19-438

United States Court of Appeals
for the Second Circuit

CHARLENE SIMMONS,

Plaintiff-Appellant,

-against-

TRANS EXPRESS INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (Brooklyn)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. PRELIMINARY STATEMENT

Plaintiff Charlene Simmons ("Plaintiff," "Appellant" or "Simmons"), hereby submits the instant brief in reply to the opposing brief of Defendant Trans Express Inc. ("Defendant," "Appellee" or "Trans Express"), and in further support of her appeal of the district court's order dismissing the complaint based on the "res judicata" affirmative defense. Most of Defendant's arguments were already addressed in Plaintiff's opening brief ("Pl. Br."), but some additional points will be addressed herein.

First, Defendant's opposition confirms that the district court committed reversible error when it granted Defendant's motion to dismiss based on an aspect of traditional res judicata that was specifically eliminated by New York State statute – NYCCCA § 1808. Realizing this fatal flaw, Defendant attempts to avoid the text of the statute (NYCCCA § 1808). For example, contrary to Defendant's argument that res judicata is allowed in all cases, the title of the statute clearly states that "res judicata" only applies in "*certain* cases" – only where a subsequent claim is the same or exactly the same as the claim in the small claims action, as the federal caselaw explains. In another attempt to fight the text of the statute, Defendant argues that Plaintiff relied on the version of the statute before it was amended in 2005 – but throughout, Plaintiff has relied on the version of the statute after the 2005 amendment as set forth in her briefs. Defendant also claims that the

pre-amendment cases Plaintiff and another federal court recently relied on are no longer good law because they were decided before the 2005 amendment. However, as explained below and even in the district court's decision, the whole purpose of the 2005 amendment was to bring the statute in line with cases holding that res judicata only applies to certain cases where the claim in the subsequent action is the exact same claim as in the prior small claims action.

Second, Defendant appears to concede that because of the inadequate and difficult to understand record, Plaintiff's logical and factual position that she brought a termination claim in small claims court and not any of the statutory claims in this action (Pl. Br. 4-10), cannot be challenged without creating factual disputes that would require a denial of Defendant's motion, especially at this pre-answer stage and with all the inferences that must be drawn in favor of Plaintiff. Defendant also appear to agree that a termination claim would not satisfy the "same claim" standard especially given Defendant's argument that the federal court in *Walters* "mistakenly relied" on the "same claim" standard. It is obvious that the wrongful termination claim Plaintiff brought in small claims court is not the same as and is very different from the statutory claims in this action.

Third, even if we applied traditional res judicata without the restrictions imposed by NYCCCA § 1808, the res judicata affirmative defense would still fail. In response, Defendant repeats the argument that if jurisdiction was an obstacle in

small claims court, Plaintiff should have brought all her claims in a higher court with jurisdiction to handle them. However, this argument is contrary to law and logic because it can be made in every case where the jurisdiction exception to res judicata is implicated and the cases applying the jurisdiction exemption would not exist. Moreover, Plaintiff did not split her claim to get additional recovery on the claim she brought in small claims court – she has brought different and separate statutory claims in this action.

In terms of relatedness, Defendant continues to erroneously argue that the entire employment is a single harm or event. However, the very Second Circuit case cited by Defendant is distinguishable and appear to support Plaintiff by noting that there can be several unrelated events during the period of employment for purposes of res judicata analysis.

Fourth, in response to Plaintiff's argument that res judicata is inapplicable in this case because it would create a prohibited waiver of wages protected under the FLSA, Defendant repeats the arguments of the district court which is based on a misunderstanding of *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959)("Appellant's argument of estoppel ignores that this case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by Congressional policy."). Contrary to the district court, *Caserta* did not involve waiver by contract and the district court was wrong

to deem *Caserta* irrelevant because this case does not involve waiver by contract, as further explained below.

II. ARGUMENT

1. DEFENDANT IN ITS OPPOSITION, AVOIDS MUCH OF THE ANALYSIS BASED ON THE PLAIN TEXT OF THE STATUTE (NYCCCA § 1808) - BECAUSE THE PLAIN TEXT OF THE STATUTE DESTROYS DEFENDANT'S DEFENSE BASED ON THE SMALL CLAIMS COURT ACTION

There has been much discussion as to whether NYCCCA § 1808, prohibits the res judicata defense or the collateral estoppel defense or some combination of the two. However, such labels are irrelevant because the only thing that matters is the text and substance of the statute – especially, where the use of such labels may be an attempt to run from the text of the statute itself which we are not allowed to do. The real question is not what is allowed by res judicata or collateral estoppel – it is what is allowed by the statute at NYCCCA § 1808. Legislatures are free to limit existing forms of preclusion and to create new forms of preclusion that may not fit neatly into the res judicata and collateral estoppel labels.

The need to focus on statutory text is even more important here because the use of the terms res judicata and collateral estoppel has not been consistent and precise in jurisprudence and discourse. See i.e. *Allen v. McCurry*, 449 U.S. 90, 94, FN 5 (1980) ('Some courts and commentators use "res judicata" as generally meaning both forms of preclusion.'). *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494,

500–01, 467 N.E.2d 487, 490 (1984) ("the doctrine of collateral estoppel [is] a narrower species of res judicata."). As such, many times when the term res judicata is used, the user is referring to collateral estoppel or vice versa or even a unique form of preclusion set forth in statute. Obviously, if traditional res judicata applied to small claims court judgments, the legislature would not have enacted a specific statute addressing and limiting the application of res judicata to judgments of small claims court to only "certain cases."

When faced with competing interpretations of a statute, appellate courts resort to the text of the statute to resolve the conflict. In *Olagues v. Perceptive Advisors LLC*, 902 F.3d 121, 128 (2d Cir. 2018), the Second Circuit stated in relevant part as follows:

> That interpretive progression is, of course, nothing unusual; "[e]very exercise in statutory construction must begin with the words of the text.... If resorting to the plain text alone fails to resolve the question, we test the competing interpretations against both the statutory structure of [the statute] and [its] legislative purpose and history." *King v. Time Warner Cable Inc.*, 894 F.3d 473, 477 (2d Cir. 2018) (internal quotation marks omitted).

Resorting to the statutory text is especially warranted, where, as here, none of the decisions interpreting the subject statute are binding on this Court and the issue is one of first impression for this Court – it appears that this Court has never before addressed the effect of NYCCCA § 1808 on the traditional res judicata and collateral estoppel affirmative defenses, especially in an FLSA case where special

public policy considerations for the protection of workers are implicated. See i.e. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015).

This simple but powerful approach of resorting to statutory text, has even been used by the U.S. Supreme Court to produce consensus in resolving circuit splits etc. See i.e. *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S.Ct. 1507203 (2019). Resorting to the statutory text is not only simple and powerful – it is also necessary because the role of the court is to enforce and apply the statute passed by the legislature even if it disagrees with the statue, and the interpretation most faithful to the statute must prevail.

Here, Plaintiff relied heavily on and argued at length based on the text of the statute at NYCCCA § 1808, reinforced by the purpose and policy behind the statute and small claims court. (Pl. Br. 14-23). By contrast, however, apart from a misleading argument that Plaintiff was relying on the pre-2005 version of the statute, Defendant it appears, stayed clear of the statutory text and the arguments based on it – because the text of the statute destroys Defendant's defense based on the small claims court action.

(A) EVEN THE TITLE OF 1808 MENTIONS "RES JUDICATA" AND LIMITS IT TO "CERTAIN CASES" – CONTRARY TO DEFENDANT'S POSITION

At the outset, the title of the statute, "§ 1808. Judgment obtained to be res judicata in *certain* cases," tells the story. Notably, the title of NYCCCA § 1808

explicitly uses the term "res judicata" and specifically limits res judicata by allowing it in "*certain* cases" – but not in *all* cases as Defendant erroneously argues.

We also know what "certain cases" the statute is referring to – cases involving the "exact same claim" as explained by other federal judges in the EDNY and the text of the Bill Jacket quoted by the district court itself in this case. (See Pl. Br. 14-22). Given the genuine disputes as to what claims were brought in small claims court, Defendant appears to argue only that the claims in this action should have been brought in small claims court – not that the claim here are the same or exact same claims as the ones in small claims court. (Def. Br. 9, fn 5- claiming that the factual disputes as to what claims were brought were irrelevant and a "red herring" because "Dismissal of Simmons' claims was based on what claims *could* have been brought."). As such, even though Plaintiff could not and was not required to bring her claims in this case in small claims court, reversal is required because the statute only allows res judicata in subsequent cases involving the same claim and Defendant concedes that a "same claim" determination was not and cannot be made as a matter of law in this case and at this stage because of the factual disputes as to what claims were brought in small claims court. By way of reinforcement, the termination claim in small claims court is very different from

the overtime, manual worker, wage statement and wage notice claims in this case. (Pl. Br. 4-11).

(B) DEFENDANT DID NOT AND COULD NOT ADDRESS THE STATUTORY TEXT ALLOWING A SUBSEQUENT ACTION EVEN "INVOLVING THE SAME FACTS, ISSUES AND PARTIES"

Plaintiff argued in her opening brief that the statute at NYCCCA § 1808 explicitly tells us that a small claims litigant can bring a subsequent action "involving the same facts, issues and parties …" – something not possible under the arguments of Defendant and the lower court which in direct contravention of the statute would prohibit a subsequent action based on the same facts and issues and even prohibit a subsequent action based on different facts and issues – if as they argue, the subsequent claims were based on the same harm/facts and could or should have been brought in small claims court. This Court has a legal obligation to follow the statute but has no legal obligation to follow the Defendant and the lower court. Defendant could not provide any example of when the statutory language allowing a subsequent action "involving the same facts, issues and parties," would be applicable – because to do so would destroy its case.

(C) DEFENDANT DID NOT AND COULD NOT ADDRESS THE SETOFF PROVIDED FOR IN THE STATUTE – CONFIRMATION THAT THE STATUTE ALLOWS EVEN FOR DUPLICATE RECOVERY IN A SUBSEQUENT ACTION

Defendant did not and could not address the statutory language providing for a setoff where a subsequent judgment "shall be reduced by the amount of the judgment under this article" – compelling confirmation that the statute at NYCCCA § 1808 even provides for duplicate recovery in a subsequent action – contrary to the arguments of Defendant and the lower court. Once again, Defendant could not provide any example of when the statutory setoff would be triggered - because to do so would destroy its case.

Defendant also did not challenge the argument that Plaintiff's position is consistent with the intent and purpose of small claims court – the legislature did not intend for small claims litigant to bring all their claims at once in small claims court and specifically allowed them to bring other claims at a later time.

While not directly addressing the specific arguments based on the statutory text, Defendant in general, attempts to avoid the text of the statute in a few ways. First, Defendant argues that Plaintiff has improperly relied on the pre 2005 amendment version of the statute and cases before the 2005 amendment. (Def. Br. 6-7). Defendant is completely wrong. The version of the statute that Plaintiff relied upon throughout is the version following the 2005 amendment. As to Plaintiff's

reliance on *Farbstein v. Hicksville Pub. Library*, 323 F. Supp. 2d 414, 423 (E.D.N.Y. 2004), and the cases cited therein, which were decided prior to the 2005 amendment, these are still good law because the whole purpose of the 2005 amendment was to bring the statute at NYCCCA § 1808 in line with the cases that held that res judicata can be applied but only when the subsequent claim is the same or exactly the same as the subject claim in small claims court. Significantly, the district court confirms this point when in addressing the 2005 amendment, stated in relevant part as follows (Simmons, 355 F. Supp. 3d at 169):

> The Legislature noted that "[t]he courts have consistently held that a small claims judgment is res judicata when the *same* claim is filed in another court,"

This is precisely why in *Walters v. T&D Towing Corp.*, No. 17CV0681JSAKT, 2018 WL 1525696, at 5 (E.D.N.Y. Mar. 28, 2018) which was decided after the 2005 amendment in 2018, the Court relied on the federal court's ruling in *Farbstein* for the rule that only exact same claims are barred - Defendant's response to *Walters* is tucked away in a footnote in its brief. However, Defendant's argument that the court in *Walters* "mistakenly relied" on *Farbstein* (Def. Br. 7, fn 2), is a concession that Defendant's motion fails under the "same claim" limitation on traditional res judicata that NYCCCA § 1808 imposes.

Second, Defendant cites to cases like *Chapman v. Faustin*, 150 A.D.3d 647, 55 N.Y.S.3d 219, 220 (1st Dep't. 2017), to support its reliance on traditional res

judicata and its effort to evade the text and purpose of the statute. However, Plaintiff distinguished these cases and it is not clear that Defendant addressed these distinctions. However, if Defendant is arguing that these cases upon which it relies allow application of traditional res judicata to small claims judgment instead of the limited res judicata that "is narrower than the general scope of res judicata," which applies only to exact same claims as recognized in federal cases such as *Farbstein* and *Walters*, these federal cases are much more persuasive. In this regard, these federal cases involve more in-depth analysis of the res judicata issue in the context of small claims judgments and NYCCCA § 1808. More importantly, the narrower view of res judicata adopted by these federal courts is consistent with the text and purpose of the statute but traditional res judicata is not. The whole purpose of small claims court is to provide lay persons without counsel, an inexpensive, quick and informal process to resolve *small* claims while preserving their rights to assert at a later time in higher courts, claims that are larger and more complex. Once again, this Court has no obligation to follow non-binding decisions from lower courts but has a legal obligation to follow the statute as written – the arguments most consistent with the statute must prevail – and those are the arguments of Plaintiff in this case.

2. WHEN CERTAIN ERRORS ARE CORRECTED, DEFENDANT DOES NOT SERIOUSLY DISPUTE THE ARGUMENT THAT ITS MOTION SHOULD BE DENIED EVEN UNDER TRADITIONAL RES JUDICATA

In addition to her argument that Defendant's "res judicata" affirmative defense fails under 1808 and its restrictions on res judicata, Plaintiff also argues that Defendant's "res judicata" defense fails under traditional res judicata as well - an argument that Plaintiff does not need but which also requires reversal in her favor. (Pl. Br.24-28).

At the outset, it appears undisputed that Plaintiff never asserted the statutory claims in this action in small claims court. As such, Defendant and the district court argue that the claims are nonetheless barred under traditional res judicata because they could have been brought in smalls claims court even if they were not. The district court and Defendant are wrong because even traditional res judicata contains an exception where the court in the first suit lacked subject matter jurisdiction to handle the claims in the second suit. (Pl. Br. 25-28). Defendant and the lower court acknowledge the jurisdiction exception to res judicata but create their own exception to this exception for purposes of this case by attempting to eliminate the monetary aspect of subject matter jurisdiction. Because such an undertaking by Defendant and the lower court lacks a proper legal basis and is contrary to law, reversal of the district court is required.

More specifically, Defendant states in relevant part as follows (Def. Br. 10):

> There is indeed a limit on applying res judicata where a party faces unavoidable constraints on bringing all claims in a single action.

Those very "unavoidable constraints" are present here in the form of the $5,000 limit on the subject matter jurisdiction of New York Small Claims Court. Nonetheless, Defendant and the lower court invoke *Chapman v. Faustin*, 150 A.D.3d 647 (1st Dep't, 2017), to argue that Plaintiff cannot split claims across two lawsuits and that if she faced jurisdictional barriers in small claims court, she should have brought her case in another court that could have handled all her claims. Such arguments are legally erroneous. First, Plaintiff distinguished *Chapman* in her opening brief (Pl. Br. 26-27), but in terms of claim splitting, it does not exist here. As previously explained, Plaintiff brought a wrongful termination claim in small claims court and has asserted different statutory claims in this action (Pl. Br. 4-10) - a jury is likely to agree with Plaintiff on this and such disputes as to what claims were asserted would require a rejection of the pre-answer motion to dismiss based on the fact-intensive res judicata affirmative defense.

Second, the lower court stated in relevant part as follows (Simmons, 355 F. Supp. 3d at 170):

> Courts have held that res judicata does not apply when a plaintiff could not seek damages in a prior action (i.e., when she could only seek equitable relief) but have not recognized an exception to the doctrine when a plaintiff was merely limited to a smaller damages award than desired. See, e.g., Leather v. Eyck, 180 F.3d 420, 425 (2d

Cir. 1999); Parker v. Blauvelt Volunteer Fire Co., Inc., 93 N.Y.2d 343, 347, 712 N.E.2d 647, 690 N.Y.S.2d 478 (1999).

This is precisely the situation here as well, where Plaintiff could not previously seek damages on the statutory claims she brought in this case because of the subject matter limitation of $5,000 in small claims court. Moreover, the distinction between no damages and lesser damages is irrelevant, artificial and contrary to logic because no damages is obviously less damages than desired.

The argument that the jurisdiction exception to res judicata does not apply because the Plaintiff should have brought her claims in a court that had jurisdiction over all her claims is erroneous and contrary to good logic because this argument can be made in every case where the jurisdiction exception is raised and the cases applying the exception would not exist. For example, in *Walters v. T&D Towing Corp.*, No. 17CV0681JSAKT, 2018 WL 1525696, at 5 (E.D.N.Y. Mar. 28, 2018) and *Weitz v. Wagner*, No. 07-cv-1106 (KAM) (ETB), 2008 WL 5605669 (E.D.N.Y. July 24, 2008), using the erroneous logic of Defendant and the district court, these cases would have been dismissed based on the argument that rather than bringing the first action in small claims court where jurisdiction was an obstacle, the plaintiff should have brought their claims in the first instance in federal court that could have granted all relief sought.

It is well settled that the monetary elements of subject matter jurisdiction are just as important as the non-monetary elements, and that jurisdiction bars on

the recovery of damages preclude the application of res judicata. See also, *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) ("Res judicata will not apply where 'the initial forum did not have the power to award the full measure of relief sought in the later litigation' … Even where a second action arises from some of the same factual circumstances that gave rise to a prior action, res judicata is inapplicable if formal jurisdictional or statutory barriers precluded the plaintiff from asserting its claims in the first action.").

Next, Plaintiff argued that her termination claim in small claims court was distinct from and not sufficiently related to her statutory claims in this action for purposes of traditional res judicata – a requirement under traditional res judicata where the argument is that Plaintiff did not but should have raised in the first action, the claims in the second action. (Pl. Br. 28-31). In response, Defendant invokes this Court's decision in *Cieszkowska v. Gray Line New York*, 295 F.3d 204, 205 (2d Cir. 2002) – which is distinguishable and actually supports Plaintiff when read in proper context. First, and unlike this case, both lawsuits in *Cieszkowska* involved termination claims – only the small claims action here involved termination claims. Second, the Second Circuit in *Cieszkowska,* 295 F.3d at 205, noted that complaints in both cases "involve the *same events* concerning her employment, pay history and termination," something not present here and which appear to highlight another important point – that a single employment can

be made up of several *events* such as pay history and termination and that the entire employment is not a single event as Defendant and the district court erroneously argue. Third, it appears that the Second Circuit used the term res judicata to include collateral estoppel especially when viewed in the context of the Supreme Court's decision in *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461,482 n.22 (1982) (Pl. Br. 17-19) – that because termination was for reasons other than discrimination in the first action, estoppel on reason or cause of termination will cause a subsequent and even different termination claim that turns on this same issue to fail – different claims and share certain common issues. Fourth, it appears that unlike here where small claims court lacked subject matter jurisdiction to entertain Plaintiff's statutory claims in this action, there was no such jurisdictional bar in *Ciezsknowska*. Once again, however, Defendant's arguments fail under 1808 as explained above.

3. IT APPEARS THAT DEFENDANT AND THE DISTRICT COURT MISREAD THE CASES AND MISUNDERSTOOD THE AGRGUMENT THAT APPLICATION OF RES JUDICATA IN THIS CASE VIOLATES THE FLSA WHICH PROHIBITS THE WAIVER OF WAGES NOT ONLY BY CONTRACT, BUT BY ACTION AND INACTION AS WELL

Plaintiff's argument that res judicata is inapplicable in this case under the FLSA because it would effectuate an improper waiver of FLSA-protected wages, is an important one of first impression for this Court. (Pl. 31-33). In response, Defendant, in essence, repeats the arguments of the district court which are based

on a misunderstanding of *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959) and the arguments based on it and the FLSA (Simmons v. Trans Express Inc., 355 F. Supp. 3d 165, 172–73):

> This portion of Caserta simply stands for the proposition that employers cannot relieve themselves of their obligations under FLSA by contract. If Trans Express asserted that it was not bound to pay Simmons at an overtime rate because her employment contract did not provide for overtime pay, Caserta would defeat this argument.

However, no contract was at issue in *Caserta*, and the district court's conclusion that *Caserta* is irrelevant here because this case does not contain an employment contract depriving plaintiff of overtime pay, totally misses the mark. *Caserta* involved the failure to claim overtime on timesheets, and the contract in *Caserta* that Judge Friendly was referring to was the contract in the case of *D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 66 (1946)*, between a former employee and employer which the U.S. Supreme Court found improperly waived FLSA rights. Judge Friendly then reasoned that if the Supreme Court in *D.A. Schulte, Inc.* did not allow waiver of FLSA rights even when both sides agreed in writing to waive such rights, it cannot be that something less such as action or inaction by way of estoppel will result in waiver of such rights. See *Caserta*, 273 F.2d at 946 ("Surely acts by an employee leading the employer to believe he is satisfied with the payments being made to him, even if we could find these here, could not have greater effect than a contract to that end."). This Court should respectfully disagree

with the lower court and follow its own reasoning of Judge Friendly in *Caserta* which does not require the existence of any contract.

In *Caserta*, the Defendant invoked estoppel to argue that the plaintiff had waived his overtime wages in question because he failed to claim said overtime on the timesheets he had submitted to the employer. Similarly, the Defendant in this case is invoking the twin sister of estoppel (res judicata) to argue that Plaintiff waived his rights to overtime pay by failing to claim such overtime wages when she submitted her wrongful termination claim to the small claims court. Even more compelling in this case is the fact that Plaintiff was prevented by subject matter jurisdiction from bringing her FLSA claims in small claims court which cannot handle claims in excess of $5,000.

Moreover, res judicata, like other forms of waiver is based on the idea that parties can choose to waive their rights but because of the uniquely protective nature of the FLSA, those workers protected by the FLSA are not free to waive their rights – and in the Second Circuit can only validly do so with court approval under *Cheeks*. Unlike the district court and Defendant in this case, Judge Friendly and the Second Circuit in *Caserta*, correctly reasoned that what matters is the improper waiver of wages under the FLSA, regardless of whether the waiver is created by contract or something else such as the doctrine of estoppel – or the doctrine of res judicata in this case.

This is not a situation where Plaintiff asserted her FLSA claims and they were actually decided by the small claims court – this is a situation where Defendant argues that the FLSA claims were waived through res judicata because Plaintiff should have brought the claims in small claims court. In any event, any argument that Plaintiff brought wage and hour claims in small claims court as opposed to the wrongful termination claim, would create a genuine dispute of material fact precluding a dismissal of this action on a pre-answer motion to dismiss and may even warrant further discovery and trial (Pl. Br. 4-10), as Defendant appear to recognize.

Defendant and the lower court both cited *Klein v. Ryan Beck Holdings, Inc.*, No. 06 CIV. 3460 WCC, 2007 WL 2059828, at *6 (S.D.N.Y. July 13, 2007), as amended (July 20, 2007), for the proposition that "No provision of the FLSA bars the application of res judicata …" But this argument is misses the mark because it neglects to mention that even though the prohibition against improper waiver of wages under the FLSA is not specifically set forth in the text or provisions of the FLSA, it can be found in decisions of the Supreme Court and this court based on the public policy behind the FLSA. See i.e. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 (1946). The same is true for the requirement under *Cheeks* that waiver of FLSA rights is invalid unless approved by the courts. Notably, the non-binding, lower court ruling in *Klein* does

not cite or discuss any of these binding decisions and only makes a brief reference to res judicata under the FLSA without the arguments and analysis here because that case did not even involve res judicata – it appeared to be a hypothetical argument by the employer in the context of opposing class claims under state law.

Since *Cheeks*, the understanding of the FLSA and its uniquely protective status has improved greatly and judges have applied and continue to apply the FLSA in many different contexts and situations. This latest issue of whether FLSA rights, especially overtime rights, can be waived through the assertion of res judicata especially where the plaintiff was prevented by subject matter jurisdiction from asserting her FLSA claims is an important one of first impression for this Court.

4. DEFENDANT'S ARGUMENTS MADE IN FOOTNOTES SHOULD BE STRICKEN

For whatever reason, Defendant has extensively used footnotes to make arguments or to respond to Plaintiff's arguments. In *Dow Jones & Co., Inc. v. Int'l Sec. Exch., Inc.*, 451 F.3d 295, 301 (2d Cir. 2006), this Court stated in relevant part as follows:

> Dow Jones's complaint also contains claims of tortious interference with contract and unjust enrichment. Dow Jones addresses these claims only in a cursory footnote in its initial appellate brief. We therefore deem them waived. See Tolbert v. Queens College, 242 F.3d 58, 75 (2d Cir.2001) ("A contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote."); United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir.1993) ("We do not consider

> an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.").

Defendants' use of footnotes to make arguments is not isolated or minor. As such, Defendants' *numerous* arguments contained only in footnotes should be stricken and not considered by this Court. These footnote arguments are also without merit. For example, in some footnotes, Defendant erroneously suggests that certain arguments by Plaintiff herein were not raised and addressed below but in the body of its brief Defendant argues the opposite and states, "Each of the arguments that Simmons raises here was fully addressed (and correctly rejected) in Judge Vitaliano's thirteen pages of analysis in his Memorandum & Order." (Def. Br. 5).

III. CONCLUSION

WHEREFORE, Plaintiff respectfully requests this Honorable Court reverse the order and judgment of the district court in their entirety, reinstate the complaint and remand for further proceedings and litigation of all claims, and grant Plaintiff such other, further and different relief in Plaintiff's favor as the Court deems just and proper.

Dated: Queens Village, New York
September 18, 2019

Respectfully submitted,

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 5,188 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman, Size 14.

Dated: September 18, 2019

/s/ Abdul Hassan
Abdul K. Hassan, Esq.

db