CLAUDIA GAYLE, Individually, On Behalf of All Others Similarly Situated and as Class Representative, Plaintiff, - against - HARRY'S NURSES REGISTRY, INC., and HARRY DORVILIER, Defendants.	07 Civ. 4672 (NGG) (PK)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

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PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

I. Defendants' Contention that Fee-Shifting Does Not Apply to Its Motion to Reopen the Case Is Mistaken and Ignores the Law of this Case

Defendants argue that, since liability for unpaid overtime premium pay was adjudicated years ago and the appeal on which this fee application is based was of a collateral issue, 29 U.S.C. § 216(b) and the American Rule preclude an award of fees. In other words, argue Defendants, Plaintiffs are not entitled to a fee award for hours expended on the successful defense of an FLSA appeal if the appeal is of something other than the employer's liability for overtime. That argument is wrong for several reasons.

First, once a plaintiff is determined to be a prevailing party on the merits of a fee-shifting claim, she is entitled to an award of attorneys' fees for all work done on appeal or in monitoring and enforcing the judgment. It is irrelevant that the merits of the claim were adjudicated earlier in the litigation. Accordingly, in *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 428 (2d Cir. 1999), the Second Circuit awarded attorneys' fees under Title VII's fee-shifting provision for services rendered in connection with the appeal of the district court's fee calculation. That is, the cited *Quaratino* appeal concerned the fee question only; it did not concern the pregnancy discrimination that impelled the lawsuit in the first instance (which was the subject of *Quaratino v. Tiffany & Co.*, 71 F.3d 58 (2d Cir. 1995)).

Second, it is the law of this case that fees for work defending appeals of collateral matters are awardable pursuant to *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 208 (2d Cir. 2009). On July 31, 2020, this Court awarded fees for services rendered in connection with the successful

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defense of the "double-dipping appeal," in which Defendants sought sanctions against Plaintiff's counsel for allegedly having failed to remit the full judgment amounts to his clients. ECF No. 280. Judgment for overtime wages had been awarded by this Court in 2012 and affirmed by the Second Circuit in 2014. The Supreme Court denied certiorari in 2015. It was not until 2017 that Defendants advanced the "double-dipping" allegations. *Id.* at 4. Neither the "double-dipping" appeal nor the defense of that appeal pertained directly to liability for overtime pay. Attorney fees for successful defense of the appeal were awarded nevertheless.

Similarly, it is law of the case that Plaintiffs' counsel is entitled to a fee award for services rendered in connection with enforcement of a judgment for overtime premium pay. In 2015, this Court determined that Plaintiff's counsel's time so spent was reasonable and compensable. ECF No. 225 at 5. That is, attorneys' fees for services rendered in connection with procurement of the overtime judgment were awarded in 2013. *Id.* at 1-2. The 2015 fee award was for post-judgment legal work: "enforcing the district court judgment, … communicating various matters to the approximately 50 individual Plaintiff opt-ins [and] making the instant fee application." *Id.* at 5.

Third, as to Defendants' public-policy contentions: Congress has abrogated the American Rule in FLSA cases. 29 U.S.C. 216(b). That abrogation reflects a Congressional judgment that working people are entitled to their full wages with liquidated damages (if they must sue to recover those wages) and should not have to pay attorneys' fees, which are typically unaffordable to the average worker. *E.g.*, *Roofers Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984). It would make no sense to force those same workers to pay out attorneys' fees to defend those wages against collateral attacks.

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II. Claudia Gayle Filed Her Consent to Be a Party to This Collective Action in 2008

Defendants urge that no fee award is proper in this case because Claudia Gayle, the lead plaintiff, purportedly did not consent to be a party to this collective action. Defendants offer no authority for the proposition that that alleged procedural defect vitiates Plaintiffs' status as prevailing parties. More to the point, Claudia Gayle did file her consent with this Court in 2008 (more than six months before the collective action was certified).

On August 15, 2008, Claudia Gayle filed her affidavit in support of her cross-motion for summary judgment and to authorize notice of a collective action pursuant to 29 U.S.C. § 216(b). ECF No. 33; Ex. 4. In that Affidavit, she stated under oath that

> I am the plaintiff in this action. I make and submit this affidavit … in support of my cross-motion to authorize notice of this action. . . . I believe that most of the field nurses employed by defendants are unaware that the pay practice [described in this affidavit] 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.

Id. ¶¶ 1, 8.

The FLSA does not prescribe a particular form by which a person consents to join an FLSA collective. *Mendez v. Radec Corp.*, 260 F.R.D. 38, 52 (W.D.N.Y. 2009). A consent form is sufficient where it clearly manifests the individual's consent to become a party plaintiff to the litigation. *Id.* (named plaintiff's signed declaration in support of collective action notice and Rule 23 certification held sufficient to satisfy Section 216(b) notwithstanding failure to file formal consent). It is respectfully submitted that Exhibit 4 manifests Ms. Gayle's consent to become a party plaintiff.

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Defendants misconstrue the language of Section 216(b) providing that "[n]o 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 such action is brought." "Such," in the quoted sentence, refers to the collective actions created by the immediately preceding sentence of Section 216(b), not to individual actions. The quoted language does not mean that the lawsuit is a nullity unless the named plaintiff files a consent form and the complaint simultaneously; it means only that no person can be a party to a collective action unless that person has filed his or her consent. In fact, first-stage certification of a collective action (for which Ms. Gayle moved and perforce consented in August 2008) was ordered by Judge Sifton on March 9, 2009 (Dkt. No. 53 at 28).

III. Defendants Identify No Reason That the Lodestar/Presumptively Reasonable Fee Should be Reduced

Defendants allege that "the Second Circuit Court of Appeals rejected the jurisdictional arguments raised by Plaintiffs' counsel in reaching its decision." In fact, the Court of Appeals' Order and Mandate says that:

> [Defendants-]Appellants move for leave to file a late appellate brief and for leave to file a sur-reply regarding the [Plaintiffs-]Appellees' motion to dismiss. Appellees cross-move to dismiss the appeal for lack of jurisdiction … Upon due consideration, it is hereby ORDERED that Appellants' motion to file a sur-reply is GRANTED. It is further ORDERED that Appellees' motion to dismiss the appeal is also GRANTED. To the extent that Appellants seek to challenge the 2012 and/or 2013 judgments, this Court lacks jurisdiction; the time to file a notice of appeal challenging those judgments has long since elapsed. (Citation omitted.)
>
> To the extent that the Appellants seek to challenge the district

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