and then act[ed] to comply with them." *Id.*

Defendants submit that CCC took proactive steps to track employee hours and ensure prompt payment of all wages, including overtime, to aides. Defendants rely on evidence reflecting that CCC implemented practices designed to reduce the amount of delayed payments and the length of any delay. They utilized electronic verification (EVV) timekeeping options in addition to paper timesheets; had mandatory training at orientation and annually regarding timekeeping procedures; issued manual, off-cycle non-payroll checks when requested; used software to improve the electronic time slip submission process; and directed staff to call aides to resolve time reporting problems that appeared on weekly "Pre-Billing Reports" (which flagged unverified shifts, unsubmitted timesheets, and other timekeeping problems) prior to running payroll. CCC retained a human resources firm (PMP) to provide guidance on employment law and human resources-related matters. CCC also contracted with Viventium to handle payroll processing. Lastly, defendants maintain that CCC held meetings with branch managers in Buffalo and Rochester to discuss ways to address employees' failures to submit timesheets and how to adapt the payroll process to ensure fewer delayed payments.

Despite these actions, defendants have not proven their entitlement, as a matter of law, to a good faith defense as a matter of law. It is disputed whether defendants actually discussed its pay frequency policies with Viventium or PMP to determine whether they were in compliance with the law. Courts in this Circuit have commonly rejected employers attempts to demonstrate subjective "good faith" to avoid liquidated damages

without specific proof of actions taken to ascertain the dictates of the FLSA. *See Hardgers-Powell v. Angels In Your Home LLC*, 16-CV-6612, 2019 U.S. Dist. LEXIS 173663, at *8-12 (W.D.N.Y. Oct. 4, 2019) (denying defendants' good faith claim because there was no evidence showing the substance of counsel's advice to defendants on regulatory changes or whether defendants relied on that advice); *Xiaochun Gao v. Savour Sichuan Inc.*, 19-CV-2515, 2024 U.S. Dist. LEXIS 27444, *81 (S.D.N.Y. Feb. 16, 2024) ("general and unspecific testimony" about accountant's advice was insufficient to meet employer's burden of showing good faith); *Dudley v. Hanzon Homecare Servs., Inc.*, 15-CV-8821, 2018 U.S. Dist. LEXIS 8112, at *15 (S.D.N.Y. Jan. 17, 2018) ("passively making an assumption" that payroll service provider would notify employer if it were not in compliance with the FLSA or the NYLL "plainly does not qualify as an active step to ascertain the dictates of the [law]….").

Moreover, defendants have not proven, as a matter of law, that they ascertained the dictates of the FLSA – namely defendants' obligation to timely and fully compensate aides for all hours works that CCC required them to work or otherwise knew or should have known that they worked. *See Perry v. City of New York*, 78 F.4th 502, 513 (2d Cir. 2023) (the Second Circuit "ha[s] long recognized that an employee's failure to report work the employer in fact knew about or required does not protect the employer from FLSA liability"); *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011) "[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours."); *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1287 (10th Cir. 2020) ("[An employer] cannot simultaneously require an activity and claim to be unaware that

employees are engaging in that activity."). As the Second Circuit has explained, the obligation to comply with FLSA § 207 "is the employer's and it is absolute." *Perry*, 78 F.4th at 514. The employer cannot discharge it by attempting to transfer his statutory burdens of accurate record keeping and of appropriate payment to the employee. *Id.*

In fact, plaintiffs provide evidence that nearly all of the untimely overtime payments were for work assigned and known by CCC. (Dkt. No. 642, ¶ 321). Under the law, prompt payment for such shifts should have been made whether or not a timesheet was submitted or the time was "verified" by CCC's payroll deadline. Further, defendants' good faith defense rests on the premise that late payments were caused by late submission of timesheets. This premise is disputed by evidence showing that more than half of the late overtime payments were not likely to have been the result of late timesheets, because payroll records instead indicate the delays were due to wage rate corrections, travel time payment adjustments, or other reasons unrelated to timesheet submission. (Dkt. No. 642, ¶ 320; 645-19).

Although a jury may find that defendants took proactive steps to track employee hours and consult with outside experts about the applicable law, it is a "heavy burden" to meet a good faith standard at summary judgment. *See Barfield*, 537 F.3d at 151. Here, there is a genuine dispute of fact as to defendants' alleged belief that they were acting in compliance with the law. Thus, the evaluation of defendants' subjective good faith and objectively reasonable grounds for its beliefs must be made by the trier of fact.

b. FLSA Overtime Claims for Indirect Travel Between Shifts

Defendants next move for summary judgment on plaintiffs' FLSA overtime claims for time spent travelling between client residences. Defendants argue that any claims by plaintiffs or opt-in plaintiffs that they are entitled to unpaid overtime for travel time or travel expenses must be denied if the claims are premised upon indirect travel between shifts. Defendants rely on a district court case and a trial court case to support this argument. *See McLaughlin v. General Electric Co.*, 87-CV-1594, 1988 U.S. Dist. LEXIS 10305, at *12-19 (N.D.N.Y. Sept. 14, 1988) (finding split shift travel time not compensable); *Avery Henix v. Liveonny, Inc.*, 158222/2016, 2021 N.Y. Misc. LEXIS 120 (Sup. Ct. N.Y. Cnty. Jan. 13, 2021) (same).

Contrary to the limited caselaw cited by defendants, there is persuasive authority holding that time spent by an employee in travel as a part of his or her principal activities, such as travel from job site to job site during the workday, must be counted as hours worked. *See Singh v. City of New York*, 524 F.3d 361, 367 n.3 (2d Cir. 2008). Indeed, many courts have held that travel between clients for whom employees are scheduled to provide services on the same day is compensable work time because the travel is "required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005); *see Su v. Nursing Home Care Mgmt.*, 21-CV-2583, 2023 U.S. Dist. LEXIS 83501, at *14 (E.D. Pa. May 12, 2023) ("Travel is a necessary, integral, and indispensable part of a home health aide's principal activities whose principal activities necessarily take place in various clients' homes").[9]

[9] Plaintiffs claim that they are entitled to be compensated for time spent travelling from one CCC client residence to another where the gap between the end of one shift and the start of the next shift was no

Further, courts have determined that even if employees engaged in non-compensable personal activities in between shifts with gaps long enough to engage in such activities, the necessary travel time between shift locations remains compensable. *See, e.g., United Transp. Union Loc. 1745 v. City of Albuquerque,* 178 F.3d 1109, 1118-20 (10th Cir. 1999) (holding that bus drivers with split shifts were entitled to compensation for time spent driving to or from relief point at either end of a split shift period, even though the break itself was not otherwise compensable); *Estorga v. Santa Clara Valley Transp. Auth.*, 16-CV-2668, 2019 U.S. Dist. LEXIS 1918, at *37-43 (N.D. Cal. Jan. 4, 2019) (concluding that split shift travel time is compensable under the FLSA).

Here, the amount of time and costs expended by each plaintiff traveling between client residences as a part of his or her principal activities must be determined by the factfinder. Further, issues of fact exists as to whether non-compensable personal activities actually occurred during the split shift time periods for which plaintiffs seek compensation. Defendants rely on testimonial evidence reflecting that, on occasion, certain plaintiffs did engage in personal errands or other activities between shifts. (Dkt. No. 614, ¶¶ 116-117). Plaintiffs dispute this fact, pointing to evidence that nine out of 11 plaintiffs who were asked this question testified that they never made stops for personal purposes when travelling between clients. (Dkt. Nos. 573; 574; 645-1). Thus, defendants are not entitled to summary judgment on these claims.

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more than one hour. (Dkt. No. 576, pg. 8). Plaintiffs also seek reimbursement of expenses incurred relative to travel between client's residences. Both the FLSA and NYLL allow employers to shift the costs of business expenses to the employee as long as the expenses do not reduce the employee's wage below the minimum wage. *Aquino v. Uber Techs., Inc.*, 22-CV-4267, 2023 U.S. Dist. LEXIS 210429, at *18-19 (S.D.N.Y. Nov. 27, 2023). However, the FLSA requires employers to reimburse their employees for any costs incurred "primarily for the benefit or convenience of the employer" if such expenses "cut[] into the minimum or overtime wages required to be paid [...] under the Act." *Johnson v. Equinox Holdings, Inc.*, 13-CV-6313, 2014 U.S. Dist. LEXIS 91786, at *8 (S.D.N.Y. July 2, 2014) (citing 29 C.F.R. §§ 531.32(c); 531.35).

c. Statute of Limitations

The "FLSA provides for a two-year statute of limitations, unless the employer's conduct is 'willful,' in which case, a three-year statute of limitations applies." *Lorenzo v. 12 Chairs BYN, LLC*, 22-CV-947, 2024 U.S. Dist. LEXIS 48195, at *9 (E.D.N.Y. Mar. 2024); *see* 29 U.S.C. § 255(a). "For an employer's actions to be willful, the employer must have 'either known or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA.'" *Id.* An employer does not willfully violate the FLSA even if it acted "unreasonably, but not recklessly, in determining its legal obligation" under the FLSA. *Id.*

Defendants assert that they are entitled to a determination that their conduct was not "willful," as defined by the FLSA, therefore a two-year statute of limitations must apply to plaintiffs' FLSA claims. Defendants submit that their "robust time and pay procedures," including issuance of off-cycle manual checks to avoid further delays, employee training programs, and retainer of human resources and payroll experts prevent a finding that they acted with reckless disregard for the law on the FLSA late pay and unpaid travel time claims.

Plaintiffs acknowledge that it is their burden at trial to prove by a preponderance of the evidence that defendants conduct was willful, for a three-year statute of limitations period to apply. *See Padilla v. Sheldon Rabin, M.D., P.C.*, 176 F. Supp. 3d 290, 300 (E.D.N.Y. 2016). However, at this stage, plaintiffs must only show that there is a genuine dispute of material fact regarding the willfulness of defendants' conduct.

Courts in this Circuit have generally left the question of willfulness to the trier of fact. *See Ramirez v. Rifkin*, 568 F. Supp. 2d 262, 268 (E.D.N.Y. 2008). Here, there is no

dispute that defendants knew that they had an obligation to timely pay overtime hours. However, plaintiffs view of the evidence shows that nearly all the late paid overtime compensation arose from shifts which plaintiffs were assigned to work by defendants. *See Perry*, 78 F.4th at 513 ("that an employee's failure to report work that the employer in fact knew about or required does not protect the employer from FLSA liability"). Thus, a reasonable jury could find that defendants had, or should have had, knowledge of most or all overtime work performed by plaintiffs that was not timely paid and that the failure to timely compensate for such work was willful. Further, regarding travel time compensation, defendants' own undisputed policy for a portion of the relevant period was to pay for travel time between clients when there was an hour or less between shifts. A jury could find that defendants' failure to pay for some travel time, when they were aware of the need to pay for certain other travel time, constituted willful avoidance of the law.

The Court finds that there are factual disputes as to whether defendants showed reckless disregard for the legality of its conduct. Whether plaintiffs can prove that defendants conduct was willful is a question for the finder of fact.

4) New York Labor Law Claims

a. Section 191 Late Pay Claims

Defendants seek summary judgment on plaintiffs NYLL § 191 late pay claims on several bases. First, defendants argue that Personal Care Aides and Home Health Aides were not "manual workers" entitled to weekly pay under the Labor Law. *See* NYLL § 191(1) and (4).

Section 191 of the New York Labor Law, entitled "Frequency of Payments," identifies how often employers must process payroll for various classes of workers. Under

the law, a manual worker must be paid "weekly and not later than seven calendar days after the end of the week in which the wages are earned." NYLL § 191(1)(a). A "manual worker" who must be paid weekly is defined as a "mechanic, workingman, or laborer." NYLL § 190(4). The New York State Department of Labor has interpreted the term to include "employees who spend more than 25% of their working time performing physical labor." *See Balderramo v. Go N.Y. Tours Inc.*, 668 F. Supp. 3d 207, 225-26 (S.D.N.Y. 2023). "In general, the NYSDOL looks at the duties performed by an employee in order to determine whether he or she is a manual worker and makes a case-by-case determination." *Id.* However, this analysis not only looks at the time spent performing physical labor, but also to the type of labor performed. *Id.*

In the case at bar, it has already been determined that plaintiffs' complaint alleged job duties which qualified them as manual workers under NYLL § 191. *See Beh v. Community Care Companions*, 19-CV-1417, 2021 U.S. Dist. LEXIS 197316, at *8-9 (W.D.N.Y. Feb.1, 2021). (Dkt. No. 241; 259). Addressing a motion to amend, the Honorable Hugh B. Scott determined that a factfinder could reasonably infer that plaintiffs spent most of their time "performing physical tasks, like cooking, cleaning, and assisting the client with various physical tasks and chores." *Id.* He further opined that "the basic responsibility of a home care worker [is] to act as a physical extension of the client so that the client can complete his or her activities of daily living." *Id.*

Defendants now argue that CCC aides are not manual workers because the job tasks they actually perform are skilled and relate to health and welfare responsibilities. Defendants rely on two decisions by the New York Industrial Board of Appeals to support their conclusion. In the *Matter of Hudson Valley Mall Dental*, the IBA determined that

dental assistants do not perform manual work under the NYLL because the role is skilled and requires specialized training and patient care. *See Matter of Hudson Valley Mall Dental*, PR 12-034 (Aug. 7, 2014). In *Creative Transportation*, the IBA found that school bus drivers transporting children with handicaps were not manual workers because they were "specially trained and ha[d] a clear and defined employment responsibility for the health and welfare of their passengers[.]" *See Creative Transportation*, PR 49-88 (Aug. 9, 1991).

Defendants contend that HHAs and PCAs employed by CCC are skilled health care professionals with extensive training whose job tasks are not simple physical labor. Defendants support this argument with undisputed evidence showing that PCAs and HHAs must be certified by the State through completion of training programs and competency examinations. HHAs and PCAs are also trained to perform patient care services such as taking vital signs and assisting with toileting, feeding, bathing, and medication administration.

Nonetheless, plaintiffs have submitted contrary evidence which creates a material issue of fact as to their classification as manual workers. Plaintiffs assert that despite their modest training and certifications, the evidence shows that they spent more than 25% of their time on physical labor, including cooking, cleaning, and assisting clients with physical tasks. To support this, plaintiffs cite to the job descriptions provided by CCC for HHA and PCA job titles, which describe the "essential functions" of each role to be assistance with personal care and activities of daily living, assistance with ambulation and transfer of clients, and maintenance of a clean client environment. (Dkt. Nos. 649-10, 649-11). The declarations of plaintiffs Beh and Balkum describe the usual tasks they

performed as a PCA and an HHA, respectively. (Dkt. Nos. 573, 574). They describe common tasks of helping clients bathe and dress, preparing and cleaning up after meals, washing and drying clothes, ensuring clients took medications correctly, helping clients move around in their residence, and other activities. (*Id.*). Plaintiffs also rely on notations of work tasks contained in 110 timesheets produced by defendants. (Dkt. No. 649-12). These timesheets indicate that of the 39 typical tasks plaintiffs performed during their shifts, at least 23 of the tasks were physical in nature (e.g., preparing meals and feeding patients; bathing, grooming, and toileting patients; cleaning; making beds; doing laundry), and that these physical tasks were the tasks most often performed by plaintiffs. (*See* Dkt. No. 650).

Based on the evidence of the record, a reasonable jury could conclude that plaintiffs were manual workers under the law. Thus, defendants are not entitled to summary judgment to on this issue.

Next, defendants argue that plaintiffs have not established that CCC is liable for late payments under NYLL § 191. They submit that § 191 governs only the frequency of payments, meaning that employees must issue payroll on a specific scheduled, i.e. weekly, biweekly, etc. Defendants argue that § 191's focus on the frequency of payroll excludes individual payments that may depart from the established frequency. According to defendants, to the extent § 191 provides a private right of action, it is premised on the employer's selection of the wrong pay frequency, not the occurrence of individual late payment of wages as is alleged here.

The Court rejects this argument in its entirety. Under defendant's proposed theory, an employer could pay an employee a fractional amount of his or her wages on a weekly

pay date and withhold the balance of the pay for an undetermined length of time. In defendants' view, such conduct would be in compliance with the law even though the majority of the compensation due would be unpaid and untimely. This is contrary to the remedial purpose of the statute to protect manual workers dependent on their weekly wages.[10] As the First Department held in *Vega v. CM & Assoc. Constr. Mgmt.*, "the term underpayment encompasses the instances where an employer violates the frequency requirements of section 191(1)(a) but pays all wages due before the commencement of an action." *See* 175 A.D.3d 1144, 1145 (1st Dept. 2019).

Next, defendants assert that any claims to liquidated damages are negated based on defendants' good faith defense to the NYLL claims. New York Labor Law § 198(1-a) provides that liquidated damages are not available where "the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." This standard is the same in substance as the FLSA standard. *See Hardgers-Powell*, 2019 U.S. Dist. LEXIS 173663, at *9 ("The NYLL contains a similar defense to liquidated damages, and 'courts have not substantively distinguished the federal standard from the current state standard of good faith.'") (citation omitted). For the reasons explained above, disputed issues of fact exist that preclude summary judgment based on a good faith defense.

[10] In fact, this same argument was rejected by the Indiana Supreme Court in *St. Vincent Hospital & Health Care Center, Inc. v. Steele*, when it decided that the Indiana Wage Payment Statute, which requires timely payment of wages, governs both the frequency and amount an employer must pay its employee. *See* 766 N.E.2d 699, 704 (Ind. 2002). ("If we interpreted the statute ... [such] that the Wage Payment Statute governs only the frequency, then an employer could avoid the penalty provisions of the statute by simply tendering $1.00 biweekly or semimonthly regardless of the amount of wages agreed to by the parties.").

Lastly, defendants argue that plaintiffs are not entitled to liquidated damages on their NYLL § 191 late payment claims. Defendant state that because there are no outstanding wages owed to plaintiffs, no liquidated damages are rightfully due. They further argue that an award of liquidated damages equal to the amount of late wages is grossly excessive and would violate both the Due Process Clause of the Fourteenth Amendment and fundamental notions of fairness. Defendants rely upon principles of constitutional interpretation to assess whether statutory penalties such as this are disproportionate and unreasonable.

Defendants ask the Court to review a possible award of damages under the Supreme Court guideposts applied to punitive damages. *See BMW of N. Am., Inc., v. Gore*, 517 U.S. 559, 574-75 (1996) ("(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual harm or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."). Defendants also refer to the civil penalty of $1,000 imposed by the NYSDOL for a first violation of § 191 as a reference point for the allegedly disproportionate amount of damages sought here. *See* NYLL § 218(1).

Plaintiffs oppose this argument based on the holding of *Vega* and other courts who have rejected it in light of *Vega*. *See, e.g., Rath v. Jo-Ann Stores, LLC*, 21-CV-791, 2022 U.S. Dist. LEXIS 214798, at *9 (W.D.N.Y. Nov. 29, 2022) ("Since this Court concludes above that the Court of Appeals would apply the rationale of *Vega* in a finding a private right of action for violation of Labor Law § 191, there is no distinction for liquidated damages as a remedy for that violation from the holding of the existence of a private right

of action); *Elhassa v. Hallmark Aviation Servs.*, L.P., 21-CV-9768, 2022 U.S. Dist. LEXIS 33051, at *6 (S.D.N.Y. Feb. 24, 2022) ("New York Labor Law permits employees to seek liquidated damages for the untimely payment of wages even if the wages are no longer past due."). Plaintiffs argue that defendants are making an end-run argument around this Court's prior finding of a private right of action for § 191 claims and the statutory damages provided for under the law.

The Court finds the issue of damages to be premature and not suitable for resolution at this stage. Even if the Court applied the *Gore* factors, as it is urged to do by defendants, there are disputed issues of fact as to relevant factors, including the reprehensibility of defendants' conduct and the disparity between the harm and the potential award. For these reasons, the Court respectfully recommends that the issue of damages be deferred for determination at trial.

b. Section 198(3) Minimum Wage and Unpaid Wage Claims

Defendants request a finding that plaintiffs' claims of unpaid wages for indirect travel between shifts is not compensable under the New York Labor Law. "The NYLL 'incorporates FLSA standard for determining whether time worked is compensable time.'" *Perkins v. Bronx Lebanon Hosp. Ctr.*, 14-CV-1681, 2016 U.S. Dist. LEXIS 151364, at *10 n.6 (S.D.N.Y. Oct. 31, 2016) (citation omitted). For the reasons explained above in the FLSA context, defendants are not entitled to summary judgment on these claims.

c. Section 195(3) Wage Statements

Defendants seek summary judgment on plaintiffs' wage statements claims. Plaintiffs do not oppose this relief and acknowledge that these claims were already dismissed by this Court. (*See* Dkt. No. 641, pg. 36 n.16; *see also* Dkt. Nos. 487; 505). To

the extent any claims of NYLL § 195(3) wage statements violations still exist, it is recommended that they be dismissed at this time.

5) Liability of Individual Defendants

Finally, defendants argue that the individual defendants, Alexander J. Caro and Mark Gatien, are not "employers" under the FLSA or NYLL and are thus not subject to liability. Personal liability may be imposed on employers under both the FLSA and NYLL. *Grande v. Rockefeller Corp.*, 21-CV-1593, 2023 U.S. Dist. LEXIS 140490, *47-48 (S.D.N.Y. Aug. 11, 2023). However, an individual's role as a corporate officer or shareholder does not necessarily make one liable for corporate violations of the law. *See Crawford v. Coram Fire Dist.*, 12-3850, 2015 U.S. Dist. LEXIS 57997, at *23-24 (E.D.N.Y. May 4, 2015) (holding that the viability of employee claims against individual defendants turns on whether they are "employers" within the meaning of NYLL § 190(3)). Because the FLSA statute does not define whether a given individual is or is not an employer, the overarching concern is whether the alleged employer possessed the power to control the workers in question, with an eye to the "economic reality" presented by the facts of each case. *See Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)). Under the "economic reality" test, the relevant factors include "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* (citation omitted). The same analysis applies to claims brought under the NYLL. S*ee Cannon v. Douglas Elliman, LLC*, 06-CV-7092, 2007 U.S. Dist. LEXIS 91139, at *4 (S.D.N.Y. Dec. 10, 2007).

Evidence that an individual is an owner or officer of a company, or otherwise makes corporate decisions that have nothing to do with an employee's function, is insufficient to demonstrate "employer" status. *Irizarry v. Catsimatidis*, 722 F.3d 99, 109 (2d Cir. 2013). Instead, to be an "employer," an individual defendant must possess control over a company's actual "operations" in a manner that relates to a plaintiff's employment. *Id.* Failure to allege facts regarding the positions held by the individual defendants or their power to control plaintiffs' hours, wages, or other terms and conditions of employment prevents individual liability. *See Xue Lian Lin v. Comprehensive Health Mgmt.*, 08-CV-6519, 2009 U.S. Dist. LEXIS 29779, at *7 (S.D.N.Y. Apr. 8, 2009). A plaintiff must show that the individual corporate officer exercised requisite operational control over employees. *See Sampson v. MediSys Health Network, Inc.*, 10-CV-1342, 2012 U.S. Dist. LEXIS 103052, at *13 (E.D.N.Y. July 24, 2012).

Since "[t]he question of whether a defendant is an employer under the FLSA is a mixed question of law and fact, with the existence and degree of each relevant factor lending itself to factual determinations[,] . . . individual employer liability is rarely suitable for summary judgment." *Alvarado v. GC Dealer Servs.*, 511 F. Supp. 3d 321, 356 (E.D.N.Y. 2021).

Here, there are disputed issues of material fact as to whether the conduct, role, and activities of Caro and Gatien qualifies individual as an "employer" under the law. It is undisputed that Gatien and Caro are the sole owners of CCC, each with a 50% share. Caro has served as President of the company. Gatien has served as Vice-President of the company who oversees daily operations. Defendants rely on evidence suggesting that neither individual exercised the requisite operational control over employees or CCC

policy, whereas as plaintiffs refer to evidence showing that Gatien was a "hands-on," daily operator of all aspects and all divisions of CCC, and that Caro was involved in negotiating contracts, billing, and payroll to an extent that he possessed requisite power over the employees. Based on the numerous questions of fact, neither defendant Caro nor Gatien is entitled to judgment as a matter of law.

In sum, the Court recommends that defendants' motion for summary judgment be denied in its entirety.

II. MOTION TO DECERTIFY RULE 23 CLASS ACTION

On January 26, 2023, the District Court certified this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. (Dkt. Nos. 487; 505). The certified class includes home care workers employed by CCC between October 14, 2017 and January 3, 2020 who were not paid wages by CCC within seven calendar days of the end of the workweek in which the wages were earned. Certification of this class is premised upon defendants' alleged violations of New York Labor Law § 191's frequency of pay requirements.

Defendants now move for decertification of the Rule 23 class action. (Dkt. No. 601). Defendants submit that based on the full factual record before the Court at this time, the class fails to satisfy Rule 23's commonality, typicality, and predominance requirements. Defendants assert that the central issue of timely wage payments to class members can only be resolved by individualized determinations which are not suitable for class treatment.

An order that grants or denies class certification may be altered or amended before final judgment. Fed. R. Civ. P. 23(c)(1)(C). Under Rule 23(c)(1), courts are "required to

reassess their class rulings as the case develops." *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999). The district court has the affirmative "duty of monitoring its class decisions in light of the evidentiary development of the case." *Mazzei v. Money Store*, 829 F.3d 260, 266 (2d Cir. 2016). A court may decertify a class if it appears that the requirements of Rule 23 are not in fact met, but a court "may not disturb its prior findings absent some significant intervening event or a showing of compelling reasons to reexamine the question." *Kloppel v. HomeDeliveryLink, Inc.*, 17-CV-6296, 2022 U.S. Dist. LEXIS 74867, at *7 (W.D.N.Y. Apr. 25, 2022) (citations omitted). Compelling reasons including an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. *Id.* A defendant seeking to decertify a class "bear[s] a heavy burden to prove the necessity of either the drastic step of decertification or the less draconian but still serious step of limiting the scope of the class." *Gulino v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 907 F. Supp. 2d 492, 504 (S.D.N.Y. 2012).

Defendants argue that reexamination of the prior certification decision is necessary because of new evidence gained during merits-phase discovery, progression of litigation, and evolution of the relevant caselaw. As to evolution of the relevant caselaw, defendants submit that a recent decision of the New York State Appellate Division, Second Department, holding that there is no private right of action for pay frequency violations under NYLL § 191 warrants reconsideration of this Court's prior certification decision. *See Grant v. Global Aircraft Dispatch, Inc.*, 223 A.D.3d 712 (2d Dept. 2024). In finding that no private right of action exists, the Second Department's decision in *Grant* disagrees with the First Department's prior decision in *Vega v. CM & Associates Construction*. *See* 175

A.D.3d at 1146 (holding that NYLL § 198(1-a) expressly and implicitly provides a private right of action for a violation of NYLL § 191).

The New York Court of Appeals has not yet addressed this issue. "[W]hen there is 'an apparent split in authority among the Appellate Divisions,' a federal court is not bound by the law of the department that would apply if the case were filed in state court where the federal court sits, but rather must predict 'how the Court of Appeals would rule.'" *Zachary v. BG Retail, LLC*, 716 F. Supp. 3d 339, 347 (S.D.N.Y. Feb. 12, 2024) (quoting *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116-17 (2d Cir. 2000)).

A court within this District has dismissed the viability of NYLL § 191 claims in light of *Grant*. *See Galante v. Watermark Servs. IV LLC*, 722 F. Supp. 3d 170, 187 (W.D.N.Y. 2024) ("In light of the Second Department's well-reasoned decision in *Grant*, the Court concludes that the New York Court of Appeals is unlikely to determine that either an express or implied private right of action exists for violations of NYLL § 191."); *Freeland v. Findlay's Tall Timbers Distrib. Ctr. LLC*, 22-CV-6415-FPG, 2024 U.S. Dist. LEXIS 199220, at *3 (W.D.N.Y. Nov. 1, 2024) (same). However, "[s]ince *Grant*, almost all district courts in this circuit have predicted that the Court of Appeals would side with *Vega* and hold that there is either an express or implied private right of action for late payment of wages." *Bryant v. Buffalo Exch., Ltd.*, 23-CV-8286, 2024 U.S. Dist. LEXIS 140311, at *7 (S.D.N.Y. Aug. 6, 2024) (collecting cases); *see Phoenix v. Cushman & Wakefield U.S., Inc.*, 24-CV-965, 2025 U.S. Dist. LEXIS 18268, at *11-12 (S.D.N.Y. Jan. 31, 2025) (declining to "abandon the near-unanimous view by courts within this Circuit that have weighed in on the *Grant/Vega* split" that manual workers have both an express and implied private right of action to enforce violations of Section 191(1)(a)).

As this Court has acknowledged previously, the relevant caselaw on § 191 claims "is evolving and the outcome of this case could be affected by binding precedent contrary to *Vega's* holding."[11] (Dkt. No. 545, pg. 11). However, in the absence of such controlling authority, this Court declines to change the law of this case or to decertify the Rule 23 class on this basis.

Defendants next argue that new evidence developed through merit-phase discovery compels a finding that the Rule 23 class should be decertified because there are no common questions of law or fact predominating the inquiry and that liability here cannot be determined based on representative evidence. The evidence relied on by defendants includes reports generated for the relevant period showing the length of delay for wage payments, relevant communications between CCC and aides, and deposition testimony regarding CCC's timesheet and payroll processes. Defendants offer that the record shows that CCC utilized comprehensive systems and policies to ensure timely payment of wages in compliance with the law and that the Court will need to resort to individualized inquiries to regarding late payments to assess liability.

The Court finds that the evidence referred to by defendants relates exclusively to facts in defendants' possession at the time the Rule 23 class certification was sought and opposed. Defendants' own policies and practices, as well as the contents of relevant payroll records, were well known to defendants. Indeed, defendants have advanced the

[11] The plaintiff in *Grant* filed a motion with Second Department for leave to appeal to the New York Court of Appeals, but the Second Department has not yet ruled on the motion. *See Urena v. Sonder USA Inc.*, 22-CV-7736, 2025 U.S. Dist. LEXIS 18268 (S.D.N.Y. Mar. 4, 2025). Defendants also submit that three district courts in this Circuit have granted motions to certify this question for interlocutory appeal. *See Bazinett v. Pregis*, 23-CV-790 (N.D.N.Y. Oct. 24, 2024); *Charles v. United States of Aritzia Inc.*, 24-CV-09389 (S.D.N.Y. Oct. 22, 2024); *Birthwright v. Advance Stores Company, Inc. d/b/a Advance Auto Parts*, 22-CV-0593 (E.D.N.Y. July 24, 2024).

same arguments in favor of decertification as were previously made and rejected by this Court in its certification decision and in the above motion for summary judgment. Defendants have not shown that new evidence or subsequent developments in this litigation require decertification of the class.

Lastly, defendants have not demonstrated that there exists a need to correct a clear error or prevent manifest injustice in this case. Thus, the Court finds no compelling reason to reexamine the prior class certification decision. Accordingly, it is recommended that defendants' motion to decertify the Rule 23 class be denied.

Conversely, it is recommended plaintiffs' motion seeking Court approval of a proposed Notice of Class Certification be granted. (Dkt. No. 565). Plaintiffs provide a proposed Notice of Class Certification (Dkt. No. 565-1) which they seek to have distributed to all known class members via U.S. Mail and email. Plaintiffs advise that they intend to hire a Claims Administrator for handling of the notice and responses. Plaintiffs ask the Court to: (1) approve the proposed form and manner of distribution of the notice, and (2) order defendants to produce a complete list of the last known addresses, email addresses, and phone numbers for all members of the class within 10 days of the Court's approval of the notice. Defendants have not provided any substantive objection to the contents of the proposed notice or the manner of distribution.[12]

[12] Defendants originally opposed the request for notice on the grounds that notification of class members should be delayed until a decision was made on defendants' motion to decertify the Rule 23 class. (Dkt. No. 568). This objection is now moot.

III. MOTIONS TO MAINTAIN OR DECERTIFY FLSA COLLECTIVE ACTION

Named plaintiffs Beh and Balkum, along with 28 remaining opt-in plaintiffs, move for leave to maintain an FLSA collective action under 29 U.S.C. § 216(b) based on their claims that defendants failed to compensate them for overtime in violation of FLSA § 207. (Dkt. No. 572). At the same time, defendants have filed a counter motion seeking to decertify the FLSA collective. (Dkt. No. 577).

The remaining collective action claims asserted by plaintiffs are: (1) failure to fully compensate employees for time spent traveling from one client to another; (2) failure to reimburse employees for expenses incurred in traveling from one client to another; and (3) late payment of overtime compensation.[13] Plaintiffs offer that each member of the putative collective is similarly situated with respect to plaintiffs Beh and Balkum regarding their claims for overtime compensation through one or more of these theories.

Defendants argue that decertification of the collective is necessary for several reasons: (1) the facts of each plaintiff's employment are highly individualized; (2) plaintiffs cannot establish a common policy or practice that violates the FLSA; (3) even if plaintiffs had identified an unlawful practice in contravention of policy, there is no evidence it was applied uniformly; (4) the individualized nature of defendants' defenses precludes collective treatment; and (5) procedural and fairness considerations militate against maintenance of a collective action.

[13] It is noted that plaintiffs no longer seek certification of a collective under several theories that were previously included in their Second Amended Complaint. Those include overtime recovery claims for certain travel compensation, work done before and after shifts, and compensation for laundering uniforms. (*See* Dkt. Nos. 576, pgs. 4-7; 590, pgs. 11-12).

1) FLSA Certification Standard

Under the FLSA, "no employer shall employ any of his employees [...] for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The FLSA creates a cause of action against employers who violate the overtime requirement, and allows affected employees to bring suit against an employer on behalf of "themselves and other employees similarly situated." *Id.,* § 216(b). "Unlike a representative action under Rule 23 of the Federal Rules of Civil Procedure, where all persons in the defined class are bound by the case outcome unless they affirmatively 'opt out,' an employee does not become a party to an FLSA collective action unless he or she affirmatively 'opts in' by filing written consent with the court." *Gordon v. Kaleida Health*, No. 08-CV-378S, 2009 U.S. Dist. LEXIS 95729, at *11 (W.D.N.Y. Oct. 14, 2009).

Courts follow a two-step process to determine whether a lawsuit should proceed as an FLSA collective action:

> The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be similarly situated to the named plaintiffs with respect to whether a FLSA violation has occurred. The court may send this notice after plaintiffs make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law. . . At the second stage, the district court will, on a fuller record, determine whether a so-called collective action may go forward by determining whether the plaintiffs who have opted in are in fact similarly situated to the named plaintiffs. The action may be de-certified if the record reveals that they are not, and the opt-in plaintiffs' claims may be dismissed without prejudice.

Myers v. Hertz Corp., 624 F.3d 537, 554 (2d Cir. 2010) (internal quotation marks, citations, and alterations omitted). At the second stage of collective certification, "it is the Plaintiffs' burden to prove by a preponderance of the evidence that the opt-in plaintiffs are similarly situated." *Guan v. Long Island Bus., Inst., Inc.*, 15-CV-2215, 2019 U.S. Dist. LEXIS 136448, at *7 (E.D.N.Y. Aug. 9, 2019). "Plaintiffs in an FLSA collective action need only show that their employment makes them similarly situated to one another." *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 402-03 (6th Cir. 2021) (citing 29 U.S.C. § 216(b)).

In this case, the parties previously stipulated to step one conditional certification of this action. On March 26, 2020, the parties reached an agreement as to the scope, form, and manner of distribution of a notice to be distributed to similarly situated home care workers employed by defendants notifying them of their right to become opt-in plaintiffs. (*See* Dkt. Nos. 136; 137). The Court now addresses the second stage of FLSA certification and is tasked with determining whether the opt-in plaintiffs are, in fact, similarly situated to the named plaintiffs.

The Second Circuit has weighed in on how to analyze the "similarly situated" standard of the FLSA. *See Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502 (2d Cir. 2020). The Circuit Court has held that "similarly situated" means that named plaintiffs and opt-in plaintiffs are alike with regard to some material aspect of their litigation. *Id.*, at 516. "That is, party plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* Further, "it follows that if named plaintiffs and party plaintiffs share legal or factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment.'" *Id.*

In *Scott*, the Circuit Court explained that, in granting employees the right to proceed as a collective, Congress' goal was to provide the advantage of lower individual costs to vindicate rights by the pooling of resources. *Id.*, at 515-16 (quoting *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989)). This results in the "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged FLSA violation." *Id.*

Defendants argue that in deciding whether decertification is appropriate, this Court should consider three factors – (1) whether the factual and employment settings of the named and opt-in plaintiffs are similar or disparate; (2) whether defendants may assert various defenses that appear to be individual to each plaintiff; and (3) whether fairness and procedural considerations support or go against proceeding as a collective action. *See Hernandez v. Fresh Diet., Inc.*, 12-CV-4339, 2014 U.S. Dist. LEXIS 139069, at *9 (S.D.N.Y. Sept. 29, 2014). However, the *Scott* court expressly disapproved of the use of this so-called "ad hoc" approach to determine whether a collective action should be maintained. *See* 954 F.3d at 517. This is for two reasons. First, "rather than consider the ways in which the opt-in plaintiffs are similar in ways material to the disposition of their FLSA claims, district courts employing the ad hoc factors consider the ways in which plaintiffs are factually *disparate* and their defenses are *individualized*." *Id.* Second, the approach serves as a back door importation of requirements that have "no application to the FLSA," such as adequacy, typicality, superiority, and predominance. *Id.* The court stressed that the FLSA's similarly situated requirement is independent of and unrelated to Rule 23's requirements. *Id.*, at 518. In fact, the *Scott* court criticized several district court cases for having "imported the more rigorous requirements of Rule 23 into the

similarly situated inquiry…conflat[ing] the requirements for class certification under Rule 23 with the requirements to proceed as a collective under § 216(b)." *See id.* at 518 n.8.

Indeed, a collective action is no more than a consolidation of individual cases, brought by individual plaintiffs. *Vanegas v. Cignet Builders, Inc.*, 113 F.4th 718, 726 (7th Cir. 2024). Accordingly, "collective actions permit individualized claims and individualized defenses," *Vanegas*, 113 F.4th at 726, so long as the individual claims share legal and factual similarities material to the disposition of those claims, *Scott*, 954 F.3d at 516. In that sense, collective certification is more similar to permissive joinder than class action. Further, under *Scott*, Rule 23 requirements of numerosity, commonality, typicality, and adequacy of representation do not apply.

2) Similarly Situated Analysis

For the following reasons, the Court finds that the FLSA overtime compensation claims of plaintiffs Beh and Balkum share legal and factual similarities with the claims asserted by 28 other opt-in plaintiffs. The defenses offered to Beh and Balkum's claims also share legal and factual similarities to the defenses asserted to the 28 opt-in plaintiffs' claims. Common questions of law and fact justify collective litigation in this instance.

The record before the Court reflects multiple factual and legal similarities between named and opt-in plaintiffs relative to the payment or nonpayment of overtime. Factually, defendants' timekeeping, payroll, and scheduling policies and practices applied uniformly to all plaintiffs and there is no evidence of variability in those policies among any plaintiff. There is evidence of both named and opt-in plaintiffs having received overtime wage payments past their regular payday. Further, the named and opt-in plaintiffs regularly provided home care services to more than one CCC client in a single workday and

incurred time and expenses traveling between those locations for which they did not receive compensation.

Similar legal issues include defendants' obligations under the FLSA to timely pay overtime wages and defendant's obligations to pay plaintiffs for time spent and expenses incurred travelling between clients. Plaintiffs allege that defendants' policy of withholding overtime wages unless employees complied with CCC timekeeping policies was unlawful so long as defendant knew or should have known about the overtime hours worked. This legal theory is shared by all plaintiffs who allege late payment of overtime wages.

Regarding plaintiffs' claims of late wage payments, defendants state that they intend to raise the defense that they paid overtime wages as soon as practicable. *See* 29 C.F.R. § 778.106. Defendants believe that application of this defense is highly individualized and will involve testimony and evidence regarding dates that timesheets were submitted, timesheet errors, discrepancies in timesheets versus schedules, and other inquiries. However, it is plaintiffs' theory that defendants knew or should have known about all overtime hours worked by these employees because of their general policies and practices, including shift scheduling and pre-approval of overtime. Thus, similar issues of law are material to the resolution of these claims and defenses.

There are also sufficient similarities for all plaintiffs who allege that CCC had a policy or practice of scheduling shifts with different clients on the same day, but uniformly not requiring travel time to be included in timesheets submissions and generally not compensating plaintiffs for time spent travelling between clients. Plaintiffs claim that this policy and practice resulted in unpaid overtime compensation.[14]

[14] During the relevant period, it appears defendants had two different policies in place regarding compensation for travel time, and that policy or practice changed as defendants' payroll or timekeeping

Named and opt-in plaintiffs are also similarly situated with regard to unpaid overtime arising from defendants' failure to reimburse employees for travel expenses. Here, defendants admit their policy was not to reimburse plaintiffs for expenses incurred traveling from one client to the next (even if they did compensate for the time spent traveling). This presents a similar issue of law as to whether defendants were obligated to reimburse travel expenses for necessary travel from one client residence to another.

In their motion to decertify, defendants argue that too many individualized issues of fact will arise in adjudicating these claims. They submit that the testimony of the record shows widely varied experiences of plaintiffs which will necessitate 30 "mini-trials" and could result in procedural unfairness to them. The Court does not agree. Although the feasibility of collective litigation can be relevant to certification decisions, application of the ad hoc test's "fairness and procedural considerations" prong runs the risk of inserting requirements of Rule 23 which have no application to the FLSA. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1115-16 (9th Cir. 2018) (stating that decertification of a collective action of otherwise similarly situated plaintiffs cannot be permitted unless the collective mechanism is truly infeasible). Here, the Court does not find that the adjudication of these claims on a collective basis will be infeasible.

For these reasons, the Court recommends that plaintiffs' motion to maintain certification of an FLSA collective action be granted and defendants' motion to decertify the collective action be denied.

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system changed. During "RSO period," defendants admit that it was generally their policy not to pay for time traveling from client to the next. (Dkt. No. 580, ¶ 25). Plaintiff argues that compensation was required when time between shifts was less than one hour because it was not possible or practicable for plaintiffs to return home or otherwise use that time. During "HHA period," defendant's policy was to pay for travel time where the gap between shifts was one hour or less. (Dkt. Nos. 575, ¶¶ 14-27, 45-60; 575-3 – 575-6). Plaintiffs acknowledge this but submit that in practice this did not always happen.

IV. MOTIONS TO STRIKE

Plaintiffs and defendants have brought several motions to strike declarations offered by the opposing party in support of their respective motions. Specifically, plaintiffs move to strike the declarations of Arlene Gannon, Karen Billups, and Mark Cuevas filed by defendants in support of their motion to decertify the FLSA collective action and motion for summary judgment. (Dkt. Nos. 587; 620; 651). Defendants move to strike portions of the declarations of plaintiffs Balkum and Beh, as well as the declaration of plaintiffs' counsel Jessica Harris, Esq., filed in support of plaintiffs' motion to maintain the FLSA collective action. (Dkt. No. 591). Defendants also move to strike portions of the declaration of Harris filed in opposition to defendants' motion to decertify the FLSA collective action. (Dkt. No. 639).

In brief, plaintiffs' motions to strike assert that the declarations of Gannon, Billups, and Cuevas, who are all employees of CCC, are not based on personal knowledge of the relevant facts or are contradicted by prior deposition testimony. Defendants counter that the sources of each declarants' knowledge are properly laid out in the declarations and that they contain no material inaccuracies.

Defendants' motions to strike assert that the declarations of plaintiffs Beh and Balkum contain statements about the circumstances of their employment that are inconsistent with prior testimony, are speculative, or are inadmissible hearsay. Defendants argue that the declaration of Attorney Harris contains legal conclusions which are more suitable for a legal memorandum. Plaintiffs counter that there are no material inconsistencies or hearsay in plaintiffs' declarations and that Attorney Harris's declaration is fact-bound based on the testimony and other evidence.

Affidavits supporting or opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Richards v. Computer Scis. Corp.*, 03-CV-630, 2004 U.S. Dist. LEXIS 19637, at *2 (D. Conn. Sept. 28, 2004). An affirmation in support of a motion to certify or decertify a collective must also be made based on personal knowledge. *See Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 687 n.7 (N.D.N.Y. 2015). Although improper portions of a document should not be considered, striking a declaration from the record is at the court's discretion. *See FTC v. Vantage Point Servs., LLC*, 266 F. Supp. 3d 648, 654 (W.D.N.Y. 2017).

Here, the Court has carefully examined the evidence and does not find a compelling reason to reject the declarations offered in support or opposition to the summary judgment or certification motions. To the extent the parties have raised evidentiary issues which will be relevant at trial, the Court defers any admissibility determinations to the District Judge. Thus, the Court recommends that the motions to strike be denied without prejudice to renewal at trial.

CONCLUSION

For the foregoing reasons, the Court recommends that plaintiffs' motion for approval of notice to class members (Dkt. No. 565) be granted. The Court further recommends that plaintiffs' motion for leave to maintain an FLSA collective action (Dkt. No. 572) be granted, and defendants' counter motion to decertify the collective action (Dkt. No. 577) be denied. It is further recommended that defendants' motion to decertify the Rule 23 class action (Dkt. No. 601) and defendants' motion for summary judgment (Dkt. No. 608) each be denied. It is also recommended that plaintiffs' motion for approval

of notice to class members (Dkt. No. 565) be granted. Lastly, it is recommended that the parties' various motions to strike (Dkt. Nos. 587; 591; 620; 639; 651) be denied without prejudice.

Pursuant to 28 U.S.C. §636(b)(1), it is hereby **ORDERED** that this Report and Recommendation be filed with the Clerk of Court.

Unless otherwise ordered by Judge Sinatra, any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a), and 6(d) of the Federal Rules of Civil Procedure, and W.D.N.Y. L. R. Civ. P. 72. Any requests for an extension of this deadline must be made to Judge Sinatra.

Failure to file objections, or to request an extension of time to file objections, within fourteen days of service of this Report and Recommendation WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. *See Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989).

The District Court will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the Magistrate Judge in the first instance. *See Paterson–Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990-91 (1st Cir. 1988).*

Finally, the parties are reminded that, pursuant to W.D.N.Y. L.R.Civ.P. 72(b), written objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority." ***Failure to comply with these provisions may result in the District Court's refusal to consider the objection.***

SO ORDERED.

DATED: March 25, 2025
Buffalo, New York

MICHAEL J. ROEMER
United States Magistrate Judge