At an IAS Term, Part COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of January, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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ADRIANA MORENO AND LEONIDAS PEGUERO-TINEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- against -

Index No. 500569/13

FUTURE CARE HEALTH SERVICES, INC., . AMERICARE CERTIFIED SPECIAL SERVICES, INC., ETHAN DREIFUS, ESAN DRESUS AND MARTIN KLEINMAN,

Defendants.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)/ Memoranda in Support	1 - 4
Opposing Memorandum and Affidavits/ Affirmations	5 - 6
Reply Memorandum	7
Other Papers Transcript of Oral Argument on the Motion	8

Upon the foregoing papers, defendants, Future Care Health Services, Inc. (Future Care), Americare Certified Special Services, Inc., (Americare), Ethan Dreifus (Dreifus) and, Martin Kleinman (Kleinman), (collectively "Future Care defendants)[1] move for an order:

a. Pursuant to CPLR 3211 (a) (1) and (7), dismissing all counts of the plaintiffs' complaint;

b. Pursuant to CPLR 901 (a), dismissing the class action as to all counts of the plaintiffs' complaint;

c. Pursuant to CPLR 901 (b), dismissing the class action as to counts I, II, III, IV, and V of the plaintiffs' complaint; and

d. For an order, dismissing all counts of the plaintiffs' complaint as against Ethan Dreifus, Martin Kleinman and Americare as neither were plaintiffs' employer.

BACKGROUND

The underlying action results from defendants' alleged violations of the New York Labor Laws ("NYLL") as well as claims for defendants' alleged breach of contract and unjust enrichment at the expense of the named plaintiffs, Adriana Moreno (Moreno) and Leonidas Peguero-Tineo (Peguero-Tineo), as well as the proposed class. According to the complaint, Moreno and Peguero-Tineo allege they were health care workers who provided home care services to disabled and elderly individuals. Moreno alleges she was employed by

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[1] Defendants allege that "Esan Dresus" is sued incorrectly herein as a variation of defendant Dreifus' name. While this issue will be addressed later within this decision, the court notes that "Esan Dresus" has not appeared and has no position on the instant motion.

defendants from December, 2008 to July, 2012[2] and Peguero-Tineo alleges she was employed by defendants from June, 2010 to August, 2011. Plaintiffs allege, among other things, that during the relevant period, they were not paid all wages due, not paid overtime wages and, frequently worked a "spread of hours," or a shift longer than ten hours per day, without receiving an additional hour of work at the minimum wage as required by the NYLL. Plaintiffs contend that they were required to attend "in-service" training sessions approximately three times a year, without pay, at defendant Future Care's office location. Plaintiffs further allege that since approximately May 2011, the defendants have improperly classified the named plaintiffs and the class as "live-in" employees, paying them a flat-rate that does not satisfy the minimum wage and overtime pay requirements for all of the hours they worked. Plaintiffs claim to have worked as many as 80 hours in a work week without receiving any overtime premium for the hours they worked in excess of 40.

Plaintiffs' seek redress under seven separate counts within their complaint as follows:

> COUNT I - Defendants' violation of NYLL Article 19, with regard to unpaid wages; unpaid overtime wages; unpaid time spent in mandatory training sessions; defendants' mandating that employees must purchase their own supplies without reimbursement;
>
> COUNT II - Violation of NYLL Articles 6 and 19, for unpaid "spread of hours" wages;

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[2] While the complaint at paragraph 26 alleges that Moreno began working in December, 2008, paragraph 29 alleges a September 2008 date as the start of her receiving a salary. The papers do not resolve this discrepancy, nor will same have any impact on the court's decision.

COUNT III - Violation of NYLL Articles 6, for defendants' failure to pay wages when due;

COUNT IV - Violation of NYLL Articles 19 and 12 NYCRR § 142-2.5(c), for defendants' failure to pay additional amounts for laundering of required uniforms;

COUNT V - Violation of NYLL §§195, 661 and 12 NYCRR § 142-2.6 for defendants' failure to comply with notification requirements and to maintain records;

COUNT VI - breach of contract;

COUNT VII - unjust enrichment for defendants' failure to pay all wages due, including wages for overtime, minimum wages under the New York Health Care Worker Wage Parity Act and, "spread of hours" wages.

Defendant Future Care was contracted by codefendant, Americare, to provide home health care services for Americare's elderly and/ or disabled clients in and around New York City. Codefendant Dreifus was an "administrator" at Future Care who, as defendants contend, left Future Care's employ some time in 2009. Codefendant Kleinman is an executive at Americare.

Within their motion, defendants argue that all counts of the complaint must be dismissed. Defendants allege that, pursuant to CPLR 3211 (a) (7), Counts I, II, III, VI and, VII must be dismissed because plaintiffs' allegations fail to state causes of action thereunder. Defendants proffer that flat-rate pay for overnight "live in" home health aides is not per se impermissible and the allegations regarding the alleged "unpaid" training sessions must be dismissed as there is no basis under New York State law for compensation during such sessions. Defendants allege that "Count IV" must be dismissed because, in accordance with their collective bargaining agreement (CBA), plaintiffs received a maintenance allowance

of $30.00 per month that covered laundering their uniforms. Defendants further allege that, even if this stipend were not contained within the CBA, the plaintiffs' pay sufficiently exceeded the statutory floor making such a payment inapplicable. To the extent that "Count VI" rests on the applicability of Public Health Law (PHL) § 3614-c, known as the Home Care Worker Wage Parity Act (Wage Parity Act), such count must also be dismissed as same is substantially inapplicable to the named plaintiffs due to the enforcement dates listed within PHL § 3614-c (3)(a) and (b). Additionally, defendants contend that no class action may be maintained as to Counts I, II, IV, V, VI and, VII by operation of CPLR 901 (a) and/ or (b).

The defendants also seek dismissal of all claims as against , Dreifus, Kleinman and Americare alleging that neither was an employer of the plaintiffs. Regarding Dreifus, defendants contend that he left Future Care in 2009, prior to any alleged wrongdoing thus, he cannot be held responsible for any of the plaintiffs' claims. As to Kleinman and Americare, defendants argue that Future Care, by virtue of an agreement between Americare and Future Care, is the only entity who should be defending this action since said agreement creates a contractor/ subcontractor relationship thus absolving Americare and its principal, Kleinman, of any liability.

In support of their request for dismissal based upon CPLR 3211 (a) (1), defendants submit, as exhibits to defense counsel Aaron C. Schlesinger's (Schlesinger) affirmation, the following:

Exhibit "A": A submission titled "Policy on hours worked by Live-In Aides."

Exhibit "B": A March 11, 2010 correspondence from the New York State Department of Labor (DOL) regarding "Request for Opinion, Live-In Companions, RO-09-0169."

Exhibit "C": Pages one and nine of the CBA between Local 373 National Amalgamated Workers Union and Future Care Health Services.

Exhibit "D": A "Services Contract" with three attached addenda, between Americare and Future Care covering the period of January 1, 2011 through and ending December 31, 2011.

Defendants further submit, as exhibits to Dreifus' affidavit, the following:

Exhibit "A": An undated "Letter of Commitment" from Meadow Park Rehabilitation and Health Care Center (Meadow Park) offering the full time position of Assistant Administrator to Dreifus.

Exhibit "B": What appear to be weekly pay "check listings" for Dreifus, from Meadow Park, beginning December 9, 2009 and continuing for approximately 14 pages until February 21, 2013.

In opposition, the plaintiffs argue that the defendants' extrinsic evidence does not support dismissal of the complaint at this early stage of the litigation since such evidence merely tends to suggest that the defendants might have a defense. That to succeed on their motion, the extrinsic evidence must conclusively prove that the plaintiffs have no cause of action. Plaintiffs further contend that the defendants offer only "hypothetical scenarios" and wage calculations in lieu of direct evidence to illustrate that the plaintiffs were properly compensated for all hours worked. Plaintiffs allege that the failure to include any wage and time records, all presumably within the defendants custody and control, tend to support the plaintiffs' allegations including, among others, that the defendants have failed to keep proper

records. Plaintiffs allege that when an employer fails to keep required accurate records, the amount and extent of underpayment should be based on the reasonable testimony of the employee, thus, precluding dismissal.

Plaintiffs argue that the allegations within the complaint are sufficiently particularized to state causes of action and that the defendants' authority to the contrary is inapplicable. Plaintiffs aver that, while the CBA may authorize a stipend for laundering and supplies, defendants have offered no direct evidence proving that the stipend was ever paid. Moreover, any allegations that the plaintiffs' salary exceeded the threshold for such a stipend is illusory as again, the defendants have offered no direct evidence in the form of wage or hourly records.

With regard to class action status, plaintiffs contend that they are permitted, and have waived, the right to seek liquidated damages thus falling outside the prohibition of CPLR 901(b); to wit, that a class action is impermissible when the statute under which the action is brought imposes a penalty such as the liquidated damages provision under the NYLL. Moreover, contrary to the defendants' assertion, plaintiffs allege that they can establish all five prerequisites for a class action under CPLR 901(a) and will do so when they make their motion for class certification. Plaintiffs stand on the position that the defendants' attempt to litigate class certification in the instant motion is premature as plaintiffs have neither had the opportunity to conduct discovery related to class certification nor have plaintiffs even made a motion for such certification.

As to the claims against Dreifus, plaintiffs proffer that, while defendants suggest Dreifus left Future Care in 2009, they also admit that during a portion of the class period, he was still employed by Future Care. As defendants offer no evidence of Dreifus' relationship with Future Care, his status cannot be fully ascertained at this early stage of the litigation.

With regard to the claims against Americare and Kleinman, the plaintiffs make an argument similar to the argument against dismissing the Dreifus claims, to wit, that the instant motion to dismiss as against these defendants rests solely on the one-year contract between Americare and Future Care. Plaintiffs argue that because the class period is considerably broader than this one year period, the court cannot, at this juncture, reach the question of whether Americare and Kleinman employed the plaintiffs under the NYLL until it reviews all the relevant facts surrounding the plaintiffs' employment relationship with the defendants. Moreover, the one year services contract does not "utterly refute" plaintiffs' allegations that they were jointly employed by Americare and Kleinman.

DISCUSSION

To the extent that the defendants' arguments under CPLR 3211 (a)(7) may rely upon both, "documents" submitted in support of their arguments under CPLR 3211 (a)(1) and those arguments supporting their request to dismiss the class action, the court shall first address those branches prior to addressing the defendants' requests pursuant to CPLR 3211 (a)(7).

Branches of Defendants' Motion Seeking Dismissal Pursuant to CPLR 3211 (a)(1)

CPLR 3211 (a) (1) provides in pertinent part that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence. Where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence must be such that it resolves all factual issues as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]: *Heaney v Purdy,* 29 NY2d 157 [1971]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). In order to be considered documentary evidence within the meaning of CPLR 3211(a)(1), the evidence "must be unambiguous and of undisputed authenticity" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849 [2012]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2010]), that is, it must be "essentially unassailable" (*Rabos, supra; Suchmacher v Manana Grocery*, 73 AD3d 1017 [2010]; *see Norment v Interfaith Ctr. of N.Y.*, 98 AD3d 955 [2012]). Therefore, a motion to dismiss may be granted on documentary evidence so long as the documents *alone* definitively dispose of plaintiffs' claims (*see Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [2006]; *Bronxville Knolls Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1995] [emphasis added]). The movant may not rely on affidavits or depositions to support a motion to dismiss pursuant to CPLR 3211(a)(1) (*see Fontanetta* at 78). Moreover, with respect to the documentary evidence submitted pursuant to CPLR 3211(a)(1), since the instant motion will not be converted into one for summary judgment, the pleadings must be given "their most

favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]), and the plaintiffs' allegations which are contrary to the documentary evidence must be accepted (*see Sopesis Const., Inc. v Solomon*, 199 AD2d 491, 493 [1993]; *Scheller v Martabano,* 177 AD2d 690 [1991]). However, a complaint containing factual claims that are flatly contradicted by documentary evidence should be dismissed (*see Well v Rambam,* 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]). "As a defense, it is the defendant who has the burden of showing that the document offered meets the enumerated standard for dismissal" (*Schapiro v Schmuckler*, 21 Misc.3d 1119[A], 2008 NY Slip Op 52104[U] Sup Ct, Kings County 2008]).

In the interest of clarity, the court shall individually address the defendants' "documentary" submissions. The four exhibits to Schlesinger's affirmation are first discussed continuing then with the two exhibits to Dreifus' affidavit.

A. Exhibit "A" to Schlesinger's Affirmation: "Policy on hours worked by Live-In Aides."

This document does not reference a specific company promulgating such policy, nor a specific "live-in aide" to whom same applies. Although there are lines at the bottom labeled "Signature," "Print Name" and, "Date," such lines are blank. As a result of this submission's unproven authenticity and ambiguous applicability to the parties herein, same cannot be considered "documentary evidence" under CPLR 3211 (a) (1) (*Rabos, supra; Fontanetta, supra*). Consequently, such document neither resolves any factual issues nor establishes a

defense to the asserted claims as a matter of law (*see Leon* at 88) and is of no probative value.

B. Exhibit "B"to Schlesinger's Affirmation: DOL Correspondence.

This March 11, 2010, correspondence from the DOL is an "Opinion Letter" which was generated in response to a letter sent to the DOL requesting same. The pertinent issues with this submission are as follows:

a. The party requesting this submission is unknown as their identity and mailing address have been redacted from the exhibit.

b. The "November 23, 2009" letter requesting this opinion, presumably containing the criteria under which the opinion applies, has not been provided in the papers. The submission reads, "[t]his opinion is based on the information provided in your letter dated November 23, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant facts were not provided." The requesting letter forms the basis for this opinion letter's applicability to the employees. Absent this letter, any connection to the plaintiffs herein is "ambiguous at best."

c. The submission reads, "[y]our letter asks four questions for which you request that it be assumed that your client's employees are within the FLSA companionship exemption" with no explanation as to what such exemption is, or why it applies to the plaintiffs herein.

d. The defendants rely on this submission for the proposition that, "[d]uring times which plaintiffs claim they were paid a live-in rate of $115 or $120 per day, such days are deemed to be 13 hour days." The relevant text actually reads as follows,

> "[t]herefore, a live-in employee *is required to be paid "spread of hours" pay* for all days in which he or she works as a live-in employee *since such employee is deemed to work, at a minimum under the rubric described above, thirteen hours per day*" [emphasis added].

The "rubric" referenced within the previous quote, reads as follows,

> "In interpreting these provisions, it is the opinion and policy of this Department that live-in employees *must be paid not less than for thirteen hours per twenty-four hour period* provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight hour sleep exclusion is inapplicable *and the employee must be paid for all eight hours*. Similarly, if the aide is not actually afforded three work-free hours for meals, *the three-hour meal period exclusion is not applicable*"[emphasis added].

As a result, the submission does not establish that a day is thirteen hours long. The submission establishes that the relevant aides *must be paid for no less than thirteen hours* if same are "live-in. This is a dramatically different interpretation than that the defendants proffer. The submission goes on further to state that,

> "The employees described in your letter *are required to be paid not less than one and one half times the minimum wage rate* for all hours worked in excess of forty hours per work week should

such individuals be non-residential employees, *and forty-four hours per work week should they be residential employees*" [emphasis added].

Such a statement seems to clearly imply that for "live-in" aides, in contravention of the defendants' position, overtime wages are due and owing after completing their forty-fourth hour of work in a given work week. By virtue of the foregoing discussion, this submission too fails to qualify as "documentary evidence" (*Rabos, supra; Fontanetta, supra*) as a result of the plethora of ancillary information required to ascertain its application to the parties herein. Because such additional information is not contained within the document (*see Blonder & Co, supra*) same fails to resolve any factual issues (*see Leon, supra*) and actually creates additional issues not addressed within the defendants' motion.

C. Exhibit "C" to Schlesinger's Affirmation: Excerpt from the CBA.

As defendants contend, the excerpted pages do indeed reference a stipend to be paid to the plaintiffs as a "maintenance allowance." As stated above, the documentary evidence must be such that it resolves all factual issues as a matter of law (*see Leon, supra*). This purported "document" does not conclusively prove that such stipend, while permitted, was actually *paid to* the plaintiffs. "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, ... dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d

at 275 [1977]). Consequently, absent any direct evidence within this document that such stipend was actually paid, Exhibit "C" too fails to satisfy the defendants' burden thus precluding a grant of dismissal.

D. Exhibit "D" to Schlesinger's Affirmation: "Services Contract" between Americare and Future Care.

Defendants contend, "Americare and Kleinman did not employ Plaintiffs, had no role in supervising, hiring or firing employees and merely retained Future Care as a subcontractor to provide health care workers." To evidence the "relationship" between Americare and Future Care, defendants offer a "Services Contract" with three attached addenda, executed by Martin Kleinman, as President and CEO of Americare and Anna Gottdiener, as Vice President of Future Care. The contract covers the period of January 1, 2011 through and ending December 31, 2011. Based on this submission, defendants argue that a general contractor/ subcontractor relationship exists between Americare and Future Care thus, Americare and Kleinman are absolved from liability.

Prior to any analysis of the purported general contractor/ subcontractor relationship that the document may or may not establish, the court must first review the document itself under the CPLR 3211 (a)(1) standard enumerated above. According to section 7, page 6, under the heading, "Term of Contract," appears the following language: "This Contract shall have a term of one (1) year commencing on the Effective Date of the Agreement. The term shall automatically renew for two (2) additional terms of one (1) year each unless either party shall give the other party . . ." There is no language within this submission, indicating that

this contract is an automatic renewal of any prior contract between these parties, nor is there any language confirming that, in accordance with the "Term of Contract" provision stated above, this particular contract did in fact renew.

1. Branches of defendants' motion seeking dismissal of all claims as against Kleinman and Americare.

Resting solely upon this submission, defendants request dismissal of all claims against Kleinman and Americare. According to the plaintiffs' complaint the "class period" allegedly runs from as early as February 6, 2007 until approximately February 6, 2013. This contract covers only the period between January 1, 2011 through and ending December 31, 2011. Again, this document, alone, fails to evidence any relationship between these two entities prior to January 1, 2011 or after December 31, 2011. In fact, defendants offer no additional documentary evidence of any kind establishing the relationship between Americare and Future Care for any other part of the alleged "class period" other than the year 2011. As long established, a motion to dismiss may be granted on documentary evidence so long as the documents *alone* definitively dispose of plaintiffs' claims (*see Blonder & Co., Inc., supra*). The defendants' documentary evidence must be such that it resolves all factual issues as a matter of law (*see Leon, supra*). The inclusion of this contract satisfies neither and, therefore, such fails to support defendants' request for dismissal.

Moreover, oral argument on the instant motion at page 17, lines 9 - 21, seems to contradict the defendants' position:

"MR. SCHLESINGER: . . . It would be a situation if I needed a home health aid, I would call Americare and say I need a home health aid because Americare represents the people that require the services and Americare contracts with Future Care and Future Care provides home health aids to Americare's clients.

Again, *Americare has complete control over them* and Future Care, again, provides their insurance, makes sure they are certified. Future Care hires and trains them, orients them" [emphasis added]."

It would seem from the plain language above that "them," "their"and, "they" all pertain to the home health aides who. According to this quote, appear to be under the control of both of these defendants.

Accordingly, as the submitted exhibit fails to satisfy the standard under CPLR 3211 (a)(1), those branches requesting dismissal of all claims as against defendants Americare and Kleinman are denied at this time and such claims shall continue.

E. Exhibits "A" and "B" to Dreifus' Affidavit: Letter of Commitment from Meadow Park and purported pay "check listing" from same.

Defendants offer an undated "Letter of Commitment" from Meadow Park Rehabilitation and Health Care Center (Meadow Park) offering the full time position of Assistant Administrator to Dreifus with a "Date of Hire" of November 25, 2009 and an "Actual Start Date" of November 25, 2009. Additionally, defendants offer a computer printout of weekly pay check listings from Meadow Park, to Dreifus, beginning December 9, 2009 and continuing for approximately 14 pages until February 21, 2013. Relying on these submissions, defendants contend that:

"Dreifus was an administrative employee of Future Care who left the employ of Future Care in 2009. As can be seen from Mr. Dreifus' affidavit, he was not

> employed during or after May 2011, which is the date the Plaintiffs allege is the first violation of the wage laws. As such, there is no allegation in the Complaint that any violation of the law occurred during Mr. Dreifus' time at Future Care. As such, all claims against Mr. Dreifus must be dismissed."

At oral argument on the instant motion, defense counsel sought to bolster this contention at page 15, lines 14-23, as follows:

> "MR. SCHLESINGER: The third argument to keep things quick is that our position is that, first of all, Dreifus, who is a named individual, named defendant, he was the Administrator of Future Care. We have an affidavit from him he left Future Care in 2009 *besides the fact he didn't have supervisory responsibilities required, the controllability to hire and fire, to discipline*" [emphasis added].

As plaintiffs correctly point out in their opposition, Dreifus was employed during a portion of the alleged "class period" and Moreno's employment period. A review of these submissions fails to provide any evidence of Dreifus' relationship with Future Care, despite counsel's opinion as above cited.

1. Branch of defendants' motion seeking dismissal of all claims as against Dreifus.

The standard for dismissal is clear and, to the extent that the defendants' seek dismissal of all claims against Dreifus based solely on these two exhibits, these submissions not only fail to definitively dispose of plaintiffs' claims (*see Blonder & Co., Inc., supra*) but the letter and check listing do not even address Dreifus' responsibilities while at Future Care, serving only to establish that in late 2009, Meadow Park placed Dreifus on its payroll. Nothing within the four-corners of the submission establishes the extent of Dreifus' responsibilities nor absolves him of any potential liability in the underlying action.

Accordingly, as the exhibits fail to satisfy defendants' burden herein, that branch requesting dismissal of all claims as against defendant Dreifus, pursuant to CPLR 3211 (a)(1), is denied at this time and such claims shall continue.

Branches of Defendants' Motion Seeking Dismissal of Plaintiffs' Class Action

CPLR § 902 states, in relevant part:

> "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied."

"In order to determine if the requirements set forth in CPLR 901 are met, and to assess the considerations listed in CPLR 902, limited discovery must be conducted (*Katz v NVF Co.*, 100 AD2d 470, 474 [1984]). Preclass discovery allows the plaintiffs "to determine whether the prerequisites of a class action . . .may be satisfied" (*Rodriguez v Metro. Cable Communications*, 79 AD3d 841[2010]). Indeed, "[t]he purpose of preclass certification discovery is to ascertain the dimensions of the group of individuals who share plaintiffs' grievance" (*Id.*). However:

> "[I]t has also been held that a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief" (Wojciechowski v. Republic Steel Corp., 67 A.D.2d 830, 831, 413 N.Y.S.2d 70 [4th Dept. 1979), lv. dismissed 47 N.Y.2d 802 [1979])"
> (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89 [2013].

The First Department's reliance on the holding in *Wojciechowski* has yet to be addressed by the Second Department, therefore, such holding is binding upon this Supreme Courts of this department. As a result, while the defendants' challenge to class action status may be held to be premature at this stage, *Downing* dictates that should a cause of action be dismissed pursuant to a CPLR 3211 motion, no claim for class action status may survive if no such cause of action may be had.

Therefore, to the extent this court may dismiss one or more causes of action within this decision, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims." With regard to all surviving causes of action, the defendants' request for dismissal of the class action claims are premature at this time and thus denied. The plaintiffs must first be allowed to conduct limited preclass discovery so as to determine whether the prerequisites of a class action may be satisfied (*see Rodriguez, supra*). In accordance with this court's short - form order dated June 13, 2013, the plaintiffs' time to move for class certification is extended for 90 days from the date of this decision resolving the instant motion.

Branches of Defendants' Motion Seeking Dismissal Pursuant to CPLR 3211 (a)(7):

CPLR 3211(a)(7) provides that, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of

action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer* at 275). The court must accept as true the facts alleged in the complaint and afford the plaintiff the benefit of every possible favorable inference in determining whether the complaint states any legally cognizable cause of action (*see International Shoppes v Spencer*, 34 AD3d 429 [2006]; *Schenkman v New York Coll. of Health Professionals*, 29 AD3d 671, 672 [2006]; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2000]). The court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Detmer v Acampora*, 207 AD2d 477 [1994]; citing *Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Although a complaint may be inartfully drawn, illogical or even informal, it will be deemed to allege whatever can be implied from its statements "by fair and reasonable intendment" (*Shields v School of Law, Hofstra Univ.*, 77 AD2d 867, 868 [1980]; quoting *Lupinski v Village of Ilion*, 59 AD2d 1050 [1977]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007], quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

In assessing a motion under CPLR 3211(a)(7) however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). As to affidavits submitted by the defendant, they will almost never warrant dismissal under CPLR 3211, unless they "establish conclusively that [plaintiff] has no [claim or] cause of action" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). "Thus, the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against the moving defendants" (*Krause v Lancer & Loader Group, LLC*, 40 Misc3d 385 [2013]; citing *Lawrence, supra*). "Unless it has been shown that a material fact as claimed by the [plaintiffs] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Guggenheimer* at 275; *see Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860 [2013]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2010]).

A. Branch seeking to dismiss plaintiffs' unpaid wages, unpaid overtime wages, unpaid time spent in mandatory training sessions and, unpaid "spread of hours" wage claims.

1. Unpaid wages and unpaid overtime wages

Defendants seek dismissal alleging, initially, that the complaint lacks sufficient specificity. Within their moving papers, defendants allege, among other things:

> "Plaintiffs have done little more than assert in a vague and conclusory manner that they were improperly paid over a certain period of time. . ."

* * *

"These allegations do nothing more than state a conclusion that Defendants violated the law. They do not allege the number of hours worked, the rate of pay or whether the rate of pay failed to meet statutory requirements."

The following statements, made during oral argument on the instant motion, further illustrate the defendants' position:

Page 5, lines13-24 "MR. SCHLESINGER: One of the claims, plaintiff claims one hundred hours a week and 80 hours a week. It is conclusory and a vacation claim. *If you do the amount, for instance, five days, there would be no violation under the law*. You can see it in our brief. *If the other plaintiff worked six or seven days and 80 hours, there is no violation*. They fail to state a cause of action so they don't say how many days they worked a week" [emphasis added].

Page 6, lines:16-19 "MR. SCHLESINGER: They don't plead how many days they worked. You don't know if there is a violation. *If they worked five days a week, there might not be [a] violation. We don't know*" [emphasis added].

In support, defendants cite *James v Countrywide Financial Corp.*, 849 F Supp 2d 296, 321 [EDNY 2012] and, *Nakahata v New York-Presbyterian Healthcare System, Inc.*, 2011 WL 321186 [SDNY 2011]. The defendants' citation to *James* reads as follows:

"Although plaintiff has identified a fourteen-month time period during which he was allegedly not properly paid overtime compensation, he has failed to include other factual allegations necessary to sustain his FLSA and NYLL claim. . . Plaintiff has done little more than assert, in vague and conclusory manner, his entitlement to overtime compensation under the FLSA and NYLL, and this is insufficient to withstand a motion to dismiss" (*James v Countrywide Financial Corp.*, 849 F Supp 2d 296, 321 [EDNY 2012]).

However, a closer reading of the complete text yields pertinent language that was redacted from the above citation. Specifically, the following language from the court appears in place of the ellipse, inserted above:

> "[The plaintiff] has not specified the "various" positions he was working in at the time he was allegedly denied overtime compensation, explained whether those positions were, in fact, exempt, or set forth the number of hours he allegedly worked without overtime compensation"
> (*James v Countrywide Financial Corp.*, 849 F Supp 2d 296, 321 [EDNY 2012]).

In contrast to the plaintiff in *James*, plaintiffs herein had only one position, home health care aide. Further, if the DOL's "opinion" letter (Exhibit "B" to the Schlesinger affidavit) were applicable, as defendants' contend, then the plaintiffs were also eligible to receive overtime pay. Additionally, plaintiffs herein allege that they regularly worked 60 to 80 hours per work week during a time period specific. /Distinguished on the facts, *James* offers little support for the instant request.

Nakahata was one of four related cases initially dismissed in a single decision because, among other reasons, the complaints lacked sufficient specificity. *Nakahata*, alone, named 35 specific defendants while all four related cases alleged putative class actions against hundreds of named defendants and related entities. All four complaints were similar in their generic quality and none alleged, among other things, which entities were which plaintiffs' employers, what were the approximate hours worked in excess of 40 in a given work week, how many hours were allegedly unpaid nor, when such unpaid wages were earned. In stark contrast, the instant matter currently involves two plaintiffs, Moreno and

Peguero-Tineo and, two alleged employing company defendants, Future Care and Americare. As confirmed by both the service contract and defense counsel at oral argument,[3] Future Care was tasked with tracking all of the hours worked by its aides in the service of Americare and reporting such hours to Americare. It is therefore understandable that either one or both of these defendants has the direct time and wage evidence necessarily lacking in the moving papers.

Moreover, in the time since defendants submitted the instant motion, *Nakahata* has been affirmed in part, vacated in part, and remanded by *Nakahata v New York-Presbyterian Healthcare System, Inc.*, 723 F3d 192 [2d Cir 2013]. On appeal, the court held:

> "We affirm in part the District Court's decision and remand in part. We affirm the dismissal, with prejudice, of the FLSA gap-time, RICO, and certain common law claims. We also affirm the dismissal of the FLSA and NYLL overtime claims, but we remand these claims with leave to replead. We reserve judgment on the dismissal of the NYLL gap-time claims and remand for reconsideration. Finally, we vacate the dismissal of certain common law claims and remand with leave to replead."

In accordance with the appellate decision, if, for argument's sake, *Nakahata* were analogous to the instant action, dismissal of the complaint would no longer result on the facts as stated therein and leave to re-plead would be warranted.

In addressing the defendants' contentions:

> "[T]he test to be applied is whether the complaint 'gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known

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[3] The actual quote from defense counsel's oral argument appears later in this decision.

to our law can be discerned from its averments' (*Moore v Johnson*, 147 AD2d 621, 621 [1989], *quoting Pace v Perk*, 81 AD2d 444, 449 [1981]; *see Conroy v Cadillac Fairview Shopping Ctr. Props. [Md.]*, 143 AD2d 726 [1988])"

(*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2010]; *see* CPLR 3013).

A review of the complaint yields the following allegations:

(1) Both plaintiffs worked for the defendants providing home health care services caring for elderly and infirm clients;

(2) From May 2011 until July 2012 when her employment with the defendants ended, Moreno continued to perform the same work for the same clients except that she was reclassified as a "live-in" aide and her "hourly" status was changed to a "flat-rate"status of $120 then $115 per day;

(3) From May 2011 until August 2011 when her employment with the defendants ended, Peguero-Tineo continued to perform the same work for the same clients except that she was reclassified as a "live-in" aide and her "hourly" status was changed to a "flat-rate"status of $120 then $115 per day;

(4) That the classification of "live-in" aide was incorrect as the plaintiffs did not live in the client's residence nor are they "exempt companions;"

(5) Upon reclassification, both plaintiffs received the same flat-rate amount regardless of how many hours they worked;

(6) During the above period (approximately sixteen months and four months respectively) the plaintiffs regularly worked more than 40 hours in a workweek, up to 80 hours a week, and Defendants did not fully compensate them for those hours at the mandatory overtime rate of one and one half times the minimum wage;

(7) Plaintiffs were required to complete in-service training sessions at Future Care's office and that Defendants did not pay any wages for the time spent in such training;

(8) Plaintiffs required to pay for supplies and laundering expenses for the required uniforms without reimbursement for such expenses;

(9) Plaintiffs regularly worked a spread of hours that exceeded 10 hours or a shift in excess of 10 hours but were not paid an extra hour's wages as required.

Further, oral argument on the instant motion reveals the following:

Page 17, line 22 through page 18, line 3:
"THE COURT: Who takes care of the hours?
MR. SCHLESINGER: Future Care. Future Care, as a matter of fact, *Future Care provides in the contract, provides a statement to Americare of the hours.*"

Page 17, lines 18-21 "MR. SCHLESINGER: Future Care, again, provides their insurance, makes sure they are certified. Future Care hires and trains them, orients them."

Accepting as true the facts alleged in the complaint and affording the plaintiffs the benefit of every possible favorable inference, the court finds that the complaint contains sufficient specificity to place *these* defendants on notice of the series of transactions or occurrences intended to be proved (*see Moore, supra*). By the defendants own admission, Future Care has, or should have, all pay and time records for these two plaintiffs and, had defendants actually provided any of these, may very well have earned dismissal pursuant to CPLR 3211 (a)(1). Considering the unambiguous language of the service contract as well as defense counsel's admission, to wit, that Future Care provides a statement of the hours worked to Americare, the court finds the defendants' use of speculative and arbitrary numbers to provide calculations purporting to support their position to be merit less and unnecessary. Although a complaint may be inartfully drawn, illogical or even informal, it will be deemed to allege whatever can be implied from its statements "by fair and reasonable intendment"

(*see Shields, supra*). As a result, the court finds defendants' allegations that the complaint lacks sufficient specificity to be without foundation.

Alternatively, defendants argue that the plaintiffs' unpaid wage and overtime wage claims are without merit as:

> "[F]latrate pay for overnight "live in" home health aides is not per se impermissible and complies with applicable law. As such, Plaintiffs' allegations do not state a cause of action for unpaid wages or overtime,"
>
> * * *
>
> "These allegations, on their own, do not state a cause of action for unpaid wages or overtime because it is not improper or illegal to pay an employee a fixed daily rate provided that the fixed rate of pay, when calculated on an hourly basis, exceeds statutory minimums. See, e.g., NYLL Sec. 195(l)(a) (specifically referring to rate of pay " by the hour, shift, day, week, salary, piece, commission, or other... "); See also Seraphin v. TomKats, Inc., 2013 WL 940914 (E.D.N.Y.,2013)."
>
> * * *
>
> "Plaintiff Moreno alleges simply that she worked as much as 60 hours per week and was paid $115 per day during " live in" shifts. This does not, on its face, state any violation of New York law because the flat rate compensated Plaintiff Moreno in excess of statutory minimums and satisfied statutory requirements. For example, if Plaintiff Moreno worked 60 hours in a 5 day week, she would have been entitled to no less than $543.85 under NYLL. Because Plaintiff Moreno was paid no less than $115 per day, she would have earned $575.00 on such a week, well in excess of the statutory minimum."

Defendants' argument presupposes and relies upon the material allegation that the plaintiffs were "live-in" aides. Plaintiffs, however, contend that this allegation is false since neither actually lived in the patient's residence. Defendants make no argument refuting the plaintiffs' contentions thus leaving this material issue in dispute which, in and of itself would preclude

dismissal (*see Guggenheimer,* supra). However, assuming for the sake of argument that this issue was resolved, defendants' reliance on NYLL § 195(l)(a) and *Seraphin v TomKats, Inc.*, (2013 WL 940914 [EDNY 2013]), offer no support for defendants, thereby, necessitating the same result. NYLL § 195(1)(a) is a notice statute proscribing the specific information employees must receive from employers, thus, wholly irrelevant to the defendants' conclusory premise above. Regarding *Seraphin*, the court stated that the FLSA "permits the use of a daily rate that includes an overtime premium for daily hours in excess of 8 [hours]" and "the FLSA permits defendants to credit the hours worked at this premium rate towards the statutory overtime compensation required for hours worked in excess of 40 [hours]." However, the defendants in *Seraphin* did more than merely state the conclusion, as defendants have herein, the court recounts the following which distinguishes this authority from the instant matter:

> "Defendants have produced hundreds of plaintiff's records. His time sheets indicate his hours worked, his daily rate, and additional overtime pay for hours beyond 12 or 14. See generally Morales Aff., Ex. B. Where additional overtime pay was awarded, the time sheets indicate the amount of overtime hours and overtime pay. See, e.g., Morales Aff., Ex. B, at 000355, 000372, 000479. The computerized versions of plaintiff's weekly pay records list his daily rate, as well as his hourly rate and his overtime rate. See, e.g., Morales Aff., Ex. B, at 000359, 000489, 000540. The records also indicate payments received at his hourly rate when he worked only partial days. See, e.g., Morales Aff., Ex. B, at 000371, 000489. Although the records do not expressly state the breakdown between hours paid at the regular rate and hours paid at the 1.5 overtime rate within the fixed daily rate, the listed rates clearly corroborate defendants' explanation of the breakdown of the daily rate. In other words, defendants' explanation yields an hourly rate of $11.7647 from 2006 to 2010, and an hourly rate of $14.2857 starting in late 2010. The hourly rates on

the records match these hourly rates, and the overtime rates on the records are multiples (either 1.5 or 2.0) of these hourly rates."

As a result of the defendants' failure to offer any direct evidence of time or wage records, defendants can find no support under this authority. Accordingly, those branches of defendants' motion seeking to dismiss the plaintiffs' unpaid wage and overtime wage claims are denied at this time and such claims shall continue.

2. Unpaid "spread of hours" wages

The defendants' request to dismiss this claim based upon a lack of sufficient specificity is denied as the plaintiffs have sufficiently pled their claim for unpaid spread of hours wages based upon the reasoning set forth in the previous section. In the alternative, defendants argue:

> "Indeed, it would appear that Plaintiffs were properly compensated under 12 NYCRR § 142 as the "live in" rate sufficiently exceeded the statutory minimum rendering the "spread of hours " premium inapplicable. See Sosnowy v. A. Perri Farms, Inc., 764 F.Supp.2d 457, 474 (E.D.N.Y.,2011)."

Sosnowy holds that:

> "Based on the Court's own reading of the statute, the Court agrees with the cases that find that the explicit reference to the 'minimum wage' in section 142–2.4 indicates that 'the spread-of-hours provision is properly limited to enhancing the compensation of those receiving only the minimum required by law' " (*Sosnowy* at 474).

However, *Sosnowy* also states, in the *very next* paragraph:

> "Whether this dismissal is without prejudice to the Plaintiff's right to amend this claim is dependent on whether the Court takes into consideration *the W–2 forms that the Defendants attached to the Perry Declaration. These W–2 forms*

> *show that for the years 2007, 2008, and 2009* the Plaintiff was paid at a rate significantly higher than minimum wage" (*Sosnowy* at 474 [emphasis added]).

Unlike *Sosnowy*, and most of defendants' cited authority, defendants herein offer no wage or time evidence of any kind. The *Sosnowy* court had ample evidence establishing the plaintiffs' rate of pay and, as a result, held as stated above. As this court has previously discussed, the defendants have offered only suppositions and arbitrary estimates of hours worked in order to provide calculations purporting to support their position. As the movant. The defendants must provide evidence in support of their position. To this end, defendants offer no competent time or wage evidence for the plaintiffs during the period they were classified as "live-in" aides. Without such proof establishing the precisely how many hours were worked under this status, defendants' allegation that $115 or $120 per day "sufficiently exceeded the statutory minimum" is rendered baseless and conclusory. As a result of this deficiency, defendants' reliance on *Sosnowy* is misplaced. Consequently, that branch of defendants' motion seeking to dismiss the plaintiffs' "spread of hours" claims is denied at this time and such claims shall continue.

3. Unpaid time spent in mandatory training sessions

Defendants allege that, "claims alleging wages due for time spent in training sessions are not actionable under New York law and must be dismissed." In support of this contention, defendants cite to *Hinterberger v Catholic Health*, 2008 WL 5114258 [WD NY, Nov. 25, 2008, No. 08-CV-380S], and *Truelove v Northeast Capital & Advisory*, 95 NY2d 220 [2000].

Defendants rely on *Hinterberger* for the following:

> "In other words, there is no state-based, statutory right to be paid for such hours. Therefore, to the extent that Plaintiffs' NYLL claims-for unpaid wages and overtime-rest on allegations of unpaid preliminary and postliminary work, and unpaid training time, Plaintiffs' NYLL claims are not "independent" of the CBA. As a result, Plaintiffs' NYLL claims based on such allegations will require substantial interpretation of the CBA and are therefore preempted" (*Hinterberger v Catholic Health*, 2008 WL 5114258, *6 [internal citations omitted]).

However, as plaintiffs' correctly point out, *Hinterberger*, upon motions to reconsider by both plaintiffs and defendants, was amended with the court deciding as follows:

> "Under the NYLL, employers must notify employees of their rate of pay at the time of hire, and of any amendments thereafter. N.Y. Lab. Law § 195 (McKinney 2009). Wages for all "labor or services rendered" must be paid to the employee within the time specified by statute and/or the Commissioner of Labor. Id. §§ 190(a), 191. If the employer fails to make timely payment, an employee can seek to recover unpaid or underpaid wages (article six), and unpaid overtime for hours worked in excess of forty per week (article 19 and 12 NYCCRR 142–2.2) . . .
>
> 'In short, regardless of the existence of any contract between Catholic Health and its employees, Plaintiffs have a statutory right to the recovery they seek here"
>
> (*Hinterberger v Catholic Health*, 2009 WL 4042718, *3 [WD NY, Nov. 19, 2009, No. 08–CV–380S]).

As amended, the defendants' reliance on *Hinterberger* appears misplaced and the authority tends now to support the plaintiffs' right of action herein.

Truelove involved a plaintiff who, while employed with defendants, was awarded a bonus payment, the unpaid balance of which he sought after resigning his position. The court held that the bonus payments were not "wages" within the meaning of the NYLL thus,

the plaintiff was not entitled to same after he terminated his employment. As a result, *Truelove* is completely distinguished from the instant matter, on the facts, as the decision does not address the defendants contentions, to wit, that the plaintiffs have no statutory right to seek payment for "in service" training sessions performed at Future Care's offices. Based on the foregoing, that branch of defendants' motion seeking to dismiss the plaintiffs' claims for unpaid time spent in mandatory training sessions is denied at this time and such claims shall continue.

B. Branch to dismiss plaintiffs' claim for defendants' failure to pay wages when due.

The defendants seek dismissal of this claim on two fronts, that the "the factual allegations of the Complaint do not state a cause of action for unpaid wages or overtime" and, "[p]laintiffs may not proceed on a class action based on violations of NYLL Article 6 pursuant to CPLR 901(b) and Plaintiffs do not meet the requirements of CPLR 901(a)."

As the court has held above, the plaintiffs have adequately stated claims for unpaid wages and, to the extent that the plaintiffs' claims survive the instant motion, any request for dismissal prior to the plaintiff formally moving for class certification is premature at this time and denied as well. Accordingly, that branch of defendants' motion seeking to dismiss the plaintiffs' claims for defendants' failure to pay wages when due is denied and such claims shall continue.

C. Branch to dismiss plaintiffs' claims resting upon violation of the Wage Parity Act.

To the extent that the plaintiffs' claim the defendants have failed to pay "wages under the [Wage Parity Act]" (PHL § 3614-c), the defendants seek to dismiss all such claims for failures occurring prior to the Act's enactment.

PHL § 3614-c (3)(a) reads, in pertinent part:

> "The minimum rate of home care aide total compensation in a city with a population of one million or more shall be:
>
> (I) for the period *March first, two thousand twelve* through February twenty-eighth, two thousand thirteen, ninety percent of the total compensation mandated by the living wage law of such city. . ." (emphasis added)

PHL § 3614-c (3)(b) reads, in pertinent part:

> "The minimum rate of home care aide total compensation in the counties of Nassau, Suffolk and Westchester shall be:
>
> (I) for the period *March first, two thousand thirteen* through February twenty-eighth, two thousand fourteen, ninety percent of the total compensation mandated by the living wage law as set on March first, two thousand thirteen of a city with a population of a million or more. . ." (emphasis added).

Further, during oral argument, plaintiffs' counsel averred at page 47, lines 18-21:

> "MS SPANIER: Ms. Moreno is alleging that claim [under the Wage Parity Act]. Ms Peguero does not because defendants are correct that she indeed left before the Wage [Parity] Act kicked in."

Accordingly, as Moreno is the sole plaintiff alleging claims hereunder, this branch of defendants' motion is granted *only to the extent that* any such claims alleged to have accrued

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"in a city with a population of one million or more" on or before February 29, 2012[4] are dismissed. As it is undisputed that both plaintiffs separated from employment, prior to February 28, 2013 - the effective date of PHL 3614-c in the counties of Nassau, Suffolk and Westchester, any claims alleged to have occurred in these counties are dismissed in their entirety. Further, in accordance with this decision, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims" since, as a matter of law, no basis for class action relief is available on a claim that no longer exists (*see Downing* at 89, quoting *Wojciechowski* at 831).

D. Branch to dismiss plaintiffs' claims alleging unreimbursed uniform laundering expenses and supply purchases.

Defendants seek dismissal of these claims under essentially three arguments: (1) that "if you play around with the numbers you don't know if there is a violation," (2) that the plaintiffs received a stipend of $30.00 per month pursuant to the CBA and, (3) had such a provision not been included within the CBA, the plaintiffs' income exceeded the statutory threshold rendering such payments inapplicable [pursuant to 12 NYCRR 142-2.5(c)].

In support of the instant request, defense counsel testified at oral argument as follows:

Page 8, lines 17-23 — "MR. SCHLESINGER: They are also claiming [a] uniform allowance. The law says you are entitled to $9 per week in addition to your weekly paycheck.

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4 2012 was a "leap" year, accounting for the extra day in the month of February.

	'Again, if you play around with the numbers you don't know if there is a violation" [emphasis added].
Page 17, lines 18-21	"MR. SCHLESINGER: Future Care, again, provides their insurance, makes sure they are certified. Future Care hires and trains them, orients them."

If defense counsel's testimony is accurate, Future Care is the entity who maintained daily control over the plaintiffs. Despite the plaintiffs' allegations, Future Care, at a minimum, must have all records necessary to establish which plaintiff worked where and for how long. It is axiomatic that such information is within the defendants' control because if it were not, how could defendants accurately pay their employees? There should be no need to "play around with the numbers," thus, such unsupported and speculative testimony fails to satisfy defendants' burden on the instant motion and must be disregarded.

Within their second argument, defendants allege that "[p]laintiffs did receive a maintenance allowance of $30.00 per month pursuant to their Collective Bargaining Agreement," defendants rely on an excerpted portion of the CBA (Exhibit "C" to the Schlesinger affidavit). As held in the Court's 3211 (a) (1) analysis above, this submission fails to resolve all factual issues as a matter of law (*see Leon, supra*) in that the exhibit itself does not conclusively prove that such stipend, while permitted, was actually paid to the plaintiffs.

Based upon the foregoing, it is not necessary for the court to analyze the defendants' third prong, to wit, whether such payments are required by 12 NYCRR 142-2.5(c). By the

defendants' own admission, such payments were owed under the CBA and defendants' motion lacks any direct evidence such payments were made. The absence of such direct evidence of payment creates an open question of whether defendants are in breach of the CBA. Plaintiffs' complaint alleges that these payments were not made and, "[u]nless it has been shown that a material fact as claimed by the [plaintiffs] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Guggenheimer* at 275). Accordingly, those branches of defendants' motion seeking to dismiss the plaintiffs' claims alleging unreimbursed uniform laundering expenses and supply purchases are denied and such claims shall continue.

E. Branch to dismiss plaintiffs' claim that defendants' failed to comply with notification and record maintenance requirements.

The defendants' argument in support of dismissing this claim is based solely on the plaintiffs' alleged inability to maintain class action status. In particular, defendants seek to dismiss this count "as to unnamed class members by operation of CPLR 901(a) and (b)." Should class action status be denied, any applicability of this count as to "unnamed class members" would be rendered moot and, likewise, should class certification be granted, the defendants duty under this count would apply to any plaintiffs equally. Defendants make no further argument for dismissal, nor do they articulate an argument for dismissal pursuant to the 3211 (a) (7) standard enumerated above. Therefore, as the defendants request to dismiss the class certification claims were found premature, those branches of defendants' motion

seeking to dismiss the plaintiffs' claims that defendants failed to comply with notification and record keeping requirements are denied and such claim shall continue.

F. Branch to dismiss plaintiffs' breach of contract claims.

Defendants seek dismissal of these claims alleging, among other things, plaintiffs fail to properly state a cause of action. To wit:

> "To state a claim for breach of contract, the complaint must allege the existence of a contract, plaintiffs performance, defendant ' s nonperformance, and resulting damages. Elisa Dreier Reporting Corp. v. Global NAPS Networks, Inc., 84 AD3d 122, 127 (2d Dept. 2011). In an action to recover damages for breach of contract, the complaint must, inter alia, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract. Chrysler Capital Corp. v. Hilltop Egg Farms, Inc., 129 A.D.2d 927, 514 N.Y.S.2d 1002 (3rd Dept., 1987)."

The defendants' contentions are unavailing. Plaintiffs contend that their claims for breach of contract rest upon the wage requirements contained within the Wage Parity Act. In their opposition, plaintiffs allege:

> "As a matter of New York law, the fact that Defendants are statutorily required to pay a prevailing wage to Plaintiffs and the Class and have promised government agencies Defendants will pay that prevailing rate under the NY Health Care Worker Wage Parity Act, NY Public Health Law § 3614-c., means that Plaintiffs and the Class are third-party beneficiaries of such promise."

In support, plaintiffs cite *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592 [2008], as follows:

> "It cannot be doubted that provisions requiring the contractor to pay such wages are also inserted in the contract, whether voluntarily or under compulsion of the statute, for the benefit of the laborers" (id.). We held that "where a valid statute requires the insertion of provisions intended for the protection of laborers or other groups in contracts relating to matters which are subject to regulation by the State," a "contractual obligation is created which

> may be enforced by action brought by one of the group for whose benefit the provisions have been inserted" (id. at 406; see also *603 United States ex rel. Johnson v Morley Constr. Co., 98 F2d 781, 788-789 [2d Cir 1938, L. Hand, J.] [laborers held to be "donee beneficiaries" of a contract that incorporated the provisions of a statute passed to protect them])"
> (*Cox*, 10 NY3d at 602, 603, quoting *Fata v S.A. Healy Co.*, 289 NY 401 [1943]).

Plaintiffs' similarly cite to *Jara v Strong Steel Door, Inc.*, 20 Misc.3d 1135[A], 2008 NY Slip Op 51733[U] Sup Ct, Kings County 2008], for the proposition that:

> "Labor Law § 220(3) provides that workers on public works contracts shall be paid not less than the prevailing rate of wages as defined by the locality within the state where the public work is performed and requires all contracts for public works to contain a provision stating that each laborer is entitled to such prevailing wages and defining what those wages are. Where such a provision is incorporated into a public works contract and a plaintiff alleges the specific provision of the contract requiring payment of prevailing wages and supplemental benefits, the worker becomes entitled to sue for those wages as a third-party beneficiary of the contract (Cox v NAP Construction Co. Inc., -- NY3d -- [2008], 2008 WL 2276160 [June 5, 2008]; Maldonado v Olympia Mechanical Piping & Heating Corp., 8 AD3d 348, 350 [2d Dept 2004]; Fata v S.A. Healy Co., 289 NY 401 [1943])."

In opposition, defendants contend that Cox and Jara are inapplicable because "there is no 'prevailing wage' applicable to Plaintiffs as they are health care workers employed by a private company and thus are outside the purview of Labor Law § 220 and § 230."

However, the Wage Parity Act reads, in relevant part:

> "PHL 3614-c(1)(c): 'Prevailing rate of total compensation' means the average hourly amount of total compensation paid to all home care aides covered by whatever collectively bargained agreement covers the greatest number of home care aides in a city with a population of one million or more. For purposes of this definition, any set of collectively bargained agreements in such city with substantially the same terms and conditions relating to total compensation shall be considered as a single collectively bargained agreement.'

* * *

> 'PHL 3614-c(2): Notwithstanding any inconsistent provision of law, rule or regulation, no payments by government agencies shall be made to certified home health agencies, long term home health care programs or managed care plans for any episode of care furnished, in whole or in part, by any home care aide who is compensated at amounts less than the applicable minimum rate of home care aide total compensation established pursuant to this section."

At oral argument, defense counsel stated at page 19, line 22 through page 20, line 10:

> "MR. SCHLESINGER: They would, Future Care would bill Americare for the services and Americare, I believe thorough Medicaid would pay for the services depending on their client's situation.
> THE COURT: So Future Care would bill Americare for their services?
> MR. SCHLESINGER: Right.
> THE COURT: Because Americare basically is ordering the services.
> MR. SCHLESINGER: Right, they are ordering them. *It is all through Medicare and Medicaid. It is mostly Medicaid*, I believe" [emphasis added].

While consisting of only a small sample, the CBA's existence provides the support plaintiffs require for their claim. Pursuant to the authority in *Cox* and *Jara,* the plaintiffs, who fall under the ambit of the CBA and are purportedly paid according to same, are the third-party beneficiaries of any agreement whereby Medicaid, Medicare, or any other government agency remunerates the defendants for home health care services rendered by the plaintiffs. The plaintiffs need not, at this juncture, allege the particulars of the contracts that may have been breached since the plaintiffs' wages must meet the minimum requirements of the statute enacted to protect them (*see Cox* at 602, 603).

However, while the Wage Parity Act has provided a basis for a cause of action for breach of contract, the Act has, similarly, limited same. Pursuant to the court's prior analysis

of the enactment dates, Moreno is the only named plaintiff able to allege claims under the Wage Parity Act. It follows, therefore, that Moreno is the only named plaintiff able to assert a cause of action for breach of contract under the Wage Parity Act as well. Accordingly, that branch of defendants' motion seeking to dismiss the plaintiffs' cause of action for breach of contract is granted *only to the extent that* any claims for breach of contract, alleged by Peguero-Tineo, are dismissed. Claims for breach of contract, alleged by Moreno, shall continue only to the extent same accrued after enactment of the Wage Parity Act. Further, in accordance with this decision, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims" since, as a matter of law, no basis for class action relief is available on a claim that no longer exists (*see Downing* at 89, quoting *Wojciechowski* at 831).

G. Branch to dismiss plaintiffs' unjust enrichment claims.

Defendants argue that as the plaintiffs cannot assert causes of action for unpaid wages, they therefore cannot assert causes of action for unjust enrichment as a matter of law.

> "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (see Cruz v McAneney, 31 AD3d 54, 59 [2006])"
>
> (*Old Republic Natl. Tit. Ins. Co. v Luft*, 52 A.D.3d 491 [2008]).

Plaintiffs have alleged that they performed their duties in good faith, that the defendants were compensated for the work performed by the plaintiffs, that the defendants did not adequately compensate the plaintiffs for the work performed thus enriching the defendants at the

plaintiffs' expense. As this court's analysis has determined, the plaintiffs' wage claims have been sufficiently pled. To the extent that the defendants' request for dismissal rests exclusively on this argument, that branch of defendants' motion seeking to dismiss the plaintiffs' claims for unjust enrichment is denied and such claims shall continue, to the extent same have not been dismissed as a result of the inapplicability of the Wage Parity Act.

Branch of Defendants' Motion Seeking Dismissal of All Claims as Against as against "Esan Dresus"

Within this branch, defendants opine that, Plaintiffs wrongly included "Esan Dresus" as a defendant, alleging that "[i]t appears. . .that Plaintiffs intended to name Ethan Dreifus but were uncertain of the individual's name and used two alternate spellings." Defendants further contend that, "there is no record of an 'Esan Dresus' having ever been employed in any capacity with the defendant organizations." As a result, defendants have requested that the name "Esan Dresus" be stricken from the caption and that all allegations regarding "Esan Dresus" be dismissed.

"Esan Dresus," whether an actual or fictitious individual, is a named defendant in this action whose existence, at this early stage of litigation, has yet to be investigated. Since counsel does not represent this "individual" and absent direct evidence that this "individual" is indeed erroneously named in this action, that branch of defendants' motion seeking to dismiss the claims against "Esan Dresus" is denied at this time and the caption shall remain as appears above.

CONCLUSION

To recapitulate:

1. That branch of the defendants' motion requesting dismissal pursuant to CPLR 3211 (a)(1) is denied;

2. Those branches of the defendants' motion, pursuant to CPLR 3211 (a)(1), requesting dismissal of all claims as against Kleinman, Americare and, Dreifus, in reliance of "documentary" evidence are denied in their entirety and all claims shall continue;

3. That branch of the defendants' motion seeking dismissal of the plaintiffs' class action is denied as premature except that, to the extent this court may dismiss one or more of plaintiffs' causes of action within this decision, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims" since, as a matter of law, no basis for class action relief is available on a claim that no longer exists.

4. Those branches of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of the plaintiffs' unpaid wages, unpaid overtime wages, unpaid "spread of hours" wages and, unpaid time spent in mandatory training sessions are denied and all such claims shall continue;

5. That branch of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of plaintiffs claim that the defendants failed to pay wages when due is denied;

6. That branch of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of plaintiffs claims resting upon violation of the Wage Parity Act is granted *only to the extent that* claims alleged by Moreno (the only plaintiff making claims under the Act) to have accrued "in a city with a population of one million or more" on or before February 29, 2012[1] are dismissed. As it is undisputed that both plaintiffs separated from employment, prior to February 28, 2013 - the effective date of Wage Parity Act in the counties of Nassau, Suffolk and Westchester, any claims alleged to have occurred in these counties are dismissed in their entirety. Further, in accordance with this decision, and as summarized directly above, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims" since, as a matter of law, no basis for class action relief is available on a claim that no longer exists. All remaining claims shall continue;

7. Those branches of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of the plaintiffs' claims for unreimbursed uniform laundering expenses and failure to reimburse for supplies purchased are denied and all such claims shall continue;

8. That branch of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of plaintiffs' claim that the defendants failed to comply with notification and record maintenance requirements is denied and such claims shall continue;

9. That branch of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of the plaintiffs' breach of contract claims is granted *only to the extent that* claims for breach of contract alleged by Peguero-Tineo are dismissed. Claims for breach

of contract alleged by Moreno shall continue only to the extent that such claims accrued after enactment of the Wage Parity Act. Further, in accordance with this decision, and as summarized directly above, such dismissal shall nullify the plaintiffs' right to seek class certification as to such "dismissed claims" since, as a matter of law, no basis for class action relief is available on a claim that no longer exists;

10. That branch of the defendants' motion, pursuant to CPLR 3211 (a)(7), requesting dismissal of plaintiffs' unjust enrichment claims is denied and same shall continue to the extent such claims have not been dismissed as a result of the inapplicability of the Wage Parity Act in accordance with this decision and as summarized directly above;

11. That branch of the defendants' motion requesting dismissal of all claims as against "Esan Dresus" is denied at this time.

The court, having considered the defendants' remaining contentions, finds them to be without merit in light of the above analysis. All relief not expressly granted herein is denied.

The foregoing constitutes the decision, order and, judgment of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT

S.R.