

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: )  
IBM ARBITRATION AGREEMENT )  
LITIGATION )  
) 21-CV-6296 (JMF)  
) 21-CV-6297 (JMF)  
) 21-CV-6308 (JMF)  
) 21-CV-6310 (JMF)  
) 21-CV-6312 (JMF)  
) 21-CV-6314 (JMF)  
) 21-CV-6320 (JMF)  
) 21-CV-6322 (JMF)  
) 21-CV-6323 (JMF)  
) 21-CV-6325 (JMF)  
) 21-CV-6326 (JMF)  
) 21-CV-6331 (JMF)  
) 21-CV-6332 (JMF)  
) 21-CV-6337 (JMF)  
) 21-CV-6340 (JMF)  
) 21-CV-6341 (JMF)  
) 21-CV-6344 (JMF)  
) 21-CV-6349 (JMF)  
) 21-CV-6351 (JMF)  
) 21-CV-6353 (JMF)  
) 21-CV-6355 (JMF)  
) 21-CV-6375 (JMF)  
) 21-CV-6377 (JMF)  
) 21-CV-6380 (JMF)  
) 21-CV-6384 (JMF)

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**PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

**I. INTRODUCTION**

Plaintiffs<sup>1</sup> hereby move to submit the Proposed Amended Complaint (attached as

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<sup>1</sup> All Plaintiffs seek to assert the additional fraudulent inducement claim included in the Proposed Amended Complaint (attached hereto as Exhibit A). Plaintiffs seek to designate William Abt as the lead Plaintiff and class representative for this purpose, and the Proposed Amended Complaint states facts specific to Plaintiff Abt. This matter consists of approximately twenty-six (26) individual matters that have been administratively related and collectively designated In Re: IBM Arbitration Agreement Litigation, C.A. No. 21-cv-06296-JMF. The Court has administratively closed all but the

Exhibit A) against Defendant International Business Machines Corp. (“IBM” or “Defendant”) to add a claim for fraudulent inducement. Plaintiff Abt brings this claim of fraudulent inducement on behalf of a class of similarly situated employees under Fed. R. Civ. P. 23. The fraudulent inducement claim is brought as a class action, or alternatively, as individual actions by these Plaintiffs (in the above-captioned consolidated matter). The Declaratory Judgment action is brought as individual actions by all these Plaintiffs.

As explained below, Plaintiffs’ request is made in good faith and will not cause undue delay or prejudice to IBM, as no discovery has begun. Indeed, granting Plaintiffs’ leave to amend is an especially simple decision given that identical fraudulent inducement claims will be proceeding before this Court in the “second wave” cases, which have been amended as matter of right. See Gilmore v. IBM, 1:21-cv-09574 (JMF), Dkt. 16 (Gilmore is the lead case in the second wave, which the Court has now re-captioned as In Re: Second Wave IBM Arbitration Agreement Litigation, 1:21-cv-09574 (JMF)). Thus, permitting Plaintiff to amend here will require no more discovery and no additional judicial resources. Indeed, Plaintiffs will be relying on common evidence to prove their claims, which is precisely why Plaintiffs should be permitted to pursue this claim on a classwide basis. However, in the event Plaintiffs’ putative class

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lead case (brought by William Chastka) in that coordinated set of actions. In this proposed Amended Complaint (that is intended to apply generally to the Plaintiffs in all these related cases), Plaintiff Abt would now be the lead plaintiff in the lead case for the claims in these related cases. But regardless of whether this claim is ultimately certified as a class action, both the fraudulent inducement claim and the Declaratory Judgment Act claim are intended to be brought individually by all Plaintiffs in the related actions consolidated in In Re: IBM Arbitration Agreement Litigation.

is not ultimately certified, it is important that Plaintiff Abt and the “first wave” Plaintiffs have the opportunity to assert their claim before this Court on individual bases.

Moreover, submission of this Amended Complaint is not intended to delay the Court’s consideration of Plaintiffs’ Motion for Summary Judgment (Dkt. 27), which is currently fully briefed before the Court. Plaintiffs believe that the Court should decide their Motion for Summary Judgment, and then the parties can proceed with discovery with respect to their fraudulent inducement claim. Therefore, the Court should permit the filing of the Amended Complaint under the liberal Fed. R. Civ. P 15(a) standard.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 15(a) provides that leave to amend “shall be freely granted when justice so requires.” Grounds for a denial of a motion to amend include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment[.]” Foman v. Davis, 371 U.S. 178, 182 (1962). “Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that a court ‘should freely give leave [to amend] when justice so requires.’ ” Gorman v. Covidien Sales, LLC, 2014 WL 7404071, at \*2 (S.D.N.Y. Dec. 31, 2014) (quoting Fed. R. Civ. P. 15(a)(2)). Consistent with this liberal amendment policy, “[t]he rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.’ ” Id. (alteration in Gorman) (quoting Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)); see also Shipner v. E. Air Lines, Inc., 868 F.2d 401, 407 (11th Cir. 1989) (“Th[e] policy of rule 15(a) in liberally permitting amendments to facilitate determination of claims on the

merits circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial.”).

### III. RELEVANT BACKGROUND

As set forth within the Proposed Amended Complaint (Exhibit A), IBM communicated to Plaintiffs and other similarly situated employees that the reason for their terminations (or events that led to their constructive discharge) were based upon legitimate, non-discriminatory reasons, rather than based on their age. (Proposed Am. Compl. ¶¶ 5-6, Exhibit A.) However, as set forth below, in fact, IBM has been engaging in a years-long effort to oust older employees from the workplace in order to make room for younger employees and thereby build a younger workforce. (Proposed Am. Compl. ¶¶ 16-19, Exhibit A.) Had Plaintiffs and other similarly situated employees known that the true reason for their discharge (or the events that led to their constructive discharge) was actually rooted in age discrimination (in particular, the desire of IBM's CEO and other top executives to shift the demographics of the company toward younger employees), they would not have signed the agreement that has relegated their pursuit of ADEA claims to individual confidential arbitration, where IBM has impeded their ability to pursue their claims as fully as they would have been able to in court. (Proposed Am. Compl. ¶¶ 6, 56, Exhibit A.)

In addition, IBM fraudulently induced Plaintiff Abt and other Plaintiffs to sign the arbitration agreement based upon misstatements that the employees would only receive COBRA benefits, upon their separation from IBM, if they signed the agreement. (Proposed Am. Compl. ¶¶ 5-6, 55, Exhibit A.) Receipt of COBRA benefits (which allow

employees to maintain health insurance after they leave a job) is a right that employees have that is not and cannot be contingent on signing a severance agreement.

(Proposed Am. Compl. ¶ 6, Exhibit A.) However, IBM knowingly misled employees into believing they could only maintain their health care coverage, through COBRA, by signing the agreement (which contained the arbitration clause). (Proposed Am. Compl. ¶¶ 5-6, 55, Exhibit A.) Had Plaintiff Abt and other Plaintiffs understood that they could maintain their health insurance through COBRA without signing the agreement, they would not have signed the agreement and thereby relegated their pursuit of ADEA claims to individual confidential arbitration, where IBM has impeded their ability to pursue their claims as fully as they would have been able to in court. (Proposed Am. Compl. ¶ 6, Exhibit A.)

In 2012, Virginia (“Ginni”) Rometty became the President and CEO of IBM. (Proposed Am. Compl. ¶ 37, Exhibit A.) In approximately June 2013, Ms. Rometty promoted a senior human resources executive, Diane Gherson, to the position of Senior Vice President and Chief Human Resources Officer. (Proposed Am. Compl. ¶ 38, Exhibit A.) Ms. Gherson communicated directly and frequently with Ms. Rometty and was responsible for implementing and executing Ms. Rometty’s policies and agenda concerning the structuring of IBM’s workforce. (Proposed Am. Compl. ¶ 38, Exhibit A.)

Ms. Rometty desired to aggressively alter the age demographics of IBM’s workforce by targeting older workers for adverse employment actions, such as layoff programs (referred to as “Resource Actions” at IBM), as well as other actions that were intended to lead to their termination or constructive discharge (such as giving employees the “option” of continuing their employment by relocating across the country,

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