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September 15, 2017

By ECF

The Honorable Nicholas G. Garaufis  
United States District Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: Gayle v. Harry's Nurses Registry, Inc. et  
ano., 07 Civ. 4672 (NGG) (MDG)

Dear Judge Garaufis:

We represented the Plaintiffs in this action for back wages under the Fair Labor Standards Act (FLSA). I write pursuant to Your Honor's directive of September 12, 2017 (Dkt. No. 230).

**1. Plaintiffs have indeed received from Defendants all of the amounts due under the Court's judgments in this case and have not sought to double-dip.**

I acknowledge that I neglected to issue satisfaction of judgment in a timely manner, owing to the unusual circumstances of collection of the judgments.<sup>1</sup> Had Mr. Dorvilier or his attorney asked me to do so, I would have complied. However, no such request was made until Mr. Dorvilier's attorney in the current litigation asked me to issue satisfaction of judgment on August 23, 2017. I hand-delivered satisfaction of judgment to counsel two days later.<sup>2</sup>

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<sup>1</sup> As Your Honor may recall, Mr. Dorvilier failed to bond his appeal in this litigation, unlike most defendant-appellants, which "complicat[ed] Plaintiffs' counsel's efforts to enforce the judgment and to communicate with Plaintiffs." Dkt. No. 225 (Order of April 15, 2015).

<sup>2</sup> Mr. Dorvilier was scheduled to appear for deposition on August 25, 2017, in *Isigi v. Harry's Nurses Registry, Inc.*, 16 Civ. 2218 (FB) (SMG), a case involving facts substantially similar to the operative facts of the *Gayle* matter, in which I represent the plaintiff. Mr. Dorvilier is represented in the *Isigi* matter by Robert Schirtzer, who was one of the five lawyers and/or law firms who represented him before the district court in the *Gayle* matter.

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Ultimately, the Clerk of Queens County, where the transcripts of judgment had been docketed, rejected the satisfaction I provided, since the state court requires separate satisfaction forms for the separate judgments. (I had been unaware of that requirement.) Once Mr. Dorvilier's attorney forwarded me the notice of rejection, I promptly reissued satisfaction in the prescribed form. I handed the forms to counsel on September 7, 2017, in Magistrate Judge Gold's courtroom. Copies of the documents are annexed hereto as Exhibit 1.<sup>3</sup> Unfortunately, on Mr. Dorvilier had filed his submission (Dkt. No. 228) the previous day.<sup>4</sup>

It appears from Mr. Dorvilier's pro se submission that his belief that I have sought to double-dip may be a consequence of the fact that, in fee-shifting cases, an award of attorney's fees is made to the plaintiff rather than to counsel. Accordingly, the two judgments representing fee awards were made in the name of the Plaintiff, not my law firm. The transcripts of judgment docketed with the County Clerk reflect this fact, which Mr. Dorvilier has apparently interpreted as my attempt to collect the fee judgments twice.

It should be noted that my law firm, as agent for the Plaintiffs, has received from Defendants all of the amounts due under the Court's judgments in this case, but has not yet been able to remit the entirety of the judgment amounts to the Plaintiffs. Of the \$760,496.96<sup>5</sup> collected (representing the judgment for the plaintiffs exclusive of attorney's fees, which were awarded separately pursuant to the FLSA as discussed below), \$13,719.04 remains in my firm's trust account. That is because we have been unable to locate several of the plaintiffs. In addition, one of the plaintiffs, who says that she fears identity theft, refuses to provide her social security

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<sup>3</sup> It appears from Mr. Dorvilier's pro se submission dated September 13, 2017 (Dkt. No. 231) that he is unaware that I have done so. The hard copies handed to Mr. Schirtzer were signed; Mr. Schirtzer inspected them at the time he accepted them.

<sup>4</sup> There is no reason to believe that Mr. Schirtzer had any prior knowledge of the submission. In the *Gayle* case as well as the *Isigi* case, Mr. Dorvilier has made several "pro se" submissions without his counsel's knowledge, including a letter dated September 13, 2017. Dkt. No. 231. In that letter, he asserts that the purported failure to issue satisfaction of judgment in the *Gayle* case is sufficient excuse for failing to appear at a court-ordered deposition in the *Isigi* case. – and that Mr. Schirtzer refused to offer that excuse to Magistrate Judge Gold (presumably because it has no merit).

<sup>5</sup> On September 19, 2012, judgment for the Plaintiffs in the amount of \$617,071.76 was entered. Dkt. No. 180. A supplemental judgment was entered on October 22, 2013. Dkt. No. 214.

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number (so that I can issue her a 1099, as required) notwithstanding my efforts to persuade her that I have no nefarious purpose.<sup>6</sup> If money remains in my firm's trust account after efforts have been exhausted, I will move the Court for permission to make a *cy pres* donation to charity. If the Court denies the application, I will dispose of the money in accordance with the Abandoned Property Law. In any event, the money is fully accounted for in my firm's trust account.

**2. Briefly stated, my law firm held in its trust account monies sufficient to satisfy the expected award of attorney's fees, as permitted by retainer agreement, pending collection of the award. The firm fully disclosed this provisional retention of funds to the Plaintiffs. Once the award was collected, the firm remitted the entirety of the judgment amount to the Plaintiffs (save for the undistributed funds described in the preceding paragraph).**

On September 19, 2012, the Court directed judgment in the amount of \$619,071.76 for the plaintiffs. Dkt. No. 180. Following entry of judgment, Plaintiffs sought an award of attorney's fees, as permitted by the FLSA. Shortly after judgment was entered, but prior to the award of attorney's fees, the judgment was enforced and my firm secured funds sufficient to satisfy the judgment. We suspected, however, that the expected award of attorney's fees might be uncollectible, possibly because the judgment debtor might take steps to dispose of or otherwise conceal his assets. Accordingly, we remitted to the Plaintiffs (including the opt-in Plaintiffs) 75% of the amounts collected, and sent the plaintiffs letters stating that:

Dear \_\_\_\_\_ :

Your claim was successfully prosecuted and the court has awarded judgment in your favor in the sum of \$[Judgment amount allocable to each Plaintiff] representing overtime premium pay plus liquidated damages. The United States Marshal executed upon the judgment against Harry's Nurses Registry and remitted the judgment amount to my firm's attorney trust account.

Accordingly, enclosed please find my firm's attorney trust account's check in the sum of \$ [75% of Judgment Amount allocable to each Plaintiff], which represents your net recovery after the deduction of our attorney's fees and costs. Our application

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<sup>6</sup> In addition, having received a notice of levy from the New York Division of Taxation and Finance, the judgment allocable to one Plaintiff was remitted to the tax authorities.



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for an award of fees and costs is pending before the court. If and to the extent the court reduces the amount applied for, we will remit any net judgment balance to you.

Please note that the money you receive in this lawsuit is taxable. You may wish to save a portion of the money toward next year's taxes. We are unable to advise you about the tax regulations; please consult a tax advisor for further information about this.

As you know from earlier correspondence, Harry's appeal of the case is pending. Please notify us if your address or telephone number changes.

My firm's retainer agreement with the Plaintiff provides that

With respect to legal fees and disbursements, and in the event that you receive any remuneration because of our efforts, your fee for our professional services will be the greater of (a) one-third of the recovery; or (b) monies designated by the Court as attorneys' fees (to be paid by the defendant).

Each of the opt-in Plaintiffs executed and filed with the Court a Consent to Join Collective Action form stating that "I consent to become a party plaintiff to this lawsuit, to be represented by Levy Davis & Maher, LLP (retainer agreement on file at the above address) and to be bound by any settlement of this action or adjudication of the Court."

On January 17, 2014, we collected funds sufficient to satisfy the judgment for attorney's fees. Ten days later (once the funds cleared escrow), we remitted the remaining 25% of the judgment allocable to each Plaintiff for whom we had a valid address and social security number, together with a letter stating:

As you know, your claim was successfully prosecuted and the court awarded judgment in your favor in the sum of [Judgment amount allocable to each Plaintiff], representing overtime premium pay plus liquidated damages. Please find enclosed my firm's attorney trust account check to your order in the amount of \$[Escrow Balance allocable to each Plaintiff after earlier

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remittance], representing the judgment amount less the amount remitted to you last year, if any. No attorney's fees have been deducted from your award; the court ordered Harry's to pay attorneys' fees in addition to the amounts awarded to you and your colleagues.

Please note that the money you receive in this lawsuit is taxable. You may wish to save a portion of the money toward next year's taxes. We are unable to advise you about the tax regulations; please consult a tax advisor for further information about this.

As you know, Mr. Dorvilier has appealed the judgment. In my view, the appeal will probably be unsuccessful. However, there is a chance that the court of appeals could reverse the judgment. If that were to happen, you would be required to return the money to Mr. Dorvilier.

I am willing to provide the records of my firm's trust account *in camera* should the Court require.

Respectfully submitted,

/s/

Jonathan A. Bernstein