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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 **NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM; MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date and Time: April 30, 2004 10:00 A.M. Courtroom: 6, 4th Floor Judge: Hon. Ronald M. Whyte **ACCOMPANYING PAPER:** [PROPOSED] **ORDER GRANTING MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM**

NOTICE OF MOTION AND MOTION

To Defendant/Counterclaim Plaintiff International Business Machines, Inc. ("IBM"), and its attorneys of record:

PLEASE TAKE NOTICE that on April 30, 2004 at 10:00 a.m., in Courtroom 6 of this Court, located at 280 South First Street, 4th Floor, San Jose, California 95113-3008, before the Honorable Ronald M. Whyte, Plaintiffs/Counterclaim-Defendants will and do hereby move, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing Defendant's Counterclaim, dated February 12, 2004 and filed with the Court on February 12, 2004.

The motion is made on the grounds that Plaintiffs' claim for violation of ERISA is preserved by the General Release and Covenant Not to Sue. Plaintiffs further contend that because their ERISA claim is inextricably intertwined with Plaintiffs' claim for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the ERISA claim is not barred by the General Release and Covenant Not to Sue. Moreover, the General Release and Covenant Not to Sue is void as a contract of adhesion. Finally, because the General Release and Covenant Not to Sue does not comply with the Older Workers' Benefit Protection Act, 26 U.S.C. § 626(f), the General Release and Covenant Not to Sue is not valid as to any claims, including those under ERISA.

The motion is based on this notice and the following memorandum in support of the motion; the accompanying proposed order granting the motion; all matters of which the Court may or must take notice; the record of this action; and any oral or documentary evidence received by the Court at the hearing on the motion.

MEMORANDUM

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 (see, e.g. 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. IBM also filed a Counterclaim asserting that Plaintiffs had violated the terms of IBM's Waiver by including a claim for violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, in Count V of the First Amended Complaint.

It is undisputed that the language of IBM's Waiver has not varied materially throughout IBM's ongoing reductions in force. IBM's Waiver contains both a release and covenant not to sue, which IBM merges both into one term, labeling the release and covenant not to sue as "Release." 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, Title VII of Civil Rights Act of 1964, as amended, the Worker Adjustment and Retraining Notification Act, and any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age, and claims for attorneys' fees." Elsewhere, IBM's Waiver expressly references claims under ERISA, declaring, "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), as of the date of termination of your IBM employment, under the IBM Personal Pension Plan or the IBM Retirement Plan as applicable under IBM TADSP 701(k) which are not released hereby but survive unaffected by this document." Emphasis added. IBM's Waiver continues, "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."

II. SUMMARY OF ARGUMENT

Plaintiffs did not waive their rights to claims for violation of ERISA by virtue of their execution of IBM's Waiver. As set forth above, IBM's Waiver expressly preserves Plaintiffs' right to bring suit for loss of accrued benefits covered by ERISA. One of those accrued benefits was money deposited by IBM in a Future Health Account for use by the employee to pay for health benefits upon his retirement. Affidavit of William Syverson ("Syverson Aff."), ¶3. Upon information and belief, upon termination by IBM, the accrued benefit in the employee's Future Health Account reverted to IBM. *Id.* at ¶4. These accounts are governed by ERISA, and inasmuch as IBM's Waiver expressly preserves their right to sue for loss of accrued benefits, Plaintiffs cannot have violated ERISA.

Moreover, Plaintiffs' entitlement to fringe benefits, including health and pension benefits, is inextricably intertwined with their claim for violation of the ADEA and OWBPA. Plaintiffs contend that as a result of their termination, they have lost accrued health benefits and that a principal motivation for their terminations was to avoid the payment of pension costs. If Plaintiffs prevail in this action, it is clear under the ADEA that they are entitled to recover the value of their lost fringe benefits, as well as lost wages. See, e.g., *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964 (4th Cir. 1985), citing *Kelly v. American Standard, Inc.,* 640 F.2d 974, 978 (9th Cir. 1981) (wages under ADEA include fringe benefits). Count V of the First Amended Complaint addresses IBM's

motivation for the terminations and preserves Plaintiffs' right to recover fringe benefits governed by ERISA.

In any event, Plaintiffs contend that IBM's Waiver constitutes a contract of adhesion and is therefore unenforceable. Where, as here, there is a disparity in bargaining power, agreements like IBM's Waiver are to be strictly construed against the drafter and may be unenforceable as contracts of adhesion. See *Graham v. Scissor-Tail Inc.* (Cal. 1990) 623 P.2d 165, 28 Cal.3d 807. Here, the relative disparity between the parties and the use of confusing, unclear language render IBM's Waiver invalid even under general contract law.

Finally, Plaintiffs contend that IBM's Release is invalid as a matter of law because it violates the OWBPA and therefore is not enforceable. Where a release is invalid under the OWBPA, claims under the ADEA are clearly preserved. See, e.g. *Kinghorn v. Citibank, N.A.*, 1999 W.L. 30534, at *4 (N.D. Cal. 1/20/99). Whether a release which is covered under the OWBPA also renders nugatory the purported release of non-ADEA claims appears to be a matter of first impression before this Court. Plaintiffs contend that because IBM's Waiver is invalid under the OWBPA, it is invalid as to all claims which they purportedly waived. Among other infirmities, IBM's Waiver includes and commingles in the same document 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 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). 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), or claims that are intertwined with that claim, like claims for fringe benefits.

III. ARGUMENT

A. IBM's Release Expressly Preserves The Right To Sue For Loss Of Accrued Benefits.

As recounted above, IBM's Waiver expressly permits employees to bring suit for loss of accrued benefits . IBM's Waiver declares, "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 ERISA), or claims under IBM's Personal Pension and/or Retirement Plan. In approximately 1999, IBM established Future Health Accounts ("the FHA Plan") for employees to help pay for medical benefits upon retirement. Syverson Aff., ¶ 2. Under the terms of the FHA Plan, IBM agreed to deposit $2,500 per year for each year of employment that an employee worked at IBM once the employee reached age 40, up to a maximum of $25,000. Syverson Aff., ¶ 3. Interest on the account accrued to the benefit of the employee. *Id.* However, upon information and belief, upon their termination by IBM, the money in Plaintiffs' FHA Plan accounts reverted to IBM, thus denying them accrued benefits. *Id.* at ¶ 4.

The FHA Plan appears to be somewhat of a hybrid welfare plan and defined contribution plan. Both welfare and defined contribution plans are governed by ERISA. 29 U.S.C. §§ 1002(2)(A) and 1003(a)(1). At this point in the litigation, Plaintiffs do not have a copy of the actual plan documents to make a final determination as to whether the FHA Plan is a welfare plan, a defined contribution plan, neither, and/or whether the FHA Plan in fact is governed by ERISA. Under these circumstances, however, where Plaintiffs can assert a colorable claim that they have been denied accrued benefits as a result of their termination by IBM, they did not violate the express terms of IBM's Waiver in bringing suit to enforce those rights.

B. Plaintiffs' ADEA And OWBPA Claims Are Inextricably Intertwined With Their Claims For Benefits Governed By ERISA.

As a result of their termination by IBM, not only have Plaintiffs lost the accrued value of their FHA Plan accounts, but Plaintiffs will lose literally hundreds of thousands of dollars, if not millions of dollars, individually over their lifetime in pension benefits. See, e.g. Syverson Aff., ¶ 5 and Exhibit 1 thereto, showing a potential loss in pension benefits of $777,000 had Syverson worked

at IBM to age 60 and lived until age 80. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), expressly incorporates the remedial scheme of the Fair Labor Standard Act ("FLSA"), including section 16(b), 29 U.S.C. § 216(b). As a result, an employer who violates the ADEA is liable for back wages. In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 978 (9th Cir. 1981), the Ninth Circuit declared, "Pursuant to these [FLSA and ADEA] statutes, an employer who violates the ADEA is liable for back wages and benefits …" Emphasis added. Accord: *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985), collecting cases defining wages to include fringe benefits, including health and pension benefits. Thus, when IBM discriminatorily terminated Plaintiffs, it achieved significant savings in health and pension costs covered by ERISA. These claims for relief are inextricably intertwined with Plaintiffs' ADEA claims. Count V of the First Amended Complaint is designed to protect Plaintiffs' right to recovery of such benefits.

Moreover, ERISA Section 510, prohibits interference with protected rights under ERISA or the alterment of rights. 29 U.S.C. § 1140. Where one fails to state such a claim, relief can be denied. *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 430 (7th Cir. 2000). Count V is necessary to preserve this allegation.

C. Because IBM's Waiver Constitutes A Contract of Adhesion, Plaintiffs' Cannot Have Waived Their ERISA-based Rights.

Even if IBM's failure to comply with the OWBPA only applies to ADEA claims and does not render nugatory Plaintiffs' purported waiver of their ERISA-based rights, general principles of contract law still apply to the release of the ERISA claims. In *Aikins v. Tosco Refining Co. Inc.*, No. C-98-00755, 1999 WL 179686, at * 5 (N.D. Cal. Mar. 26, 1999), discussing the Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), this Court noted that the OWBPA does not preclude reliance upon general contract principles as they apply to non-ADEA claims. The Court stated:

> *Oubre* was based on the clear statutory commands of a [sic] the OWBPA, and that Act's requirements for waivers of ADEA claims … The decision does not purport to decide how general contract principles would apply to non-ADEA claims, such as the Title VII or FEHA race discrimination claims made by the plaintiffs."

Thus, traditional principles of contract law continue to apply here, in addition to, or in lieu of, the

OWBPA.

Plaintiffs contend that applying federal common law, 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). The teachings of *Graham v. Scissor-Tail Inc.* (Cal. 1990) 623 P.2d 165, 28 Cal.3d 807, are instructive. *Graham, id.* at 620, 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 622:

> 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' ERISA rights.

D. Because IBM's Waiver Does Not Comply With the Stringent Requirements of the OWBPA, Plaintiffs Cannot Be Deemed to Have Waived Their Right to Bring Suit for Violation of ERISA.

As set forth in greater detail below, Plaintiffs contend that IBM's Waiver does not comply with the stringent requirements of the OWBPA. If it does not, then Plaintiffs' claim for violation of the ADEA clearly are preserved. See, e.g. *Kinghorn v. Citibank, N.A.*, 199 W.L. 30534, at *4 (N.D.Cal. 1/20/99). In *Kinghorn*, plaintiff challenged the validity of a waiver on several grounds. Although this Court rejected much of plaintiff's argument, the Court 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.

Plaintiffs contend that if IBM's Waiver is invalid under the OWBPA, then not only are their

ADEA claims preserved, but so are claims for violations of other statutes, including ERISA. The issue was expressly reserved in *Oubre*, 522 U.S. at 427-28, and this appears to be a matter of first impression in this Circuit. There is a paucity of precedent elsewhere.[1] Plaintiffs contend that because their ADEA and ERISA claims are inextricably intertwined, since IBM's Waiver is invalid as to claims for violations of the ADEA, it also is invalid as to claims for violation of ERISA.

1. The Legislative History of the Older Workers' Benefit Protection Act and *Oubre* Require Stringent Compliance to Waive Claims.

The OWBPA and *Oubre* require strict compliance with the OWBPA before an employee can be found to have waived his statutory rights. 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, 26 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;

The legislative history underlying the OWBPA establishes that Congress intended the judiciary to scrutinize 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.

[1] The only reported case Plaintiffs could locate addressing this issue following *Oubre* was *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 375-76 (5th Cir. 2002). Unlike here, plaintiffs there did not assert a claim for violation of the OWBPA or ADEA, but nonetheless asserted that because the release that they signed was invalid under principles established by *Oubre* and the OWBPA, they had not waived their ERISA-based claims for severance pay. Because *Chaplin* did not assert violations of the ADEA in conjunction with the ERISA claim, it is readily distinguishable from the instant case.

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 a waiver is not 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.

2. IBM Has Not Met 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 agreement 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). IBM's Waiver is a multi-page document captioned "General Release and Covenant Not to Sue," which, in its first paragraph, defines both as a "Release." The second paragraph on page 1 of 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 then 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 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.

The fundamental flaw in the 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 defines "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 the average individual entitled to participate in the resource action or separation allowance plan. Comparison of the language in paragraph 3 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).

IBM's Waiver fails to distinguish between a release and a covenant not to sue, and indeed calls both concepts a "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. 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 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 because IBM's Waiver does not comply with the stringent requirements of the OWBPA, Plaintiffs may proceed with their ERISA claims, as well as within their ADEA claims for reasons which will be set forth in greater detail in a Memorandum to be filed with the Court on April 2, 2004.

CONCLUSION

For all of the foregoing reasons, IBM's Counterclaim should be dismissed.

Dated: March 16, 2004

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

By _____
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