Jeffrey Neil Young (Maine SBN 3874)
Patrick McTeague (Maine SBN 621)
McTEAGUE, HIGBEE, CASE, COHEN
WHITNEY & TOKER, PA
PO Box 5000
Topsham, ME 04086
Telephone: 207.725.5581
Facsimile: 207.725.1090
e-mail: jyoung@me-law.com

Robert E. Jesinger, SBN 59550
Wylie, McBride, Jesinger, Platten & Renner
2125 Canoas Garden Avenue Suite 120
San Jose, CA 95125
Telephone: 408.979.2920
Facsimile: 408.979.2934
e-mail: rjesinger@wmjpr.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

AND RELATED COUNTERCLAIM

Case No. C 03 04529 RMW

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

Date and Time: 04/30/2004 – 9:00 a.m.
Courtroom: 6, 4th Floor
Judge: Hon. Ronald M. Whyte

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

I. INTRODUCTION

On or about October 7, 2003, ten former employees filed a representative class action on behalf of themselves and other similarly situated employees, including 126 referenced by name in Exhibit A to the Complaint, against Defendant International Business Machines Corporation ("IBM"). The Complaint alleged violations of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f)(1) ("the OWBPA"), the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA"), and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* arising out of an ongoing reduction in force by IBM since January 2001. Plaintiffs subsequently filed a First Amended Complaint on or about December 19, 2003.

On February 12, 2004 IBM filed a Motion to Dismiss Plaintiffs' First Amended Complaint Without Leave to Amend ("Motion to Dismiss") premised upon the fact that Plaintiffs had executed IBM's waiver (Exhibit 1 hereto and Exhibit L to the First Amended Complaint) entitled "General Release and Covenant Not to Sue" ("IBM's Waiver") at the time of their separation from IBM. It is undisputed that the language of IBM's Waiver has not varied materially throughout IBM's ongoing reductions in force. In all instances, IBM's Waiver states that the employee agrees "that this Release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended … and any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on … age … ." Elsewhere, however, IBM's Waiver states, "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 expenses of defending against a suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission." In addition, although IBM's Waiver contains both a release and covenant not to sue, IBM's Waiver merges both into one term, labeling the release and covenant not to sue as "Release."

II. SUMMARY OF ARGUMENT

IBM baldly and without analysis asserts that IBM's Waiver signed by Plaintiffs "fully

complies" with the OWBPA's strict requirements governing waiver of ADEA claims. IBM's Memorandum in Support of Motion ("Memorandum"), p. 1. Among other infirmities, IBM's Waiver includes and commingles in the same document the two separate waivers quoted above, one denominated a "release" and the other termed a "covenant not to sue," which directly contradict one another with respect to the key issue of waiver of ADEA rights. The confusing, misleading, and contradictory language contained in IBM's Waiver on its face violates the prime requirement of the OWBPA that ADEA waiver language must be "written in a manner calculated to be understood by such individual, or by the average individual entitled to participate." 29 U.S.C. § 626(f)(1)(A).

As "the party asserting the validity of a waiver," IBM has "the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)." 29 U.S.C. § 626 (f)(3). Just as IBM's Memorandum fails to mention, let alone discuss, the contradictory language quoted above, the Memorandum also omits mention that IBM has the burden of proof to show compliance with each and every requirement under the OWBPA. *Kinghorn v. Citibank, N.A.*, 1999 WL 30534, at *4 (N.D. Cal. 1/20/99). The very language of IBM's Waiver defeats Defendant's attempt to carry its burden. Because the waiver does "not comply with OWBPA's stringent safeguards, it is unenforceable against [Plaintiffs] insofar as it purports to waive or release [their] ADEA claim." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427-28 (1998). The Court should deny IBM's Motion to Dismiss and allow Plaintiffs to proceed with their claims.

III. STANDARD OF REVIEW

This Court has stated that Rule 12(b)(6) motions to dismiss are disfavored and rarely to be granted. In *Torres v. AT&T Broadband, LLC*, 158 F.Supp.2d 1035, 1037 (N.D.Cal. 2001), the Court declared:

> A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The complaint must be construed in the light most favorable to the plaintiff. *See Parks Sch. Of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See id.* However, although courts generally assume the facts alleged are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations."
>
> *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Accord: *Butler v. Sears Roebuck & Company*, 1992 WL 364779, at *2 (N.D.Cal.), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. ARGUMENT

A. The Legislative History Of The Older Workers' Benefit Protection Act And *Oubre* Require Stringent Compliance To Waive ADEA Claims.

Responding to evidence of abuse in the procurement of waivers of ADEA claims, Congress in 1990 amended the ADEA by enacting the OWBPA. The OWBPA sets out with considerable specificity the minimum requirements which must be satisfied before an employee can be held to have waived an ADEA claim, providing in pertinent part, 29 U.S.C. § 626(f)(1)(A) (emphasis added):

> (f)(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum:
>
> > (A) the waiver is part of an agreement between the individual and the employer that is **written in a manner calculated to be understood by such individual, or by the average individual eligible to participate**;

In addition, the OWBPA provides in 29 U.S.C. §§ 626(f)(3) and (4) that the burden of proof rests with the party asserting validity of the waiver, and that no waiver can affect the Equal Employment Opportunity Commission's ("EEOC") rights to enforce the ADEA (emphasis added):

> (3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraphs (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2) have been met, **the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary** pursuant to paragraph (1) or (2).
>
> (4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

The legislative history underlying the OWBPA establishes that Congress intended the judiciary to scrutinize ADEA waiver agreements carefully to ensure that the specific requirements of OWBPA are satisfied:

> The Committee expects that courts reviewing the "knowing and voluntary" issue will scrutinize carefully the complete circumstances in which the waiver was executed . . . The bill establishes specified minimum requirements that must be

> satisfied before a court may proceed to determine factually whether the execution of a waiver was 'knowing and voluntary.'"

See S. Rep. No. 101-263, at 32 (1990), *reprinted in* 1990 U.S. C.C.A.N., 1509, 1527.

EEOC regulations implementing the OWBPA provide how waiver agreements should be worded (emphasis added):

> (b) Wording of waiver agreement.
>
> (3) Waiver agreements must be drafted in **plain language** geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. **Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.**
>
> (4) **The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals.** Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations."

29 C.F.R. § 1625.22(b)(3&4) (1998). The OWBPA and the implementing regulations thus establish that no waiver of an ADEA claim is knowing and voluntary, and thus valid, unless: 1) the waiver agreement is written in a manner calculated to be understood by the average individual; 2) the document is drafted in plain language and avoids technical jargon; and 3) the agreement does not have the effect of misleading, misinforming, or failing to inform affected individuals.

The Supreme Court interpreted the ADEA waiver requirements imposed by the OWBPA in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), a case involving, as does the instant case, waiver language that was invalid on its face because it did not comply with the OWBPA safeguards. Ruling that "[t]he OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications," Justice Kennedy, writing for the Court, held that the OWBPA requirements are to be applied strictly:

> The statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. The policy of OWBPA is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision

> and without qualification: An employee 'may not waive' an ADEA claim unless the employer complies with the statute. *Id.* at 426-27.

Because the waiver signed by Oubre on its face "did not comply with the OWBPA's stringent safeguards," the Court ruled, "it is unenforceable against her insofar as it purports to waive or release her ADEA claim." *Id.* at 427-28. Because the non-complying release "cannot bar her ADEA suit," the Supreme Court remanded the case so that the plaintiff could pursue her ADEA claim. *Id.* at 428.

Oubre thus establishes that the "stringent safeguards" of the OWBPA are to be taken seriously and must be fully complied with before waivers of ADEA claims can be deemed valid. The Supreme Court's command that the OWBPA be applied rigorously was followed by this Court in its decision in *Kinghorn*, 1999 WL 30534. In *Kinghorn*, plaintiff challenged the validity of an ADEA waiver on several grounds. Although this Court rejected many of plaintiff's arguments, it found the ADEA waiver invalid because it did not comply with one of the seven OWBPA factors regarding waivers of future rights. The Court declared, "Because satisfaction of all seven OWBPA factors is the minimum required showing for a valid ADEA waiver, plaintiff's ADEA waiver is unenforceable." *Id.* at *4. *Accord*: *Butcher v. Gerber Products*, 8 F. Supp.2d 307, 3144 (the OWBPA requires "absolute technical compliance" and "the absence of even one of the OWBPA's requirements invalidates a waiver"), citing *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373 (11th Cir. 1995). As shown below, because IBM's Waiver does not comply with the express requirements of the OWBPA, it is unenforceable against Plaintiffs and cannot bar their ADEA claims.

B. IBM Bears The Burden Of Proving That IBM's Waiver Complies With The Requirements Of The OWBPA.

Under the OWBPA, IBM, not the Plaintiffs, has the burden of proving that its Waiver complies fully with the stringent statutory safeguards: "A party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)." 29 U.S.C. § 626(f)(4). Other than the bald assertion that its waiver "fully complies" with statutory requirements, and a cursory discussion of the requirements, IBM makes no attempt to carry its burden. Indeed, IBM's Motion to Dismiss does not

even quote, let alone discuss, the confusing and contradictory language contained in its two waivers in a single document. As discussed below, because the language of IBM's Waiver on its face violates the OWBPA's requirement of clarity, accordingly, as was the case in *Oubre* and *Kinghorn*, IBM cannot carry its burden of proof.

C. Because IBM's Waiver Does Not Comply With The Minimum Requirements Of The OWBPA, It Does Not Bar Plaintiffs' Rights To Pursue Their ADEA Claims.

IBM's Waiver is a multi-page document captioned "General Release and Covenant Not to Sue," which, in its first sentence, defines both as a "Release," stating "If you feel you are being coerced to sign this General Release and Covenant Not to Sue (hereinafter "Release" …).[1] The second paragraph on page 1 of the release contained in IBM's Waiver states:

> In exchange for the sums and benefits received pursuant to the terms of the _____ [Resource Action or Separation Allowance Plan], _____ [name of employee] agrees to release and hereby does release International Business Machines Corporation, its subsidiaries and affiliates, and its and their benefits plans (collectively, hereinafter "IBM"), from all claims, demands, actions or liabilities you may 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 or your eligibility for participation in a Retirement Bridge, . . . or claims for attorneys' fees.

The fourth paragraph on page 1 states in pertinent part that the "release" "covers" the ADEA:

> . . . You also agree that this Release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended . . .

The second page of IBM's Waiver contains the covenant not to sue and states:

> 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 attorney's 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*

[1] To assist the Court, in this Memorandum Plaintiffs use lower case letters to differentiate the "release," which apparently does not include the covenant not to sue, from the "Release," which does include the covenant not to sue. Where IBM has capitalized the word "Release" in the General Release and Covenant Not to Sue, Plaintiffs have left the capitalization unchanged.

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

IBM's Waiver language is inherently contradictory, confusing, and misleading, and cannot pass muster under the strict requirements of the OWPBA.

1. IBM's Waiver Is Not Written in Language Calculated to be Understood by the Average Individual.

The fundamental flaw in IBM's language quoted above is that it includes and commingles in the same document, without differentiation, two waivers, one a "release" and the other a "covenant not to sue," and then compounds the confusion by defining "Release" to include both the "release" and the "covenant not to sue." This results in contradictory, confusing language which on its face cannot be understood by and confuses the average individual entitled to participate in the resource action or separation allowance plan. Comparison of the language on page 1 of IBM's Waiver with the language on page 2 demonstrates the inherent confusion.

Page 1 of IBM's Waiver states that the employee agrees to release IBM from all claims, and that this "Release" "covers" claims arising from the ADEA. Page 2 of IBM's Waiver, however, states that the covenant not to sue, which is also confusingly included in and called a "Release" on page 1, "does not apply to actions based solely under the Age Discrimination in Employment Act of 1967, as amended." The "Release" thus states two completely contradictory things; on page 1 it states that it covers ADEA claims, and on page 2 it states that it "does not apply" to actions based under the ADEA. This confusing, contradictory language on its face violates the prime "stringent safeguard" of the OWBPA – that waiver language must be written in "plain language" in a manner "calculated to be understood" by the average individual. 29 U.S.C. § 626(f)(A) and 29 C.F.R. § 1625.22(b)(3).

The waiver language at issue thus tells employees who signed it two different, contradictory things – both that it "covers" ADEA claims, and that it does not apply to ADEA claims. While experienced ADEA attorneys might, after due reflection and considered analysis, be able to

disentangle the "release" from the covenant not to sue (although both are termed "Release") and discern what this waiver language might mean, IBM cannot carry its burden of proving that the **average** individual who signed the agreement understood this confusing, contradictory language. The IBM employees who signed IBM's Waiver, however intelligent, are not law school graduates, let alone experienced ADEA attorneys. IBM's dual and conflicting waiver language is the opposite of plain language.

Indeed, the "General Release and Covenant Not to Sue" states in its very first paragraph that both are a "Release," which would lead logical employees to believe that the two concepts are synonymous. Moreover, IBM's Waiver states that "this covenant not to sue does not apply to actions based solely" under the ADEA, which logically would lead employees, who are not expert in contract or ADEA/OW BPA law, to believe that IBM's Waiver does not preclude them from pursuing ADEA claims, despite the language on page 1 stating the release "covers" ADEA claims. In fact, IBM's Waiver expressly states on page 2 that "that means that if you were to sue IBM or those associated with IBM only under the Age Discrimination and Employment Act of 1967, as amended, you would not be liable under the terms of this Release for their attorney's fees and other costs and expenses of defending against the suit." This language certainly suggests to the average employee that s/he is permitted despite IBM's Waiver to file suit under the ADEA. Rather, the language on page 2 appears to reserve the right of employees who signed the release to pursue claims under the ADEA, stating:

> That means 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 attorney's fees and other costs and expenses of defending against this suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

Obviously, the hundreds of former IBM employees who filed ADEA claims after signing IBM's Waiver understood IBM's Waiver to permit them to file suit. If the former employees understood that IBM's Waiver barred them from pursuing such actions, it is difficult to understand why so many have expended the effort and funds necessary to file ADEA claims. The Court should not decide whether IBM's Waiver in the abstract preserves the right of employees to pursue ADEA actions; similarly, whether IBM's inherently confusing two waivers in one document approach was

a subtle attempt to subvert Congress's protective goals under the OWBPA or instead was the result of layer upon layer of language created by different draftpersons at different times is likewise irrelevant to the issue before the Court. Rather, the only issue raised here is whether IBM's Waiver **fully** complies with the OWBPA's strict requirements and the EEOC's regulations. At the very least, IBM's Waiver is flagrantly misleading, in violation of the OWBPA's stringent safeguards, because it states that the covenant not to sue "does not apply" to actions under the ADEA, thereby leading employees to believe that their rights to pursue ADEA claims are preserved by the labored language.

IBM's Waiver fails to distinguish between a release and a covenant not to sue, and indeed defines both concepts as "Release." Average employees do not appreciate the legal distinction between these two concepts, and nothing in the OWBPA requires that employees should be required to hire experienced ADEA/OWBPA attorneys to explain these concepts. The inclusion of these two concepts without explanation in one document and the resulting conflicting provisions are obvious sources of confusion which violate the OWBPA's requirement that waiver agreements be written in plain language without technical jargon. Indeed, the EEOC has cautioned against the inclusion of both a release and covenant not to sue in the same document. See 29 C.F.R. Part 1625 (65 F.R. 77438, at * 77443, available at 2000 W.L. 180424 (F.R.), declaring:

> However, a point of caution is warranted with respect to such covenants. Although ADEA covenants not to sue (absent damages) operate as the functional equivalent of waivers, they carry a higher risk of violating the OWBPA by virtue of their wording. An employee could read "covenant not to sue" or "promise not to sue" as giving up not only the right to challenge a past employment consequence as an ADEA violation, but also the right to challenge in court the knowing and voluntary nature of his or her waiver agreement. The chance of misunderstanding is heightened if the covenant not to sue is added to an agreement that already includes an ADEA waiver clause. The covenant in such a case would have no legal effect separate from the waiver clause. Nonetheless, its language would appear to bar an individual's access to court.

The confusing, contradictory, and misleading language in IBM's Waiver on its face violates the fundamental safeguard in the OWBPA that ADEA waivers be written in a manner "calculated to be understood" by average employees. 29 U.S.C. § 626(f)(1)(A). The Court should rule that this waiver agreement does not comply with the stringent requirements of the OWBPA, deny the Motion

to Dismiss, and allow the Plaintiffs to proceed with their ADEA claims.[2]

2. IBM's Waiver Makes a Material Omission of Fact Because it Fails to Inform Employees of Their Right to Test the Knowing and Voluntary Nature of the Waiver in Court Under the OWBPA.

Because IBM's Waiver fails to clearly explain to IBM employees that filing a charge of age discrimination with the EEOC does not constitute the filing of litigation which alone can be legally binding upon IBM, and because IBM's Waiver further fails to inform IBM employees that regardless of the EEOC's determination, any suit which they might file in court (as opposed to suit by the EEOC) could be deemed to violate IBM's Waiver, IBM's Waiver contains a material omission which renders it invalid under the OWBPA. 29 C.F.R. § 1625.22(a) of the regulations promulgated by the EEOC states:

> (a) *Introduction.* (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).
>
> * * *
>
> (3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, **omission**, or misstatement in the information furnished by the employer to an employee in connection with the waiver. (Emphasis added.)

This admonition is repeated in § 1625.22(b)(4), which declares:

> (4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. **Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations**. (Emphasis added.)

Certainly laypersons cannot uniformly have attributed to them detailed knowledge of the Civil Rights Acts and in particular the ADEA/OWBPA and the structured nature of the EEOC's/ADEA's administrative and judicial enforcement mechanism. Indeed, the ADEA does not

[2] Plaintiffs respectfully urge that this Court avoid the approach of the district court in *Thomforde v. IBM*, Civ. No. 02-CV-4817 (JNE/JGL) (D. Minn. 1/27/04). That decision, which Plaintiffs understand will be appealed to the Eighth Circuit, is devoid of recognition of the OWBPA stringent requirements, the underlying thrust of *Oubre*, and Congress's clear placement of the burden of proof on the party asserting the validity of an ADEA waiver. Rather, the district court in *Thomforde* merely focused upon the question, "Is there any language anywhere in IBM's Waiver which in isolation may be viewed as barring Plaintiff's ADEA claim?" Such an approach does not comport with the stringent requirements of the OWBPA.

even require a right to sue letter or waiting for final action by the EEOC but merely requires that an individual wait 60 days after filing an ADEA charge, regardless of action or inaction on the part of the EEOC, to file suit. 29 U.S.C. § 626(d). This contrasts with Title VII, where an EEOC right to sue letter is a prerequisite to filing suit. 42 U.S.C. §2000e-5(f)(1).

IBM should have and could have made these distinctions clear by using added language such as:

> However, although you may file a charge with the U.S. Equal Employment Opportunity Commission, and the EEOC in its discretion may file suit for statutory limited injunctive relief, neither the EEOC on your behalf nor you individually or in concert with others may obtain monetary relief through such litigation. You may not under any circumstances file or join an individual or private action against IBM under the Age Discrimination in Employment Act or seek or obtain monetary damages.

For another example of appropriate language, see Form F-1, Section 2(a), Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law* 1417 (2003) (attached hereto as Exhibit 2).

D. IBM's Waiver Constitutes A Contract of Adhesion.

IBM's Waiver is a contract of adhesion drafted unilaterally by IBM and not subject to individual negotiation. 17A *Am.Jur. 2d*, Contracts § 348 (1991). While the OWBPA imposes yet stricter requirements than contract law, federal law "'does not supplant state law governing the unconscionability of adhesive contracts.'" *Circuit City Stores v. Mantor*, 335 F.3d 1101, 1105 (9th Cir. 2003), quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 n. 10 (9th Cir. 2003). The teachings of *Graham v. Scissor-Tail Inc.* (Cal. 1990) 623 P.2d 165, 28 Cal.3d 807, are instructive in this regard. *Graham, id.* at 172, n. 16, states:

> Such terms, of course, are subject to interpretation under established principles. The rule requiring the resolution of ambiguities against the drafting party 'applies with peculiar force in the case of a contract of adhesion. Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. …' [Citations omitted.]

Graham continues, *id.* at 172:

> Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion …. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [Citations omitted.]

Thus, the ambiguities and contradictions in IBM's Waiver are to be construed against IBM and in favor of Plaintiffs. Even under general contract principles which are less protective than the OWBPA, the conflicting provisions of IBM's Waiver should be construed to protect Plaintiffs' ADEA rights

E. Plaintiffs Did Not Waive Their ERISA Claims By Signing IBM's Waiver.

Contrary to Defendant's assertion, IBM's Waiver does not include within its purview Plaintiffs' claims for violation of ERISA. On page 1 of IBM's Waiver, Plaintiffs agreed to release IBM "from all claims, demands, actions or liabilities you may have against IBM of whatever kind . . . ," but ERISA is not included in the recitation of statutory rights and causes of action included in the waiver set forth in paragraph 4 of the Agreement. Rather, IBM's Waiver expressly reserves employee rights to pursue certain ERISA actions:

> This Release does not prevent you from enforcing your nonforfeitable rights to your accrued benefits (within the meaning of §§ 203 and 204 of the Employee Retirement Income Security Act of 1974 as amended), as of the date of termination of your IBM employment, under the IBM personal pension plan or the IBM retirement plan as applicable and the IBM PDSP 401(K) which are not released hereby but survive unaffected by this document.

This paragraph is not only another example of the confusing, technical language in IBM's Waiver, but it also plainly reserves the right of employees to pursue certain rights pursuant to ERISA. Whether these rights are included in the ERISA claim set forth in the First Amended Complaint remains to be determined. The language set forth in IBM's Waiver is far from the plain, non-technical language necessary to waive Plaintiff's ERISA claims and comply with either the OWBPA, or judicially related protections applicable to contracts of adhesion. The references under ERISA to "accrued" benefits and statutory sections 203 and 204 are not plain language which lay people would readily understand. The Court should dismiss with prejudice the Defendant's Counterclaim with regard to Count V of the First Amended Complaint, and allow Plaintiffs to proceed with their ERISA claim.

F. The First Amended Complaint Contains A "Short And Plain Statement Of The Claim" That IBM's Waiver Is Invalid, And That Is All That Is Required.

IBM contends, Memorandum, p. 8 , that Plaintiffs do not allege any facts upon which the

Release can be held invalid. Paragraph 17 of the First Amended Complaint states:

> The Releases are illegal on their face because they violate the OWBPA and the regulations implementing the OWBPA, 29 C.F.R. § 1625.22. In particular, the Releases contain material mistakes, omissions, and/or misstatements of information, and are not drafted in plain language calculated to be understood by the average individual eligible to participate.

According to IBM, however, this allegation is insufficient. Rather, IBM contends that Plaintiffs must allege specific facts establishing that IBM's Waiver is invalid and that absent such allegations, the First Amended Complaint fails to state a claim upon which relief may be granted.

The Supreme Court rejected a very similar contention in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and this Court should do so here. In *Swierkiewicz*, the Court held that a complaint in an employment discrimination lawsuit need not contain specific facts establishing a *prima facie* case of discrimination, but "instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." *Id.* at 508. The only pleading requirement applicable to an employment discrimination complaint, according to *Swierkiewicz*, is that the complaint "gives respondent fair notice of the basis for petitioner's claims." *Id*. at 512.

The First Amended Complaint plainly gives IBM fair notice of Plaintiffs' claim that IBM's Waiver is invalid, asserting that IBM's Waiver violates the OWBPA and the implementing regulations because it contains material mistakes, omissions, and/or misstatements, and is not drafted in plain language calculated to be understood by the average individual. These allegations give Defendant fair notice of the basis for Plaintiffs' claim that IBM's Waiver is invalid. That is all that is required by Rule 8(a)(2) and *Swierkiewicz*. The Court should reject Defendant's contention that the First Amended Complaint does not allege any facts upon which IBM's Waiver can be held invalid.

V. CONCLUSION

IBM has not met its burden of proof that "beyond a doubt" its Waiver complies with the dictates of the OWBPA. IBM's Waiver contains confusing and contradictory language and technical jargon which is not calculated to be understood by the average individual signing the document. Moreover, IBM's Waiver contains material omissions and misleads employees to

believe that despite the release language in IBM's Waiver, they could still bring suit for violations of the ADEA and ERISA. IBM's Waiver is in effect a contract of adhesion which should be construed against IBM. Under these circumstan ces, IBM's Waiver is not valid and do es not preclude Plaintiffs' claims here. Accordingly, IBM's Motion to Dismiss should be denied.

Dated: April 2, 2004

McTEAGUE, HIGBEE, CASE, COHEN WHITNEY & TOKER, PA

By _____
JEFFREY NEIL YOUNG
Attorney for Plaintiffs

Dated: April 2, 2004

By _____
PATRICK N. McTEAGUE
Attorney for Plaintiffs