UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLAUDIA GAYLE, **Individually,On Behalf of All Others Similarly Situated and as Class Representative,** Aline Antenor, Anne C. DePasquale, Annabel Llewellyn-Henry, Eva Myers-Granger, Lindon Morrison, Natalie Rodriguez, Jacqueline Ward, Dupont Bayas, Carol P. Clunie, Ramdeo Chankar Singh, Christaline Pierre, Lemonia Smith, Barbara Tull, Henrick Ledain, Merika Paris, Edith Mukardi, Martha Ogun Jance, Merlyn Patterson, Alexander Gumbs, Serojnie Bhog, Genevieve Barbot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre-Joseph, Rose-Marie Zephirin, Sulaiman Ali-El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard, Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan-Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman,

Plaintiffs

v.

HARRY'S NURSES REGISTRY, INC. and HARRY DORVILIER

Defendants/Appellants

ATTORNEY AFFIRMATION OPPOSING PLAINTIFFS' MOTION FOR POST-JUDGEMENT ATTORNEY FEES AND COSTS

Case No. 07 Civ 4672 (NGG) (PK)

GEORGE A. RUSK, Esq., affirms as true and states:

1. I am an attorney admitted to practice before this Court.

2. I have been retained by Defendants to opposed Plaintiffs' motion for post-judgement attorney's fees and costs in connection with the above-captioned matter. I have diligently reviewed the records regarding the above captioned case and am familiar with the facts and circumstances relating to said case.

BACKGROUND REGARDING THE INSTANT MOTION

3. As recited in paragraph 2 of Plaintiffs' Declaration in Support of the instant motion

(hereinafter referred to as the "Declaration"), the above captioned case (hereinafter referred to as the "Case") was commenced in 2007, judgment was subsequently issued and affirmed by the Second Circuit Court of Appeals and certiorari was denied by the U.S. Supreme Court.

4. The Case was brought by Plaintiffs as a Collective Action under Section 216(b) of the Fair Labor Standards Act (hereinafter referred to as the "FLSA"), and among other things, the various decisions and judgments issued by the District Court and Second Circuit Court of Appeals in this case determined that Plaintiffs should be classified as "employees" and that Defendants were legally obligated to pay them minimum wages and overtime compensation in accordance with FLSA Sections 206 and 207. Critical facts relevant to the instant motion that were omitted in Paragraph 2 of the Declaration, are the following:

    a. the total amount of the judgments awarded to Plaintiffs and paid by Defendants for violations of FLSA Sections 206 and 207 (for wage and overtime owed) was $942,763.79. These judgments were rendered several years prior to the filing of the instant Appeal;

    b. Plaintiffs' counsel applied for legal fees and was in fact awarded "reasonable attorney's fees" and "costs of the action" by the Court in connection with said judgments as authorized thereunder. The judgments approving said legal fees were also rendered (and paid by Defendants)several years prior to the filing of the instant Appeal; and

    c. Defendants raised his defenses to the aforementioned FLSA violations on a *pro se*

basis and a summary of said defenses are provided in footnote one on page 9 herein. Upon information and belief, said defenses have merit and the judgments referenced in paragraphs 4(a) and (b) hereinabove would have been avoided and/or reduced if Defendants had retained counsel to better articulate said defenses.

5. The exact wording governing the award of the attorney's fees and costs that are the subject of the instant motion is provided below:

> Any employer who **violated the provisions of section 206 or section 207**of this title shall be liable to the employee or employees affected in the amount of their **unpaid minimum wage, or their unpaid overtime compensation**, as the case may be, and an additional equal amount as **liquidated damages**…No employee shall be a party plaintiff to any such action unless **he gives his consent in writing** to become such a party and **such consent is filed in the court** in which the action is brought. The court shall, in addition to **any judgment awarded to the plaintiff or plaintiffs**, **allow a reasonable attorney's fee to be paid by the defendant, and costs of the action** (emphasis added).

6. In this regard it is important to note the following:

    a. No wage or overtime judgments awarded under FLSA Sections 206 or 207 are at issue in the underlying appeal that was challenged by Plaintiffs and for which Plaintiffs' attorneys now seek attorney fees. As noted above, Attorney fees are only available under this statute to the extent said attorney fees are incurred in connection with a judgment awarding wages, unpaid overtime compensation and liquidated damages under the above specified FLSA sections. In the instant motion, the fees and costs are sought in connection with an appeal filed by Defendants to determine whether the District Court properly decided that the District Court files

should continue to be designated as closed; no wage (FLSA Section 206), overtime compensation (FLSA Section 207) or liquidated damages issues are raised by the Appeal and the services rendered by Plaintiffs' counsel that are the subject of the instant motion were in no way associated with judgments for wage, overtime compensation or liquidated damages and thus are not authorized by FLSA Section 216(b). Therefore, the instant motion must be rejected as not authorized by said statute.

b. Consent of Representative Plaintiff Claudia Gayle was not provided. In this case the consent of the lead plaintiff Claudia Gayle was never provided and nowhere appears in the case docket (Note: the consent identified in docket entry as the Consent "by Claudia Gayle" is in fact a consent signed by a person named "Patricia Robinson)." Not only is it a consent from the wrong person but the consent date is over four (4) months **after** the November 7, 2007 filing date of the Complaint. As noted in paragraph 6(b) above, consent of the representative plaintiff Claudia Gayle is necessary to have been filed as of the date of the Complaint to establish Court jurisdiction and the award of attorney fees. Based on the strict statutory construction of FLSA Section 216(b), the failure of Plaintiffs to file the required consent precludes Plaintiffs' counsel from recovering the attorney fees requested in the instant motion. Therefore, again, the instant motion must be rejected as not authorized by said statute.

7. The Declaration in paragraph 4 references Defendant's filing of a motion with the U.S. Judicial Panel on Multidistrict Litigation (JPML) and this deserves additional clarification. I first filed an appearance with the JPML on January 27, 2021. After a review of applicable regulations and discussion with the client, I determined that Defendants were within their legal rights to request that the instant case and related cases pending in the Second Circuit, be transferred to the JPML.
8. After reviewing the docket of the instant case I determined that Plaintiffs' had not filed a Satisfaction of Judgment in the instant case and that in other related cases, fee applications had been filed, were not yet decided and satisfactions of judgment in connection thereto had not been filed. Notwithstanding the foregoing after contacting representatives of the Clerk of the Eastern District Court, I was informed that the instant case and the other related cases with fee applications pending, had been identified as "closed" and the only mechanism for changing the file status to "open" was to file a motion requesting a change in file status designation. A change in file status to an "open" designation was determined to be important because I had been advised by JPML representatives that it would only consider transfer motions if the cases sought to be transferred were designated as "open" on the Court docket.
9. On **May 11, 2021** (emphasis added), because no Satisfaction of Judgment had been filed in the instant case by Plaintiffs' counsel, I filed the three page letter referenced in paragraph 5 of the Declaration requesting that the instant case be redesignated as "open" and cited case law in support thereof. The Hon. N.G. Garaufis issued a text order on May 13, 2021 denying said motion and the appeal to the Second Circuit Court of Appeals

referenced in paragraph 6 of the Declaration followed.

10. The Appeal of the text order was filed on **June 9, 2021** (emphasis added). I subsequently contacted representatives of the Second Circuit Court of Appeals and confirmed that the Appeal case file was designated as open and would continue to be so designated until the Second Circuit Court of Appeals decided the pending Appeal, which in this case was March 16, 2022.
11. Plaintiffs did not file a Satisfaction of Judgment in the instant case until **August 6, 2021** (emphasis added) so when the Defendants' request for changed file status designation was made to the Eastern District Court and the Appeal was subsequently filed with the Second Circuit Court of Appeals, Defendants were within their legal rights to pursue the requested change in file status. In this regard, the following should be noted:
    a. Paragraph 17(b) of the Declaration indicates that the Second Circuit Court of Appeals requested information regarding the applicability of *United States v. Yonkers Bd. Of Education*, 946 F.2d 180 (2nd Cir 1991). The distinction raised by Plaintiffs' between procedural and non-substantive orders was rejected by the Second Circuit Court of Appeals and in its order held that "this Court has jurisdiction" which indicates that the jurisdictional arguments raised by Plaintiffs' counsel played no role in the dismissal Order issued by the Second Circuit Court of Appeals.
    b. With due respect to the Second Circuit Court of Appeals, it continues to be Defendants position that it was within its legal rights to pursue available legal options to change the case designation from "closed" to "open" and there was

nothing “frivolous” about doing so.

12. The Motion for Transfer of the instant case was filed with the JPML on August 20, 2021 as indicated in paragraph 4 of the Petition. At that time, though the Satisfaction of Judgment had already been filed in the instant case (i.e. on August 6, 2021), because the appeal to the Second Circuit Court of Appeals referenced in paragraph 6 hereinabove was then pending in the instant case, Defendants in good faith determined that the applicable JPML rules allowed them to meet the JPML requirements for transfer as of the date said Motion for Transfer was filed.

13. On August 21, 2022, I was requested by a JPML court clerk to voluntarily withdraw the pending JPML transfer motion and in response filed the letter attached as **Exhibit A** dated August 22, 2022, which among other things called attention to ambiguous JPML rules and the absence of any rules that clearly stated that the transfer motion was inappropriate and failed to meet JPML jurisdictional requirements. Notwithstanding Defendants’ objections, on August 25. 2021 the JPML issued its Order Deeming Motion Moot based on its determination that the Second Circuit action relied upon by Defendants to demonstrate that Defendants were entitled to the requested “open” file designation, was rejected by the JPML; said Order held that because there was no “open” case pending in the Eastern District Court and the pending Appeal was “not before a federal circuit court,” it refused Defendants motion to transfer the case to the JPML.

14. Even though the JPML motion had been denied, Defendants refused to authorize me to voluntarily withdraw the Appeal to the Second Circuit and specifically asked that I continue to zealously represent his interests on Appeal by focusing on the specific

language stated in the Text Order and calling attention to how Defendants' *pro se* status severely prejudiced Defendants in the various judgments that were ultimately issued by the Second Circuit Courts in the instant case.

15. It continues to be Defendants' position that Plaintiffs' failure to file a Satisfaction of Judgment in the instant case until August 6, 2021 (i.e. nearly three (3) months after Defendants requested the Eastern District Court to designate the instant case as "open" on May 11, 2021) was the single most significant factor that led to Defendants' filing of the appeal herein and the legal fees subsequently incurred by Plaintiffs' counsel that he seeks to recover in the instant motion. Stated another way,the legal fees incurred by Plaintiffs' counsel were the result of a situation of its own making: if Plaintiffs had timely filed the Satisfaction of Judgment, the request for changed file status from "closed" to "open" reference in paragraph 6 hereinabove, would not have been made to the District Court and Plaintiffs' fees would not have been incurred.

16. As stated in paragraphs 6(a) and 6(b) hereinabove, no attorney fees should be awarded in the instant motion because they are not authorized under the strict construction of FLSA 216(b). However, in the alternative, if the Court determines that the FLSA statute authorizes the award of attorney fees, the following relevant factors merit the reduction of any attorney fees so awarded:

    a. Upon information and belief, the $350 per hour attorney fee rate requested by Plaintiffs' attorneys is excessive. If any attorney fees are approved by the Court pursuant to the instant motion (which Defendants strongly oppose for the reasons stated hereinabove), the attorney rate fee should be reduced to the previous rate

approved by the Court for his services and the following should be considered to reduce the number of attorney hours approved:

b. Any attorney hours associated with the jurisdictional issues raised by Plaintiffs' attorneys should be rejected by the Court because the Second Circuit Court of Appeals determined that those arguments lacked merit.

c. Any attorney fees associated with the review of the "95 page briefing" that is referenced in Paragraph 17(a) of the Declaration and was appended as an appendix to Defendants appeal should also be rejected. That information was not filed to provide the legal basis for granting the Appeal, but rather was provided to call attention to substantive errors that Defendant believes had been made by the District Court and Second Circuit Court of Appeals in issuing their FLSA wage and compensation judgments in the instant case; and that the various references and statements made by the Hon. N.G. Garaufis in his Text Order indicating his reliance upon prior judgements in this case rendered against a *pro se* Defendant -- were overstated and inappropriate. A detailed review of said briefing while of interest and informational to those taking the time to review same,*[1]

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*[1] (Footnote 1) The substantive legal issues addressed therein include but are not limited to the following: Defective Consent; Fraud and Fraud on the Court; Absence Of Engagement In Commerce and Violation of 14th Amendment Protections; Improper assessment of Individual Liability Of Defendant Dorvilier That Violates New York State Law and the14th Amendment; Improper Assessment of Criminal Liability Of Defendant Dorvilier Violates Federal and State Law and the 14th Amendment; Improper Application of US DOL Regulatory Exemption That Should Have Insulated Defendants from FLSA Liability; Improper Application of Statute of Limitations That Would Have Reduced Actual and Liquidated Damages; Denial of Defendant Right to Jury Determination of the Amount of FLSA Liquidated Damages as provided by the 6th Amendment and *Per Se* Unlawful Denial of Defendants Good Faith Affirmative Defense that Defendants raised in reliance on a valid determination of a Department of Labor Administrative Law Judge; and Flawed Discovery.

was clearly presented as a document that was suitable for optional review in the discretion of the reviewer and was strictly relevant to the issue raised on appeal as to whether the case status designation should be changed from “closed” to “open.”

d. Any attorney time devoted to sort through court clerk administrative determinations related to the motion for leave to file a late brief that are referenced in paragraph 17(c) of the Declaration should also be limited to less than 30 minutes in total by the Court. It continues to be Defendant’s position that the various requests to file modified documents with the Court were unnecessary and untimely were inappropriate, unwarranted and attributable to conflicting/contradictory written guidance provided by the Second Circuit Court of Appeals and an inefficient, sequential review process that caused the allegedly late filing to occur. Upon information and belief the inefficient and sequential review conducted by the Second Circuit court clerks may be in part attributable to staff shortages resulting from the Covid Pandemic. This position is further summarized in Defendants’ Motion to file late, document 99 of the Second Circuit Court of Appeals Docket (case no. 21-1463).

RELIEF REQUESTED BY DEFENDANTS

17. Plaintiff respectfully requests an Order of this Court:

    a. denying the instant motion for Plaintiffs' attorneys fees and costs or in the alternative reducing said award to a *de minimus* amount for the reasons stated hereinabove; and

    b. such other and further relief as this Court deems just and proper.

Dated: May 2, 2022
Buffalo, New York

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