UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHANNON RIVENBARK, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	**CIVIL ACTION NO. 4:17-CV-3786**
	§	
JPMORGAN CHASE & CO.,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

It is unfortunately necessary for this Court to respond to some misleading and inaccurate statements in the decision issued by the Court of Appeals in this case on February 21, 2019. The opinion was authored by the Honorable Jerry E. Smith. This response is necessary because the Court of Appeals opinion may otherwise be relied on in subsequent stages of the case.

If the same panel is to be involved in further stages of this case, it is to be hoped that the panel can achieve a higher degree of accuracy and candor. This Court can ill afford the time and effort that are required to set right such errors.

The first inaccuracy in the panel's opinion is to be found in the slip opinion at page 12, footnote 20. Without citation to the District Court's opinion or to the transcript of the oral hearing, Judge Smith faults the District Court for referring to an "illegality." The passage to which the panel is apparently referring needs to be set out in full:

> Take the argument that plaintiffs make at face value. If, if JPMorgan Chase has engaged in a long-running illegality, it doesn't seem to me unfair to give plaintiffs notice that they have been victims of this illegality.

Transcript of November 20, 2018 hearing (hereafter "Tr.") at 16.

Read in context, the language to which Judge Smith apparently refers can be readily understood as offering a hypothetical. The quote begins, "Take the argument that plaintiffs make at face value." The next sentence starts with, not one, but two "ifs": "If, if . . . ."

Many other references during the hearing further validate the obvious truth that this Court had not assumed illegality, or any misconduct, on the part of the defendant. A few examples are noted:

"It is a collision of facts. I understand that." Tr. at 7.

"Why shouldn't that be part of the Court's concern. If there has been illegality – I know we can't determine that now." Tr. at 17.

"If there has been illegality, why shouldn't those who have been victims of the illegality get notice?" *Id.*

"I don't know whether they know they may have been subject to a long-running illegal practice." Tr. at 20.

"But you are saying their [i.e., plaintiffs'] claims are non-meritorious, so no need to go forward. They're contradicted by other people in the same office, they're contradicted by supervisors, they're belied by the time sheets." Tr. at 31.

"Well, Ms. Gonell [defendant's counsel] says that you already admitted in writing that the arbitration clauses are valid, enforceable." Tr. at 37.

"She claims what he [i.e., plaintiffs' co-counsel] meant was that the arbitration clauses are enforceable." *Id.*

This Court's Memorandum and Order ("M&O"), from which the defendant unsuccessfully sought mandamus, contains numerous, similar references emphasizing that the plaintiffs had made allegations and that the Court had made no determinations of fact. The second sentence of the M&O notes, "In addition to alleging violations of the FLSA, Plaintiffs seek recovery . . . ." To similar effect are the following:

"Plaintiffs claim that call-center employees were not paid overtime wages . . . ." M&O at 1.

"Plaintiffs believe the other employees are 'similarly situated' . . . ." M&O at 2.

"Plaintiffs argue that their evidence is sufficient to support company-wide conditional certification." M&O at 3.

"Plaintiffs believe that their corroborating declarations by employees . . . ." *Id.*

"Plaintiffs contend . . . . " *Id.*

"Plaintiffs argue . . . ." *Id.*

"Plaintiffs concede . . . . " M&O at 4.

The other quote that Judge Smith takes out of context leaves a similar mis-impression. The Court sought to describe the defendant's litigation position, not to express its own. "It seems to me that you characterize JPMorgan Chase's position as we made these people sign arbitration agreements, which in itself is a huge compromise of individual's rights. Now we are going to further disenfranchise them by not telling them there may have been something illegal about the practice they were subject to."[1] Tr. at 17.

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[1]As to whether arbitration agreements in an employment context compromise individual rights, this Court makes reference to *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612 (2017). Both Justice Gorsuch's opinion for the five-member majority and Justice Ginsburg's dissent for the other four members of the Court accepted the self-evident fact that a compulsory arbitration agreement that an employer required employees to sign did severely restrict an employee's rights.

Defendant's counsel did not seem to be troubled by the Court's characterization of her client's position: "But that's no different than any other claim that an employee might potentially have. That doesn't mean that there is a court-sanctioned notification procedure for such potential illegality." Tr. at 17.

Many courts have held that, in putative FLSA collective actions, notice should be sent to employees who may have signed arbitration agreements:

> The Court is persuaded by the decisions of the majority of courts. At least in the circumstances of this case, in which the named Plaintiff has not signed an arbitration agreement and questions of fact remain about the existence and validity of other arbitration agreements, the Court will not prematurely limit the dissemination of notice.

Camara v. Mastro's Restaurants LLC, 340 F. Supp 3d 46, 59 (D.D.C. 2018).

In *Gordon v. TBC Retail Group*, the court said,

> [Defendant asserts] that there are very few potential class members who *could* join the litigation, due to the fact that "[its] employees started to sign mandatory arbitration agreements in October 2013." The court does not find this consideration compelling, as it prematurely assumes that such arbitration agreements are enforceable. Instead, the court finds that the better approach is to address arbitration issues after conditional certification, when the scope and substance of those issues become clearer.

134 F. Supp. 3d 1027, 1039 n.9 (D.S.C. 2015) (internal citation omitted).

In *Friscia v Panera Bread Co.*, the court held

> Panera also argues that approximately half the proposed collective is covered by binding arbitration agreements, further distinguishing at least those potential plaintiffs from [the named plaintiff.] This argument is inappropriate at the notice stage, however, because it goes to Panera's merits defenses. *See, e.g.*, *Romero v. La Revise Assocs., L.L.C.*, 968 F.

Justice Gorsuch noted, "While the dissent is no doubt right that class actions can enhance enforcement by 'spread[ing] the costs of litigation,' it's also well known that they can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims' . . . ." 138 S. Ct. at 1632 (internal citation omitted). The disagreement was whether the employers' requiring arbitration was permitted by applicable federal statutes. None of the cases before the Court in *Epic* would have been necessary if employees were satisfied with arbitration as an alternative to litigation.

> Supp. 2d 639, 647 (SDNY 2013) ("[C]ourts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination.'")(quoting *D' Antuono v. C & G of Groton, Inc.*, No. 11-0033, 2011 WL 5878045, at *4 (D. Conn. Nov. 23, 2011) (collecting cases)).

2018 WL 3122330, at *7 (D.N.J.)

In almost 20 years on the bench, this Court has not had to issue any other writing like this one. But, never before has an appellate judge mischaracterized the trial record so significantly and, it appears, willfully.[2]

IT IS ORDERED that the Minute Entry of March 16, 2018, and the Memorandum and Order of December 10, 2018 (Dkt No. 71) are **WITHDRAWN** during the pendency of the stay entered on March 5, 2019 (Dkt. No. 86).

SIGNED this 11th day of March, 2019.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

[2]Judge Smith's entire opinion seems to take as a given that the arbitration agreements that defendant's employees may have signed are valid and enforceable. But, plaintiffs do not concede that, and defendant has not even filed a motion to refer to arbitration any of the named plaintiffs' claims. As recently as last year, the Fifth Circuit held that, "Texas has no presumption of arbitration when determining whether a valid arbitration agreement exists." *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 688 (5th Cir. 2018). In this case, the arbitration agreements in question would presumably have to be analyzed under the laws of several different states.