No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant

v.

R.J. REYNOLDS TOBACCO CO., et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia (Gainesville Division)
Case No. 2:12-cv-00138-RWS (Hon. Richard W. Story)

APPENDIX VOLUME II: DOCKET NOS. 59-90

JOHN J. ALMOND
MICHAEL L. EBER
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Tel: (404) 522-4700
Fax: (404) 525-2224
JAlmond@rh-law.com
MEber@rh-law.com

JAMES M. FINBERG
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
jfinberg@altber.com
cpitts@altber.com

Attorneys for Plaintiff-Appellant
[Additional Counsel on Inside Cover]

Additional Counsel for Plaintiff-Appellant

SHANON J. CARSON
SARAH R. SCHALMAN-BERGEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 1-800-424-6690
Facsimile: 215-875-4604

TODD M. SCHNEIDER
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100, Ext. 306
Facsimile: 415-421-7105

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY and PINSTRIPE, INC. Defendants.	)	Civil Action No. 2:12-CV-0138-RWS

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S
ANSWER AND AFFIRMATIVE DEFENSES

Defendant R.J. Reynolds Tobacco Company ("RJRT"), by and through its undersigned counsel, hereby answers the Complaint filed by Plaintiff Richard M. Villarreal as follows:

INTRODUCTION

1. Defendant RJRT admits that Plaintiff purports to bring this lawsuit as a collective action. Defendant RJRT denies the remaining allegations contained in Paragraph 1 of the Complaint.

2. Defendant RJRT denies the allegations contained in Paragraph 2 of the Complaint.

3. Defendant RJRT admits that Plaintiff makes the allegations and seeks the relief set forth in the Complaint. Defendant RJRT denies that Plaintiff, or any potential opt-in plaintiff, has any cognizable claims under the Age Discrimination in Employment Act ("ADEA") or has properly stated any such claims; denies that it has violated the ADEA; and denies that Plaintiff or any potential opt-in plaintiff is entitled to any relief whatsoever.

PARTIES

4. Defendant RJRT admits that Plaintiff Villarreal applied for the Territory Manager position four times between June 2010 and April 2012 and that Defendant RJRT did not hire Plaintiff into the Territory Manager job position. Defendant RJRT further admits that Cumming, Georgia is located in Forsyth County, which is covered by the Gainesville Division of the United States District Court for the Northern District of Georgia. Defendant RJRT is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 4 of the Complaint, and therefore denies those allegations.

5. Defendant RJRT admits the allegations contained in Paragraph 5 of the Complaint.

6. Defendant RJRT admits that Pinstripe, Inc. provides recruiting services. Defendant RJRT is without knowledge or information sufficient to form

a belief as to the remaining allegations contained in Paragraph 6 of the Complaint, and therefore denies those allegations.

7. Defendant RJRT admits that CareerBuilder, LLC provides recruiting services. Defendant RJRT is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 7 of the Complaint, and therefore denies those allegations.

JURISDICTION AND VENUE

8. The allegation contained in Paragraph 8 of the Complaint is a legal conclusion to which no responsive pleading is required.

9. The allegations contained in Paragraph 9 of the Complaint are legal conclusions to which no responsive pleading is required. To the extent that a response is deemed required, Defendant RJRT denies the allegations contained in Paragraph 9.

FACTS

10. Defendant RJRT admits that it has hired individuals into the Territory Manager position since September 1, 2007, and that Defendant Pinstripe, Inc. has provided recruiting and screening services for Defendant RJRT at certain times during this period. Defendant RJRT further admits that Territory Managers promote and sell its tobacco products in assigned geographic territories. The

allegation that age is not a *bona fide* occupational qualification reasonably necessary for the Territory Manager position is a legal conclusion to which no responsive pleading is required. To the extent that a response is deemed required, Defendant RJRT denies this allegation. Defendant RJRT denies any remaining allegations contained in Paragraph 10.

11. Defendant RJRT is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 11 of the Complaint, and therefore denies those allegations.

12. Defendant RJRT admits that it has never offered Plaintiff the Territory Manager position. Defendant RJRT is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 12 of the Complaint, and therefore denies those allegations.

13. Defendant RJRT admits that Kelly Services, Inc. provided recruiting and screening services for Defendant RJRT at certain times in 2007 and 2008. Defendant RJRT denies the remaining allegations contained in Paragraph 13 of the Complaint.

14. Defendant RJRT admits that a document that Plaintiff characterizes as a copy of "resume review guidelines" is attached as Exhibit A to the Complaint.

Defendant RJRT denies the remaining allegations contained in Paragraph 14 of the Complaint.

15. Defendant RJRT states that the document attached to the Complaint as Exhibit A speaks for itself. Defendant RJRT denies the remaining allegations contained in Paragraph 15 of the Complaint.

16. Defendant RJRT denies the allegation that it instructed to Kelly Services to "stay away from" anyone because of age. Defendant RJRT is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 16 and therefore denies those allegations.

17. Defendant RJRT admits that Plaintiff applied for the Territory Manager position in June 2010. Defendant RJRT states that it is without knowledge or information sufficient to form a belief as to Plaintiff's age in June 2010. Defendant RJRT denies the remaining allegations contained in Paragraph 17 of the Complaint.

18. Defendant RJRT admits that it did not hire Plaintiff for the Territory Manager position in June 2010. Defendant RJRT is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 18 and therefore denies those allegations.

19. Defendant RJRT denies the allegations contained in Paragraph 19 of the Complaint.

20. Defendant RJRT admits that Plaintiff applied for the Territory Manager position again in December 2010, April 2011, and March 2012. Defendant RJRT further admits that Plaintiff Villarreal was not offered the position of Territory Manager in response to any of these applications. Defendant RJRT denies the remaining allegations contained in Paragraph 20 of the Complaint.

21. Defendant RJRT admits that Pinstripe, Inc. has provided recruiting and screening services to Defendant RJRT for the Territory Manager position since April 1, 2009. Defendant RJRT denies the remaining allegations contained in Paragraph 21 of the Complaint.

22. Defendant RJRT denies the allegations contained in Paragraph 22 of the Complaint.

23. Defendant RJRT admits that in 2009 it implemented the "Blue Chipper Project," in which it surveyed its top recent Territory Managers to determine the type of candidate who would be a successful Territory Manager. Defendant RJRT further admits that the document Plaintiff characterizes as a copy of the "Blue Chip TM profile" is attached as Exhibit B to the Complaint and states

that the document speaks for itself. Defendant RJRT denies the remaining allegations in Paragraph 23 of the Complaint.

24. Defendant RJRT denies the allegations contained in Paragraph 24 of the Complaint.

25. Defendant RJRT denies the allegations contained in Paragraph 25 of the Complaint.

26. Defendant RJRT admits that Pinstripe, Inc. has provided recruiting and screening services related to the Territory Manager position during certain periods of time. The allegation in the last sentence of Paragraph 26 is a legal conclusion to which no response is required. To the extent a response is deemed required, Defendant RJRT denies the allegations contained in this sentence. Defendant RJRT denies the remaining allegations contained in Paragraph 26 of the Complaint.

FACTS SUPPORTING EQUITABLE TOLLING

27. Defendant RJRT admits that Plaintiff Villarreal attempted to file a charge on May 17, 2010, but the EEOC dismissed it as untimely. Defendant RJRT denies the remaining allegations contained in Paragraph 27.

28. Defendant RJRT denies the allegations contained in Paragraph 28 of the Complaint.

EEOC PROCEEDINGS

29. Defendant RJRT admits that on July 21, 2010, Plaintiff Villarreal submitted a letter to the EEOC containing certain allegations which speaks for itself and that Plaintiff Villarreal perfected a charge in September 2010, by submitting a sworn charge of discrimination form. Defendant RJRT admits that Plaintiff Villarreal filed another amended charge in December 2011 but denies that Plaintiff Villarreal applied for the Territory Manager position in May 2011 and September 2011. Defendant RJRT admits the remaining allegations contained in Paragraph 29.

30. Defendant RJRT admits that the EEOC issued Notice of Right to Sue letters dated April 2, 2012 in Charge Numbers 435-2012-00211, 435-2012-00212, and 410-2010-04714, and that Plaintiff purports to attach copies of these letters as Exhibit D. Defendant RJRT is without knowledge or information sufficient to form a belief as to when and why Plaintiff asked EEOC to issue the Notice of Right to Sue letters, and therefore denies those allegations.

ADEA COLLECTIVE ACTION ALLEGATIONS

31. Defendant RJRT admits that Plaintiff's Complaint purports to assert a collective action under the ADEA, but denies that Plaintiff has any cognizable claims under that law or has properly stated any such claims, denies that Plaintiff

has any cognizable collective action claim, denies that it has violated the ADEA, and denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any relief whatsoever. Defendant RJRT denies any remaining allegations contained in Paragraph 31 of the Complaint.

32. Defendant RJRT denies the allegations contained in Paragraph 32 of the Complaint.

33. Defendant RJRT denies the allegations contained in Paragraph 33 of the Complaint.

34. Defendant RJRT denies the allegations contained in Paragraph 34 of the Complaint.

35. Defendant RJRT admits that Exhibit E to the Complaint purports to be a copy of Plaintiff's consent to sue.

COUNT ONE

Unlawful Pattern or Practice of Intentional Age Discrimination (Disparate Treatment) in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

36. Defendant RJRT incorporates by reference, as if fully re-written, Paragraphs 1-35 of this Answer.

37. Defendant RJRT admits that Plaintiff purports to bring this lawsuit as a collective action under the ADEA. Defendant RJRT denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any relief whatsoever.

38. Defendant RJRT denies the allegations contained in Paragraph 38 of the Complaint.

39. The allegations contained in Paragraph 39 of the Complaint are legal conclusions to which no responsive pleading is required. To the extent that a response is deemed required, Defendant RJRT admits that it is an employer within the meaning of the ADEA, that it has engaged in interstate commerce within the meaning of the ADEA, and that it has employed twenty or more employees. Defendant RJRT denies the remaining allegations in Paragraph 39 of the Complaint.

40. Defendant RJRT states that the statutory language of the ADEA speaks for itself. Defendant RJRT denies that Plaintiff or any potential opt-in plaintiff has any cognizable claims under the ADEA or has properly stated any such claims, and denies that it has violated that law.

41. Defendant RJRT denies the allegations contained in Paragraph 41 of the Complaint.

42. Defendant RJRT denies the allegations contained in Paragraph 42 of the Complaint.

43. Defendant RJRT denies the allegations contained in Paragraph 43 of the Complaint.

COUNT TWO

Unlawful Use of Hiring Criteria Having Disparate Impact on Applicants Over 40 Years of Age in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

The Court dismissed Count Two. No response is therefore appropriate or necessary.

PRAYER FOR RELIEF

Defendant RJRT denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any of the relief requested in the Prayer for Relief section of Plaintiff's Complaint or any relief whatsoever.

DEMAND FOR JURY TRIAL

Whether Plaintiff is entitled to a trial by jury on some or all of the allegations contained in the Complaint is a legal question to which no responsive pleading is required. To the extent that a response is deemed required, Defendant RJRT denies the allegation contained in the Demand for Jury Trial section of the Complaint. Answering further, Defendant RJRT denies that there are any issues in this case that are triable.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Plaintiff is not similarly situated to any other plaintiff he seeks to join in this action, to make appropriate the treatment of this action as a collective action under the ADEA.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statute of limitations. Plaintiff's claims are also barred by the ADEA's charge-filing period, 29 U.S.C. § 626(d)(1).

FOURTH DEFENSE

Plaintiff's claims are barred by his failure to exhaust his administrative remedies as required under the ADEA, 29 U.S.C. § 626.

FIFTH DEFENSE

To the extent that Plaintiff complains about matters that were not reasonably within the scope of any charge filed with the EEOC or a state or local agency, the Court lacks jurisdiction with respect to any such matters.

SIXTH DEFENSE

Defendant RJRT had legitimate, non-discriminatory business reasons for any employment decisions regarding Plaintiff, and Defendant RJRT's stated reasons were not a pretext for discrimination.

SEVENTH DEFENSE

Plaintiff's claims are barred because any allegedly adverse treatment of him was based solely on one or more reasonable factors other than age.

EIGHTH DEFENSE

The relief sought by Plaintiff, including monetary damages, is neither authorized nor appropriate for one or more causes of action set forth in the Complaint.

NINTH DEFENSE

Plaintiff has failed to mitigate or make reasonable efforts to mitigate his alleged damages, and Plaintiff's recovery of damages, if any, must be barred or reduced accordingly.

TENTH DEFENSE

Plaintiff has failed to allege facts sufficient to state a claim for liquidated damages.

ELEVENTH DEFENSE

Plaintiff may not recover liquidated damages because at all times relevant to the Complaint Defendant RJRT had a good faith belief that its policies did not violate the ADEA.

TWELFTH DEFENSE

Plaintiff's claims for injunctive or other equitable relief are barred because Plaintiff has an adequate and complete remedy at law.

THIRTEENTH DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of laches, waiver and/or estoppel.

FOURTEENTH DEFENSE

Some or all of Plaintiff's claims for relief are barred because of Plaintiff's unclean hands.

FIFTEENTH DEFENSE

Some or all of plaintiff's claims for damages are speculative or unavailable as a matter of law.

SIXTEENTH DEFENSE

Plaintiff Villarreal lacks standing to bring some or all of his claims.

SEVENTEENTH DEFENSE

Defendant RJRT is not responsible for any conduct of its employees or agents taken outside the scope of their responsibility.

EIGHTEENTH DEFENSE

Plaintiff has not alleged sufficient facts to justify a collective action.

NINETEENTH DEFENSE

Plaintiff cannot adequately represent the interests of any potential opt-in plaintiff.

TWENTIETH DEFENSE

In the event that the Court should certify this action as a collective action under the ADEA (which Defendant RJRT denies would be appropriate), Defendant RJRT incorporates by reference and realleges all of its defenses to the claims of any plaintiff who joins the action, and reserves the right to assert additional defenses depending upon the identity of the new plaintiff or plaintiffs.

TWENTY-FIRST DEFENSE

Defendant RJRT reserves the right to assert and does not waive any additional or further defenses as may be revealed during discovery or otherwise and reserves the right to amend this Answer to assert any such defenses.

Dated: March 20, 2013

Respectfully submitted,

/s/

Deborah A. Sudbury
(Ga. State Bar No. 000090)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
(404) 521-3939 (Telephone)
(404) 581-8300 (Facsimile)

Eric S. Dreiband
Alison B. Marshall
JONES DAY
51 Louisiana Ave, N.W.
Washington, DC 20001-2113
Telephone: 202-879-3720
Facsimile: 202-626-1700
esdrieband@jonesday.com
abmarshall@jonesday.com

Attorneys for Defendant
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2012, I electronically filed Defendants R.J. Reynolds Tobacco Company's Answer and Affirmative Defenses with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys:

John J. Almond
Kristina M. Jones
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224
jalmond@rh-law.com
kjones@rh-law.com

Attorneys for Plaintiffs

Todd M. Schneider
Mark T. Johnson
Joshua G. Konecky
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street
Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100, Ext. 306
Facsimile: 415-421-7105
tschneider@schneiderwallace.com
mjohnson@schneiderwallace.com
jkonecky@ schneiderwallace.com

Attorneys for Plaintiffs

James M. Finberg
P. Casey Pitts
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189
jfinberg@altshulerberzon.com
cpitts@altber.com

Attorneys for Plaintiffs

Shanon J. Carson
Sarah R. Schalman-Bergen
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 1-800-424-6690
Facsimile: 215-875-4604
scarson@bm.net
sschalman-bergen@bm.net

Attorneys for Plaintiffs

Natasha Wilson
Greenberg Traurig, LLP
Suite 2500-Terminus 200
3333 Piedmont Rd., N.E.
Atlanta, GA 3035
Telephone: 678-553-2100
Facsimile: 678-553-2212
wilsonn@gtlaw.com

Attorney for Defendant
Pinstripe, Inc.

Scott Beightol
Paul E. Benson
Michael Best & Friedrich LLP
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202
Telephone: 414-225-4994
Facsimile: 414-277-0656
SCBeightol@michaelbest.com
PEBenson@michaelbest.com

Attorneys for Defendant
Pinstripe, Inc.

/s Deborah A. Sudbury, Esq.
Deborah A. Sudbury (Ga. Bar 000090)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:12-CV-0138-RWS
R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC,	)	
Defendants.	)	

DEFENDANT PINSTRIPE, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Pinstripe, Inc.'s ("Pinstripe"), by and through its undersigned counsel, hereby answers the Complaint filed by Plaintiff, Richard M. Villarreal, as follows:

ANSWER TO SECTION TITLED "INTRODUCTION"

1. Pinstripe admits that Plaintiff purports to bring this lawsuit as a collective action. Pinstripe denies the remaining allegations contained in Paragraph 1 of the Complaint.

2. Pinstripe denies the allegations contained in Paragraph 2 of the Complaint.

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3. Pinstripe admits that Plaintiff makes the allegations and seeks the relief set forth in the Complaint. Pinstripe denies that Plaintiff, or any potential opt-in plaintiff, has any cognizable claims under the Age Discrimination in Employment Act ("ADEA") or has properly stated any such claims; denies that it has violated the ADEA; and denies that Plaintiff or any potential opt-in plaintiff is entitled to any relief whatsoever.

ANSWER TO SECTION TITLED "PARTIES"

4. Pinstripe admits that Plaintiff applied for the Territory Manager position four times between June 2010 and April 2012 and was not hired into the Territory Manager job position. Pinstripe further admits that Cumming, Georgia is located in Forsyth County, which is covered by the Gainesville Division of the United States District Court for the Northern District of Georgia. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 4 of the Complaint, and therefore denies those allegations.

5. Pinstripe admits that RJ Reynolds Tobacco Company ("RJ Reynolds") is a tobacco company. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 5 of the Complaint, and therefore denies those allegations.

6. Pinstripe admits the allegations contained in Paragraph 6 of the Complaint.

7. Pinstripe admits that CareerBuilder, LLC provides recruiting services. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 7 of the Complaint, and therefore denies those allegations.

ANSWER TO SECTION TITLED "JURISDICTION AND VENUE"

8. The allegation contained in Paragraph 8 of the Complaint is a legal conclusion to which no responsive pleading is required.

9. The allegations contained in Paragraph 9 of the Complaint are legal conclusions to which no responsive pleading is required. To the extent that a response is otherwise required, Pinstripe denies the allegations contained in Paragraph 9.

ANSWER TO SECTION TITLED "FACTS"

10. Pinstripe admits it has provided recruiting and screening services for RJ Reynolds at certain times from April 1, 2009 to the present. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 10 of the Complaint, and therefore denies those allegations.

11. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 11 of the Complaint, and therefore denies those allegations.

12. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 12 of the Complaint, and therefore denies those allegations.

13. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13 of the Complaint, and therefore denies those allegations.

14. Pinstripe admits that a document that Plaintiff characterizes as a copy of "resume review guidelines" is attached as Exhibit A to the Complaint. Pinstripe denies the remaining allegations contained in Paragraph 14 of the Complaint.

15. Pinstripe states that the document attached to the Complaint as Exhibit A speaks for itself. Pinstripe denies the remaining allegations contained in Paragraph 15 of the Complaint.

16. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 16 and therefore denies those allegations.

17. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 17 of the Complaint, and therefore denies those allegations.

18. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 18 and therefore denies those allegations.

19. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 19 of the Complaint, and therefore denies those allegations.

20. Pinstripe admits that Plaintiff applied for the Territory Manager position again in December 2010, April 2011, and March 2012. Pinstripe is without knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 20 of the Complaint, and therefore denies those allegations.

21. Pinstripe admits it has provided recruiting and screening services to RJ Reynolds for the Territory Manager position at some point between April 1, 2009 and the present. Pinstripe denies the remaining allegations contained in Paragraph 21 of the Complaint.

22. Pinstripe denies the allegations contained in Paragraph 22 of the Complaint.

23. Pinstripe admits that in 2009 it helped Defendant RJ Reynolds develop the "Blue Chipper Project." Pinstripe further admits that the document Plaintiff characterizes as a copy of the "Blue Chip TM profile" is attached as Exhibit B to the Complaint and states that the document speaks for itself. Pinstripe denies the remaining allegations in Paragraph 23 of the Complaint.

24. Pinstripe is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 24 and therefore denies those allegations.

25. Pinstripe denies the allegations contained in Paragraph 25 of the Complaint.

26. Pinstripe admits that it has provided recruiting and screening services related to the Territory Manager position during certain periods of time. The allegation in the last sentence of Paragraph 26 is a legal conclusion to which no response is required. To the extent a response is otherwise required, Pinstripe denies the allegations contained in this sentence. Pinstripe denies the remaining allegations contained in Paragraph 26 of the Complaint.

ANSWER TO SECTION TITLED "FACTS SUPPORTING EQUITABLE TOLLING"

27. Pinstripe admits that Plaintiff attempted to file a charge on May 17, 2010, but the EEOC dismissed it as untimely. Pinstripe denies the remaining allegations contained in Paragraph 27.

28. Pinstripe denies the allegations contained in Paragraph 28 of the Complaint.

ANSWER TO SECTION TITLED "EEOC PROCEEDINGS"

29. Pinstripe admits that on July 21, 2010, Plaintiff submitted a letter to the EEOC containing certain allegations which speaks for itself and that Plaintiff perfected a charge in September 2010, by submitting a sworn charge of discrimination form. Pinstripe admits that Plaintiff filed another amended charge in December 2011 but denies that Plaintiff applied for the Territory Manager position in May 2011 and September 2011. Pinstripe admits the remaining allegations contained in Paragraph 29.

30. Pinstripe admits that the EEOC issued Notice of Right to Sue letters dated April 2, 2012 in Charge Numbers 435-2012-00211, 435-2012-00212, and 410-2010-04714, and that Plaintiff purports to attach copies of these letters as Exhibit D. Pinstripe is without knowledge or information sufficient to form a

belief as to when and why Plaintiff asked EEOC to issue the Notice of Right to Sue letters, and therefore denies those allegations.

ANSWER TO SECTION TITLED "ADEA COLLECTIVE ACTION ALLEGATIONS"

31. Pinstripe admits that Plaintiff's Complaint purports to assert a collective action under the ADEA, but denies that Plaintiff has any cognizable claims under that law or has properly stated any such claims, denies that Plaintiff has any cognizable collective action claim, denies that it has violated that law, and denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any relief whatsoever. Pinstripe denies any remaining allegations contained in Paragraph 31 of the Complaint.

32. Pinstripe denies the allegations contained in Paragraph 32 of the Complaint.

33. Pinstripe denies the allegations contained in Paragraph 33 of the Complaint.

34. Pinstripe denies the allegations contained in Paragraph 34 of the Complaint.

35. Pinstripe admits that the Exhibit E to the Complaint purports to be a copy of Plaintiff's consent to sue.

ANSWER TO SECTION TITLED "COUNT ONE"

Unlawful Pattern or Practice of Intentional Age Discrimination (Disparate Treatment) in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

36. Pinstripe incorporates by reference, as if fully re-written, Paragraphs 1-35 of this Answer.

37. Pinstripe admits that Plaintiff purports to bring this lawsuit as a collective action under the ADEA. Pinstripe denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any relief whatsoever.

38. Pinstripe denies the allegations contained in Paragraph 38 of the Complaint.

39. The allegations contained in Paragraph 39 of the Complaint are legal conclusions to which no responsive pleading is required. To the extent that a response is otherwise required, Pinstripe admits that it is an employer within the meaning of the ADEA, that it has engaged in interstate commerce within the meaning of the ADEA, and that it has employed twenty or more employees. Pinstripe denies the remaining allegations in Paragraph 39 of the Complaint.

40. Pinstripe states that the statutory language of the ADEA speaks for itself. Pinstripe denies that Plaintiff or any potential opt-in plaintiff has any

cognizable claims under the ADEA or has properly stated any such claims, and denies that it has violated that law.

41. Pinstripe denies the allegations contained in Paragraph 41 of the Complaint.

42. Pinstripe denies the allegations contained in Paragraph 42 of the Complaint.

43. Pinstripe denies the allegations contained in Paragraph 43 of the Complaint.

ANSWER TO SECTION TITLED "COUNT TWO"

Unlawful Use of Hiring Criteria Having Disparate Impact on Applicants Over 40 Years of Age in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

The Court dismissed Count Two. No response is therefore appropriate or necessary.

ANSWER TO SECTION TITLED "PRAYER FOR RELIEF"

Pinstripe denies that Plaintiff is, or any potential opt-in plaintiffs are, entitled to any of the relief requested in the Prayer for Relief section of Plaintiff's Complaint or any relief whatsoever.

ANSWER TO SECTION TITLED "DEMAND FOR JURY TRIAL"

Whether Plaintiff is entitled to a trial by jury on some or all of the allegations contained in the Complaint is a legal question to which no responsive pleading is required. To the extent that a response is deemed required, Pinstripe denies the allegation contained in the Demand for Jury Trial section of the Complaint. Answering further, Pinstripe denies that there are any issues in this case that are triable.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Plaintiff is not similarly situated to any other plaintiff he seeks to join in this action, to make appropriate the treatment of this action as a collective action under the ADEA.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statute of limitations. Plaintiff's claims are also barred by the ADEA's charge-filing period, 29 U.S.C. § 626(d)(1).

FOURTH DEFENSE

Plaintiff's claims are barred by his failure to exhaust his administrative remedies as required under the ADEA, 29 U.S.C. § 626.

FIFTH DEFENSE

To the extent that Plaintiff complains about matters that were not reasonably within the scope of any charge filed with the EEOC or a state or local agency, the Court lacks jurisdictions with respect to any such matters.

SIXTH DEFENSE

Pinstripe had legitimate, non-discriminatory business reasons for any employment decisions regarding Plaintiff, and Pinstripe's stated reasons were not a pretext for discrimination.

SEVENTH DEFENSE

Plaintiff's claims are barred because any allegedly adverse treatment of him was based solely on one or more reasonable factors other than age.

EIGHTH DEFENSE

The relief sought by Plaintiff, including monetary damages, is neither authorized nor appropriate for one or more causes of action set forth in the Complaint.

NINTH DEFENSE

Plaintiff has failed to mitigate or make reasonable efforts to mitigate his alleged damages, and Plaintiff's recovery of damages, if any, must be barred or reduced accordingly.

TENTH DEFENSE

Plaintiff has failed to allege facts sufficient to state a claim for liquidated damages.

ELEVENTH DEFENSE

Plaintiff may not recover liquidated damages because at all times relevant to the Complaint Pinstripe had a good faith belief that its policies did not violate the ADEA.

TWELFTH DEFENSE

Plaintiff's claims for injunctive or other equitable relief are barred because Plaintiff has an adequate and complete remedy at law.

THIRTEENTH DEFENSE

Plaintiff's claims are barred in whole or in part by the doctrine of laches, waiver and/or estoppel.

FOURTEENTH DEFENSE

Some or all of Plaintiff's claims for relief are barred because of Plaintiff's unclean hands.

FIFTEENTH DEFENSE

Some or all of Plaintiff's claims for damages are speculative or unavailable as a matter of law.

SIXTEENTH DEFENSE

Plaintiff lacks standing to bring some or all of his claims.

SEVENTEENTH DEFENSE

Pinstripe is not responsible for any conduct of its employees or agents taken outside the scope of their responsibility.

EIGHTEENTH DEFENSE

Plaintiff has not alleged sufficient facts to justify a collective action.

NINETEENTH DEFENSE

Plaintiff cannot adequately represent the interests of any potential opt-in plaintiff, his claims are not typical of the putative class, the putative class does not share common questions of law or fact, and a class would not be manageable.

TWENTIETH DEFENSE

In the event that the Court should certify this action as a collective action under the ADEA (which Pinstripe denies would be appropriate), Pinstripe incorporates by reference and realleges all of its defenses to the claims of any plaintiff who joins the action, and reserves the right to assert additional defenses depending upon the identity of the new plaintiff or plaintiffs.

TWENTY-FIRST DEFENSE

Pinstripe, at all relevant times, was not the agent of RJ Reynolds.

TWENTY-SECOND DEFENSE

The types of claims alleged by Plaintiffs on behalf of putative class/ collective action members are matters in which individual questions predominate and thus are not appropriate for class or collective treatment.

TWENTY-THIRD DEFENSE

A class/ collective action is not a superior method of adjudicating the Plaintiffs' allegations.

TWENTY-FOURTH DEFENSE

A class/ collective action is not a superior method of adjudicating the Plaintiffs' allegations.

TWENTY-FIFTH DEFENSE

There is no direct evidence of age discrimination.

TWENTY-SIXTH DEFENSE

Plaintiffs were treated the same as similarly situated younger employees.

TWENTY-SEVENTH DEFENSE

Pinstripe reserves the right to assert and does not waive any additional or further defenses as may be revealed during discovery or otherwise and reserves the right to amend this Answer to assert any such defenses.

Dated: March 20, 2013

Respectfully submitted,

/s/ *Natasha L. Wilson*
Natasha L. Wilson
Greenberg Traurig, LLP
Terminus 200
Suite 2500
3333 Piedmont Road, N.E.
Atlanta, GA 30305
Telephone: 678-553-2182
Facsimile: 678-553-2283
wilsonn@gtlaw.com

Attorney for Pinstripe, Inc.

CERTIFICATE OF COMPLIANCE WITH L.R. 5.1B

I HEREBY CERTIFY that the foregoing document was prepared in Times New Roman, 14-point font, as approved by Local Rule 5.1B.

/s/ *Natasha L. Wilson*
Attorney for Pinstripe, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:12-CV-0138-RWS
R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2013, a true and correct copy of the foregoing has been served via electronic filing upon the following counsel of record:

John J. Almond, Esq.
Kristina M. Jones, ESq.
Rogers & Hardin, LLP
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
Attorneys for Plaintiff

James M. Finberg, Esq.
P. Casey Pitts, Esq.
Altshuler Berzon, LLP
177 Post Street
San Francisco, CA 94108
Attorneys for Plaintiffs

Todd M. Schneider, Esq.
Mark T. Johnson, Esq.
Joshua G. Konecky, Esq.
Schneider Wallace Cottrel, et al.
180 Montgomery Street, Ste 2000
San Francisco, CA 94101
Attorneys for Plaintiffs

Shanon J. Carson, Esq.
Sarah R. Schalman-Bergen, Esq.
Berger & Montague, PC
1622 Locust Street
Philadelphia, PA 19103
Attorneys for Plaintiffs

Alison B. Marshall, Esq.
Eric S. Dreiband, Esq.
Jones Day - D.C.
51 Louisiana Avenue, NW
Washington, DC 20001-2113
Attorneys for R. J. Reynolds Tobacco Company

Deborah A. Sudbury, Esq.
Jones Day
1420 Peachtree Street, NE
Suite 800
Atlanta, GA 30309
Attorneys for R. J. Reynolds Tobacco Company

Frederick T. Smith, Esq.
Seyfarth Shaw, LLP
1075 Peachtree Street, N.E.
Suite 2500
Atlanta, GA 30309
Attorneys for CareerBuilder, LLC

/s/ Natsha L. Wilson
Natasha L. Wilson
GA. Bar No. 371233

Attorney for Pinstripe, Inc.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY and PINSTRIPE, INC., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

The Plaintiff moves the Court, in accordance with Rule 15(a)(2) of the Federal Rules of Civil Procedure, for leave to amend the Complaint.

In its Order of March 6, 2013, the Court granted the Defendants' Partial Motion to Dismiss and ruled that claims related to hiring decisions made more than 180 days before the May 17, 2010 filing by Mr. Villarreal of his discrimination charge with the Equal Employment Opportunity Commission ("EEOC") are dismissed, inasmuch as the Complaint, the Court held, failed to plead facts sufficient to show a basis for equitable modification or tolling of the time limitations for filing a charge with the EEOC. Specifically, the Court concluded:

"Without knowing which facts alerted Plaintiff to this discrimination claim or how he learned those facts, the Court cannot determine whether or when those facts should have become apparent to a reasonably prudent person." Order at 18-19. Plaintiff has prepared a proposed Amended Complaint in which he specifically describes what facts he learned, when he learned them, and why he could not possibly have learned those facts earlier. Plaintiff seeks an order granting him leave to file and serve the proposed Amended Complaint, a copy of which is appended hereto as Exhibit "A".

In support of this motion, as appears more fully from the "Brief in Support of Plaintiff's Motion for Leave to Amend Complaint," filed herewith, Plaintiff shows that:

a) The proposed Amended Complaint provides the detailed information relevant to equitable tolling that was not set forth in the Complaint;

b) F.R.Civ.P. Rule 15(a)(2) provides that "[t]he court should freely give leave [to amend] when justice so requires";

c) In this Circuit, a plaintiff must be granted one opportunity for leave to amend if "a more carefully drafted complaint might state a claim upon which relief can be granted";

e) The proposed amendment would not be futile because the detailed allegations of the proposed Amended Complaint state a claim for equitable tolling.

WHEREFORE, the Plaintiff prays that the Court enter an order granting leave to file and serve the proposed Amended Complaint.

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com

ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

James M. Finberg, Esq.
jfinberg@altber.com
P. Casey Pitts, Esq.
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Shanon J. Carson
scarson@bm.net
Sarah R. Schalman-Bergen
sschalman-bergen@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: 800-424-6690
Facsimile: 215-875-4604

Mark T. Johnson
mjohnson@schneiderwallace.com
Todd M. Schneider
tschneider@schneiderwallace.com
Josh G. Konecky
jkonecky@schneiderwallace.com
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY, LLP-CA
180 Montgomery Street
Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100
Facsimile: 415-421-7105

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I caused the foregoing ***PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT*** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

Deborah A. Sudbury
dsudbury@jonesday.com

R. Scott Campbell
campbellrs@gtlaw.com

James M. Finberg
jfinberg@altshulerberzon.com

P. Casey Pitts
cpitts@altber.com

Shanon J. Carson
scarson@bm.net

Sarah R. Schalman-Bergen
sschalman-bergen@bm.net

Mark T. Johnson
mjohnson@schneiderwallace.com

Todd M. Schneider
tschneider@schneiderwallace.com

and that I have caused a copy to be served by U.S. Mail on the following attorneys of record:

Alison B. Marshall
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Eric S. Dreiband
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Paul E. Benson
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

Scott Beightol
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
Attorney for Plaintiff

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EXHIBIT A TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY and PINSTRIPE, INC.,

Defendants.

Civil Action No. 2:12-cv-00138-RWS

**[PROPOSED]
FIRST AMENDED COMPLAINT AND JURY DEMAND**

(Collective Action)

FIRST AMENDED COMPLAINT FOR AGE DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Plaintiff Richard M. Villarreal ("Plaintiff" or "Mr. Villarreal"), on behalf of himself and all others similarly situated, by and through his undersigned counsel, files this collective action First Amended Complaint and Jury Demand (the "Complaint") against Defendants R.J. Reynolds Tobacco Company ("RJ Reynolds") and Pinstripe, Inc. (collectively, "Defendants"). The following allegations are based on personal knowledge as to Plaintiff's own conduct and on information and belief as to the acts of others.

INTRODUCTION

1. This is a collective action challenging Defendants' repeated acts of unlawful age discrimination with respect to the hiring of individuals to fill regional sales positions. Since at least September 1, 2007 and perhaps earlier, Defendant RJ Reynolds, with the assistance of Defendant Pinstripe, Inc. ("Pinstripe"), has hired over a thousand individuals to fill its "Territory Manager/Sales Representative/Trade Marketing" positions ("Territory Managers") throughout the United States. In doing so, Defendants followed policies established by RJ Reynolds that expressly instructed recruiters to reject candidates with eight years or more of sales experience and to target candidates two to three years out of college. RJ Reynolds understood and intended that these policies would result in the rejection of candidates 40 years of age or older. Pursuant to those policies, almost all of the individuals hired for the Territory Manager position were 39 years of age or younger, and many hundreds, if not thousands, of qualified persons 40 years of age and over were rejected on the basis of their age alone.

2. Defendants engaged in a pattern or practice of intentionally discriminating against qualified applicants age 40 or over on the basis of their age, and they also applied employment policies and practices that, although not expressly directed at age, had a disparate impact on qualified applicants over the

age of 40, in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").

3. Plaintiff Richard M. Villarreal, whose applications for the Territory Manager position were repeatedly rejected due to his age, brings this action on his own behalf and on behalf of all other similarly situated applicants for the Territory Manager position. Mr. Villarreal seeks a declaration that Defendants' hiring policies and/or practices violate the ADEA; an injunction prohibiting Defendants from discriminating against applicants over the age of 40 in the future and requiring Defendants to remedy the effects of their past discrimination; and damages for himself and for all similarly situated applicants who opt into this action pursuant to 29 U.S.C. § 216(b).

PARTIES

4. Plaintiff Richard M. Villarreal is a 55-year-old resident of Cumming, Georgia, who applied for a Territory Manager position with RJ Reynolds on six separate occasions between November 8, 2007 and April 2012. Cumming is located in the Gainesville Division ("this Division") of this District.
Mr. Villarreal's applications for the Territory Manager position were rejected each time he applied.

5. Defendant RJ Reynolds Tobacco Company is a tobacco company with approximately 4,800 employees. It is headquartered in Winston-Salem, North

Carolina, and incorporated in North Carolina. RJ Reynolds markets and sells its tobacco products in all fifty states, including within this Division, and engages in recruiting activities in all fifty states, including within this Division.

6. Defendant Pinstripe, Inc. is a recruiting services company and employment agency. Pinstripe regularly procures employees for employers engaged in interstate commerce and employs twenty or more employees. Its principal office is located in Brookfield, Wisconsin, and it is incorporated in Wisconsin. Pinstripe provides recruiting services in all fifty states, including within this Division.

JURISDICTION AND VENUE

7. Because this case is brought under the ADEA, 29 U.S.C. § 621 *et seq.*, this Court has federal question jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4).

8. Venue is proper in this District because a substantial part of the events and omissions giving rise to the claims in this case occurred in this District, and because each of the Defendants is subject to personal jurisdiction in this District by virtue of its substantial, continuous, and systematic commercial activities in this District. *See* 28 U.S.C. § 1391(b), (c). Venue is proper in this Division because all Defendants are subject to personal jurisdiction in this Division and, thus, "reside" in this Division for venue purposes (*see* LR, NDGa 3.1(B)(1); 28 U.S.C.

§ 1391(c)); and because this cause of action arose within this Division (*see* LR, NDGa 3.1(B)(3)).

FACTS

9. Since at least September 1, 2007, RJ Reynolds, with the assistance of Pinstripe, has actively recruited and hired individuals to fill Territory Manager positions within RJ Reynolds. Territory Managers are assigned to a specific geographic territory and are responsible for working with traditional and non-traditional retailers in that territory to increase sales of RJ Reynolds's tobacco products and to build RJ Reynolds's brands. Territory Managers also market RJ Reynolds's products directly to consumers through "one-to-one" engagements designed to convert consumers to RJ Reynolds's tobacco products. Being of a certain age is not a *bona fide* occupational qualification reasonably necessary for the Territory Manager position.

10. On November 8, 2007, Mr. Villarreal applied for a Territory Manager position with RJ Reynolds. Mr. Villarreal learned of the vacancy on a website maintained by CareerBuilder, LLC ("CareerBuilder"), which directed him to a website maintained by RJ Reynolds. On that website, Mr. Villarreal completed a questionnaire; uploaded his resume; and submitted his application. He also indicated his desire to be notified of future job openings that matched his website

profile. At the time, Mr. Villarreal was 49 years old. Mr. Villarreal resided in Cumming, Georgia, when he learned of the opening and applied for the position.

11. Mr. Villarreal was never contacted by any of the Defendants regarding his November 8, 2007 application, and he was never offered the Territory Manager position.

12. Kelly Services, Inc. ("Kelly Services"), a recruiting and staffing company and employment agency, through its subdivision Kelly HRFirst, assisted RJ Reynolds in recruiting and screening applications for the Territory Manager position in 2007 and 2008, and was doing so when Mr. Villarreal first applied for the position. Kelly Services screened all of the applications for the position that RJ Reynolds received during that time period, including Mr. Villarreal's application, and it determined which applicants should be rejected based on their resumes alone and which should be interviewed by RJ Reynolds.

13. In screening those applications, Kelly Services used "resume review guidelines" provided by RJ Reynolds. A true and correct copy of a document setting forth the resume guidelines that was obtained from Kelly Services is attached to this Complaint as **Exhibit A** and incorporated herein.

14. RJ Reynolds's resume review guidelines listed various desired aspects of the "**targeted candidate**," including, among others, "willing to relocate," "leadership skill," "21 and over," "comfortable with tobacco industry," "***2-3 years***

out of college," "***adjusts easily to changes***," "ability to travel 65-75% of time," and "bilingual candidates (is a plus, but not required)." (Emphasis added.) The guidelines also listed candidates to "**stay away from**," including, among others, "former employees of competitors," "candidates with DUI(s)," "graduates who held a 4.0 w/o involvement in other activities," and "***in sales for 8-10 years***." (Emphasis added.)

15. Kelly Services applied these guidelines when reviewing Mr. Villarreal's November 8, 2007 application for RJ Reynolds. Mr. Villarreal's application was rejected by Kelly Services on behalf of RJ Reynolds because Mr. Villarreal had over eight years of sales experience and was 49 years old, and RJ Reynolds had instructed Kelly Services to "stay away from" such candidates. Mr. Villarreal was well qualified for the Territory Manager position but, due to Mr. Villarreal's extensive sales experience and age, Kelly Services, acting on RJ Reynolds's behalf, rejected Mr. Villarreal's application and instead forwarded the applications of substantially younger individuals to RJ Reynolds for further consideration for the Territory Manager position.

16. In June 2010, after receiving an email from RJ Reynolds soliciting applications for the Territory Manager position, Mr. Villarreal again applied for a Territory Manager position with RJ Reynolds. Mr. Villarreal was 52 years old at

the time of his June 2010 application, and he was well-qualified for the Territory Manager position.

17. Less than one week after applying, Mr. Villarreal received an email from RJ Reynolds rejecting his application and stating that RJ Reynolds was pursuing other individuals.

18. At the time of Mr. Villarreal's June 2010 application, RJ Reynolds continued to target candidates under 40 years of age and to reject candidates 40 years of age and over. Like his November 2007 application, Mr. Villarreal's June 2010 application for the Territory Manager was rejected because of his age. Rather than hiring Mr. Villarreal, RJ Reynolds hired substantially younger individuals.

19. Mr. Villarreal applied for the Territory Manager again in December 2010, May 2011, September 2011, and March 2012. He was well-qualified for the position, but was rejected on account of his age each time he applied. Each time, RJ Reynolds chose to hire individuals younger than 40 to fill the Territory Manager position.

20. Defendant Pinstripe has assisted RJ Reynolds in recruiting and screening applications for the Territory Manager position from at least April 2009 through the present, and was doing so when Mr. Villarreal applied for the position in 2010, 2011, and 2012. Pinstripe screened all of the applications for the position

that RJ Reynolds received, including Mr. Villarreal's application, and it determined which applicants should be rejected based on their resumes alone and which should be interviewed by RJ Reynolds.

21. In screening applications, Pinstripe used "resume review guidelines" identical or almost identical to those in Exhibit A, pursuant to which Pinstripe rejected candidates like Mr. Villarreal who were 40 years of age or older, and instead forwarded on the applications of substantially younger candidates.

22. In addition to applying these resume review guidelines, Pinstripe and RJ Reynolds developed a candidate profile that identified the characteristics RJ Reynolds preferred in Territory Manager candidates. The profile labeled the ideal candidate as the "Blue Chip TM." RJ Reynolds and Pinstripe created the profile by surveying recent hires who were nominated by management as ideal new hires. Because RJ Reynolds had been discriminating against persons over 40 in its hiring for Territory Manager positions, since at least September 1, 2007, the 2009 candidate profile created from strong recent hires not surprisingly was heavily weighted toward young persons. The profile stated that 67% of "Blue Chip TMs" had no prior experience or 1-2 years of work experience, while only 9% had six or more years of prior experience. Pinstripe used the "Blue Chip TM" candidate profile, as well as the resume review guidelines described above, in screening

candidates for the Territory Manager position. A true and correct copy of the "Blue Chip TM" profile is attached as **Exhibit B.**

23. From at least September 1, 2007 (and perhaps earlier) through the present, RJ Reynolds has applied the same policy or practice of hiring only individuals under the age of 40 to fill the Territory Manager position. During that time, many hundreds, if not thousands, of qualified applicants other than Mr. Villarreal were similarly rejected because they were 40 years of age or older. Indeed, from September 1, 2007 through July 10, 2010, RJ Reynolds hired 1,024 people to fill the Territory Manager position, and only 19 of those hires (1.85%) were over the age of 40.

24. This hiring disparity was caused by RJ Reynolds's discriminatory practices, not by any unique characteristics of the Territory Manager position or the applicant pool. Throughout the relevant time period, individuals over the age of 40 constituted far more than 1.85% of the pool of applicants for the Territory Manager position. For example, the 2000 Census reported that more than 54% of the individuals occupying outside sales representative positions like the Territory Manager position are over the age of 40. Of the applications for the Territory Manager position screened by Kelly Services between September 2007 and March 2008, approximately 48% (9,100 of 19,086) were from individuals with eight or more years of sales experience, yet Kelly Services, following RJ Reynolds's

guidelines, only referred 15% of that group on to RJ Reynolds for further consideration, compared to 35% of individuals with less experience. Of the applications for the Territory Manager position screened by Pinstripe from February 1, 2010 through July 10, 2010, more than 49% (12,727 out of 25,729) were from individuals with 10 years or more of sales experience, but Pinstripe only forwarded 7.7% of the persons with 10 or more years of sales experience to RJ Reynolds for further review, rejecting 92.3% of them based on RJ Reynolds's discriminatory guidelines. In contrast Pinstripe forwarded 45% of the candidates who only had one-to-three years of sales experience.

25. CareerBuilder and Defendant Pinstripe assisted RJ Reynolds in recruiting and hiring applicants for the Territory Manager position, as described above. While assisting RJ Reynolds, these Defendants were aware of RJ Reynolds's policy of hiring only individuals under the age of 40 for the position, and applied that policy when screening applicants for the position. In assisting RJ Reynolds in recruiting, screening, and hiring applicants for the Territory Manager position, CareerBuilder and Defendant Pinstripe acted as agents of RJ Reynolds.

FACTS SUPPORTING EQUITABLE TOLLING

26. On May 17, 2010, Mr. Villarreal filed a charge of discrimination with the EEOC, alleging that RJ Reynolds discriminated against him on the basis of age in rejecting his November 8, 2007 application.

27. Mr. Villarreal did not file his charge before May 2010 because he did not become aware until shortly before filing the charge that there was reason to believe that his 2007 application for the Territory Manager position had been rejected on account of his age. The facts necessary to support Mr. Villarreal's charge of discrimination were not apparent to him, and could not have been apparent to him, until less than a month before he filed his May 17, 2010 EEOC charge.

28. Mr. Villarreal was not an employee of either RJ Reynolds or Kelly Services or related to anyone who was. He did not receive any communication from RJ Reynolds or anyone else informing him why he was not hired. As a result, Mr. Villarreal had no idea why he was not hired. He did not even know whether his application had been reviewed at all, much less whether it had been rejected or screened out. He was not aware that RJ Reynolds had instructed Kelly Services to use the resume review guidelines that disadvantaged persons 40 or over, or that Kelly Services followed them, to the disadvantage of persons 40 and over. Indeed, Mr. Villarreal was unaware that Kelly Services (or anyone else) was or had been reviewing or screening resumes or applications for RJ Reynolds.

29. On April 20, 2010 lawyers from Altshuler Berzon LLP sent Mr. Villarreal a letter. A copy of that letter is attached as **Exhibit C.**

30. On April 26, Mr. Villarreal called P. Casey Pitts, an attorney with Altshuler Berzon.[1] Mr. Pitts informed Mr. Villarreal that he had obtained information indicating that RJ Reynolds had used resume review guidelines similar to those attached as **Exhibit A** to this Complaint when screening applications for the Territory Sales Manager position in 2007. Mr. Pitts further informed Mr. Villarreal that RJ Reynolds used these guidelines when screening applications to the disadvantage of persons 40 years of age and older (including Mr. Villarreal), as alleged in ¶¶ 12 to 15 and 18 of this Complaint. Before that conversation with Mr. Pitts, Mr. Villarreal had no knowledge and no reason or means to know that RJ Reynolds or anyone screening or reviewing resumes for RJ Reynolds had used any such guidelines or had applied criteria such as those set forth in **Exhibit A**.

EEOC PROCEEDINGS

31. In July 2010, Mr. Villarreal filed an amended charge of discrimination including both the 2007 rejection and the June 2010 rejection of his application for the same position. In December 2011, Mr. Villarreal filed another amended charge of discrimination addressing the rejection of his December 2010, May 2011, and September 2011 applications for the Territory Manager position and adding,

[1] In that conversation, Mr. Villarreal sought legal advice. As a result, the conversation is protected by the attorney-client privilege. For the limited purpose of establishing facts supporting equitable tolling, Mr. Villarreal waives the attorney-client privilege to the portion of the conversation where he became aware of facts alerting him to the fact that he had a meritorious claim for age discrimination.

among others, Pinstripe and CareerBuilder as Respondents. Mr. Villarreal's EEOC charge, and the various amendments to his charge, are attached collectively as **Exhibit D**.

32. On March 26, 2012, Mr. Villarreal asked the EEOC to issue Notices of Right to Sue as to Defendant RJ Reynolds, Defendant Pinstripe, and CareerBuilder so that he could litigate the case in court against those Defendants on his own behalf. On April 2, 2012, the EEOC issued Notices of Right to Sue letters in Charge Numbers 435-2012-00211 and 435-2012-00212 – the charge numbers assigned to Pinstripe and CareerBuilder – and in Charge Number 410-2010-04714 – Mr. Villarreal's original charge against RJ Reynolds. Copies of the EEOC right-to-sue letters as to RJ Reynolds, Pinstripe, and Career Builder are attached collectively as **Exhibit E**.

ADEA COLLECTIVE ACTION ALLEGATIONS

33. Mr. Villarreal brings this action for violation of the ADEA as a collective action pursuant to 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b). Mr. Villarreal brings this collective action on behalf of:

> all applicants for the Territory Manager position who applied for the position since the date RJ Reynolds began its pattern or practice of discriminating against applicants over the age of 40 (which Plaintiff is informed and believes was no later than September 1, 2007, and possibly earlier); who were 40 years of age or older at the

time of their application; and who were rejected for the position (the "ADEA Collective Action Members").

34. At all relevant times, Mr. Villarreal and the other ADEA Collective Action Members are and have been similarly situated. All of the ADEA Collective Action Members were subject to the same common, unified decisions, policies, practices, plans, procedures, programs, rules, and schemes of discrimination, pursuant to which Defendants willfully and intentionally rejected qualified applicants for the Territory Manager position 40 years of age and older and instead targeted and hired applicants under the age of 40.

35. In addition, all of the ADEA Collective Action Members were subject to the same common, unified decisions, policies, practices, plans, procedures, programs, rules, and schemes of discrimination, pursuant to which Defendants applied hiring guidelines that had an adverse or disparate impact on older workers, including guidelines targeting recent college graduates, candidates with 1-2 years of experience, and candidates who "adjust[ ] easily to change[ ]," and guidelines disfavoring applicants who have been in sales for 8-10 years or who have six or more years of prior experience. Mr. Villarreal's claims against Defendants are the same in all material respects as those of the other ADEA Collective Action Members.

36. This action is properly brought under and maintained as an opt-in collective action pursuant to 29 U.S.C. § 216(b). The ADEA Collective Action Members are readily ascertainable. Their names and addresses are readily available from Defendants, and notice of this action, as permitted by the ADEA and *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), can readily be provided to the last current address reasonably ascertainable by Defendants' records, and to any changes of address ascertained using the U.S. Post Office's National Change of Address database and other publicly available records.

37. Mr. Villarreal hereby consents to sue under the ADEA and 29 U.S.C. §216(b). A copy of his consent to sue is attached as **Exhibit F**.

COUNT ONE

Unlawful Pattern or Practice of Intentional Age Discrimination (Disparate Treatment) in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

38. Mr. Villarreal realleges and incorporates herein by reference the foregoing paragraphs.

39. Mr. Villarreal brings this action as a collective action, on his own behalf and on behalf of the other ADEA Collective Action Members.

40. Mr. Villarreal filed timely charges of discrimination with the EEOC, making claims of age discrimination on his own behalf and on behalf of all similarly situated individuals, and he has satisfied all preconditions to bringing this

action. Mr. Villarreal has exhausted his administrative remedies on his own behalf and on behalf of the other ADEA Collective Action Members. Mr. Villarreal timely files this suit following notices of his right to sue.

41. At all relevant times, Defendants have been, and continue to be, employers or agents of an employer within the meaning of the ADEA, 29 U.S.C. § 630. Defendant Pinstripe also is an employment agency within the meaning of the ADEA. *Id.* At all relevant times, Defendants have been engaged in interstate commerce within the meaning of the ADEA, *id.*, and all of the Defendants have employed, and continue to employ, twenty or more employees.

42. The ADEA makes it unlawful for employers and their agents "to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Likewise, the ADEA makes it unlawful for any employment agency "to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age." 29 U.S.C. § 623(b). These prohibitions apply if an employer, an employer's agent, or an employment agency discriminates against an individual who is at least 40 years of age in favor of a substantially younger individual. 29 U.S.C. § 631(a); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

43. By targeting applicants for the Territory Manager position under the age of 40, and rejecting applications of those 40 years of age or over, Defendants engaged in a pattern or practice of discriminating against qualified applicants over the age of 40, in violation of the ADEA. In addition, when targeting candidates with 1-2 years of experience pursuant to the "Blue Chip TM" candidate profile, Defendants used lack of experience as a proxy for age, and thereby engaged in a pattern or practice of discriminating against qualified applicants over the age of 40, in violation of the ADEA. Defendants' violations of the ADEA were intentional and willful.

44. Defendants engaged in this unlawful age discrimination from at least September 2007 onward, and they continue to engage in unlawful age discrimination in hiring RJ Reynolds Territory Managers.

45. As a direct and proximate result of the foregoing violations of the ADEA, the ADEA Collective Action Members, including Mr. Villarreal, have sustained economic and non-economic damages, including, but not limited to, denial of the wages and other benefits provided to RJ Reynolds' Territory Managers, lost interest on those wages and other benefits, and loss of the opportunity to advance within RJ Reynolds. The ADEA Collective Action Members are entitled to recover economic and statutory damages and penalties,

including back pay, front pay, liquidated damages, and other appropriate relief under the ADEA.

COUNT TWO

[Count dismissed by the Court's March 6, 2013 order, but retained for purposes of appeal.]

Unlawful Use of Hiring Criteria Having Disparate Impact on Applicants Over 40 Years of Age in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

46. Mr. Villarreal realleges and incorporates herein by reference the foregoing paragraphs, except for the intent and willfulness allegations alleged in paragraphs 2, 34, and 43.

47. The ADEA, as construed by the United States Supreme Court, prohibits employment practices or policies that, although facially neutral with respect to age, have an adverse or disparate impact on older workers.

48. The RJ Reynolds resume review guidelines used by Defendants in screening applications for the Territory Manager position included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA. Those criteria include, without limitation:

a. That the "Targeted Candidate[s]" are those "2-3 years out of college" or "[r]ecent college grad[s];"

b. That the "Targeted Candidate[s]" are those who "[a]djust[ ] easily to changes;" and

c. The directive to "Stay Away From" applicants who have been "[i]n sales for 8-10 years."

49. The "Blue Chip TM" profile also included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA, including, without limitation, that a "Blue Chip TM" has "1-2 years of experience."

50. By imposing and applying the foregoing resume review criteria and "Blue Chip TM" candidate profile, Defendants discriminated against qualified applicants over the age of 40, in violation of the ADEA.

51. Defendants engaged in these unlawful employment policies or practices from at least September 2007 onward, and they continue to engage in such unlawful age discrimination in hiring RJ Reynolds Territory managers.

52. As a direct and proximate result of the foregoing violations of the ADEA, the ADEA Collective Action Members, including Mr. Villarreal, have sustained economic and non-economic damages, including, but not limited to, denial of the wages and other benefits provided to RJ Reynolds' Territory Managers, lost interest on those wages and other benefits, and loss of the opportunity to advance within RJ Reynolds. The ADEA Collective Action

Members are entitled to recover economic and statutory damages and penalties, including back pay, front pay, liquidated damages, and other appropriate relief under the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Richard M. Villarreal, on behalf of himself and all others similarly situated, prays for the following relief:

a. Certification of this action as a collective action brought pursuant to the ADEA, 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b);

b. Designation of Plaintiff Richard M. Villarreal as the representative of the ADEA Collective Action Members;

c. An order requiring that notice of the pendency of this action and of the right to opt into this action be provided, at Defendants' expense, to each of the ADEA Collective Action Members at the last current address reasonably ascertainable using Defendants' records and other publicly available records;

d. A declaratory judgment that the practices complained of herein are unlawful and violate the ADEA, 29 U.S.C. § 621 *et seq.*;

e. A permanent injunction against all Defendants and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them, prohibiting them from engaging in unlawful age discrimination in recruiting, screening, and hiring applicants for the Territory Manager position;

f. A permanent injunction requiring that RJ Reynolds institute and carry out policies, practices, and programs that provide equal employment opportunities for all job applicants regardless of age, and that eradicate the effects of its past and present unlawful employment practices;

g. Back pay and front pay (including interest and benefits) for all ADEA Collective Action Members who join this action;

h. Liquidated damages for all ADEA Collective Action Members who join this action;

i. Reasonable attorneys' fees and all expenses and costs of this action;

j. Pre-judgment interest, in the event liquidated damages are not awarded, as provided by law;

k. Such other and further legal and equitable relief as this Court deems necessary, just, and proper.

DEMAND FOR JURY TRIAL

Under Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all issues so triable in this action.

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com

ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

Of Counsel:

James M. Finberg, Esq.
jfinberg@altber.com
P. Casey Pitts, Esq.
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Shanon J. Carson, Esq.
scarson@bm.net
Sarah R. Schalman-Bergen, Esq.
sschalman-bergen@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 1-800-424-6690
Facsimile: 215-875-4604

Todd M. Schneider, Esq.
tschneider@schneiderwallace.com
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street
Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100, Ext. 306
Facsimile: 415-421-7105

Counsel for Plaintiff Richard M. Villarreal and all others similarly situated

EXHIBIT A

Resume Review Guidelines

What To Look For On A Resume

- 4 year College Degree
(Needs client clarification)
- Outside Sales Experience
- Past employment with rental car companies. (i.e. Hertz, Enterprise Rental Car)
- Ability to engage others
- Merchandising
- Multi-tasking
- Teaching Experience (2-3 yrs.)
- Former Manager of a large retail establishment (i.e. Wal-Mart)
- Marketing
- Recent college grad involved in many activities (sports, fraternities/ sororities, clubs etc.) simultaneously while maintaining a GPA of 2.8-3.1.
- Communication Skills
- Pharmaceutical Sales Experience
- Advertising

Targeted Candidate

- Willing to relocate
- Leadership skill
- 21 and over
- Comfortable with tobacco industry
- 2-3 years out of college
- Adjusts easily to changes
- Ability to travel 65-75% of time
- Bilingual Candidates (is a plus, but not required)

Stay Away From

- Former employees of competitors
  - Phillip Morris
  - Lorillard Tobacco Company
- Candidates with DUI(S)
- Graduates who held a 4.0 w/o involvement in other activities
- Candidates taking drastic pay cuts
- In sales for 8-10 years

EXHIBIT B

Reynolds
RJReynolds

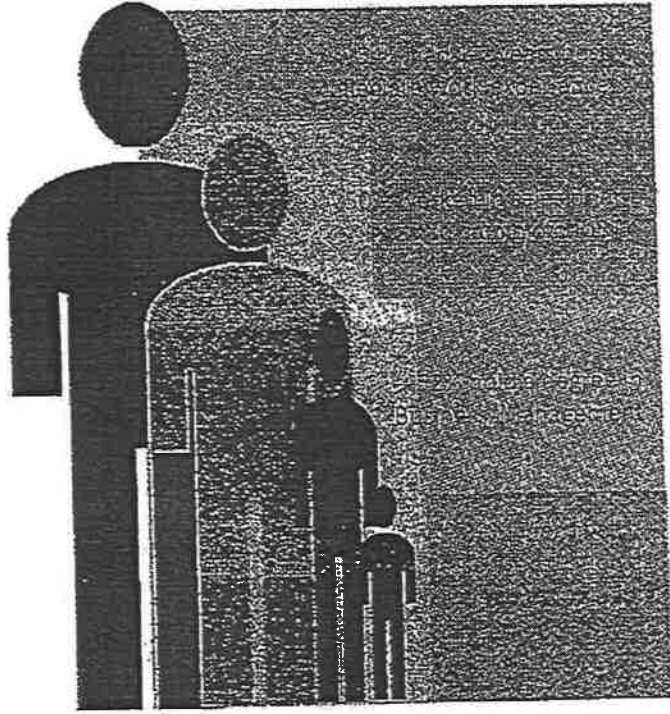
2009 Trade Marketing Talent Acquisition Review
Blue Chipper Project

Previous Experience - Tenure	
No Prior Experience	15%
1 – 2 years of Experience	52%
3 – 4 Years of Experience	15%
4 – 5 Years of Experience	12%
6+ Years of Experience	9%

Previous Experience - Background	
Sales	50%
Finance/Insurance	17%
Recent College Grads	12%

Previous Education – Major Studies	
Business/Management	52%
Liberal Arts	30%
Marketing/Advertising	12%

The make up of a "Blue Chip TM"



CONFIDENTIAL

EXHIBIT C

ADVERTISEMENT

ANNE N. ARKUSH
STEPHEN P. BERZON
HAMILTON CANDEE
EVE H. CERVANTEZ
BARBARA J. CHISHOLM
CAROLINE P. CINCOTTA
JEFFREY B. DEMAIN
JAMES M. FINBERG
EILEEN B. GOLDSMITH
SCOTT A. KRONLAND
PETER LECKMAN
DANIELLE E. LEONARD
STACEY M. LEYTON
LINDA LYE
PETER D. NUSSBAUM
P. CASEY PITTS
DANIEL T. PURTELL
MICHAEL RUBIN
REBECCA SMULLIN
JENNIFER SUNG
PEDER J. THOREEN
JONATHAN WEISSGLASS
EMILY B. WHITE

FRED H. ALTSHULER
FOUNDING PARTNER EMERITUS

CASEY A. ROBERTS
FELLOW

April 20, 2010

Richard M. Villareal
3720 Rivendell Lane
Cumming, GA 30040
Tel.: (678) 779-0026

RE: Investigation Regarding Age Discrimination in Hiring for RJReynolds Territory Manager/Sales Representative/Trade Marketing Position

Dear Richard M. Villarreal:

In anticipation of a possible class action lawsuit, our law firm is currently investigating alleged age discrimination in the hiring process used by R.J. Reynolds Tobacco Company to fill its Territory Manager / Sales Representative / Trade Marketing positions. We understand that you applied for one of these positions and that you were not hired. We are interested in talking to you about your experience in applying for this position. We believe that you may have been a victim of age discrimination, and we would like to discuss your potential claim with you.

If you are willing to discuss this matter with us on a confidential basis, please contact our office at (415) 421-7151 and ask to speak with Casey Pitts.

Please note that we are still investigating this matter, and we have not yet determined whether R.J. Reynolds violated the law, whether to pursue a lawsuit, or what the value of any individual or class claim might be. This letter does not constitute an offer of legal representation,

ADVERTISEMENT

and does not obligate Altshuler Berzon LLP to serve as your attorney in this or any other matter.[1] The firm can only represent you if you and the firm agree in writing to such representation. Nonetheless, we will consider our communications to be confidential communications made for the purposes of facilitating the rendition of professional legal services and, if disclosure of such communications is sought by a third party, we will assert that the communication is protected by attorney-client privilege.

Thank you for your consideration,

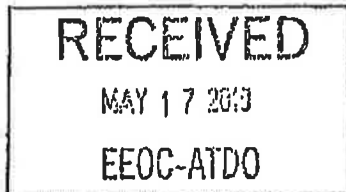
James M. Finberg
Eve Cervantez
P. Casey Pitts
Altshuler Berzon LLP

---

[1] We are not currently admitted to practice law in the state of Georiga. However, if our investigation results in court proceedings in Georgia, we expect to be authorized to appear in those proceedings. *See* Georgia State Bar Rules and Regulations, Rule 4-102, Rule of Professional Conduct 5.5.

EXHIBIT D

May 10, 2010



Equal Employment Opportunity Commission
Sam Nunn Atlanta Federal Center
100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

Re: Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this charge of age discrimination on behalf of myself and others similarly situated. I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds"). I believe that my application for the position was rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").

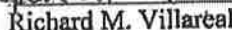
RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

It is my understanding that RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

5/17/10
Date


Richard M. Villareal

July __, 2010

Equal Employment Opportunity Commission
Sam Nunn Atlanta Federal Center
100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

Re: Amended Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this amended charge of age discrimination on behalf of myself and others similarly situated. I twice applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds"). I believe that my applications for the position were rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[1]

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In June 2010, when I was 52 years old, I again applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. RJ Reynolds was hiring individuals to fill that position throughout the country. As before, I was well qualified for the position. Nonetheless, less than week after I applied for the position I received an email from RJ Reynolds rejecting my application and stating that they were pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds again rejected my application on account of my age.

---

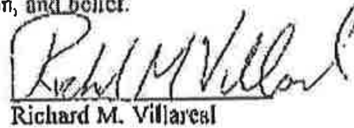
[1] On May 17, 2010, I filed a charge alleging that RJ Reynolds discriminated against me on the basis of my age when I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position in November 2007. This amended charge includes both that 2007 rejection and my June 2010 rejection for the same position at RJ Reynolds.

July 21, 2010
Page 2

It is my understanding that in both 2007 and 2010 RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

7/21/10
Date


Richard M. Villareal

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

[ ] FEPA
[X] EEOC 410-2010-04714

and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Richard Villareal		12-23-1957

Street Address: 3720 Riverdell Lane, Cumming, GA 30040
City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name	No. Employees, Members	Phone No. (Include Area Code)
R. J. REYNOLDS TOBBACCO CO	500 or More	

Street Address: 401 N Main St, Winston Salem, NC 27102
City, State and ZIP Code

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address
City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

[ ] RACE [ ] COLOR [ ] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[ ] RETALIATION [X] AGE [ ] DISABILITY [ ] GENETIC INFORMATION
[ ] OTHER (Specify)

DATE(S) DISCRIMINATION TOOK PLACE
Earliest: 06-15-2010 Latest: 06-15-2010
[ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

SEE ATTACHED CHARGE DETAILS

RECEIVED
SEP 02 2010
EEOC-ATDO

THIS PERFECTS MY ORIGINAL CHARGE WHICH WAS TIMELY FILED WITH THE EEOC ON JULY 21, 2010.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY – When necessary for State and Local Agency Requirements

I declare under penalty of perjury that the above is true and correct.

Sep 02, 2010
Date

Charging Party Signature

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

CP Enclosure with EEOC Form 5 (11/09)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (11/09).

2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

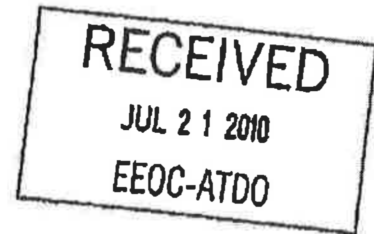
5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, the ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please notify EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.



July 21, 2010

Equal Employment Opportunity Commission
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100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

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July 21, 2010
Page 2

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I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, ~~and belief~~.

7/21/10
Date

Richard M. Villareal

Equal Employment Opportunity Commission
Charlotte District Office
129 West Trade Street, Suite 400
Charlotte, North Carolina 28202
Telephone: 800-669-4000
Fax: 704-954-6410
Email: TINA.BURNSIDE@EEOC.GOV; JOSE.ROSENBERG@EEOC.GOV; JEFFERY.WALTERS@EEOC.GOV

Re: EEOC Charge: 410-2010-04714

Third Amended Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this third amended charge of age discrimination on behalf of myself and others similarly situated against R.J. Reynolds Tobacco Company ("RJ Reynolds"); Kelly Services, Inc. ("Kelly"); Pinstripe, Inc. ("Pinstripe"); and CareerBuilder, LLC ("CareerBuilder"). I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds") on five different occasions. I believe that my applications for the position were rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[1]

RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

Kelly is a recruiting and staffing services company with more than 5,000 employees.[2] Its principal office is located at 999 West Big Beaver Road, Troy, Michigan 48084-4782. Its telephone number is (248) 362-4444.

---

[1] On May 17, 2010, I filed a charge alleging that RJ Reynolds discriminated against me on the basis of my age when I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position in November 2007. In July 2010, I filed an amended charge including both that 2007 rejection and my June 2010 rejection for the same position at RJ Reynolds. In September 2010, I filed a second amended charge that included additional contact information for myself and my attorneys. This third amended charge includes three additional instances since June 2010 in which I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at RJ Reynolds, and adds as respondents three recruiting companies used by RJ Reynolds when hiring employees into that position.
[2] In its 2010 Annual Report, Kelly reported that it had 530,000 employees worldwide.

Pinstripe is a recruiting services company with more than 500 employees. Its principal office is located at 200 S. Executive Drive, Suite 400, Brookfield, WI 53005. Its telephone number is (262) 754-5050.

CareerBuilder is a recruiting services company with more than 1,000 employees. Its principal office is located at 200 N. LaSalle St, Suite 1100, Chicago, IL 60601. Its telephone number is (773) 527-3600.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country, and that Kelly, through its subdivision Kelly HRFirst, was assisting RJ Reynolds in recruiting and screening applicants for that position. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

In June 2010, when I was 52 years old, I again applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. RJ Reynolds was hiring individuals to fill that position throughout the country. As before, I was well qualified for the position. Nonetheless, less than week after I applied for the position I received an email from RJ Reynolds rejecting my application and stating that RJ Reynolds was pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds again rejected my application on account of my age.

I again applied for the Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds in December 2010 and May 2011. As before, I was well qualified for the position. Shortly after applying for the position, I again received emails from RJ Reynolds rejecting my applications and stating that RJ Reynolds was pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds rejected my applications on account of my age.

I again applied for the Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds in September 2011. As before, I was well qualified for the position. After applying I received an email stating that the position was no longer available. I believe that RJ Reynolds again rejected my application on account of my age, and selected individuals younger than 40 years old to fill the position.

I believe that, when I applied for the Territory Manager/Sales Representative/Trade Marketing position in 2010 and 2011, Kelly, Pinstripe, and/or CareerBuilder assisted RJ Reynolds in screening applicants for the position.

It is my understanding that in 2007, 2010, and 2011, RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United

States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I am informed and believe that RJ Reynolds retained Kelly, Pinstripe, and CareerBuilder to assist it in hiring persons for the Territory Manager/Sales Representative/Trade Marketing position in 2007, 2010, and 2011; that Kelly, Pinstripe, and CareerBuilder were joint employers with RJ Reynolds in doing so; and that they discriminated against me on the basis of my age.

My contact information is as follows:

Richard M. Villareal
3720 Rivendell Lane
Cumming, GA 30040
Tel: 678-779-0026

I am represented by the following attorneys in this matter:

James M. Finberg
Eve H. Cervantez
P. Casey Pitts
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: 415-421-7151

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

12/2/2011
Date

Richard M. Villareal

EXHIBIT E

EEOC Form 161-B (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

To: Richard Villareal
3720 Rivendell Lane
Cumming, GA 30040

From: Greensboro Local Office
2303 West Meadowview Rd
Suite 201
Greensboro, NC 27407

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
435-2012-00211	JEFFERY R. WALTERS, Investigator	(336) 547-4116

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

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☐ The EEOC is terminating its processing of this charge.

☐ The EEOC will continue to process this charge.

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Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

[signature]

JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

Enclosures(s)

cc: Scott Beightol
MICHAEL BEST & FRIEDRICH, LLP
100 East Wisconsin Ave., Suite 3300
Milwaukee, WI 53202-4108

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

Enclosure with EEOC
Form 161-B (11/09)

INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC

*(This information relates to filing suit in Federal or State court under Federal law.
If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)*

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Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

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ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

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IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

EEOC Form 161-B (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

To: Richard Villareal
3720 Rivendell Lane
Cumming, GA 30040

From: Greensboro Local Office
2303 West Meadowview Rd
Suite 201
Greensboro, NC 27407

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
435-2012-00212	JEFFERY R. WALTERS, Investigator	(336) 547-4116

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

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On behalf of the Commission

JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

Enclosures(s)

cc:

Fredrick Smith
SEYFARTH SHAW LLP
1075 Peachtree Street, N.E., Suite 2500
Atlanta, GA 30309

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

Enclosure with EEOC

Form 161-B (11/09)

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On behalf of the Commission

[signature]

JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

Enclosures(s)

cc: **Eric Dreiband**
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001-2113

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

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Form 161-B (11/09)

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EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated,

Plaintiff,

v.

R.J. Reynolds Tobacco Company; Pinstripe, Inc.; and CareerBuilder, LLC,

Defendants.

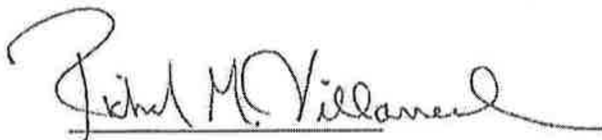
Civil Action No. ____________

CONSENT TO SUE/JOIN

(Collective Action)

Pursuant to 29 U.S.C. §216(b), I, Richard M. Villarreal, hereby consent to join this collective action for violations of the Age Discrimination in Employment Act.

Dated: June 6, 2012



Richard M. Villarreal

61-2

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY and PINSTRIPE, INC., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

**BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR LEAVE TO AMEND COMPLAINT**

This matter is before the Court on the Plaintiff's Motion for Leave to Amend the Complaint, brought under Rule 15(a)(2) of the Federal Rules of Civil Procedure.

The purpose of the proposed amendment is to correct what the Court's Order of March 6, 2013 (the "Order") described as deficiencies in the original Complaint's pleading relating to equitable tolling of the time for the Plaintiff to have filed his charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In the Order, the Court held that the original Complaint

did not provide the Court with sufficient facts to evaluate the claim of equitable tolling. The proposed Amended Complaint provides the detailed factual allegations that were not set forth in the original Complaint and alleges specifically what facts the Plaintiff learned in April 2010, how he learned those facts, and why he had no reason theretofore to suspect that he had been the victim of discrimination. Under Rule 15 of the Federal Rules and case law authority, leave to amend in these circumstances should be freely granted.

I. STATEMENT OF THE CASE

Plaintiff Richard M. Villarreal brought this action as a collective action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., to remedy discrimination by the Defendants since September 1, 2007 (if not earlier) in recruiting and hiring for the Territory Sales Manager position with Defendant R. J. Reynolds Tobacco Company ("RJ Reynolds"). The Defendants filed a motion for partial dismissal of the Complaint, in which motion they asked the Court, among other things, to dismiss as time-barred "[a]ny claims related to hiring decisions made more than 180 days before Mr. Villarreal filed his [EEOC] charge on May 17, 2010." The Defendants relied upon the provisions of 29 U.S.C. § 626(d)(1)–(A), which requires, as a prerequisite to the filing of an ADEA civil action, that the plaintiff have filed a charge with the EEOC within 180 days after

the occurrence of the alleged unlawful practice. As Mr. Villarreal first filed a charge with the EEOC on May 17, 2010, the Defendants argued that the statute, unless tolled, would limit him to asserting only claims relating to hiring decisions made on or after November 19, 2009, which is the date 180 days before Mr. Villarreal first filed a charge with the EEOC.

In opposition to the dismissal motion relating to the limitations period, we argued that Mr. Villarreal's time for filing an EEOC charge with respect to the original act of discrimination complained of – that is, the rejection of his November 8, 2007 application – should be tolled under the well-established doctrine of equitable modification. We argued that the time limit for filing the EEOC charge should be equitably tolled because it was not until April 2010, less than a month before he filed his EEOC charge, that Mr. Villarreal had any knowledge or reason to know that his application might have been rejected for unlawfully discriminatory reasons. For this argument, we relied upon *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F3d 1023 (11th Cir. 1994). *Sturniolo* holds that "[u]nder equitable modification, a limitations period does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* at 1025. The court in *Sturniolo* made clear that "the facts which would support a charge of

discrimination" are such facts as suffice to establish a *prima facie* case of unlawful discrimination, *id.*, and that "mere suspicion of age discrimination, unsupported by personal knowledge," is not sufficient to start the running of the limitation period. *Id.* at 1026.

In the Order, the Court granted the Defendants' motion for partial dismissal as related to the statute of limitations and the equitable tolling doctrine. The Court quoted the test for equitable tolling from *Sturniolo*, which is set out above, but ruled that the facts as pleaded in the original Complaint were insufficient for the Court to evaluate whether the limitations period should be tolled. The Court held: "Here, without knowing which facts alerted Plaintiff to his discrimination claim or how he learned those facts, the Court cannot determine whether or when those facts should have become apparent to a reasonably prudent person." Order at 18-19.

The proposed Amended Complaint sets forth with specificity the facts that alerted Mr. Villarreal to his claim and how he learned those facts. The proposed Amended Complaint, attached as Exhibit A to the Plaintiff's Motion for Leave to Amend Complaint, alleges that the Altshuler Berzon law firm sent Mr. Villarreal a letter on April 20, 2010 (¶ 29), and that he thereafter called and spoke with Casey Pitts of that firm:

> On April 26, Mr. Villarreal called P. Casey Pitts, an attorney at Altshuler Berzon. Mr. Pitts informed Mr. Villarreal that he had obtained information indicating that RJ Reynolds had used resume review guidelines similar to those attached as **Exhibit A** to this Complaint when screening applications for the Territory Sales Manager position in 2007. Mr. Pitts further informed Mr. Villarreal that RJ Reynolds used these guidelines when screening applications to the disadvantage of persons 40 years of age and older (including Mr. Villarreal), as alleged in ¶¶ 12 through 15 and 18 of this Complaint. Before that conversation with Mr. Pitts, Mr. Villarreal had no knowledge and no reason or means to know that RJ Reynolds or anyone screening or reviewing resumes for RJ Reynolds had used any such guidelines or had applied criteria such as those set forth in **Exhibit A**.

(Proposed Amended Complaint, ¶ 30.)[1]

The proposed Amended Complaint also addresses in further detail why the facts that were related to Mr. Villarreal by Mr. Pitts would not have been known or apparent to a reasonably prudent person in Mr. Villarreal's situation before the time of that conversation. As pleaded in the original Complaint as well as in the proposed Amended Complaint at ¶¶ 10 and 11, Mr. Villarreal made his application in November 2007 by submitting his application and resume through a website maintained by Defendant RJ Reynolds, but he was never thereafter contacted by RJ

[1] The original Complaint did not contain these allegations because they address privileged conversations between Mr. Villarreal and his attorneys. In the proposed Amended Complaint, for the limited purpose of establishing facts supporting equitable tolling, Mr. Villarreal waives the attorney-client privilege as to the portion of the conversation where he became aware of facts alerting him to the fact that he had a meritorious claim for age discrimination. Proposed Amended Complaint at 13, n. 1.

Reynolds about his application. The proposed Amended Complaint, at ¶ 28, elaborates on why Mr. Villarreal had no inkling of any unlawful discrimination in connection with that application:

> Mr. Villarreal was not an employee of either RJ Reynolds or Kelly Services or related to anyone who was. He did not receive any communication from RJ Reynolds or anyone else informing him why he was not hired. As a result, Mr. Villarreal had no idea why he was not hired. He did not even know whether his application had been reviewed at all, much less whether it had been rejected or screened out. He was not aware that RJ Reynolds had instructed Kelly Services to use the resume review guidelines that disadvantaged persons 40 or older, or that Kelly Services followed them, to the disadvantage of persons 40 and older. Indeed, Mr. Villarreal was unaware that Kelly Services (or anyone else) was or had been reviewing or screening resumes or applications for RJ Reynolds.

II. ARGUMENT

Under Federal Rule 15(a)(2) and applicable case authority, leave to amend should be freely granted in this case.

Because more than 21 days have passed since the service of the various Defendants' Rule 12(b) motions, the applicable provision of Rule 15(a) is subparagraph (2). That is, the Complaint may be amended only with the written consent of the opposing parties or with leave of Court. We have asked counsel for Defendant RJ Reynolds to consent to the filing of the Amended Complaint, but that consent has been refused. Accordingly, we apply to the Court for leave to amend.

Under Rule 15(a)(2), "[t]he court should freely give leave when justice so requires." Under the case law, it is the rare case when leave to amend should not be granted. The United States Supreme Court has explained:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as 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, futility of amendment, etc. – relief sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without the justifying reason appearing for the denials is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182 (1962) (internal citation omitted).

The Eleventh Circuit Court of Appeals has gone so far as to suggest that one extension of leave to amend is mandatory:

> [a] district court must grant a plaintiff at least one opportunity to amend [his] claims before dismissing them if it appears that a more carefully drafted complaint *might* state a claim upon which relief can be granted even if the plaintiff never seeks leave to amend.

Silva v. Bieluch, 351 F.3d 1045, 1048-49 (11th Cir. 2003) (emphasis added) (internal quotations omitted).

The present motion, of course, is the Plaintiff's first request for leave to amend the Complaint in this case. There has been no previous amendment. There has been no undue delay or conceivable prejudice to the Defendants, inasmuch as this motion is filed within three weeks of the Court's Order granting partial dismissal. The amendment is tendered only to make explicit that which the original Complaint attempted to plead in a more general way that did not disclose any privileged conversation between Mr. Villarreal and his attorneys. The proposed amendment very explicitly alleges facts that warrant equitable tolling of the relevant time limitations. In the circumstances, leave should be granted. In the words of Justice Goldberg in *Foman v. Davis*, "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, *supra,* 371 U.S. at 182.

It appears that Defendant RJ Reynolds will argue that the proposed amendments are "futile." The proposed amendment, however, is manifestly not futile. "Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant." *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). Whether a proposed amendment to a complaint would be futile is not an issue

within the trial court's discretion but is, rather, a conclusion of law. *E.g., Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999) (whether to grant leave to amend is a matter of the trial court's discretion, but the determination of whether a particular amendment would be futile is a legal conclusion reviewable *de novo*.) Determining whether an amendment is futile is essentially to determine that the proposed amendment fails to state a claim on which relief can be granted.

The allegations of the proposed Amended Complaint state a cognizable claim for equitable tolling or equitable modification. The applicable standard is set forth in *Sturniolo*: "Under equitable modification, a limitations period does not start to run until the facts which support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." 15 F.3d at 1025. Until the person has knowledge of facts sufficient to make out a *prima facie* case, he has insufficient facts to support filing a charge of discrimination with the EEOC and, accordingly, the limitation period cannot begin to run. *Id.* at 1026. The facts known to Mr. Villarreal before his April 26, 2010 conversation with Casey Pitts did not even support a suspicion of discrimination, much less a *prima facie* case. Mr. Villarreal learned for the first time on April 26, 2010 that, at the time that he made his 2007 application, Defendant RJ Reynolds had been using discriminatory resume review guidelines in connection with

recruiting and hiring for the Territory Sales Manager position, to the disadvantage of Mr. Villarreal and others 40 years of age and older. Proposed Amended Complaint, ¶ 30. Before that day, Mr. Villarreal had no knowledge or any reason or means to know that RJ Reynolds or its recruiting agencies were using such guidelines for screening applications. *Id.* Mr. Villarreal had no connection to RJ Reynolds. Unlike the plaintiff in the *Bond v. Roche* decision cited in the Order, Mr. Villarreal was not an employee of the company that discriminated against him, nor was he related to anyone who was so employed. Proposed Amended Complaint, ¶ 28. He submitted his application over the Internet to an RJ Reynolds-maintained website and, thus, had no way of knowing what person or persons (if any) might have reviewed his resume and application. *Id.* And because no one with RJ Reynolds (or anyone else) ever told him why (or that) his 2007 application had been rejected, Mr. Villarreal not only had no reason to suspect discrimination, but he did not know whether his application had been rejected or even reviewed at all. *Id.*

The circumstances in this case are wholly unlike those in *Bond v. Roche*, 2006 WL 50624 (M.D. Ga. Jan. 9, 2006), where the *pro se* plaintiff had been terminated from his employment for violation of his employer's drug policy. The *Bond* plaintiff complained of his discharge through his employer's grievance

procedures, which included an arbitration and an appeal to the Court of Appeals for the Federal Circuit. Only after losing at every stage of the grievance procedure did the plaintiff in *Bond* make a claim of racial discrimination, and he then attempted to excuse the tardiness of his claim by citing alleged inside information (which he did not describe) from an alleged unidentified informant. District Judge Royal dismissed the allegations as "merely the unsupported speculations of a veteran conspiracy theorist." 2006 WL 50624, at *2.

The standard for equitable modification set forth in *Sturniolo* is without question satisfied by the allegations of the proposed Amended Complaint. Mr. Villarreal had no reason to suspect discrimination until he was informed by Mr. Pitts about the resume review guidelines and their use by RJ Reynolds and its recruiting agencies. Until that date, he had no reason or cause to suspect anything other than that RJ Reynolds had received applications or resumes that were more attractive than his on the merits. Until that date, he had no knowledge of facts supporting a *prima facie* case and had no grounds or cause for filing a charge with the EEOC.

III. CONCLUSION

The Motion for Leave to Amend the Complaint should be granted. Leave is to be freely granted absent special circumstances such as bad faith, undue delay, or

futility of the proposed amendment, none of which circumstances are present in this case.

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com

ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

James M. Finberg, Esq.
jfinberg@altber.com
P. Casey Pitts, Esq.
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Shanon J. Carson
scarson@bm.net
Sarah R. Schalman-Bergen
sschalman-bergen@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: 800-424-6690
Facsimile: 215-875-4604

Mark T. Johnson
mjohnson@schneiderwallace.com
Todd M. Schneider
tschneider@schneiderwallace.com
Josh G. Konecky
jkonecky@schneiderwallace.com
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY, LLP-CA
180 Montgomery Street
Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100
Facsimile: 415-421-7105

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I caused the foregoing ***BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT*** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

Deborah A. Sudbury
dsudbury@jonesday.com

R. Scott Campbell
campbellrs@gtlaw.com

James M. Finberg
jfinberg@altshulerberzon.com

Shanon J. Carson
scarson@bm.net

Sarah R. Schalman-Bergen
sschalman-bergen@bm.net

Mark T. Johnson
mjohnson@schneiderwallace.com

P. Casey Pitts
cpitts@altber.com

Todd M. Schneider
tschneider@schneiderwallace.com

and that I have caused a copy to be served by U.S. Mail on the following attorneys of record:

Alison B. Marshall
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Eric S. Dreiband
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Paul E. Benson
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

Scott Beightol
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:12-CV-0138-RWS
R.J. REYNOLDS TOBACCO COMPANY and PINSTRIPE, INC.	)	
Defendants.	)	

DEFENDANTS R.J. REYNOLDS TOBACCO COMPANY'S AND PINSTRIPE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

On March 6, 2013, the Court granted Defendants' Partial Motion to Dismiss. In that Order, the Court ruled that Plaintiff Villarreal had alleged insufficient facts to state a claim for equitable tolling and excuse his failure to file a charge with the EEOC until May 2010 for an application that he made in November 2007. (Order 18-19, Mar. 6, 2013, ECF No. 58.) Plaintiff now seeks leave to amend his complaint to allege that he first became aware that he might have a claim for age discrimination based on his November 2007 application when he was contacted by his current counsel in April 2010.

These new allegations provide no basis for equitable tolling to extend the limitations period fivefold (from 180 days to two and one half years); the amendment is futile and should be denied. Indeed, under Plaintiff's theory, counsel could troll for applicants years or even decades after they applied, call them, discuss certain supposed selection "guidelines," and then these applicants could file EEOC charges without regard to the 180-day limitations period. Plaintiff's theory would render meaningless the statute of limitations that Congress established for ADEA claims; this is clearly not the purpose of the equitable tolling doctrine. The Court should deny Plaintiff's motion.

ARGUMENT

I. Leave to Amend Should be Denied Where Amendment is Futile.

Although Fed. R. Civ. P. 15(a)(2) contemplates that leave to amend shall be "freely give[n]" when justice so requires, this Court and others have repeatedly held that leave to amend is "'by no means automatic.'" *McDaniel v. Yearwood*, No. 2:11-CV-00165-RWS, 2012 WL 526078, at *4 (N.D. Ga. Feb. 16, 2012) (denying motion for leave to amend on futility grounds) (quoting *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1099 (5th Cir. 1979)). To the contrary, a trial court has "extensive discretion" in deciding whether to grant leave to amend and when the amendment is futile, amendment should be denied. If the amended complaint

could not survive a Rule 12(b)(6) motion to dismiss, then the amendment is futile and leave to amend is properly denied: "[t]hat is, leave to amend will be denied 'if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim.'" *Id*. (quoting *Mizzaro v. Home Depot, Inc*., 544 F.3d 1230, 1255 (11th Cir. 2008)). *See also Grant v. Countrywide Home Loans, Inc.,* Civil No. 1:08-CV-1547-RWS, 2009 WL 1437566, at *8 (N. D. Ga. May 20, 2009) ("The futility [analysis] is akin to that for a motion to dismiss; thus if the amended complaint could not survive Rule 12(b)(6) scrutiny, then the amendment is futile and leave to amend is properly denied.").

II. Leave to Amend Should Be Denied Because Plaintiff's Proposed Amendment Fails to State a Claim for Equitable Tolling.

Here, Plaintiff's proposed amendment to add new paragraphs 28 thru 30 in an endeavor to state a claim for equitable tolling is futile. While he now provides allegations about what information he received in 2010 that prompted him to file an EEOC charge and from whom, these allegations fail to excuse his not filing a charge earlier and provide no basis for a claim of equitable tolling.

A. A Claim for Equitable Tolling Requires a Showing of Extraordinary Circumstances, Such as Fraud, Misinformation or Deliberate Concealment.

As this Court previously noted (Order 17, ECF No. 58), the Eleventh Circuit has stated repeatedly that equitable tolling is "an extraordinary remedy to be

applied sparingly." *Hunt v. Ga. Dep't of Cmty. Affairs*, 490 F. App'x 196, 198 (11th Cir. 2012); *Bost v. Fed. Express Corp*., 372 F.3d 1233, 1242 (11th Cir. 2004) (quoting *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993)). Thus "a court may toll time limitations only in carefully circumscribed instances" and "a heavy burden rests upon the plaintiff to produce facts showing 'extraordinary circumstances' prevented him from seeking EEO counseling with the prescribed time period." *Tarmas v. Mabus*, No. 3:07-cv-290-J-32TEM, 2010 WL 3746636, at *5 (M.D. Fla. Sept, 21, 2010) (citing *Jackson v. Astrue*, 506 F.3d 1349, 1353 (11th Cir. 2007)), *aff'd*, 433 F. App'x 754 (11th Cir. 2011).

To state a claim for equitable tolling, a plaintiff must allege that: (1) he pursued his rights diligently and (2) some extraordinary circumstance stood in his way. *Downs v. McNeil*, 520 F.3d 1311, 1324 (11th Cir. 2008). The Eleventh Circuit has emphasized that due diligence on the part of the plaintiff is a necessary precondition to the application of equitable tolling. *See Bazemore v. Dynamic Sec*., No. 2:12cv436–MEF, 2012 WL 3543473, at *5 (M.D. Ala. July 26, 2012), *report & recommendation adopted by* No. 2:12cv436-MEF, 2012 WL 3544741 (M.D. Ala. Aug. 16, 2012) ("Courts 'need not consider whether extraordinary circumstances exist' if the plaintiff's delay in filing 'exhibits a lack of due diligence.'"); *Outler v. United States,* 485 F.3d 1273, 1280 (11th Cir. 2007); *Bost,*

372 F.3d at 1242 (holding that "[e]quitable tolling is inappropriate when a plaintiff . . . failed to act with due diligence" and refusing to equitably toll filing period for plaintiff's ADEA claim); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.").

Furthermore, Eleventh Circuit precedent establishes that a plaintiff must show some affirmative misconduct on the part of the defendant before a claim will be equitably tolled. *See Bourne v. Sch. Bd. of Broward Cnty.*, No. 12-11402, 2013 WL 385420, at *2 (11th Cir. Feb. 1, 2013) ("'Traditional equitable tolling principles require a claimant to justify her untimely filing by a showing of extraordinary circumstances,' such as fraud, misinformation, or deliberate concealment.") (citation omitted); *Hunt*, 490 F. App'x at 198 ("[e]quitable tolling typically requires some affirmative misconduct, such as fraud, misinformation or deliberate concealment.") (citation omitted); *accord Cabello v. Fernandez- Larios*, 402 F.3d 1148, 1154-55 (11th Cir. 2005).

B. Plaintiff's Proposed Amendment Presents No Allegations to Establish the Requisite Extraordinary Circumstances.

Plaintiff's proposed amendment contains no allegation that he pursued his rights diligently or that extraordinary circumstances existed to justify his late filing.

He does not allege – nor can he – that he ever tried to contact RJRT or Kelly Services to inquire about the status of his November 2007 application, why he was not selected for a position, or who was hired in his place. Nor does Plaintiff make any claim in his proposed amendment that Defendant RJRT engaged in fraud, concealed any facts from him, or engaged in any misrepresentation of misinformation regarding why he was not selected. He merely alleges that he did not receive any communication from RJRT telling him why he was not hired and he did not know whether his application had been reviewed. (Proposed Am. Compl. ¶ 28.) These allegations cite no wrongdoing or malfeasance by RJRT.

Rather, the crux of his new allegations are that counsel made him aware of certain resume review guidelines that were purportedly used by RJRT in screening applicants for the Territory Manager position at the time he claims he applied in November 2007 and that these guidelines had an adverse impact on older persons. These allegations are wholly inadequate to state a claim for equitable tolling. The fact that a plaintiff may not have known all of the facts to support his claim does not justify his waiting more than two years after he applied to file a charge.

Plaintiff's argument, if accepted, would eviscerate the statute of limitations in failure to hire cases and would mean that the limitations period in such cases is tolled indefinitely, or at least until a putative plaintiff receives a telephone call

from a lawyer who is looking for clients in order to bring a class or collective action lawsuit. That is not the law. Indeed, this case is directly analogous to the court's decision in *Howard v. Intown Suites Management, Inc*., No. 1:04–CV–759–TWT, 2006 WL 739168, at *2 (N.D. Ga. Mar. 17, 2006), a failure to hire race discrimination case in which the court rejected the plaintiff's invocation of the equitable tolling doctrine.

In *Howard*, the plaintiff interviewed for a property manager position in January or February 2001, but was not called back for a second interview and was not hired. *Id*. at *1. As in this case, in *Howard*, an attorney contacted the plaintiff more than two years later and told him that he "might have a lawsuit because of discrimination in hiring." *Id*. The plaintiff then filed an EEOC charge in November 2003, well outside of the limitations period. *Id*. The court rejected application of equitable tolling and held that the plaintiff's attempt to stretch Eleventh Circuit precedent would "eviscerate[] the statute of limitations in employment discrimination cases." *Id.* at *2. In addressing the applicable standard, the *Howard* court noted that, in the Eleventh Circuit, "courts usually require some affirmative misconduct, such as deliberate concealment" *id.* (quoting *Cabello,* 402 F.3d at 1155), and stated:

> In all but the most egregious cases, the potential plaintiff will be able to say that he or she did not know the true motivation for the adverse

> employment act until long after the fact. In Title VII cases, the 180 day limitation would be meaningless. The EEOC would find itself—as in this case—investigating events from years ago instead of within the last six months. Congress had good reasons for establishing a relatively short statute of limitations in these types of cases. As the Seventh Circuit has said:
>
> > Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose. The statute of limitations is short in age discrimination cases as in most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines.
>
> *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 452–53 (7th Cir. 1990); *see also Arce*, 400 F.3d at 1347.
>
> This is not an appropriate case for equitable tolling. The Plaintiff failed to act with due diligence. The Defendants made no misrepresentations that hindered him from learning of its discrimination against him.

Howard, 2006 WL 739168, at *2.

Other courts have reached the same conclusion. For example, in *Lukovsky v. City and County of San Francisco*, No. C 05-00389 WHA, 2006 WL 2038465, at *4 (N.D. Cal. July 17, 2006), *aff'd*, 535 F.3d 1044 (9th Cir. 2008), the court rejected a claim for equitable tolling on a failure to hire discrimination claim because the plaintiff made no effort to investigate the denial of his application in the period between November 2000 and 2004. *Id.* The only basis for tolling that he provided was a "revelation" about possible discrimination that "did not come to

light until 2004 when [fellow plaintiff] Alex Lukovsky told him about the possibility that Defendants had discriminated against him in 2000." *Id.* The court held that that was an insufficient showing of diligence on a motion for summary judgment to find equitable tolling. *Id. See also, Amini v. Oberlin Coll.*, 259 F.3d 493, 501 (6th Cir. 2001) (equitable tolling rejected in failure-to-hire case because plaintiff failed to contact anyone at Oberlin to learn whom it hired and thus failed to act "with the requisite diligence in his attempts to ascertain the information which ultimately led him to file a discrimination charge" and did not allege that Oberlin engaged in any misrepresentation or other wrongdoing); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391 n.10 (3d Cir. 1994), (finding "no basis for the application of the equitable tolling doctrine" to plaintiff's failure to hire claim where her complaint "merely allege[d] that the firm told her that she would be considered for an associate position if one became available, but did not contact her upon the opening of an associate position . . . . To be activated, equitable tolling requires *active* misleading on the part of the defendant.") (emphasis in original); *Haines v. Twp. of Voorhees*, No. Civ.A. 96–3032(JEI), 1997 WL 714226, at *7 (D.N.J. Nov. 10, 1997) (equitable tolling was not appropriate where plaintiff "fail[ed] to delve into the facts" of why she was not

hired and the employer had not "lulled the plaintiff into foregoing prompt attempts" to investigate).

Plaintiff ignores both these cases and numerous other Eleventh Circuit cases that recognize equitable tolling only when a plaintiff demonstrates both that he exercised due diligence and that the defendant engaged in some concealment or malfeasance. Instead, Plaintiff continues to rely solely on the Eleventh Circuit's decision in *Sturniolo v. Scheaffer, Eaton, Inc.,* 15 F.3d 1023, 1025 (11th Cir. 1994). However, his reliance on this case is misplaced. In that case, the plaintiff relied on an affirmative misrepresentation by the employer. Specifically, the plaintiff was told at the time of his termination that his position was being eliminated. The plaintiff later learned that his position was not eliminated and a younger employee was assigned to it. Based on these facts, the court held that equitable modification might apply. Here, Plaintiff Villarreal's proposed amendment contains no such allegations and thus does not state a claim for equitable tolling.

C. Alleged Facts Supplied by Counsel Do Not Provide Basis for a Disparate Treatment Age Discrimination Claim.

In any event, the facts Plaintiff claims he learned from counsel provide no basis for a disparate treatment age discrimination and therefore, the circumstances surrounding his learning these facts do not justify equitable tolling. Plaintiff claims that counsel told him that (1) "he had obtained information indicating that

RJ Reynolds had used the resume review guidelines similar to those attached as Exhibit A" when screening applicants for the Territory Sales Manager position in 2007, guidelines which targeted applicants "2-3 years out of college" and directed to stay away from applicants "in sales for 8-10 years" and (2) "RJ Reynolds used these guidelines when screening applications to the disadvantage of persons 40 years of age and older." (Proposed Am. Compl. ¶ 30.) Even if true, these facts provide no basis for a disparate treatment age discrimination claim.[1]

The Supreme Court has long since held that an employer does not violate the ADEA's disparate treatment prohibitions "by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608 (1993). Indeed, "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Id.* at 611. Since *Hazen Paper,* numerous courts have recognized that the factors Plaintiff cites from the resume review guidelines -- years of sales experience or recent college graduation -- are similarly analytically distinct from age and do not provide the basis for an age

[1] The Court's March 6, 2013 Order dismissed Plaintiff's disparate impact claim. Therefore, the only claim that Plaintiff conceivably has under the ADEA is a disparate treatment claim.

discrimination disparate treatment claim. These courts have uniformly held that "an employer's consideration of experience or its failure to do so is not tantamount to making employment decisions on the basis of age." *Lincoln v. Billington*, No. Civ. A. 95-CV-0468 (RMU), 1998 WL 51716, at *5 (D.D.C. Jan. 28, 1998), *aff'd*, No. 98-5242, 1998 WL 796424 (D.C. Cir. Oct. 29, 1998).

Thus, in *Sack v. Bentsen*, No. 94-1896, 1995 WL 153645 (1st Cir. Mar. 20, 1995), the court held that the Internal Revenue Service's practice of awarding 15 points to applicants for lawyer positions if the applicant had completed law school or an accounting education, been admitted to the bar, or completed at least six months of progressively responsible legal education or accounting education within the prior 12-18 months, 10 points if the legal education or professional legal or accounting experience had been obtained within the past 2-4 years, but no points if the experience or education was completed more than three years prior to the application did not constitute age discrimination. *Id*. at *1. Noting that recent legal education or experience are analytically distinct from age, the court cited *Hazen Paper* and held that the IRS "could reward the former without necessarily engaging in unlawful age discrimination." *Id*. at *4.

Similarly, in *Johnson v. Cook, Inc.*, 587 F. Supp. 2d 1020 (N.D. Ill. 2008), *aff'd*, 327 F. App'x 661 (7th Cir. 2009), the court granted summary judgment on

the claim of age discrimination brought by an applicant for an entry level sales position who alleged that the company's explanation that he had too much sales experience for the entry level sales training program was a pretext for age discrimination. Noting that the employer started its training program for those new to sales, the court held "[t]hat it chose not to hire experienced sales people through that specific program is defendant's prerogative." *Id.* at 1027. *See also Das v. Ciba Corning Diagnostics Corp.,* No. 92-1049, 1993 WL 192827, at *1 (1st Cir. June 8, 1993) (job posting that said "ideal candidate will have . . . and 3-5 years of experience in a manufacturing environment" does not implicate the prohibitions of the ADEA); *Santana-Ramos v. Vilsak*, Civ. No. 09-1086 (JAG), 2011 WL 925458, at *3-4 (D.P.R. Mar. 4, 2011) (decision that applicant who previously held a G-7 position was not qualified for a G-5 entry level position because she was overqualified complied with the ADEA); *Collins v. SunTrust, Inc.*, No. 3:04-1031, 2006 WL 1207593, at *11 (M.D. Tenn. May 4, 2006) (job posting specifying preference for candidates who had 2-3 years of relevant experience and statement that company was looking for someone "just out of college" were not evidence of age discrimination); *Sundaram v. Brookhaven Nat'l Labs.,* 424 F. Supp.2d 545, 576 (E.D.N.Y. 2006) (statement by hiring manager that he favored hiring of recent graduates and post-doctoral candidates was not evidence of age discrimination).

Thus, when counsel shared "facts" regarding the resume review guidelines, Plaintiff Villarreal learned nothing that provided him the basis for an ADEA claim. Accordingly, Plaintiff's proposed amendment provides no basis for extending the statutory statute of limitations period by fivefold.

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for Leave to Amend should be denied.

STATEMENT OF COMPLIANCE

Pursuant to Local Rule 7.1(D), this brief was prepared in court approved font and point.

Dated: April 11, 2013

Respectfully submitted,

/s Deborah A. Sudbury, Esq.

Deborah A. Sudbury (Ga. Bar 000090)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
Telephone: 404-581-8443
Facsimile: 404-581-8330
dsudbury@jonesday.com

Eric S. Dreiband
Alison B. Marshall
JONES DAY
51 Louisiana Ave, N.W.
Washington, DC 20001-2113
Telephone: (202) 879-3720
Facsimile: 202-626-1700
esdrieband@jonesday.com
abmarshall@jonesday.com

Attorneys for Defendants
R.J. Reynolds Tobacco Company
and Pinstripe, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2013, I electronically filed Defendants R.J. Reynolds Tobacco Company's and Pinstripe, Inc.'s Opposition to Plaintiff's Leave to Amend the Complaint with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys:

John J. Almond
Kristina M. Jones
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street, N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224
jalmond@rh-law.com
kjones@rh-law.com

Attorneys for Plaintiffs

James M. Finberg
P. Casey Pitts
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189
jfinberg@altshulerberzon.com
cpitts@altber.com

Attorneys for Plaintiffs

Todd M. Schneider
Mark T. Johnson
Joshua G. Konecky
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, California 94104
Telephone: 415-421-7100, Ext. 306
Facsimile: 415-421-7105
tschneider@schneiderwallace.com
mjohnson@schneiderwallace.com
jkonecky@ schneiderwallace.com

Attorneys for Plaintiffs

Shanon J. Carson
Sarah R. Schalman-Bergen
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 1-800-424-6690
Facsimile: 215-875-4604
scarson@bm.net
sschalman-bergen@bm.net

Attorneys for Plaintiffs

/s Deborah A. Sudbury, Esq.
Deborah A. Sudbury (Ga. Bar 000090)

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. Reynolds Tobacco Company; and Pinstripe, Inc., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

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INTRODUCTION

As this Court recognized in its March 6, 2013 Order ("Order"), longstanding Circuit precedent establishes that the limitations period for filing an EEOC charge alleging unlawful employment discrimination "'does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" Order at 18 (quoting *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994)); *see also Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). In that Order, the Court held that Plaintiff had not established his right to equitable tolling of the deadline to file an EEOC charge regarding the rejection of his 2007 application for a Territory Manager position with defendant R.J. Reynolds Tobacco Co. ("RJR"), because his Complaint alleged that Plaintiff did not discover the facts necessary to support that charge until April 2010 but "d[id] not specify which facts Plaintiff came to know in 2010, or how Plaintiff came to know them." Order at 18 (quotation and alterations omitted). The Court concluded that "without knowing which facts alerted Plaintiff to his discrimination claim or how he learned those facts, the Court cannot determine whether or when those facts should have become apparent to a reasonably prudent person." Order at 18-19.

Plaintiff now seeks leave to file a First Amended Complaint describing the

specific facts that "alerted Plaintiff to his discrimination claim [and] how he learned those facts." *Id.*; *see* Plaintiff's Motion for Leave To Amend Complaint Exh. A (hereinafter "First Amended Complaint"). The new allegations demonstrate that, when Plaintiff's 2007 application was rejected, he could not have known that RJR was using discriminatory hiring guidelines, because he applied through a website, was never told why he was rejected, and did not even know if his application had been reviewed. *Id.* ¶28. He did not learn those facts until he called an attorney at Altshuler Berzon LLP in April 2010, who informed him that applications for the Territory Manager position, including Plaintiff's, had been screened using resume review guidelines designed "to target candidates under 40 years of age and to reject candidates 40 years of age and over." *Id.* ¶¶18, 29-30.

Defendants do not contest that Plaintiff could not reasonably have discovered these facts before April 2010. No more is required to establish Plaintiff's right to equitable tolling. Contrary to Defendants' arguments, "equitable tolling does not require employer misconduct." *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987). Likewise, the well-established Eleventh Circuit equitable tolling standard applied in employment discrimination cases does not require any separate analysis of "extraordinary circumstances" or diligence. *See, e.g.*, *Sturniolo*, 15 F.3d at 1025; *Reeb*, 516 F.2d at 931.

Furthermore, Plaintiff discovered all of the facts necessary to support a claim of intentional discrimination when he first spoke with his counsel in April 2010. *See, e.g.*, First Amended Complaint ¶¶18, 30. The Court should therefore grant Plaintiff's Motion for Leave To Amend.

ARGUMENT

I. The Limitations Period To File A Charge Of Unlawful Employment Discrimination Is Equitably Tolled Until A Plaintiff Knows Or Reasonably Should Know The Necessary Supporting Facts.

As this Court recognized in its prior Order, the Eleventh Circuit has long held that the deadline for filing an EEOC charge alleging unlawful employment discrimination is equitably tolled "until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo*, 15 F.3d at 1025. "[M]ere suspicion of age discrimination" is insufficient to terminate the tolling period; instead, the limitations period is tolled until the plaintiff has "knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.* at 1026. This standard was first announced by the then-Fifth Circuit nearly 40 years ago in *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), and has been repeatedly

reaffirmed and applied by the Eleventh Circuit since that time.[1]

Defendants ignore this standard, and instead argue that equitable tolling is available only if a plaintiff alleges that "he pursued his rights diligently," "some extraordinary circumstance stood in his way," and there was "some affirmative misconduct on the part of the defendant." Defendants' Opposition to Plaintiffs' Motion for Leave To Amend Complaint ("Opp.") at 4-5. Defendants' authorities, however, do not justify their departure from the well-established Eleventh Circuit standard governing equitable tolling in employment discrimination cases.

[1] *See Reeb*, 516 F.2d at 931 (limitations period "did not begin to run . . . until the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights"); *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987) (in ADEA cases, "[e]quitable modification suspends a limitations period until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.") (citation omitted); *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988) ("The [limitations period] begins running from the date the employee knows or reasonably should know that he or she *has been discriminated against*.") (emphasis added); *Miranda v. B&B Cash. Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992); *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1267 (11th Cir. 2003) ("The applicable limitations period did not begin to run until the facts supporting a cause of action became apparent or should have become apparent to a reasonably prudent person with concern for his or her rights."); *Smith v. Potter*, 310 Fed. Appx. 307, 310 (11th Cir. 2009); *Leach v. State Farm Mut. Auto. Ins. Co.*, 431 Fed. Appx. 771, 775 (11th Cir. 2011) ("The 180-day timing requirement may be equitably tolled if the employee had no reason to believe that he was a victim of unlawful discrimination in the period preceding 180 days before the filing deadline.").

Defendants' contention that equitable tolling in employment discrimination cases requires "affirmative misconduct on the part of the defendant" has been squarely rejected by the Eleventh Circuit. It is well-established in the Eleventh Circuit that "equitable tolling does not require employer misconduct." *Cocke*, 817 F.2d at 1561. "Rather, equitable tolling focuses on the employee with a reasonably prudent regard for his rights." *Id.*; *see also Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) ("[E]quitable tolling does not require any misconduct on the part of the defendant.").[2] Thus, as this Court has previously noted, cases involving equitable modification based on a defendant's conduct "are not relevant here." Order at 19 n.5; *see also Bennett v. Advanced Cable Contractors, Inc.*, No.

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[2] As both the Eleventh Circuit and this Court have previously recognized, Defendants' argument confuses equitable tolling and equitable estoppel. *See Browning*, 120 F.3d at 226 ("In arguing that the doctrine of equitable tolling may not be invoked in this case because it has not engaged in any misconduct which led [plaintiff] to defer filing suit in a timely fashion, [defendant] appears to be confusing, as apparently do many litigants and courts, the doctrines of equitable tolling and equitable estoppel."); *Bennett v. Advanced Cable Contractors, Inc.*, No. 1:12-CV-115-RWS, 2012 WL 1600443, at *6 (N.D. Ga. May 7, 2012) ("Unlike equitable estoppel, which 'require[s] an allegation of misconduct on the part of the party against whom it is made,' 'equitable tolling does not require any misconduct on the part of the defendant,' though misconduct on the part of the defendant may warrant it.") (quoting *Browning*, 120 F.3d at 226); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990) (Posner, J.) ("Many cases . . . in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently.").

1:12-CV-115-RWS, 2012 WL 1600443, at *6 (N.D. Ga. May 7, 2012).[3]

Defendants also err in suggesting that Plaintiff must allege "extraordinary circumstances" above and beyond his inability, despite reasonable diligence, to learn the facts necessary to support a charge of discrimination. The "extraordinary circumstances" standard is drawn from Eleventh Circuit cases involving federal habeas petitions, and thus reflects the uniquely strong state and federal interest in the finality of criminal convictions. *See Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008); *Outler v. United States*, 485 F.3d 1273 (11th Cir. 2007); *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999). The equitable tolling standard

[3] Defendants cite three Eleventh Circuit decisions (two unpublished) in arguing that Plaintiff must allege affirmative misconduct by Defendants. *See* Opp. at 5. However, those decisions do not trump *Cocke* or *Browning*'s on-point precedent. Two of the decisions specifically recognize the *Reeb/Sturniolo* standard, and none suggests that employer misconduct is *always* necessary before equitable tolling may be applied. *See Bourne v. Sch. Bd. of Broward County*, No. 12-11402, 2013 WL 385420, at *2 (11th Cir. Feb. 1, 2013) (stating that proof of "fraud, misinformation, or deliberate concealment" is sufficient to justify tolling, not that such a showing is necessary in all cases, and that the limitations period does not run "until a plaintiff knew or reasonably should have known that she was discriminated against") (citation omitted); *Hunt v. Ga. Dep't of Cmty. Affairs*, 490 Fed. Appx. 196, 198 (11th Cir. 2012); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (tolling appropriate "when the plaintiff has no reasonably way of discovering the wrong perpetrated against her"). Further, neither *Hunt* nor *Cabello* involved employment discrimination, and *Bourne* involved a hostile work environment claim where the plaintiff necessarily knew all relevant facts when the challenged acts – i.e., the harassment – occurred.

announced in *Reeb* and reaffirmed in *Sturniolo* and *Corke* reflects the very different equitable considerations in employment discrimination cases.[4] That standard, not the habeas standard, applies in this lawsuit under the Age Discrimination in Employment Act.

Finally, Defendants cite the "due diligence" considerations in cases like *Downs*, *Sandvik*, and *Bost v. Fed. Exp. Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004). However, that issue is encompassed within the *Reeb* standard's consideration of whether the facts supporting a charge of discrimination "should [have been] apparent to a person with a reasonably prudent regard for his rights." No further consideration of a plaintiff's diligence is necessary or proper.

In short, clear Eleventh Circuit precedent establishes that the question here is not whether "wrongdoing or malfeasance" by Defendants kept Plaintiff from learning of RJR's discriminatory practices, or whether "extraordinary circumstances" (beyond Plaintiff's inability to learn of those practices) kept him from filing an EEOC charge. The sole question is whether "a person with a

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[4] *Reeb*, 516 F.2d at 929-31 (limitations period is subject to modification "in the interest of giving effect to the broad remedial purposes of the [Civil Rights Act of 1964]" and that period is tolled until plaintiff learns facts supporting his discrimination charge because "[s]ecret preferences in hiring . . ., [by] their very nature, are unlikely to be readily apparent to the individual discriminated against").

reasonably prudent regard for his rights" would have discovered the facts supporting a charge based on Plaintiff's 2007 application more than 180 days before Plaintiff filed his May 17, 2010 charge. *Sturniolo*, 15 F.3d at 1025.[5]

II. Plaintiff Could Not Reasonably Have Learned Of The Facts Necessary To Support His Charge Of Discrimination Before April 2010.

Applying the proper standard, Plaintiff's First Amended Complaint demonstrates that equitable tolling is appropriate here.

The First Amended Complaint explains that Plaintiff applied for the Territory Manager position in 2007 using a website maintained by RJR, but was never contacted by RJR regarding that application. First Amended Complaint ¶10. No one from RJR ever informed Plaintiff why he was not hired, and Plaintiff did not know whether his application had been reviewed, let alone rejected or screened out. *Id.* ¶28. Plaintiff was not employed by RJR, so he had no existing work relationships to help him discover that information. *Id.* ¶28.

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[5] Ignoring the precedents cited in *Sturniolo*, the Eleventh Circuit's subsequent reaffirmation of that standard, and *Sturniolo*'s explicit language, Defendants argue that *Sturniolo* is irrelevant because the employer therein told the plaintiff that his position was being eliminated and the employee only later learned that he had been replaced by a younger person. *See* 15 F.3d at 1025-26; Opp. at 10. Nothing in *Sturniolo*'s description or application of the equitable tolling standard, however, turned upon the employer's "misconduct." Rather, *Sturniolo* noted those facts only to identify the point at which the plaintiff finally acquired "knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.* at 1026.

Plaintiff did not learn any additional facts regarding his 2007 application until April 2010, when he received a letter from Altshuler Berzon LLP. First Amended Complaint ¶29. The letter informed Plaintiff that he may have been a victim of age discrimination by RJR, and invited Plaintiff to contact attorney Casey Pitts to discuss a potential claim. *Id.* Exh. C.[6] Plaintiff contacted Mr. Pitts, who informed Plaintiff that, when reviewing applications for the Territory Manager position in 2007, RJR had used discriminatory resume review guidelines that disadvantaged persons 40 and older, and that Plaintiff's November 2007 application was rejected because of his age. *Id.* ¶¶13-14, 18, 30 & Exh. A.

These allegations easily satisfy the equitable tolling standard and demonstrate that the facts supporting a charge of discrimination based on RJR's rejection of Plaintiff's 2007 application for the Territory Manager position would not "have become apparent to a reasonably prudent person" prior to April 2010. Order at 19. Because Plaintiff applied through an RJR website, had no preexisting relationships with RJR, and was never contacted by RJR or anyone else acting on

[6] Defendants suggest that this case involves "a putative plaintiff [who] receive[d] a telephone call from a lawyer who [was] looking for clients in order to bring a class or collective action lawsuit," Opp. at 6-7, but the First Amended Complaint establishes that, consistent with Georgia's ethical rules, Altshuler Berzon LLP contacted Plaintiff via a written letter and Plaintiff thereafter chose to contact Mr. Pitts to discuss his legal rights. *See* First Amended Complaint ¶¶29-30 & Exh. C.

RJR's behalf, he never learned the reasons for his rejection, and did not even know whom, if anyone, he could contact to inquire about his rejection. Plaintiff had no access to RJR's internal resume review guidelines, or to the applicant flow data necessary to determine that less than two percent of the individuals hired as Territory Managers between September 2007 and July 2010 were over the age of 40. *See id.* ¶¶23-24. Until Plaintiff learned such facts from counsel, he "had no knowledge and no reason or means to know" that RJR had engaged in unlawful age discrimination. *Id.* ¶30.

Defendants nonetheless contend that equitable tolling is inappropriate here because Plaintiff did not "contact RJR[] or Kelly Services to inquire about the status of his November 2007 application, why he was not selected for a position, or who was hired in his place." Opp. at 6. Given the facts alleged above, however, such inquiries would have been unreasonable or futile, and Plaintiff's failure to undertake those inquiries therefore does not exhibit the absence of a "reasonably prudent regard for his rights." *Sturniolo*, 15 F.3d at 1025. No one in Plaintiff's position would have contacted Kelly, because Plaintiff applied through an RJR-maintained website and was never informed that Kelly was in any way involved in screening Territory Manager applications. First Amended Complaint ¶10. Likewise, because Plaintiff interacted with RJR only through its website, he had no

human point of contact at RJR and no way of knowing whom to contact regarding his application. *Id.* Moreover, even if Plaintiff had undertaken the inquiries suggested by Defendants, he would not have discovered the facts necessary to support a charge of discrimination. Defendants cannot credibly suggest that RJR would have provided Plaintiff with the internal resume review guidelines used to screen Territory Manager applications, as well as the applicant flow data showing that RJR was systematically rejecting individuals over the age of 40 while hiring individuals under the age of 40, had Plaintiff simply asked.[7]

None of the cases cited by Defendants suggests that Plaintiff failed to demonstrate a reasonably prudent regard for his rights. Defendants rely primarily on *Howard v. Intown Suites Mgmt.*, No. 1:04-cv-759-TWT, 2006 WL 739168 (N.D. Ga. Mar. 17, 2006) – an unpublished and uncited decision that was heavily criticized by the EEOC on appeal. *See* Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Howard v. Intown Suite Mgmt.*, No. 06-12270-AA (11th Cir. July 3, 2006). The circumstances in *Howard*, however, were entirely different from those here. The plaintiff in *Howard* received an in-person interview for an open property manager position, but a white applicant was

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[7] Indeed, because RJR hired many Territory Managers in 2007, it would not have made sense for Plaintiff to ask what particular individual RJR hired instead of him.

instead hired for the position. *Id.* at *1. *Howard* explained that the plaintiff "could easily have discovered the wrong by calling the Defendants and asking if the person who was hired was of a different race," and concluded that, in not doing so, the plaintiff "failed to act with due diligence." *Id.* at *2. In this case, by contrast, Plaintiff had no direct contact with RJR or its agents, and RJR cannot credibly claim that it would have given Plaintiff its resume review guidelines and applicant flow data had he simply asked.[8] *Howard* is thus inapposite.

The other out-of-circuit cases cited by Defendants are similarly irrelevant. They do not apply the well-established Eleventh Circuit tolling standard described in *Reeb*, *Sturniolo*, and *Cocke*, and, as in *Howard*, the plaintiffs in those cases did not act with reasonably prudent regard for their rights.[9]

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[8] Like Defendants, *Howard* erroneously applied the equitable tolling standard used in habeas cases rather than the specific Eleventh Circuit standard used in employment discrimination cases. Because the plaintiff in *Howard* did not show a reasonably prudent regard for his rights, that error did not impact the Court's ultimate conclusion that equitable tolling was inappropriate.

[9] *See Lukovsky v. San Francisco*, No. C 05-00389 WHA, 2006 WL 2038465, at *1, *5 (N.D. Cal. July 17, 2006) (noting plaintiff's concession that equitable tolling did not apply, then concluding that equitable tolling was unavailable *as a matter of California law* where plaintiff had been interviewed for position on multiple occasions and was informed of reasons he was not hired but made no further inquiries, and defendant was prejudiced by delay in proceedings); *Amini v. Oberlin College*, 259 F.3d 493, 501-02 (6th Cir. 2001) (applying Sixth Circuit standard for equitable tolling and concluding that applicant for faculty position in academic (continued)

In short, there is no reason to conclude that Plaintiff should have been aware of RJR's discriminatory hiring practices at any point prior to April 2010. The deadline for an EEOC charge based on Plaintiff's 2007 application was therefore tolled until that time, and Plaintiff's May 17, 2010 charge was timely.

III. The Facts That Plaintiff Learned In April 2010 Were Sufficient To Support His Charge Of Discrimination.

Finally, Defendants make the entirely different, and inconsistent, argument that Plaintiff did not learn *enough* facts in April 2010. Specifically, Defendants contend that equitable tolling is not available to Plaintiff because "the facts Plaintiff claims he learned from counsel provide no basis for a disparate treatment age discrimination [claim]." Opp. at 10. That argument misconstrues both the relevant law and Plaintiff's allegations.

(continued)

department failed to exercise due diligence where he never contacted department to learn who had been hired to fill position and learned identity of hired individual two months *before* filing deadline but still failed to file timely charge); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391 n.10 (3d Cir. 1994) (applying Third Circuit standard requiring "active misleading on the part of the defendant," and concluding that equitable tolling did not apply where plaintiff never contacted law firm for which she had previously worked as hourly attorney to learn whether associate position for which she had applied had been filled); *Haines v. Township of Voorhees*, No. Civ.A 96-3032 (JEI), 1997 WL 714226, at *6-*7 (D.N.J. Nov. 10, 1997) (requiring active misleading by defendant and concluding that equitable tolling was unavailable where relevant facts were known to plaintiff more than two years before she filed her charge of discrimination).

Contrary to Defendants' assertions, the First Amended Complaint does not assert that Plaintiff learned about only the resume review guidelines in April 2010. Rather, Mr. Pitts "informed [Plaintiff] that [RJR] used these guidelines when screening applications *to the disadvantage of persons 40 years of age and older* (including [Plaintiff]), *as alleged in ¶¶ 12 to 15 and 18 of this Complaint*." First Amended Complaint ¶30 (emphasis added). Paragraph 18 alleges that Plaintiff's 2007 application "was rejected because of his age," and that, "[r]ather than hiring [Plaintiff], [RJR] hired substantially younger individuals." *Id.* ¶18. The First Amended Complaint thus alleges that Mr. Pitts informed Plaintiff, in April 2010, that RJR had rejected his application "because of his age." Nothing else was required to provide a basis for his disparate treatment age discrimination claim.[10]

Defendants also misconstrue the law in suggesting that, by disclosing RJR's resume review guidelines to Plaintiff, Mr. Pitts did not give Plaintiff the information necessary to establish a disparate treatment claim. The cases cited by Defendants do not suggest that factors such as limited experience or recent college graduation can never form the basis for a disparate treatment claim, and they do not hold that plaintiffs cannot show that a defendant used such factors (which are

[10] Notably, Defendants have never contended that Plaintiff's allegations are facially inadequate to state such a claim.

highly correlated with age) as a proxy for age and with the intent to discriminate against older individuals – especially where, as here, the age-correlated factors bear no rational relationship to the position in question and the use of those factors is accompanied by extreme disparities in hiring. *See, e.g.*, First Amended Complaint ¶23 (only 19 out of 1,024 Territory Managers hired from September 1, 2007 through July 10, 2010 were over the age of 40). Defendants' cases simply establish that the use of such factors does not constitute illegal age discrimination *per se*.[11] That principle is irrelevant to the issues raised by Plaintiff's motion.

CONCLUSION

For the foregoing reasons, the Motion for Leave To Amend should be granted.

---

[11] *See, e.g.*, *Sack v. Bentsen*, No. 94-1896, 51 F.3d 264, at *5 (1995) (unpublished) (plaintiff failed to provide sufficient evidence, under totality of circumstances, to show that recent education or experience was used as a proxy for age); *Johnson v. Cook Inc.*, 587 F.Supp.2d 1020, 1026-27 (N.D. Ill. 2008) (plaintiff failed to provide any credible evidence to show that defendant had used experience as a proxy for age); *Das v. Ciba Corning Diagnostics Corp.*, 993 F.2d 1530 (1st Cir. 1993) (unpublished) ("Das may not . . . ask us to presume that the employer's decision to hire a candidate with significantly less work experience is *automatically* age-based.") (emphasis added); *Sundaram v. Brookhaven Nat'l Laboratories*, 424 F.Supp.2d 545, 576-77 (E.D.N.Y. 2006) (statement that manager "favored the hiring of recent graduates and post-doctoral candidates" was not *by itself* "direct evidence of discriminatory motive").

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Pursuant to Local Rule 7.1(D), the undersigned counsel hereby certifies that the foregoing **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT** has been prepared in accordance with Local Rule 5.1(C) using 14-point Times New Roman font.

/s/ John J. Almond
JOHN J. ALMOND
Georgia Bar No. 013613
jalmond@rh-law.com
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

James M. Finberg
jfinberg@altber.com
P. Casey Pitts
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Shanon J. Carson
scarson@bm.net
Sarah R. Schalman-Bergen
sschalman-bergen@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street

Philadelphia, PA 19103
Telephone: 800-424-6690
Facsimile: 215-875-4604

Todd M. Schneider
tschneider@schneiderwallace.com
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, CA 94104
Telephone: 415-421-7100 ext. 306
Facsimile: 415-421-7105

Counsel for Plaintiff Richard M. Villarreal and all others similarly situated

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

CERTIFICATE OF SERVICE

I hereby certify that on April 26TH, 2013, I caused the foregoing **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

Deborah A. Sudbury dsudbury@jonesday.com	Shanon J. Carson scarson@bm.net
R. Scott Campbell campbellrs@gtlaw.com	Sarah R. Schalman-Bergen sschalman-bergen@bm.net
James M. Finberg jfinberg@altshulerberzon.com	Mark T. Johnson mjohnson@schneiderwallace.com

P. Casey Pitts
cpitts@altber.com

Todd M. Schneider
tschneider@schneiderwallace.com

and that I have caused a copy to be served by U.S. Mail on the following attorneys of record:

Alison B. Marshall
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Eric S. Dreiband
Jones Day-D.C.
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
Attorney for Plaintiff

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	:	
Plaintiff,	:	CIVIL ACTION NO. 2:12-CV-0138-RWS
v.	:	(Collective Action)
R.J. REYNOLDS TOBACCO COMPANY, PINSTRIPE, INC., AND CAREERBUILDER, LLC,	:	
Defendants.	:	

ORDER

This case comes before the Court on Plaintiff's Motion for Leave to Amend Complaint [61]. After reviewing the record, the Court enters the following Order.

Background

Plaintiff Richard Villarreal brings this action for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*., as a collective action pursuant to 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b). Plaintiff, on behalf of himself and all others similarly situated, claims that Defendants engaged in an unlawful pattern or practice of intentional age

discrimination (disparate treatment) in violation of the ADEA (Count I) and unlawful use of hiring criteria having disparate impact on applicants over 40 years of age in violation of the ADEA (Count II).

On March 6, 2013, this Court granted Defendants' Motion to Dismiss in part, finding that all Plaintiff's claims related to hiring decisions before November 19, 2009 were time-barred under 29 U.S.C. § 626(d)(1)-(A) 180-day limitation period . (Order Dkt. No.[58].) Further, this Court found that Plaintiff's time-barred claims could not be saved by the continuing violations doctrine or equitable tolling. Specifically, the Court found that Plaintiff did not meet his burden regarding tolling of the limitations period because he failed to allege how and when he was first alerted to facts giving rise to his discrimination claim. Without such allegations in the complaint, the Court could not determine whether or when those facts should have become apparent to a reasonably prudent person. Accordingly the Court dismissed Plaintiff's claims arising from the rejection of his November 8, 2007, application.

Plaintiff now seeks to amend his complaint to add facts in support of his discrimination claim relating to his November 8, 2007, application. Plaintiff's added facts allege that he was unaware that his application may have been

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rejected for unlawful discriminatory reasons until April 2010. (Dkt. No. [61] Amended Complaint ¶ 28.) Plaintiff now alleges that on April 20, 2010, lawyers from Altshuler Berson, LLP notified him that RJ Reynolds used resume review guidelines giving rise to his cause of action. (Id. at ¶ 30.) Prior to this communication, Plaintiff "had no knowledge and no reason or means to know" that his application may have been unlawfully rejected. (Id.)

Discussion

Federal Rule of Civil Procedure 15(a) provides that where, as here, a responsive pleading has been filed, a litigant must seek leave to amend before filing an amended pleading. Fed. R. Civ. P. 15(a). "[L]eave," however, }shall be freely given when justice so requires." Id. Indeed, a district court should ordinarily deny leave to amend only where the amendment is requested "(1) after undue delay, in bad faith, or with a dilatory motive, (2) when the amendment would be futile, or (3) when the amendment would cause undue delay or prejudice." Worsham v. Provident Cos., 249 F. Supp. 2d 1325, 1334 (N.D.Ga. 2002).

In this circuit, "[e]quitable tolling is a remedy that must be used sparingly." Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008). Further,

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"equitable tolling of the limitations period is warranted when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Id. at 1319 (internal quotations omitted); see also Bond v. Roche, 2006 WL 50624, at *1-2 (M.D. Ga. Jan. 9, 2006) (a plaintiff has the burden to "show good cause for tolling the limitations period"). To state a claim for equitable tolling, a plaintiff must allege that: (1) he pursued his rights diligently and (2) some extraordinary circumstance stood in his way. See Downs, 520 F.3d at 1324.

Defendants oppose the new allegations on the basis that the amended complaint is futile because it fails to state a claim for equitable tolling. (Dkt. No. [66] at 2.) Defendants contend that the amendment does not allege any extraordinary circumstances that were beyond his control or show good cause to support tolling the limitations period. (Id. at 5.) Further, Plaintiff does not allege any wrongdoing or malfeasance by Defendants. Rather, the new allegations that counsel made Plaintiff aware of the unlawful hiring practices in 2010 do not justify the delayed filing with the EEOC. (Id.)

Upon review of Plaintiff's amended complaint, the Court finds that Plaintiff's proposed amendments do not state a claim for equitable tolling and

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thus would be futile. Plaintiff has not alleged any misrepresentations or concealment that hindered Plaintiff from learning of any alleged discrimination. In Cabello v. Fernandez–Larios, 402 F.3d 1148 (11th Cir.2005), the Eleventh Circuit held: "[E]quitable tolling is appropriate in situations where the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against her, as is the case here. Additionally, in order to apply equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment." Id. at 1155 (quoting Arce v. Garcia, 400 F.3d 1340, 1349 (11th Cir. 2005)(internal citation omitted). Plaintiff made no attempt to contact Defendant and ascertain the basis for his application rejection. In fact, Plaintiff has not alleged any due diligence on his part to determine the status of his 2007 application. Plaintiff asserts in his Reply brief that "even if [he] had undertaken the inquires... he would not have discovered the facts necessary to support a charge of discrimination." (Dkt. No. [66] at 11.) While this may be true, had Defendants failed to disclose the alleged discriminatory tactics upon inquiry, Plaintiff would then be able to properly assert concealment or malfeasance on the part of Defendants. Absent any such

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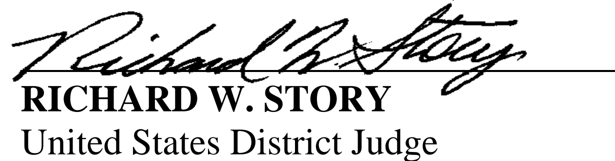
allegations, Plaintiff's proposed amendments do not assert a claim that can be saved by equitable tolling. Accordingly, Plaintiff's Motion to Amend [61] is **DENIED**.

Conclusion

Based on the foregoing, Plaintiff's Motion to Amend [61] is **DENIED**.

SO ORDERED this _26th_ day of November, 2013.



RICHARD W. STORY
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

(~~PROPOSE~~D) ORDER DIRECTING
ENTRY OF JUDGMENT AND STAYING ACTION

This Court's Orders of March 6, 2013 and November 26, 2013 have dismissed with prejudice, and without leave to amend, all claims based on hiring decisions made by Defendants before November 19, 2009 (the "Claims"), on the ground that the Claims are time-barred under 29 U.S.C. § 626(a)(i)(A). Plaintiff has moved the Court to direct the entry of final judgment as to the Claims in order that an immediate appeal may be taken from the dismissal of the Claims. Plaintiff has also moved for a stay of proceedings in this Court pending such appeal.

As the Claims are distinct "claims for relief" within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure; as the Court's Orders of March 6

and November 26, 2013 constitute full and final disposition of the Claims; and as there is no just reason for delay in entry of judgment on the Claims, Plaintiff's motion is hereby GRANTED.

The Court's determination that there is no just reason for delay in entry of judgment is based on the following findings:

(1) Immediate appeal of the Orders disposing of the Claims is in the interests of judicial administration and efficiency.

a) Immediate appeal will avoid the substantial risk of costly and time-consuming duplication of proceedings in this Court. If Plaintiff is compelled to await conclusion of the case as to the remaining claims (the "Remaining Claims") before appealing the dismissal of the Claims, an appellate ruling in Plaintiff's favor would result in the duplication of proceedings in this Court. All phases of the case that had been completed as to the Remaining Claims would then have to be repeated as to the Claims as reinstated on appeal, including, without limitation, a second *Hoffman-LaRoche* motion for conditional certification; a second notice to prospective opt-in plaintiffs; a second round of discovery and motions practice; and, potentially, a second trial.

b) There is no danger that an immediate appeal as to the Claims will lead to duplicative or piecemeal appeals, as the issues in such an

immediate appeal would be resolved once and for all in that appeal. The timeliness issue as to the Claims does not affect the Remaining Claims. And an immediate appeal would fully and finally resolve, for all claims in the case, the issue as to the availability of the disparate impact theory of liability in this case.

c) In addition, an immediate appellate resolution of the issues involved in that appeal would tend to increase the likelihood of settlement, as the chances of settlement appear to be negligible as long as dismissal of the Claims remains subject to possible reversal on appeal.

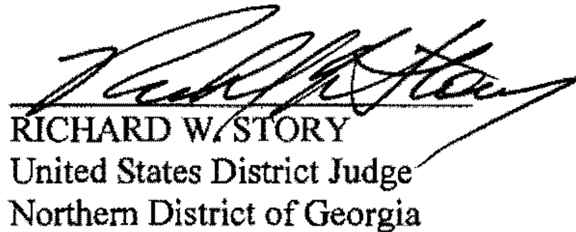
(2) Considerations of equity also favor an immediate appeal. Dismissal of the Claims disposed of what is likely the largest number of potential claims and the largest dollar magnitude of claims in this collective action. Plaintiff and a large number of potential opt-ins, who are by definition older workers, will have to wait longer – and, perhaps, years longer – for final resolution of this case absent an immediate appeal. Directing entry of judgment now so that an appeal can be immediately taken promises to shorten these proceedings and accelerate the day that these individuals can finally have their claims vindicated or otherwise brought to a conclusion.

WHEREFORE:

(1) The Clerk of Court is hereby DIRECTED to enter final judgment on the Claims immediately in the form of the "Final Judgment as to Certain Claims" attached hereto as Exhibit A; and

(2) This matter is hereby STAYED pending appeal of the Final Judgment on Certain Claims or until further order of this Court.

IT IS SO ORDERED, this 20th of May, 2014.



RICHARD W. STORY
United States District Judge
Northern District of Georgia

Proposed Order submitted by:

John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

Counsel for Plaintiff Richard M. Villarreal

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC.

Defendants.

CIVIL ACTION FILE

NO. 2:12-cv-138-RWS

FINAL JUDGMENT AS TO CERTAIN CLAIMS

This action having come before the court, Honorable Richard W. Story, United States District Judge, for consideration of Plaintiff's Motion for entry of judgment as to claims based on hiring decisions made before November 19, 2009, and the court having granted said motion and having directed that judgment be entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, it is

Ordered and Adjudged that any and all claims asserted in the Complaint insofar as they are based on hiring decisions before November 19, 2009 are **DISMISSED** and the Plaintiff shall take nothing under such claims.

Dated at Gainesville, Georgia this 21st day of May, 2014.

JAMES N. HATTEN
CLERK OF COURT

By: s/Stacey Kemp
Deputy Clerk

Prepared, Filed and Entered
In the Clerk's Office
May 21, 2014
James N. Hatten
Clerk of Court

By: s/Stacey Kemp
Deputy Clerk

84

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 22, 2014

James N. Hatten
U.S. District Court
121 SPRING ST SE
STE 201
GAINESVILLE, GA 30501

Appeal Number: 14-12707-BB
Case Style: Richard Villarreal v. Careerbuilder, LLC, et al
District Court Docket No: 2:12-cv-00138-RWS

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Carol R. Lewis, BB/bmc
Phone #: (404) 335-6179

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12707-BB

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

versus

R.J. REYNOLDS TOBACCO COMPANY,
PINSTRIPE, INC.,

Defendants-Appellees,

CAREERBUILDER, LLC,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

Before: MARCUS, WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

The motion to dismiss the appeal for lack of jurisdiction brought by Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc. is GRANTED and this appeal is DISMISSED for lack of jurisdiction. The district court's March 6, 2013 order granting Appellees' partial motion to dismiss and November 26, 2013 order denying leave to amend are not amenable to Fed.R.Civ.P. 54(b) certification. Accordingly, we lack jurisdiction to hear the appeal because it is not from a final judgment. *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b).

Appellant Richard Villarreal asserts entitlement to relief on behalf of himself and others similarly situated based on an alleged pattern and practice of age discrimination (Count I of Villarreal's complaint) and the alleged disparate impact of the use of unlawful hiring criteria (Count II of the complaint). The district court dismissed Count II after determining that the disparate-impact theory was not available to Villarreal and dismissed all claims under Count I of the complaint involving alleged failures to hire that occurred before November 19, 2009. That left intact the disparate-treatment claims relating to failures to hire that occurred on or after November 19, 2009, pursuant to an alleged pattern and practice of age discrimination.

Recoveries under the theories espoused in Counts I and II of the complaint are mutually exclusive. As pled, Villarreal could not recover twice for the same conduct under his disparate-treatment claim and his disparate-impact claim since both counts arise out of the same facts and contemplate the same relief. Because any relief that Villarreal could recover for his remaining claims under his disparate-treatment count necessarily substantially overlaps with—and, under some scenarios, may be exactly the same as—the relief that he could recover if he prevailed on the dismissed disparate-impact count, the appealed district court order does not qualify as final and thus appealable for purposes of Rule 54(b), Fed. R. Civ. P. *See In re Se. Banking Corp.*, 69 F.3d 1539, 1547 (11th Cir. 1995) (claims are not "final" for purposes of Rule 54(b) when the possible recoveries under various portions of the complaint are mutually exclusive or substantially overlap). As for the disparate-treatment claims dismissed as time-barred, these claims also substantially overlap with the dismissed disparate-impact claims for the same period. For the same reason, therefore, the order dismissing these claims is not final for purposes of Rule 54(b).

As the district court did not finally adjudicate any claim for relief separable under Rule 54(b), we lack jurisdiction to hear the appeal. Any motions that remain pending are DENIED as moot.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 04, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-12707-BB
Case Style: Richard Villarreal v. Careerbuilder, LLC, et al
District Court Docket No: 2:12-cv-00138-RWS

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Carol R. Lewis, BB(lt)
Phone #: (404) 335-6179

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12707-BB

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

versus

R.J. REYNOLDS TOBACCO COMPANY,
PINSTRIPE, INC.,

Defendants-Appellees,

CAREERBUILDER, LLC,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

Before: MARCUS, WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Appellant Richard Villareal's October 14, 2014 motion for reconsideration of our September 22, 2014 order dismissing this appeal for lack of jurisdiction is DENIED.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC.,

Defendants.

Civil Action No. 2:12-CV-0138-RWS

(Collective Action)

PLAINTIFF'S MOTION TO DISMISS REMAINING CLAIMS WITH PREJUDICE (UNOPPOSED)

On March 6, 2013, the Court entered an order granting the Defendants' Partial Motion to Dismiss (the "Order"). (Doc. 58.) By the Order, certain of the Plaintiff's claims were dismissed from this action. The Order left certain other claims (the "Remaining Claims") pending.

Comes now the Plaintiff, and hereby moves, in accordance with Fed. R. Civ. P. Rule 41(a)(2), for the dismissal of all Remaining Claims WITH PREJUDICE.

Voluntary dismissal of the Remaining Claims would create a final judgment. Plaintiff intends to appeal from that judgment in order to assert error regarding the previously dismissed claims. *See Myers v. Sullivan*, 916 F.2d 659, 673 (11th Cir.

1990) ("Under general legal principles, earlier interlocutory orders merge into the final judgment, and a party may appeal the latter to assert error in the earlier interlocutory order.").

Plaintiff's counsel has been authorized by the Defendants' counsel to represent that the Defendants do not oppose this motion.

Submitted herewith, for the Court's consideration, is a proposed Consent Order of Dismissal with Prejudice, a copy of which is attached hereto as Exhibit "A".

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

/s/ James M. Finberg
James M. Finberg
jfinberg@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Attorneys for the Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC.,

Defendants.

Civil Action No. 2:12-CV-0138-RWS

(Collective Action)

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2015, I caused a copy of the foregoing PLAINTIFF'S MOTION TO DISMISS REMAINING CLAIMS WITH PREJUDICE (UNOPPOSED) and Proposed CONSENT ORDER OF DISMISSAL OF REMAINING CLAIMS WITH PREJUDICE to be electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification to the following attorneys of record:

Deborah A. Sudbury
dsudbury@jonesday.com
Eric S. Dreiband
esdreiband@jonesday.com
James M. Finberg
jfinberg@altshulerberzon.com

Shanon J. Carson
scarson@bm.net
Sarah R. Schalman-Bergen
sschalman-bergen@bm.net
Mark T. Johnson
mjohnson@schneiderwallace.com

P. Casey Pitts
cpitts@altber.com
Joshua G. Konecky
jkonecky@schneiderwallace.com

Todd M. Schneider
tschneider@schneiderwallace.com
Alison B. Marshall
abmarshall@jonesday.com

/s/ John J. Almond

John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

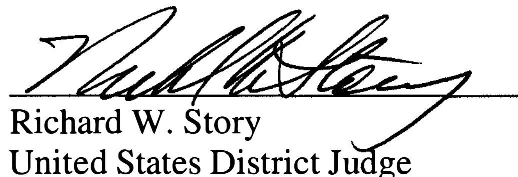
RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

CONSENT ORDER OF DISMISSAL OF REMAINING CLAIMS WITH PREJUDICE

On March 6, 2013, the Court entered an order granting the Defendants' Partial Motion to Dismiss (the "Order"). By the Order, certain of the Plaintiff's claims were dismissed from this action. The Order left certain other claims (the "Remaining Claims") pending.

The Plaintiff having moved for an order dismissing the Remaining Claims with prejudice, which motion is not opposed by the Defendants, it is ORDERED, ADJUDGED, and DECREED that the Remaining Claims are hereby DISMISSED WITH PREJUDICE, each party to bear his or its own costs of this matter, including attorneys' fees, in regard to the Remaining Claims.

It is SO ORDERED, this 16th day of January, 2015.



Richard W. Story
United States District Judge

Consented to:

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

/s/ James M. Finberg
James M. Finberg
jfinberg@altber.com
P. Casey Pitts
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Attorneys for the Plaintiff

/s/ Eric Dreiband
Eric Dreiband
esdrieband@jonesday.com
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001-2113
Telephone: 202-879-3720
Facsimile: 202-626-1700

Attorney for the Defendants

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

R,J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC.,

Defendants.

CIVIL ACTION FILE

NO. 2:12-cv-138-RWS

J U D G M E N T

This action having come before the court, Honorable Richard W. Story, United States District Judge, for consideration of plaintiff's motion for dismissal of the pending claims, and the court having granted said motion, it is

Ordered and Adjudged that the remaining claims are **dismissed with prejudice** and each party shall bear his or its own costs of this matter, including attorneys' fees, in regard to the remaining claims.

Dated at Gainesville, Georgia, this 20th day of January, 2015.

JAMES N. HATTEN
CLERK OF COURT

By: s/Stacey R. Kemp
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
January 20, 2015
James N. Hatten
Clerk of Court

By: s/Stacey R. Kemp
Deputy Clerk

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY AND PINSTRIPE, INC., Defendants.	Civil Action No. 2:12-CV-0138-RWS (Collective Action)

NOTICE OF APPEAL

Notice is hereby given that Richard M. Villarreal, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on January 20, 2015 (Doc. 89), and from the following earlier orders that merge into the final judgment: March 6, 2013 Order granting Defendants' Partial Motion to Dismiss (Doc. 58); November 26, 2013 Order denying Plaintiff's Motion for Leave to Amend Complaint (Doc. 67); and May 21, 2014 Judgment as to Certain Claims (Doc. 78).

/s/ John J. Almond
JOHN J. ALMOND
Georgia Bar No. 013613
jalmond@rh-law.com

ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

James M. Finberg
jfinberg@altber.com
P. Casey Pitts
cpitts@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: 415-421-7151
Facsimile: 415-788-9189

Shanon J. Carson
scarson@bm.net
Sarah R. Schalman-Bergen
sschalman-bergen@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 800-424-6690
Facsimile: 215-875-4604

Todd M. Schneider
tschneider@schneiderwallace.com
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, CA 94104

Telephone: 415-421-7100 ext. 306
Facsimile: 415-421-7105

Counsel for Plaintiff Richard M. Villarreal and all others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2015, I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of Court using the CM/ECF system that will send notification of such filing to all attorneys of record.

/s/ John J. Almond

John J. Almond
Georgia Bar No. 013613

Counsel for Plaintiff Richard M. Villarreal

ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Telephone: 404-522-4700
Facsimile: 404-525-2224

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, I electronically filed the foregoing APPENDIX with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter. On that same date, I caused physical copies of the foregoing APPENDIX VOLUME II to be filed with the Clerk of Court and served upon the following counsel by U.S. First Class Mail:

Eric S. Dreiband
Allison Marshall
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Attorneys for Defendants-Appellees

Dated: March 23, 2015

/s/ P. Casey Pitts
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
cpitts@altber.com