EUGEN SCHENFELD, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES (IBM), JOHN KELLY, ZACHARY LEMNIOS, LARRY O'CONNELL, JOHN DOES 1-10, and ABC CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY–LAW DIVISION DOCKET NO.: MID-L-7334-18 Civil Action

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In 2018, Plaintiff Eugen Schenfeld was terminated as part of a reduction in force by his business unit, IBM Research ("Research"). The workforce reduction resulted from a shift in the technology market toward artificial intelligence ("AI") and Research's strategic decision to reprioritize its investments into AI. Research's goal was to reduce its existing workforce in order to hire AI talent and stay within its budget. Schenfeld was selected for the resource action because his department (which was within Research) eliminated Schenfeld's work. While the decision to curtail Schenfeld's project was strategic and is entitled to deference, it is also entirely understandable: By 2018, multiple aspects of Schenfeld's project were halted or unfunded, and he had alienated many colleagues whose support he needed with disparaging and hostile remarks. Schenfeld had been developing his project, which he called the "Hardware Cloud," since 2012, but as of 2018, he had no dedicated team, no functioning prototype and no identifiable path from concept to product. Schenfeld could not even create a work plan for 2018 with specific milestones, deadlines and resource requests.

With his selection for the reduction in force, Schenfeld was told that he could apply for other positions within IBM. He failed to formally apply for any other job, lobbing only informal calls and emails to a handful of executives—only some of whom he knew and all of whom were the same age as or older than Schenfeld. Failing to find a new position, Schenfeld was terminated along with fifteen other employees in Research. Far from showing age discrimination, the other terminations show that IBM acted without regard to age. Six of the terminated employees were more than a decade <u>younger</u> than Schenfeld, while over 300 U.S. employees aged 60 or <u>older</u> remained in Research after the reduction in force. <u>No</u> <u>one</u> was hired into Schenfeld's department to continue his work, let alone a younger employee.

On these facts, and in the absence of any direct evidence of age discrimination, Schenfeld has sued IBM, the supervisor who selected him for termination (Zachary Lemnios), and two other executives, John Kelly and Larry O'Connell, alleging that they terminated and then failed to rehire him due to his age, in violation of the New Jersey Law Against Discrimination ("LAD").

Defendants move for summary judgment given the absence of any material facts demonstrating age discrimination. Schenfeld has no direct evidence of discrimination and cannot make a prima facie showing of discriminatory intent because he was never replaced within his department. In addition, the ages of the employees who were terminated (many younger than Schenfeld) and retained (many older than Schenfeld) preclude any inference of age discrimination. Even if Schenfeld could articulate some prima facie showing (and he cannot), Defendants have articulated a non-discriminatory reason for his termination: Research was redirecting its investments into employees and work product within its strategic plan, and Schenfeld's work was neither strategic for his department nor demonstrably viable.

Schenfeld's failure-to-hire claims similarly fail a threshold requirement: Schenfeld did not formally apply for a new position at IBM, and he lacks any evidence that he was qualified for any open position. Here, too, context matters. The supervisors to whom Schenfeld purportedly informally applied were all Schenfeld's age or older. There is nothing from which to infer age discrimination.

At the end of the day, Schenfeld has only his belief that he was a valuable employee whose work was, in his mind, strategic, and a conclusory, unreasoned EEOC letter, about different reductions in force, that has no relevance here. Subjective belief and inadmissible evidence cannot save Schenfeld's baseless claims.

STATEMENT OF FACTS

A. Schenfeld's Work on the "Hardware Cloud"

As its name suggests, IBM's Research unit explores technologies for potential, new IBM products and services and for improvements to IBM's existing products and services; like IBM, Research is comprised of multiple departments and organizations focusing on different technical areas. Statement of Undisputed Material Facts ("SUMF"), ¶¶ 1, 2. In 1998, IBM hired Schenfeld (then aged 40) as a Research Staff Member (or "RSM"). SUMF, ¶ 3. In 2012, Schenfeld was moved into a department within Research under Vice President T.C. Chen. SUMF, ¶ 4. He then worked in a department known as Science & Solutions ("S&S"), which was later renamed Science & Technology ("S&T") and then Physical Sciences & Government Programs ("PS&GP"). SUMF, ¶ 5.[1]

From 2012 until his termination, Schenfeld worked on a theoretical disaggregated hardware architecture for data centers that he called the "Hardware Cloud." SUMF, ¶ 8. Schenfeld did not invent disaggregated data centers. SUMF ¶ 9. The Hardware Cloud was Schenfeld's proposed approach to them, which he hoped to develop into "a real data center, a real cloud that c[ould] operate with novel features." SUMF, ¶ 10.

After John Kelly, then the Director of Research, arranged for several groups to evaluate Schenfeld's Hardware Cloud concept, Kelly quickly recognized that Schenfeld was hindered by his inability to work together with a team. As Schenfeld admits, "the work in data center and cloud is not a single person work . . . . This is teamwork, team-based work, this area of research and technical contributions require multiple people." SUMF, ¶ 11; ("a cloud, as I explained before, is

[1] This department was initially headed by T.C. Chen. Dario Gil then became the Vice President and Plaintiff's second-level manager; Gil was succeeded by Zachary Lemnios. SUMF, ¶¶ 6, 7.

a very, very big area. There is no way that one person alone can move something like that."), SUMF, ¶ 12. Despite the need for teamwork, Schenfeld disparaged his colleagues, causing Kelly to reprimand him in 2015:

> You must stop disparaging your colleagues to me and I hear with others. First, it just is not right. Second, you cannot be successful alone; you will need them if you have any chance of your ideas ever being implemented. Many have come to me and simply do not want to work with you. Third, I do not want to read or listen to it anymore. Please stop this and find a way to work with the team. We need your ideas and passion, but not at the expense of others.

SUMF, ¶¶ 13-14. Schenfeld acknowledged the problem but viewed it as unsolvable:

> "Sorry John, The problem of working with these others wont be solvable. Its not a personal issue as you may think. Its ability to think different and innovate. Yes I understand from your perspective its hard to see what I see, and it indeed does not help when people are called on their mistakes . . . . But alas I do not run for political office job. I can be the most popular guy in the world and all I have to do is just praise everyone . . . . Surely then all will want to work with me then."

SUMF, ¶¶ 13, 15.

In early March 2016, Schenfeld sought to work with several teams, including one dedicated to developing Hardware Cloud's patent applications, another charged with building a Hardware Cloud "mockup," and another for a "first of a kind," or "FOAK," project, SUMF, ¶¶ 16 17, but Schenfeld's interpersonal failures derailed his plans. James Speidell, who is two years older than Schenfeld, SUMF, ¶ 161, and whose team was assigned to build the mockup, SUMF, ¶¶ 18, 19, complained to Dario Gil, then the Vice President of S&T and Schenfeld's second-level manager, that Schenfeld had been making disparaging and disrespectful comments. SUMF, ¶ 20. After an investigation by Human Resources, SUMF, ¶ 21, Gil formally warned Schenfeld:

> . . . you have demonstrated a number of unacceptable behaviors which are inappropriate and detrimental to the working environment as well as to your fellow employees and managers . . .
>
> These behaviors include, but are not limited to:

> - degrading comments about fellow employees' knowledge and intelligence
>
> - inappropriately using senior executive names as implicit support or threats to achieve your goals
>
> . . .
>
> Until you demonstrate a change in your behavior, I asked that you confine your work to generating patents and IP in your field; work only with the small teams assigned to you by management; and act and behave as an individual contributor and collaborate with your peers as opposed to trying to direct and lead them.
>
> . . . .
>
> Failure to comply with these expectations and requests will jeopardize your position at IBM.

SUMF, ¶¶ 22, 23. In response, Schenfeld canceled several meetings, SUMF, ¶¶ 24, 25, and stopped functioning as the leader of the patent application team, id. Further setbacks followed: Gil did not approve Schenfeld's funding request for a full-time patent application team, and the patent work fell behind, SUMF, ¶¶ 26, 27; the FOAK project did not happen, SUMF, ¶ 28; and Schenfeld did not receive other Hardware Cloud-related funding, SUMF, ¶ 29.

Around the same time, Gil sought to transfer Schenfeld into a different Research department. Schenfeld was then in S&T, which focused primarily on components like chips and semiconductors, but Schenfeld's work related to cloud datacenters and did not fit well within S&T. SUMF, ¶¶ 30, 31, 32, 33 (Schenfeld 2015 performance evaluation statement that "I dare Dario to show me in our S&T whom is handling anything around Cloud area . . . I dare suggest we do nothing in this area"), 34.

On May 4, 2016, Gil emailed the Vice President of the cloud research group, Giovanni Pacifici (who is the same age as Schenfeld, SUMF, ¶ 159), advocating for Schenfeld's transfer into that group. SUMF, ¶¶ 35, 36. But Pacifici's group was pursuing a software-based strategy called the "Hybrid Cloud," rather than Schenfeld's hardware-focused strategy. SUMF, ¶ 38

(Plaintiff testifying: "As we now know, the Hybrid Cloud, now declared by Arvind Krishna, the new CEO, is the big thing and everything needs to go around that. That's what they do."); see also SUMF, ¶ 37 (John Kelly testimony that Schenfeld's work "became a nonstrategic piece of research that none of the units were going to pick up. We had decided as a corporation to go down the hybrid strategy path."). The two cloud strategies were so divergent that Schenfeld's work did not fit into Pacifici's group—a point Schenfeld acknowledged when he wrote to Kelly on May 15, 2017, that "the [hardware] architecture has been explicitly placed outside the limits of discussion or work!!"; "we are in a deadlock we cannot do much." SUMF, ¶ 39, 40.

In S&T, Schenfeld resolved to work on the Hardware Cloud and its patent applications without any formal team. SUMF, ¶ 41. After additional incidents of disrespectful and insulting comments, Schenfeld was issued, and signed, a formal memo dated September 7, 2016, warning him that he could be terminated. SUMF, ¶¶ 42, 43.

In 2017, Zachary Lemnios (a then-62 year old former Assistant Secretary of Defense for Research and Engineering) succeeded Gil as Vice President of S&T, which was renamed PS&GP, becoming Schenfeld's new second-level manager. SUMF, ¶¶ 44-46. At the end of August 2017, unbeknownst to Lemnios, Schenfeld submitted a proposal to present his Hardware Cloud concept at the March 2018 IBM Think Conference, listing T.C. Chen[2] (not Lemnios) as the Vice President on the proposal. SUMF, ¶¶ 47, 49. Schenfeld was planning to present a non-functional mockup, which he needed Speidell's group to build, as he was far from building a functional prototype. SUMF, ¶¶ 50, 51 (Schenfeld admitting that the mechanical mockup was "not functional;" it was "just plastic tubes with color. It's not real processor. It's not real memory not real storage"), 54; see also SUMF ¶¶ 47, 48 (acknowledging to Chen that the mockup was not complete and that

[2] Chen had been Plaintiff's Vice President before Gil.

Schenfeld was "far behind" on filing for patents). At that time, Schenfeld viewed himself as anywhere from "five or six years," SUMF, ¶¶ 52, 53, or three to seven years, id., from creating an actual product. In fact, Schenfeld never produced a working prototype of the Hardware Cloud. SUMF, ¶ 54.

In mid-December 2017, James Stathis (Lemnios's technical assistant), questioned whether there was funding for the Hardware Cloud mock-up, which was elevated to Lemnios. SUMF, ¶¶ 55, 56. Lemnios asked for "a program and resource plan and clarity on what this will enable." SUMF, ¶¶ 55, 57. Speidell estimated that it would cost approximately $87,000 to complete the mockup, transport it to and from the conference, and assemble and disassemble it. SUMF, ¶¶ 55, 58. Stathis (who is the same age as Schenfeld, SUMF, ¶ 160) clarified that "there [was] no functioning prototype" of the Hardware Cloud, that "the work competes with IBM-Q [Quantum Computing] work, which takes priority," and that Schenfeld's project "has been going on for several years and it is not on any roadmap." SUMF, ¶ ¶ 55, 59. Lemnios instructed Stathis to put Schenfeld's mock-up "on hold." SUMF, ¶¶ 55, 60.

B. Lemnios's Requests For Schenfeld's 2018 Work Plan

Around the same time, Schenfeld began communicating with employees in Data Centric Solutions ("DCS"), a department within Research focusing on high-performance computer systems and products, about DCS's bid for a project known as "CORAL 2."[3] SUMF, ¶ 61. Put simply, CORAL 2 was "a high-performance computing system, a large system that [IBM was] proposing to the [United States] Department of Energy." Saravay Cert., Ex. R (Lemnios Tr. At

[3] CORAL stands for "Collaboration of Oak Ridge, Argonne and Livermore." Certification of James Sexton, ¶ Sexton Cert. 4. The CORAL project was a collaboration between the U.S. National Nuclear Security Administration's Advanced Simulation and Computing Program and the Office of Science's ASC Research program that culminated in high-performance supercomputers at Oak Ridge, Argonne and Lawrence Livermore National Laboratories. Id.

105:9-14). Schenfeld wanted to incorporate CPUs manufactured by Advanced Micro Devices ("AMD") into the CORAL 2 proposal. SUMF, ¶¶ 63, 64. Lemnios and Michael Rosenfield, the Vice President in charge of DCS (who is the same age as Schenfeld, SUMF, ¶ 157), agreed that Schenfeld did not "play into" the CORAL 2 bid, which Rosenfield was managing. SUMF, ¶¶ 62, 63, 65, 66. Lemnios suggested transferring Schenfeld to Rosenfield's group, but Rosenfield declined with, "Not at this time." SUMF, ¶¶ 63, 67, 68.

In early January 2018, Schenfeld (without the knowledge of his supervisors) emailed several high-level IBM executives about news reports of a potential security vulnerability in IBM processors and proposed his Hardware Cloud architecture and a joint venture with AMD as the solution. SUMF, ¶ 69. Rosenfield ultimately responded that many people were already working on the security issue. SUMF, ¶ 70. Schenfeld persisted, saying "everywhere I hear that IBM is disorganized and we do not have a coherent operation." SUMF, ¶ 71. Rosenfield responded, "Enough e-mails. Your assessment is incorrect." SUMF, ¶ 72. Rosenfield then wrote to Lemnios, "Eugen must be told to stop in very clear terms," SUMF, ¶ 73. On January 10, 2018, Lemnios instructed Schenfeld to "halt any further e-mail traffic" on the issue and send Lemnios two to three charts "that summarize what you plan to work on in 2018[,] the impact you plan to drive in IBM and how you plan to accomplish this. We need to move forward!" SUMF, ¶ 74. On January 15, 2018, Lemnios again asked Schenfeld for his plans for the work he would do in 2018, including what the cost would be, what impact it would have, "and when." SUMF, ¶ 75.

On January 16, 2018, Lemnios learned that Schenfeld was insisting that Speidell's team complete the mock-up Schenfeld had requested for the IBM Think conference. SUMF, ¶ 76. Lemnios asked Schenfeld: "1) What have you committed to do for the March IBM Think conference in Las Vegas and what impact will this have to the IBM Company? 2) Who is driving

this outside of Research, [and how] are they covering the costs and what are their expectations?" SUMF, ¶ 77.

After reviewing Schenfeld's response, on January 17, 2018, Lemnios instructed Schenfeld to stop "all work" for the Think Conference and focus instead on his 2018 work plan; Lemnios requested Schenfeld's "plans and goals with specific detail of what resources you need, what you plan to do, what milestones you plan to achieve and what impact you plan [to] have on the IBM Company." SUMF, ¶ 78. Lemnios followed up again on January 21, 2018, SUMF, ¶ 79, and Schenfeld objected, insisting that his ideas were "a key IBM strategy for the future" and that, even though Lemnios was "in the dark . . . shooting blindly in all directions," "John Kelly will see and understand." SUMF, ¶ 80. Schenfeld continued:

> I realize you lack the technical background, formal (university) credentials, and experience to understand this area, so what seem to you a garbled information aka noise, is actually very deep technical innovation and insight that your lack of deciphering keys of knowledge makes things pass over you.

Id. On January 29, 2018, Schenfeld sent Lemnios three charts, with no specific goals, no costs or description of resources needed, and no milestones or schedule. SUMF, ¶¶ 81, 82. Throughout February 2018, Lemnios communicated and met with Schenfeld about his Hardware Cloud project and his 2018 work plan. SUMF, ¶ 83.

In preparation for a quarterly meeting with John Kelly, Lemnios also asked Schenfeld on February 16, 2018, to prepare "a one page summary of your work plan for 2018" that "clearly highlights the work and the potential impact to IBM." SUMF, ¶ 84, 85. On February 26, 2018, Schenfeld supplied a "list" of his overarching goals with respect to possible projects, without milestones, dates, or resource requests. SUMF, ¶¶ 86, 87, 88. The next day, Lemnios advised Schenfeld that his response was unsatisfactory; Lemnios needed "a page that outlines specifically what you plan to accomplish this year and when" with a "program plan and schedule with

milestones." SUMF, ¶¶ 89, 90. In Lemnios' view, Schenfeld's work plan was terribly deficient and not viable: "What I asked him for was a plan, and this is a list. What I asked him for was a plan that articulated the architecture of what he was going to develop … and some way to measure progress along the way…. So this wasn't what I asked for." SUMF, ¶¶ 91, 92. On February 28, 2018, Lemnios and Schenfeld met again, SUMF, ¶ 93, and on March 1, 2018, Schenfeld wrote to Lemnios that he "was very sorry to hear you won't present my proposal" at the quarterly meeting with Kelly. SUMF, ¶¶ 94, 95.

C. Schenfeld's Selection for the Resource Action

In the fourth quarter of 2017, Research developed its strategic plan for 2018, known as the "Fall Plan." SUMF, ¶ 96. The 2018 Fall Plan anticipated an overall "[i]ncreased investment in AI" that would be offset by "[r]esource/other spending reductions required to contain higher costs in a competitive skill environment." SUMF, ¶ 97. In January 2018, Research decided to propose a resource action—IBM's term for a reduction in force—and Lisa Regan (the Director of Finance for Research) and other managers developed and proposed a target of 21 U.S. employees in Research. SUMF, ¶¶ 98, 99. On February 9, 2018, Research was authorized to proceed with the resource action, which was called "CDRS." SUMF, ¶ 100. Over the next few weeks, several managers in Research, including Varun Gupta (the Director of Human Resources for Research), Sophie Vanderbroek (the Chief Operating Officer of Research), and Dario Gil began preliminarily identifying employees potentially eligible for separation in CDRS. SUMF, ¶ 101.

On February 20, 2018, Gil suggested that Lemnios consider Schenfeld for CDRS because Schenfeld's work could be eliminated from the mission of PS&GP, SUMF, ¶ 102. At that time, Lemnios resisted including Schenfeld on the list of potential CDRS candidates, as Schenfeld was still developing his 2018 work plan per Lemnios's instruction, SUMF, ¶¶ 103, 104; Lemnios only later concluded that Schenfeld had no strategic or viable work plan, after finding Schenfeld's

further efforts at a plan unsatisfactory. SUMF, ¶¶ 89-95, 107.

On February 22, 2018, Gupta reviewed a preliminary list of employees being considered for the resource action with Arvind Krishna, the then-Director of Research. Gupta then circulated comments on the status of the selection process, including "let's include Eugene in the list, Dan,[4] pls work with Zach," and "[w]e have time till Feb 28 to complete and submit the names." SUMF, ¶¶ 105, 106.

By March 2, 2018—after concluding that Schenfeld did not have a strategic or viable 2018 work plan—Lemnios had identified Schenfeld as a potential candidate for CDRS. SUMF, ¶¶ 89-95, 107. On March 1, 2018, Bellor prepared a resource action worksheet for Schenfeld with "position elimination" as the selection type. SUMF, ¶ 108. Under IBM's guidelines, "position elimination" applies when a unique position is eliminated and some of the employee's work will be absorbed by others in the same organization. SUMF, ¶ 109. The next day, after speaking with Lemnios again, Bellor submitted a revised worksheet with "work elimination" as the selection reason. SUMF, ¶ 110. Under IBM's guidelines, work elimination applies when most of the work will be eliminated "in a specific location or site, organization, job group, or project" even if some of the work goes "outside of [the] business unit or location." SUMF, ¶ 111. Lemnios viewed work elimination as the applicable designation because he was not going to continue Schenfeld's work in his department; he did not plan on backfilling Schenfeld's position or reassigning his work to others in PS&GP. SUMF, ¶ 112.

Lemnios subsequently met separately with Kelly and Krishna. SUMF, ¶ 113. On March 7, 2018, he wrote to Kelly "regarding Eugen Schenfeld":

- Very smart guy with a deep passion for moving IBM to a disaggregated datacenter architecture.

[4] "Dan" was Daniel Bellor, a human resources partner in Research.

- Completely ineffective in current position – difficult to work with, drain on resources, poor communicator.

- I have spent hours with him, without success, to understand his POV and what he proposed to do in 2018.

- Need your guidance on potential paths forward:

    1. Stay the course to keep his voice in the mix
    2. Transfer to Systems
    3. RA

SUMF, ¶ 114. On March 22, 2018, Lemnios again wrote to Kelly that, "I met with Arvind and have placed Eugen on our Resource Action list. While Eugen is a very bright guy, he simply has no path for impact at IBM and I see nothing in the foreseeable future that will change that." SUMF, ¶ 115.

On March 29, 2018, Lemnios called Schenfeld to tell him that Lemnios had was eliminating Schenfeld's work and selecting him for CDRS. SUMF, ¶ 116. Lemnios also sent Schenfeld a letter, advising that Schenfeld could "apply for IBM positions," but that "IBM won't displace another IBMer to place you in that role," and that "[u]nless you have transferred to a new position within IBM . . . your last day worked will be June 27, 2018." SUMF, ¶ 117.

Schenfeld did not formally apply for any open position at IBM, either before or after his employment ended. SUMF, ¶ 118. Schenfeld claims that he informally asked Lemnios and Kelly about other positions; he informally asked James Sexton (who reported to Mike Rosenfield) about a possible position on the CORAL 2 bid; and he informally asked Giovanni Pacifici and Larry O'Connell, a Vice President in a different business unit whom Schenfeld had never met, about unspecified positions. SUMF, ¶ 119. Rosenfield and Sexton had no open position on the CORAL 2 bid and were not interested. SUMF, ¶ 120. Pacifici and O'Connell did not respond. SUMF, ¶ 121. All of these individuals were the same age as or older than Schenfeld. In 2018, John Kelly

was 64, Mike Rosenfield was 60, James Sexton was 61, Larry O'Connell was 64, Zach Lemnios was 63, and Giovanni Pacifici was 60. SUMF, ¶¶ 154-159.

Ultimately, Schenfeld was one of twenty-one U.S. employees identified for CDRS. SUMF, ¶ 122. Of those twenty-one, six were in their forties—ages 43, 45, 46, 46, 47, and 47. SUMF, ¶ 123. Notably, five employees selected for CDRS —aged 51, 57, 60, 66, and 46—found alternative positions within IBM and were not terminated. SUMF, ¶ 124. After CDRS, at the end of 2018, Research had over 300 U.S. employees who were aged 60 or older. SUMF, ¶ 125.

Following Schenfeld's departure from IBM, the work he had been doing did not continue in PS&GP, and Lemnios did not hire anyone in PS&GP to continue that work. SUMF, ¶ 126.

D. Schenfeld's Claims

On November 13, 2018, Schenfeld commenced this action, alleging that IBM terminated him and failed to rehire him due to his age, in violation of the New Jersey Law Against Discrimination ("LAD"). Schenfeld does not allege, and does not attempt to prove, that he has direct evidence of age discrimination. He argues from circumstantial evidence and claims that the individual defendants—John Kelly, Zachary Lemnios, and Larry O'Connell—aided and abetted alleged LAD violations. Kelly is four years older than Schenfeld; Lemnios is three years older; and O'Connell is four years older. SUMF ¶¶ 154-156.

ARGUMENT

Summary judgment is required "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533, 539 (1995) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); adopting federal summary judgment standard). The existence of a "scintilla" of evidence in support of the plaintiff's claims is insufficient to avoid summary judgment. Brill, 142 N.J. at 532. The issue for summary

judgment is whether the plaintiff's showing would allow reasonable jurors "[to] find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Id.

POINT I

SCHENFELD'S DISCRIMINATORY TERMINATION CLAIM FAILS AS A MATTER OF LAW

Schenfeld cannot satisfy the basic requirements for an unlawful termination claim, entitling Defendants to summary judgment on that claim. Under the LAD, Schenfeld must show that age "played a role in the decision making process and that it had a determinative influence on the outcome of that process." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 207 (1999). But there is no record evidence whatsoever that any individual involved in Schenfeld's termination knew of, commented on, or asked about Schenfeld's age. As a result, Schenfeld must establish a prima facie case of age discrimination. But here, too, he fails a threshold requirement; Schenfeld cannot prove that PS&GP replaced him with a younger employee, and even if he could, Schenfeld cannot overcome the non-discriminatory reason for firing him.

A. Schenfeld Was Not Replaced By A Younger Candidate.

To establish a prima facie case of age discrimination, Schenfeld must prove that: (i) he belongs to a protected class; (ii) he satisfied the employer's legitimate expectations; (iii) he was discharged; and (iv) he was replaced by "a candidate sufficiently younger to permit an inference of age discrimination." Young v. Hobart W. Grp., 385 N.J. Super. 448, 458 (App. Div. 2005); see also Venegas v. Cosmetic Essence, L.L.C., 2015 WL 588403, at *3, *4 (App. Div. Feb. 13, 2015) (plaintiff must establish that employer "sought someone to perform the same work after [plaintiff] left" or "retained a sufficiently younger worker in the same position as plaintiff"). Assuming solely for the sake of this Motion that Schenfeld can satisfy the first three elements, he fails the fourth for two separate and independent reasons.

First, no one replaced Schenfeld or his Hardware Cloud work in PS&GP. SUMF, ¶ 126. This fact, without more, requires summary judgment in IBM's favor. See Young, 385 N.J. Super. at 460 (affirming summary judgment); Venegas, 2015 WL 588403, at *3, *4.

To the extent Schenfeld intends to argue that his work continued after his departure, the arguments are complete red herrings. For example, Schenfeld has argued that employees in Ireland (IBM Research Europe) performed some research on disaggregated datacenters both before and after Schenfeld's termination. But these employees did not work in PS&GP. SUMF, ¶127. PS&GP is the only unit relevant for discerning whether Schenfeld was replaced, because Lemnios had no authority over the employees in Ireland; he could consider only employees within PS&GP (and only U.S. employees) for CDRS. SUMF, ¶¶ 128, 129, 130. And even if the employees in Ireland were relevant (and they are not), their mere absorption of some of Schenfeld's prior work would not demonstrate that Schenfeld was replaced in the manner required to establish a claim under the LAD. Young, 385 N.J. Super. at 460 (distribution of responsibilities to other employees insufficient); Horan v. Verizon New Jersey Inc., No. A-1643-12T2, 2014 WL 1672366, at *7 (App. Div. Apr. 29, 2014) (same).

In addition, Schenfeld has suggested that he was necessarily replaced because, more than two years after his termination, IBM announced a new processor with a memory-sharing capability, POWER10, but without dispute, the POWER10 work was not Schenfeld's type of work. Schenfeld admits that he performed no product development work, and he did not design, engineer, or program the POWER10. SUMF, ¶ 131. Schenfeld's assumption that his ideas somehow contributed post-termination to the development of POWER10 is just that—a self-promoting assumption, not based in fact, which is insufficient to create any genuine dispute about whether he was replaced, let alone by whom and doing what work. See Fletcher v. Lucent Tech., Inc., 2005

WL 2373191, at *7 (D.N.J. Sept. 27, 2005) ("[A]n employee's opinion of her own contributions … to a company is insufficient to create a genuine issue as to whether the company's grounds for terminating the employee are a pretext for unlawful discrimination.").

That IBM submitted patent applications relating to the Hardware Cloud is likewise of no moment. The mere completion of a patent application by others is insufficient as a matter of law to establish that Schenfeld was replaced. Young, 385 N.J. Super. at 460; Horan, 2014 WL 1672366, at *7. Preparing and filing patent applications takes time, meaning patent applications may be filed and patents issued years after the underlying innovation work is completed. SUMF, ¶ 132. The Hardware Cloud patents are no exception; they reflected past work by Schenfeld and his co-inventors; they were not plans for future work. SUMF, ¶ 133. But, given the use of IBM resources in the work underlying the patents, the applications serve a legitimate function that IBM could lawfully pursue: to protect IBM's past investments. SUMF ¶ 132.

In short, once Schenfeld was gone from PS&GP, his work was, too. No one replaced Schenfeld or continued his Hardware Cloud project in PS&GP.

Second, the ages of the employees IBM terminated and retained as part of CDRS preclude any inference of age discrimination. Unlike the federal Age Discrimination in Employment Act, the LAD does not specify a particular age threshold for discrimination. See Sisler, 157 N.J. at 213. To infer age discrimination, the courts examine how the plaintiff's age compares to the ages of the employees who were terminated and retained. See Venegas, 2015 WL 588403, at *1, *5 (holding as a matter of law that no inference of discrimination was permissible where the terminated employees were sixty-four and fifty-five and the retained employees were sixty-six, sixty-four and forty-five); Horan, 2014 WL 1672366, at *3, *7 (affirming summary judgment where all the terminated employees were over 40, the plaintiff was not replaced, and five retained employees

were as old as or older than the plaintiff). Where an employer terminates employees younger than the plaintiff, while retaining employees older than the plaintiff, there can be no "inference of age discrimination in the selection of workers for layoff." Venegas, 2015 WL 588403, at *5 (reversing denial of summary judgment).

Here, Schenfeld was fifty-nine when he was selected for CDRS and was sixty on the day of his termination. SUMF, ¶ 134. Of the sixteen U.S. employees in Research who were ultimately terminated in CDRS, six were in their 40s (43, 45, 46, 46, 47, and 47), more than ten years younger than Schenfeld. SUMF, ¶ 123. After the resource action, over 300 U.S. employees in Research were aged 60 or over. SUMF, ¶ 125. As in Venegas, this "does not give rise to an inference of age discrimination in the selection of workers for layoff." Venegas, 2015 WL 588403, at *5; see also Horan, 2014 WL 1672366, at *3, *7.

To be sure, some new employees under age 40 were hired into Research during and after CDRS, but the mere hiring of younger employees does not give rise to an inference of discrimination. To infer discrimination from new hires, Schenfeld must establish that IBM "sought someone to perform the same work after [Schenfeld] left" or "retained a sufficiently younger worker in the same position as plaintiff"—the first point above. Venegas, 2015 WL 588403, at *3, *4. Otherwise, there is no nexus between the new hires and Schenfeld's termination. Here, there is no evidence that any newly hired employee replaced Schenfeld. To the contrary, the record shows that Research was increasing its investment in AI and engaged in CDRS to invest in new employees with different skill sets. A change in strategy is a legitimate basis for a reduction in force. Brader v. Biogen Inc., 983 F.3d 39, 57 (1st Cir. 2020).

In addition, nothing suggests that any newly hired employees were young relative to the applicant pool. Absent a comparison of the new hires to the qualified applicant pool, the raw hiring

numbers are meaningless. Ezold v. Wolf, Block Schorr and Solis-Cohen, 983 F.2d 509, 542-543 (3rd Cir. 1992); see also Steele v. Pelmor Labs. Inc., 642 F. App'x 129, 134 (3d Cir. 2016) (rejecting plaintiff's "statistical evidence of pretext" consisting of "raw numerical comparisons" that employer's three vice presidents over time were all men, without evidence as to "whether there were qualified female candidates who applied for those openings and were denied"); Larison v. Fedex Corp. Servs., Inc., 2017 WL 2569206, at *7 (E.D. Pa. June 13, 2017) (rejecting plaintiff's statistical evidence in the absence of evidence of the ages of the candidates considered and not hired). The critical analysis is whether Schenfeld was older or younger than the employees IBM terminated and retained as part of CDRS. That analysis belies any inference of discrimination.

B. Defendants Articulated a Legitimate, Non-Discriminatory, Non-Pretextual Reason for Schenfeld's Termination.

1. Defendants Terminated Schenfeld To Invest In Higher Priority Areas.

Even if Schenfeld could establish a prima facie case of discrimination, and he cannot, Defendants would still prevail given the legitimate, non-discriminatory reasons for Schenfeld's discharge. See Venegas, 2015 WL 588403, at *3 (citing Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005), and holding that defendants can rebut a prima facie case by articulating a non-discriminatory reason for the termination).

Eliminating an employee's position "as a cost reduction measure" is a legitimate, non-discriminatory reason for termination. See Young, 385 N.J. Super. at 460. Similarly, a "rethinking . . . [of] business strategy and company priorities," such as focusing on certain areas of research over others, is lawful and permissible. Brader, 983 F.3d at 51-52, 57. Those rationales apply here. Research conducted CDRS to align its workforce with its evolving strategic plan, which was to focus more on AI. SUMF, ¶¶ 96, 97, 98. Research eliminated non-strategic positions and work to counterbalance the cost of hiring employees with new and different skills. Id.

Schenfeld, in particular, was selected for CDRS after Lemnios concluded that Schenfeld's work could be eliminated from PS&GP. SUMF, ¶¶ 91-92, 107, 110, 112, 116. Schenfeld could not construct a viable work plan, and his work did not fit within PS&GP. SUMF, ¶¶ 86-92, ¶¶ 30, 31, 32, 33. Indeed, when Lemnios made his decision, Schenfeld had been working on his Hardware Cloud for six years without a functioning prototype to show for his efforts, and Schenfeld believed it would take up to six or seven additional years to convert his concept into a product. SUMF, ¶¶ 8, 50, 51, 52, 53, 54. It was entirely lawful for Lemnios to conclude that Schenfeld's potential future contribution was limited and remote and that his work should not continue within PS&GP. See Young, 385 N.J. Super. at 463 (employee's future potential is legitimate basis to select employee for reduction in force); Brader, 983 F.3d at 55 (company was "no longer prioritizing the [] innovation work on which [the plaintiff] was primarily focused").

While Schenfeld may disagree with Lemnios about the viability and value of his work, Schenfeld's subjective self-assessment cannot undercut Lemnios's rationale. "[A]n employee's own view of her performance … is not at issue in an alleged discrimination case. What is significant is the perception of the decisionmaker. Absent discrimination, a company is privileged to make business judgments on an employee's status." Johnson v. Penske Truck Leasing Co., 949 F. Supp. 1153, 1172 (D.N.J. 1996); see Fletcher, 2005 WL 2373191, at *7 ("[A]n employee's opinion of her own contributions … to a company is insufficient to create a genuine issue as to whether the company's grounds for terminating the employee are a pretext for unlawful discrimination."). "[T]he LAD does not authorize courts to 'second-guess' employers, their choice of 'performance standards,' or their assessments of whether employees satisfied them." Horan, 2014 WL 1672366, at *8 (citing Ditzel v. Univ. of Med. & Dentistry of N.J., 962 F. Supp. 595, 604 (D.N.J.1997) and Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 496 (1982)).

2. Schenfeld Cannot Demonstrate Pretext.

Given the legitimate basis for Schenfeld's termination, Schenfeld must prove that the proffered reason for his termination was pretext for discrimination. Venegas, 2015 WL 588403, at *3 (citing Sisler, 157 N.J. at 211). He cannot.

"To raise a genuine factual dispute as to whether an employer's facially legitimate employment action is a pretext for discrimination, a plaintiff may show that (1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is unworthy of credence." Horan, 2014 WL 1672366, at *7 (citations and quotation marks omitted). "[A] 'plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" Id. (quoting Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994)).

With respect to discriminatory motive, Schenfeld has repeatedly maintained that IBM's discriminatory animus is demonstrated by an Equal Employment Opportunity Commission ("EEOC") Letter of Determination ("LOD") regarding the EEOC's investigation of age discrimination. But under the EEOC's own regulation, "[a] determination finding reasonable cause is based on, and limited to, evidence obtained by the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination." 29 C.F.R. § 1601.21. None of the charges identified in the LOD as investigated by the EEOC relates to Schenfeld (who never filed a charge with the EEOC) or to the CDRS. SUMF, ¶¶ 135, 136. In addition, the LOD does not identify any witnesses or documents that the EEOC reviewed and does not describe facts like those here—where all of the alleged decisionmakers were the same age as or older than the terminated employee. SUMF, ¶¶ 137, 138; see Capasso v. Collier Cty., No. 2:12-CV-499-FTM-38DNF, 2014 WL 12607856, at *2 (M.D. Fla. Nov. 26, 2014) (EEOC letter of determination

regarding plaintiff's own charge inadmissible where it was conclusory and did not identify specific evidence relied upon). As irrelevant and inadmissible material, the EEOC Letter cannot help Schenfeld on summary judgment. Lanzilotti v. Greenberg, No. A-1608-10T2, 2011 WL 3300155, at *6 (N.J. Super. Ct. App. Div. Aug. 3, 2011) (inadmissible evidence cannot be used to defeat summary judgment (citing R. 4:46-5, R. 1:6-6, and El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 164 (App. Div. 2005)).

Indeed, the fact that the alleged decisionmakers here are older than Schenfeld negates any inference of age discrimination. See Young, 385 N.J. Super. at 461 (rejecting pretext arguments and affirming summary judgment where the two managers who eliminated the plaintiff's position were "close in age" to the plaintiff); Horan, 2014 WL 1672366, at *2, *8 (same where the plaintiff was 49 and the four committee members who made the termination decision ranged in age from 43 to 49).

With respect to Defendants' articulated reasons for Schenfeld's termination, IBM could lawfully rebalance its workforce to fulfill IBM's strategic plan. See Brader, 983 F.3d at 56-57. That is exactly what IBM did. The record demonstrates that, in fact, the number of U.S. employees in Research did not significantly change. In 2017, there were 2,013 U.S. employees in Research, and at the end of February 2018, there were 2,031 U.S. employees, SUMF, ¶ 139, just before the resource action resulted in the separation of 16 employees. SUMF, ¶ 140. As explained above at p. 18, the mere fact that some of the new employees were younger than Schenfeld cannot, without more, give rise to pretext. See Ezold, 983 F.2d at 542-543; Steele, 642 F. App'x at 134; Larison, 2017 WL 2569206, at *7.

POINT II

SCHENFELD'S FAILURE TO HIRE CLAIM FAILS ON MULTIPLE GROUNDS

Schenfeld's failure to hire claim fares no better, indeed fails for numerous reasons. To demonstrate a prima facie failure-to-hire claim, Schenfeld must demonstrate by a preponderance of the evidence that he:

> (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications for persons of plaintiff's qualifications.

Andersen v. Exxon Co., USA, 89 N.J. 483, 492 (1982); see also Barbera v. DiMartino, 305 N.J. Super. 617, 633 (App. Div. 1997).

As a matter of law, Schenfeld cannot establish several of these elements. Specifically, (i) Schenfeld never actually applied for any open position, either before his separation date or after; (ii) Schenfeld cannot show that he was qualified for any open positions about which he informally inquired; and, (iii) Schenfeld cannot demonstrate that his informal inquiries—which were directed at individuals his age or older—were unsuccessful because of his age.

A. Schenfeld Did Not Formally Apply for Any Open Positions at IBM

At the outset, Schenfeld did not apply for any open position at IBM, either before or after his employment ended, even though he was told that he could "apply for IBM positions." SUMF, ¶¶ 117, 118. This failure precludes Schenfeld's claim as a matter of law. See Murray v. Beverage Distribution Center, Inc., 757 F. Supp. 2d 480, 488 (D.N.J. 2010) (granting summary judgment to employer in LAD failure to hire case where plaintiff did not apply for position, thus failing to satisfy prima facie case), aff'd, 533 Fed. Appx. 98 (3d Cir. 2013); Molnar v. Covidien, LP, 2016 WL 1597242 (D.N.J. April 21, 2016), aff'd, 687 Fed. Appx 189 (3d Cir. 2017) (summary judgment granted; plaintiff did not apply for position); Velez v. Janssen Ortho, LLC, 467 F.3d 802, 807 (1st

Cir. 2006) ("in the absence of a job application, there cannot be a failure-to-hire"; letters expressing interest in any available job were insufficient); see also In re Carnegie Ctr. Associates, 129 F.3d 290, 298 (3d Cir. 1997) (plaintiff in reduction in force case alleging discriminatory failure to offer an alternative position must "show that [he] applied for the position."), cert. denied, 524 U.S. 938 (1998).

Defendants had no legal obligation to affirmatively search for a position on Schenfeld's behalf. "[A]ny requirement to offer alternative positions upon termination [is limited] to instances where the employer has a practice of doing so." Molnar, 2016 WL 1597242, at *5. IBM had no such practice. To the contrary, the March 29 letter made clear that the Schenfeld had the burden to apply for open positions.

B. Schenfeld Cannot Demonstrate That There Was an Open Position For Which He Was Qualified.

To the extent Schenfeld's supposed informal inquiries about possible open positions count as applications—and they should not—Schenfeld cannot show that there were open positions for which he was qualified.

Schenfeld claims that, while at IBM, he asked Lemnios, Kelly, and James Sexton[5] about transferring into Rosenfield's DCS organization to work on the CORAL 2 bid. SUMF, ¶ 119. But there is no evidence of an open position in DCS, let alone one for which Schenfeld was qualified. Rather, in the months before CDRS, Rosenfield stated that he was not interested in Schenfeld transferring to DCS and was not interested in Schenfeld's ideas. SUMF, ¶¶ 67-68, 72-73, 120.

In addition, in October 2018, while he was preparing to file this lawsuit, Schenfeld recorded a phone conversation with John Kelly, in which he informally asked for help finding a position on

[5] Mr. Sexton was the Department Group Manager of Data Centric Systems and reported to Mr. Rosenfield. SUMF, ¶ 141.

the CORAL 2 project, following-up via email. SUMF, ¶¶ 142, 143. Kelly emailed Sexton: "Do you really want Eugen back???" SUMF, ¶ 144. To which, Sexton responded:

> We looked at possibilities for Eugene when he was let go some months ago and didn't find an obvious fit. We explained to him the time that we didn't have a slot.
>
> Right now we are extremely limited in our ability to hire and I am holding any slots that might come available to use to convert five postdoc to RSMs that are coming to the end of their contracts. These people have been delivering critical work for us and I really need to keep them. [6]
>
> I think the position re Eugen remains the same – I don't have an obvious fit and have critical needs to fill with the small number of hiring slots I have to fill.
>
> You know Eugen much better than I, so if you feel Eugen is important to retain, I will work on it.

SUMF, ¶ 145. Kelly replied in agreement that "no action nec." SUMF, ¶ 146. Sexton's views – that DCS "really needed to keep" the postdocs who were "delivering critical work" on the project rather than displacing them for Schenfeld, who did not have their experience, SUMF, ¶ 145 – corroborated Mr. Rosenfield's earlier views. While Schenfeld may view himself as qualified, DCS had the right to evaluate his qualifications and disagree. Again, the LAD does not authorize courts to "second-guess" employers, their choice of "performance standards," or their assessments of whether employees satisfied them, Ditzel v. Univ. of Med. & Dentistry of N.J., 962 F. Supp. 595, 604 (D.N.J. 1997), or to "to make personnel decisions for employers." Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 87 (1978).

[6] The fact that some employees were coming to the end of their contract terms and Sexton was looking for "slots" for them is of no moment. The postdocs were IBM employees, and IBM had no obligation to terminate them to make room for Schenfeld. See, e.g., Natale v. Mission Solutions, LLC, 2016 WL 3548029, at *9 (D.N.J. June 29, 2016) ("[A]n employer has no duty under ADEA to permit an employee to transfer to another position or to displace workers with less seniority when the employee's position is eliminated as part of a work force reduction.") (citation omitted).

At the same time, Schenfeld emailed defendant Larry O'Connell, a Vice President in a business unit entirely outside of Research, asking him to "help me find a suitable position with IBM." SUMF, ¶ 147. The email did not identify any specific position. SUMF, ¶¶ 147, 148. O'Connell, whom Schenfeld had never met, did not respond. SUMF, ¶¶ 149-150. On this record, there is no evidence that O'Connell had any open position or one for which Schenfeld was qualified.

Finally, Schenfeld claims that he made an informal inquiry to Giovanni Pacifici, the Vice President of the cloud research organization, and that Pacifici said he would contact Schenfeld but never did so. SUMF, ¶¶ 119, 121. These facts do not establish that Pacifici had an open position or that Schenfeld would have been qualified for one. Rather, as Schenfeld has acknowledged, Pacifici's group was working only on software and not "the architecture." SUMF, ¶¶ 39, 40. Schenfeld is not a software programmer or engineer. SUMF, ¶ 151.

To the extent Schenfeld disagrees with the above analysis, "the employee's personal disagreement with the employer's determination of its needs or assessment of the employee's performance is insufficient to prove pretext, as is the employee's subjective disagreement (or conclusory statement) in raising an issue regarding the employer's credibility." Attanasio v. Plainfield Country Club, 2009 WL 1686527, at *7 (N.J. App. Div., June 18, 2009), certif. denied, 200 N.J. 371 (2009); see also Johnson, 949 F. Supp. at 1172; Fletcher, 2005 WL 2373191, at *7; Reap v. Cont'l Cas. Co., 2002 WL 1498679, at *11 (D.N.J. June 28, 2002).

C. The Ages of Employees Who Were Hired For Alternative Positions and Those Who Failed To Hire Schenfeld Preclude an Inference of Age Discrimination.

To the extent this Court has any remaining doubt, the ages of the employees who were selected in the CDRS resource action but found alternative positions at IBM precludes any inference of age discrimination. Of the twenty-one employees who were identified for the CDRS, five found other positions within IBM. Their ages were: 51, 57, 60, 66, and 46. SUMF, ¶ 124.

The fact that IBM rehired, and did not terminate, three employees older than or around the same age as Schenfeld precludes a finding of age discrimination in rehiring. See Venegas, 2015 WL 588403, at *5 ("Given that the employer laid off, along with plaintiff, a worker ten years younger than he while retaining workers both older and younger, this scenario does not give rise to an inference of age discrimination in the selection of workers for layoff."). The same facts disprove Schenfeld's assertion that hiring was effectively "frozen." SUMF, ¶¶ 152, 153 ("frozen" meant that "unless you walk on water and God himself appears and says you should hire this guy, you basically cannot get a position at IBM during layoffs"). IBM did hire from the CDRS pool; Schenfeld failed to make an effort to formally apply.

The ages of the supervisors Schenfeld claims discriminated against him in hiring separately precludes an inference of age discrimination. In 2018, John Kelly was 64, Mike Rosenfield was 60, James Sexton was 61, Larry O'Connell was 64, Zach Lemnios was 63, and Giovanni Pacifici was 60. SUMF, ¶¶ 154-159. Given these indisputable facts, Schenfeld cannot establish an inference of age discrimination, see Young, 385 N.J. Super. at 461; Horan, 2014 WL 1672366, at *2, *8, and cannot show that age discrimination had a "determinative influence on the outcome" of his informal inquiries about possible positions. Sisler, 157 N.J. at 207.

CONCLUSION

For all of these reasons, Defendants' motion for summary judgment should be granted.

Respectfully submitted,

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