No. 15-3540

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Elizabeth McLeod, et al.,

Plaintiffs-Appellees,

v.

General Mills, Inc.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civ. No. 15-cv-494 (JRT/HB)
Chief Judge John R. Tunheim

APPELLEES' BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal arises from an Age Discrimination in Employment Act (ADEA) action in which the Plaintiffs challenge the validity of Release Agreements obtained by Appellant General Mills after a company-wide layoff. The Plaintiffs assert that General Mills secured the Release Agreements without complying with the "knowing and voluntary" requirements of the Older Workers Benefit Protection Act (OWBPA).

General Mills' interlocutory appeal challenges a narrow ruling in which the district court enforced the congressional command of 29 U.S.C. § 626(f)(3) that "the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that the waiver was knowing and voluntary." General Mills argues on appeal that the highlighted statutory language is superfluous and that the validity of the disputed releases of claims can only be resolved by arbitration. General Mills bases its appeal on an arbitration provision within the Release Agreements that is limited in scope to disputes about a "release of claims" in that same document, which is exactly the type of dispute that Congress specifically commanded must be resolved by a court in an ADEA case.

This Court should affirm and remand for further proceedings.

Plaintiffs respectfully request 15 minutes for oral argument.

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STATEMENT OF THE ISSUES

1. Was the district court correct in following the plain language of the Older Workers Benefit Protection Act (OWBPA) that "the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction" that the waiver was "knowing and voluntary"?

Apposite statutory provision

- 29 U.S.C. § 626(f)(3).

Apposite cases

- *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).
- *Thomforde v. Int'l Bus. Mach. Corp.*, 406 F.3d 500 (8th Cir. 2005).

2. Does the plain language of the OWBPA require that, when a waiver of an employee's right to a jury trial in an arbitration provision is part of an agreement by which that employee must also waive any claims under the ADEA, the waiver of the right is effective only if it were "knowing and voluntary," as is true for the waiver of claims?

Apposite statutory provision

- 29 U.S.C. § 626(f)(1).

Apposite cases

- *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).
- *Thomforde v. Int'l Bus. Mach. Corp.*, 406 F.3d 500 (8th Cir. 2005).

STATEMENT OF THE CASE

A. Procedural history.

On February 11, 2015, 14 persons commenced this action.[1] They alleged that General Mills improperly terminated their employment due to their ages, in violation of the ADEA.[2]

On March 26, 2015, the Plaintiffs filed an Amended Complaint, which added 19 additional Plaintiffs.[3] Five additional Plaintiffs have since opted into the action by filing Consent forms.[4]

The district court described the allegations in the Amended Complaint as follows:

> Specifically, the amended complaint, like the initial complaint, asserts the following five counts: (1) ADEA declaratory judgment claim, seeking a declaration that the release agreements are unenforceable because they were not signed "knowingly and voluntarily" by the plaintiffs as prescribed by the ADEA and the OWBPA; (2) ADEA collective action claim, alleging disparate treatment age discrimination; (3) ADEA individual claims, alleging disparate treatment age discrimination; (4) ADEA collective action claims, alleging disparate impact age discrimination; and (5) ADEA individual claims, alleging disparate impact age discrimination.[5]

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1 Add.7 & Add.2 n.1.

2 Add.7.

3 *Id.*

4 Dkt. Nos. 30-33 & 59. (Unless otherwise noted, citations to docket entries refer to the district court's docket. *See* Fed. R. App. P. 28(e).)

5 Add.7-8.

On April 9, 2015, General Mills filed an amended motion to dismiss and compel arbitration under Rule 12(b)(1).[6] The district court denied General Mills' motion in its Order of October 23, 2015 ("Order").[7]

The district court held that, "[b]ecause the language of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), specifically 29 U.S.C. § 626(f)(3), mandates that a dispute like this one be heard in a 'court of competent jurisdiction,' the Court will deny General Mills' motion …."[8] After an in-depth analysis of the statutory language and legislative history of § 626(f)(3), the district court stated:

> The Court … concludes that the plain language of Section 626(f)(3) requires General Mills to defend the validity of the plaintiffs' release agreements in court, not in an arbitral forum. It is a contrary congressional command precluding arbitration in the narrow circumstances presented in this case: a dispute over the validity of a waiver of substantive claims under the OWBPA's waiver requirements found in Section 626(f)(1).[9]
>
> ***
>
> The Court presumes Congress intended to give different words different meaning, and that where a word like "shall" is included in some provisions and not others, that choice was deliberate.[10]
>
> ***

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6 A149.

7 Add.22.

8 *Id.* at 2-3.

9 *Id.* at 18.

10 *Id.* at 19.

> Thus, the plain language of Section 626(f)(3) clearly mandates that a dispute over the validity of a waiver of substantive claims or rights under the OWBPA, like in this case, shall be heard by a court, not an arbitral forum.[11]
>
> ***
>
> This [legislative] history, combined with the language of Section 626(f)(3), makes clear that, in the narrow circumstances of cases like this one, an arbitration provision is precluded. As a result, the Court will deny General Mills' motion to dismiss and compel arbitration and, instead, will allow this case to proceed for further motion practice and an eventual determination by the Court as to whether the release agreements at issue comply with the waiver provisions of the OWBPA at Section 626(f)(1).[12]

On November 3, 2015, General Mills filed an appeal from the Order.

On November 4, 2015, General Mills filed in the district court an "Expedited Motion to Stay All District Court Proceedings Pending Appeal."[13] The district court denied that motion, noting "the narrow circumstances of cases like this one."[14]

On November 10, 2015, Plaintiffs moved the district court for partial summary judgment declaring that the waiver of claims in the Release Agreements was not valid as a matter of law as to ADEA claims because General Mills could

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11 *Id.* at 20.

12 *Id.* at 21-22 (footnote omitted).

13 Dkt. 60.

14 A244.

not establish that the waivers were "knowing and voluntary."[15] General Mills has not responded to that motion.

On November 20, 2015, General Mills moved this Court for a stay pending its appeal, and its motion was granted.[16]

B. Applicable facts.[17]

In June 2012, General Mills announced a mass layoff of about 850 employees. The layoffs were part of a company-wide initiative called "Project Refuel."[18]

The named Plaintiffs and other similarly situated employees who were age 40 or over and who were involuntarily terminated from employment with General Mills in connection with Project Refuel were victims of an alleged pattern or practice of age discrimination by General Mills.[19]

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15 Dkt. 72.

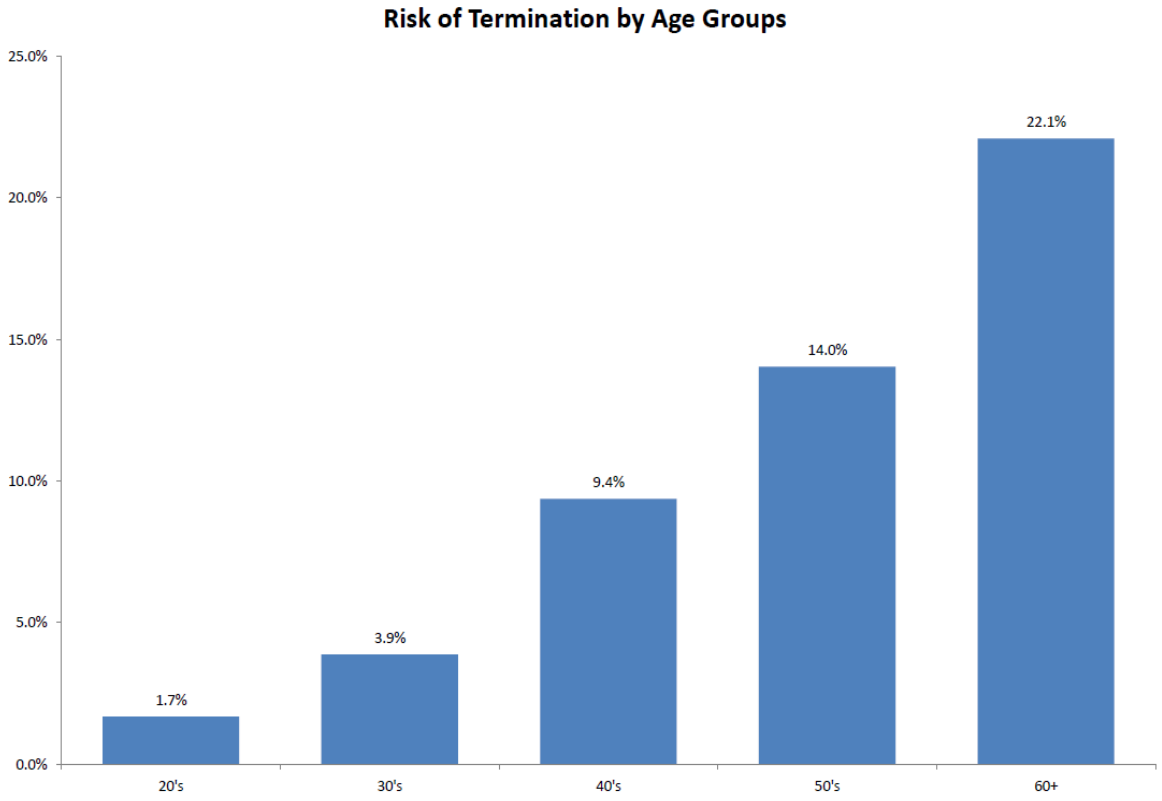
16 A245.

17 On a facial attack of subject matter jurisdiction under Rule 12(b)(1), "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Osborn v. U.S.*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Thus, the Court must "accept all facts pled by the nonmoving party as true and draw all reasonable inferences from the facts in favor of the nonmovant." *Waldron v. Boeing Co.*, 388 F.3d 591, 593 (8th Cir. 2004).

18 A94, ¶ 2.

19 A142, ¶ 254.

The Project Refuel terminations predominantly adversely affected employees age 40 or over while General Mills disproportionately retained younger employees.[20] The rates of termination increased by steps with age—i.e., the older each employee was, the greater his/her risk of being terminated:[21]



Combining data provided by General Mills to employees terminated in Project Refuel, a p-value can be calculated to ascertain the chance that this correlation between age and rates of termination could have occurred if age (or a factor closely correlated with age) were not used as a factor in the termination

[20] A110, ¶ 72.

[21] A116, ¶ 88.

selections. The p-value for the Project Refuel data is only 8.6×10^{-45} (i.e., 0.00000000000000000000000000000000000000000086), calculated by the Fisher exact test.[22] Professional statisticians consider p-values smaller than 0.05 to be statistically significant and p-values smaller than 0.01 to be highly statistically significant.[23]

While the Project Refuel terminations were occurring, General Mills posted notices for open positions from which older employees were being terminated. General Mills filled many of these open positions with new hires who were younger than the terminated employees who had been performing those jobs.[24] General Mills directed some of the Plaintiffs, as well as others similarly situated who also were discharged as part of Project Refuel, to train their younger replacements.[25]

C. The limited arbitration provision.

In connection with Project Refuel, after the employees were informed of their terminations, General Mills told the employees that they were ineligible to

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22 *Id.* at ¶ 89.

23 A117, ¶ 90.

24 A111, ¶ 73.

25 *Id.* at ¶ 74.

receive any severance pay unless they signed a "Release Agreement" form.[26] Those forms were drafted by General Mills.

In seeking to secure the employees' signatures on its Release Agreement, General Mills provided the Plaintiffs and others similarly situated with misleading and inaccurate information.[27] The Release Agreements signed by the named Plaintiffs and by other similarly situated persons were not "knowing and voluntary" under the standards set forth in the OWBPA.[28]

Thirty-seven of the 38 Plaintiffs in this action signed the GMI Release Agreement. Plaintiff Dara Walter did not.[29]

The Release Agreement form, in its second paragraph, "contains a broad release from all causes of action or claims against General Mills, including claims arising under the ADEA."[30] In applicable part, it reads:

> I hereby release [General Mills] . . . from all causes of action, claims, debts or other contracts and agreements which I . . . may have for any cause up to this date, including, but not limited to, any and all claims directly or indirectly relating to my employment, or to my separation from employment. This release includes any and all claims under federal, state, and local laws prohibiting employment discrimination, harassment or retaliation, and specifically includes, without limitation,

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26 A113, ¶ 79.

27 *See* A114, ¶¶ 80-84.

28 *See* A115, ¶ 85; A140, ¶ 249.

29 Dkt. 77-1 at 5.

30 Add.6.

> claims arising under the Age Discrimination In Employment Act . . . [and the] Older Workers Benefit Protection Act . . . .[31]

The Release Agreement also includes an arbitration provision, found in the fourth paragraph, which acted as a backstop to the release of claims.[32] In contrast to the broad release of claims, the arbitration provision is limited in scope to "any dispute or claim arising out of or relating to the above release of claims":

> I agree that, in the event there is any dispute or claim arising out of or relating to **the above release of claims**, **including**, without limitation, any dispute about the validity or enforceability **of the release** or the assertion of any claim covered **by the release**, all such disputes or claims will be resolved exclusively through a final and binding arbitration on an individual basis and not in any form of class, collective, or representative proceeding.[33]

The arbitration provision expressly states that, "it is not intended to cover claims that cannot by law be required to be arbitrated."[34]

There is no other arbitration provision applicable to this case.

The Plaintiffs' ADEA claims set forth in Counts II-V of the Amended Complaint do not arise out of or relate to the "release of claims" in the Release Agreement. Those counts arise from the Plaintiffs' terminations, which occurred before the Release Agreements were provided to the employees or signed.[35]

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31 Add.23.

32 *Id.*

33 *Id.* (emphasis added).

34 *Id.*

35 A143-46, ¶¶ 256-57, 262-63, 270, 276.

D. Misstatements in General Mills' Principal Brief.

General Mills' Principal Brief is replete with misstatements of the record. Some of the more egregious examples are these:

- General Mills states it moved to enforce Plaintiffs' "agreements to arbitrate any claims against General Mills in individual proceedings,"[36] yet there are no such agreements—the only arbitration provision in this case is limited by its terms to claims arising out of "the above release of claims" in the Release Agreements.
- General Mills states that Plaintiffs opposed General Mills' motion by "arguing that the ADEA overrode the FAA,"[37] yet Plaintiffs made no such argument—Plaintiffs asserted then and assert now that the district court's Order is consistent with both the ADEA and the FAA.
- General Mills further asserts that, "[t]he district court made no attempt to reconcile its decision to the holdings of *CompuCredit* and the cases its cites,"[38] but, again, that is a misstatement—the district court thoroughly analyzed *CompuCredit* and the cases it cites at pages 17-19 of its Memorandum Opinion.[39]

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36 Appellant's Principal Brief ("GMI Br.") at 4.

37 *Id.*

38 *Id.* at 22 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)).

39 Add.17-19.

SUMMARY OF ARGUMENT

This Court should affirm the district court's narrow ruling, which correctly followed the express mandate of Congress in the OWBPA (29 U.S.C. § 626(f)(3)) that an employer "shall" prove the validity of a waiver of ADEA claims "in a court of competent jurisdiction."

Congress enacted the OWBPA to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.

Congress placed the burden of proving the validity of a disputed waiver of "any right or claim" under the ADEA on the party asserting the waiver, and it further directed that such a showing "shall" be made "in a court of competent jurisdiction." 29 U.S.C. § 626(f)(3)).

General Mills' response to the plain statutory text is to ignore the words "in a court of competent jurisdiction" within that provision, an approach that must be rejected. Courts must enforce plain and unambiguous statutory language. A cardinal principle is that a statute ought to be construed such that no clause, sentence, or word shall be superfluous, void or insignificant.

By adopting § 626(f)(3), Congress did not expressly bar arbitration of ADEA claims, but rather mandated only that a court decide a threshold issue that arises only in a subset of ADEA disputes, i.e., those in which the employer asserts,

and an employee disputes, that the employee has waived a right or claim under the ADEA.

Section 626(f)(3) is a contrary congressional command precluding arbitration in the narrow circumstances of this case. Congress evinced its intention that challenges to the validity of a disputed waiver of "any right or claim" under the ADEA must be adjudicated in a court. The congressional intention is also discoverable from the legislative history of the OWBPA.

General Mills concedes that a waiver of ADEA claims must satisfy the OWBPA "knowing and voluntary" requirements to be valid. In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court made clear that the OWBPA is a mandatory stricture on ADEA waivers and is subject to no exceptions or qualifications. General Mills nevertheless asks this Court to ignore the express language of the OWBPA that the validity of disputed waivers of ADEA claims is to be decided by a court.

This case is readily distinguishable from the cases upon which General Mills relies. Here the arbitration provision was not a "prospective" waiver of an employee's right to a jury trial. Moreover, the employees could accept the arbitration provision *only* if they also waived all claims against General Mills.

Neither General Mills nor its aligned *amici* have cited a single case in which any court failed to apply the plain language of § 626(f)(3) to a dispute about the validity of a waiver of accrued ADEA claims, such as the instant case.

The district court's Order does not reflect any hostility toward arbitration, just fidelity to plain statutory text. The Order does not preclude arbitration of ADEA claims. The district court also did not, as General Mills suggests, base its reasoning on an unsupported definition of the term "court of competent jurisdiction."

General Mills' request for relief on appeal also contradicts the express language of the very arbitration provision that it seeks to enforce. That provision is limited in scope to disputes arising out of "the above release of claims" in the Release Agreements. Counts II-V of Plaintiffs' Amended Complaint assert ADEA claims that accrued before the Release Agreements were provided or signed and are outside the scope of the arbitration provision. If General Mills contends otherwise, this Court should return the case to the district court to rule on the scope of the arbitration provision. The FAA does not expand the range of claims subject to arbitration beyond what is provided for in the agreement.

Finally, while the district court denied General Mills' motion based on the plain language of § 626(f)(3) of the OWBPA, Plaintiffs submit that § 626(f)(1) provides a separate, and independent, statutory basis that supports the same result.

The district court applied the plain language of the OWBPA to the narrow circumstances of this case. The Order should be affirmed.

ARGUMENT

I. The District Court Correctly Applied Clear and Unambiguous Statutory Language in Holding that a Court Must Decide Whether the Purported Waivers of ADEA Claims were "Knowing and Voluntary."

A. The district court followed the OWBPA statutory language.

Congress enacted the OWBPA provisions related to waivers to ensure "that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." S. Rep. No. 101-263, at 5 (1990), reprinted in part in 1990 U.S.C.C.A.N. 1509, 1510.

As this Court has noted, in the OWBPA, "Congress addressed employers' attempts to pressure departing workers into waiving their right to bring an ADEA claim in exchange for a severance or settlement agreement." *Parsons v. Pioneer Seed Hi-Bred Int'l, Inc.*, 447 F.3d 1102, 1104 (8th Cir. 2006) (citing *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir.1997) (explaining the legislative history leading to the enactment of the OWBPA), *cert. denied* (1998)). Thus, the OWBPA was adopted expressly for settings like the instant case, involving a group termination of employees who were asked to waive claims under the ADEA as a condition of receiving any severance pay.

The statutory scheme adopted by Congress in the OWBPA is clear and straightforward:

- "An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1).

- "[A] waiver may not be considered knowing and voluntary unless at a minimum --" it satisfies all the requirements listed at subparagraphs (A) through (H) of § 626(f)(1). *Id*.

- "In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)." 29 U.S.C. § 626(f)(3) (emphasis added).

The seminal case concerning the OWBPA requirements for ADEA waivers is *Oubre*, 522 U.S. 422, which held:

> "The statutory command is clear: employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements." *Id.* at 426-27.
>
> "The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word." *Id.* at 427.
>
> "The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications." *Id.* (emphasis added).

Although General Mills has conceded that the OWBPA governs the purported waivers of ADEA claims in the Release Agreements, neither General Mills nor its aligned *amici* discuss, or even cite, *Oubre* in their briefs. None of the cases they do cite involved, as is true in the instant case, a purported waiver of actual and accrued ADEA claims.

Since *Oubre* was decided, this Court has cited and followed its holding. In *Thomforde*, 406 F.3d at 503, this Court confirmed that the OWBPA requirements for ADEA waivers are "strict and unqualified," and held that the ADEA waiver at issue was invalid because it was "not 'written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.'"

In *Thomforde*, this Court also recognized that an employee has the right under law "to challenge the validity of an ADEA waiver in court." 406 F.3d at 504. On this point, this Court cited an EEOC regulation on the subject of ADEA waivers, 29 C.F.R. § 1625.23(b),[40] which states:

> "No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement." 29 C.F.R. § 1625.23(b).

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[40] In the ADEA, the EEOC was charged by Congress with enforcement of the ADEA and OWBPA. *See* 29 U.S.C. § 628 (directing that EEOC "may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter").

This Court found that the "intended effect" of the agreement at issue in *Thomforde* was that the employee had released his "substantive claims" under the ADEA, but had preserved his "right to challenge *the validity* of the release through a lawsuit, *as provided by the regulations*." 406 F.3d at 504 (emphasis added) (citing 29 C.F.R. § 1625.23(b)). The district court's Order in the instant case permits this right to be exercised.

The EEOC has issued written commentary related to the regulation cited by this Court in *Thomforde*, 29 C.F.R. § 1625.23(b). In the year 2000, the EEOC explained:

> "Employers must therefore take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA. By investing 'court[s] of competent jurisdiction' with the authority to resolve 'any dispute that may arise over *** the validity of a waiver,' Congress manifested in the plain language of the statute its intention to permit an employee who signed an ADEA waiver, to sue his or her employer upon the belief that the waiver did not comply with the OWBPA. Thus, any provision in a waiver agreement that would cause an employee to believe that he or she could not seek a judicial determination of the validity of the waiver misrepresents the rights and obligations of the parties to the agreement. Such a misrepresentation conflicts with the OWBPA requirement that a valid waiver agreement must be written in a manner calculated to be understood by the employee or by the average individual eligible to participate. 29 U.S.C. § 626(f)(1)(A)." *Waivers of Rights and Claims: Tender Back of Consideration*, 65 Fed. Reg. 77438, 77444 (Dec. 11, 2000) (emphasis added).

The Supreme Court has held that an agency's regulations and its interpretation of them are entitled to great deference. *Auer v. Robbins*, 519 U.S.

452, 462 (1997) (crediting regulatory interpretation submitted "in the form of a legal brief"; "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

In the instant case, Chief Judge Tunheim applied the plain language of the OWBPA in § 626(f)(3), that "the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary."[41] The district court noted that Congress used the term "shall," which "is markedly different from not just Section 626(c)(1), but also from other provisions in the ADEA."[42]

General Mills and its *amici* have not cited a single case in which a court failed to follow the plain language of § 626(f)(3) that the party asserting the validity of a waiver of claims "shall" prove its OWBPA compliance "in a court of competent jurisdiction."

The district court's reading of the term "shall" within § 626(f)(3) is in accord with Supreme Court cases that state that this term within a statutory provision is "mandatory language" that reflects a "command." *See, e.g.*, *Shapiro v. McManus*, 136 S. Ct. 450, 454 (2015) (holding that the term "shall" required action and "admits of no exception"); *Miller v. French*, 530 U.S. 327, 337-38 (2000)

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41 Add.18.

42 Add.19.

(interpreting statute providing that a motion "shall operate as a stay" to be "mandatory" based on the "plain meaning"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("shall" within statutory text "normally creates an obligation impervious to judicial discretion").

There is no merit to General Mills' argument that the word "shall" within § 626(f)(3) is directed only at the subject of the burden of proof and not also to the "forum for litigation."[43] The statutory command is a single command, that the party relying on the alleged waiver "shall have the burden of proving in a court of competent jurisdiction that the waiver was knowing and voluntary." Under this plain language, the party asserting the validity of an ADEA waiver may meet its burden in but one forum: "a court of competent jurisdiction."

There was no error in the district court's order because it simply applied the words of the statute. *See Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) ("'Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted)); *Park N' Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the

[43] GMI Br. at 21-22.

language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[44]

The district court's Order is also consistent with the principle that where a litigant opposes a motion to compel arbitration and contends that there is no valid arbitration provision, a court should first determine whether there is a valid agreement. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.").

By adopting the plain language of § 626(f)(3), Congress did not expressly bar arbitration of ADEA *claims*, but rather mandated only that a court decide a threshold issue that arises only in a subset of ADEA disputes, i.e., those in which the employer asserts, and an employee disputes, that the employee has waived a right or claim under the ADEA.

The EEAC/Chamber *amici* make the grandiose assertion that ADEA plaintiffs "would have every incentive to assert an OWBPA violation in every

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[44] The district court's ruling is also in line with the exclusion in the Release Agreement:

> "I agree that this arbitration provision … is not intended to cover claims that cannot by law be required to be arbitrated …." [Add.23.]

See Enderlin v. XM Radio Satellite Holdings, 483 F.3d 559, 560 (8th Cir. 2007) (holding claim outside scope of an arbitration provision based on an exclusionary clause within the contract); *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 504-05 (8th Cir. 1999) (holding employee's ADEA claim was "excluded from the agreement to arbitrate by the plain language of the parties' Agreement").

case" if the district court's Order were not reversed,[45] but that is nonsense. Courts are already well-equipped to summarily dispose of frivolous claims or defenses. The opposite to GMI's *amici's* assertion is likely true. If the district court's Order were reversed, then employers like General Mills may knowingly violate the OWBPA for the specific purpose of inducing older, terminated employees to waive their ADEA rights and claims. Such a scenario would nullify Congress' express purpose for enacting the OWBPA.

B. General Mills' reading of § 626(f)(3) must be rejected because it renders statutory language superfluous.

General Mills advances a faulty interpretation of 29 U.S.C. § 626(f)(3), which, under the standards for construing statutory language, must be rejected.

Courts "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In an OWBPA case, this Court has said:

> In interpreting a statute, we begin with the language of the statute. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

Ellison v. Premier Salons Int'l Inc.,164 F.3d 1111, 1114 (8th Cir. 1999) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation and citations omitted)).

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[45] EEAC/Chamber Amicus Br. at 25.

Here, the words of § 626(f)(3) are unambiguous, and General Mills has not asserted otherwise. The district court correctly applied those plain and unambiguous words, and its Order should therefore be affirmed.

A "'cardinal principle of statutory construction'" is that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)); *see U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883)). Accordingly, courts reject interpretations that result in statutory text being rendered "insignificant, if not wholly superfluous." *E.g.*, *Duncan*, 533 U.S. at 174 (stating also that the Court is "reluctant to treat statutory terms as surplusage in any setting"); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574-75 (1995) (same); *Rille v. Pricewaterhousecoopers LLP*, 803 F.3d 368, 372 (8th Cir. 2015) (rejecting reading that rendered language "superfluous").

The full text of § 626(f)(3) reads as follows:

> In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent

> jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

29 U.S.C. § 626(f)(3) (emphasis added).

General Mills' assertion that the "sole function" of this section "is to place the burden of proving the validity of a release on the party seeking to enforce it"[46] is incorrect. While § 626(f)(3) does address the subject of the burden of proof and specifies that it is on the "party asserting the validity of waiver," the section also clearly and plainly directs the mandatory forum in which such a showing *shall* be made. General Mills' interpretation simply ignores the words "in a court of competent jurisdiction" within the section, rendering them superfluous.

General Mills is also off the mark in claiming that the district court's holding is based on an erroneous interpretation of the statutory phrase "court of competent jurisdiction." The district court did not "ascribe a different meaning to the same phrase used in the same statute," as General Mills argues.[47] The district court properly based its Order on the fact that § 626(f)(3) uses the term "shall," i.e., "**shall** have the burden of proving in a court of competent jurisdiction."[48]

The Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), did not define the phrase "court of competent jurisdiction," nor hold that arbitration

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46 GMI Br. at 7.

47 *Id.* at 20.

48 Add.18 (citing *CompuCredit*, 132 S. Ct. at 669).

is a "court of competent jurisdiction." The employee in *Gilmer* had argued that compulsory arbitration of his ADEA claim was improper because, among other reasons, it deprived him of the judicial forum provided for in the ADEA by 29 U.S.C. § 626(c)(1), which states, "Any person aggrieved **may** bring an action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." (Emphasis added.) The *Gilmer* Court found that § 626(c)(1) did not expressly bar arbitration of ADEA claims, and said that "arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts...". *Id*.

The *Gilmer* Court did not address the language of § 626(f)(3). The arbitration provision at issue in *Gilmer* was signed before Congress adopted the OWBPA, so its requirements did not apply in that case. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 12 (1st Cir. 1999) ("*Gilmer* involved a contract signed prior to the OWBPA, and thus did not consider the effect of the act.") (footnote omitted).

There likewise is no merit to General Mills' assertion that § 626(f)(3) is a "peripheral provision of the ADEA."[49] No legal authority is cited to support that assertion. In truth, the entire text of Title II of the OWBPA, the portion relating to "waivers," is codified at 29 U.S.C. § 626(f). *Waiver of Rights and Claims: Tender*

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[49] GMI Br. at 7.

Back of Consideration, 65 Fed. Reg. 77438 (Dec. 11, 2000). Section 626(f)(3) reflects a key and core point of the OWBPA, that the party seeking to enforce a disputed waiver of any right or claim under the ADEA bears the burden of proof to show that it was "knowing and voluntary," and "shall" do so "in a court of competent jurisdiction." Congress adopted this narrow and specific response in plain terms to an identified problem. Section 626(f)(3) thus certainly is not a provision in which Congress hid "elephants in mouseholes."[50]

At page 23 of its brief, General Mills also argues, without citing authority, that "it is impossible to believe Congress intended" to "divorce the treatment of releases and claims." It asks, "What sense would it make to require an affirmative defense to be decided by a court when the ADEA claims themselves must be decided by an arbitrator …?" Rhetoric aside, the district court followed the plain language used by Congress. Congress felt strongly enough about waivers of ADEA rights and claims that it enacted specific legislation setting forth stringent requirements for such waivers and expressly stated that any party asserting the validity of such a waiver "shall" prove OWBPA compliance "in a court of competent jurisdiction." The congressional intent is clear.

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[50] *See* GMI Br. at 19 (citing *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001)).

Moreover, the argument about this approach being "illogical" is undercut by authorities holding that "piecemeal" proceedings may be required under federal law if a dispute involves some issues that must be resolved in court and others within the scope of a valid arbitration provision. *See, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 62 (8th Cir. 1984) ("By staying the arbitration proceeding pending judicial resolution of the federal securities law claim, the court would not relinquish its authority to decide matters within its exclusive jurisdiction.").

In this case, not only does § 626(f)(3) require that the district court decide whether the ADEA waivers are valid, that is also an efficient approach from a case management perspective. If the district court should hold the waivers to be valid, General Mills would benefit from obtaining a single court ruling that would apply to the waivers signed by those persons. If the district court instead holds that the waivers of ADEA claims are invalid, it can then decide whether any of the Plaintiffs' remaining claims are within the scope of the arbitration provision.[51]

[51] As this Court has recently observed, such an issue is "presumptively" one for the district court to decide. *See, e.g.*, *Nebraska Machinery Co. v Cargotec Solutions, LLC.*, 762 F.3d 737, 740 (8th Cir. 2014) (remanding for district court determination whether claims were within scope of arbitration clause; quoting *AT & T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

C. The district court was correct in reading Section 626(f)(3) as a "contrary congressional command" that precludes arbitration of the narrow question of whether the ADEA waivers at issue in this case are invalid.

General Mills concedes that Congress overrides the FAA's general mandate to enforce arbitration agreements according to their terms when it issues a "contrary congressional command" precluding arbitration.[52]

On this issue, the Supreme Court in *Gilmer* stated that a court should consider whether "'Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,'" and explained that it "will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict between arbitration and the ADEA's underlying purposes.'" 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Here, the district court held that § 626(f)(3) "is a contrary congressional command precluding arbitration in the narrow circumstances presented in this case: a dispute over the validity of a waiver of substantive claims under the OWBPA's waiver requirements found in Section 626(f)(1)."[53] The plain language of § 626(f)(3) supports that conclusion.

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52 GMI Br. at 11.

53 Add.18.

The *Gilmer* Court did not consider § 626(f)(3), and instead concluded that arbitration of ADEA claims was not inconsistent with the section of the ADEA which says that aggrieved individuals "may bring a civil action in any court of competent jurisdiction." 500 U.S. at 29. Whether ADEA claims may be arbitrated is not an issue in the instant case. Here, the question is whether the plain language of § 626(f)(3) means what it says—that if there is a dispute about whether an ADEA waiver was obtained in compliance with OWBPA requirements, then the proponent of the waiver must prove it was "knowing and voluntary" in a court of competent jurisdiction. In § 626(f)(3), Congress "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," which is "discoverable in" the statutory text. *See Gilmer*, 500 U.S. at 26.

This congressional intention is also discoverable from the legislative history of the OWBPA. The Report of the Senate Committee on Labor and Human Resources accompanying the OWBPA, in a section discussing "[w]aivers as an affirmative defense," states that the Committee's intent was that the party seeking to enforce a waiver would be subject to the burden to prove its validity "in a court of competent jurisdiction." S. Rep. No. 101-263 (1990), reprinted in part in 1990 U.S.C.C.A.N. 1509, 1540.[54] Moreover, the Report contains multiple additional

[54] When the EEOC later adopted a final regulation related to ADEA waivers, it confirmed that "[a]ccording to the OWBPA legislative history," courts were to

statements in its discussion of "the purposes underlying the OWBPA waiver provisions" that refer "to the critical role **courts** will play in interpreting and applying those waiver requirements and ensuring that waiver agreements pass muster."[55] For example, the Report states:

- "The Committee expects that courts reviewing the 'knowing and voluntary' issue will scrutinize carefully the complete circumstances in which the waiver was executed." S. Rep. No. 101-263 (1990), reprinted in part in 1990 U.S.C.C.A.N. 1509, at 1537.

- "The bill establishes specified minimum requirements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was 'knowing and voluntary.'" *Id*.

- "The Committee expects that courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience." *Id*. at 1538.

The Senate Committee report also confirms a point later underscored by *Oubre*: that the ADEA waiver requirements are to be "strictly interpreted to protect those individuals covered by the Act." *Id.* at 1537. Thus, the legislative history of § 626(f)(3) supports the congressional intention stated in the plain language of the section. Both confirm that Congress intended that disputes about the validity of an ADEA waiver were exclusively for a court to decide.

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decide whether waivers were "in compliance with the statutory requirements." 65 Fed. Reg. 77438 (2000).

[55] Add.21 (emphasis in original).

On this point, this case is quite different from *CompuCredit Corp*, 132 S. Ct. 665, which the district court found was distinguishable. The issue in *CompuCredit* was whether the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679, *et seq.*, barred enforcement of an arbitration agreement in a lawsuit alleging violations of the CROA. *Id.* at 668. *CompuCredit* did not involve the ADEA or OWBPA. The Court held that the CROA did not provide a right to consumers "to bring an action in a court of law" and that it was "silent on whether claims under the Act can proceed in an arbitrable forum." *Id.* at 669-70, 673. The CROA does not include a provision like § 626(f)(3) of the OWBPA, which commands that a particular issue shall be resolved "in a court of competent jurisdiction," and the *CompuCredit* court recognized that the FAA's general mandate does not apply if it has been "'overridden by a contrary congressional command,'" 132 S. Ct. at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

Similarly, *Unison v. Juhl Energy Dev., Inc.*, 789 F.3d 816 (8th Cir. 2015), provides no support for General Mills. *Unison* did not involve a statutory claim nor any argument by the party opposing arbitration that Congress had evinced an intention to preclude waiver of judicial remedies for the rights at issue. Instead, the issue in that case related to the interplay between a jurisdiction clause in one commercial contract and an arbitration provision in a related contract. This Court held that the arbitration provision applied to the contract-related claims at issue in

the case and that there was no conflict between the two contractual provisions. *Id*. at 820. General Mills' assertion that *Unison* is relevant by analogy has no merit since, as this Court noted in that case, "the jurisdiction clause does not address whether, or under what circumstances, a dispute must be litigated and resolved in court." *Id*. That clause is not akin to § 626(f)(3) of the OWBPA.

Finally, while General Mills asserts that a "contrary congressional command" must be "exceptionally clear," it cites no authority to support that proposition.[56] In truth, "Congress need not employ 'magic words.'" *CompuCredit*, 132 S. Ct. at 679-80 (Ginsburg, J., dissenting). Here, the narrow, contrary congressional command in the plain text and the legislative history of § 626(f)(3) precludes arbitration of the validity of the purported waivers of ADEA claims.[57]

D. Unlike *Gilmer* and other cases addressing "predispute" arbitration agreements, the Release Agreement in this case is a purported waiver of claims.

General Mills has not asserted that the Plaintiffs agreed to arbitrate disputes as a condition of employment, nor that any company policy, employee handbook or collective-bargaining agreement requires arbitration. The only arbitration

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[56] *See* GMI Br. at 23.

[57] The statutory text of § 626(f)(3) was not considered in other cases cited by General Mills in which courts addressed "*pre-dispute* arbitration agreements." *Rosenberg*,170 F.3d at 11 (emphasis added); *see Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995). None of those cases addressed a release of accrued ADEA claims.

provision is in the Release Agreement that General Mills proffered to employees *after* they had been told they were being terminated. Each Release Agreement included a general release of claims. The arbitration provision applied to "any dispute or claim arising out of or relating to the above release of claims."

General Mills has not contested that an ADEA waiver of claims or substantive rights must satisfy OWBPA requirements to be valid. *See, e.g., Oubre* , 522 U.S. at 426-27; *Thomforde,* 406 F.3d at 503. In this key respect, the Release Agreements at issue in the instant case are fundamentally different from the arbitration agreements in the cases on which General Mills bases its arguments.

Neither General Mills nor its aligned *amici* have cited a single case in which any court failed to follow the plain language of § 626(f)(3) in a case that involved a waiver of accrued ADEA claims, such as the instant case.

Confronted with the absence of case authority applicable to the fact situation in the instant case, General Mills mischaracterizes the Order from the court below to argue that the district court held that ADEA claims could never be arbitrated. General Mills then argues from *Gilmer*, 500 U.S. 20, to shoot down its fictitious version of the lower court's Order. In truth, *Gilmer* has no application to the issue on appeal, which is whether the district court was correct in ruling that a court must decide the validity of the ADEA waivers, as § 626(f)(3) directs. As noted, that section was not involved in *Gilmer*.

A review of *Gilmer* confirms an important distinction between "predispute" arbitration agreements like the one involved in that case and the Release Agreements at issue here. The employee in *Gilmer* had been required as a condition of a new job to sign a securities industry registration application form, called a U-4 form.[58] It included a broad agreement to arbitrate "any dispute, claim or controversy" with the employer under industry rules. After Gilmer's termination, he brought suit under the ADEA. As noted, the Court held that Gilmer's claim was arbitrable and that arbitration was "consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, ..." *Id*. at 29 (citing 29 U.S.C. § 626(c)(1)).[59]

In its analysis, the *Gilmer* Court observed that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 26. After citing earlier cases, the Court said:

> In these cases we recognized that "'[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'"

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[58] The *Gilmer* Court therefore described the issue in that case as "whether a claim under the [ADEA] can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." 500 U.S. at 23.

[59] The employee in *Gilmer*, who could not base his argument on the OWBPA because it had not been adopted at the time he signed the U-4 form, had *conceded* that "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id*. at 27.

Id. (quoting *Mitsubishi*, 473 U.S. at 628). In this case, that premise is *not* true. Unlike predispute contexts, in this case the arbitration provision was in the same document as an integrally related general release of claims.

In a footnote, the *Gilmer* Court mentioned the then-recent enactment of the OWBPA. *Id*. at 28 n.3. The Court quoted the OWBPA statutory text ("[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary") and noted that Congress had "specified certain conditions that must be met in order for a waiver to be knowing and voluntary." *Id*. (citations omitted). These specific conditions were not considered or applied by the Court in *Gilmer*.

In a subsequent passage (which General Mills concedes is dicta),[60] the *Gilmer* Court observed that Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA." *Id*. at 29. While Congress did not expressly bar arbitration of ADEA "claims" in the OWBPA, it is also true, based on the plain statutory language, that Congress mandated that when an employer seeks to rely on waiver as a *defense* to an ADEA claim and its OWBPA compliance is contested, the employer "shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary." 29 U.S.C. § 626(f)(3).

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[60] GMI Br. at 15.

There is no merit to General Mills' assertion that *Gilmer*'s observation about the OWBPA should trump the statutory text of § 626(f)(3). The Court's brief remark in *Gilmer* is not "considered dicta" because the OWBPA had no application in *Gilmer*, and the Court took no note whatsoever of the specific language of § 626(f)(3). When the Supreme Court subsequently addressed the OWBPA statutory scheme in *Oubre*, it stated that the OWBPA is "a strict, unqualified statutory stricture on waivers," "and incorporates no exceptions or qualifications." 522 U.S. at 427.

Plaintiffs do not contest the general principle that ADEA claims may be subject to valid agreements to arbitrate, nor has the district court ruled to the contrary. No one is arguing in this case that employers and employees cannot agree to arbitrate employment disputes. However, no waiver of ADEA claims is valid unless the employer has complied with the "knowing and voluntary" requirements of the OWBPA. If the employer's compliance is not challenged, then an arbitration clause can be binding as to ADEA rights or claims and no court need be involved. However, by the plain language of the OWBPA, if an employer seeks to rely on a disputed waiver as a defense to an employee's ADEA claim, then it "shall" prove its OWBPA compliance "in a court of competent jurisdiction." That is the narrow ruling by the district court in the instant case.

E. The 1991 amendment to the ADEA has no impact on the issue before the Court.

Approximately one year after Congress enacted the OWBPA in 1990, it amended various federal anti-discrimination statutes, including Title VII and the ADEA, by passing the Civil Rights Act of 1991. General Mills highlights one section of those amendments, which reads:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

See Civil Rights Act of 1991, Pub. L. 102-166, Section 118, 105 Stat. 1071, (November 21, 1991), codified at 42 U.S.C. § 1981 note. Under the plain language of this provision, arbitration (among other forms of alternative dispute resolution) is "encouraged," but only "[w]here appropriate and to the extent authorized by law." *See Rosenberg*, 170 F.3d at 17 (affirming order denying motion to compel arbitration and finding arbitration "inappropriate" since the employer had failed to satisfy its obligation to explain relevant industry rules to employee). Here, arbitration of whether the asserted waivers of ADEA claims are valid would not be "appropriate" nor would it be "authorized by law" since § 626(f)(3) makes clear that that narrow issue is exclusively for a court to decide.

Moreover, General Mills has cited no authority holding that this 1991 amendment, which generally encourages arbitration, overrides the express

congressional command of § 626(f)(3), enacted just the year before, which relates specifically to the subject of waivers under the ADEA.

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). That is particularly true where "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)). In such settings, courts must apply the plain language of the specific provision over the general one, "regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

Adopting General Mills' argument would also violate the clear principles mandated by the Supreme Court in *Oubre*, seven years *after* the 1991 amendment: that the "OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers," "with no qualifications or exceptions," and that courts are "bound to take Congress at its word." 522 U.S. at 426-27 (refusing to "open the door to evasion of the statute").

The district court's Order follows the plain language of § 626(f)(3). It does not improperly preclude or discourage arbitration or any other form of dispute resolution, but follows the stated intention of Congress that employers "shall"

prove "in a court of competent jurisdiction" that a purported waiver of ADEA claims is "knowing and voluntary."

II. Plaintiffs' Counts II-V are Outside the Scope of the Arbitration Clause.

"[A] party may not be compelled under the FAA" to arbitrate a claim or issue "unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original); *see E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("it is the language of the contract that defines the scope of disputes subject to arbitration").

The FAA "does not expand the range of claims subject to arbitration beyond what is provided for in the agreement." *Waffle House*, 534 U.S. at 293 n.9. Because parties are free to structure arbitration provisions as they see fit, in order "to give effect to the intent of the parties," "contractual limitations" in such provisions must be given effect. *Stolt-Nielsen*, 559 U.S. at 683-84. The court may not override the intent of the parties, "or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294.

In *Granite Rock Co.*, the Supreme Court confirmed: "[W]e have never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes … that the parties have agreed to

submit.' Nor have we held that courts may use policy considerations as a substitute for party agreements." 561 U.S. at 303 (citations omitted).

This Court has upheld orders denying arbitration where the claims at issue were outside the scope of the arbitration clause. *See, e.g., Art Etc. LLC v. Angel Gifts, Inc*., 686 F.3d 654, 657 (8th Cir. 2012) (rejecting as "not reasonable" a party's attempt to expand express terms of a limited arbitration provision); *United Steelworkers of Am., AFL-CIO-CLC v. Duluth Clinic, Ltd.*, 413 F.3d 786, 789-90 (8th Cir. 2005) (holding that "plain language" of arbitration provision "limit the grievances that may be processed" in arbitration); *Nordin v. Nutri/System, Inc*., 897 F.2d 339, 345 (8th Cir. 1990) (holding that arbitration provision in a settlement agreement that contained a broad release of claims and applied to "[a]ny controversy or claim relating to this [settlement] Agreement or the breach thereof" did not apply to employee's claim for declaratory judgment related to a preexisting contract).

General Mills' brief reads as if this case involves a broad arbitration clause that encompasses all of the Plaintiffs' claims. Indeed, General Mills asks this Court to order "that all of Plaintiffs' claims, including all defenses and other issues related to their claims, be addressed in individual arbitration proceedings."[61]

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[61] GMI Br. at 30. It would be quite a surprise if the district court were to refer *all* of the Plaintiffs' claims to arbitration. Plaintiff Dara Walter never agreed to any arbitration provision since she refused to sign the Release Agreement.

However, General Mills' request runs afoul of the clear express language of the arbitration provision.

General Mills drafted the Release Agreement form and gave it to the Plaintiffs only after informing each that he/she was being involuntarily terminated. While the Release Agreements contain a broad release of claims in paragraph 2, in paragraph 4, the arbitration provision is limited to "any dispute or claim arising out of or relating to the above release of claims."[62] For whatever reason, General Mills elected to include an arbitration provision in its proffered Release Agreement that served only as a backstop to the release of claims in that same document.

By an explanatory "including" phrase, paragraph 4 clarifies that the arbitration provision includes, "any dispute about the validity or enforceability of the release or the assertion of any claim covered by the release."[63] As a matter of basic English grammar, the present participle "including" does not expand the preceding phrase "any dispute or claim arising out of or relating to the above release of claims." *See, e.g., Heyer v. Moldenhauer*, 538 N.W.2d 714, 717 (Minn. Ct. App. 1995) ("The term 'fraud' instead appears in a parenthetical that modifies the preceding clause 'arising out of or relating to the physical condition of the

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62 Add.23, ¶ 4 (emphasis added).

63 *Id.* (emphasis added).

property ….' The arbitration clause covers claims about the property, not issues of formation to the agreement to arbitrate.").

Thus, General Mills did not draft a broad arbitration provision, such as one, for example, written to apply to "all claims arising from the employee's employment or termination," but instead proposed arbitration limited to the "above release of claims." If there is any ambiguity in those words, it must be construed against the drafter. *See, e.g., Union Elec. Co. v. AEGIS Energy Syndicate 1225*, 713 F.3d 366, 369 (8th Cir. 2013).[64]

A claim for discriminatory discharge accrues when "the adverse employment action is communicated to the employee." *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1033 (8th Cir. 2005). Hence, all of the claims asserted in Counts II-V of the Amended Complaint accrued when General Mills informed the Plaintiffs of their terminations, and before General Mills distributed the Release Agreements. Counts II-V would be the same, and would be unaffected, if the release of claims provision in the Release Agreements had never existed. Counts II-V "arose out of a different nucleus of operative facts, and seek[] redress for a different act or wrongdoing" than the dispute in Count I about OWBPA compliance. *See Ziegler v. Salazar*, 560 Fed. Appx. 643 (Mem), 644 (8th Cir.

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[64] Minnesota also follows the rule that ambiguities in a written contract are construed against the drafter. *E.g., Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979).

2014) (per curiam) (unpublished). Counts II-V are outside the scope of the arbitration provision in this case.

General Mills' argument that the arbitration provision is broad because it incorporated the phrase "arising out of or relating to"[65] is meritless, as can be seen by comparing the facts here with those in the case cited by General Mills, *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber. Co*., 118 F.3d 619 (8th Cir. 1997). In that case, the two litigants were parties to a license agreement, which included this arbitration clause, "[a]ny controversy or claim arising out of or relating to this Agreement or any breach of its terms shall be settled by arbitration ... ." *Id*. at 620. Those parties thus had a contractual relationship, and the arbitration provision extended to all claims "arising out of or relating to" that contract. Here, the parties had an employment relationship until General Mills terminated it.

In contrast to *Fleet Tire*, the arbitration provision in the instant case was *not* written to apply to all claims "arising out of or relating to" the parties' (primary) employment relationship. Instead, the limited arbitration provision acted solely as a backstop to disputes about the release of claims in the Release Agreement.

The district court has not yet ruled in this case on the scope of the arbitration provision, and instead has held only that the plain language of § 626(f)(3) requires that General Mills must prove the validity of the ADEA waivers in court. Plaintiffs

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65 *See* GMI Br. at 29.

submit that the language of the purported arbitration clause begins and ends with that determination, but, if General Mills contends otherwise, then this Court should return the case to the district court to rule on the scope of the arbitration provision. *See Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 516 F.3d 695, 700 (8th Cir. 2008) (noting that whether claim was within scope of arbitration provision "must also be resolved by a court to ensure that a party is not unfairly stripped of its right to a judicial decision about a matter it had not agreed to arbitrate").

III. Plaintiffs Did Not Waive Their Right Under the ADEA to Proceed Collectively.

Near the end of its brief, General Mills asks this Court to "make it clear that Plaintiffs are being ordered to individual arbitration proceedings."[66] The district court briefly addressed this topic in footnote 6 of the Order:

> Additionally, given that the Court's decision precludes enforcement of the arbitration provision at this point, and that the waiver of collective action is an integral part of that provision, the Court in denying General Mills' motion to dismiss also denies the company's request to compel arbitration on an **individual basis**. Given the OWBPA's obvious concern for employees terminated in large-scale layoffs who have little leverage, S. Rep. No. 101-263, at 1511, 1520, 1537-41 (1990), it makes sense that Section 626(f)(3) would preclude not just an arbitration agreement, but also one that forces individual action.[67]

General Mills does not address the district court's reasoning, which is sound and which promotes the efficient processing of this case. Instead, General Mills

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66 GMI Br. at 28.

67 Add.22 n.6 (emphasis in original).

cites non-ADEA case decisions in which courts enforced class action waivers. General Mills' citations are of little relevance here as none considered the express language of the OWBPA that governs this issue. General Mills has not identified any ADEA case that enforced a collective action waiver when the employer was unable to prove that that waiver was "knowing and voluntary."

The ADEA specifically incorporates the collective action provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), which provides that "[a]n action … may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Congress expressly authorized ADEA plaintiffs "to bring collective action age discrimination actions 'in behalf of … themselves and other employees similarly situated.'" *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169 (1998). The Supreme Court stated:

> Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and facts arising from the same alleged discriminatory activity.

Id. at 170.

Under the OWBPA, an individual may not waive "any right or claim" unless the waiver is "knowing and voluntary." 29 U.S.C. § 626(f)(1). The word "any" in

this context plainly denotes a broad meaning.[68] While some courts have held that the phrase "any right or claim" means only any *substantive* right or claim and does not extend to *procedural* rights, those rulings are limited to predispute arbitration agreements.[69] Neither the Supreme Court nor this Court has ever held that an employer may obtain a valid waiver of its employees' right to proceed collectively with accrued ADEA claims if the waiver is not "knowing and voluntary."

Accordingly, Plaintiffs could not waive their right to proceed collectively in connection with their ADEA claims unless the waivers were "knowing and voluntary." Based on the facts in this action, that showing cannot be made here, and it would thus be inappropriate for this Court to enforce the alleged collective action waivers. In any event, the validity of a waiver of any ADEA right under the OWBPA's requirements should be addressed first by the district court.

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[68] "Any" is commonly defined to mean "[o]ne or some, regardless of kind, quality or amount." THE AMERICAN HERITAGE DICTIONARY, Second Coll. Ed. (1982).

[69] *See, e.g.*, *Rosenberg*, 170 F.3d at 13 ("We hold that Congress did not intend to preclude pre-dispute arbitration agreements when it enacted the OWBPA."); *Seus*, 146 F.3d at 182 (finding that OWBPA reflected "no congressional intent to except from the FAA predispute agreements to arbitrate"); *Williams*, 56 F.3d at 661 (declining "to remove from the province of arbitration all such pre-dispute agreements").

IV. This Court May Affirm for the Independent Reason that the Arbitration Provision is Invalid Because it was Not "Knowing and Voluntary."

As noted, Congress directed in the OWBPA that, "An individual may not waive *any right or claim* under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (emphasis added). A "waiver may not be considered knowing and voluntary unless at a minimum" it was obtained in compliance with all of the requirements listed at subsections (A) through (H) of that section. *Id.* General Mills cannot show in this case that it complied with the OWBPA requirements in obtaining the Release Agreements.[70]

"The [OWBPA] statutory requirements are minimum standards for creating a voluntary and knowing waiver. Without them, a waiver is not valid as a matter of law, regardless of whether the employee actually understood the waiver or not." *Parsons*, 447 F.3d at 1105. "[I]f the Agreement at issue here was not 'written in a manner calculated to be understood by such individual, or by the average individual eligible to participate,' then [the plaintiff] did not release *his rights* under the ADEA." *Thomforde*, 406 F.3d at 503 (emphasis added). The purported waiver of the Plaintiffs' statutory right to a jury trial on their ADEA claims is therefore invalid.

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[70] *See* A113-15, ¶¶ 79-85, A140-1, ¶ 249.

The district court did not base its Order on the express language of § 626(f)(1). Instead, as noted above, it denied General Mills' motion based on the plain language of § 626(f)(3). While the district court's decision can be affirmed as written, Plaintiffs submit that § 626(f)(1) provides a separate, and independent, statutory basis that supports the same result.

The district court did not apply the statutory language of § 626(f)(1) as an additional basis for its ruling because, it stated, "The problem with that argument is that *14 Penn Plaza* [*LLC v. Pyett*, 556 U.S. 249 (2009)] clearly held the opposite, implicitly overruling cases like *Thiele*" [*v. Merrill Lynch, Pierce, Fenner & Smith*, 59 F. Supp. 2d 1060, 1064-65 (S.D. Cal. 1999) (holding that the plain language of the OWBPA required that a waiver of "any right" under the ADEA must meet OWBPA requirements)].[71] Plaintiffs respectfully submit that the district court was wrong about *14 Penn Plaza*. The plain language of § 626(f)(1) as applied by the Supreme Court in *Oubre* does provide an independent reason why the district court's result is correct.

14 Penn Plaza presented the question whether an arbitration provision in a collective-bargaining agreement (CBA) that extended to ADEA claims was enforceable. 556 U.S. at 251. The Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate

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[71] Add.16.

ADEA claims is enforceable as a matter of federal law." *Id*. at 274. The employees in *14 Penn Plaza* had argued that each was "personally" required to waive his rights in order for the waiver to be "knowing and voluntary" under the OWBPA, 29 U.S.C. § 626(f)(1). In rejecting application of the OWBPA to the CBA's arbitration provision, the *14 Penn Plaza* Court said:

> [T]he agreement to arbitrate ADEA claims is not the waiver of a "substantive right" as that term is employed in the ADEA. Indeed, if the "right" referred to in § 626(f)(1) included the prospective waiver of the right to bring an ADEA claim in court, even a waiver signed by an individual employee would be invalid as the statute also prevents individuals from "waiv[ing] rights or claims that may arise after the date the waiver is executed."

Id. at 259 (quoting 29 U.S.C. § 626(f)(1)(C)) (citation and footnote omitted).

In *14 Penn Plaza*, as in *Gilmer* (but unlike in the instant case), the arbitration provision was a pre-dispute waiver—i.e., it was not tied to and did not require a waiver by the employee of accrued ADEA claims. The arbitration provision in *14 Penn Plaza* was instead a waiver of "only the right to seek relief from a court in the first instance." 556 U.S. at 265-66. In that circumstance, where the arbitration agreement did not also include a release of the employee's claims under the ADEA, the Court in *14 Penn Plaza* found that the OWBPA "knowing and voluntary" requirements did not apply to the arbitration provision.

The Court in *14 Penn Plaza* was clear that its conclusion on this point was based on the fact that the waiver provision was prospective in nature. A separate

provision of the OWBPA—29 U.S.C. § 626(f)(1)(C)—states that an ADEA waiver is not valid if it "waives rights or claims that may arise after the date the waiver is executed." The *14 Penn Plaza* Court explained that if the term "any right" within 29 U.S.C. § 626(f)(1) were interpreted to include the "prospective waiver of the right to bring an ADEA claim in court," then no predispute arbitration agreement could ever be valid. *Id*. at 259. If the OWBPA applied to that type of pre-dispute scenario, then no union could negotiate grievance procedures for ADEA claims. By contrast, in the instant case, the Release Agreements are post-dispute waivers of substantive rights and claims by individuals after their ADEA claims had already accrued. This is exactly the scenario for which Congress enacted the OWBPA.

Accordingly, while *14 Penn Plaza*'s dicta may apply to other prospective waivers of ADEA rights – such as other predispute arbitration provisions – the plain language of 29 U.S.C. § 626(f)(1) ("An individual may not waive any right or claim unless ...") supports the opposite conclusion with respect to the retrospective arbitration provision in this case. *See Oubre*, 522 U.S. at 427 ("Courts cannot with ease presume ratification of that which Congress forbids.").

Another case cited by General Mills distinguishable on the same grounds is *Faber v. Menard, Inc*., 367 F.3d 1048 (8th Cir. 2004). *Faber* also involved a predispute arbitration provision that was not joined with a waiver of ADEA claims.

Id. at 1050-51. There is no indication in *Faber* that the employee in that case made any argument based on the OWBPA, and this Court did not address the OWBPA in its analysis. This Court noted that Faber's ADEA claim fell within the scope of the arbitration provision in that case, which specifically referred to an employee's claims under the ADEA. *Id*. at 1052 n.1. That is not true in the instant case.

In the ADEA, Congress provided that "a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Courts have recognized this right under the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

Congress had earlier provided in the FAA that written provisions "to settle by arbitration a controversy" "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "If a party challenges the validity under [FAA] §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under §4." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010); *see Cargotec*, 762 F.3d at 744 (remanding for trial over whether there was a valid arbitration agreement). The FAA explains specifically how a district court should address a challenge to the validity of an alleged agreement to arbitrate:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. … Where such an issue is raised, the party alleged to be in default may … demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding [to compel arbitration] shall be dismissed.

9 U.S.C. § 4. In this case, the Plaintiffs have directly challenged the validity of the arbitration provision in the Release Agreement.[72]

The OWBPA was enacted in 1990—many years after the FAA. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013) (noting dates of FAA enactment and reenactment). The OWBPA speaks specifically to the subject of waivers of "any right or claim" under the ADEA. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Under the FAA, arbitration agreements are to be on an equal footing with other contracts. *See, e.g., DirecTV, Inc. v. Imburgia*, S. Ct. Dkt. No. 14-462 (slip op. Dec. 14, 2015) at 6 ("[W]e must decide whether the decision of the California court places arbitration contracts 'on equal footing with all other contracts.'") (quoting *Buckeye Check Cashing, Inc. v . Cardegna*, 546 U.S. 440, 443 (2006));

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[72] *See* A107, ¶¶ 58-59, A109-10, ¶¶ 64-69, A115, ¶ 85, A140-2, ¶¶ 249-251.

Gilmer, 500 U.S. at 33 ("the FAA's purpose was to place arbitration agreements on the same footing as other contracts"). General Mills concedes (and Congress has plainly required) that the purported waiver of ADEA *claims* in the Release Agreements at issue in this case is ineffective unless it was "knowing and voluntary" under the OWBPA.[73] A court determination that an arbitration provision found in the same agreement is invalid for the same reason treats that arbitration provision on the same footing as any other contract that purports to waive "any right or claim" under the ADEA. The plain language of 29 U.S.C. § 626(f)(1) requires this result.

CONCLUSION

It is undisputed that a party cannot be ordered to arbitrate a dispute under the FAA unless that party agreed to arbitrate that dispute. It is further undisputed that a waiver of ADEA claims is not valid without compliance with the OWBPA "knowing and voluntary" requirements. An employer and its employee can agree to arbitrate ADEA claims, but, as the district court held in this case, an employer cannot assert a waiver of "any right or claim" under the ADEA if the employee has challenged the employer's compliance with the OWBPA unless the employer first proves "in a court of competent jurisdiction" that the waiver was "knowing and

[73] GMI Br. at 16 (acknowledging that "retrospective waivers" must be "knowing and voluntary" to be enforceable).

voluntary." That is what the district court's opinion held in this case. That is all it held.

Notwithstanding General Mills' efforts to appeal from some entirely different order, the district court's Order here applied only to the narrow circumstances of this case. The district court applied the plain language of the OWBPA to those narrow circumstances. Its Order should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

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Dated: February 8, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) because it uses 14-point Times New Roman font and the number of words in the brief is 12,371 (including hand counting the chart), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on February 8, 2016, Appellees' Brief was filed with the Clerk of Court for the Eighth Circuit United States Court of Appeals via CM/ECF, that all participants in the case are registered CM/ECF users, and that service will be accomplished via the CM/ECF system.

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