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

Attorneys for Plaintiffs

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

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.

Case No. C 03 04529 RMW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO APPROVE NOTICE OF ACTION, TO CERTIFY CLASS FOR PURPOSES OF COUNT I OF THE AMENDED COMPLAINT, AND TO COMPEL IBM TO PROVIDE NAMES, ADDRESSES, AND DATES OF BIRTH OF SIMILARLY SITUATED EMPLOYEES

Date: March 5, 2004
Time: 10:30 a.m.
Dept: Courtroom 6, 4th Floor
Judge: The Hon. Ronald M. Whyte

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Federal Rules

INTRODUCTION

Plaintiffs respectfully request that this Court: (1) authorize Plaintiffs to send notice of this action to all employees age 40 and over terminated by IBM since July 7, 2001 in deferral states, and since November 3, 2001 in non-deferral states; (2) conditionally authorize plaintiffs to proceed as representatives of a class of individuals age 40 and over terminated by IBM since July 7, 2001 in deferral states and since November 3, 2001 in non-deferral states with respect to the alleged violations of the OWBPA as asserted in Count I of the Amended Complaint; (3) compel IBM to provide Plaintiffs in an electronically suitable format with the names, last-known addresses, and dates of birth of all similarly situated employees; and (4) permit similarly situated employees 120 days to notify the Court that they wish to opt-in to this action. A proposed notice and consent form are attached to the Young Declaration as Exhibits 22 and 23.

Plaintiffs, William Syverson, *et al*., by and through the undersigned counsel, hereby move this Court: 1) to approve the provision of notice of this action to similarly situated individuals as permitted by the Supreme Court's decision in *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), and this Court's determination in *Church v. Consolidated Freightways, Inc.,* 137 F.R.D. 294 (N.D. Cal. 1991); 2) to authorize Plaintiffs to conduct this action as a representative action with respect to Count I of the Amended Complaint, which asserts a violation of the Older Workers Benefit Protection Act ("the OWBPA"), pursuant to Section 216(b) of the Fair Labor Standards Act, as incorporated by Section 626(b) of the Age Discrimination in Employment Act ("the ADEA"), 29 U.S.C. § 626(b); and 3) to compel Defendant International Business Machines Corporation ("IBM" or "the Employer") to furnish Plaintiffs with the names, addresses, and dates of birth in an electronically suitable format of all employees age 40 and over whom IBM has terminated or informed of their prospective termination since on or after July 7, 2001 if they live in a deferral state or on or after November 3, 2001 if they live in a non-deferral state. The provision of notice of this action to similarly-situated individuals is consistent with *Sperling*, 493 U.S at 170, which declared that the vindication of rights under the ADEA "depend(s) on employees receiving accurate and timely notice concerning the pendency of the collective action." Applying Rules 83 and 16(b), Fed. R. Civ. P.,

Sperling suggests that the Court "begin its involvement early, at the point of the initial notice, rather than at some later time." *Id.* at 171. Indeed, as one court has noted, "The Supreme Court's decision in *Sperling* clearly authorizes and, in fact, advocates that the district court exercise its discretion early in the litigation to permit discovery of the names and addresses of discharged employees to ensure that such potential plaintiffs are promptly and accurately notified." *Krueger v. New York Telephone Company*, 1993 WL 276058, at *1 (S.D.N.Y. July 21, 1993).

BACKGROUND

Defendant IBM is an international company which provides information technology solutions to customers. Declaration of William Syverson ("Syverson Decl."), ¶ 2. IBM provides services ranging from "business transformation consulting, to software, hardware, fundamental research, financing and the component technologies used to build larger services." *Id.* This includes development, manufacture, sale, and maintenance of computers to individuals, businesses, and public entities and the provision of computer technology and management services to such entities. *Id.* IBM operates manufacturing facilities in, *inter alia*, San Jose, California; Rochester, Minnesota; East Fishkill, Endicott, and Poughkeepsie, New York; Austin, Texas; and Burlington, Vermont. Syverson Decl., ¶ 3. IBM employs approximately 315,000 individuals globally, approximately one-half of whom have been employed by IBM for less than five years. Syverson Decl., ¶ 4.

Over the last several years IBM has engaged in a series of what it calls "resource actions" which have resulted in the termination of over ten thousand and perhaps as many as twenty thousand IBM employees based in the United States in the various business groups. Amended Complaint, ¶ 11; Declaration of James Leas ("Leas Decl."), ¶ 3. In addition thereto, IBM has terminated large numbers of employees over the same time but not as part of any specific resource action. Amended Complaint, ¶ 11; Leas Decl., ¶ 4. The resource actions and terminations have not necessarily resulted in an overall reduction in IBM's workforce, as IBM continues to recruit and hire employees whom Plaintiffs allege are typically younger. Leas Decl., ¶ 8. For example, just recently, a manager from IBM was quoted as stating that for 2004, IBM intended to increase its hiring of college graduates in the United States from 40-50%. Leas Decl., ¶ 8 and Exhibit 3 thereto.

Employees terminated by IBM as part of the various resource actions and reductions in force have been eligible to receive severance pay equal to two weeks of pay per year of service up to 26 weeks provided that they first sign a General Release and Covenant Not to Sue (referred to by IBM as "Release"). Syverson Decl., ¶ 7. Although the resource actions and terminations have occurred at different times, the language of the Release drafted by IBM has been materially identical.[1] Declaration of Jeffrey Neil Young ("Young Decl."), ¶ 2 and Exhibits 1-16 thereto; Exhibits L and M to Amended Complaint; Exhibits 1 to Declarations of Dale Cahill, Rolf Marsh, James Payne and Antonio Rivera; ("Cahill Decl.," "Marsh Decl.," "Payne Decl.," and "Rivera Decl.," respectively); Exhibit 3 to Syverson Decl.; Exhibit 2 to Leas Decl.; Exhibit 1 to Declaration of David Mazgaj ("Mazgaj Decl."). In every instance, the Release states (emphasis added):

> 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.
>
> * * * *
>
> . . . 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 . . .
>
> * * * *
>
> 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,

[1] The language of the Releases varies slightly with respect to the Retirement Bridge. For example, Exhibit L to the Amended Complaint states "the Retirement Bridge Leave of Absence," while Exhibit M to the Amended Complaint states "a Retirement Bridge or non-vested IBM benefits plans." Exhibit L also refers to a "Retirement Bridge Leave of Absence" while Exhibit M only references a "retirement bridge." Some of the Releases have a different ¶ 7 pertaining to California and a different non-competition clause in ¶ 8.

> 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.

Named Plaintiff Ruth Alice Boyd was employed by IBM at its Burlington, Vermont facility in a variety of positions, most recently in its Microelectronics Division as a senior lab specialist, from September 17, 1984 to June 4, 2002. Declaration of Ruth Alice Boyd ("Boyd Decl."), ¶ 1. After learning of her termination, Boyd executed the Release. Boyd Decl., ¶ 3. On or about August 23, 2002, within 300 days of learning of her termination, Boyd filed a charge of discrimination with the Vermont Office of the Attorney General and the Equal Employment Opportunity Commission ("EEOC"), alleging, *inter alia*, that her termination was part of an unlawful company-wide practice of terminating employees age 45 and over in violation of the ADEA. Boyd Decl., ¶ 4. Boyd's charge states, "Respondent gave me a document entitled, 'Microelectronics Division Resource Action Employee Information Package.' This document listed the ages of Respondent's employees, including those employees selected to be laid off and those not selected. Upon information and belief, the data in the document shows that employees over the age of 45 years old are more likely to be laid off by Respondent." Boyd Decl., ¶ 4 and Exhibit 1 thereto. In a letter dated February 3, 2003 provided to the EEOC in response to IBM's submission, Boyd declared, "in reviewing the data supplied by IBM, the overall pattern of age discrimination is obvious, demonstrating that the probability of being laid off increased exponentially with increased age." Boyd Decl., ¶ 5 and Exhibit 2 thereto. Boyd further asserted that the Release did not comply with the Older Workers Benefit Protection Act, declaring, *inter alia*, "the entire release in [sic] invalid since it does not meet the requirements of the Older Workers Benefit Protection Act. . . ." *Id.*

Named Plaintiff Dale Cahill was employed by IBM at its Burlington, Vermont facility from February 16, 1982 to August 5, 2002 as a maintenance technician. Cahill Decl., ¶ 1; Exhibit E to Amended Complaint. After learning of his termination, Cahill executed a Release with the language

quoted above. Cahill Decl., ¶ 4 and Exhibit 1 thereto. On or about September 3, 2002, within 300 days of learning of his termination, Cahill filed a charge of age discrimination with the Vermont Office of the Attorney General and the Equal Employment Opportunity Commission ("EEOC"), alleging, *inter alia*, that his termination was part of an unlawful company-wide practice of terminating employees age 40 and over in violation of the ADEA. Cahill Decl., ¶ 3. Cahill's charge references a document entitled "Microelectronics Division Resource Action Employee Information Package" prepared by IBM and stated that "the data in the document shows that employees in my job category who were over age 40 were more likely to be laid off by Respondent." Cahill Decl., ¶ 3; Exhibit E to Amended Complaint.

Names Plaintiff James Payne was employed by IBM at its San Jose, California facility from August 1979 to August 15, 2002 in IBM's Storage Systems Group as a Mechanical Design Specialist. Payne Decl., ¶ 1. After learning of his termination, Payne executed a Release with the language quoted above. Payne Decl., ¶ 3 and Exhibit 1 thereto. On or about October 17, 2002, within 300 days of learning of his termination, Payne filed a charge of age discrimination with the California Department of Fair Employment and Housing and the EEOC. Payne Decl., ¶ 4 and Exhibit 2 thereto. At the same time, Payne provided the EEOC with a questionnaire in which he alleged, *inter alia*, that "[m]y layoff in San Jose is part of a national trend of age discrimination by IBM against older employees." Payne Decl., ¶ 5 and Exhibit 3 thereto.

Named Plaintiff William Syverson was employed by IBM at its Burlington, Vermont facility from February 4, 1980 to August 5, 2002 in its Microelectronics Division as a senior engineer. Syverson Decl., ¶ 1; Exhibit B to Amended Complaint. After learning of his termination, Syverson executed a Release with the language quoted above. Syverson Decl., ¶ 7 and Exhibit 3 thereto. On or about October 23, 2002, within 300 days of learning of his termination, Syverson filed a charge of age discrimination with the Vermont Office of the Attorney General and the EEOC. An attachment accompanying Syverson's charge declares, "I believe IBM employees beyond age 40 were illegally, systematically, methodically targeted" for termination. Syverson Decl., ¶ 6; Exhibit B to Amended Complaint. Syverson supplied the EEOC with charts showing the discriminatory impact of IBM's

June 2002 Microelectronics Division Resource Action. *Id.*

Named Plaintiff Antonio Rivera was employed by IBM at its Somers, New York facility from November 24, 1980 to June 28, 2002 in IBM Global Services as a Program Manager. Rivera Decl., ¶ 1. After learning of his termination, Rivera executed a Release with the language quoted above. Rivera Decl., ¶ 3 and Exhibit 1 thereto. On or about March 14, 2003, within 300 days of learning of his termination, Rivera filed a charge of age discrimination with the EEOC, alleging, *inter alia*, that his termination was part of an unlawful company-wide practice of terminating employees age 40 and over in violation of the ADEA to save "billions of dollars, and future payments to the pension plan." Rivera Decl., ¶ 4; Exhibit C to Amended Complaint.[2] Rivera's cover letter (dated March 13, 2003) referenced layoffs in New York, Vermont, Minnesota, California, North Carolina and other states and asked that the EEOC treat his charge as a class action. *Id.* Rivera further supplied the EEOC with the names, addresses, and/or phone numbers of some similarly situated employees. *Id.*

Named Plaintiff Rolf Marsh was employed by IBM's Global Services Division. Marsh Decl., ¶ 1. Marsh worked out of his home or at a customer site as a Senior I/T specialist and reported to managers all over the country from June 1984 to April 4, 2003. After learning of his termination, Marsh executed a Release with the language quoted above. Marsh Decl., ¶ 3 and Exhibit 1 thereto. On or about July 8, 2003, within 300 days of learning of his termination, Marsh filed a charge of age discrimination with the EEOC alleging, *inter alia*, that his termination was in violation of the ADEA and that IBM's "layoff policy was discriminatory towards individuals who were 40 years of age and older." Marsh Decl., ¶ 4; Exhibit D to Amended Complaint.[3]

The EEOC dismissed each of the Named Plaintiffs' class-based age discrimination charges by letters dated on or after July 9, 2003. Boyd Decl., ¶ 6 and Exhibit 3 thereto; Cahill Decl., ¶ 5 and Exhibit 2 thereto; Marsh Decl., ¶ 5 and Exhibit 2 thereto; Payne Decl., ¶ 6 and Exhibit 4 thereto;

[2] Paragraph 8(b) of the Amended Complaint mistakenly states that Rivera filed his charge on February 3, 2003. As stated in Paragraph 4 of his Declaration, the charge actually was filed on March 14, 2003.

[3] Named Plaintiff Sylvia Jones did not file a charge of age discrimination. The charges filed by Named Plaintiffs Jack Friedman, Paul Gromkowski and Walter Maslak did not make claims of a company-wide practice of age discrimination. Young Decl., ¶ 3 and Exhibits 17-19 thereto.

Rivera Decl., ¶ 5 and Exhibit 3 thereto. The letters stated, "The waiver you signed met the Older Workers Benefit Protection Act (OWBPA) criteria and was not the product of economic duress." In addition thereto, each of the Named Plaintiffs received a form right to sue entitled "Dismissal and Notice of Right."

Plaintiffs instituted this action against IBM on or about October 7, 2003. Exhibit A to the Complaint referenced 126 individuals who had authorized that suit be brought in their behalf. On December 19, 2003, the ten Named Plaintiffs filed an Amended Complaint and Exhibit A with 156 names. IBM was served on December 24, 2003. Count I of the Amended Complaint alleges that the Release signed by the Plaintiffs violates the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), and therefore does not prohibit Plaintiffs from suing IBM for age discrimination under the ADEA. Count II of the Amended Complaint alleges that IBM's terminations since January 1, 2001 have had a disparate impact upon employees age 40 and older as well as upon proposed subclasses of age 45, 50, 55, and 60 and older on a company-wide, division-wide, and facility-wide basis. Count III of the Amended Complaint alleges that IBM has been engaged in a pattern and practice of age discrimination in its reduction in force since January 1, 2001 and ongoing. Count IV of the Amended Complaint alleges that the terminations since January 1, 2001 on the basis of age have been willful. Finally, Count V of the Amended Complaint alleges that IBM's reduction in force since January 1, 2001 has violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.,* insofar as the reduction in force has been designed to avoid the cost of and deny retirement and health benefits to the terminated employees.

ARGUMENT

1. BECAUSE THIS COURT'S DETERMINATION ON IBM'S POTENTIALLY DISPOSITIVE MOTION WILL HAVE A SIGNIFICANT PRACTICAL AND POSSIBLY PRECLUSIVE IMPACT UPON OTHER SIMILARLY SITUATED INDIVIDUALS, THIS COURT SHOULD FIRST DECIDE THE NOTICE, CLASS CERTIFICATION, AND DISCOVERY ISSUES.

Applying the Supreme Court's decision in *Sperling*, 493 U.S. at 165, and this Court's decision in *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977), this Court first should address the instant motion to sanction notice, certify the class, and compel discovery of

the names, addresses, and dates of birth of similarly situated employees before deciding IBM's potentially dispositive motion with respect to the effect of the Release.[4] The Court should do so because of the significant practical and potential legally preclusive effect that the decision on IBM's motion necessarily will have upon thousands of similarly situated individuals who IBM has terminated by IBM since July 7, 2001 and who are entitled to have the opportunity to be heard on the validity of the Release.

Although there is some superficial appeal to first decide IBM's potentially dispositive motion without addressing issues of notice, certification, and discovery, closer scrutiny does not bear this out. In *Harriss*, 74 F.R.D. at 43, this Court recognized that decisions whether to certify a class impact upon both current and potential class members. Discussing the need to fairly and adequately protect the interests of the class under Rule 23(a)(4), Fed. R. Civ. P., the Court stated that, "The potential *res judicata*, or at least collateral estoppel effect of any judgment in the action makes it imperative that the absent members on whom it works will not be deprived of their day in court. See, *EEOC v. Detroit Edison Co*., 515 F.2d 301, 311 (6th Cir. 1975)."

Although Count I of the instant case involves an action under the ADEA, not Title VII, and as such is not subject to the requirements of Rule 23, *Church*, 137 F.R.D. at 304-07, "Rule 23 procedures may be helpful in the management of an ADEA class action." *Id.* at 306. Indeed, similar, if not stronger, concerns than those in *Harriss* militate in favor of issuing notice of this action to employees who are similarly situated to the named plaintiffs at the outset of this litigation, before IBM's dispositive motion is decided. First, although this is an opt-in, rather than an opt-out action, this Court's determination of the validity of the Release is likely to have a major impact upon similarly situated individuals terminated by IBM who may desire to bring claims for age discrimination here and elsewhere. Second, because many potential plaintiffs who are similarly situated to Plaintiffs did not file their own individual charges with the EEOC, but rather still may join the instant action under the single filing rule, see *Bean v. Crocker National Bank*, 600 F.2d 754,

[4] By stipulation dated January 16, 2004 IBM indicated its intent to file with this Court no later than February 12, 2004 a Rule 12(b)(6) motion seeking to dismiss the Amended Complaint. Upon information and belief, that motion is to be premised, at least in part, upon the effect of the Release signed by all of the named plaintiffs. Young Decl., ¶ 6.

759 (9th Cir. 1979),[5] if they are not permitted the opportunity to join this suit, they may be barred by the applicable statute of limitations from bringing or joining another action here or elsewhere. Third, other courts are likely to be influenced by this Court's opinion, and should that opinion be adverse to plaintiffs, similarly situated individuals likely would have a difficult time persuading other counsel to undertake an age discrimination action against IBM where the employee has executed a similar release.[6] Given the significant impact of this Court's determination and its potential legally preclusive effect, the other similarly situated employees should be given the opportunity to be heard with regard to this critical matter through representation either by the undersigned, by counsel of their own choosing, or *pro se*. See generally, *EEOC v. Pan Am*, 52 FEP Cases (BNA) 929, 936-937 (N.D. Cal. 1988), stating "[W]here an interest is threatened, notice is required" and "Those whose rights are prejudiced by the outcome of the [ADEA] litigation, are entitled to constitutionally sufficient notice and an opportunity to respond."

Not only does the significant and potentially preclusive effect of this Court's determination with respect to the validity of the Release counsel that notice first be provided to other similarly situated employees so that they may be heard, but the Supreme Court's decision in *Sperling*, 493 U.S. at 165, buttresses Plaintiffs' request that the Court entertain this motion prior to deciding IBM's dispositive motion. In *Sperling*, the Supreme Court considered whether a district court faced with a suit for violation of the ADEA may authorize and facilitate notice of the pending action. The employees there, like the Plaintiffs here, sought discovery of the names and addresses of similarly situated employees and requested that the court authorize them to provide notice to all potential plaintiffs who had not yet filed consent forms to opt in to the case. Sustaining the determination of

[5] In *Bean*, the Ninth Circuit held that where an employee files a suit for discrimination under the ADEA as a representative action after first having filed a class-based charge of discrimination with the EEOC, the statute of limitations is tolled and that other individuals who did not file charges but who could have done so within 180 or 300 days of the named plaintiff's EEOC charge can join the action, depending on whether the employee resides in a deferral or non-deferral state.

[6] Plaintiffs are aware that there are at least two other cases pending against IBM where IBM also has moved for dismissal of or summary judgment on the Complaint based upon the fact that former IBM employees there signed the Release. Young Decl., ¶ 5. Neither of those cases was brought as a representative action. *Id.* In *Mooney v. IBM*, Civil Action No. 03-323-KSF (E.D. Ky. 10/1/03), the Kentucky district court denied IBM's motion to dismiss. *Id.* The Minnesota district court reached the opposite conclusion on a summary judgment motion in *Thomforde v. IBM*, Civ. No. 02-CV-4817 (JNE/JGL) (D. Minn. 1/27/04). *Id.* Copies of the *Mooney* and *Thomforde* slip opinions are attached as Exhibits 20 and 21 to the Young Declaration.

the New Jersey District Court and the Third Circuit, which had concluded that such discovery and court-ordered notice was permissible, the Supreme Court stated, "We hold that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs." *Id.* at 169. The Supreme Court noted that Section 216(b)'s opt-in procedure "must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and otherwise contrary to statutory commands." *Id.* at 171. Relying upon Rules 83 and 16 of the Federal Rules of Civil Procedure, the Supreme Court concluded:

> Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time. One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation. A trial court can better manage a major ADEA action if it ascertains the contours of the action at the outset.

Id. at 171-72 (citations omitted) (emphasis added).

The Supreme Court's encouragement of early judicial intervention in representative ADEA actions such as the instant case was noted with approval by this Court in *Church*, 137 F.R.D. at 300. As discussed in greater detail *infra*, upon concluding that the plaintiffs had met all of the procedural prerequisites of the ADEA and that there were other prospective similarly situated employees, the *Church* court sanctioned notice and ordered defendant to provide plaintiffs with the names and addresses of the putative class, which consisted of hundreds, if not thousands, of prospective plaintiffs. *Id*. at 298.

Following *Sperling*, not only this Court but other courts uniformly appear to have ordered the early provision of names and addresses of potential plaintiffs and have authorized notice of the action to potential plaintiffs. See, e.g., *Schwed v. General Electric Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995) ("Moreover, even where later discovery proves the putative class members to be dissimilarly situated, notice to those preliminary identified as potential plaintiffs prior to full discovery is appropriate as it may further the remedial purpose of the ADEA") (emphasis added);

Krueger, 1993 WL 276058, at *2 ("[E]ven if plaintiffs' claims turn out to be meritless or, in fact, all the plaintiffs turn out *not* to be similarly situated, notification at this stage rather than after further discovery may enable more efficient resolution of the underlying issues in this case."); *Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672 (D. Colo. 1997); *Allen v. Marshall Field & Company*, 93 F.R.D. 438 (N.D. Ill. 1982) (pre-*Sperling* case ordering notice); *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2d Cir. 1979) (pre-*Sperling* case). Accordingly, this Court should address the discovery, notification, and class authorization issues now before considering IBM's potentially dispositive motion.

2. THE COURT SHOULD SANCTION NOTICE OF THIS ACTION TO ALL SIMILARLY SITUATED EMPLOYEES.

As set forth above, this Court's decision on IBM's potentially dispositive motion to dismiss the Amended Complaint based upon the language of the Release will have a significant impact not only upon individuals who already have consented to join this action but also upon prospective plaintiffs, who may in fact be precluded from bringing suit if not provided with notice of this action. The Supreme Court's decision in *Sperling*, 493 U.S. at 165, counsels but does not compel early intervention of the court in representative actions like the one at bar, and authorizes provision of notice of the suit to individuals who are similarly situated to the named Plaintiffs. This Court's subsequent decision in *Church*, 137 F.R.D. at 294, strongly supports Plaintiffs' request that this Court authorize Plaintiffs to provide notice now of the instant action to similarly situated employees. In *Church*, this Court quoted *Sperling* with approval and noted in particular that "court approval and facilitation of notice will not only alleviate the potential for 'misuse of the class device, as by mis-leading communications,' but will also help serve the goals of 'avoiding a multiplicity of duplicative suits and setting cut-off dates to expedite disposition of the action.'" *Church*, 137 F.R.D. at 300.

While *Sperling* and *Church* may not require this Court to sanction notice, the failure to do so would be unfair and contrary to the remedial purposes of the ADEA. As the Seventh Circuit expressed in *Allen*, 93 F.R.D. at 442, "It would be anomalous for Congress to provide a class action remedy, and, at the same time require that a class action's existence be hidden from potential class

members." Accord: *Krueger*, 1993 WL 276058, at *2 (quoting *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, 676 (S.D.N.Y. 1981) ("[T]he notice machinery contemplated by the ADEA, by reaching out to potential plaintiffs, may further the statute's remedial purpose."); *Schwed*, 159 F.R.D. at 375-76 (remedial nature of ADEA warrants notice).

In *Church*, a case virtually on all fours with the instant case, this Court authorized the provision of notice to similarly situated employees. Like the instant case, plaintiffs in *Church* sought court authorization to provide notice of their ADEA suit to similarly situated employees. Like the instant case, the employees to whom plaintiffs sought to give notice worked in a variety of jobs in different locations, reported to different supervisors, and were terminated on different dates over a long period of time. *Church*, 137 F.R.D. at 298. The *Church* Court established a three-step process before it agreed to authorize notice to the prospective plaintiffs. First, the Court required the named plaintiffs to show that they had complied with the procedural prerequisites to bring a civil action on behalf of themselves and other similarly situated employees. Second, the named plaintiffs had to demonstrate that the proposed opt-in plaintiffs were similarly situated. Finally, the named plaintiffs had to define the scope of the proposed class based upon the timing of their charges. *Id.* at 300. After concluding that the named plaintiffs in *Church* had complied with the procedural prerequisites to bring a civil action on behalf of themselves and other similarly situated individuals and that there were other employees who were similarly situated, the Court defined the scope of the class and ordered notice.

Here, because plaintiffs can demonstrate that they complied with all procedural prerequisites and have alleged and can show that there are similarly situated individuals, this Court, adhering to the *Church* test, should authorize the provision of notice in the instant matter to all employees who, like the named Plaintiffs are age 40 and over and were terminated by IBM after July 7, 2001 (or November 3, 2001, if living in a non-deferral state).[7]

[7] Plaintiffs have filed today a Motion for Leave to File Second Amended Complaint, *inter alia*, to add Daniel Moczan as a Named Plaintiff. IBM terminated Moczan on April 2, 2002, and he filed a charge of age discrimination with the New York office of the EEOC on May 2, 2002. Declaration of Daniel Moczan ("Moczan Decl."), ¶¶ 2, 4. His charge avers, "On April 2, 2002 I was let go with about 700 others in my area. All but about 100 were over the age of 40. I had been with IBM since 1977, eligible for retirement in 21 months at age 55." Moczan Decl., ¶ 4 and Exh. 1 thereto. Plaintiffs believe this to be the earliest charge which they have filed which would have put the EEOC on notice of the class-based nature of their claims. The Moczan charge would make the relevant statute of limitations July 7, 2001 in deferral states and November 3, 2001 in non-deferral states.

A. Plaintiffs Have Complied With All Procedural Prerequisites To Bring This Action.

In order to proceed as a representative action and warrant notice of the action to similarly situated employees, Plaintiffs must first show that they have complied with the procedural requisites of the ADEA. Here, as shown in their Declarations, Named Plaintiffs Boyd, Cahill, Payne, Syverson, Rivera, and Marsh, and prospective named plaintiff Moczan, filed charges of age discrimination with the EEOC within 300 days of learning of their termination, as required by 29 U.S.C. Section 626(d).[8] In addition to timely filing a charge of discrimination with the EEOC, Plaintiffs must also show that they gave the EEOC notice of the class nature of the claims alleged against IBM so that the EEOC can attempt to fulfill the conciliatory purpose of § 626(d). *Church*, 137 F.R.D. at 300-301. Here, the charges and documents filed by named Plaintiffs Boyd, Cahill, Syverson, Rivera and Marsh and prospective named plaintiff Moczan all served to put the EEOC (and IBM) on notice that the claims of age discrimination were not simply limited to themselves but extended to other individuals.[9] The Boyd charge declares that data demonstrated that employees over age 45 were more likely to be laid off by IBM. See Exhibit 1 to Boyd Decl. Moreover, in a letter to the EEOC, Boyd stated, "in reviewing the data supplied by IBM, the overall pattern of age discrimination is obvious, demonstrating that the probability of being laid off increased exponentially with increased age and "the entire release in [sic] invalid since it does not meet the requirements of the Older Workers Benefit Protection Act . . ." Exhibit 2 to Boyd Decl. The Cahill charge states in pertinent part that "the data in the document [furnished by IBM in attempted compliance with the OWBPA] shows that employees in my job category who were over age 40 were more likely to be laid off by respondent." See Exhibit E to the Amended Complaint. Payne filed a Questionnaire in which he stated, "my layoff in San Jose is part of a national trend of age discrimination by IBM against older workers." See Exhibit 3 to Payne Decl. The Syverson charge references a "pattern of age discrimina-

[8] Payne worked for IBM in California; Boyd, Cahill and Syverson worked for IBM in Vermont; Rivera and Moczan worked for IBM in New York; Marsh worked everywhere but filed his charge in Washington. California, Vermont, New York and Washington are 300-day deferral states. 29 U.S.C. §§1626.7-1626.10. Each of the named Plaintiffs' Declarations shows that s/he filed a charge of age discrimination within 300 days of learning of his or her termination. Syverson Decl., ¶ 6; Boyd Decl., ¶ 4; Cahill Decl., ¶ 3; Marsh Decl., ¶ 4; Payne Decl., ¶ 4; and Rivera Decl., ¶ 4. See also Moczan Decl., ¶ 4.

[9] See Boyd Decl., ¶ 4; Cahill Decl., ¶ 3; Payne Decl., ¶ 5; Syverson Decl., ¶ 6; Rivera Decl., ¶ 4; and Marsh Decl., ¶ 4. See also Moczan Decl., ¶ 4.

tion" "buried in the mass of numbers" and information provided by IBM and references an increase in probability of being laid off by age, based upon charts Syverson supplied to the EEOC. See Exhibit B to Amended Complaint. The cover letter to Rivera's charge expressly asked that the EEOC "help us make this a class case." See Exhibit C to Amended Complaint. Rivera's charge and supporting documents reference that numerous other individuals had been laid off in New York, Vermont, Minnesota, California, North Carolina, and elsewhere and provided statistical analyses of the layoffs purporting to show discrimination within various job titles at IBM. *Id.*; see also Exhibit 2 to Rivera Decl. The Marsh charge states that in addition to the fact that Marsh felt that he was discriminated against individually, "I further believe Respondent's layoff policy was discriminatory towards individuals who are 40 years of age and older." See Exhibit D to Amended Complaint. The Moczan charge alleges that of 700 employees terminated by IBM, all but about 100 were over age 40. See Exhibit 1 to Moczan Decl.

While it is true that none of the aforementioned charges and documents expressly states that the charges were filed on behalf of the charging party and other "similarly situated" individuals, this Court's decision in *Church* makes clear that no such magic words are required to maintain a representative action. *Church*, 137 F.R.D. at 301-02. Rather, all that is required is to place the EEOC on notice of the class-based notice of the discrimination. *Id.* at 302. Moreover, as *Church* instructs, in assessing whether the EEOC was placed on notice, "it should suffice that the EEOC has notice from the charge or notice in fact, however served, so that it can begin the conciliation process." *Id.* (emphasis added). Here, the cover letters, information, charts, and documents supplied by Boyd, Cahill, Payne, Syverson, Rivera, Marsh, and Moczan show that the EEOC received substantial notice that the complaints were not limited to the individuals who filed the charges.

That the EEOC regarded these matters as class-based is perhaps best demonstrated by the EEOC's own handling of the cases. Many, albeit not all, of the charges filed against IBM, including those filed by employees living in Arizona, Colorado, New Jersey, New York, North Carolina, Pennsylvania, Vermont, and Washington, were consolidated for handling in the Boston office of the EEOC irrespective of the date of termination or resource action. Young Decl., ¶ 4. Notably, some of

the named plaintiffs (Cahill, Syverson, Rivera, and Maslak), as well as others who have already opted in to file to this suit, received the same answer from the EEOC; the charge was dismissed because the EEOC concluded (wrongly) that the Release complied with the OWBPA. See Exhibits F, G, I, and K to the Amended Complaint. In any event, as this Court stated in *Church*, 137 F.R.D. at 303, "As the Ninth Circuit held in *Albano v. Schering-Plough Corp.*, 912 S.2d 384 (9th Cir. 1990), the EEOC's failure to investigate and conciliate cannot be held against the individual (or the class he represents). What controls is that the EEOC be given an opportunity, not that the EEOC used that opportunity."

Accordingly, the text of the charges filed by the Plaintiffs, the information provided in support of those charges, and the EEOC's own handling of the charges all demonstrate that the EEOC received timely and adequate notice of the class-based nature of these charges. Thus, the Court should conclude that Plaintiffs complied with all procedural prerequisites necessary for the Court to authorize notice of this suit to similarly situated individuals.

B. The Named Plaintiffs Are Similarly Situated To The Proposed Class With Respect To Count I Of The Amended Complaint.

In addition to meeting the procedural prerequisites, Plaintiffs must also show that they are similarly situated to other prospective members of the class. *Church*, 137 F.R.D. at 300. The named plaintiffs in this case seek authorization to represent individuals age 40 and over who have been terminated by IBM since July 7, 2001 (November 3, 2001 in non-deferral states) and who signed IBM's Release in exchange for a severance payment. At the current time, named Plaintiffs seek to show that they are similarly situated to other employees only with respect to Count I of the Amended Complaint, which avers that the language of the Release on its face violates the OWBPA. See Amended Complaint, ¶ 17. The named Plaintiffs do not seek at this time to show that they are similarly situated to other employees with respect to the age-based disparate impact, disparate treatment, and ERISA claims asserted in Counts II, III, IV, and V of the Amended Complaint.[10] In

[10] Should this Court find in IBM's favor that the Release executed by the Plaintiffs on its face complies with the OWBPA, the remaining claims of the Amended Complaint largely would be precluded. Some individuals might still be able to show circumstances unique to them preclude dismissal. Plaintiffs concede that it would be premature and a waste of judicial resources to decide at this time whether they are similarly situated to others for purposes of Counts II, III, and IV and/or the scope of appropriate class or subclasses for those Counts. Since Count V states a claim for violation of

determining whether Plaintiffs are in fact similarly situated to other employees for purposes of the alleged OWBPA violation,[11] this Court does not, however, apply the familiar Rule 23 test. As this Court emphasized in *Church*, 137 F.R.D. at 304-307, a representative action for violation of the provisions of ADEA is not subject to the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. Quoting *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977), this Court declared, *Church*, 137 F.R.D. at 305, "The clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under 216(b)." Unlike with a Rule 23 class action, Plaintiffs here need not show numerosity, commonality, typicality, or (arguably) even adequacy of representation. See *Flores v. Lifeway Foods, Inc*., 289 F. Supp. 1042, 1044 (N.D. Ill. 2003). Rather, as this Court explained in *Church*, 137 F.R.D. at 306:

> [T]he Court agrees with plaintiffs that requiring ADEA plaintiffs to show that common questions of law or fact predominate over questions affecting only individual members under Rule 23(b)(3) is far more stringent a test than the similarly situated requirement under Section 216(b). Because, ADEA is a remedial statute which is to be liberally construed in light of its purpose, the Court believes that ADEA plaintiffs, at least at this stage of the litigation, should not have to show that common questions of law or fact predominate over individual questions.

To the extent that the ability of the named plaintiffs to fairly and adequately protect the interests of the class must be assured, that determination is nowhere near so important in an ADEA action where individuals must opt in rather than opt out. *Id.*

Like this Court, other courts also have concluded that the standard for showing that employees are similarly situated for purposes of notice of an action under the ADEA is far less rigorous than under Rule 23. For example, in *Allen*, 93 F.R.D. at 441, the district court declared, "[T]he better known and more frequently used class action procedures of Rule 23 . . . are not applicable to class actions . . . under the ADEA." The Illinois District Court continued, "The plaintiffs in a § 216(b) class action, however, need not show that their positions are identical, but only that they are similar." *Id.* at 443. Accord: *Schwed*, 159 F.R.D. at 375, stating that putative class

---

ERISA, that claim, unlike the other claims, will be governed by Rule 23. See *Vaszlavik*, 175 F.R.D. at 672, discussing separate requirements for certifying ERISA and ADEA classes.

[11] The OWBPA "imposes specific requirements for releases covering ADEA claims," and is part of the ADEA. 29 U.S.C. § 626(f). *Oubre v. Entergy Operations, Inc.* 522 U.S. 422, 424 (1998).

members need not share identical positions.

This Court's determination in *Church* does not appear to address the precise showing that plaintiffs must make to demonstrate for purposes of notice that they are similarly situated to other potential class members. Elsewhere, the courts are divided as to what showing is necessary. The debate was summarized by the Southern District of Ohio in its decision in *Pritchard v. Dent Wizard International Corp*., 210 F.R.D. 591 (S.D. Ohio 2002). Quoting its prior decision in *Viciedo v. New Horizons Computer, Learning Center of Columbus, Ltd.,* No. 2:01-CV-250, slip op. (S.D. Ohio Dec. 4, 2001), the court there stated:

> Some courts hold that a plaintiff can demonstrate that potential class members are 'similarly situated,' for purposes of receiving notice, based solely upon allegations in a complaint of class-wide illegal practices. *Belcher v. Shoney's, Inc.*, 927 F.Supp. 249, at 251 [(M.D. Tenn. 1996)]. *See, e.g., Allen v. Marshall Field & Co.,* 93 F.R.D. at 438. "other [sic] courts hold that a plaintiff meets this burden by demonstrating some factual support for the allegations before issuance of notice. *Belcher*, 927 F.Supp. at 251. *See, e.g., Jackson v. New York Telephone Co.,* 163 F.R.D. 429, 431 (S.D.N.Y. 1995). However, authorized notice [need only be] based on a modest factual showing. *Severtson v. Phillips Beverage Co.]*, 137 F.R.D. 264, at 266 [(D. Minn. 1991)]. Courts requiring a factual showing 'have considered factors such as whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; and whether evidence of a widespread discriminatory plan was submitted.' *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999) (citations omitted). The *Severtson* court reasoned that [r]equiring a showing that there is some factual basis for the class allegations, however, hardly places an unreasonable burden on the plaintiffs. To obtain court authorization to send the proposed notice, plaintiffs must submit evidence establishing at least a colorable basis for their claim and a class of 'similarly situated' exists. 137 F.R.D. at 267.

Pritchard, 210 F.R.D. at 595-96. See also *Vaszlavik*, 175 F.R.D. at 678-79, where the Colorado District Court declared, "at the notice stage, courts following the *ad hoc* method 'require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan . . .'" As shown below, regardless of whether this Court applies the test employed in *Belcher*, *Allen*, *Vaszlavik*, and *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 406 (D.N.J. 1988) and looks only to the face of the complaint, or the more stringent test advocated by the *Jackson* and *Severtson* courts requiring a modest factual showing, Plaintiffs can readily

demonstrate that they are similarly situated to other protected class members for purposes of notice.

Here, from the face of the Amended Complaint, the named plaintiffs easily can show that they are similarly situated to other potential class members for purposes of the alleged violation of the OWBPA. Paragraphs 15-17 of the Amended Complaint allege that in order to obtain severance pay, contrary to the regulations governing the OWBPA, Plaintiffs and similarly situated employees terminated by IBM were required to sign a confusing Release which was not drafted in plain language calculated to be understood by the average individual. At this stage of the proceedings, that allegation is arguably all that Plaintiffs need show in order to obtain court authorization to provide notice of this action for violation of the OWBPA to potential class members. See *Belcher v. Shoney's, Inc.*, 927 F. Supp. 249, 251 (M.D. Tenn. 1996); *Allen*, 93 F.R.D. at 438.

Even if a greater showing is needed to support the issuance of notice, Plaintiffs exceed that requirement here. In *Schwed*, the district court for the Northern District of New York declared that all that is required at the preliminary stage is for plaintiffs to "describe the potential class within reasonable limits and provide some factual basis from which the court can determine if similarly situated potential plaintiffs exists." *Id.* at 375-76. A "modest factual showing is sufficient to demonstrate that they [named plaintiffs] and potential plaintiffs were victims of a common policy or plan that violated the law." *Realite v. Ark Restaurants Corp.*, 7 F. Supp.2d 303, 306 (S.D.N.Y. 1998), quoted with approval in *Ballaris v. Wacker Silttronic Corp.*, 2001 W.L. 1335809, at *2 (D.Ore. 2001). Plaintiffs here have identified other potential plaintiffs (employees who have been terminated as part of the various resource actions and smaller reductions in force that have occurred throughout the United States since July 7, 2001); have submitted declarations showing that others were terminated and signed the Release; and can submit evidence of a widespread discriminatory plan. Here, IBM has eliminated over 10,000, perhaps as many as 20,000, American jobs since May 2000. Leas Decl., ¶ 3. As other courts have noted, the determination to engage in such a large reduction in force by necessity is made at a high echelon of the corporate structure. In *Hyman v. First Union Corp.*, 982 F.2d 1, 3 (D.D.C. 1997), the District Court stated, "A systematic reduction of the work force is a decision that is obviously made at a high level of the organization," citing *Owens*

v. Bethlehem Mines Corp., 108 F.R.D. 207, 212 (S.D.W. Va. 1985). Here, the Release utilized by IBM has not differed substantively from one resource action or separation to the other. Compare Exhibits L and M to the Amended Complaint with one another and with Exhibits 1-15 of Young Decl.; compare also Exhibit 2 to Leas Declaration with Exhibit 1 to Declaration of David Mazgaj.

In view of the fact that the various Releases executed by IBM employees since 2001 are substantially uniform, and in view of the obvious significance of the Release to IBM, there is more than sufficient evidence at this stage from which to conclude that the language of the Release is part of a corporate plan to provide severance in exchange for a purported waiver of employees' claims against IBM arising out of their terminations. Thus, even without the benefit of discovery, plaintiffs easily satisfy the requirement in *Church* that they make a preliminary showing that the proposed opt-in plaintiffs are similarly situated to the proposed class with respect to Count I of the Amended Complaint for purposes of notice.[12]

C. The Scope Of The Class For Purposes Of The Alleged Violation Of The OWBPAContained In Count I Of The Amended Complaint Should Be All Individuals Age 40 And Over Terminated By IBM On Or After July 7, 2001 or November 3, 2001, Depending On Whether The Individual Resided In A Deferral Or Non-Deferral State.

Based upon the timing of the named plaintiffs' EEOC charges, for purposes of notice of the alleged violation of the OWBPA contained in Count I of the Complaint the Court should sanction notice to all individuals who signed the Release age 40 and over who have been terminated by IBM on or after July 7, 2001 who reside in a deferral state, or on or after November 3, 2001 who reside in a non-deferred state. The *Church* Court defined the scope of the class based upon the named plaintiffs' charges there. Noting that an EEOC charge must be filed within 300 days or 180 days in non-deferral states, based upon the timing of the named plaintiffs' charges, the *Church* court counted back 180 days and 300 days from the earliest-filed EEOC charge. *Church*, 137 F.R.D. at 309-10.

[12] Concerns that the Plaintiffs might later be determined not to be similarly situated to the class do not preclude notice at this time. In *Schwed*, 159 F.R.D. at 375, the district court considered the ramifications of such a circumstance and declared "even where later discovery proves the putative class members to be dissimilarly situated, notice to those preliminarily identified as potential plaintiffs prior to full discovery is appropriate as it may further the remedial purpose of the ADEA." Accord: *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, 676 (S.D.N.Y. 1981), declaring, "[T]he experiences of other employees may well be probative of the existence *vel non* of a discriminatory policy, thereby affecting the merits of the plaintiffs' own claims; and the notice machinery contemplated by the ADEA, by reaching out to potential plaintiffs, may further the statute's remedial purpose."

The Court further determined that because the alleged discrimination was ongoing, plaintiffs in *Church* could seek notification up to the date of the court's order. *Id.* at 310.

Here, the earliest class-based charge filed by any named plaintiff is that of Daniel Moczan.[13] Moczan's charge was filed on May 2, 2002. Counting back 180 days from May 2, 2002 for those in non-deferral states would extend the scope of the class to those terminated on or after November 3, 2001; counting back 300 days would extend the scope of the class to July 7, 2001.

Because of the breadth of the class which plaintiffs seek to represent for purposes of the violation of the OWBPA alleged in Count I of the Amended Complaint, IBM may argue that the class is unmanageable and dissimilar. This Court considered and rejected similar arguments raised in *Church*, and it should do so here. The *Church* court expressly rejected arguments that because plaintiffs there were employed in 112 different locations in 74 various job titles, the class therefore was unmanageable and dissimilar. This Court stated, 137 F.R.D. at 307-308:

> [H]ere plaintiffs have made allegations supported by declarations that the decision making process was highly centralized, unlike that in *Lusardi [v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *vacated in part and modified in part on other grounds*, 122 F.R.D. 463 (D.N.J. 1988)]. Also, plaintiffs persuasively argue that the broad and uniform impact of the defendants [sic] actions should not mitigate against a courts [sic] decision to facilitate notice. In *Heagney v. European American Bank*, 122 F.R.D. 125 (E.D.N.Y. 1988)], the court explained that 'class treatment under the ADEA is not defeated simply because … the plaintiffs performed a variety of jobs in a number of departments and different locations.' Similarly, Subclass C should not be deprived of their right to opt-in to the action simply because they held a variety of different jobs at different locations. The procedural mechanisms by which proposed opt-in plaintiffs left employment, i.e. job elimination, demotion, lay off, discharge, etc. should also not defeat their claim.

This Court added*, Church*, 137 F.R.D. at 308:

> [T]he Court believes the better view is that a class claim is not defeated simply because the proposed class performed a variety of different jobs at different locations, reported to different supervisors, or left employment for different reasons than the named plaintiffs. What governs the scope of the class is whether the named plaintiffs and the class members were all affected by a similar plan infected by

[13] If the Motion for Leave to file Second Amended Complaint is not permitted, then the earliest class-based charge filed by a named plaintiff would be the charge filed on August 23, 2002 by Ruth Alice Boyd. 300 days before the Boyd charge is October 27, 2001; 180 days is February 24, 2002.

discrimination.

Indeed, the Court quoted with approval the district court's opinion in *Heagney*, 122 F.R.D. at 127, quoting *Allen*, 93 F.R.D. 438 at 443, that, "'To deny class treatment would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates against a diverse group of people over a wide geographic range in a number of ways, such as termination, salary, promotions and working conditions.'" *Church*, 137 F.R.D. at 308.

The same rationale applies with equal force here. The declarations supplied by plaintiffs suggest a centralized decision making process, at least with regard to the language of the Release which IBM required individuals to execute in return for severance pay. The Release has a broad (and Plaintiffs' contend, unlawful) impact—the apparent waiver of all claims against IBM. Under these circumstances, applying this Court's decision in *Church*, any argument by IBM that the class is unmanageable or dissimilarly situated should be rejected. The broad scope of the class whom named Plaintiffs seek to represent here is no barrier to notice.[14] Because Plaintiffs have met all of the prerequisites for notice, and because of the significance of this Court's determination with respect to IBM's dispositive motion on both counts and prospective class numbers, this Court should sanction notice now.

3. THE COURT SHOULD CONDITIONALLY CERTIFY A CLASS OF ALL IBM EMPLOYEES AGE 40 AND OVER TERMINATED BY IBM SINCE JULY 7, 2001 (OR NOVEMBER 3, 2001 IN NON-DEFERRAL STATES) WHO SIGNED A RELEASE AND COVENANT NOT TO SUE

Following this Court's teaching in *Church*, since plaintiffs successfully have demonstrated that they are entitled to court-authorized notice, this Court should give conditional approval of the class. In *Church*, 137 F.R.D. at 308, after first concluding that "At this stage, plaintiffs have made a sufficient showing that the proposed class is similarly situated," the Court concluded, "At this stage, conditional approval of the class and court facilitated notice is appropriate." *Id.* The *Church* court's determination to provide conditional certification at the notice stage is consistent with the procedure followed by most other courts. See, e.g., *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987),

[14] The *Church* Court noted that court-sanctioned notice should not be confused with approval of the class. In *Church*, 137 F.R.D. at 307, this Court concluded that in the preliminary stages of litigation, "court facilitation of notice is proper but does not preclude a later determination that the class is not similarly situated."

vacated in part, modified in part on other grounds, 122 F.R.D 463 (D.N.J. 1988); *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 401 (D.N.J. 1988). *Vaszlavik*, 175 F.R.D. at 679 ("Because the court has minimal evidence [at this time] this determination is made using a fairly lenient standard and typically results in 'conditional certification' of a representative class."). Accordingly, since Plaintiffs have met the three-part test established in *Church* for court-facilitated notice, for purposes of Count I of the Amended Complaint this Court should conditionally certify a class of all individuals age 40 and over terminated by IBM since July 7, 2001 in deferral states, and since November 3, 2001 in non-deferral states, who signed the Release.

If necessary, the Court can always adjust the class later or even determine that the class is not similarly situated. In *Ballaris*, 2001 W.L. 1335809, at *3, the Oregon district court noted that "a class can always be adjusted after discovery if necessary." Similarly, this Court in *Church*, referencing *Lusardi* and *Sperling*, declared, "[T]he holding in *Lusardi* is in accord with the district court in *Sperling* which explained that preliminary certification through court approval of notice and facilitation of notice does not preclude a later determination that the class is not similarly situated." Accordingly, conditional class certification is appropriate here.

4. THIS COURT SHOULD ORDER IBM TO PROVIDE PLAINTIFFS IN AN ELECTRONICALLY SUITABLE FORMAT WITH THE NAMES, ADDRESSES, AND DATES OF BIRTH OF SIMILARLY SITUATED EMPLOYEES.

A. The Courts Uniformly Compel Provision Of Names And Addresses

Applying the Supreme Court's decision in *Sperling* and this Court's decision in *Church*, the Court here should compel IBM to provide Plaintiffs with the names, last-known addresses, and dates of birth of employees who are similarly situated to the named plaintiffs. In *Sperling*, 493 U.S. at 170, the Supreme Court sustained the determination of the New Jersey District Court, stating, "The District Court was correct to permit discovery of the names and addresses of the disadvantaged employees." After concluding that notice was warranted, this Court without discussion in *Church*, 137 F.R.D. at 310, ordered defendant there to provide the plaintiffs with the names and current addresses of employees.

The determination to compel discovery of the names and addresses of similarly situated

employees necessarily follows from the Supreme Court's decision in *Sperling*. In *Sperling*, 439 U.S. at 170, the Supreme Court stated, "A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." Accordingly, the Court sustained the Third Circuit's decision which compelled defendant there to provide plaintiffs with the names and address of employees. In *Krueger*, 1993 WL 276058, at *1 (S.D.N.Y. 7/21/93), the Southern District Court for New York stated that *Sperling* not only authorizes but "advocates that the district court exercise its discretion early in the litigation to permit discovery of the names and addresses of discharged employees to ensure that such potential plaintiffs are promptly and accurately notified" about the suit. Accord: *Vaszlavik*, 175 F.R.D. at 682 (ordering notice of names and addresses of putative class members if possible in electronically usable form); *Monroe v. United Airlines, Inc.*, 90 F.R.D. 638, 640 (N.D. Ill. 1981) (ordering disclosure of names, addresses, and dates of birth in ADEA representative action). See also *United States v. Cook*, 795 F.2d 987, 993 (1st Cir. 1986) (ordering early disclosure of names and addresses in FLSA representative action as discovery order).

Indeed, the virtually uniform practice of the courts has been to grant discovery of names and addresses of similarly situated employees once the plaintiffs have demonstrated that they meet the prerequisites to bring suit and that they are similarly situated to the class whom they wish to represent. Summarizing the response of the judiciary to requests by plaintiffs for discovery of names and addresses of similarly situated employees, the District Court in *Hammond v. Lowe's Home Centers, Inc.*, 216 F.R.D. 666, 673 (D. Kan. 2003), stated, "Other lower courts addressing whether to permit discovery of the names and addresses of other similarly-situated employees in section 216(b) FLSA actions have almost universally permitted discovery of this information." Here, since plaintiffs beyond peradventure are similarly situated to other employees who signed the Release in order to obtain severance pay, this Court should compel Defendant to provide Plaintiffs within 15 days with the names and last-known addresses of all similarly situated employees in an electronically suitable

format.[15]

B. The Class Members Should Be Given 120 Days To Opt In With Respect To Count I Of The Amended Complaint Alleging Violation Of The OWBPA.

Because of their diverse locations and the potential size of the class, Plaintiffs request that this Court afford individuals 120 days to opt in to this action from the date IBM certifies to this Court that it has furnished the undersigned counsel in an electronically usable format with the names, addresses, and dates of birth of potential opt in plaintiffs. Analogizing to Rule 23(d), Fed.R.Civ.P., the Third Circuit in *Sperling*, 24 F.3d 463, 471-72 (3rd Cir. 1994), set a cut-off date for closing the opt in class so that the scope of the suit would be limited and made known to the employer within a reasonable period of time. The Appeals Court stated, "If the District Court, pursuant to its case management powers, promptly sets a reasonable cut-off date for closing the opt-in class, the scope of this suit is limited and made known to the defendant employer within a reasonable time after the claims seeking class relief is filed." *Id.* In *Rosen v. Reckitt & Colman, Inc.*, 77 FEP Cases [BNA] 370 (S.D.N.Y. 1994), finding that there was no apparent statute of limitations with regard to the period to opt in, the court determined that it should impose a deadline "consistent with fairness." *Id.* at 372 n.3, citing *Kelley v. Alamo*, 964 F.2d 747, 750 (8th Cir. 1992) (FLSA case stating the courts have authority to set, prospectively, reasonable cutoff date for filing consents). The *Rosen* court permitted potential opt in plaintiffs to file consents within 90 days of notice.

Although this Court in *Church* granted plaintiffs' request for discovery of the names and addresses of individuals and granted plaintiffs' request that the Court authorize notice, the opinion does not recount how long potential plaintiffs were afforded to opt in to the case. Here, given the broad scope of the class, the multiple locations, and the likelihood that numerous questions may be raised, plaintiffs respectfully request that prospective plaintiffs be allowed 120 days to opt in after

[15] Because of the nature of this case, Plaintiffs further request that IBM be required to provide them with the dates of birth of the similarly situated employees. While dates of birth are not critical at this stage, dates of birth will be important to Plaintiffs' claims under the remaining counts of the Amended Complaint. Plaintiffs will need this information for purposes of statistical analysis should the Court deny IBM's dispositive motion. Provision of such information at this stage would not appear to be onerous and may indeed be more efficient than requiring IBM to gather such information at a later date. Plaintiffs request that IBM provide such information in an electronically usable format to help facilitate notice. Information provided electronically can be manipulated for purposes of data organization and, given the nature of IBM's business, may in fact be simpler for IBM to produce than reducing the information to a hard copy.

IBM certifies to this Court that it has provided plaintiffs with names, addresses, and dates of birth as directed by the Court.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court: (1) authorize Plaintiffs to send notice of this action to all employees age 40 and over terminated by IBM since July 7, 2001 in deferral states, and since November 3, 2001 in non-deferral states; (2) conditionally authorize plaintiffs to proceed as representatives of a class of individuals age 40 and over terminated by IBM since July 7, 2001 in deferral states and since November 3, 2001 in non-deferral states with respect to the alleged violations of the OWBPA as asserted in Count I of the Amended Complaint; (3) compel IBM to provide Plaintiffs in an electronically suitable format with the names, last-known addresses, and dates of birth of all similarly situated employees; and (4) permit similarly situated employees 120 days to notify the Court that they wish to opt-in to this action. Two versions of the proposed notice, one for deferral states and one for non-deferral states, and consent form are attached to the Young Declaration as Exhibits 22, 23, and 24.

Dated: February __, 2004

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

By _____
JEFFREY NEIL YOUNG
Attorney for Plaintiffs