

39 Broadway, Suite 1620
New York, New York 10006
(212) 371-0033
Attorneys for Plaintiffs

To: Thomas F. Liotti, Esq.
Law Offices of Thomas F. Liotti, LLC
600 Old Country Road - Suite 530
Garden City, New York 11530
(516) 794-4700
Attorneys for Defendants

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 (NGG) (MDG)
	:	
Plaintiff,	:	DECLARATION IN SUPPORT
	:	OF PLAINTIFFS' MOTION
- against -	:	TO DISTRIBUTE
	:	<u>UNCLAIMED FUNDS</u>
	:	
HARRY'S NURSES REGISTRY, INC., and	:	
HARRY DORVILIER a/k/a HARRY	:	
DORVILIEN,	:	
	:	
Defendants.	:	
----- X		

JONATHAN A. BERNSTEIN, an attorney duly licensed to practice in the courts of this State, declares the truth of the following under the penalties of perjury:

1. I am a former member of the firm of Levy Davis & Maher, LLP, attorneys for the plaintiffs herein, and am fully familiar with the facts hereinafter set forth. I make and submit this declaration in support of Plaintiffs' Motion To Distribute Unclaimed Funds.¹

2. As is discussed in the Report and Recommendation of Magistrate Judge Marilyn D. Go, dated September 11, 2018, Levy Davis & Maher (the "Firm") has distributed all but \$14,197.04 of the judgments issued by this Court in this matter. Dkt. No. 261-1.² M.J. Go thereafter encouraged the parties to "discuss and consider distributing the remaining funds *pro rata* based on the amounts of the judgments awarded to all plaintiffs who can be located." Scheduling Order, October 3, 2018.

¹ I recently left Levy Davis & Maher. However, since this motion has to do with the disposition of funds in the Firm's trust account, it would be cumbersome to submit this motion on behalf of my new firm. I have discussed the matter with my former Firm, which has agreed to permit me to submit this motion on behalf of Levy Davis & Maher.

² The R&R was adopted on September 30, 2018. Dkt. No. 274.

3. On that date, I wrote defense counsel to propose such a discussion. On October 10, 2018, I spoke to defense counsel, who represented that he was unable to state a position on the matter pending a scheduled conference with his client.

4. In light of the Magistrate's suggestion, and having reviewed the case law on the subject of *cy pres* distributions, I have reconsidered my earlier intention to propose a charitable donation of the unclaimed funds. As is discussed in the accompanying memorandum of law, the Second Circuit appears to prefer that the funds be distributed to those plaintiffs who can be located. As is discussed hereunder, however, a pro rata distribution may be impracticable; a distribution of equal shares of the unclaimed funds appears appropriate.

5. The full amount of this Court's judgments in favor of 38 Plaintiffs was \$760,315.76. Dkt. No. 261 at 2. As is usual in wage-hour cases, the shares of the judgments allocable to each of the persons who opted into the action are not equal; they range from \$80.00 to \$205,000.00 depending on the number of hours worked by each opt-in plaintiff during the statutory period. The average award was approximately \$20,000.00.

6. As is discussed in the R&R, the Firm executed on the judgments and thereafter attempted to remit the amount of the judgment allocable to each Plaintiff. However, the Firm was unable to locate several of the Plaintiffs and one refused to provide her social security number. The Firm was subsequently able to locate some of those Plaintiffs, but the Firm still holds \$14,197.04 in its trust account.

7. Were the remaining funds to be remitted in equal shares, calculation of those shares would be a matter of simple arithmetic. Were the remaining funds to be distributed in proportion to the amount of the judgment awarded to each plaintiff, calculation might require relatively

sophisticated mathematics or computer programming. An explanation of the difficulty follows:

8. The judgment amount (exclusive of attorney's fees) was approximately \$760,000. There remains approximately \$14,000 in undistributed funds. Thus, if the judgment allocable to a particular plaintiff ("Plaintiff X") was \$20,000, she would be entitled to $20/760$, or 2.63%, of \$14,000, *i.e.*, \$.368.20.

9. The calculation set forth in Paragraph 8 would result in the distribution of the entire amount held in trust only if each of the 38 plaintiffs received a proportionate share. Unfortunately, however, the firm has lost contact with a number of the Plaintiffs. In addition, it appears likely that at least some of the Plaintiffs who received distributions in 2012-14 no longer reside at the addresses known to the Firm at that time.

10. Accordingly, if the funds are to be distributed, the Firm must attempt to reestablish contact with the 38 Plaintiffs by sending letters to them at their last known addresses and inviting them to claim shares of the unclaimed funds. If, *e.g.*, 25 of those 38 respond, and the Firm were to remit \$368.20 to Plaintiff X as described above, then undistributed funds would remain in the Firm's trust account (*i.e.*, the funds allocable to the 13 who failed to make claims).

11. Thus, complete distribution of the unclaimed funds would require that the funds remaining after the initial distribution be distributed proportionately, and the amounts recalculated, and the operation repeated, until the amount remaining for distribution approached zero. Otherwise stated, the calculation becomes very much more complex if the unclaimed funds are distributed (1) in proportion to the amounts awarded in the first instance and (2) only to the persons who make a claim to the undistributed funds.

12. It may be possible to secure the services of a computer expert capable of creating a

