EUGEN SCHENFELD.	:	**SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY**
Plaintiff,	:	**LAW DIVISION DOCKET NO:MID-L-7334-18**
Vs.	:	
INTERNATIONAL BUSINESS MACHINES (IBM), JOHN KELLY, ZACHARY M. LEMNIOS, LARRY O'CONNELL, JOHN DOES 1 - 10 (said names being fictitious) and ABC CORPORATIONS 1-10 (said corporations being fictitious)	:	**CIVIL ACTION**
Defendants.	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION

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PRELIMINARY STATEMENT

This is an employment discrimination case filed pursuant to the *New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et seq.* The plaintiff, Eugen Schenfeld, is an isolated victim of wide spread intentional discrimination coordinated by defendants' upper management executives at the highest levels of the corporate hierarchy. Dr. Schenfeld's long-time employment with the defendant, IBM, was terminated based upon his age. The plaintiff was terminated along with thousands of other older workers in what the defendants code named "*Project Concord.*" Concord was the 2018 version of what had become a series of annual "rebalancing" exercises, in which predominately older workers were permanently laid off, while the company simultaneously hired new younger employees. Terminating an employee, selecting an employee for a reduction in force, or making any adverse employment decision, such as refusing to consider hiring an employee based on an employee's age is a violation of the *New Jersey Law Against Discrimination. N.J.S.A. 10:5-4 et seq.*

The plaintiff's long-term employment with the defendants was terminated as part of a larger series of layoffs, and that IBM despite the fact that his division was hiring a larger number of employees IBM refused to even consider hiring him. The plaintiff files this brief in opposition to the defense motion, and in support of the plaintiff's cross motion for partial summary judgment concerning his failure to hire claim contained in Count II. [Enc. 1]

A significant amount of the discovery in this case has been marked as confidential, and, therefore, cannot be discussed in this brief to the extent necessary for a

proper review of the facts of this case. We are filing this brief in opposition to the defense motion for summary judgment publicly without some detailed discussion of these documents because this is a matter of public interest, and we do not believe all the proceedings in this case should take place behind closed doors. The plaintiffs detailed statement of fact, and a more detailed discussion of these documents will be filed confidentially offline. This has been a cumbersome process that will need to be reviewed before we can try this case. We, therefore, will discuss some of the facts, to the extent possible in this brief with the objective of fully arguing our position, while respecting the existing protective order.

In 2018 the defendants engaged in a Resource Action, or layoff of employees throughout various divisions across IBM in the United States. These layoffs included the Research Division where the plaintiff was employed. We know from the discovery ordered in this case that all the employees in the Research Division terminated in 2018 were over the age of 40, and the vast majority were over 50. In fact, all of the employees terminated from Arvind Krishna's division for the three years we have data were over 40. [Enc.9,10] A large percentage employees terminated by IBM in the 2018 Resource Action across all divisions in the United States were also over 40. [Enc.9,10] The plaintiff was one of the individuals terminated by the defendants in the 2018 Resource Action, Project Concord. (See Enc. 9,10 and attached data for a more detailed analysis)

Dr. Schenfeld was initially employed by the defendants as a Research Staff Member in 1998. He worked his entire career in the Research Division, on various projects, most recently working on research involving cloud technology involving datacenters. Schenfeld was a successful long-term employee who received various raises

and bonuses during the course of his employment. Schenfeld is also the inventor and co-inventor of close to 100 patents related to various inventions in the area of datacenter and cloud technology. Many of these patents were filed after Schenfeld was separated from IBM. [Enc. 25, 26] In fact the most recent patent award was issued by his office this October 2021, over three years after the defendants' claim Schenfeld's work was eliminated. [Enc. 25, 26] The evidence as will be set forth below will demonstrate that the area of Cloud, was a relevant a growth area for the research Division, and the plaintiff's research work has in fact continued.

The plaintiff alleges in this case that the defendants engaged in these annual layoffs, at least in part to reduce the number of older employees, and to save money to compensate for aggressively hiring new young employees. The plaintiff's complaint specifically alleges:

"The plaintiff was among numerous employees selected for the defendants, IBM's reduction in force as a result of intentional and deliberate decisions to begin heavily recruiting and hiring younger employees while at the same time systematically phasing out and/or terminating older employees." [Enc.1]

. As will be set forth below, the proof is over whelming. Plaintiff recently deposed Dr. Arvind Krishna, who was the Director of Research in 2018, and is now the Chief Executive Officer of IBM. Krishna confirmed in his deposition that the resource actions were done to save money and reallocate money into areas where IBM wanted to expand. Krishna directly associated the terminations with hiring of new employees as part of the resource action. [Krishna P31:L1-P34:L8; P35:L2-15] There were numerous questions on this topic, and Krishna explained that in deciding if they could hire people they needed to consider if there was "*financial headroom.*" [Krishna P82:L12- P83:L8]

Krishna also admitted there was a focus on hiring young employees because IBM perceived they had the necessary skills the company was looking for as opposed to the existing workforce which was older. [Krishna P53:L23-P54:L12] Krishna further explained that the skills they were looking for were rare and could not be found in the existing work force, as a justification for why there was an emphasis on hiring recent University graduates. [Krishna P53:L23-P54:L12][Enc. 35] This admission by Krishna explains why for the three-year period analyzed, everyone terminated in Research during the Resource Actions was over 40, and almost everyone hired was under 40. [Enc. 9,10]

There is a clear link between the terminations as part of theses resource actions and IBM's aggressive hiring approach. [See Plaintiff's Statement of Facts, paragraphs 170-174] This testimony is consistent with the key documents in this case. For example, the Research Division's 2018 Fall Plan, sets forth various hiring objectives with a focus on Early Professional Hires. [Enc.1] Dr. Krishna's testimony corroborates the plaintiff's contention that his employment was terminated as part of this Resource Action based upon his age, and the company's discriminatory perceptions that older employees do not have the needed skills in today's technology world. [Krishna P53:L23-P54:L12] [Enc.11] The data collected and analyzed in this case is remarkable and can only lead any objective fact finder to the clear conclusion that age was directly related to employment decisions at IBM. [Enc.9,10]

The Defendants' brief goes to great lengths to distract from the facts, and the legal issues in this case with a direct though entirely irrelevant attack on Dr. Schenfeld. First, it is important to point out, and will be argued in greater detail below, that the defendants are arguing an erroneous legal standard. This is a layoff, or reduction in force case, where

the plaintiff need only prove that non-members of the protected class were treated more favorably. *Model Jury Instruction 2.23*

A review of the defense motion demonstrates that the vast majority of the defense effort in seeking summary judgment was to attack the plaintiff, with exaggerated examples of poor behavior. This approach however cannot withstand scrutiny, since as will be set forth below, all the witnesses deposed who were involved in the decision to terminate Schenfeld have clearly and unequivocally testified that these issues were not relevant to the decision to terminate the plaintiff. [Lemnios P.130, L.14 – P.131, L.4] [Gill P.152, L.15 -24] [Bellor P.99, L.16 – P.100, L.5]

This is an employment discrimination case filed pursuant to New Jersey's Civil Rights protection of older employees. New Jersey has a strong public policy against employment discrimination. Our courts have repeatedly stated that enforcement of the *New Jersey Law Against Discrimination* was necessary in order, *"to eradicate the cancer of discrimination."* *Jackson v. Concord Co. 54 N.J. 113 at 124 (1969); Peper v. Princeton Univ. Bd. of Trustees 77 N.J. 55 at 80 (1978); Anderson v. Exxon 89 N.J. 483 at 490 (1982); Rendine v. Pintzer, 276 N.J. Super. 387 (App. Div. 1994)*

In Peper v. Princeton Univ. Bd. of Trustees 77 N.J. 55 at 80 (1978) the New Jersey Supreme Court stated, *"employment discrimination due to sex, race, or any other invidious classification is particularly repugnant in a society that prides itself in judging each individual by his or her merits."* The New Jersey Supreme Court in *Peper* further stated, *"....The opportunity to gain employment without discrimination because of race, creed, color, national origin, ancestry, age, marital status, or sex to be a civil right of our*

citizens.... "and further declared that *"discrimination menaces the foundations of the free democratic state."*

The New Jersey Law Against Discrimination was designed by the legislature to fulfill provisions of the State Constitution guaranteeing civil rights. *Goodman v. London Metals Exchange, Inc. 86 N.J. 19 (1981); Anderson v. Exxon 89 N.J. 483 at 490 (1982)* It is in this context that the defendant's motion, seeking to deny the plaintiff a right to try this matter in court before a jury should be reviewed.

POINT I

THE DEFENSE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTS REGARDING THE PLAINTIFF'S LAD CLAIMS

A. STANDARD OF REVIEW

This is an employment discrimination case filed pursuant to the *New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et. seq.*, The defendants have filed a motion for summary judgment in this case. The defendants are seeking a dismissal of the causes of action against them without availing the plaintiff the opportunity of a full hearing. Our courts have consistently provided the broadest possible scope and coverage for LAD claims in order to advance the statute's important social goals. *Quinlan v. Curtiss-Wright Corp. 214 NJ 219(2010)* In this motion for summary judgment the facts and evidence must be viewed in a light most favorable to the plaintiff. Summary judgment proceedings are governed by the New Jersey court rules.

New Jersey Court *R. 4:46-2* sets forth the standard for summary judgment as follows:

> *The judgment or order sought shall be rendered forthwith, if the pleadings, deposition, answers to interrogatories and admissions on file,*

> *together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.*

In the New Jersey Supreme Court case, *Brill vs. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995),* the Court provided the definitive expression of the standards governing a motion for summary judgment. When determining whether there exists a genuine issue with respect to material fact, the motion judge is to consider whether competent evidential materials present, viewed in light most favorable to the non-moving party, in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve alleged disputed issues in favor of the non-moving party. *Brill vs. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995)* The New Jersey Supreme Court recently reaffirm this standard of review in statutory employment cases. *Lippman v. Ethicon* 222 N.J. 362, 367 (2015)

In an employment case, our courts have recognized that to address the difficult task of proving discriminatory and/or retaliatory intent, the courts should follow the *McDonald Douglas* burden shifting analysis. *McDonald Douglas Corp. v. Green* 411 U.S. 792 (1973) *Zive v. Stanley Roberts* 182 N.J. 436 (2004) This analysis is not a hard and firm set of rules to be uniformly applied in all different types of discrimination claims. *Anderson v. Exxon* 89 N.J. 483, 492 (1982) Our courts have consistently held that the elements of a particular cause of action must be molded to the facts of a specific case. *Clowes v. Terminex International Inc., 109 N.J. 575 (1988)* In this case the plaintiff was terminated as part of a reduction of force, and the elements required to be proven at the summary judgment stage, or at trial are therefore appropriately modified. *Model Jury Instruction*.2.23 There should not be any factual dispute that this was a reduction in force

or lay-off since the plaintiff's termination latter specifically states, "*you have been chosen for a permanent layoff.*" [Enc.13]

The evidentiary burden at this stage is "*rather modest.*" Zive at P. 447-448 A prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff. "*Procedurally courts have recognized that the prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence*" Zive at P. 448.

In reviewing the facts of case on a summary judgment motion, the court should not only view the facts in a light most favorable to the plaintiff but should provide all reasonable inferences related to those facts in favor of the plaintiff. The question, therefore, is whether the plaintiff's factual scenario presents a viable claim that the defendants' true reasons for acting were based upon unlawful discrimination concerning the plaintiff's age. In this case it is clear that a reasonable fact finder could infer from the facts and circumstances that the defendants did not fire the plaintiff based upon any legitimate business criteria.

The courts have consistently held that the plaintiff's evidentiary burden is slight and that the plaintiff must only present credible evidence that the plaintiff's "*factual scenario is compatible with discriminatory intent.*" Zive at P. 447 "*As long as the plaintiff presents facts to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent--i.e., that discrimination could be a reason for the employers' action*" the court should deny the defense motion for summary judgment. Zive at P. 447-448

The courts have also been consistently mindful that discrimination claims are often difficult to prove with direct evidence and that at the motion stage, and the *McDonald Douglas* burden shifting analysis must be viewed through the standards set by R. *4:46-2* and *Brill vs. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), "In analyzing the evidence plaintiff offered to demonstrate pretext, the court was obligated to give the plaintiff the benefit of all of the favorable inference supported by that evidence."* *Meyers v. AT&T* 380 *N.J. super 443 (App. Div. 2005) at P. 455.*

It is well accepted that a plaintiff can prove discriminatory intent through circumstantial evidence. Model Jury Inst. 2.21 & 2.22 A plaintiff can also prove discriminatory intent based upon solely upon disproving an employer's stated reasons for acting. This well accepted principal has been written into the model jury instructions. Model Jury Inst. 2.21 states: "*If you don't believe the reason given by the defendant is the real reason the defendant took an adverse action with respect to the plaintiffs' employment you may but are not required to find that the plaintiff has proven his/her case of discrimination. You are permitted to do so because, if you find the employer has not told the truth about why it acted, you may conclude that it is hiding the discrimination."*

This is particularly applicable to the facts of this case. There are significant questions of credibility in this case involving the central issues in this dispute. Questions of credibility, however, are generally questions of fact and difficult to determine simply by reading the printed page of deposition transcripts, emails or other documents that may be presented in a motion stage. In this case the credibility of four central figures in this case is in doubt; Arvind Krishna, Zachary Lemnios, John Kelly, and Varun Gupta. It is

not the court's role to decide issues of credibility at the summary judgment stage. *Brill vs. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), Gilhooly v. County of Union* 164 N.J. 533, 545 (2000) Only through a full and fair trial can the fact finder properly assess credibility. At this stage of the proceedings the court must consider all of these issues in favor of the non-moving party. *Zive v. Stanley Roberts* 182 N.J. 436 (2004)

The defendants seek to deny the plaintiff the opportunity to present these matters at trial. A live trial with witnesses testifying allows the decision maker to see and hear the witnesses including, the ability to develop an understanding of their demeanor, their evasiveness, and lack of candor on the subject. A review of documents and portions of deposition transcripts is helpful in understanding the respective positions of the parties, but cannot weed out the factual disputes, or resolve issues of credibility. In this case the plaintiff and the defendant have different versions and interpretations of facts and key events. A court should deny a motion for summary judgment where there are questions of credibility on material facts. *Gilhooly v. County of Union* 164 N.J. 533, 545 (2000); *Anderson v. Exxon 89 N.J. 483 at 490 (1982); Peper v. Princeton Univ. Bd. of Trustees 77 N.J. 55 at 80 (1978)*

The plaintiff's statutory causes of action involve fundamental rights and important public policy issues. *Anderson v. Exxon 89 N.J. 483 at 490 (1982); Peper v. Princeton Univ. Bd. of Trustees 77 N.J. 55 at 80 (1978)* For the court to grant the defendants' motion for summary judgment the court would need to conclude that the evidence, viewed in a light most favorable to the plaintiff clearly failed to establish that the

defendants' conduct was unlawful pursuant to the *New Jersey Law Against Discrimination.*

A review of the plaintiff's counter Statement of Facts, as well as the documents and deposition testimony presented in this case, clearly establishes that a reasonable jury could find for the plaintiff, and the plaintiff has a valid cause of actions that should go forward to trial. The defendants' motion for summary judgment should be denied.

The plaintiff has filed a cross motion for partial summary judgment on Count II of his complaint alleging the defendants' refused to hire him, after he was on the Resource Action list based upon unlawful age discrimination. A review of the facts of this case require granting the plaintiff's cross motion for summary judgment on this claim.

B. PLAINTIFF'S AGE DISCRIMINATION CLAIM

The plaintiff's complaint alleges that he was wrongfully terminated and otherwise discriminated against by the defendants due to his age. [Enc.1] The defendants have filed a motion for summary judgment as set forth above. As set forth above in part A, the evidence in this case must be viewed based on the applicable summary judgment standards, and how courts have applied these standards in employment discrimination cases. *Zive v. Stanley Roberts* 182 N.J. 436 (2004).

The *New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et seq.* specifically prohibits discrimination in employment based on age. *N.J.S.A 10:5-4.* In order for the plaintiff to prevail in an age discrimination case that involves a layoff or reduction in force, the employee generally needs to prove:

1. The employee is a member of a protected class; (in this case age)

2. The plaintiff was laid off while others not in a protected class were treated more favorably. *Model Jury Instruction 2.23*; *Massarsky v. General Motors Corp*. 706 F. 2nd P111 (3rd Cir.) Cert. den. 464 U.S. 937 (1983); *N.J.S.A. 10:5-1 et seq. Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999); Grigoloiti v. Ortho Pharmaceutical Corp. 118 N.J. 89 (1990); Baker v. National State Bank* 312 N.J. Super 268 (App. Div. 1998)

The defendants in their motion for summary judgment set forth incorrect elements that the plaintiff needs to establish. In fact, the entire premise of the defendants' motion, that the plaintiff cannot prove the fourth element of his prima facie case is flawed since this is a reduction in force case that does not require a plaintiff prove that their employment was replaced by a substantially younger employee. Model Jury Instruction 2.23. (Def. Brief P5-7) There should not be any factual dispute that this was a reduction in force or lay-off since the defendant's claim the plaintiff was terminated for work elimination and the plaintiff's termination latter specifically states, "*you have been chosen for a permanent layoff*." [Enc.13]

In *Clowes v. Terminex International Inc., 109 N.J. 575 (1988)* the Supreme Court dealt with the issue of how the *McDonald Douglas* analysis should be used in the context of unique employment discrimination claims. *Clowes* points out that the *McDonald Douglas* analysis is not designed for rigid application and must be tailored to the unique facts of each particular case. *Clowes* at P. 596-598. The proper analysis of this case would be the elements set forth in Model Jury Instruction 2.23.

In this case, there are facts and evidence that require denial of the defendants' motion for summary judgment. There are objective facts that support each of these

elements. The defendants may dispute some of this evidence, but at this stage of the proceedings this evidence must be viewed in a light most favorable to the plaintiff. *Brill vs. Guardian Life Ins. Co. of America,* 142 N.J. 520 (1995)

The plaintiff clearly is in a protected category or status based upon age. He was 60 years old at the time his employment was terminated by the defendants. There is no reasonable dispute concerning this aspect of the prima facie case.

The second element that a plaintiff needs to prove in a reduction in force case is that younger employees similarly situated were treated more favorably. We know from the discovery in this case that all the employees in the plaintiff's division that were terminated as part of this 2018 reduction in force were over 40. [Enc.9,10] In fact, in 2016 and 2017 everyone selected for the Resource Acton were over 40. We have provided to the court detailed data on the age distribution of employees at IBM and within the Research Division. The younger employees in the division were not selected for termination, therefore, treated more favorably.

We further know that the defendants set up training guidelines which were established to set up procedures for selecting employees for the resource action. The company is required to follow these guidelines in the selection process. These guidelines specifically exclude new hires for certain categories in the resource action. [Enc.12]

There is also direct evidence that the defendants were hiring new employees at the same time they were engaged in a division, and company wide series of layoffs. The data provided objectively shows the overwhelming majority of new hires in 2017, 2018, and 2019 were under 40 years of age. [Enc.9,10] When questioned concerning this data Arvind Krishna, the director of IBM Research in 2018 candidly explained their

preference for new college graduates since they perceived that they had the skills needed as opposed to the existing workforce. [Krishna P53:L23-P54:L12]

The plaintiff has retained an expert who did a statistical analysis of IBM, and the Research Division. As set forth by Paul Gazaleh in his report, younger employees were clearly treated more favorably than older employees. [Enc.9,10] Any objective review of the hiring and firing data for three years within the Research Division could only lead one to the conclusion that older employees were treated less favorably than their younger colleagues. There should be no doubt, therefore, that the plaintiff can establish a prime facie case.

This evidence viewed in a light most favorable to the plaintiff clearly establishes that the plaintiff was in a protected status based upon his age, and that he has met the applicable summary judgment standards to demonstrate that younger employees were treated more favorably than the plaintiff in this reduction in force. The plaintiff has established a prima facie case of age discrimination. Model Jury Instruction 2.23.

C. THE DEFENDANTS CANNOT PRODUCE SUFFICIENT LEGITIMATE BUSINESS REASONS FOR THE PLAINTIFF'S TERMINATION

When a plaintiff establishes a prima facie case of age discrimination under the *McDonald Douglas* burden shifting analysis, the defendants need to demonstrate a legitimate business reason for selecting the plaintiff. The defendants' claim that the plaintiff was selected for the defendants' Resource Action because his work was eliminated. From the beginning of this case, and even now at the summary judgment stage, the defense against the weight of great evidence, has attempted to claim that Schenfeld' s termination was unrelated to the larger decision making involved in this Resource Action. A close review of the evidence surrounding this issue clearly

establishes numerous questions of fact concerning the defendants' decision-making process.

The defendants are required under this analysis to provide evidence of a legitimate non-discriminatory reason the employee was terminated. If the reasons provided are rejected by the fact finder, then the jury may find for the employee. If the defendants produce a legitimate business reason for their actions, the plaintiff then can prevail by demonstrating that the employer's reasons are false or are a mere pretext to discriminatory intentions. *DeWees v. RCN Corp. 380 N.J. Super 511, 526 (App. Div. 2005)*

1) The Decision-Making Process

There is an abundance of evidence that discredits the legitimacy of this decision. There is a significant factual dispute concerning who the actual decision maker was in the termination of the plaintiff. The defendant's claim that Zachary Lemnios made this decision. We have a series of emails, however, that clearly demonstrate that Lemnios was against the termination of the plaintiff. [Enc.14] Lemnios' position that he did not want to eliminate Schenfeld's work was not done without having giving matters some detail and thought. It is important to consider that Lemnios' opposition to the elimination of the plaintiff's work was after he had done a detailed review, and realignment of his entire organization. [Enc.13] Lemnios' opposition to the selection of Schenfeld was also after a January exchange of emails with Senior Vice President, John Kelly where there was an agreement that Schenfeld's research work would continue. [Enc. 21] Lemnios opposition to terminating Schenfeld in fact persisted for weeks after his name was submitted as part of the final list to the Project Office. [Enc.15]

There are a critical and revealing series of emails between Dan Bellor and Zachary Lemnios on this process. [Enc.14,15,16] It is clear from a review of these emails that Lemnios disagrees with the decision to place Schenfeld on this list, and even specifically raises legal concerns regarding the selection. [Enc.15] We know from the March 1, 2018, email Bellor writes to Lemnios that including Schenfeld on the Resource Action list was something supported by Krishna. [Enc.16] Lemnios confirmed in his deposition that he understood Krishna had directed the inclusion of Schenfeld and it was Bellor's job to "*get him on board.*" [Lemnios P.135, L.15 – P.137, L.15]

After Lemnios refused to go along with the termination of Schenfeld, there was a meeting between the HR Director, Varun Gupta, and Arvind Krishna on February 22, 2018. [Enc.17] We have Gupta's direct testimony on this issue where he agrees Krishna directed Schenfeld to be placed on the Resource Action list. [Gupta P] This is confirmed in Gupta's email of February 22, 2018. [Enc.17] The defendants are trying to claim that somehow this was not the final list. The email chain regarding this matter demonstrates that the list was final and submitted to the project office on February 28, 2018. [Enc.18] There really can be no doubt on this point since the email chain says, "*we will bounce the end list off Arvind*" In addition, Bellor writes on March 2, 2018; "*Here is an updated Research list capturing all employees that were submitted to the Project Office. We had some swizzles in the end but came in on target at...The identification window is now closed.*" By March 2, at the direction of Arvind Krishna, Schenfeld was on the final list even though at this point Lemnios was still opposed to his selection. [Enc.18] There can be no doubt that Lemnios was opposed to Schenfeld at this time since he next sends an email to Senior Vice President John Kelly on March 6 asking for his advice.[Enc.19] Of

note there is absolutely nothing in this email, or any other document where there is a discussion involving management where the topic of eliminating Schenfeld work was even discussed. [Enc.19]

While Lemnios claims to have made the decision to terminate Schenfeld, there are serious questions concerning the credibility of his testimony. The plaintiff contends the decision to terminate his employment was made by Arvind Krishna, and that the various witnesses in this case are covering up Krishna's involvement due to the fact that Krishna is now the Chief Executive Officer of IBM. The actual objective evidence all points in Krishna's direction. [Enc.16,17,19]

We know from a series of emails that Lemnios had meetings with both John Kelly and Arvind Krishna weeks after Schenfeld's name was submitted to the project office. [Enc.19,20] What really went on in these various meetings between Kelly, Lemnios and Krishna in early March 2018 is the subject to disagreement and debate. It is the plaintiff's contention that Arvind Krishna made the decision to terminate Schenfeld's employment on or about February 22, 2018, in his meeting with Varun Gupta. It is also clear that Dario Gil, age 42, not Lemnios was the active individual pushing to include the plaintiff. [Enc.14][Plaintiff's Statement of Facts, paragraphs 35-36]

All of the evidence in this case demonstrates that Gil and Gupta, two individuals substantially younger than the plaintiff, made and supported the decision to terminate Schenfeld's employment. [Enc.14,16,17] Krishna then met with Gupta and decided Schenfeld should be on the 2018 Resource Action list. Based on Krishna's own testimony, however, he could not have made a rational fact-based decision to eliminate the plaintiff's work since he repeatedly testified in his deposition that he was unfamiliar

with the nature of Schenfeld's work. [Krishna P95, L18 – P96, L18] These are fact and credibility questions that a jury needs to decide.

There are serious questions concerning the credibility of the key players in this case. Arvind Krishna repeatedly denied he made the decision to select Schenfeld. In support of his position, he claimed he had no knowledge of Schoenfeld's work. This can be proven with clear objective evidence to be false. There are a series of emails in December of 2017, in January of 2018 and even March of 2018, that demonstrate Krishna was clearly involved with the plaintiff's work.[Enc.21,22][See Plaintiff's Statement of Facts] In fact, Lemnios emails Krishna about Schenfeld's plan to make a presentation of his work at a conference in January of 2018, and Krishna, who must clearly have knowledge of the project, concurs that he does not want Schenfeld to make any presentation. [Enc.21] Why would Krishna testify repeatedly that he had no idea what the plaintiff was doing in 2018? The most logical explanation for Krishna's false testimony was he needed to claim a lack of knowledge to separate himself from the decision-making process. The fact that he is now the CEO of the company, has created a situation where everyone is rallying around him by falsely testifying concerning the decision-making process. Krishna and the other individuals that lack candor on these critical issues undermines the defense position. Model Jury instructions state that *"if you find the employer has not told the truth about why it acted, you may conclude that it is hiding the discrimination."* Model Jury Instruction 2.21.

There is also direct evidence that challenge the credibility of Zach Lemnios testimony. Lemnios claims to have made the decision to terminate Schenfeld. He further

claims he "wrote" key parts of Schenfeld' s termination letter. In particular he claims he individually wrote this key paragraph. [Lemnios P41:L13-P42:L14]

"As we shift to higher-value offerings and have grown in certain areas, our need for skills in other areas has declined. Increasingly deeper technical skills are required, based on what our clients need. As we become more a cognitive business, we are restructuring operations for speed and simplification," [Enc.3]

We know that Lemnios sworn testimony on this import point was false, since this is a form letter that was given to thousands of IBM employees. [Enc.5][Plaintiff's Statement of Facts, paragraphs 9-11] This is not trivial or peripheral point. This paragraph was given to the plaintiff to tell him why he was selected. If a jury were to conclude that Lemnios is not telling the truth on the critical language in this letter, they may easily conclude that he is also not telling the truth on the selection of Dr. Schenfeld.

The defense position in this case is that the plaintiff was selected for a Resource Action, and then could secure another position because he made an insufficient effort. [Def. Brief p] This position has no merit and is undercut be the documents produced in discovery. Schenfeld was list as on no hire on a human resources fact sheet. [Enc.4] In fact the termination letter purportedly written by Zach, Lemnios, and Lemnios certification claim the plaintiff had 90 days to look for a job within IBM. How could this be true when IBM classified Schenfeld as do not hire? There are serious credibility issue concerning Lemnios affidavit and sworn testimony. [Enc.3,4]

2. <u>The Resource Action Worksheets</u>

There are serious questions concerning the integrity of the selection process. First it is important to understand there are specific guidelines established to ensure the

selection process is fair. [Enc.12] In this case these guidelines were completely ignored. These worksheets are a required part of this process. [Enc.12] Bellor completed a Resource Action Worksheet and forwarded this worksheet to the project office on February 28, 2018. [Enc.6] The first line manager is required to participate and complete these work sheets. [Enc.12] Rebecca Torres, the manager of the Workforce Center of Excellence was deposed on this issue. Torres runs the small department that is tasked with being the companies' experts on the separation of employees. [Torres] Torres described the Worksheets as the official document demonstrating the reasons an employee was selected for the Resource Action. [Enc.12] Bellor also agreed that as a Human Resources professional he was required to follow the procedures set forth in these guidelines in completing these worksheets. [Bellor P.45, L.15 – P.46, L.4]

In this case however, there were a series of different worksheets changing the reasons why Schenfeld was selected. [Enc.6,7,16] According to the chain of emails there were at least three different worksheets completed between February 28th and March 2nd, 2018. [Enc.6,7] Only two of these worksheets have been produced in discovery. Ghavam Shahidi is listed as having made and approved of the decision. [Enc.6,7] We know Ghavam Shahidi had no idea there was a Resource Action and was uninvolved in the process. [Enc.24]

These different worksheets completed by Daniel Bellor contain varying reasons why the plaintiff was terminated and undermine this entire process. In addition, Bellor signed Ghavam Shahidi's name to the worksheet creating the false impression that the plaintiff's direct manger was involved in the selection process.[Enc.6,7,23] A review of these worksheets, and the emails related to the decision-making process in February and

March of 2018 seem to demonstrate that there was a decision to include Schenfeld on the Resource Action list, and then a search to create a justification after the fact.

3. Spoliation of Evidence

There are serious issues concerning the credibility of this entire process including the failure on that of the defendants to produce all three of the Resource Action Worksheets. The courts in this state as well as the Federal courts, have addressed the issue of spoliation of evidence. The Federal courts clearly recognize a separate cause of action for spoliation of evidence, as well as curative instructions. *Schmind v. Milwaukee Electric* 13 F. 3d. 76, 78 (3rd Cir. 1994) *Rosenblit v. Zimmerman 166 N.J. 391 (2001); Robertet Flavors v. Tri-Form Construction 203 N.J. 252 (2010)*

In *Rosenblit v. Zimmerman 166 N.J. 391 (2001)* the court dealt with issues concerning spoliation of evidence. The *Rosenblit* case was a medical malpractice case and concerned lost and/or modified medical records. The New Jersey Supreme Court in Rosenblit states in part, *"The best-known civil remedy that has been developed is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence during the underlying ligation."* The New Jersey Supreme Court went on further to state "*the courts use the spoliation inference during an underlying litigation as a method of evening the playing field where evidence has been hidden or destroyed.*" *Rosenblit v. Zimmerman 166 N.J. 391 (2001).*

A spoliation inference essentially allows a jury in the underlying case to assume that the evidence the spoliator destroyed or otherwise concealed was adverse to their interests. Our state courts, as well as federal courts, recognize a separate cause of action for spoliation of evidence. We are not seeking a separate cause of action, but rather

seeking the appropriate sanctions to even the playing field based on the missing documents from the plaintiff's file related to his workers compensation claims and his termination. [Enc.49,50] The court should apply this adverse inference to this summary judgment motion and infer that the documents destroyed by the defendants were adverse to their interests.

The New Jersey Supreme Court discussed the issue of spoliation of evidence, and the remedies available to the parties, in *Tartaglia v. UBS Paine Webber, Inc. 197 N.J. 81 (2008).* The Supreme Court reiterated the policy statements from *Rosenblit* and discussed at some length what remedies should be available based upon the conduct of the party destroying or concealing evidence. The adverse inference remedy is the least intrusive remedy available and the remedy the plaintiff believes is appropriate and necessary in this case and should be applied to this motion. *Robertet Flavors, Inc v. Tri-Form Construction Inc.* at 269-272.

In light of the facts of this case, the missing documents raise unsettling questions about the defendants' disclosure of evidence and entitles the plaintiff to a proper spoliation charge at time of trial, and here in this motion. The court may infer that this information, which was in the sole possession of the defendant is critical to questions regarding the decision making and intent of the defendants and is critical to question the decision making of the defendants, is adverse to the defense position. *Rosenblit v. Zimmerman* 166 N.J. 391 (2001)

4. Work Elimination

In addition to the questionable activity regarding the multiple work sheets justifying the Schenfeld selection, the defense claims that he was terminated because his

work was eliminated is directly undermined by the evidence in the case. In March of 2018 when the meetings concerning the selection of Schenfeld were taking place, he was actually part of important conversations with the Chief Technology Officer of IBM, and the Senior Vice President of IBM Cloud, where they were seeking Schenfeld' s participation in current research plans involving Cloud. [Enc.22] Both of these individuals work directly for Arvind Krishna. In March of 2018 David Kenny, Senior Vice President IBM Cloud wrote to Schenfeld that they were working on building a strong team between Research and Cloud and wanted Schenfeld involved.[Enc.] Bryson Koehler, the Chief Technology Officer for IBM Cloud wrote to Schenfeld on March 22, 2018; "*your input moving forward is sought after and helpful.*" Cloud's Chief Technology Officer further wrote; "*I look forward to getting a few hours with you to go through this all in more detail.*" [Enc.22] This is hardly consistent with the defense position that the plaintiff's work, which was research in the area of cloud, was eliminated. It is also inconsistent with Dr. Krishna's testimony that he relied on his subordinates. [Krishna, P.24, L.1 – P.28, L.3]

The fact that Lemnios was opposed to the termination of the plaintiff, and in particular, the elimination of his work is significant. In the fall of 2017 Zachary Lemnios, Vice President of Physical Science and Government Programs did a detailed evaluation and realignment of his strategy area. The end result was a document produced captioned, "Realignment of Yorktown S&T." [Enc.13][Lemnios P18:L7-16] Lemnios explained that he did a detailed evaluation of his strategy area with the objective of aligning his group to the business needs of IBM. [Lemnios P18:L7-14] Lemnios further explained he did this by engaging in individual meetings with each of the contributors

within his strategy area in order to understand how there were ??impact on IBM. [Lemnios P19:L15-22] Lemnios explained this project went beyond simply producing a Table of Organization but was a current snapshot of the full investment that IBM was making in these particular areas. [Lemnios P23:L13-21] Lemnios' area included both exploratory technology and Next Generation computing. [Enc.13][Lemnios P29:L5-19]

Lemnios also explained the importance of IBM's Research into Cloud and/or datacenters within his strategy area. [Lemnios P17:L3-6] Lemnios explained that Schenfeld's work involved research on how to efficiently connect boxes and racks is to build an efficient datacenter system. [Lemnios P16:L11-P17:L13] Lemnios recognized Schenfeld as having particular expertise in that area. [Lemnios P16:L11-P17:L13] Most significantly with respect to the issues in this motion Lemnios testified he recognized Schenfeld's work as important technology. [Lemnios P17:L3-6]

Plaintiff has produced more than 37 patents where Schenfeld was a co-inventor issued either during the last year of his employment, or in many cases after his termination. [Enc.25,26] Many of these patents were filed after he was terminated and demonstrate that other scientist are continuing to work on his exact concepts. [Encl.25,26] We have also supplied to the court documents demonstrating that IBM continues to do research work in Schenfeld's area long after his termination. We further know that Schenfeld, as described by Dario Gil, was a *"one hundred percent cloud researcher."* [Gil P.81, L.5-21] Cloud is a key area for IBM as confirmed by various documents, and even the testimony of Arvind Krishna who in 2018 was the Director of Research. [Enc.11] [Krishna P.98, L.8-25, P.107, L.23-108] There are substantial

questions of credibility, therefore, as to whether or not IBM eliminated Schenfeld's work. All of these issues require denial of the defendant's motion for summary judgment.

There is significant evidence that Schenfeld's research work at IBM continues. We asked during discovery a series of Request for Admissions concerning very specific areas of research involved with Schenfeld. The defendants admitted a series of questions which undermine their position that Schenfeld's work was eliminated. [Enc.27,28,29] In addition on IBM's public website they describe current research efforts in Schenfeld's specific areas of research cloud technology on IBM's own web site the current research team thanks their *"prior colleague"* Eugen Schenfeld. [Enc29]

The defendants also admitted during discovery that at least one employee as hired subsequent to the plaintiff's terminated who did research work in Schenfeld's specific area. [Enc. 30] Any reasonable jury would have very little difficulty concluding that the defendants stated reasons of work elimination lack credibility and therefore the true reasons the plaintiff as selected for the 2018 Resource Action was unlawful age discrimination.

We deposed Arvind Krishna on many of these keys these issues. He testified that the purpose of the Resource Action was to eliminate employees in areas that were not being emphasized within the Research Department to spend additional resources in other areas. [Krishna P.107, L.5 – P.108, L.2, P.121, L.15 – P.124, L.5] Krishna, however, admitted that cloud was an important area for IBM. [Krishna P.107, L.23 – P.108, L.2] There can be little doubt that research continues in cloud technology in the same or similar manner as done by Schenfeld when he was employed by the defendants.[Enc.22,23,25,26,27,28,29,30]

The law in this area is clear, that even if the defendants present sufficient evidence on this point, the question is whether a reasonable fact finder could conclude that the employer's reasons were false and a mere pretext. " *...if the employer proffers a reason and the plaintiff can produce enough evidence to enable a reasonable fact finder to conclude that the proffered reason is false, plaintiff has earned the right to present his or her case to the jury" Zive v. Stanley Roberts 182 N.J. 436, 449 (2004)* These are all issues of fact and credibility that can only be determined after the plaintiff has an opportunity to present these matters in a fair way at trial.

5. Corporate Control

There are also significant disputes concerning the level of control upper management had concerning these layoffs. The defendants have taken the position in this case that this was a decision made on a *"local"* level that only affected Schenfeld. This is certainly not the case. Schenfeld was selected as part of a larger Resource Action code named Project Concord. There is significant evidence that there was total organization and control from the highest levels at IBM.

We took the deposition of Thomas Erickson. Erickson is a financial analyst that works in Corporate Finance. Erickson provided a tremendous amount of detailed information concerning how much corporate control there is over the decision-making process. For example, a small group of individuals at the corporate level engaged in a weekly cadence call to check up on how the various business organizations are meeting their quotas. These calls are at a high level. Erickson explained not call each division, for example the Research Division separately, but the calls would be at the higher group level. Corporate Finance coordinated directly with John Kelly's Cognitive Solutions

Group. This demonstrates control at a high level of IBM. [Enc. 49] Corporate Finance on a weekly basis coordinated with John Kelly's Cognitive Solutions Group there was control at a very high level of IBM. Erickson explained that if business units were not achieving their targets, "then people jump all over them as to why they can't achieve their target. [Erickson P.43, L16-22] [Enc. 49] This certainly supports the contention that Kelly's organization Cognitive Solutions, which reports directly to the CEO, had control over the various divisions.

We can also review some of Kelly's emails to various division leaders within Cognitive Solutions and it is clear that he is directing, and in some place creating the quotas himself for various divisions the actual layoffs within Cognitive Solutions. [Enc.3] These emails have been marked confidential, however, if the court were to review this language Kelly uses in communicating with various subordinates regarding the Resource Action it is clear that Kelly, who reports to directly to the CEO, has control over these layoffs. [Enc.31] The simple idea that Schenfeld was selected for the 2018 Resource Action, and that is unconnected to a larger picture at IBM lacks credibility and by itself alone requires the court to deny the defendant's motion for summary judgment.

The plaintiff has a long history of good performance with the defendants. The plaintiff has been involved in numerous different assignments and tasks and has a wide range of experience which clearly could be utilized by the company moving forward. His record on the development of intellectual property, especially after his termination alone sufficiently challenges the defense position. [Enc.25,26] The plaintiff's job responsibilities were not eliminated, rather his job responsibilities were absorbed by younger employees with less experience within his department.

6. Legal Analysis

The defendants argue this was a legitimate business decision. The underlying facts and circumstances concerning these events, however, severely question the defendants' motives, and provide perhaps the best evidence that the true reasons for terminating the plaintiff's employment were discrimination based upon his age. It is clear that a plaintiff in an employment discrimination case can prove unlawful discriminatory intent simply by disproving the defendants' stated reasons for terminating the plaintiff's employment. *Model Jury Instruction 2.21.* *DeWees v. RCA Inc. 380 N.J. Super. 511,526 (App. Div. 2005)* The Model Jury instructions on this issue clearly state that the jury is permitted to find *"discriminatory intent"* sole based on the lack of belief in the defendant's stated reasons for terminating the plaintiff.

A causal connection has been defined as sufficient evidence to permit a fact finder to conclude that the employer acted, at least in part, with discriminatory intent. *Viscik v. Fowler Equipment Co. 173 N.J. 1 at 13 (2002); Romano v. Brown & Williamson Tobacco Corp. 284 N.J. Super. 543 at 551 (App. Div.1995)* Since it is particularly difficult to prove discriminatory intent, a plaintiff is permitted to demonstrate motive or intent, in a variety of ways and through circumstantial evidence. *Zive v. Stanley Roberts 182 N.J. 436 at 446 (2004) Ferrell v. Planters Life Savers Co., Nabisco Inc. 206 F. 3rd 271 (3rd Cir. 2000)*

In *Zive v. Stanley Roberts 182 N.J. 436 (2004)* the New Jersey Supreme Court discussed discriminatory intent, and the common lack of direct evidence and stated, "*our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination.*" The Supreme Court in

Zive went on further to state, *"we do not require direct proof of discrimination because it is often unavailable or difficult to find.... Even an employer who knowingly discriminates on the basis of protected status may leave no written records revealing the forbidden motive and may communicate it orally to no-one."* Zive *at 447.*

An employee need not prove his termination was solely based upon issues concerning discrimination or retaliation. The plaintiff does not challenge the legitimacy of the defendants' reduction in force. It is simply the plaintiff's position that the decision-making process was tainted by unlawful age discrimination. Often there are *"mixed motives"* explaining why a defendant employer has taken an adverse complaint action. A plaintiff need only prove that discriminatory reasons were involved in the decision-making process, not that discrimination was the only reason for the employer's actions. *Rendine v. Pantzer, 276 N.J. Super. 387 (App. Div. 1994)*. The facts and evidence in this case viewed through the proper summary judgment standards require a denial of the defendants' motion for summary judgment.

POINT II

THE COURT SHOULD DENT THE DEFNSE MOTION TO DISMISS THE PLAINTFFS FAILURE TO HIRE CLAIM AND GRANT HIS CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT.

In addition to the plaintiff's claim that his employment was terminated based upon unlawful discrimination concerning his age, the plaintiff has a claim in this action that the defendants' failed to hire him for various open positions based upon unlawful age discrimination. The plaintiff has filed a cross motion on this claim.

In order for a plaintiff to demonstrate that he was not hired for a position based on age he must prove: 1) He was in a protected class based upon his age 2) He sought or

applied for open positions; 3) He was rejected despite his qualifications; and 4) the employer hired a substantially younger individual, or the circumstances involved with the rejection of the plaintiff give rise to an inference of age discrimination. *Anderson v. Exxon 89 N.J. 483 at 490 (1982)*

The defendant's motion is based on the claim that he did not formally apply for a position with IBM. The plaintiff explained in his deposition that as a long-term employee, applying as if he were off the street was not an effective way to secure a position. The plaintiff further testified that he understood that since he was selected for the resource action he could not be hired back by IBM. The plaintiffs' position is specifically supported by the internal documents contained in his personnel file which state he is not illegible for re-hire. [Enc.4]

The defendants claim that Schenfeld cannot pursue a failure to hire claim because he did not formally apply for a position. A formal application is not a necessary element of a failure to hire claim, especially in light of the fat that IBM classified him as no re-hire. How could he apply when his opportunities were cut off by being listed as not illegible for re-hire? [Enc.4]

As set forth above the evidence is clear that Schenfeld's research work continued at IBM. Schenfeld did in fact seek a position in Rosenfeld's group. Rosenfeld decided to hire the "*five post docs*" rather than the plaintiff. [Enc.32] Schenfeld also spoke directly with John Kelly, a senior Vice-President, and the director of the Cognitive Resources Group. Kelly flat out told Schenfeld he would not find him a position. [Enc. 42] We also have John Kelly's email, which indicates that he would not assist Schenfeld with securing a position in Systems where his research work continued and was most relevant. [Enc.

32] The clearest indication that Schenfeld's work continue to be relevant are a series of emails on March 22nd with Senior Executives in IBM Cloud. How it could be that at the same time Lemnios claims Schenfeld's work was eliminated, and would have no impact across IBM, the Senior Technology Officer, as well as the Senior Vice President in IBM Cloud were seeking to include him in the work involving the future of cloud and/or datacenters. [Enc.22]

The plaintiff was well recognized has having an expertise in cloud. Cloud was a critical area. The defendants admit that the areas of work the plaintiff did continue, and that they hired at least one person in that area. [Enc.30] We have already set forth above and in the plaintiff's statement of facts the detailed statistical information concerning four years of hiring within research and would rely on that analysis and argument on this point as well. [Enc.9,10]

There is no question that the facts support the conclusion that the defendants' motion for summary judgment on this issue should be denied and support the position that the facts in this case establish that the defendants refused to hire the plaintiff simply due to his age. The summary judgment standard pursuant to Court R. 4:46-2 apply to this analysis. No reasonable jury could find for the defendants on this claim.

There is no question that the plaintiff is in a protected class based upon his age. There is further no doubt that he sought open positions within IBM. There is no doubt that the plaintiff is viewed as having specific expertise, in Cloud Technology, and therefore, was well qualified to continue this research work. We also know that IBM hired substantially younger employees to do the same work, and under circumstances that provide a strong inference of age discrimination.

A review of Paul Gazaleh's statistical analysis, in particular the supplemental report of September 20, 2021 demonstrates hundreds of new employees were hired by IBM Research in 2017 and 2018. The vast majority of them were under 40, and nearly all of these new hires within Research Division were under 50 during this time period. [Enc.9,10] Some of these employees are data scientists or software engineers so if we focus solely on Research Staff Members for the period 2016 through 2018 which was analyzed by Gazaleh the numbers are remarkable and can only lead one to the conclusion that hiring decisions at IBM were based to some degree on age. [Enc.9,10]

If we view this information in the context of the specific testimony provided by Arvind Krishna regarding hiring practices the conclusion here is clear. [Krishna P53:L23-P54:L12] As argued previously Krishna's testimony can reasonably be considered as an admission on the part of IBM that they perceived younger employees, fresh out of school to be those necessary training and skills IBM desired as opposed to the existing workforce.

When these facts are viewed, even through applying the summary judgment standards, no reasonably juror can come to any other conclusion then that the defendants' refused to hire the plaintiff based on his age and, therefore, the court should deny the defendants' motion for summary judgment on this issue and grant the plaintiff's cross motion.

POINT III

THERE IS SUFFICIENT EVIDENCE TO DENY THE DEFENDANTS' MOTION TO DISMISS THE PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANT LAWRENCE O'CONNELL

In this case the plaintiff has named three individual defendants. Those defendants are John Kelly, Zachary Lemnios and Lawrence O'Connell. The defendants have not moved to dismiss the individual claims against John Kelly or Zachary Lemnios. O'Connell is not a remote unconnected individual, but the Senior Location Executive in charge of all employees in the State of New Jersey and therefore, has administrative oversight of the plaintiff's employment. The plaintiff summarized O'Connell's position in his deposition. When he explained that O'Connell was his administrative manager because he worked in New Jersey. [Schenfeld, P.102:L.23 – P.104:L.6; P.105:L.24-P.107:L.7]

If we review the plaintiff's complaint, we can see the specific allegations with respect to O'Connell. Plaintiff states in relevant part in paragraphs 16, *"Larry O'Connell .... participated in the organization in structuring of this layoff and/or reduction in force and had obligation to accurately report information concerning the termination of employees to various government entities with oversight of the defendant's IBM operations including IBM's New Jersey operations."* [Enc.1]

With respect to O'Connell, the plaintiff's complain further states in Count Three, paragraph 4, *"the individual defendants were at all times fully aware of the unlawful and discriminatory employment practices on the part of the defendants and continued to aid, assist, coordinate and otherwise participate in the coordination and operation of the*

reduction in force to advance defendant's discriminatory objectives and to actively assist in the coverup of the discriminatory actions of the defendants to terminate older employees and replace them with younger workers including the employment of the plaintiff." [Enc.1]

The plaintiff specifically alleges that O'Connell that as the Senior Location Executive in New Jersey he had specific administrative responsibilities regarding the plaintiff and other New Jersey employees. O'Connell was the IBM point of contact with government in New Jersey. [Enc.33] The Plaintiff further alleges, and the evidence supports that O'Connell was well aware of the unlawful nature of the defendant's Resource Action and failed to properly report this information to New Jersey State officials.

We had the opportunity to depose O'Connell. O'Connell specifically downplayed his responsibilities as a Senior Location Executive. After O'Connell's deposition, however, we made an additional discovery request for his written job description as Senior Location Executive. The defendants produced a document titled, *"IBM Senior Location Executive."* [SLE Guidelines] A review of this document supports the plaintiff's position that O'Connell had specific responsibilities with regard to the plaintiff's employment in New Jersey, and his conduct aided and assisted in the unlawful discriminatory conduct directed at Schenfeld and others. This document defines in part the Senior Location Executive's role as *"SLE functions as the key IBM manager in the specific location with responsibility for the outcome of all cross divisional functions, programs and policy implementation."* [Enc.33] These guidelines further indicate that

the Senior Location Executive's primary responsibility is government relations, specifically communications. [Enc.33]

A further review of this document, indicates that the Senior Location Executive has specific responsibility to all IBM employees within his jurisdiction to *"ensure that IBM programs and services are administered consistently in the interest of both employees and the company."* [Enc.33] This would include the 2018 Resource Action which significantly effected New Jersey employees including the plaintiff. [See Plaintiff's Expert Report regarding Statistical Analysis of New Jersey employees][Enc.9,10] The plaintiff was a New Jersey employee assigned to the Piscataway location.

During the course of Schenfeld's employment he received numerous emails form Larry O'Connell regarding various administrative matters. These include his vacation days, work schedules, and other topics related to Schenfeld's employment. These emails support Schenfeld's position that O'Connell had administrative management responsibilities with respect to Schenfeld. When Schenfeld was advised that his employment was to be terminated pursuant to a Resource Action, and allegedly that he had 90 days to secure a position, he wrote to O'Connell seeking a position in New Jersey. Schenfeld, of course, had been administratively designated as not eligible for a rehire a fact that O'Connell undoubtedly knew in his position as Senior Location Executive. O'Connell never responded to Schenfeld's request. It is certainly reasonable to infer for summary judgment purposes that O'Connell was aware of the fact that the vast majority of employees being terminated in New Jersey were over 40. [Enc.9,10] It is also

reasonable to infer from the facts of this case that O'Connell would have been aware of the fact that Schenfeld was designated as do no hire. [Enc.4]

A review of the guidelines for the Senior Location Executive, viewed in the proper summary judgment standards, supports the plaintiff's contention that Larry O'Connell had administrative responsibilities with respect to his employment in New Jersey. The plaintiff contends that O'Connell was well aware of the discriminatory nature of the Resource Action's focus on older employees and actively assisted in the coverup of these activities by failing to report to the New Jersey Department of Labor, as well as local government officials' proper information concerning the 2018 reduction in force that affected Schenfeld's employment.

There is no question that the *New Jersey WARN Act, N.J.S.A. 34:21-1 et seq.* requires a company to advise the Department of Labor as well as local officials concerning the significant layoffs of employees. This is specifically why the plaintiff alleges in County Three, paragraph 4 when he states O'Connell did, *"actively assist in the coverup of the discriminatory actions of the defendant to terminate older employees and replace them with younger workers ....."* [Enc.1] There is no question O'Connell had administrative responsibilities including communicating information to government entities within New Jersey regarding New Jersey employees, and those effected by the 2018 Resource Action including the plaintiff.

There is no question that the *New Jersey Law Against Discrimination* permits an individual to be individually named in a complaint and libel pursuant to this statute as an aider and abettor. *N.J.S.A. 10:5-12(e).* In *Tarr v. Bob Casuilli et al.* 181 N.J. 70 (2004) the court had the opportunity provide context to the aiding and abetting section of the

New Jersey Law Against Discrimination. On Page 84 of this Opinion, it states in part, "*That an individual may be libel if the individual knows that the other's conduct constitutes a breach of duty, and they give substantial assistance and encouragement to the other.*" This is precisely the plaintiff's allegations in this case against the individual defendants. Some of the aiding and abetting alleged in this case occurred during the decision-making process and some occurred in the active cover-up of IBM's actions. [Enc.1]

Plaintiff does not allege O'Connell was an active participant in the decision-making process to include him in the Resource Action. The plaintiff alleges that O'Connell was part of IBM's plan and scheme to cover up their actions regarding age discrimination invoke the termination of employees and the hiring of new employees which are directly relevant to the issues in plaintiff's complaint.[Schenfeld [106:L19-P107:L7] O'Connell is the Senior Location Executive in New Jersey, had specific administrative responsibilities regarding the plaintiff and other New Jersey employees. O'Connell clearly was aware of the 2018 Resource Action having participated directly in the termination of some employees. [Enc.5] If the court assumes this is true for purposes of this motion that O'Connell had administrative oversight responsibilities of Schenfeld and was an active participant in the 2018 Resource Action, then the defendants' motion for summary judgment with respect to O'Connell should be denied.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that the defendants' Motion for Summary Judgment be denied.

STEVEN D. CAHN, ESQ.

Dated: October 26, 2021

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EUGEN SCHENFELD.	:	**SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY**
Plaintiff,	:	**LAW DIVISION**
		DOCKET NO: MID-L-7334-18
Vs.	:	
INTERNATIONAL BUSINESS MACHINES (IBM), JOHN KELLY, ZACHARY M. LEMNIOS, LARRY O'CONNELL, JOHN DOES 1 – 10 (said names being fictitious) and ABC CORPORATIONS 1-10 (said corporations being fictitious)	:	**CIVIL ACTION**
		PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF FACTS
Defendants.	:	

1. Plaintiff admits the factual allegations set forth in this paragraph, however, that the plaintiff's employment with IBM was more complex than described herein. See Plaintiff's Statement of Facts for more additional and detailed information.

2. Plaintiff admits the Research Division was comprised of multiple departments and organizations. Plaintiff further states, however, that the Research Division, as well as the various subparts, were constantly reorganizing and redefining their objectives and often the objectives of these various departments or organizations overlapped. See Plaintiff's Statement of Facts as well as attached documents for additional and more detailed information.

3. Plaintiff admits the factual allegations set forth in this paragraph.

4. Plaintiff admits the factual allegations set forth in this paragraph.

5. Plaintiff admits the factual allegations set forth in this paragraph. The Research Division and the various subparts thereof constantly reorganized and redefined and in many cases the objectives of these departments or organizations overlapped. See Plaintiff's Statement of Facts for additional and more detailed information.

6. Plaintiff admits the factual allegations set forth in this paragraph.

7. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff further states, however, that the Research Division and the various subparts including departments or organizations were constantly reorganized within IBM and often had overlapping technical objectives. See Plaintiff's Statement of Facts for more additional and detailed information.

8. Plaintiff denies the factual allegations set forth in this paragraph. Plaintiff worked on various aspects of cloud technology. See Plaintiff's Statement of Facts and attached documents, including the list of various patents and other related documents setting forth more specifically the nature of the plaintiff's research work while employed at IBM from 2012 until the time of his termination.

9. Plaintiff admits the factual allegations set forth in this paragraph.

10. Plaintiff admits that hardware cloud was one of many turns used to describe a technical approach to disaggregated datacenters focusing on the hardware architecture aspects of datacenter design. See Plaintiff's Statement of Facts and attached documents including various patents demonstrating more accurately the scope of the plaintiff's research work while employed by the defendants.

11. Plaintiff admits the factual allegations set forth in this paragraph.

12. Plaintiff admits the factual allegations set forth in this paragraph.

13. Plaintiff admits the factual allegations set forth in this paragraph.

14. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff denies the facts set forth in this paragraph, or the statements contained within the August 16, 2015, John Kelly email are relevant to the issues concerning the selection of the plaintiff for termination in defendant's 2018 Resource Action. See Plaintiff's Statement of Facts attached documents.

15. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff denies the facts set forth in this paragraph, or the statements contained within the August 16, 2015, John Kelly email are relevant to the issues concerning the selection of the plaintiff for termination in defendant's 2018 Resource Action. See Plaintiff's Statement of Facts attached documents.

16. Plaintiff admits Exhibit D is a copy of the email described. Plaintiff, however, states there are numerous emails on various topics not attached to the defendant's certification. Plaintiff also denied Exhibit D is relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information.

17. Plaintiff admits this was a portion of what is written in the email exchanged between Schenfeld and Kelly. Plaintiff states the email itself contains a more accurate description of what was written by the plaintiff. Plaintiff further states this email is not

relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

18. Plaintiff admits only that at time he worked with James Speidell, Brian Pear, Tim Chainer and Al Morrison on research. Plaintiff also worked with numerous other individuals and collaborated on various research projects in the development of intellectual property which resulted in patents. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

19. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's more detailed answer to paragraph 18 for more additional information.

20. Plaintiff admits only Speidell complained to Gil. Plaintiff denies the characterization and balance of this paragraph. Plaintiff states that based upon the testimony of Dario Gil any comments made to Speidell is not relevant to any decisions concerning the selection of the plaintiff to be terminated pursuant to the defendant's 2018 Resource Action. . [See Plaintiff's Statement of Facts and attached documents]

21. Plaintiff admits the factual allegations set forth in this complaint. Plaintiff denies these facts are in any way related to the plaintiff's termination in 2018.

22. Plaintiff admits Exhibit E is a copy of the March 18, 2018, email. Plaintiff denies those documents may relate to the selection of the plaintiff for termination in the defendant's 2018 Resource Action.

23. Plaintiff admits only this is a portion of what is contained in 2018 email. This paragraph fails to set forth the most important statement by Dario Gil in this email, *"I*

acknowledge your creativity and technical expertise in the area of systems and cloud." [Def. Exhibit E]

24. Plaintiff states this is a portion of this email. Plaintiff further states, however, that the language set forth in this paragraph by the defendants which is a portion of this email takes the entire email out of context. Plaintiff further states if the court were to read Exhibit E and Exhibit F together, the court would be able to understand the proper context and the comments made by Schenfeld in Exhibit F. Plaintiff further states, however, that these issues are not relevant to the decision to terminate the plaintiff's employment in the defendant's 2018 Resource Action.

25. Plaintiff admits the factual allegations set forth in this paragraph and deny the relevance to the plaintiff's termination. [Gil P162:L15-24][Bellor P99:-100:L5]

26. Plaintiff admits this was a portion of his deposition testimony.

27. Plaintiff admits this is a portion of his testimony. Plaintiff denies that there was no presentation at the open power summit based solely on an issue of patent applications.

28. Plaintiff admits the factual allegations set forth in this paragraph.

29. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for more detailed information. In addition, see specifically plaintiff's 2017 performance evaluation which directly contradicts the statement in this paragraph that Schenfeld did not receive additional funding.

30. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information.

31. Plaintiff admits that a significant portion of his work focused on cloud datacenters.

32. Plaintiff admits the factual allegations set forth in this paragraph.

33. Plaintiff admits this is a portion of what the plaintiff said to Dario Gil in 2015 in the context of complaining that not enough effort was being put into cloud in Science and Technology. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

34. Plaintiff admits this is a portion of his deposition testimony. Plaintiff denies the balance of the facts set forth in this paragraph. See Plaintiff's Statement of Facts additional and more detailed information.

35. Plaintiff admits Exhibit G is the described May 4, 2016, email.

36. Plaintiff admits this is a portion of what the attached email states.

37. Plaintiff admits IBM adopted a hybrid cloud strategy. Plaintiff denies the balance of the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts setting forth detailed information concerning the defendant's continued research on various other aspects of the technology used in cloud and/or datacenters.

38. Plaintiff admits this is only a portion of his deposition testimony. See Plaintiff's Statement of Facts and attached documents setting forth in greater detail the full scope of the research being done at IBM concerning various aspects of cloud and datacenters.

39. Plaintiff admits that Exhibit H is a May 15, 2017, email from Schenfeld to Kelly.

40. Plaintiff admits that this is a portion of an email exchanged between Schenfeld and Kelly. See Plaintiff's Statement of Facts for additional and more detailed information including the John Kelly, Senior Vice President of Cognitive Solutions continued to encourage Schenfeld ion various topics related to cloud and/or datacenters up to and through the time of the plaintiff's termination.

41. Plaintiff admits only this is a portion of his deposition testimony. Plaintiff denies that he was doing intellectual property work on his own. See Plaintiff's Statement of Facts and in particular see the various patent applications and patent awards demonstrating Schenfeld worked with various other individuals on this research.

42. Plaintiff admits Exhibit I is a September 7, 2016, memo to Schenfeld. Plaintiff denies this memo is in any way related to plaintiff's termination. . [Gil P162:L15-24][Bellor P99:L16-100:L5]

43. Plaintiff admits this is a portion of Lemnios' memo. Plaintiff states, however, this memo is not related to the decision to terminate the plaintiff's employment. [Gil P162:L15-24] [Bellor P99:L16-100:L5][Lemnios P130:L14-P131:L4]

44. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff further states that Science and Technology as well as subparts of research constantly reorganized throughout the plaintiff's tenure in research. See Plaintiff's Statement of Facts for additional and more specific information.

45. Plaintiff admits the factual allegations set forth in this paragraph.

46. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, the fact that Lemnios was 62 years old is not relevant to the issues

concerning the termination of the plaintiff's employment. See Plaintiff's Statement of Facts and legal brief for additional and more detailed information as well as legal argument on this issue.

47. Plaintiff admits that Exhibit J is a copy of a series of emails on August 29, 2017.

48. Plaintiff admits that this is only a portion of this email exchange. Plaintiff states for a full understanding of this issue the court should read the full exchange of emails. In addition, see Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

49. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states the court, however, should read all of the attached emails for the proper context including the discussion between Schenfeld and Chiang concerning why Chiang was listed on the form rather than the new incoming Vice President, Lemnios. Plaintiff further states, however, that the facts and issues surrounding the Think Conference are not relevant to any issues concerning the termination of the plaintiff's employment. See attached documents, in particular an email exchanged in January 2017 between Zach Lemnios and Senior Vice President, John Kelly where there was an agreement that Schenfeld's research work would continue despite the fact his Think Conference presentation was canceled.

50. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, the court should read these emails in full for a proper understanding of the context of this statement.

51. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, the court should read these emails in full for a proper understanding of the context of this statement.

52. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information as well as plaintiff's brief and legal argument with respect to Schenfeld's role as a Research Staff Member.

53. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information as well as plaintiff's brief and legal argument with respect to Schenfeld's role as a Research Staff Member.

54. Plaintiff admits only that he was terminated before he could be part of the group of scientists who developed a working prototype with hardware cloud. See Plaintiff's Statement of Facts for additional and more detailed information including the fact that the defendants knew Power10 System was designed and placed on the market in 2021 it was designed consistent with various concepts Schenfeld had worked on so that it could in fact be used in a disaggregated environment. See attached documents evidencing the fact that the Research Division subsequent to the termination of the plaintiff's employ did in fact develop a working prototype of a disaggregated system. In addition, see Plaintiff's Statement of Facts where the Research Scientists and/or Staff Members who developed this working prototype specifically thanked Schenfeld for his prior research work.

55. Plaintiff admits Exhibit A is a copy of various emails as set forth in this paragraph.

56. Plaintiff admits only this was a portion of a series of emails exchanged. Plaintiff denies the facts set forth in this paragraph were discussed in these emails as relevant to the issues concerning the termination of the plaintiff's employment. See Plaintiff's Statement of Facts and attached documents, in particular the email exchange between Lemnios and Kelly in January of 2017 indicating Schenfeld's research work would continue. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

57. Plaintiff admits only that this is a portion of the discussion between Schenfeld and Lemnios that took place prior to the termination of the plaintiff's employment. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

58. Plaintiff admits this is a portion of the email exchange. Plaintiff denies the facts in this paragraph and/or these emails as related to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information. In addition, see Lemnios/Kelly email January 2017 stating plaintiff's research work would continue. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

59. Plaintiff admits this is a portion of the email exchange. Plaintiff denies the facts in this paragraph and/or these emails as related to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed

information. In addition, see Lemnios/Kelly email January 2017 stating plaintiff's research work would continue. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

60. Plaintiff admits this is a portion of the email exchange. Plaintiff denies the facts in this paragraph and/or these emails as related to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information. In addition, see Lemnios/Kelly email January 2017 stating plaintiff's research work would continue. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

61. Plaintiff admits the factual allegations set forth in this paragraph.

62. Plaintiff admits the factual allegations set forth in this paragraph.

63. Plaintiff admits that Exhibit B is a portion of emails related to the topic set forth in this paragraph.

64. Plaintiff admits this is a portion of the exchange of emails concerning the CORAL 2 proposal. See Plaintiff's Statement of Facts for additional and more detailed information.

65. Plaintiff admits this is a portion of the various emails set forth in this exhibit. See Plaintiff's Statement of Facts for additional and more detailed information.

66. Plaintiff admits this is a portion of the various emails set forth in this exhibit. See Plaintiff's Statement of Facts for additional and more detailed information.

67. Plaintiff admits this is a portion of the various emails set forth in this exhibit. See Plaintiff's Statement of Facts for additional and more detailed information.

68. Plaintiff admits this is a portion of the various emails set forth in this exhibit. See Plaintiff's Statement of Facts for additional and more detailed information.

69. Plaintiff admits Exhibit C are the emails described in this paragraph. Plaintiff denies that the facts set forth in this paragraph including January 5, 2018, email are related in any way to the termination of the plaintiff's employment. See Plaintiff's Statement of Facts and documents for additional and more detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

70. Plaintiff admits this is a portion of the email in Exhibit D. Plaintiff states that to understand the full context of this issue the court would need to read the entire set of emails set forth in Exhibit C and D. Plaintiff further states, however, this issue is not related in any way to the selection of the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts for additional and more detailed information. In addition, see deposition transcripts. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

71. Plaintiff admits that Exhibit E are the emails described in this paragraph. Plaintiff states, however, these issues are not relevant to the selection of the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts for additional and more detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

72. Plaintiff admits that Exhibit E are the emails described in this paragraph. Plaintiff states, however, these issues are not relevant to the selection of the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts for additional and more

detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

73. Plaintiff admits that Exhibit E are the emails described in this paragraph. Plaintiff states, however, these issues are not relevant to the selection of the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts for additional and more detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

74. Plaintiff admits that Exhibit E are the emails described in this paragraph. Plaintiff states, however, these issues are not relevant to the selection of the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts for additional and more detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

75. Plaintiff admits Exhibit H contains an email a portion of which is cited here in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information.

76. Plaintiff admits this paragraph sets forth a portion of what is in Exhibit I. See the various attached emails relevant to this issue. Plaintiff states, however, this email exchange is not relevant to the selection of the plaintiff in the defendant's 2018 Resource Action. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

77. Plaintiff admits this is a portion of what is said in the email exchange referenced in this paragraph. Plaintiff states, however, that the facts contained in this paragraph are not relevant to the selection of the plaintiff in the 2018 Resource Action. See

Plaintiff's Statement of Facts for additional and more detailed information. [Gil P162:L15-24] [Bellor P99:L16-P100:L5][Lemnios P130:L14-P131:L4]

78. Plaintiff admits this is a portion of what is set forth in Exhibit K. See the entire exhibit for the full context of the discussion. Plaintiff states, however, that the Think Conference 2018 is not related to the decision to terminate the plaintiff's employment. See attached email exchange between Lemnios and Senior Vice President John Kelly where there was an agreement that plaintiff's research work would continue. [Enc. 21]

79. Plaintiff admits the facts contained in this paragraph are a portion of what is in Exhibit L and a portion of various emails exchanged between Lemnios and Schenfeld in January 2018. See Plaintiff's Statement of Facts and additional and more detailed information.

80. Plaintiff admits this is a portion of what is set forth in the emails described in this paragraph. See the entire emails for full discussion. See the Plaintiff's Statement of Facts for more additional and detailed information.

81. Plaintiff admits that Exhibit M contains an email and three charts.

82. Plaintiff denies the factual allegations set forth in this paragraph.

83. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

84. Plaintiff admits Exhibit N contains an email described in this paragraph.

85. Plaintiff admits this is a portion of what is contained in the February 16, 2018, email as well as the other emails on this topic. The more accurate statement with respect

to this issue would be that Lemnios asked various individuals in addition to Schenfeld to prepare a one-page summary of their plans for 2018. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

86. Plaintiff admits Exhibit N contains the email described in this paragraph.

87. Plaintiff admits this is a portion of the plaintiff's deposition testimony. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

88. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

89. Plaintiff admits Exhibit Q is the email described in this paragraph.

90. Plaintiff admits this is a portion of what is set forth in the February 27, 2018, email. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

91. Plaintiff admits this is a portion of what Lemnios testified to at the time of his deposition. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

92. Plaintiff admits this is a portion of Lemnios' deposition testimony. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

93. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information including the

fact that by February 28th Schenfeld was already placed on the Resource Action list and this information was communicated to the project office. See Plaintiff's Statement of Facts and documents for additional information.

94. Plaintiff admits Exhibit R is the email described in this paragraph.

95. Plaintiff admits this is a portion of what is set forth in this email. See the entire email for the entire context of this discussion. In addition, see Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

96. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

97. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

98. Plaintiff admits only that research participated in the companywide 2018 Resource Action. Plaintiff denies the balance of the facts set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

99. Plaintiff admits that Regan as well as the Research Division participated in the companywide Resource Action in 2018. Plaintiff further admits Regan worked with various managers to develop a head count. See Plaintiff's Statement of Facts for additional and more detailed information including the fact that Lemnios was specifically excluded

from this group of managers since he was going to *"winding down his shop."* See attached documents in particular email exchange between Romine and Regan. [Enc.37]

100. Plaintiff admits that corporate finance authorized research to proceed with their target number of 21. See Plaintiff's Statement of Facts for additional and more detailed information including various aspects of Thomas Erickson's deposition testimony relevant to this procedure. [Enc. 36]

101. Plaintiff admits the evidence demonstrates over the next few weeks Gupta, Vandebroek and Gil identified employees. Plaintiff denies this identification was preliminary. In addition, see Plaintiff's Statement of Facts and attached documents demonstrating the manner in which the defendant's conducted this selection process in direct violation of the procedures established by IBM. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

102. Plaintiff admits that on February 20, 2018, Gil suggested that Schenfeld's employment be terminated in the Resource Action. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

103. Plaintiff admits Lemnios objected to eliminating Schenfeld's work. See Plaintiff's Statement of Facts and additional documents for a detailed discussion on this issue.

104. Plaintiff denies the factual allegations set forth in this paragraph. Plaintiff admits that Schenfeld and Lemnios were having discussions concerning his 2018 work, however, see Plaintiff's Statement of Facts for additional and more detailed information

which demonstrates the plaintiff was working on long term research projects for IBM for many years, with the specific approval of upper management. [Enc.25,26]

105. Plaintiff admits on February 2018 Gupta reviewed a list of employees selected for the Resource Action with Arvind Krishna. Plaintiff denies this was a preliminary list. See Plaintiff's Statement of Facts and attached documents. In particular, see Gupta's email indicating this was a *"final list."* [Enc.14,18]

106. Plaintiff admits this was a portion of Gupta's February 22, 2018, email. See Plaintiff's Statement of Facts for a more detailed discussion concerning the fact that Krishna made the decision to place Schenfeld on the final list, which is ultimately submitted to the project office. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.[Enc.17]

107. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts for additional and more detailed information including Lemnios' specific March 6, 2018, email to John Kelly. See Lemnios' March 22, 2018, email to John Kelly. [Enc.17]

108. Plaintiff admits that on March 1, 2018, Bellor sent a Resource Action worksheet with positional elimination to the project office and copied Lemnios. See Plaintiff's Statement of Facts for additional and more detailed information including the more detailed discussion on the various worksheets, the process involved as well as the missing initial February 28, 2018, worksheet.[Enc.6,7]

109. Plaintiff admits this is a portion of the IBM guidelines. See Plaintiff's Statement of Facts and additional documents for a more detailed discussion on this issue. [Enc. 12][See Plaintiff's Statement of Facts, Para.70-98]

110. Plaintiff admits only that on March 2, 2018, Bellor submitted an additional worksheet indicating work elimination. See Plaintiff's Statement of Facts and more detailed discussion concerning the issue of the various worksheets. [See Plaintiff's Statement of Facts Para. 70-98]

111. Plaintiff admits only that this is a portion of the IBM guidelines involving the 2018 Resource Action. [Enc.12]

112. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed discussion.

113. Plaintiff admits that Lemnios had meetings with Kelly and Krishna to discuss the plaintiff's termination. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

114. Plaintiff admits that Lemnios had a meeting with Kelly seeking Kelly's advice on what to do with Eugen Schenfeld. Plaintiff states this is a portion of Lemnios' email to Kelly. See Plaintiff's Statement of Facts and attached documents for a more detailed discussion on this issue.

115. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

116. Plaintiff admits the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

117. Plaintiff admits that this is a portion of the Lemnios letter to Schenfeld. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

118. Plaintiff admits only that he did not formally apply for any open positions. Plaintiff made specific efforts to seek other employment within IBM including having specific conversation with Senior Vice President John Kelly. See Plaintiff's Statement of Facts and attached documents.[Enc.42]

119. Plaintiff admits that he discuss with various individuals and sent various emails to the individuals identified in this paragraph about positions within IBM. Plaintiff denies these were informal and states that this was the proper method for seeking employment within the company with individuals who knew the plaintiff's work. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

120. Plaintiff denies Rosenfield, and Sexton had no open positions. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

121. Plaintiff admits there is no evidence in the record indicating Pacifici and O'Connell responded to the plaintiff's request for employment opportunities. See Plaintiff's Statement of Facts and attached documents for additional information.

122. Plaintiff admits he was one of 21 employees identified in the 2018 Resource Action. Plaintiff states CDRS is not a business unit within IBM but rather an acronym allowing IBM to make an administrative designation of various aspects of the 2018 Resource Action. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

123. Plaintiff admits the facts set forth in this paragraph are in Bellor's certification. Plaintiff denies these facts are specifically relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts and attached documents in particular see detailed statistical analysis. [Enc.9,10]

124. Plaintiff admits these facts were contained in Bellor's certification. Plaintiff states these facts are not relevant to the decision to select the plaintiff for the 2018 Resource Action. See Plaintiff's Statement of Facts and attached documents including but not limited to plaintiff's statistical analysis. [Enc. 9,10]

125. Plaintiff admits this information is contained in the Toch certification. See Plaintiff's Statement of Facts and attached documents including but not limited to the plaintiff's statistical analysis for additional and more detailed information.

126. Plaintiff admits only that he has no evidence that any one specifically replaced him in Physical Science and Government Programs. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information including the fact that Physical Science and Government Programs was eliminated and all other employees with the exception of Schenfeld were placed somewhere else within the Research Division.

127. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, these facts are not relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information.

128. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, these facts are not relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information.

129. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, these facts are not relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information.

130. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff states, however, these facts are not relevant to the decision to terminate the plaintiff's employment. See Plaintiff's Statement of Facts for additional and more detailed information.

131. Plaintiff admits the factual allegations set forth in this paragraph. See, however, Plaintiff's Statement of Facts and attached documents for additional information including the statement made by the defendants that some of the theoretical concepts of the plaintiff were incorporated in the development of POWER10.

132. Plaintiff denies the factual allegations set forth in this paragraph. See Plaintiff's Statement of Facts and documents for additional and more detailed information.

133. Plaintiff admits only that this was a statement made by Lemnios in his certification. Plaintiff states, however, Lemnios has no factual basis to make this statement since he admitted he was unfamiliar with various patent work done by the plaintiff. [Lemnios P] See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

134. Plaintiff admits the fact that he was 59 when selected for termination and 60 when his employment was terminated. The plaintiff denies that the acronym CDRS is in any way relevant to any issues in this litigation. This is simply a term developed by IBM. CDRS is not any form of business unit or organization at IBM. See Plaintiff's Statement of Facts for additional and more detailed information.

135. Plaintiff did not file a charge with the EEOC. This fact is not relevant to any issues in this litigation.

136. Plaintiff admits that this was a statement made by Alison Marshall. Plaintiff denies, however, that the Equal Employment Opportunity Commission investigation of IBM related to various charges and various divisions within the United States is not related to the issues in this litigation. See Plaintiff's Statement of Fact, see plaintiff's statistical analysis and legal brief for additional and more detailed information.

137. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff denies, however, that this in any way relevant or dispositive of whether or not the EEOC investigation is relevant to issues in this litigation. See Plaintiff's Statement of Facts, statistical analysis, and legal brief for additional and more detailed information on this issue.

138. Plaintiff admits the factual allegations set forth in this paragraph. Plaintiff denies, however, that this in any way relevant or dispositive of whether or not the EEOC investigation is relevant to issues in this litigation. See Plaintiff's Statement of Facts, statistical analysis, and legal brief for additional and more detailed information on this issue.

139. Plaintiff admits this information was produced by the defendants in discovery. See Plaintiff's Statement of Facts in particular plaintiff's statistical analysis demonstrating the relevancy of this issue in this litigation.

140. Plaintiff denies the factual allegations set forth in this paragraph. CDRS is not a business unit with any type at IBM, but an artificial acronym created by IBM. See Plaintiff's Statement of Facts and legal brief for additional and more detailed information.

141. Plaintiff admits the factual allegations set forth in this paragraph.

142. Plaintiff admits Exhibit A is the email described in this paragraph.

143. Plaintiff denies the factual allegations set forth in this paragraph. In addition, plaintiff states the facts set forth in this paragraph are not in any way related to the issues in this litigation.

144. Plaintiff admits this is a portion of what is set forth in the email described in this paragraph. See Plaintiff's Statement of Facts and attached documents as well as plaintiff's legal brief for more additional information with respect to these facts.

145. Plaintiff admits this is a portion of the email described in this paragraph. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

146. Plaintiff admits this is a portion of the email exchanged between Kelly and Sexton relevant to the plaintiff seeking employment at IBM. See Plaintiff's Statement of Facts, attached documents and legal brief for additional and more detailed information.

147. Plaintiff admits he sent an email to Larry O'Connell who was the Senior State Executive in New Jersey looking for a position in New Jersey with IBM. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

148. Plaintiff admits the factual allegations set forth in this paragraph.

149. Plaintiff admits the factual allegations set forth in this paragraph.

150. Plaintiff admits the factual allegations set forth in this paragraph. These facts are not relevant to any issues in this litigation. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

151. Plaintiff admits that he is not a software programmer or engineer. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

152. Plaintiff admits this is a portion of the plaintiff's testimony. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

153. Plaintiff admits this is a portion of the plaintiff's testimony. See Plaintiff's Statement of Facts and attached documents for additional and more detailed information.

154. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of John Kelly on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

155. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of Zachary Lemnios on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

156. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of Larry O'Connell on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

157. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of Michael Rosenfield on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

158. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of James Sexton on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

159. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of Giovanni Pacifici on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

160. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of James Stathis on March 31, 2018, is not relevant to any issues in

this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

161. Plaintiff admits this information was contained in the Toch certification. Plaintiff states the age of James Speidell on March 31, 2018, is not relevant to any issues in this litigation. See Plaintiff's Statement of Facts, attached documents and legal brief for additional information.

CAHN & PARRA, INC.
Attorney for Plaintiff

By: _____
STEVEN D. CAHN, ESQ.

Dated: October 26, 2021