19-2240

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

KETLER BOSSE,

Plaintiff–Appellee,

—v.—

NEW YORK LIFE INSURANCE COMPANY; NEW YORK LIFE INSURANCE ANDANNUITY CORP.; NEW YORK LIFE INSURANCE COMPANY OF ARIZONA,

Defendants–Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
NO. 1:19-CV-016 (HON. STEVEN J. MCAULIFFE)

BRIEF FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether the District Court, in its November 13, 2019 Order, erred in denying Appellants' Motion to Dismiss or, in the Alternative, Stay Proceedings and Compel Arbitration, where the facts and events alleged in the Complaint occurred – in their entirety – over 12 years after the Partner's Employment Agreement (which contained the arbitration clause upon which Appellants rely) was terminated, and during which Mr. Bossé was operating as an independent contractor under two different agreements with Appellants, neither of which contained an arbitration clause.

2) Whether the District Court, in its November 13, 2019 Order, erred in holding the issue of whether the arbitration clause in the Partner's Employment Agreement applies to this dispute is not an arbitrability issue that should be decided in arbitration, where there is no clear and unmistakable evidence in that Agreement that the parties intended for that issue to be decided in arbitration, where the language of the Agreement limited issues of arbitrability to only those claims and disputes that could arise from Mr. Bossé's prior employment relationship with Appellants.

STATEMENT OF THE CASE

A. Mr. Bossé's Career with New York Life: A Wildly Successful Soliciting Agent is Promoted to District Agent

Mr. Bossé began working as a soliciting agent for the Appellants (hereinafter, "New York Life") in 2002, when he was 31 years old. (JA at 11.) At the time, he signed an Agent's Contract. *Id.* Under the Agent's Contract, Mr. Bossé was authorized "to solicit applications for individual life insurance policies, individual annuity policies, individual health insurance policies, group insurance policies, and group annuity policies." *Id.* Mr. Bossé's success as a soliciting agent depended on how many clients he could solicit and whether clients renewed their contracts. (JA at 012.) The Agent's Contract entitled him to be compensated generally in two ways: First, Mr. Bossé earned First Year Commissions ("FYC"), a percentage of the entire first-year premium a new client that he directly generated paid on an individual policy or annuity. *Id.* Second, he earned renewal commissions, income generated from a client's renewal of a contract or policy (known as "residual income"). *Id.* Mr. Bossé did not earn a salary. *Id.*

Mr. Bossé was wildly successful under this arrangement. (JA at 012-014.) He succeeded at not only generating new clients, but retaining them; he demonstrated proficiency at up-selling more expensive products from which he received residual income; he built a solid residual income over 15 years; his income grew from $60,557 in 2001 to $430,380 in 2013; and he achieved many

accolades and awards: he was a top case writer, Agent of the Year in 2011, and a member of the "Million Dollar Round Table" almost every year since 2003, among numerous other milestones. *Id.*

In 2013, Mr. Bossé was promoted to a District Agent, which allowed him to establish his own firm separate from New York Life's general office and hire his own agents. (JA at 014.) (During his first decade with New York Life, Mr. Bossé had his office at New York Life's General Office in Manchester, NH. *Id.*) At the time, there were fewer than 125 District Agents (among approximately 11,000 to 12,000 soliciting agents). *Id.* Mr. Bossé was the first black District Agent at New York Life, and he remained the *only* black District Agent before he was terminated. *Id.*

Mr. Bossé believed he had entered into a District Agent Agreement with New York Life. (JA at 015.) In addition to his duties as a soliciting agent under the Agent's Contract, under the District Agent Agreement, Mr. Bossé was required "to select, recruit and recommend the appointment of Agents to New York Life." *Id.* He was also required to have one proactive agent (an agent earning at least $24,000 per year in commissions) at the end of his first full District Agent calendar, two proactive agents by the end of his fourth year, and three proactive agents by the end of his fifth year. (JA at 015-016.) Under the compensation schedule included with the District Agent Agreement, Mr. Bossé could earn

various "override" commissions in addition to his usual compensation. (JA at 016.) An "override" was a "fee paid to the District Agent when a contracted Agent within the District Agent Unit sells [certain] products for New York Life." *Id.* A "District Unit" was comprised of the agents Mr. Bossé recommended and who were contracted by New York Life and assigned to Mr. Bossé. *Id.* As a District Agent, Mr. Bossé could lease his own office space, purchase furniture, hire his own administrative staff, and pay office expenses. *Id.*

B. The "Partner's Employment Agreement"

Mr. Bossé did not "transition" – as New York Life contends, *see* Brief of Appellants at 6 – between various roles. As described above, he began as a soliciting agent in 2001 and then was promoted to District Agent 2013 and remained one until his termination in 2016. *See supra* pp. 2-3. For a brief one-year period early in his career, Mr. Bossé became an employee with New York Life: he signed a "Partner's Employment Agreement" on March 25, 2004 ("Employment Agreement"). (JA at 72-76.) New York Life concedes that Agreement terminated, and Mr. Bossé "ceased to be an employee of New York Life," ***one year later, in 2005***, "when he transferred to a different role as an insurance agent." (JA at 62.) Indeed, Mr. Bossé and New York Life resumed proceeding under the Agent's Contract he signed in November 2001, and New

York Life concedes he "transitioned back to an Agent's position." (JA at 10, 70; Brief of Appellant at 8.)

It was for the best: the Employment Agreement made Mr. Bossé a mere employee with far more limited duties than under the Agent's Contract and the District Agent Agreement. The Employment Agreement afforded Mr. Bossé a salary of $60,000. (JA at 72.) It did not identify any right to earn commissions or any other incentivized form of compensation derived from the solicitation of insurance products. His only responsibility under the Employment Agreement was to "personally recruit, train, and supervise Agents under the direction of the Managing Partner of the General Office." *Id.*

C. The Partner's Employment Agreement Contained an Arbitration Clause but the Agent's Contract and District Agent Agreement Did Not

There is no dispute that neither the Agent's Contract nor the District Agent Agreement contains an arbitration clause. (JA at 81, 91-108.) In contrast, the Employment Agreement contains one. (JA at 74-75.) It states, "The Partner [Mr. Bossé] and New York Life agree that any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding." *Id.*

D. New York Life Terminates Mr. Bossé in January 2016

Despite a wildly successful 15-year career with New York Life, the company terminated Mr. Bossé on January 15, 2016 during a surprise meeting with three of its high-level officials and representatives: James Robbins (the Director of Operations/Administrative Manager for the New Hampshire General Office in Manchester, New Hampshire), Stephen Irish (the then-Managing Partner of the New Hampshire General Office), and Nicholas Inglese (a Compliance Officer and Senior Associate). (JA at 28-29; Brief of Appellant at 8.) In a letter they handed Mr. Bossé during that meeting, New York Life purported to terminate him under the 30-day at-will provision in his Agent's Contract (rather than the immediate "for cause" provision). (JA at 29.) Mr. Robbins, Mr. Irish, and Mr. Inglese told Mr. Bossé during that meeting, however, that he was being terminated because of certain alleged inaccuracies in the application process for Mr. Bossé's ex-wife, Erika Applegate. (JA at 29; Brief of Appellants at 8-9.) This reason was a fraudulent pretext designed to conceal New York Life's collective and/or concerted decision to discriminate and harass Mr. Bossé and ultimately jettison him from the company because he was black. (JA at 7-8, 17-30.)

After terminating him, New York Life made defamatory statements concerning Mr. Bossé that prevented him from re-starting his business and revealed it had forged one of the contracts Mr. Bossé believed he had signed.

(JA at 30-32.) Mr. Bossé requested a copy of his Agent's Contract, and New York Life provided him with two visibly-forged documents: two of the copies of the Contract it provided were not countersigned by a New York Life representative, and a third copy whited out Mr. Bossé's alleged signature while portions of cursive lettering below the line remain visible. (JA at 30.) (New York Life would later defend a Charge of Discrimination filed by Mr. Bossé with the New Hampshire Commission for Human Rights, in part, by submitting one of these forged Contracts and arguing Mr. Bossé was an independent contractor, and, thus, the Commission lacked jurisdiction. *Id.*) New York Life then included defamatory statements in letters to the Financial Industry Regulatory Authority ("FINRA") and communicated that information to many of Mr. Bossé's clients. (JA at 31-32.) As a result, many of those clients chose to stay with New York Life. *Id.*

E. The Underlying Lawsuit and the District Court's Order

Mr. Bossé filed a lawsuit in the District Court on January 7, 2019. (JA at 6-53.) His Complaint alleged claims under Title XLII (Title 42) (Equal rights under the law), Title VII (42 U.S.C. § 2000e-2(a)(1) and 2000e-3(a)) (Retaliation in Violation of the Law), and 42 USC § 1985 (Conspiracy to Interfere With Civil Rights); common law claims for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and wrongful termination, tortious interference with

business relations, breach of fiduciary duty, unjust enrichment, conversion, and defamation; and a claim for unfair or deceptive conduct under RSA 358-A. *Id.*

New York Life filed a Motion to Dismiss or, in the Alternative, Stay Proceedings and Compel Arbitration on April 9, 2019. (JA at 53-76.) Mr. Bossé filed an Objection to that Motion on April 26, 2019. (JA at 77-108.)

The District Court issued an Order on November 13, 2019, denying New York Life's Motion. (ADD. at 1-23.) In that Order, the Court held a valid agreement to arbitrate did not exist. *Id.* The Court rejected New York Life's argument that the arbitration clause was so expansive that it covered Mr. Bossé's claims, concluding "No reasonable person in either Bossé's position or New York Life's position would have understood the 2004 Partner's Agreement arbitration provision (and survival provision) to require arbitration of any and all future claims of whatever nature or type, no matter how unrelated to the Partner's Agreement, and no matter how distant in the future the claim arose." (ADD at 11-12.) The Court referenced an analogy in explaining its holding: "[A] reasonable person signing the Partner's Agreement would hardly think that a slip and fall injury suffered by plaintiff on New York Life property 30 years in the future, and 25 years after any work or other relationship terminated, would be subject to arbitration under that particular clause." (ADD at 12.) The Court continued: "[New York Life's] current position – that the Partner's Agreement obligates the

parties to arbitrate any and every dispute between them, no matter what it is and no matter when it arises – ***is unbounded to the point of absurdity***." *Id.* (emphasis added)

New York Life timely filed a notice of appeal on November 27, 2019. (JA at 5.)

SUMMARY OF ARGUMENT

Rather than allowing Mr. Bossé his day in court with a jury, New York Life reached far back into the annals of its history with Mr. Bossé, located and dusted off a 15-year-old employment agreement (that was in effect for only one year), and claimed an arbitration clause in that agreement requires that this case be stayed and Mr. Bossé's claims be referred to arbitration. This argument lacks merit for several reasons.

First, the arbitration clause in the above employment agreement does not apply to this dispute because the facts and events alleged in the Complaint occurred – in their entirety – ***over 12 years after*** that agreement was terminated. When the facts alleged in the Complaint occurred, Mr. Bossé was operating as an independent contractor, with a distinct and more onerous set of duties and obligations and a far different and more lucrative compensation structure, and under two different agreements with New York Life, neither of which contains an arbitration clause. Thus, the arbitration clause in his employment agreement from over a decade ago does not cover this dispute.

Second, the issue of whether the arbitration clause applies to this dispute is not an arbitrability issue that should be decided in arbitration. Rather, there is no clear and unmistakable evidence in the employment agreement that Mr. Bossé and New York Life intended for that issue to be decided in arbitration. The language

of that agreement limited issues of arbitrability to only those claims and disputes that could arise from Mr. Bossé's prior employment relationship with New York Life. Thus, it was correct for *the District Court* to decide whether the arbitration clause applies here.

Third, the doctrines of judicial estoppel and waiver bar New York Life from invoking the arbitration clause at all. In a prior administrative agency proceeding over four years ago, Mr. Bossé filed some of the discrimination claims he is asserting in this proceeding. Instead of introducing the employment agreement and arguing those claims should be referred to arbitration, New York Life introduced *another* agreement (Mr. Bossé's Agent's Contract), under which Mr. Bossé was operating as a soliciting agent, and claimed the agency lacked jurisdiction over Mr. Bossé's claims because he was an independent contractor under that Contract. New York Life has obviously adopted the opposite position here. It should be judicially estopped from doing so, and it has otherwise waived the right to invoke arbitration because it delayed doing so until now.

This Court should affirm the District Court's November 13, 2019 Order.

ARGUMENT

I. This Court Should Affirm the District Court's Denial of New York Life's Request to Compel Arbitration of Mr. Bosse's Claims Because the Arbitration Clause in the Employment Agreement Does Not Cover This Dispute

New York Life argues "it is beyond doubt that the arbitration agreement between Mr. Bossé and New York Life" contained in a "Partner's Employment Agreement" Mr. Bossé purportedly signed in March 2004 "was specifically intended to cover claims such as those asserted in this case." Brief of Appellants at 26. No matter the superlatives New York Life chooses, it cannot escape one undisputed fact that resolves this issue: Mr. Bossé's claims concern facts and events that occurred ***many years after*** that Employment Agreement was terminated in 2005. Those claims, therefore, are not covered by the arbitration clause in the Employment Agreement and cannot be referred to arbitration.

"A party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that ***the claim asserted comes within the clause's scope***." *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003) (emphasis added). It is axiomatic that "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 142-43 (quoting *AT&T Techs., Inc. v. Commcn's Workers of Am.*, 475 U.S. 643 (1986)).

This Court need look no further than *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 227 F. App'x 159 (3d Cir. 2007), which is dispositive of this issue. In that case, the Third Circuit found that a dispute that occurred ***after*** the expiration of the parties' agreement was not subject to an arbitration clause contained in that agreement. Bogen was a manufacturer and seller of sound systems and telephone peripherals, and it hired Tri-Signal to distribute its products in California. Bogen and Tri-Signal's contract included an arbitration clause and expressly stated that it would terminate on December 31, 2000. After the contract expired**,** the companies continued to do business together, ***but on different terms***. On May 7, 2003, more than two years after the expiration of the initial contract, Bogen terminated its business relationship with Tri-Signal. Tri-Signal sued, and Bogen moved to compel arbitration pursuant to the arbitration clause in their prior agreement. The Third Circuit denied the motion. It held: "Despite well-established policy considerations favoring the enforcement of arbitration agreements . . . , a party can only be required to arbitrate if 'that party has entered into a written agreement to arbitrate that covers the dispute.'" The Third Circuit identified the fact that the parties did not enter into a new written agreement after the termination of the original contract, and that their dispute did not arise ***until over two years after the termination of their agreement***. The court found that the

lawsuit did not arise under the original contract, and there was no evidence of a clear intention to arbitrate disputes that arose under the parties' new arrangement.

Similarly, in *Vantage Tech. v. College Entrance Examination Bd.*, 591 F. Supp. 2d 768 (E.D. Pa. 2008), the district court denied a motion to compel arbitration of a contract dispute because it arose after the expiration of the parties' written contract containing an arbitration clause and before the commencement of their subsequent written contract that did not include an arbitration provision. *Id.* at 770-72.

Here, ***all*** of the claims New York Life seeks to refer to arbitration concern facts and events that arose ***over 12 years after*** the Employment Agreement was terminated. New York Life concedes the Employment Agreement terminated, and Mr. Bossé "ceased to be an employee of New York Life," ***in 2005***, "when he transferred to a different role as an insurance agent." (JA at 062.) At that point, Mr. Bossé and New York Life resumed proceeding under the Agent's Contract he signed in November 2001, and New York Life concedes he "transitioned back to an Agent's position." (JA at 011, 070.) Mr. Bossé then became a District Agent and signed a District Agent Agreement in 2013. (JA at 014-015.) Neither of those contracts contains an arbitration clause. *See id.* & (JA at 091-108.)

Mr. Bossé's claims are based on facts and events that did not arise under the Employment Agreement and, instead, arose under either of two separate,

subsequent agreemets under which he worked with New York Life: the above-referenced Agent's Contract or the District Agent Agreement. The earliest events concerning this dispute occurred in ***2013***, seven years after the Employment Agreement was terminated, and Mr. Bossé's term as an employee ended. (JA at 061-062.) *See id.* ¶ 61. The majority of New York Life's conduct occurred in 2015. (JA at 018-026.) Mr. Bossé's termination and the events that preceded it occurred in 2015 and 2016. (JA at 026-029.) Indeed, when New York Life terminated Mr. Bossé, it provided him with a letter that purported to terminate him under the 30-day at-will provision in the ***Agent's Contract***, not the Employment Agreement. (JA at 029.) New York Life then defamed Mr. Bossé to his clients and FINRA in 2016, *after* his termination. (JA at 031-032.) That conduct does not fall under any agreement. *See id.*

Indeed, the nature of the dispute Mr. Bossé describes in the Complaint relates to his role as a soliciting agent and then, from 2013 onward, a District Agent, ***not*** as an employee under the Employment Agreement. Under the Agent's Contract, Mr. Bossé was authorized "to solicit applications for individual life insurance policies, individual annuity policies, individual health insurance policies, group insurance policies, and group annuity policies." (JA at 011.) That Contract also entitled him to earn either First Year Commissions ("FYC"), a percentage of the entire first-year premium a new client that he directly generated paid on an

individual policy or annuity, and renewal commissions, income generated from a client's renewal of a contract or policy (known as "residual income"). (JA at 012, 069 ("Agents are compensated with commissions based on the percentage of first-year and renewal premiums they generate.").) In addition to his duties as a soliciting agent under the Agent's Contract, when he entered into the District Agent Agreement, Mr. Bossé was required "to select, recruit and recommend the appointment of Agents to New York Life." (JA at 015-016.) He was also required to have one proactive agent (an agent earning at least $24,000 per year in commissions) at the end of his first full District Agent calendar, and hire additional agents in the ensuing years. *Id.* Under the compensation schedule included with the District Agent Agreement, Mr. Bossé could earn various "override" commissions in addition to his usual compensation. (JA at 016, 069 ("District Agents are eligible for additional compensation in the form of overrides based on commissions paid to agents they recruit.").) An "override" was a "fee paid to the District Agent when a contracted Agent within the District Agent Unit sells [certain] products for New York Life." *Id.* A "District Unit" was comprised of the agents Mr. Bossé recommended and who were contracted by New York Life and assigned to Mr. Bossé. *Id.* As a District Agent, Mr. Bossé could lease his own office space, purchase furniture, hire his own administrative staff, and pay office expenses. (JA at 016.)

In contrast, the Employment Agreement made Mr. Bossé a mere employee with far more limited duties. He earned salary of $60,000 and did not earn commissions or any other incentivized form of compensation. (JA at 072.) His only responsibility under the Employment Agreement was to "personally recruit, train, and supervise Agents under the direction of the Managing Partner of the General Office." *Id.*

In the Complaint, Mr. Bossé alleged claims that relate to the nature of his role as a soliciting agent and District Agent, not as an employee. For example, Mr. Bossé alleges New York Life (a) failed to process and underwrite applications for him and his agents that they properly submitted; (b) engaged in back billing that undermined Mr. Bossé and his agents; and (c) stole or drove away Mr. Bossé's agents. (JA at 018.) The Complaint provides excruciating detail about instances in which New York Life delayed the processing of applications that Mr. Bossé's agents such as Willie Miles, Xavier Veras, and Paul Etienne had submitted. (JA at 018-019.) It also details how New York Life treated Mr. Bossé's agents, such as Malcom Ngundam, Mr. Miles, and Mr. Etienne, with respect to denying them compensation they were due, and how that treatment led to three of his agents – Mr. Ngundam, Mr. Veras, and Amanda Brown – quitting. (JA at 021-022.) The Complaint also explains how New York Life seduced two of Mr. Bossé's top-producing agents, David Duquette and Ron Noyes, to re-locate to the General

Office and diverted the hiring of another agent, Marie Elsie Buteau, to the General Office. (JA at 022.) Mr. Bossé has also alleged that, as a result of New York Life's conduct above, he lost new commissions, residual commissions, and override commissions. (JA at 033-034.) These are all components related to Mr. Bossé's role as a soliciting agent under the Agent's Contract and a District Agent under the District Agent Agreement, not his status as a salaried employee under the long-ago terminated Employment Agreement.

New York Life relies heavily on the fact the arbitration clause is "broadly worded" and cites several cases that hold such clauses are enforceable.[1] *See* Brief of Appellants at 27-29. None of those cases, however, involves a situation, like Mr. Bossé's, where a party to a dispute arising out of a contract attempted to invoke an arbitration provision in a ***different contract*** terminated over ***a decade earlier***. *See Guglielomo v. LG&M Holdings LLC*, No. CV-18-03718, 2019 WL 3253190, at *8 (D. Ariz. Jul. 19, 2019) (enforcing arbitration clauses in two agreements signed by various plaintiffs, where there is no mention of any other agreement into which the parties entered); *First Sealord Sur., Inc. v. TLT Constr. Corp.*, 765 F. Supp. 2d 66, 72-74 (D. Mass 2010) (enforcing arbitration clause in

[1] New York Life also uses the term "relationship-centered" to describe the arbitration clause in the Employment Agreement and arbitration agreements in other cases. *See* Brief of Appellants at 28. It fails to define that term, however, or any authority explaining why it is relevant.

subcontract in connection with dispute between general contractor and surety company that arose just months after contract was executed and project commenced); *Gibbs v. PFS Invs., Inc.*, 209 F. Supp. 2d 620, 623 (E.D. Va. 2002) (enforcing arbitration provisions referenced in two agreements plaintiff entered with defendants and U-4 form plaintiff submitted to NASD, all of which governed plaintiff's dispute with defendants concerning non-disclosure of criminal record, where there were no other agreements governing the parties' relationship); *Bosinger v. Phillips Plastics Corp.*, 57 F. Supp. 2d 986, 988-90 (S.D. Cal. 1999) (granting motion to stay pending arbitration, where plaintiff and defendant entered into "approximately fifteen new or amended sales representative agreements," and "the last, and perhaps last two, of these agreements contained an arbitration clause").

New York Life also spends considerable time alleging Mr. Bossé's relationship with New York Life was of an "evolving nature" and that he frequently "transitioned" between certain "roles" with the company during an "ongoing relationship," obviously in an attempt to argue his decades-old Employment Agreement somehow covers this dispute. *See* Brief of Appellants at 6, 28. This is inaccurate and irrelevant. None of the agreements at issue, however, mentions this "evolving" or "ongoing" relationship. Rather, they are highly specific about what they cover: Mr. Bossé began as a soliciting agent in 2001 and

then was promoted to District Agent 2013 and remained a District Agent until his termination in 2016. *See supra* pp. 2-3. For a brief one-year period early in his career, he was an employee under the Employment Agreement. (JA at 72-76.) No document explains that he "transitioned" between these roles. His trajectory was exclusively upward: he left his brief experimentation as an "employee" with New York Life far in the past and ascended through the company's ranks from a soliciting agent to a District Agent and never looked back, while entering into the appropriate agreements (Agent's Contract and District Agent Agreement) to govern those later relationships. *See id.* New York Life's attempt to describe Mr. Bossé's relationship with the company as "evolving" ignores the facts that the Employment Agreement has exactly ***zero*** relation to his work as a soliciting agent and District Agent, and his two later agreements with the company do not contain arbitration provisions.

The fact New York Life contends the arbitration clause survived the termination of the Employment Agreement is also irrelevant: the dispute must still be covered by the arbitration clause in order to be arbitrable. *See Bogen*, *supra*; *Vantage Tech*, *supra*. New York Life complains that the District Court "seems to question" the declaration submitted by Albert Marquez, its "Agency Standards Officer" who allegedly was "generally familiar with the roles of Agents and District Agents," and implies this was inappropriate. *See* Brief of Appellants at 30

n.10, 31; (JA at 069-070.). The District Court was correct in doing so. "The fate of a motion to dismiss under Rule 12(b)(6) ordinarily depends on the ***allegations contained within the four corners of the plaintiff's complaint***." *Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) (emphasis added). The Court may expand its consideration of such matters to include "undisputed information" contained within exhibits attached to or referenced in the complaint. *Bourne v. Arruda*, No. 10-cv-393-LM, 2011 U.S. Dist. LEXIS 62332, at *9-*10 n.3 (D.N.H. Jun. 10, 2011). The information in Marquez's declaration was not in the Complaint or undisputed. Thus, the Court correctly declined to consider any of it in denying New York Life's Motion to Dismiss.

Finally, New York Life claims the fact this dispute arose 12 years after the Employment Agreement was terminated should not preclude enforcement of the arbitration clause contained in it. Brief of Appellants at 31-32. That argument misses the point: this dispute not only arose 12 years later, but also ***when Mr. Bossé was operating under two different agreements (the Agent's Contract and the District Agent Agreement) that did not contain arbitration provisions***. Not a single case New York Life cites to support this argument involves a situation where, in addition to the passage of time, the parties entered into *another*, very

different, agreement (let alone two) that did not contain an arbitration clause. *See* Brief of Appellants at 31-33.[2]

This dispute arose, long after the termination of the Employment Agreement. Accordingly, Mr. Bossé's claims are not covered by the arbitration clause in the Employment Agreement, and this Court should affirm the District Court's denial of New York Life's request to compel arbitration.

II. The Issue of Whether the Arbitration Clause Applies to this Dispute is for the District Court to Decide

New York Life spends a large portion of its Brief arguing the issue of arbitrability must be decided in arbitration because the Employment Agreement delegated that issue to an arbitrator by stating "any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding." Brief of Appellants at 13-25. It relies on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), which held that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, ... a court possesses no power to decide the arbitrability issue . . . . even if the court thinks that the argument that the arbitration

[2] New York Life also speculates "the fact Mr. Bossé continued to work for New York Life, in one form or another, from the date he signed the arbitration agreement (2004) until the date of his termination (2016), demonstrates his intent to be bound by the arbitration agreement." Brief of Appellants at 31. This statement ignores, however, the equally-important suggestion that Mr. Bossé's resumption of his soliciting agent duties under the Agent's Contract and signing of the District Agent Agreement perhaps demonstrated his intent *not* to be bound by the arbitration agreement.

agreement applies to a particular dispute is wholly groundless." *Id.* at 528. This is inaccurate.

The Supreme Court ***did not actually decide whether the contract in Henry Schein delegated the arbitrability question to an arbitrator***. 139 S. Ct. at 531 ("We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue.") The Court held only that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract," and rejected the notion that a court may decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." *Id*. As will be demonstrated below, other authorities support the District Court's Order.

New York Life argues that a challenge to a delegation provision requires a court to answer two questions: "(1) was there a valid agreement; and (2) was there clear and mistakable evidence that the parties agreed to delegate questions of arbitrability to the arbitrator?" Brief of Appellants at 13. New York Life focuses a lot on the first question above and conflates it with the second question, relying primarily on the Supreme Court's decision in *Henry Schein* and expanding its scope to conclude erroneously that the arbitrability issue should be decided by an

arbitrator. No one, however, disputes that there is a valid agreement to arbitrate ***in general***. The point is that it does not cover ***this dispute***: There is no "clear and unmistakable evidence" that there was an agreement to arbitrate ***the dispute in this case***.

A. Who Decides the Arbitrability Issue Depends on Whether the Arbitration Agreement Covers the Underlying Dispute

The arbitrability issue starts and ends with a single line in the District Court's opinion: "There is not an enforceable agreement to arbitrate ***the claims brought in this case***." (ADD. at 8.) (emphasis added) New York Life acknowledges that holding in its Brief, *see* Brief of Appellants at 15, but it fails to understand that that conclusion ***also*** applies to the arbitrability question: In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the United States Supreme Court held: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, ***so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter***." *Id.* at 943 (internal citations omitted)

The Court reasoned further: "Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate." *Id.* "That is to say, the court should give considerable leeway to the arbitrator, setting

aside his or her decision only in certain narrow circumstances. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, ***then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently***." *Id.* (internal citation omitted) (emphasis added)

"These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* Because the issue is a matter of contract, '[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944. The only "qualification" the Court added to this analysis was that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.614, 626 (1985)). Also important: the Court held "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement": whereas the latter question is decided by resolving any doubts about the scope of

arbitrable issues in favor of arbitration, the former question (who decides arbitrability) is decided independently of that presumption, i.e., without interpreting silence or ambiguity as giving arbitrators the power to decide arbitrability. *Id.* at 945.

New York Life attempts to argue *Henry Schein* mandates that the mere mention of arbitrability in an arbitration clause constitutes "clear and unmistakable evidence" of the delegation of that question to an arbitrator. *Henry Schein* isn't so broad, and New York Life focuses instead on whether the arbitration clause is "valid" (which no one disputes) and skips the analysis and question posed in *First Options*: Did the parties agree to submit the arbitrability question to an arbitrator? *See supra* pp. 24-26. *Henry Schein* did not change this framework: it acknowledged "[t]his Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." 139 S. Ct. at 530 (quoting *First Options*, 514 U.S. at 944).

In the First Circuit, the "clear and unmistakable evidence" standard is a "high one." *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 89-90 (1st Cir. 2007) (quoting *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005)). This Circuit has held that "[a] dispute over whether an arbitration provision applies to a particular controversy raises an issue of substantive

arbitrability that is ***presumptively for the courts, not the arbitrator, to decide***." *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 89 (1st Cir. 2007) (emphasis added); *see also NASDAQ OMX Group, Inc. v. UBS Securities, LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) ("The law generally treats arbitrability as an issue for judicial determination 'unless the parties clearly and unmistakably provide otherwise.'") (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). New York Life's own case law supports this point: "[W]hether the court or the arbitrator decides arbitrability is '"an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise.*"' *Oracle Am., Inc. v. Myriad Group AG*, 724 F.3d 1069, 1072 (9th Cir. 2013) (cited in Brief of Appellants at 21). While it is true "parties may delegate threshold arbitrability questions to the arbitrator," New York Life further concedes the parties' agreement must do so by "***clear and unmistakable evidence***." *Henry Schein*, 139 S. Ct. at 530 (emphasis added); Brief of Appellants at 13-14. "[T]he federal policy in favor of arbitration does not extend to deciding questions of arbitrability." *Oracle Am.*, 724 F.3d at 1072.

New York Life declares, quite dramatically, that the District Court's decision "stands alone in the wake of *Henry Schein*," and it "is unaware of any other decision by a federal court limiting *Henry Schein* in the manner submitted by the District Court." Brief of Appellants at 23. The first statement is inaccurate: the

District Court's decision is consistent with several prior cases, including the Fifth Circuit's decision in *Henry Schein* on remand after the Supreme Court's January 2019 decision. The second statement is illogical because it is based on a false premise: the District Court did not "limit" *Henry Schein* at all. Rather, the same result occurred 24 years earlier in *First Options*, eight years earlier in *Turi v. Main St. Adoption Servs. LLP*, 633 F.3d 496 (6th Cir. 2011), five years earlier in *NASDAQ*, and just six months ago in *Henry Schein, Inc. v. Archer & White Sales*, No. 16-41674 (5th Cir. Aug. 14, 2019). New York Life conveniently ignores these cases in its Brief, and – as noted above – the Supreme Court specifically cited and relied on *First Options* in *Henry Schein*.

In *First Options*, the Court held an arbitration clause in a workout agreement between a firm (First Options) that cleared stock trades on the Philadelphia Stock Exchange and several investors (the Kaplans) did not apply to the arbitrability of a dispute between the parties arising from that agreement. 514 U.S. at 944-46. It concluded "First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide (*i. e.,* to arbitrate) the question of arbitrability," despite the facts the Kaplans accepted arbitration after First Options submitted the dispute to an arbitration panel and then argued the arbitrability issue to the panel, because the agreement did not show the parties delegated that issue to an arbitrator. *Id.* at 946.

In *Turi*, the Sixth Circuit held an arbitration clause was so narrow that questions of arbitrability did not need to be decided by the arbitrator. *Id.* at 511. The clause covered claims regarding fees in excess of $5,000. *Id.* at 506. The plaintiffs asserted claims, however, outside that delineation: claims for fraud, conspiracy, misrepresentation, intentional and negligent infliction of emotional distress, and RICO violations. *Id.* at 500. The Sixth Circuit held that the delegation of the arbitrability issue "applies only to claims that are at least *arguably* covered by the agreement." *Id.* at 511.

New York Life also fails to mention the Fifth Circuit's decision in *Henry Schein* in August 2019 *after* the case was remanded following the Supreme Court's January 2019 decision. On remand, the Fifth Circuit held the parties did ***not*** clearly delegate arbitrability. *See Henry Schein, Inc. v. Archer & White Sales*, No. 16-41674, at *4-*9 (5th Cir. Aug. 14, 2019). There was a valid arbitration clause in a dealer agreement that referred any dispute arising out of the agreement to arbitration, except for several types of claims, including actions seeking injunctive relief. *Id.* at *3. The defendant argued the clause's general incorporation of the AAA rules functioned as a delegation of the arbitrability issue to an arbitrator. *Id.* at *6. The Fifth Circuit held that, because some of the plaintiff's claims sought injunctive relief, they fell within the carve-out provision in the arbitration clause and could not be arbitrated. *Id.* at *6-*7. Thus, the Court held, because the

arbitration clause delegated arbitrability for all disputes except those under the carve-out, it could not conclude the agreement showed a "clear and unmistakable" intent to delegate arbitrability. *Id.*

Finally, in *NASDAQ OMX Group, Inc.*, the Second Circuit held a similar arbitration clause that incorporated the AAA rules did not clearly and unmistakably delegate arbitrability because the clause contained a carve-out that arguably covered the underlying dispute. 770 F.3d at 1031-32. Thus, because there was an ambiguity as to whether the parties intended to have arbitrability questions decided by an arbitrator, the Court held the arbitrability question was for the Court to decide. *See id.*

The District Court's Order is consistent with these authorities in holding that there must be an enforceable agreement to arbitrate the claims brought in this case. (ADD. at 8.)

B. Although there is an Agreement to Arbitrate in General, There is No "Clear and Unmistakable Evidence" of an Agreement to Arbitrate <u>This</u> <u>Dispute</u>

The Employment Agreement states it "shall be governed by and interpreted in accordance with the laws of the State of New York." (JA at 76.) Under New York law, "'[t]he court must ascertain the intent of the parties from the plain meaning of the language employed,' and a 'contract should be construed so as to give full meaning and effect to all its provisions.'" *Painewebber, Inc. v. Elahi*, 87

F.3d 589, 600 (1st Cir. 1996) (quoting *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. Add. Div. 1990)). "A contract term is ambiguous if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.'" *Painewebber*, 87 F.3d at 600 (quoting *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987)).

Here, the Employment Agreement does not demonstrate "clear and unmistakable evidence" that Mr. Bossé and New York Life intended that the issue of whether the arbitration clause applies to this dispute is an arbitrability issue that must be decided in arbitration. The arbitration clause states, "The ***Partner*** [Mr. Bossé] and New York Life agree that ***any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such Claim is arbitrable***, shall be resolved by an arbitration proceeding." (JA at 74) (emphases added). Mr. Bossé was an ***employee*** under this Agreement, and his relationship with New York Life at that time was an ***employment*** relationship: he had a far more limited set of duties and obligations than he had under the Agent's Contract

or District Agent Agreement, and he earned a salary and had no right to the extensive commission structure provided by the latter two agreements. Thus, reading the Employment Agreement as a whole, a "dispute, claim, or controversy" between Mr. Bossé and New York Life would have necessarily been limited to employment-related claims, such as a traditional employment discrimination claim (which is expressly included in the arbitration clause) or a breach of the non-compete provision in the Employment Agreement. *See id.* They would not have included claims or disputes arising out of the resumption of Mr. Bossé's relationship with New York Life as a soliciting agent and his relationship with New York Life as a District Agent (and, as New York Life contends, an "independent contractor," *see supra* p. 7). These latter relationships yield a separate set of duties and obligations and different array of disputes, claims, or controversies, such as the many claims Mr. Bossé asserted in the Complaint. Thus, while there may be "clear and unmistakable evidence" that the parties intended that the issue of whether the arbitration clause applies to disputes arising out of Mr. Bossé's prior employment relationship with New York Life is an arbitrability issue for an arbitrator, there is no such evidence that the issue of whether the clause applies to disputes arising out of Mr. Bossé's subsequent independent contractor relationship with New York Life is also an arbitrability issue for an arbitrator.

Thus, *the District Court* must decide whether the arbitration clause applies to this dispute. As demonstrated above, the clause does not apply.

New York Life ignores this point entirely.

First, it relies heavily on the fact Mr. Bossé did not contest the validity of the arbitration clause or its survival provision, and it dedicates an inordinate amount of time arguing this lack of attention "concedes" the arbitration clause was valid. *See* Brief of Appellants at 14-15, 17-18. This is irrelevant. The point is that, regardless of its validity, the Employment Agreement does not delegate ***this*** threshold issue of arbitrability to an arbitrator because the Agreement lacks "clear and unmistakable evidence" of that intent.

Second, New York Life focuses on the fact of the delegation language of the arbitration clause and its broadness, arguing such language demonstrates "clear and unmistakable evidence" of an intent to delegate the arbitrability determination to the arbitrator. *See* Brief of Appellants at 19-21. What New York Life overlooks, however – and what the District Court correctly decided – is the superseding point that ***that language still must apply to this dispute***. *See supra* pp. 24-30. As demonstrated above, it does not. *See id.*

Third, New York Life attempts another argument that it did not raise in the District Court: the arbitration clause's inclusion of the arbitral forum's rules constitutes "persuasive evidence" that the parties agreed to delegate the

arbitrability issue to the arbitrator. *See* Brief of Appellants at 21-22. This is inaccurate: the mere inclusion of the arbitral forum's rules does not, by itself, constitute "clear and unmistakable evidence" of an intent to delegate the arbitrability issue to an arbitrator. For example, in *NASDAQ*, the Second Circuit held a service agreement's incorporation of the AAA rules, which provide for arbitrability to be decided by an arbitrator, did not constitute a clear and unmistakable delegation of that decision to an arbitrator. 770 F.3d at 1032. Rather, the agreement was not so clear: it provided "for AAA rules to apply to such arbitrations as may arise under the [a]greement," and certain issues were carved out from arbitration. *Id.*

Even if the arbitral forum's rules are properly incorporated into the arbitration clause, the very authority New York Life cites confirms that "the question 'who has the primary power to decide arbitrability.'" nevertheless "turns upon what the parties agreed about *that* matter." *Oracle Am.*, 724 F.3d at 1072 (quoting *First Options*, 514 U.S. at 943) (emphasis in original). "[E]ven if such a reference does generally delegate this power to the arbitrator, and even if the parties in the present case properly incorporated the AAA Rules for Commercial Arbitration . . ., the arbitrator would still not have the authority to decide the arbitrability of the plaintiffs' claims ***that are clearly outside the scope of the arbitration clause***." *Turi*, 633 F.3d at 506-07.

For example, in *Turi*, the Sixth Circuit held that, despite the fact an arbitration clause incorporated the AAA rules, the clause was so narrow that questions of arbitrability did not need to be decided by the arbitrator. 633 F.3d at 511. As described above, the arbitration clause in *Turi* covered claims regarding fees in excess of $5,000. *Id.* at 506. The plaintiffs asserted claims, however, outside that delineation. *Id.* at 500. The Sixth Circuit held that the delegation of the arbitrability issue "applies only to claims that are at least *arguably* covered by the agreement." *Id.* at 511.

For that reason, New York Life's reliance on *Oracle America* is unavailing: the claims in that case were "related to arbitrable claims" – the arbitration clause covered claims related to a software programming license, and the claims directly related to that license. 724 F.3d at 1076. In this case, Mr. Bossé's claims are not.

Even if the inclusion of the arbitral forum's rules had some relevance, they still fail to provide "clear and unmistakable evidence" that the parties intended to delegate the arbitrability issue to the arbitrator. New York Life cites the applicable arbitral rules in its Brief: FINRA Rule 13413 and AAA Rules 6(a)-(b). Brief of Appellants at 21 n.5. They may confer jurisdiction on an arbitrator to decide its own competence, but they do not provide ***exclusive*** jurisdiction nor deprive courts of their authority; rather, they confer non-exclusive, concurrent jurisdiction with national courts to decide gateway issues. FINRA Rule 13413 states, "The panel

has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." That rule fails to indicate any directive that the arbitrator should decide an arbitrability issue. AAA Rule 6(a) states, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA 6(b) states, in relevant part, "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." Those rules, while clearer, are also unhelpful for two reasons. They concern the existence and validity of an agreement to arbitrate, not the issue of whether that agreement applies to a given claim. They are also contained in the AAA's employment rules of arbitration. As explained above, Mr. Bossé was – by New York Life's own admission – an independent contractor, and his claims arise out of that relationship, not his prior employment relationship that existed for only one year over a decade before the events giving rise to this case occurred.

There is no "clear and unmistakable evidence" in the Employment Agreement that the parties intended to delegate the arbitrability issue to an arbitrator. Accordingly, this Court should affirm the District Court's Order.

III. New York Life is Judicially Estopped from Invoking the Arbitration Clause

"[T]he doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *InterGen*, 344 F.3d at 144. "The doctrine is designed to ensure that parties proceed in a fair and aboveboard manner, without making improper use of the court system." *Id.* "Courts are prone to invoke it 'when a litigant is playing fast and loose with the courts.'" *Id.* (quoting *Patriot Cinema, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). It applies in "a situation in which a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." *InterGen*, 344 F.3d at 144.

Mr. Bossé filed a Charge of Discrimination with the New Hampshire Commission for Human Rights on February 12, 2016, alleging some of the same claims he is alleging here, including, among others, race discrimination and retaliation. (JA at 030.) As New York Life notes, the arbitration clause in the Employment Agreement applies to "any dispute, claim or controversy arising between them, ***including those alleging employment discrimination*** (including sexual harassment and age and ***race discrimination***) in violation of a statute . . . ." (JA at 074.) New York Life did ***not***, however, invoke the arbitration clause in the Employment Agreement and request the Commission to refer Mr. Bossé's claims

to arbitration; rather, it alleged Mr. Bossé was an *independent contractor*, not an employee, and it provided the Commission with Mr. Bossé's Agent's Contract and argued that Contract controlled that dispute and supported the notion that he was an independent contractor. (JA at 030.) New York Life argued that, because Mr. Bossé was not an employee, the Commission lacked jurisdiction over the dispute. *See id.* The Commission agreed with New York Life and dismissed the Charge.

New York Life has now taken the opposite position. Mr. Bossé raised the same claims, this time in a proper forum (in court, not an administrative agency that lacked jurisdiction). New York Life now contends, however, that Mr. Bossé was an ***employee***, and that a ***different contract*** (the Employment Agreement) controls this dispute and supports referring his claims to arbitration. New York Life should be estopped from assuming this position now, after having secured a favorable ruling by assuming a contradictory position in a prior legal proceeding.

IV. New York Life Waived its Right to Arbitrate

If the Court is disagrees that the doctrine of judicial estoppel applies, it should, nevertheless, hold that New York Life waived its right to arbitrate. "[A]n arbitration provision has to be invoked in a timely manner or the option is lost." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003). "Such a forfeiture is an issue for the judge." *Id.*; *see also Marie*, 402 F.3d at 14-15 (holding whether a party waived the right to arbitrate was not an issue to be decided by an arbitrator).

"[T]he components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side." *Rankin*, 336 F.3d at 12.

Before the Commission, New York Life could have invoked the arbitration clause in the Employment Agreement and requested Mr. Bossé's claims be referred to arbitration. It failed to do so. Rather, it waited to invoke it until *after* Mr. Bossé undertook the extensive effort and cost to have his Complaint prepared and filed in the District Court (rather than the Charge of Discrimination he filed with the Commission). Further, Mr. Bossé has incurred significant costs in pursuing this case. New York Life exhibited undue delay in invoking the arbitration clause, and Mr. Bossé has suffered prejudice. Thus, New York Life waived its right to invoke the arbitration clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order denying New York Life's Motion to Compel Arbitration.

Respectfully submitted,

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By His Attorneys,

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Dated: March 2, 2020

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Robert M. Fojo, Esq.

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I certify that, on March 2, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of Court of the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system, which will send notice of the filing to all counsel of record.

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