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August 22, 2021

Karen K. Caldwell, Chair
Joint Panel On Multidistrict Litigation
United States District Court
Eastern District of Kentucky
c/o the Joint Panel On Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room G-255, North Lobby
Washington, DC 20544-0005

Re: Proposed MDL No. 54 and Request For Information and Clarification Regarding Court System Unwritten Rules and Procedures

Dear Judge Caldwell,

I am involved in what I believe to be a unique situation and would appreciate any help or clarification you can provide regarding unwritten rules and procedures off the Joint Panel On Multdistrict Litigation (JPML). In addition, any guidance and direction you can provide would also be appreciated.

I am a practicing attorney with forty years of experience and after being confronted with a number of unwritten procedural practices engaged in by the federal court system, am beginning to understand the frustration of my client.

I represent a small minority owned business and it's owner. My clients provide home health care services to the most economically challenged, underserved minority population of New York City. In 2007 they were sued as defendants in labor wage litigation under the collective action provisions of Section 216(b) of the Fair Labor Standards Act (FLSA). Litigation continued over the next 14 years in the Eastern District of New York and the Second Circuit Court of Appeals (hereinafter collectively referred to as the "Second Circuit") with much of it conducted *pro se* by my client.

Over a year ago I was requested to review a series of FLSA Second Circuit decisions in that litigation that involved my client. Based on that review it is my firm opinion that my clients have been poorly served by the federal court system. Over the past year I have been working with them, with much of my work conducted on a *pro bono* basis to seek ways to reverse what I firmly believe to be erroneous Second Circuit decisions so that my client can receive some measure of justice. However, it seems that at every turn, unwritten procedural roadblocks are confronted that eliminate any opportunity to have a substantive review of the legal defects identified in the Second Circuit proceedings that I believe to be obvious and fundamental.

Specifically, I am referring to the case of *Gayle v. Harry's Nurses Registry, Inc. and Harry Dorvilier* (hereinafter and in proposed MDL No. 54 referred to as the "*Gayle Case*")where I have identified ten (10) such errors (see *Gayle Case* Second Circuit Court of Appeals Case No. 18-3472, Docket Item No. 147, document 4) including the following substantive defects that were ignored by the Second Circuit:

1. No consent was filed by the lead plaintiff. The filing of consent is a jurisdictional requirement established by Section 216(b) FLSA;
2. The domestic service exemption set forth at 29 CFR 552.3 and 552.109 was ignored by the Second Circuit; this was the case even though this exemption was specifically approved by the U.S. Supreme Court in *Long Island Care at Home v, Coke* 551 U.S. 158 and that particular exemption remained in effect until October 15, 2015; and
3. Felony criminal convictions of Dorvilier are barred by Section 216(a) FLSA (because he was not a "repeat offender") and by Section 31 of the NYS Workers Compensation Law (limits liability to misdemeanor charges only). The *Habeas Corpus* decision of the Second Circuit filed by my client ignores these provisions.

This past Friday, August 20, 2021 I filed a Motion with the JPML pursuant to 28 U.S.C. 1407 for the transfer of three Related Actions and three proposed Tag Along actions to the Fifth Circuit where similar FLSA collective action litigation involving a collective of "potentially thousands" of plaintiffs is underway (hereinafter referred to as the "Motion"). Prior to filing I had been informed by a representative of the JPML Clerk's Office that it is the JPML practice to only consider "open" cases for transfer under this provision. I subsequently confirmed that the appeal of *Gayle v. Harry's Nurses Registry, Inc. and Harry Dorvilier* (Case No. 21-1463; hereinafter referred to as the "*Gayle Case*") remains open on the Second Circuit Court of Appeals docket. Shortly after filing and before notices of the filing were sent to the various courts and concerned parties, I received a message from a representative of the JPML Clerk's Office indicating that only open district court cases are accepted for review by the JPML and further requesting that I withdraw my Motion until Case No. 21-1463 is decided.

After speaking with my client he is concerned that the Defendants are not being treated fairly. He also is frustrated that the significant errors and defects in the Second Circuit's decisions in the *Gayle Case* cannot be substantively reviewed and reversed. I want to make sure that I am properly and zealously representing his interests and before voluntarily withdrawing the pending Motion, I ask that the JPML provide copies of any statutes, written rules or policies that codify the practice of declining motions involving "open" district court cases only. I could not find any.

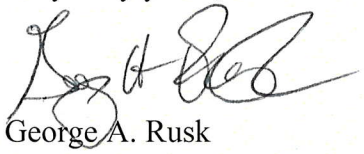
It should be noted that my client had a similar experience in the Second Circuit Court of Appeals, where a Motion to Vacate under Rule 60 of the Federal Rules of Civil Procedure was refused to be considered because of a determination by the Court that the cases that were the subject of the Motion were previously decided by Mandamus Orders and the Second Circuit Court of Appeals refused my clients' motion to reinstate the cases and recall mandate. I presume that the issuance of the Mandamus Orders are discretionary by the Court and may have been

issued pursuant to 28 U.S.C. Section 1651 -- though no justification for such orders in the *Gayle Case* was provided by the Second Circuit or appears to be addressed in the Federal Rules of Civil Procedure. I also was not able to find any written rules or policies to codify the practice of requiring a motion to reinstate cases and recall mandate as a pre-requisite to filing a Rule 60 Motion to Vacate.

In my view, our highest courts (and judicial panels) in the country should not be relying on unwritten rules to prevent *pro se* litigants from access to our courts and receiving just, fair and substantive review of what I believe to be erroneous Second Circuit court decisions. It is also my view that our federal court system must be and do better, particularly for minority parties that have chosen to defend themselves on a *pro se* basis. Indeed such practices raise fundamental issues of fairness and system-wide discrimination similar to those raised in *Caldwell v. City of San Francisco* (case No. 12-cv-01892 (N.D. Cal Dec. 23, 2020).

Your cooperation is appreciated and I acknowledge and agree that until I receive a response form the JPML, the pending Motion and issuance of the notices specified in the Proof of Service in Proposed MDL No. 54 shall be held in abeyance.

Very truly yours,



George A. Rusk

Cc: Hon. John G. Roberts, Jr., Chief Justice of the United States
Supreme Court of the United States 1 First street, NE Washington, DC 20543
Hon. Debra Ann Livingston, Chief Judge Second Circuit Court of Appeals
Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, NY 10007
Hon. Margo K. Brodie, Chief Judge Eastern District of New York
United States District Court, Eastern District of New York,225 Cadman Plaza East,Brooklyn, NY 11201