

disfavored penalty; the FLSA creates a strong presumption in favor of doubling, a presumption overcome only by an employer's affirmative showing by "plain and substantial" evidence, both subjective good faith and objective reasonableness. *Id.*

An employer's showing that its FLSA violation was not purposeful is insufficient to establish that it acted in good faith. *Id.* Nor is good faith demonstrated by the absence of complaints on the part of employees or conformity with industry-wide practice. *Id.*, *Wilamowsky*, 833 F.2d at 19-20. "Industry custom" is not a defense to liquidated damages *SNET*, 121 F.3d at 71. Moreover, industry custom may be attributable to nothing more than "widespread evasion of labor laws." *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 74 (2d Cir. 2003).

 B.

**Defendants Cannot Establish a Good Faith/Reasonable Belief that their Pay Policies Comply with the FLSA**

A full year after Judge Sifton awarded summary judgment that Harry's home care nurses were entitled to time and a half for overtime, Harry's continued to pay straight time for overtime hours. *E.g.*, Ex. 3 (Burke-Hylton) at 53-98; Ex. 3 (Bhola) at 20-23. It is respectfully submitted that such defiance precludes a showing of good faith.

As noted in Judge Sifton's Order, Dkt. No. 53, defendants' business model is substantially identical to that of the defendant in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988). *Superior Care* is the leading authority in this Circuit on the independent contractor/employee distinction generally and in the nursing industry particularly. Its holdings have been repeatedly reaffirmed and endorsed in the last 22 years (*e.g. Chao v. Gotham*

*Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008)). In other words, the law is well settled. Defendants cannot possibly establish that their belief – that home care nurses are not entitled to overtime – is reasonable.

**Conclusion**

For the foregoing reasons, plaintiffs respectfully request that this Court issue an Order granting them summary judgment on damages, ordering defendants to pay them \$370,183.95 and an equal amount as liquidated damages and granting such other and further relief as to this Court may seem just, fair and equitable.

Dated: New York, New York  
June 25, 2010

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

Plaintiff,

- against -

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

Defendants.  
----- x

07 Civ. 4672 (CPS) (KAM)

AFFIDAVIT

STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF                )

CLAUDIA GAYLE, being duly sworn, deposes and says:

1. I am the plaintiff in this action. I make and submit this affidavit in opposition to defendant's motion for summary judgment and in support of my cross-motion to authorize notice of the action. I have personal knowledge of all facts stated in this affidavit.
2. I was employed by defendants as a licensed practical nurse from February 2007 until November 2007.
3. When I was employed by Harry's as a field nurse, I did not receive time and a half for overtime hours worked. This is because Harry's treated me as an independent contractor. Harry's required me to execute an memorandum of agreement stating that I was an independent contractor.
4. I am not, and never have been, in business for myself. I have no business cards, have never advertised, and have never solicited a patient directly. I am entirely dependent upon

referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

9. Having been informed by counsel that a different legal standard applies to determinations of employee status under the Fair Labor Standards Act and New York Labor Law determinations of whether workers' compensation premiums may lawfully be charged to employees, I now consent to the dismissal of the Fourth Cause of Action set forth in my Complaint.

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Claudia Gayle

Sworn to before me  
this \_\_ day of August, 2008

---

Notary Public

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

07 Civ. 4672 (CPS) (KAM)

Plaintiff,

- against -

AFFIDAVIT

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

Defendants.  
-----X

STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF                )

**PATRICIA ROBINSON**, being duly sworn, deposes and says:

1. On or about March 24, 2008, I caused to be filed with this court a consent to join this action for unpaid overtime premium pay. I make and submit this affidavit in opposition to defendant's motion for summary judgment and in support of Claudia Gayle's cross-motion to authorize notice of the action. I have personal knowledge of all facts stated in this affidavit.

2. I was employed by defendants as a licensed practical nurse and registered nurse for approximately 2 ½ years ending in early 2008. I was paid at different hourly rates depending on whether I was doing LPN work or RN work.

3. When I was employed by Harry's as a field nurse, I did not receive time and a half for overtime hours worked. This is because Harry's treated me as an independent contractor. Harry's required me to execute an memorandum of agreement stating that I was an independent contractor.

4. I am not, and never have been, in business for myself. I have no business cards, have never advertised, and have never solicited a patient directly. I am entirely dependent upon referrals from Harry's and similar placement agencies.

5. Harry's paid me in my own name. That is, I received my compensation from Harry's directly. I did not form a corporation or other business entity for the provision of nursing services, either during the time I worked for Harry's or before or after that time.

6. Harry's required me to obtain malpractice insurance, but none of the nursing jobs I have ever had has required professional liability insurance.

7. I believe that all of the field nurses employed by defendants are paid as described in above, and I am informed that Harry Dorvilier has so testified. I have been informed that this pay practice is unlawful.

8. I believe that most of the field nurses employed by defendants are unaware that the pay practice is unlawful, that many, if not most, of them, lack the resources to hire private counsel to prosecute a lawsuit on their behalf and that, if given the opportunity, they would opt in to the above-captioned lawsuit.

---

Patricia Robinson

Sworn to before me  
this \_\_\_ day of August, 2008

---

Notary Public

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

07 Civ. 4672 (CPS) (KAM)

Plaintiff, :

AFFIDAVIT

- against -

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

Defendants. :  
----- X

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

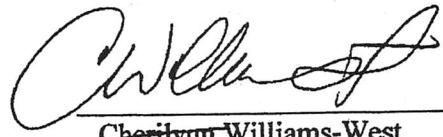
*Cherilyn*  
CHERYLYNN WILLIAMS-WEST, being duly sworn, deposes and says:

1. I am a registered nurse. I was employed as a nursing supervisor by Harry's Nurses Registry, Inc. ("Harry's"), for approximately one year ending November 2007. During the period of my employment, my job duties and responsibilities included monitoring the patients and the nurses (both licensed practical nurses and registered nurses) placed by Harry's in their homes.

2. Within 90 days of the time that a nurse was placed in service by Harry's, I (or another of the nursing supervisors employed by Harry's) would go into the field, that is, to the home of the patient. While there, I would observe and assess the nurse's skills, for example, hand washing (because many patients breathe through ventilators and are fed through gastric tubes, the nurse's hand washing is of paramount importance). I would also check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive

supervision of this kind every 6 months. I, or one of my colleagues, would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient.

3. During my employment at Harry's, I was also responsible for documentation, that is, review of assessments performed by nurses in the field. For example, I would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. I would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, I would be accompanied on these in-service assessments by vendors of medical equipment (e.g., ventilators) or their technicians so that I could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, I (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's.

  
Cherilyn Williams-West  
*Cherilyn*

Sworn to before me <sup>August</sup>  
this 8<sup>th</sup> day of July, 2008

  
Notary Public

HEICHA ORTIZ  
Notary Public - State of New York  
NO. 010R6187551  
Qualified in Bronx County  
My Commission Expires 5/16/2012