JEFFREY D. WOHL (Cal. State Bar No. 120791)
KERRI N. HARPER (Cal. State Bar No. 217377)
PAUL, HASTINGS, JANOFSKY & WALKER LLP
55 Second Street, 24th Floor
San Francisco, California 94105-3441
Telephone: (415) 856-7000
Facsimile: (415) 856-7100

Attorneys for Defendant
International Business Machines Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM SYVERSON, RUTH ALICE BOYD, DALE CAHILL, JACK FRIEDMAN, PAUL GRAMKOWSKI, SYLVIA JONES, ROLF MARSH, WALTER MASLAK, JAMES PAYNE, and ANTONIO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Counterclaimant,

vs.

WILLIAM SYVERSON, RUTH ALICE BOYD, DALE CAHILL, JACK FRIEDMAN, PAUL GRAMKOWSKI, SYLVIA JONES, ROLF MARSH, WALTER MASLAK, JAMES PAYNE, and ANTONIO RIVERA,

Counter-Defendants.

No. C-03-04529-RMW

OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS IBM'S COUNTERCLAIM

Date: April 30, 2004
Time: 9:00 a.m.
Courtroom: 6, 4th Floor
Judge: Hon. Ronald M. Whyte

Accompanying papers:

Declaration of Marianne DeFarzio in Opposition to Plaintiffs' Motion to Dismiss IBM's Counterclaim

[Proposed] Order Denying Plaintiffs' Motion to Dismiss IBM's Counterclaim

I. INTRODUCTION/SUMMARY OF ARGUMENT

When plaintiffs were terminated from employment with defendant International Business Machines Corporation ("IBM") between January 2001 and June 2002, each accepted IBM's offer of severance pay and benefits in exchange for a "General Release and Covenant Not To Sue" (the "Release"). The Release, in no uncertain terms, waived all claims against IBM, including all claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The Release, however, did not extend to plaintiffs' non-forfeitable rights to accrued benefits within the meaning of sections 203 and 204 of ERISA, which pertain to pension plans such as the IBM Personal Pension Plan and the IBM Retirement Plan. As part of their Release, plaintiffs also agreed that they would not sue IBM on their released ERISA claims and that, if they did, they would be liable for all of IBM's costs and expenses in defending against the suit, including reasonable attorneys' fees.

In this action, plaintiffs have done just what they contracted with IBM not to do: they have sued IBM on the very ERISA cause of action they waived under the Release, *i.e.*, a cause of action alleging that they were terminated in violation of ERISA to avoid paying them benefits that would have accrued in the future had they remained IBM employees. Accordingly, IBM has brought a counterclaim against plaintiffs for breach of their covenant not to sue and, pursuant to their covenant, seeks costs and reasonable attorneys' fees in defending against plaintiffs' released but still asserted ERISA cause of action. IBM does not counterclaim based on plaintiffs' pursuit of claims under the Age Discrimination in Employment Act ("ADEA"), even though those claims are also barred by the Release, because the Release's covenant not to sue does not extend to those ADEA claims.[1]

In their motion to dismiss IBM's counterclaim, plaintiffs raise numerous arguments why IBM has failed to state a valid counterclaim against them. None of their contentions withstands analysis.

- Plaintiffs first argue that their ERISA cause of action is not barred by the Release. But nowhere in their ERISA cause of action do plaintiffs allege that IBM denied plaintiffs' non-forfeitable rights to accrued benefits under the IBM Personal Pension Plan and the IBM Retirement Plan.

[1] IBM has separately moved to dismiss those ADEA claims, along with the rest of plaintiffs' First Amended Complaint, based on the Release, and that motion will be heard at the same time as plaintiffs' motion to dismiss IBM's counterclaim.

Moreover, it is undisputed that the termination of plaintiffs' employment with IBM did not impair any such rights. What plaintiffs do allege is that IBM terminated them in violation of ERISA to keep them from receiving benefits accruing in the *future* by virtue of continued employment, including pension and health benefits. But plaintiffs waived that cause of action, along with all of their other termination-based claims, when they accepted the Release, and are breaching their covenant not to sue by asserting the claim in this action.

- Plaintiffs argue that their ERISA cause of action is a necessary component of their ADEA claims because under those claims they are seeking lost benefits as damages. Plaintiffs miss the fundamental difference between the recovery of lost benefits as an aspect of damages for wrongful termination (such as a termination in violation of the ADEA), and a cause of action under ERISA itself. The issue here is not whether, if plaintiffs were successful in avoiding the Release and recovering under the ADEA, they could recover lost benefits as part of their damages. The issue here is whether plaintiffs can maintain a separate cause of action under ERISA by alleging that they were terminated in violation of that statute to deny them those benefits. But plaintiffs waived that cause of action under the Release.

- Plaintiffs also contend that the Release is a contract of adhesion that must be read in a way that denies the plain language of the Release's covenant. The clear terms of a contract are not to be disregarded simply because the contract is adhesory. And there is nothing ambiguous about the covenant not to sue; plaintiffs were not supposed to sue IBM on the ERISA cause of action they have now asserted and, having done so, they are liable to IBM for its costs and reasonable attorneys' fees incurred in defending against that cause of action.

- Finally, plaintiffs argue that the Release is invalid under the Older Workers Benefit Protection Act ("OWBPA") and that they may therefore pursue their ERISA cause of action as well as their ADEA claims. In fact, the Release fully complies with the OWBPA, as IBM initially established in its own motion to dismiss plaintiffs' First Amended Complaint, as another district court reviewing the same Release has already held, and as IBM will further demonstrate when it submits its reply in support of the motion next week. For purposes of plaintiffs' motion to dismiss IBM's counterclaim, however, it is enough to note that the OWBPA, which is an amendment to the ADEA, governs only waivers of claims under the ADEA, not claims under ERISA. Accordingly, plaintiffs' arguments about whether the

Release complies with the OWBPA are simply irrelevant with respect to IBM's counterclaim, which pertains to plaintiff's breach of the Release *only* with respect to their ERISA claims.

Accordingly, IBM's counterclaim more than adequately states a claim for relief, and plaintiffs' motion to dismiss is without merit. It should be denied.[2]

II. BECAUSE PLAINTIFFS CLAIM THAT IBM TERMINATED PLAINTIFFS IN VIOLATION OF ERISA TO AVOID PAYING BENEFITS ACCRUING IN THE FUTURE, THEY HAVE BREACHED THEIR COVENANT NOT TO SUE

When IBM terminated plaintiffs' employment between January 2001 and June 2002, it offered each plaintiff severance pay and benefits contingent upon his or her acceptance of the Release. The Release provided specifically that in exchange for the severance pay and benefits, plaintiffs waived all claims against IBM, but also made clear that certain ERISA rights were unimpaired:

> In exchange for the sums and benefits received...[insert name] (herein "you") agrees to release and hereby does release International Business Machines Corporation…from all claims, demands, actions or liabilities you have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments...
>
> *This Release does not prevent you from enforcing your non-forfeitable rights to your accrued benefits (within the meaning of Sections 203 and 204 of the Employee Retirement Income Security Act of 1974, as amended…under the terms of the IBM Personal Pension Plan or the IBM Retirement Plan…which are not released hereby but survive unaffected...*

Release, at 1 (emphasis supplied); *see also* plaintiffs' Motion to Dismiss at 4. The Release further provides that plaintiffs may not sue IBM on an ERISA claim waived by the Release, and if they do so, they will be liable to IBM for reasonable costs and attorneys' fees in defending against the claim.[3]

---

[2] Once their motion to dismiss is denied and plaintiffs answer the counterclaim, IBM will move for summary judgment.

[3] You agree that you will never institute a claim of any kind against IBM, or those associated with IBM including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the retirement bridge. If you violate this covenant not to sue by suing IBM or those associated with IBM, you agree that you will pay all costs and expenses of defending against the suit incurred by IBM or those associated with IBM, including reasonable attorneys' fees, and all further costs and fees, including attorneys' fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the Age Discrimination in Employment Act of 1967, as amended. That means that if you were to sue IBM or those associated with IBM only under the Age Discrimination in Employment Act of 1967, as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and

As their first argument in support of their motion to dismiss IBM's counterclaim, plaintiffs contend that their ERISA cause of action is not barred by the Release, and therefore in asserting it they have not breached their covenant not to sue. Plaintiffs are incorrect.

The plain language of the Release makes clear that the employee did not waive a claim for benefits only if all of the following conditions were met:

- the claim was for a non-forfeitable benefit;
- the claim was for an accrued benefit, within the meaning of ERISA sections 203 and 204;
- the claim was for a benefit earned as of the plaintiff's termination date; and
- the claim was for a benefit under the IBM Personal Pension Plan or the IBM Retirement Plan.

In their ERISA cause of action (Fifth Count of their First Amended Complaint), plaintiffs make no allegation that the termination of their employment with IBM impaired any non-forfeitable right to benefits accrued within the meaning of ERISA sections 203 and 204 as of their termination date under the IBM Personal Pension Plan or the IBM Retirement Plan. Instead, plaintiffs allege that the termination of their employment violated ERISA as follows:

> 50. IBM terminated plaintiffs in violation of ERISA in order to avoid general vesting of plaintiffs and vesting of "cliff" benefits under various ERISA-protected pension and welfare benefit plans.
>
> 51. IBM terminated plaintiffs in violation of ERISA in order to avoid its increasing pension and benefit cost obligations to employees with greater years of service.
>
> 52. IBM terminated plaintiffs in violation of ERISA in order to avoid increasing cost of health care benefits to employees with greater years of service.
>
> 53. IBM terminated plaintiffs in violation of ERISA in order to avoid vesting of retiree/dependent health benefits.
>
> 54. IBM terminated plaintiffs in violation of ERISA in order to recover retiree/dependent health care benefits of employees in Future Health Accounts.

First Amended Complaint, ¶¶ 50-54. All of these allegations are barred by the Release.

First, the allegations relating to "welfare benefit plans" (¶ 50) and "health care benefits" (¶¶ 52-

---

> expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

Release, at 2.

54) do not relate to the IBM Personal Pension Plan or the IBM Retirement Plan. The IBM Personal Pension Plan and the IBM Retirement Plan are not "welfare benefit plans" and do not provide "health care benefits"; they are pension plans and provide pension benefits. Declaration of Marianne DeFazio ("DeFazio Decl."), ¶ 7.[4] Under ERISA, pension plans provide retirement income or post-employment deferred compensation. *See* ERISA § 3(2), 29 U.S.C. § 1002(2). Welfare benefit plans, by contrast, provide such things as medical benefits. *See* ERISA § 3(1) , 29 U.S.C. § 1002(1).

Contrary to plaintiffs' speculation,[5] the IBM Future Health Account ("FHA") plan (referenced in paragraph 54 of the First Amended Complaint) is a welfare benefit plan, not a pension plan, because it provides subsidized medical benefits to eligible employees after retirement, not pension benefits. *See* DeFazio Decl., Exh. B at 4 ("The IBM Future Health Account provides you with funds to help pay the premiums for IBM medical, dental and vision benefits after you leave the company…"). Moreover, IBM reports the FHA as a welfare benefit as part of its annual Form 5500 to the United Stated Department of Labor for the IBM Benefits Plan for Retired Employees. DeFazio Decl., ¶ 3.

Welfare benefit plans are wholly exempt from ERISA sections 203 and 204, 29 U.S.C. §§ 1053-1054, pursuant to ERISA section 201(1), 29 U.S.C. § 1051(1) (which exempts welfare benefit plans from part 2 of title I of ERISA, pertaining to pension plans). Hence, a benefit under a welfare benefit plan cannot be an "accrued benefit" within the meaning of sections 203 and 204. The term "accrued benefit," as used in sections 203 and 204 of ERISA, principally is defined in ERISA section 3(23), 29 U.S.C. § 1002(23)). This section of ERISA defines "accrued benefit" with respect to a defined benefit pension plan as "the individual's accrued benefit determined under the plan...expressed in the form of an

---

[4] Because plaintiffs rely on the Syverson declaration in support of their motion to dismiss, the motion should be deemed a summary judgment motion, Fed. R. Civ. 12(b), which means that IBM may also rely on evidence outside of the pleadings in this opposition. *See Grove* v. *Meed School District*, 753 F.2d 1528, 1532-33 (9th Cir. 1985); *Erlich* v. *Glasner*, 374 F.2d 681, 683 (9th Cir. 1967) (holding that when court does not exclude affidavit provided in support of motion to dismiss, court must treat motion as one for summary judgment, and give non-moving party reasonable opportunity to present all material facts in response). That also means that if in the unlikely event the Court is in doubt about any of facts presented here, the Court should find a triable issue and deny plaintiffs' motion on that basis.

[5] Plaintiffs admit they are just guessing about the actual nature of the FHA. *See* Motion to Dismiss at 3 (plaintiffs admit that they "do not have a copy of the FHA to make a final determination as to whether the FHA is a welfare benefit plan, a defined contribution plan, neither, and/or whether, the FHA is governed by the ERISA").

annual benefit commencing at normal retirement age." ERISA § 3(23), 29 U.S.C. § 1002(23). With respect to an individual account pension plan, it defines "accrued benefit" as the participant's account balance. 29 U.S.C. § 1002(23)(b). The term "accrued benefit," therefore, has no meaning except in relation to "pension plans."

Second, none of plaintiffs' ERISA-related allegations in their First Amended Complaint (¶¶ 50-54, quoted above) relates to "non-forfeitable rights to accrued benefits" as of the time of their termination. The first four of these paragraphs pertain to *future* benefits, not currently accrued benefits: *See* ¶ 50 ("general *vesting* of plaintiffs and *vesting* of 'cliff' benefits"); ¶ 51 ("*increasing* pension and benefit cost obligations"); ¶ 52 ("*increasing* cost of health care benefits"); ¶ 53 ("*vesting* of retiree/dependent health benefits"). Indeed, in his declaration accompanying the motion (¶ 5), plaintiff Syverson asserts that "[a]s a result of my termination by IBM...I will lose literally $777,000 in pension benefits *had I worked to age 60 and lived until age 80*" (emphasis added).

As for the FHA benefits referenced in paragraph 54, an employee has no entitlement to FHA benefits unless he or she retired from IBM at age 55 or older with 15 or more years of service, or retired with 30 or more years of service regardless of age. DeFazio Decl., ¶ 5. Absent this eligibility, access to FHA benefits automatically terminates when an employee's employment ends for any reason. *See* DeFazio Decl., ¶ 5. At the time they were terminated by IBM, none of the plaintiffs was eligible for FHA benefits. *Id*., ¶ 8.

Plaintiffs' ERISA cause of action is barred by the Release, and subject to the covenant not to sue. Accordingly, IBM's counterclaim for breach of the covenant states a valid claim against plaintiffs.

III. PLAINTIFFS' ERISA CAUSE OF ACTION IS DISTINCT AND SEPARATE FROM PLAINTIFFS' CLAIM FOR DAMAGES UNDER THE ADEA

Plaintiffs' next argument is that their ERISA cause of action is necessarily intertwined with their ADEA claims and that, to the extent that they are entitled to sue under the ADEA notwithstanding the Release, they are also permitted to sue under ERISA. Plaintiffs thus miss the fundamental difference between lost benefits as an aspect of damages, and a cause of action under ERISA itself for lost benefits. IBM does not dispute that if plaintiffs were successful in avoiding the Release and recovering under the ADEA, they could recover lost benefits as part of their damages. *See, e.g., Cancellier* v. *Federated*

Dept. Stores, 672 F.2d 1312 (9th Cir. 1982) (even in absence of ERISA cause of action, plaintiff who was terminated in violation of ADEA can recover lost benefits as well as lost wages). But the availability of lost benefits as part of recoverable damages does not turn an ADEA claim into an ERISA cause of action. *Ethridge* v. *Harbor House Restaurant*, 861 F.2d 1389, 1405 (9th Cir. 1988) (holding that claim does not relate to ERISA "when the loss of pension benefits was a mere consequence of, but not a motivating factor behind the termination of benefits"); *Karambelas* v. *Hughes Aircraft Co.,* 992 F.2d 971, 974 (9th Cir. 1993) (mention of lost benefits as consequence of termination does not give rise to ERISA preemption where employer was motivated by other concerns).

Here, plaintiffs' Fifth Count is not merely an enumeration of the ADEA damages they seek in their other claims; it is brought as a stand-alone cause of action alleging that plaintiffs were terminated in violation of ERISA to avoid paying them benefits. *See Tingey* v. *Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992) (wrongful termination claim preempted by ERISA because plaintiff's theory was that his employer terminated him to deny him medical insurance benefits); *Felton* v. *Unisource Corp*, 940 F.2d 503, 507 (9th Cir. 1991) (same). And because plaintiffs waived their ERISA cause of action under the Release and covenanted not to assert it in a subsequent lawsuit, their pursuit of it in this action breaches their contract and entitles IBM to relief.

IV. THERE IS NO AMBIGUITY ABOUT THE RELEASE THAT MAKES THE COVENANT NOT TO SUE UNENFORCEABLE AGAINST PLAINTIFFS

Plaintiffs' next argument is that the Release is a contract of adhesion and for that reason the Release should be construed against IBM such that their ERISA claim is not barred. Plaintiffs' logic stops short of meaningful analysis. A contract of adhesion is nothing more than "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only opportunity to adhere to the contract or reject it." *Allan* v. *Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1375 (1996) (internal quotations and citations omitted). To describe a contract as "adhesive," however, says nothing of its "legal effect." *Id*. "[*A]n adhesive contract is binding* unless it is also substantively unconscionable," *Grafton Partners LP* v. *Superior Court*, 115 Cal. App. 4th 700, 710 n.10 (2004) (emphasis added), or the provisions of the contract "do not fall within the reasonable expectations of the weaker 'adhering' party." *Graham* v. *Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 (1990).

Plaintiffs do not—and cannot—assert that the Release is substantively unconscionable. Rather, they contend that any ambiguities in the contract should be construed against IBM. However, there are no ambiguities in the covenant not to sue.[6] Under it, plaintiffs agreed that they would "never institute a claim of any kind against IBM...including, but not limited to, claims related to your employment with IBM or the termination of that employment... If you violate this covenant not to sue by suing IBM...you agree that you will pay all costs and expenses of defending against the suit incurred by IBM...including reasonable attorneys' fees." Combined with the broad scope of their release of claims, the covenant made it plain and simple that plaintiffs were not supposed to sue IBM under ERISA based on the termination of their employment and the resulting loss of benefits. That, of course, is exactly what plaintiffs did, and IBM is now entitled to compensation for the expense caused to it by plaintiffs' breach of the Release.

V. THE OWBPA STANDARDS FOR A WAIVER OF AN ADEA CLAIM DO NOT APPLY TO ERISA CLAIMS.

Plaintiffs' final argument is that that the OWBPA's minimum requirements for a waiver of ADEA claims also apply to ERISA claims and that, based on their contention that the Release does not comply with the OWBPA, they are also entitled to avoid the Release with respect to their ERISA cause of action as well as their ADEA claims. In its motion to dismiss plaintiffs' First Amended Complaint, IBM established that in fact the Release does comply with the OWBPA in every respect, and in its reply to plaintiffs' opposition to that motion, IBM will show that the language in the Release's covenant not to sue that plaintiffs attack is, in fact, clear and unambiguous and in conformance with applicable EEOC regulations.[7]

---

[6] *See also Thomforde* v. *International Business Machines Corporation*, discussed in note 7 *supra*, in which the court found no ambiguity in the same Release at issue here.

[7] IBM notes that the same argument made by plaintiffs here—that an ambiguity in violation of the OWBPA is created because (a) the Release releases ADEA claims while (b) the covenant not to sue does not apply to ADEA claims—was raised by the plaintiff in *Thomforde* v. *International Business Machines Corporation*, 2004 WL 314304 (D. Minn., Jan. 27, 2004), and summarily rejected by the court there. In *Thomforde*, the court, reviewing the same IBM Release at issue here, held: "The release is not qualified by the covenant not to sue's inapplicability to an action based solely on the ADEA. The Agreement satisfies section 626(f)(1)(A) [of OWBPA]." 2004 WL 314304 *2. The court further held: "The release is not qualified by the covenant not to sue's inapplicability to an action based solely under

For purposes of this motion to dismiss IBM's counterclaim, it is sufficient to note that plaintiffs are simply wrong as a matter of law in asserting that the OWBPA controls the validity of the release with respect to an ERISA claim. The OWBPA was, of course, an amendment to the ADEA, not ERISA, and nothing in the OWBPA suggests that it also was intended to apply to ERISA claims (or, for that matter, any claims other than ADEA claims). For this reason, the court in *Chaplin* v. *Nationscredit Corp*, 307 F.3d 368, 375-76 (5th Cir. 2002), had no difficulty concluding that a release that does not comply with the OWBPA still can waive an ERISA claim. The *Chaplin* court reasoned that the phase "this chapter" in the text of the OWBPA, which provides, "[a]n individual may not waive any right or claim *under this chapter* unless the waiver is knowing and voluntary," 29 U.S.C. § 626(f)(1) (emphasis added), refers exclusively to the ADEA. *See Chaplin*, 307 F.3d at 376 ("[o]ne need only cursorily examine the text of the OWBPA to see that it applies only to ADEA claims"). *See also Skrbina* v. *Fleming Companies, Inc*, 45 Cal. App. 4th 1353, 1367-68 (1996) ("By its plain terms, 29 United States Code section 626(f)(1) applies only to rights or claims under the ADEA. It does not apply to claims based on state law…"). The *Chaplin* court also explained that the U.S. Supreme Court in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998), "recognized this obvious point and the very limited scope of the OWBPA." *Id.* at 376. Indeed, the *Chaplin* court concluded that the Supreme Court's decision in *Oubre* actually precludes the argument that the OWBPA applies to release of an ERISA claim. *Id* at 375-376. The *Chaplin* court further noted the Supreme Court's recognition in *Oubre* of "a congressional intent for the OWBPA to displace the common law and create 'its own regime for assessing the effect of ADEA waivers separate and apart from contract law.'" *Id.* at 376. Thus, even if the intent of the OWBPA extends beyond the ADEA, it only reaches those federal statutes with an equally comprehensive regulation of releases. *See id*. As ERISA does not regulate releases, neither the OWBPA nor *Oubre* applies to the release of ERISA claims. *See id* at 376; *see also Aikins*, 1999 WL 179686 at *5 ("[w]here Congress has wanted to insure particular protections for employees in

---

the ADEA. Thomforde clearly and unambiguously released his ADEA claims against IBM. The Court therefore concludes that IBM is entitled to summary judgment." *Id.*, *3. In its reply in support of its motion to dismiss plaintiffs' First Amended Complaint, IBM will elaborate on the reasons why the *Thomforde* court reached the right result, but even standing alone the *Thomforde* decision shows how vacuous is plaintiffs' attack on the Release.

procedures for obtaining releases, it has done so with specific language, for instance, in the OWBPA.").

Plaintiffs' sole attempt to distinguish the holding of *Chaplin* is unavailing. Plaintiffs note that the plaintiff in *Chaplin* did not raise an ADEA claim in that case. That makes no difference. The OWBPA either applies to ERISA, or it does not; the joinder of an ADEA claim with an ERISA claim does not change the analysis. It was the plain language of the OWBPA, the Supreme Court's ruling in *Oubre*, and the reasoning behind *Oubre* that led the *Chaplin* court to conclude that the OWBPA does not apply to a release of ERISA claims.

Finally, even before *Chaplin*, at least two Judges of this Court ruled that OWBPA applies exclusively to ADEA claims, and has no force or effect with respect to non-ADEA claims. *See Aikins* v. *Tosco Refining Co.*, 1999 WL 179686 (N.D. Cal., 1999) (Breyer, J.) (applying general contract principles, not OWBPA principles, to non-ADEA claims such as Title VII); *Kinghorn* v. *Citibank*, 1999 WL 30534 (N.D. Cal., 1999) (Smith, J.) (holding that "the OWBPA's minimum criteria for knowing and voluntary waivers applies only to rights or claims under the ADEA," and not to state law discrimination claims, *quoting Skrbina*, 45 Cal. App. 4th at 1367-68 (1996)). Plaintiffs offer no reason that the Court in this action should depart from *Chaplin* and these prior rulings by other Judge of this Court.

Plaintiffs' OWBPA arguments have no bearing on their breach of their covenant not to sue by proceeding with their ERISA cause of action.

VI. CONCLUSION

When they accepted the Release and took the severance pay and benefits provided under it, plaintiffs promised they would not sue IBM on the very same ERISA cause of action they now assert. Plaintiffs breached their covenant not to sue, and are liable to IBM for costs and attorneys' fees incurred in defending against the ERISA cause of action. Plaintiffs' motion to dismiss the counterclaim should therefore be denied.

Dated: April 9, 2004.

JEFFREY D. WOHL
KERRI N. HARPER
PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/ Jeffrey D. Wohl
Jeffrey D. Wohl
Attorneys for Defendant and Counterclaimant
International Business Machines Corporation