

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NELLIE SAMPSON and TIMOTHY GILL,
on behalf of themselves and all other employees
similarly situated,

Plaintiffs,

-against-

**REPORT AND
RECOMMENDATION**
CV 10-1342 (SJF)(ARL)

MEDISYS HEALTH NETWORK, INC., et al.,

Defendants.

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LINDSAY, Magistrate Judge:

Before the court, on referral from District Judge Feuerstein, is the defendants' motion to dismiss the Second Amended Complaint and to stay discovery. For the reasons set forth herein, the court recommends that the defendants' motion to dismiss be granted with prejudice. The defendants' motion to stay discovery is moot

BACKGROUND

This motion highlights the problems that have stemmed from one law firm's attempt to file nearly identical class action complaints in at least a dozen different cases. *See e.g., DeSilva v. North Shore-Long Island Jewish Health Sys., Inc.*, No. 10-1341 (JFB)(ETB), 770 F. Supp. 2d 497 (E.D.N.Y. Mar. 16, 2011); *Wolman v. Catholic Health Sys. of Long Island*, No. 10-1326 (JS)(ETB), 2010 U.S. Dist. LEXIS 137392 (E.D.N.Y. Dec. 30, 2010); *Nakahata v. New York - Presbyterian Healthcare Sys., Inc.*, 2011 U.S. Dist. LEXIS 8585, n.1 (S.D.N.Y. Jan. 28, 2011). On March 24, 2010, Claudette Fraser commenced this action, alleging that the defendants, MediSys Health Network, Inc. ("MediSys"), Jamaica Hospital, Brookdale Hospital Medical Center, Flushing Hospital and Medical Center, Peninsula Hospital Medical Center, David Rosen,

President and CEO of MediSys, and Max Sclair, Vice-President of Human Resources for MediSys, violated the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* (“FLSA”) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (“RICO”). Before serving the complaint, an Amended Complaint was filed, which substituted Nellie Sampson (“Sampson”) as the named plaintiff and added state law claims under the New York Labor Law (“NYLL”) §§ 190(8) and 191, *et seq.*, and for breach of implied and express contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, fraud, negligent misrepresentation, conversion and estoppel. In the Amended Complaint, the plaintiffs challenged three policies of the “MediSys Network,” namely, the Meal and Break Deduction Policy, the Unpaid Pre- and Post-Schedule Work Policy, and the Unpaid Training Policy, which all allegedly stem from the defendants’ record keeping system. For reasons that this court can only believe were strategic, given the number of defendant/employers named, the Amended Complaint contained no information with respect to plaintiffs’ employment.

On September 30, 2010, the defendants filed a motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6). The plaintiffs’ Amended Complaint among other things alleged a violation of the FLSA without articulating which part of the FLSA the plaintiffs were relying on. After being forced to review the one hundred and ninety six paragraph complaint, the District Court determined that the plaintiffs were alleging a gap time compensation claim and an overtime claim. By order dated February 8, 2011, Judge Feuerstein dismissed with prejudice the gap time compensation claim,¹ the RICO claim, and the state law claims arising from breach of the

¹ Gap time claims involve situations where an employee has worked beyond those hours contracted for, yet fewer than forty hours. *See* Feuerstein 2/8/11 Order at 8 (citing *Wolman*, 2010 U.S. Dist. LEXIS * 4.

plaintiffs' collective bargaining agreement or independent employment agreements where the plaintiffs were concurrently represented by collective bargaining agents. The court dismissed without prejudice the plaintiffs' overtime compensation claim and remainder of the state law claims. With respect to the overtime claim, the court found that the plaintiffs had failed to allege sufficient "facts to support the general conclusion that by working during the challenged periods [the plaintiffs] would have been working in excess of forty hours in a one week period." *See* Feuerstein 2/8/11 Order at 7. The court declined to exercise pendent jurisdiction over the remaining state law claims, but dismissed those claims without prejudice.

In the same order, the court granted the plaintiffs' motion to amend the FLSA overtime claims. Significantly, the court instructed that "[s]hould plaintiffs decide to amend the complaint . . . any such . . . Amended Complaint should contain significantly more factual detail concerning who the named Plaintiffs are, where they worked, in what capacity they worked, the types of schedules they typically or periodically worked, and any collective bargaining agreements they may have been subject to." *Id.* at 19 (citing *Wolman*, 2011 U.S. Dist. LEXIS *23). The court denied the motion to amend the gap time claims and RICO claims.

On March 10, 2011, the plaintiffs filed a Second Amended Complaint adding Timothy Gill ("Gill") as a named plaintiff. As they had in the First Amended Complaint, the plaintiffs asserted that the practices and policies of the defendants collectively deprived them of proper remuneration. Throughout the complaint, the plaintiffs collectively referred to MediSys, Jamaica Hospital, Brookdale Hospital Medical Center, Flushing Hospital and Medical Center, Peninsula Hospital Medical Center, David Rosen, and Max Sclair, as "the defendants". The plaintiffs asserted that the defendants automatically deducted time from their total hours worked for meal

breaks even when they were working during meals. *See* Second Amended Complaint ¶¶ 71-87. The plaintiffs also alleged that the defendants' record keeping prevented them from recording work they performed before and after their scheduled shifts. *See id.* at ¶¶ 88-96. Finally, the plaintiffs asserted that the defendants failed to pay them for time spent attending training programs. *See id.* at ¶¶ 97-105. The plaintiffs assert that these practices constitute a violation of the FLSA and NYLL and amount to a breach of contract and a breach of the implied covenant of good faith and fair dealing. The plaintiffs further assert that the defendants are liable under the theories of quantum meruit and unjust enrichment, and for fraud, negligent misrepresentation, and conversion. The plaintiffs finally assert that the defendants are estopped from raising a statute of limitations defense.

In response to Judge Feuerstein's directive to provide "significantly more factual detail" in the Second Amended Complaint, the plaintiffs added two paragraphs setting forth additional facts about the named plaintiffs. With respect to Sampson, the plaintiffs for the first time admitted that she "worked" at Brookdale Hospital Medical Center location in the Schulman and Schachne Institute for Nursing and Rehabilitation from November 30, 2001 to June 1, 2008. *See id.* at ¶ 64. Sampson was subject to a collective bargaining agreement. *Id.* Sampson typically worked from 3 p.m. to 11:15 p.m., five days a week, totaling 37.5 hours per week of straight time. *Id.* Sampson also "occasionally . . . picked up an additional 11 p.m. until 7:15 shift resulting in a workweek of at least 45 hours." *Id.* The plaintiffs do not seek overtime pay for any additional shifts, but do contend that Sampson was not compensated as follows:

during her meal breaks which were typically missed or which were interrupted . . . ; before her scheduled start time in order to meet with outgoing staff, receive report[s] and make rounds, typically

resulting in an additional 10 minutes a week; after her scheduled end time in order to give report[s] or take inventory of narcotics, typically resulting in an additional 15 minutes of time each shift or as long as 30 minutes of time if she was tending to an emergency or dealing with an ongoing patient issue; and for training such as CPR training which was approximately two hours every two years, and in-service classes on topics such as new treatments, wound care, medication administration, IV training, and HIV training which would typically be approximately eight hours twice a year.

Id. Sampson approximates that she was not compensated for “at least 5 hours and 10 minutes in weeks without training and 15 hours and 10 minutes with training.” *Id.* Sampson asserts that “when her scheduled hours exceeded forty hours, all of such uncompensated time should have been paid at overtime rates.” *Id.*

With respect to Gill, the newly added facts were that he “worked” at the Jamaica Hospital Medical Center location at Hi-Tech Home Care from February 2004 to February 2005, but was not subject to a collective bargaining agreement. *See id.* at ¶ 65. Gill typically worked from 8 a.m. to 5 p.m., approximately five days a week, totaling 35 hours per week of straight time during weeks he worked five days. *Id.* Gill contends that he was not compensated as follows:

during his meal breaks which were typically missed or which were interrupted . . . ; before his scheduled start time in order to retrieve his equipment . . . and drop off the equipment to other locations, typically resulting in an additional two hours every week; and after his scheduled end time in order to finish patient visits and check equipment functionality, typically resulting in an additional hour and a half each shift.

Gill contends that he “typically” worked 35 hours per week and given the additional 14 hours and 30 minutes, he also would have exceed forty hours, requiring all hours over 40 to be compensated at overtime rates. *Id.* Although the Second Amended Complaint asserts that Sampson and Gil worked at Brookdale and Jamaica Hospital locations, the complaint continues to charge all of the

defendants as employers.

The defendants now move to dismiss for the second time on the grounds that the plaintiffs have failed to satisfy the pleading standard or to state a valid claim. Specifically, the defendants argue that by only asserting that the plaintiffs “typically” worked 35 or 37.5 hours per week and “typically” or occasionally” were not compensated for additional time worked without a single reference to a specific incident, the plaintiffs did not cure the defects identified by the court.² The defendants also argue that the plaintiffs continue to assert claims against the defendants without alleging any facts to show that the defendants are the plaintiffs’ employers. The defendants further argue that the plaintiffs have not sufficiently pleaded a class claim. The defendants finally contend that Gill’s claims are barred by the statute of limitations and that Sampson has failed to allege any facts identifying work performed within the statute of limitations.

DISCUSSION

A. Fed. R. Civ. P. 12(b)(6) Standards.

The Supreme Court has instructed that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

Although for the purposes of a motion to dismiss the court must accept as true the factual allegations in the complaint, it is not “bound to accept as true a legal conclusion couched as a factual allegation,” *Iqbal*, 129 S. Ct. at 1949-50, and “[t]hreadbare recitals of the elements of a

²The defendants also argue that the plaintiffs failed to re-plead within the time period permitted. In her February 8, 2010 order, Judge Feuerstein granted the plaintiffs 30 days to re-plead. The plaintiffs filed the Second Amended Complaint on March 10, 2008. Rather than address this minor procedural defect, the undersigned will address the merits of the motion.

cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949. The court must “determine whether the ‘well-pleaded factual allegations,’ assumed to be true, ‘plausibly give rise to an entitlement to relief.’” *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1950). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citations omitted); *see also Twombly*, 550 U.S. at 570 (noting that a complaint must be dismissed where a plaintiff has not “nudged [his] claims across the line from conceivable to plausible”). Determining whether a complaint states a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S. Ct. at 1950. With these standards in mind, the court addresses the plaintiffs’ claims.

B. Statute of Limitations

As a threshold matter, the court addresses the defendants’ contention that the FLSA claims are barred by the statute of limitations. “[T]he FLSA has a two-year statute of limitations, except in the case of willful violations, for which the statute of limitations is three years.” *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 548 (S.D.N.Y. 2009). Here, the court must assume that the three year statute of limitations applies because the plaintiffs have alleged that the defendants’ violations of the FLSA were willful. *See* Second Amended Complaint ¶ 123. The action is deemed commenced on the date the complaint is filed for named party plaintiffs who simultaneously file a consent. *See Hinterberger v. Catholic Health System*, 2009 U.S. Dist. LEXIS 97944 *44 (W.D.N.Y. Oct. 20, 2009)(statute of limitations tolled on putative plaintiff’s claims on date individual opts into suit). If an individual’s name does not appear in the complaint,

the action is deemed filed on the subsequent date on which he or she files written consent. 29 U.S.C. § 256(b). Sampson filed her notice to opt-in as a party plaintiff on March 29, 2010, five days after the complaint was filed. Gill, who was not named in the first amended complaint, filed his consent to opt-in on June 11, 2010. Thus, any claims for willful violations of the FLSA occurring before March 29, 2007 and June 11, 2007, respectively, are untimely.

The plaintiffs argue that the defendants engaged in conduct that equitably tolled the statute of limitations. *See* Second Amended Complaint ¶¶ 121, 202.³ Specifically, the plaintiffs contend that the defendants' corporate publications, employee manuals and policy manuals, which indicated that employees would be paid overtime for any hours they worked in excess of forty hours, led them to believe that they were being properly compensated. The plaintiffs also contend that they were unaware that the defendants' record keeping systems prevented them from being properly compensated until they spoke to class counsel. *Id.* at §§ 112-19. Therefore, they argue that the defendants are estopped from raising a statute of limitations defense.

“In this Circuit, equitable tolling is only appropriate in [] rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising his rights.” *Hinterberger*, 2009 U.S. Dist. LEXIS at *45. Generally, equitable tolling is appropriate where a defective pleading has been filed within the statutory period or where a party has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Id.*; *see Chen v. Grand Harmony Rest., Inc.*, 2011 U.S. Dist. LEXIS 117952 * 7 (S.D.N.Y. Aug. 10, 2011)(equitable tolling may apply where defendant neglects to post FLSA or Department of Labor provisions). “[A] district court must consider whether the person[s] seeking application of the

³This argument forms the basis of the plaintiffs' eleventh cause of action for estoppel.

equitable tolling doctrine (1) ha[ve] acted with reasonable diligence during the time period [they] seek [] to have tolled, and (2) ha[ve] proved that the circumstances are so extraordinary that the doctrine should apply.” *Id.* (citing *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 81 (2d Cir. 2003)). The plaintiffs have not alleged any facts that would entitle them to this relief.

The plaintiffs acknowledge that the defendants provided them with corporate publications, employee manuals and policy manuals indicating that they were entitled to overtime pay.

Extraordinary circumstances does not mean a plaintiffs’ knowing failure to read an employee manual. Nor does a plaintiffs’ failure to understand an employee manual constitute extraordinary circumstances since that party, who alone is aware of his or her own limitations, has a duty to have the document read or explained to them so they can understand its contents. The statute of limitations is not tolled for potential litigants until they seek advise from legal counsel.

Accordingly, the court finds no merit in the equitable tolling argument.

The defendants are, therefore, correct that since Gill only worked from February 2004 to February 2005 his FLSA claims are barred by the statute of limitations and he cannot serve as a representative with respect to the collective action.⁴ With respect to Sampson, who worked from November 30, 2001 to June 1, 2008, the defendants argue that since she has not identified any specific work she performed within the statute of limitations, her claims should also be barred.

While the court agrees that the complaint lacks specificity in this regard, Sampson alleges that she was not properly compensated during her entire term of her employment, thus, Sampson would not be barred from pursuing her FLSA claims for any violations that occurred between March 29,

⁴Gill’s NYLL claims would not be completely barred by the statute of limitations, which is six years. *See* N.Y. Lab. Law §§ 198(3), 663(3). However, as is addressed below, the undersigned also recommends that Gill’s NYLL claims be dismissed.

2007 and June 1, 2008.

C. Sufficiency of the Pleading

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The purpose of the complaint is to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41,47 (1957). While highly specified figures need not be pleaded in FLSA overtime cases, the plaintiffs must at a minimum “indicate the applicable rate of pay and the amount of minimum or overtime wages due.” *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 629 (S.D.N.Y. 2007). “[W]here a plaintiff brings an FLSA claim ‘for and on behalf of himself . . . and other employees similarly situated,’ the complaint should also indicate who those other employees are, and allege facts that would entitle them to relief.” *Id.* at 628.

1. Sampson’s FLSA claim⁵

In the Second Amended Complaint, Sampson challenges the defendants’ alleged Meal and Break Deduction Policy, Unpaid Pre- and Post-Schedule Work Policy, and Unpaid Training Policy. *See* Second Amended Complaint at ¶¶ 71-87, ¶¶ 88-96, ¶¶ 97-105. With respect to the Meal and Break Deduction Policy, she contends that, as a registered nurse, she performed tasks during meal breaks such as continuing regular job duties, answering/returning phone calls, equipment maintenance, completing documentation, and tending to emergency situations without compensation. *Id.* at ¶¶ 64, 75. With respect to the Unpaid Pre- and Post-Schedule Work Policy,

⁵ “[T]he relevant portions of New York Labor Law do not diverge from the FLSA,’ and, as such, the analysis above would ‘appl[y] equally to [the plaintiffs’ NYLL] state law claims,’” if the court were to exercise pendent jurisdiction. *DeSilva*, 770 F. Supp. 2d at 509, n.5 (citing *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 330 n. 2 (W.D.N.Y. 2008), *rev’d on other grounds sub nom. Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009)).

Sampson contends that before and after her shifts she met with outgoing staff or supervisors, received and gave reports, made rounds, completed charts, took inventory of narcotics, attended to emergencies and dealt with ongoing patient care duties without compensation. *Id.* at ¶¶ 64, 93.

With respect to the Unpaid Training Policy, Sampson contends that she was required to attend training sessions and in-service classes covering topics such as CPR, new treatments, wound care, medication administration, IV training, and HIV training. *Id.* at ¶¶ 64, 100. Sampson alleges that since she typically worked 37.5 hours per week of straight time, she was not compensated for at least 5 hours and 10 minutes in weeks without training and up to 15 hours and 10 minutes in weeks with training. *Id.* at ¶ 64.

The defendants argue that, despite the inclusion of these new facts, the Second Amended Complaint remains deficient and does not comply with Judge Feuerstein's February 8, 2011 order. The Second Amended Complaint now specifies where Sampson worked, what position she held, the type of schedule she typically worked, and whether she was subject to a collective bargaining agreement. In addition, the Second Amended Complaint identifies three policies, all stemming from the defendants' record keeping system, that have allegedly resulted in Sampson not receiving overtime as required by the FLSA. The Second Amended Complaint also includes an approximation of the amount of overtime Sampson worked during the challenged period.⁶ Accordingly, the plaintiffs have complied with the District Court's directive.

⁶To the extent Sampson seeks to be reimbursed for straight or gap time under the FLSA based on these allegations, the claims must be dismissed. The plaintiffs acknowledge that Judge Feuerstein has already ruled that the plaintiffs may not pursue gap time claims under the FLSA. *See* 2/8/11 Order at 9. As noted by several courts in this district, "straight time" or "gap time" claims should be addressed as part of a contractual or quasi contractual state common law claim. *See DeSilva*, 770 F. Supp 2d. at 508, n.4; *Wolman*, 2010 U.S. Dist. LEXIS at *14-15.

Nonetheless, the defendants argue that, for a number of reasons, the Second Amended Complaint should still be dismissed and the court will now address those arguments. To begin with, the defendants argue that Sampson has still failed to adequately plead an overtime claim because she has not alleged her applicable rate of pay. While the oft-cited *Zhong* standard certainly suggests that a plaintiff must allege a rate of pay, several courts in this Circuit have found it sufficient to provide an approximation of overtime hours without any reference to rate of pay. See *Connolly v. Smuggler's Notch Mgmt. Co.*, 2009 U.S. Dist. LEXIS 104991 *6 (D. Vt. Nov. 5, 2009)(plaintiff survived motion to dismiss by alleging that she frequently worked in excess of 40 hours averaging between 2100 and 2300 hours per year); *Nichols*, 608 F. Supp. 2d at 547 (plaintiff survived motion to dismiss by specifying time period they were employed and approximate number of hours they worked without pay). In *Connolly*, the district court explained its rationale for forgiving the plaintiff's failure to plead rate of pay. The court noted that "[e]ven without [satisfying the *Zhong* standards], . . . if the earnings one claims are readily determinable from statements on working hours and amount to be paid, such statements are sufficient." See *Connolly*, 2009 U.S. Dist. LEXIS at *6; see also *Harris v. Scriptfleet, Inc.*, 2011 U.S. Dist LEXIS 139870 * 8-11 (D.N.J. Dec. 6, 2011)(plaintiff's allegation that the defendant failed to pay overtime sufficient where a review of the defendant's records would provide the number of overtime hours worked and the weekly earnings). Thus, the court finds that Sampson's failure to include her hourly rate in the complaint is not fatal.

The defendants also argue that Sampson has not provided a "plausible" approximation her overtime hours. Sampson alleges that she was not paid for "at least 5 hours and 10 minutes in weeks without training time and up to 15 hours and 10 minutes in weeks with training time."

Second Amended Complaint at ¶ 64. Sampson estimates that she worked 10 minutes a week before her scheduled start time and 15 to 30 minutes after each shift, amounting to a maximum of 2 ½ hours and 10 minutes a week. She also estimates that she was required to attend training sessions for 2 hours every two years and in-service classes for eight hours twice a year. Although Sampson does not specify how many minutes or hours she worked during her meals, Sampson's 5 hour and 10 minute overtime approximation clearly includes 30 minute per shift or an additional 2 ½ hours per week due to missed meal breaks. As the defendants note, Sampson must then be claiming that the entirety of her meals were always missed. Her 15 hour and 10 minute approximation is more confusing, but the court can reasonably infer that Sampson arrived at the figure by adding one training and one in-service session to her basic 5 hour and 10 minute overtime estimate, which suggests, if true, that Sampson worked her standard 5 hours of overtime and attended an in-service course and a training session in the same week.

While the defendants question the accuracy of this approximation, the plaintiffs' burden at this stage of the litigation is minimal. *DeSilva*, 770 F. Supp 2d at 509. Plaintiffs are "not required to state every single instance of overtime worked or to state the exact amount of pay which they are owed." *Id.* Discovery may reveal that Sampson never missed all of her meal breaks or that she only stayed late and arrived early during a week she worked four rather than five days. Discovery may also reveal that Sampson never attended an in-service course and a training session in the same week. Nonetheless, Sampson has pleaded enough facts to render her overtime claim plausible.

Furthermore, the Second Amended Complaint now contains allegations concerning the type of work performed during meal breaks, before and after shifts, and a description of the

training and in-service sessions. This addresses the District Court's prior concern that the First Amended Complaint had not sufficiently alleged facts that would enable the court to determine if the extra hours allegedly worked were compensable. Feuerstein 2/8/11 Order at 7 (citing *Wolman*, 2010 U.S. Dist. LEXIS at *7 (not all training periods or work performed immediately prior to or after a shift is compensable); *see also DeSilva*, 770 F. Supp 2d at 509. Nonetheless, the defendants argue that the complaint remains deficient, in this regard, because it fails to demonstrate that the policies are unlawful.

The defendants are correct that "[a] policy of automatic meal deductions does not *per se* violate the FLSA." *Ledbetter v. Pruitt Corp.*, 2007 U.S. Dist LEXIS 10243 * 13 (M.D. Ga. Feb. 12, 2007). "In fact, the Department of Labor excludes meal periods from compensable work time," if an employee is completely relieved from duty for the purpose of eating a meal. *Id.* (citing 29 C.F.R. § 785.19). In prior versions of this complaint, the plaintiffs' allegations consisted only of a vague statement that the plaintiffs performed work during breaks and were not paid for that time. *See* First Amended Complaint at ¶ 70. At least with respect to Sampson, the complaint now provides information concerning the type of tasks performed during meal breaks such as continuing regular job duties, answering/returning phone calls, equipment maintenance, completing documentation, and tending to emergency situations. *See* Second Amended Complaint at ¶¶ 64, 75. While the inclusion of these facts is in no way determinative of whether the tasks she performed will be compensable,⁷ the court can reasonably infer from the allegations

⁷To prevail, Sampson will still have to show, among other things, that the tasks performed during the meal breaks were predominantly for the benefit of her employer. *See Reich v. S. New England. Telecomms. Corp.*, 121 F.3d 58, 65 (2d Cir. 1997)(affirming bench decision that found that the work performed during lunch period was predominantly for the benefit of the employer).

that Sampson was not completely relieved during her meal breaks, and thus, the Meal and Break Deduction allegations are sufficient.

Likewise, Sampson has alleged sufficient facts with respect to her claim regarding the Unpaid Pre- and Post-Schedule Policy. The Portal-to-Portal Act sets forth certain activities that are not compensable under the FLSA. Specifically, the Act provides that an employee need not be compensated for activities which are preliminary to or postliminary to a principal activity, unless they are an integral and indispensable part of the principal activities. *See Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 717 (2d Cir. 2001)(radiological technologist entitled to compensation for activities performed before work to “ready the office” such as turning on x-ray machines). In the Second Amended Complaint, Sampson alleges that before and after her shifts she met with outgoing staff or supervisors, received and gave reports, made rounds, completed charts, took inventory of narcotics, and attended to emergencies or dealt with ongoing patient care duties without compensation. *Id.* at ¶¶ 64, 93. Accepting these facts as true, the court can infer that at least some of the activities were integral part of her nursing job.⁸

Furthermore, the court’s consideration of whether or not the time spent was *de minimus* will have to be made after discovery has been completed. Sampson alleges she worked an additional 10 minutes a week before her shifts and 15 to 30 minutes after each shift. If these allegations are true, the work would not be considered *de minimus*. *Compare Albrecht v. Wackenhut Corp.*, 379 Fed. Appx. 65, 66 (2d Cir. 2010)(unpublished opinion)(30-90 seconds

⁸The defendants’ argument that the plaintiffs have failed to allege that the defendants had knowledge that Sampson was continuing to work is without merit. Although it is true that she has not identified a specific supervisor or manager she spoke to, Sampson has asserted that “the defendants” were aware that their employees were working beyond their shifts.

spent engaging in activity before and after each shift not compensable) *with Kosakow*, 274 F.3d at 719 (15 minutes of prep time compensable).⁹

As to the specifics of the Unpaid Training Policy, the defendants argue that the plaintiffs have failed to allege that the training was “mandatory versus voluntarily, on or off shift, or that they completed productive work during that time.” Defs. Mem. at 12. “Pursuant to regulations promulgated under the FLSA, the time that an employee spends at ‘lectures, meetings, training programs and similar activities’ need not be counted toward that employee's hours worked where: (1) Attendance is outside of the employee's regular working hours; (2) Attendance is in fact voluntary; (3) The course, lecture, or meeting is not directly related to the employee's job; and (4) The employee does not perform any productive work during such attendance.” *Kosakow*, 274 F.3d at 721 (citing 29 C.F.R. § 785.27). Sampson alleges that the training activities occurred during regular working hours, were required by the defendants, were directly related to her position, and that the plaintiffs were required to actively participate. *See* Second Amended Complaint at ¶¶ 97-99. While these allegations were clearly designed to address the various prongs of the regulation, *see Diaz v. Consortium for Workers Educ., Inc.*, 2010 U.S. Dist LEXIS 10772 *11 (S.D.N.Y. Sept. 28, 2010), Sampson has provided sufficient detail about the training and in-service programs that she attended. She alleges that she was required to attend CPR

⁹The court notes that two of the cases relied upon by the defendants for the proposition that Sampson’s activities are not compensable as *de minimus* were decided after discovery had closed. *See Singh v. City of N.Y.*, 524 F.3d 361 (2d Cir. 2008)(affirming district court’s order granting summary judgment); *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995)(reversing district court’s determination after bench trial). In the *Gorman* case, which is also relied upon by the defendants, the Second Circuit affirmed a determination that a motion to amend was futile based on the plaintiffs’ acknowledgment at oral argument that the time spent was *de minimus*. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007).

training for two hours every two years, and in-service classes on topics such as new treatments, wound care, medication administration, IV training, and HIV training. Coupled with the general allegations, the court can reasonably infer that the sessions were mandatory and took place during her regular working hours. Accordingly, she has also pleaded sufficient facts regarding the Unpaid Training Policy.

Finally, the defendants contend that the plaintiffs' FLSA claims should be pursued through the grievance and/or arbitration provisions of the CBA.¹⁰ They argue, in this regard, that since the CBAs fully protect the plaintiffs' FLSA rights by requiring overtime pay, the plaintiffs must resolve whether certain activity is "work" through the CBA. Under the FLSA, employers and employees "may make 'reasonable provisions of contract [to guide] the computation of work hours where precisely accurate computation is difficult or impossible,'" such as issues involving whether "certain activity is 'work.'" *Leahy v. City of Chicago*, 96 F.3d 228, 232 (7th Cir. 1996). That does not suggest, however, that plaintiffs are always required to pursue their FLSA claims through grievance or arbitration provision where a CBA provides for overtime pay.

"Where, [as here], statutory claims are susceptible to arbitration, the next inquiry is whether the parties intended to arbitrate such claims, as indicated by the terms of their agreement to arbitrate." *Severin v. Project CHR, Inc.*, 2011 U.S. Dist. LEXIS 99839 *6-7 (S.D.N.Y. Sept. 2, 2011). Because there is no presumption of arbitrability, "any CBA requirement to arbitrate [statutory claims] must be particularly clear" and un-mistakable. *Id.* at *7 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998)). One of two conditions must be met for an

¹⁰The court notes that the defendants never moved to compel arbitration, choosing instead to include this argument for the first time at page 18 of their memorandum.

arbitration clause in a CBA to “clearly and unmistakably” apply:

First, a waiver is sufficiently explicit if the arbitration clause contains a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration . . . , Second, a waiver may be sufficiently clear and unmistakable when the CBA contains explicit incorporation of the statutory . . . requirements in addition to a broad and general arbitration clause Courts agree that the specific incorporation requires identifying the . . . statutes by name or citation.

Id. The defendants have not suggested that the CBAs contain a provision requiring all federal causes of action to be arbitrated. They do appear to suggest, however, that because the overtime provision is “consistent with fundamental FLSA principles,” the plaintiffs’ claims must be resolved through the CBA. But, the defendants have not cited to one provision in the CBA that refers to the FLSA by name or citation. The fact that the CBAs require defendants to pay one-and-a-half times the regular rate to employees who work more than forty hours is alone insufficient.

Thus, for all the reasons set forth above, the court finds that Sampson has now provided sufficient information regarding the overtime violation.¹¹

2. The Defendants

However, as to the specifics regarding the named defendants, the plaintiffs have not alleged sufficient facts to survive a motion to dismiss. In an attempt to cast a very large net

¹¹Should the court decide to exercise pendent jurisdiction, Gill has alleged sufficient facts to state an overtime claim under the NYLL concerning the Unpaid Pre- and Post Schedule Policy. In this regard, Gill alleges that he was required to work before his scheduled start time in order to retrieve his equipment and to drop off the equipment at other locations, typically resulting in an additional two hours every week and after his scheduled end time in order to finish patient visits and check equipment functionality, typically resulting in an additional hour and a half each shift. Gill does not assert that he was required to attend training or in-service class and has not alleged sufficient facts to support his claim regarding the Unpaid Meal and Break Deduction Policy.

encompassing over forty health centers and affiliates, the plaintiffs have named Medisys, Jamaica Hospital, Brookdale Hospital Medical Center, Flushing Hospital and Medical Center, Peninsula Hospital Medical Center, David Rosen (“Rosen”), and Max Sclair (“Sclair”) as defendants. The plaintiffs allege without any factual support that they are “joint employers,” and thus, are jointly and severally liable to the named plaintiffs and the class members for any violations that have allegedly occurred. Yet, the complaint, which is 35 pages long and contains 202 paragraphs, still lacks the most basic, relevant, facts about the plaintiffs’ employers .¹²

“Both the FLSA and the NYLL impose financial liability on employers who violate the . . . overtime provisions.” *Chen v. Domino’s Pizza, Inc.*, 2009 U.S. Dist. LEXIS 96362 * 9 (D.N.J. Oct. 16, 2009)(citing 29 U.S.C. § 216(b)). “The FLSA defines employer as ‘any person acting directly or indirectly in the interest of an employer in relation to an employee.’” *Chen*, 2011 U.S. Dist LEXIS at * 9 (citing 29 U.S.C. § 203(d)). The definition of employer in the NYLL parallels the FLSA. The provisions in the statutes were drafted in broad terms so that the provisions would have “the widest possible impact.” *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)(citing *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984)).

“Because the statute . . . offers little guidance on whether a given individual is or is not an employer,” courts in this Circuit look to the “economic reality” of the relationship, weighing the

¹²In her prior order, Judge Feuerstein did not address the sufficiency of the pleadings with respect to the named defendants, focusing, as the parties had, on the deficiencies regarding the named plaintiffs. In the latest round of motion practice filed in connection with this boilerplate complaint, at least one other court in this district is now questioning the sufficiency of the pleadings with respect to the defendants. *See Wolman*, No. 10-1326 (JS)(ETB)(the court can no longer accept as true plaintiffs’ bald allegations that claim that twelve separate entities and one individual were involved in enforcing the alleged pay policies given the plaintiff’s admission that she only worked at one hospital).

following factors:

whether the alleged employer (1) had the power to hire or fire 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.*¹³ The economic reality test “‘is useful largely in cases involving joint claims of joint employment[.]’ . . . because, when an entity exercises those four prerogatives, that entity, in addition to any primary employer, must be considered a joint employer.” *Zheng*, 355 F.3d 61,68 (2d Cir. 2003)(citing *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996)). While “no one of the factors standing alone is dispositive,” the term employer includes individuals with substantial control over the aspect of employment alleged to have been violated, here, the overtime policies. *Diaz v. Consortium for Workers Educ.*, 2010 U.S. Dist LEXIS 107722 *7 (S.D.N.Y. Sept. 28, 2010)(citing *Herman*, 172 F.3d at139). With this guidance, the court assesses whether the facts are sufficient to state an FLSA claim against the defendants.

Ignoring all of the plaintiffs’ conclusory allegations that refer to the defendants as “joint employers,” restate provisions of the FLSA or interpret labor law regulations, the Second Amended Complaint asserts the following facts with respect to MediSys and the four named hospitals :

21. Collectively, MediSys comprises a single, integrated enterprise, as they perform related activities through common control for a common business purpose.

22. In fact, MediSys admits it is one of the largest employers in New York City, consisting of an integrated network. MediSys is an

¹³“The regulations promulgated under the FLSA expressly recognize that a worker may be employed by more than one entity at the same time.” *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 66 (2d Cir. 2003).

integrated network engaged in the operation of hospitals and/or the care of the sick.

23. Specifically, the Brookdale Hospital Medical Center, Flushing Hospital and Medical Center, the Jamaica Hospital, and Peninsula Hospital Medical Center are each hospitals that are part of the integrated MediSys

24. Defendants operations include over 40 health care facilities and centers and employ approximately 11,000 individuals at their various locations.

25. Further MediSys is controlled and operated through central management. For example, centralized management includes David P. Rosen . . . Max Sclair . . . , for the entire system and oversight by a senior executive team and board of directors.

26. Defendants also publish one newsletter . . . for the entire hospital system.

27. Further, defendants' labor relations and human resources are centrally organized and controlled. . . . MediSys . . . maintains system-wide policies and certain employee benefit plans.

28. Defendants also have centralized supply chain management, and financial, computer, payroll and health records systems that are integrated throughout their locations.

29. Defendants have common ownership.

30. Therefore, defendants constitute an integrated, comprehensive, consolidated health care delivery system, offering a wide range of services.

* * *

32. . . . Defendants engage in a joint venture of operational control for providing healthcare services by entering an agreement, established through their conduct in sharing profits and losses.

33. Defendants jointly managed and controlled this venture as well as its employees and assets. For example, MediSys . . .990 form describes the organization's mission as supporting the operations of

the Jamaica Hospital Medical Center, Brookdale Hospital Medical Center, Flushing Medical Center, and Peninsula Hospital Center. Further, a MediSys Health Network Inc. 990 identifies defendants as controlled entities, which the Internal Revenue Service defines as an entity that is owned, directly or indirectly by MediSys Health Network Inc. Additionally, defendants have a centralized approach to management and human resources, including having a Vice President of Human Resources for the entire system, a senior executive board for the MediSys Health System, system-wide policies, including those claimed herein, and a centralized payroll system.

See Second Amended Complaint ¶¶ 21-30, 32-33.

a. MediSys

Even accepting all of the allegations as true, the plaintiffs have not pleaded sufficient facts to show that MediSys had control over the plaintiffs or the overtime policies at issue. See *Jean-Louis v. Metro. Cable Communs. Inc.*, 2011 U.S. Dist LEXIS 113084 *18-50 (S.D.N.Y. Sept. 30, 2011)(finding Time Warner Cable not joint employer of Metro Cable technicians where Time Warner had no formal control over hiring or firing, work schedules, rate or methods of payment, or maintenance of employment records, minimal control over conditions of employment, and no functional control over technicians); *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam) (holding that "[a] joint employer relationship may be found to exist where there is sufficient evidence that [one entity] had immediate control over the other company's employees" and identifying "commonality of hiring, firing, discipline, pay, insurance, records, and supervision" as "relevant factors").

To the extent MediSys alleges that it maintains operational control over its forty health care facilities and its employees, these allegations are conclusory and insufficient to survive a motion to dismiss. See *Diaz*, 2010 U.S. Dist LEXIS at * 10-11(allegations that defendant

“supervised and controlled” the other defendants and their employees by controlling the method, rate, and time of payment of salaries insufficient to survive motion to dismiss). Similarly, the plaintiffs assertion that MediSys, and the other defendants, “engage in a joint venture . . . established through their conduct in sharing the profits and losses,” is insufficient. “Pleading a joint venture does not trigger joint employer status because it is possible for joint venturers to separately employ different people. . .” *Cannon v. Douglas Elliman, L.L.C.*, 2007 U.S. Dist. LEXIS 91139 * 11, n.3 (S.D.N.Y. Dec. 10, 2007).

There are no facts that indicate that MediSys had any direct role in hiring or firing the plaintiffs or that it supervised or controlled their work schedules. The plaintiffs’ broad assertions that MediSys maintains some unidentified “system wide policies and employee benefit plans” or that it has a centralized payroll records system, at best, reflects a centralized human resource system. The complaint also contains no facts that indicate that MediSys had any direct role in controlling the plaintiffs’ conditions of employment or in determining their rate and method of payment. Moreover, the plaintiffs have not specified what and whose records are processed through and maintained in their payroll records system. Also absent from the pleading are factual allegations explaining where the plaintiffs’ personnel files, time sheets, evaluations, pay stubs, or government employment forms were kept. In fact, although the plaintiffs’ refer to the fact that MediSys provided employees with pay stubs and payroll information, *see* Second Amended Complaint at ¶ 109, at best, this assertion suggests that MediSys prepared their paychecks. It remains unclear, however, who actually pays the plaintiffs’ salaries. In sum, the court finds that the plaintiffs have failed to sufficiently allege that MediSys was their employer within the meaning of the FLSA.

b. The Hospitals

The sufficiency of the pleadings with respect to the four named hospitals are also insufficient. There are absolutely no facts that suggest that Flushing Hospital Medical Center and Peninsula Hospital Center have any connection with the named plaintiffs except to the extent that are alleged to be part of the MediSys Network. Plaintiffs acknowledgment that they work at health centers operated by Brookdale and Jamaica, respectively, came only as a result of Judge Feuerstein's directive. The court might have inferred that Brookdale was Sampson's employer and Jamaica was Gill's employer, but for the wording in the complaint. Throughout the complaint, the plaintiffs continue to insist that all of "the defendants" are their joint employers. In fact, the plaintiffs flatly assert that while Sampson and Gill "worked" at Brookdale and Jamaica Health Centers, they were "employed" by the defendants." *See* Second Amended Complaint ¶¶ 64-65. Given the plaintiffs' failure to identify a single supervisor or manager, to indicate who enforced the policies at issue, to indicate who pays their salaries, to identify who sets their work schedules or where their payroll records are maintained, it is impossible to identify their employer from the current pleadings. It may very well be that Brookdale employs Sampson and Jamaica employs Gill, but the fact that the court still has to guess after the plaintiffs have been given numerous opportunities to cure the defects in the pleading, indicates the deficiencies that remain in the Second Amended Complaint. Accordingly, the court reports that the plaintiffs have failed to sufficiently alleged that the hospitals were the plaintiffs' employers within the meaning of the FLSA.

c. Rosen and Sclair

With respect to Rosen and Sclair, the Second Amended Complaint asserts:

39. As the President and CEO of MediSys Health Network Inc., Mr. Rosen has operational control over the System. For example, Mr. Rosen has been involved in the acquisition of Peninsula Hospital Center into the MediSys Health Network Inc. Such an acquisition provides Mr. Rosen further bargaining power in the marketplace on behalf of the MediSys Health Network Inc.

40. As President and CEO, Mr. Rosen is listed as the Principal Officer of the MediSys Health Network Inc. on tax documentation.

41. In 2006, Mr. Rosen testified before the New York State Assembly Committee on Health Insurance, on behalf of MediSys Health Network Inc., regarding the role of HMOs in New York State healthcare.

42. In concert with others, Mr. Rosen has the authority to, and does, make decision that concern defendants' operations and significant functions, including functions related to employment, human resources, training and payroll.

43. For example, as President and CEO, Mr. Rosen has participated in employee recognition programs.

44. In his role as President and CEO of MediSys Health Network Inc., Mr. Rosen serves on the boards of the Greater New York Hospital Association, New York State Coalition of Financially Distressed Hospitals, and New York City Primary Care Development Corporation, as well as the Greater Jamaica Development Corporation.

45. Due in part to his role, Mr. Rosen, has the authority to, and does, make decisions concerning the policies defendants adopt and the implementation of those policies.

46. Further, Mr. Rosen in concert with others, is involved in the creation and/or maintenance of the illegal policies complained of in this case.

47. Mr. Rosen has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of employees, and control the drafting and enforcement of the policies which govern the hiring and firing of employees.

48. Because Mr. Rosen, in concert with others, provides day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment and controls the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, he is affirmatively, directly, and actively involved in operations of the defendants' business functions, particularly in regards to the employment of employees.

* * *

51. As Vice President of Human Resources of MediSys Health Network Inc., Mr. Sclair has operational control over the human resource functions across MediSys Health Network Inc.

52. As Vice President of Human Resources, Mr. Sclair has hosted employee recognition programs.

53. Mr. Sclair, in concert with others, has the authority to, and does, make decisions that concern defendants' operations and controls significant functions of MediSys Health Network Inc., including functions related to employment, human resources, training, payroll and benefits.

54. As Vice President of Human Resources, Mr. Sclair is actively involved in payroll functions across MediSys Health Network Inc.

55. In his role, Mr. Sclair controls significant functions of MediSys Health Network Inc. For example, in the concert with others, Mr. Sclair, created and/or implemented human resource policies for MediSys Health Network Inc.

56. Mr. Sclair, in concert with others, is actively involved in the determination and drafting of human resources policies, the resolution of issues and disputes regarding policies and their application, the counseling locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

57. As Vice President of Human Resources, Mr. Sclair, in concert with others, is involved in the creation and/or maintenance of the illegal policies complained of in this case.

58. In his role as Vice President of Human Resources, Mr. Sclair is actively involved in defendants' employment and human resources records, including the systems for keeping and maintaining those records.

59. Further, Mr. Sclair, is actively involved in reviewing and counseling defendants regarding employment decisions, including the hiring and firing of Plaintiffs and Class Members.

60. Mr. Sclair has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of employees, and control the drafting and enforcement of the policies which govern the hiring and firing of employees.

See Second Amended Complaint ¶¶ 39-48, 51-60.

Deciphering the allegations that touch upon the factors of the economic reality, the plaintiffs have alleged that Rosen (1) had "operational control over the System;" (2) "does functions" related to employment, human resources, training and make decisions that concern defendants' operations and significant functions, including payroll; (3) has the authority to, and does, make decisions concerning the policies defendants adopt and the implementation of those policies; (4) is involved in the creation and/or maintenance of the illegal policies complained of in this case; (5) has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of employees, and control the drafting and enforcement of the policies which govern the hiring and firing of employees; and (6) in concert with others, provides day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment and controls the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment.

Similarly, the plaintiffs' alleged that Sclair (1) has operational control over the human

resource functions; (2) in concert with others, controls functions related to employment, human resources, training, payroll and benefits; (3) is actively involved in the network's payroll functions; (4) in concert with others, creates and implements the network's human resource policies; (5) in concert with others, is involved in the determination and drafting of the network's human resources policies and communicates with employees about human resources issues and policies; (6) in concert with others, is involved in the creation and/or maintenance of the illegal policies complained of in this case; (7) is involved with the network's' employment and human resources records, including the systems for keeping and maintaining those records; (8) counsels "the defendants" regarding employment decisions, including the hiring and firing; and (9) has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of employees, and control the drafting and enforcement of the policies which govern the hiring and firing of employees.

These allegations are nothing more than conclusory allegations designed to satisfy the economic reality test factors. *See Diaz*, 2010 U.S. Dist LEXIS at *11 ("[M]ere boilerplate allegations that an individual meets various prongs of the economic reality test" are insufficient to survive a motion to dismiss). In fact, these thread-bare recitals, which the plaintiffs have attempted to mask by including among a vast number of irrelevant allegations, are virtually identical to the allegations asserted by plaintiffs counsel in other hospital overtime cases against unrelated defendants. *See Wolman v. Catholic Health Centers*, No. 10-1326 (JS)(ETB)(Fourth Amended Complaint §§ 46, 52, 53, 54); *DeSilva v. North Shore-Long Island Jewish Health System, Inc.*, No. 10-1341 (JFB)(ETB)(Third Amended Complaint §§ 48, 55, 58, 68, 66). The court cannot reasonably infer from these allegations that Rosen and Sclair had any direct role in

hiring or supervising Sampson or Gil, in controlling their work schedules, or in setting their conditions of employment. The plaintiffs also do not allege how either of these men provided human resource support, which employment policies they drafted, how they were involved in the creation and implementation of the defendants' record keeping system, how they controlled the overtime policies at issue and how that involvement effected the named plaintiffs. Accordingly, the court finds that the facts are also insufficient to establish their individual liability under the FLSA.

3. The State Law Causes of Action

The plaintiffs have also asserted claims under the New York Labor Law §§ 190(8) and 191, *et seq.*, and for breach of express and implied contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, fraud, negligent misrepresentation, conversion and estoppel.¹⁴ In her prior order, the District Court declined pendent jurisdiction over the state law claims. *See Swiatkowski v. Citibank*, 745 F. Supp. 2d 150, 173 n.14 (“In the interest of comity, the Second Circuit instructs that absent exceptional circumstances, where federal claims can be disposed of pursuant to Rule 12(b)(6) or summary judgment grounds, courts should abstain from exercising pendent jurisdiction.”); *see also Board*

¹⁴In its February 8, 2011 order, the court dismissed any claims arising from a breach of the plaintiffs' CBA pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The court also found that any claims based on independent employment contracts alleged by plaintiffs, like Sampson, who are concurrently represented by collective bargaining agents are preempted by the *Garmon* preemption. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The defendants continue to argue that all of the state law claims are preempted by Section 301 because they require an analysis of the CBA. The defendants also contend that the claims are duplicative of the FLSA overtime claim and therefore preempted. The court notes that common law claims based upon the failure to compensate plaintiffs for straight time would not be preempted. *See DeSilva*, 770 F. Supp. 2d at 553.

of Locomotive Eng'rs Div. v. Long Island R.R., 85 F.3d 25, 29 (2d Cir. 1996) (declining to consider state law wage claim where court dismissed federal wage claim). Accordingly, the undersigned reports and recommends that the district court, in its discretion, should again decline to exercise jurisdiction over plaintiffs' state law claims.

4. The Collective/Class Action

The court also finds that the collective/class action claims are insufficiently pleaded. According to the complaint, class members include secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, transport nurses, nurse aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, nurse aides, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse techs, trainers, transcriptionists, occupational therapists, occupational therapy assistants, physical therapists, physical therapy assistants, radiation therapists, staff therapists, angiotechnologists, x-ray technicians, CAT scan technicians, mammographers, MRI technologists, sleep technologists, surgical technologists, radiographers, phlebotomists, respiratory technicians, respiratory care specialists, respiratory care practitioners, clinical coordinators, medical assistants, home care nurses, home health aides, clinical case managers, midwives and other health care workers, employed at over forty health care facilities and centers.¹⁵ See *e.g.* Second Amended Complaint ¶

¹⁵The Class Members have been broken into six subclasses. Class Members are first broken down according to which of the three policies they were subjected to and then further divided into subclasses based on whether they were subject to a collective bargaining agreement. See Second Amended Complaint at ¶ 87.

84. In fact, the plaintiffs estimate that the putative class will include approximately 11,000 health care employees.

“The FLSA permits a plaintiff to bring an action ‘against any employer . . . in behalf of himself . . . and other employees similarly situated.’ § 216(b). While neither the FLSA nor its accompanying regulations define the term ‘similarly situated,’ courts have held that plaintiffs must, at least, set forth ‘a modest factual showing sufficient to demonstrate that they and potential plaintiffs . . . were victims of a common policy or plan that violated the law.’” *Zhong v. August August Corp.*, 498 F. Supp. 2d at 630 (citing *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998)). In order to avoid dismissal of a class action claim, the plaintiff must similarly set forth facts which touch upon the four prerequisites for a class action under Rule 23(a). *See Ruggles v. Welpoint, Inc.*, 253 F.R.D. 61, 66 (N.D.N.Y. Sept, 24, 2008). In this regard, the plaintiff must “allege questions of law or fact that are common to the class and assert that her claims are ‘typical’ of the class.” *Id.* (allegations sufficient where case management nurses, utilization review nurses and medical management nurse performed substantially similar duties and were thus subject to same illegal wage practices).

Here, the plaintiffs allege that all of the Class Members were subject to the same Meal and Break Deduction Policy, Unpaid Pre- and Post- Work Policy and Unpaid Training Policy regardless of their location, position, unit or shift. *Id.* at ¶¶ 84, 96, 104. While the same time-keeping system may be in place for all 11,000 employee, Sampson’s modest factual showing is insufficient to allow her to propose a collective or class action comprised of the identified Class Members. Sampson has asserted that she was a victim of the defendants’ time-keeping system because her meals were interrupted by answering/returning phone calls, maintaining equipment,

completing documentation, and tending to emergency situations. She has also alleged that she did not receive compensation before work when she was required to meet with outgoing staff, receive report[s] and make rounds and after her shift to give a report or take inventory of narcotics, or to tend to an emergency or deal with an ongoing patient issue. With respect to the Unpaid Training Policy, Sampson has alleged that she was not compensated for CPR training and in-service classes on topics such as new treatments, wound care, medication administration, IV training, and HIV training.¹⁶

Sampson's allegations all relate to her nursing duties. There is no colorable basis to infer that the entirety of the proposed class performed the same type of work. For example, it is unlikely that housekeepers, custodians, clerks, porters, medical coders, medical underwriters, and transcriptionists were required to tend to patient emergencies or take part in mandatory wound care classes. While "any two people who work at the same time for the same employer are going to be subject to *some* common policies," the two employees can not bring an FLSA action unless they are "victims of a single decision, policy or plan." *Saleen v. Waste Mgmt.*, 649 F. Supp. 2d 937, 940-41 (D. Minn. 2009); *Landry v. Peter Pan Bus Lines, Inc.*, 2009 U.S. Dist LEXIS 129873 *3 (D. Mass. Nov. 20, 2009)(while complaint contained sufficient facts for individual claim it did not set forth fact entitling anyone else to relief). As such, the court cannot reasonably infer that the proposed putative class are victims of the same policies.

¹⁶The court has not addressed the plaintiffs' arguments concerning Gill's standing to represent the class in a Rule 23 class action given the undersigned's recommendation that the state law claims be dismissed.

CONCLUSION

In order to comprehend this court's recommendation, it is necessary to review plaintiffs' counsel's practices in similar litigation. Plaintiffs' counsel initiated nine nearly identical cases in the Southern District of New York. Judge Crotty considered motions to dismiss in four of those cases all containing allegations virtually identical to the allegations asserted in this case. In his decision, Judge Crotty noted that the collective pleadings, took "a blunderbuss approach of alleged wrongs, [and included] multiple defendants who are not employers, and random citation of inapplicable statutes" and were "a vivid demonstrative of how not to plead." *Nakahata*, 2011 U.S. Dist LEXIS at *29-30. Judge Crotty dismissed those complaints and that decision is under appeal. Judge Crotty noted at that time that at least three other virtually identical boilerplate complaints had been filed in other cases in the Western District as well as the District of Massachusetts.

During the same time period, three nearly identical complaints were filed in the Eastern District including the case at hand. Prior to Judge Crotty's decision, Judge Seybert had dismissed one of those complaints noting the same pleading deficiencies. In particular Judge Seybert cautioned plaintiffs' counsel that factual detail was required to support the allegations of the complaint. Thereafter, in this case, Judge Feuerstein, in response to the defendants' first motion to dismiss, cautioned plaintiffs' counsel that the pleadings were lacking in factual detail. Despite the admonitions of three separate District Courts, plaintiffs' counsel persisted in their refusal to provide factual support for the allegations of the complaint. To date, in the Eastern District alone, plaintiffs' counsel have been permitted to amend their pleadings now four separate times without penalty and consideration of the financial burdens imposed on the defendants or the waste of

judicial resources.

When the court collectively views the cases that have addressed “what is functionally the same pleading,” it is shocking to see the number of opportunities counsel for the plaintiffs have been given to cure the defects. Yet, in this matter, the complaint still fails to include the most basic, relevant, and easily obtainable information about the named plaintiffs’ employers. It is the court’s belief that counsel has strategically chosen to omit that information for fear it might erode the class action lawsuit, which is dependent on the survival of the joint venture theory. Plaintiffs’ counsel has been apprised multiple times of the inadequacy of these pleadings and has made only minimal attempts to cure the defects. Accordingly, the undersigned recommends that dismissal with prejudice is now warranted. *See Williams v. Citigroup, Inc.*, 659 F.3d 208 (2d Cir. 2011)(citing *Forman v. Davis*, 371 U.S. 178 (1962)(leave to amend freely given in the absence of “repeated failure to cure deficiencies by amendments previously allowed)); *Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP.*, 322 F.3d 147 (2d Cir. 2003)(affirming District Court’s denial of leave to amend and noting “Three bites at the apple is enough.”).

The defendants’ motion to stay discovery is moot.

OBJECTIONS

A copy of this Report and Recommendation is being served by the Court on all parties. Any objections to this Report and Recommendation must be electronically filed with the Clerk of the Court within 14 days. Failure to file objections within this period waives the right to appeal the District Court’s Order. *See* 28 U.S.C. §636 (b) (1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118

F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
February 9, 2012

_____/s/_____
Arlene R. Lindsay
United States Magistrate Judge