WHITFIELD BRYSON &
MASON LLP
Alex R. Straus (SBN: 321366)
alex@wbmllp.com
2716 Ocean Park Blvd.
Santa Monica, CA 90405
Telephone: (310) 450-9689
Facsimile: (310) 496-3176

[ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE]
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARK COMIN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

INTERNATIONAL BUSINES MACHINES CORPORATION,

Defendant.

Case Number: 3:19-cv-07261-JD

PLAINTIFF MARK COMIN'S BRIEF IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

Date: April 16, 2020
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: 11, 19th Floor

United States District Court
Northern District of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND HEARINGS

RULES

I. INTRODUCTION

This case involves a dispute over IBM's commissions scheme in California. IBM routinely misrepresents the terms of the program and what IBM intends to pay to its employees. IBM is able to do that by refusing to provide sales employees with a binding, written contract that outlines how commissions will be paid, as required by California law. For more than 15 years, IBM has successfully argued in court that the commissions scheme is *not* a contract and that employees cannot sue IBM for breach of contract. Recently, some courts have recognized that, as of January 1, 2013, IBM is required to have a contract that governs commissions under California Labor Code § 2751.[1] In other words, if IBM has no commissions contract, as IBM has convinced so many courts, then it has perfected its own violation of section 2751 in California.

In his original complaint, Comin did not allege a claim for breach of contract. However, in late 2019, IBM filed a brief in a similar case that reflected a sudden and dramatic shift in its strategy: there, IBM said that it had an enforceable commissions contract that satisfied section 2751. *Beard v. IBM*, No. 3:18-cv-06783, Dkt. No. 64 at 6-8 (N.D. Cal. Nov. 1, 2019). Given IBM's (apparent) new position, Comin filed an amended complaint, mainly to add an alternative claim for breach of contract. The amended complaint alleges, in relevant part here, two things: (1) primarily, that IBM violated section 2751 because the IPL is *not* an enforceable contract; and (2) in the alternative, if the IPL *is* an enforceable contract, then IBM breached it. IBM is now stuck in a Catch-22 of its own making. Comin will prevail one way or another, but at this point, the case needs to proceed to determine which way it will be.[2]

---

[1] Section § 2751(a) provides as follows: "[w]henever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which commissions shall be computed and paid."

[2] It would help if IBM would actually make clear its position about whether the commissions scheme is an enforceable contract. Comin's primary claim is for violation of section 2751 because of the litany of courts that have agreed with IBM that there is not a contract. Comin reserves the right to argue later that IBM should be judicially estopped from asserting as a fact something that it has claimed in other cases for years is not a fact. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001) (describing the doctrine of judicial estoppel) and *Hughes v. IBM*, No. 2:19-cv-01891, Dkt. No. 24 at 4-7 (E.D. Cal. Jan. 2, 2020) (arguing that IBM is estopped from arguing that the IPL is a contract).

II. FACTUAL BACKGROUND

A. Common Factual Allegations.

IBM is a global technology company that employs sales representatives and managers throughout the United States. (FAC ¶¶ 11, 12). Their compensation is split between a base salary and commissions. (FAC ¶¶ 13, 14). The two most common splits are 55/45 (55% base salary, and 45% sales commissions) and 70/30 (70% base salary, and 30% sales commissions). (*Id.*). Commissions under these plans are uncapped and paid based on "achievement" (i.e., the amount of products/services sold) rather than on assessment of employee contribution. (*Id.* ¶ 17).

At the beginning of each half-year sales period, IBM provides each sales employee with a substantially similar, standardized document called an Incentive Plan Letter ("IPL"). (*Id.* ¶ 22). The IPLs are typically about five pages long and contain some limited information that is specific to each individual sales representative, such as the representative's quota for that period, the territory the sales representative is responsible for, and the rate at which the sales representative will earn commissions for that period. (*Id.* ¶ 23).

The majority of the five pages is devoted to uniform disclaimers. These disclaimers are the same in each sales representative's IPL for each sales period. (*Id.* ¶ 24). Among other things, the disclaimers state that the IPL "is not an express or implied contract or a promise by IBM" to pay commissions to that employee." (*Id.* ¶ 25). IBM does not have any other document that is supposedly a contract with its California-based sales employees who earn commissions regarding the calculation and payment of those commissions. (*Id.* ¶ 26).

In the past several years, IBM has routinely failed to pay employees the commissions reflected by the quotas contained in IPLs and other inputs shown on IBM's online commissions workplace. (*Id.* ¶ 27). As a result, several sales representatives and managers have sued IBM for not paying them commissions that they were owed. (*Id.* ¶ 28). Each time, IBM's defense has been the same: IBM owes nothing because the employees do not have an enforceable contract for the payment of commissions. (*Id.* ¶¶ 29-32).

An enforceable contract protects commissioned sales employees from exactly the type of

bait-and-switch behavior IBM is engaging in, where it promises compensation to sales representatives of a base salary plus uncapped sales commissions, but then unilaterally decides not to pay the commissions on certain occasions. (*Id.* ¶ 37). The situation where an employer "holds all of the cards" with respect to how much to pay in sales commissions is precisely what this statute is designed to protect employees from. (*Id.* ¶ 38). Without an enforceable contract the commissions would simply be discretionary bonuses, which IBM's sales commissions undisputedly are not. (*Id.* ¶ 39).

Because IBM has admitted that it does not have an enforceable contract, IBM's commissions program cannot satisfy the requirements of California Labor Code Section 2751. (*Id.* ¶ 40). Indeed, in *Swafford*, in her Order Granting in Part, Denying in Part, IBM's Motion for Summary Judgment, the Honorable Lucy H. Koh stated that "the Court agrees with Swafford that the IPL is not a contract and that the IPL therefore cannot satisfy the requirements of California Labor Code Section 2751." (*Id.* ¶ 41).

The obvious purpose of section 2751's requirement of a written contract is to legally obligate employers to specify how commissions will be paid and pay them. (*Id.* ¶ 43). If an employer violates section 2751 by not having such a contract, then its employees are harmed because the employer is not obligated to specify and pay commissions under such a contract. (*Id.*) Here, if IBM had complied with section 2751, it would have had enforceable contracts with Plaintiff and the Classes; IBM would have complied with those contracts, or its employees could easily sue if IBM did not, and either way the employees would be in a better situation than they are now. (*Id.* ¶ 43).

B. Comin's Factual Allegations.

Comin began his employment as an IBM sales representative in approximately January 2001. (*Id.* ¶ 45). During his time with IBM, Mr. Comin was responsible for selling various IBM products and services. (*Id.* ¶ 46). At all relevant times, Comin's compensation consisted of a base salary paired with uncapped commissions. (*Id.* ¶ 47).

Each sales period, Comin was provided with an IPL, which described some of the terms of

his commissions plan, as alleged above. (*Id.* ¶ 48). However, in each sales period the IPL expressly stated that it was not an express or implied contract for the payment of commissions and Comin was not provided any other contract for commissions. (*Id.* ¶¶ 49, 50).

During Comin's employment with IBM, three different times IBM refused to pay him the full commissions he earned on deals that he closed. (*Id.* ¶ 51). Each of these situations would have been avoided had IBM provided him with a contract that complied with section 2751. (*Id.* ¶ 52). In each situation, Comin should have received a certain amount under the formula of his IPL, but he received either less or nothing at all. (*Id.* ¶¶ 53-74). Comin left IBM in February 2018 out of frustration with IBM's refusal to pay him his commissions. (*Id.* ¶ 75).

III. ARGUMENT

A. Comin Has Pled Causation For His Section 2751 Claim.

Comin has alleged that IBM violated section 2751 by failing to provide to him and other class members with enforceable contracts governing how their commissions are calculated and paid. Comin was injured by IBM's failure to provide such an enforceable contract because having an enforceable contract is better than not having an enforceable contract. Most importantly, of course, a person can sue if they have an enforceable contract. IBM's violation of section 2751 therefore caused injury to Comin, because he was in a worse place than he would have been had IBM complied with section 2751.

In its motion, IBM argues that Comin has failed to allege that its alleged violation of 2751 caused him any injury. (Br. at 5-8). To make that argument, IBM first misconstrues the nature of the caused harm. IBM characterizes the causation issue as this: "Plaintiff has not alleged *any* facts showing that IBM's failure to provide a written contract under Section 2751 changed his economic position at all. Plaintiff's allegations that, *had* there been an enforceable contact, IBM presumably would have paid him and other employees additional commission is purely speculative and cannot withstand a motion to dismiss." (Br. at 1 (emphasis in original)). Putting aside IBM's cynical suggestion that it may not have complied with an enforceable contact even if one had existed, Comin would have been in a better position had there been an enforceable

contract *not* because IBM necessarily would have complied with the contract, but because Comin could have *sued* IBM if it did not comply with the contract. IBM completely overlooks the fact that enforceable contracts have value, and that the lack of a right to make a breach of contract claim—especially the easy contract claim that would exist here based on the failure to pay commissions laid out by simple math—causes direct harm.

IBM's misconstruing of the causation issue must be intentional, because Comin's amended complaint plainly alleged the causation and the injury: "Plaintiff and the Classes have suffered an injury in fact, including lost money, as a result of IBM's failure to have enforceable written contracts—which presumably IBM would have complied with, *but which could be the basis for an easy breach of contract claim if it did not*." (FAC ¶ 43 (emphasis added)); "[I]f IBM had complied with California Labor Code Section 2751, it would have had enforceable contracts with Plaintiff and the Classes; IBM would have complied with those contracts, *or its employees could easily sue if IBM did not, and either way the employees would be in a better situation than they are now*." (*Id.* (emphasis added)). IBM actually cites these allegations in its brief, but it then ignores the parts italicized above, instead pretending that Comin's claim relies entirely on his hope (apparently naïve and unreasonable!) that IBM would have voluntarily chosen to comply with its contracts. (Br. at 7). To the contrary, Comin was injured not because IBM might have acted in good faith and complied with the enforceable contract; Comin was injured because he could have sued had IBM not acted in good faith and complied with the enforceable contract.

Furthermore, the California State Legislature's manifest purpose in enacting section 2751 was to ensure that employees paid by commissions had a breach of contract remedy if their employers failed to pay them the amounts due. The Legislature may also have hoped that some employers would be less likely to underpay their employees in the first place if there was an enforceable contract in place, but the incentive for employers not to underpay is entirely coextensive with and dependent upon the ability of the employee to sue the employer for underpayment. Consequently, IBM's argument here necessarily implies that the Legislature enacted a statute that had no effect whatsoever. Under IBM's argument, the Legislature required

that employers have enforceable contracts with commissioned employees—but an employer's failure to comply with that clear mandate causes no harm to those commissioned employees. That is absurd. Why would the Legislature have given a right to employees if the lack of that right made no difference? Obviously section 2751 was designed to give something new to employees like Comin, and an employer harms those employees when it fails to give them that.[3]

IBM also argues that Comin's amended complaint "set[s] forth highly individualized reasons underlying each instance of alleged underpayment (or nonpayment) of commissions to Plaintiff, none of which have anything to do with whether Plaintiff's IPL satisfied the requirements of Section 2751." (Br. at 6). That argument blatantly misreads the allegations in the amended complaint. The amended complaint alleges that IBM should have been contractually obligated to pay (and should have paid) Comin and other class members according to the formulas contained in their commissions plan, including primarily the formulas contained in the IPLs. (FAC ¶¶ 23; 27 ("In the past several years, IBM has routinely failed to pay employees the commissions reflected by the quotas contained in IPLs and other inputs shown on IBM's online commission workplace"); 110; 122; 128). In other words, the claim is that IBM should have been obligated to pay (and should have paid) certain amounts easily calculable for Comin and each class member based on their IPLs and related documents. Regarding Comin specifically, the amended complaint clearly alleges the amounts that he was underpaid on each of his three deals at issue. (FAC ¶¶ 54; 61-62; 68; 73). It is IBM's legally insufficient and irrelevant explanation for its actions that supposedly relies on the facts of each deal, but those facts and that explanation does not change the actual claim here: that IBM injured Comin and the class members by not having enforceable contracts to pay them what the IPLs and related documents set out in clear terms, regardless of whatever after-the-fact excuses that IBM might make for why it did not pay those amounts on any

[3] IBM also argues that Comin "'would suffer the same harm' regardless of whether the IPL is ultimately found to satisfy Section 2751's requirements." (Br. at 7-8). That argument is no different than IBM's argument addressed above, and it fails for the same reason. Comin would not "suffer the same harm" regardless of whether the IPL were found to satisfy section 2751, because if the IPL *does not* satisfy the statute, then the IPL is not an enforceable contract and he cannot sue for breach of it, but if the IPL *does* satisfy the statute, then the opposite is true.

given deal for any given person. Indeed, that is exactly why Comin alleged the following about IBM's decision to underpay him on his three deals: "Each of the situations [of underpayment] would have been avoided had IBM provided him with a contract that complied with Cal. Labor Code Section 2751 that set forth how his commissions would be calculated and paid." (FAC ¶ 52). Had IBM actually complied with section 2751, there would have been an enforceable contract—like the IPL but actually enforceable—and the after-the-fact excuses cited by IBM in Comin's case would be irrelevant.[4]

Finally, IBM states that "[u]nder the plain terms of the statute, Section 2751 simply requires that the commission agreements be in writing and be delivered to the employee. Section 2751 does not dictate the terms of a commission agreement, not does it mandate that a commission agreement obligate an employer to pay a particular commission amount." (Br. at 6). As an initial matter, IBM does not argue in its brief that the IPL (or any other document) actually satisfies section 2751, and this statement in IBM's brief standing alone does not constitute such an argument; IBM's argument is only that, even if it did violate section 2751 by not having an enforceable contract, Comin has failed to allege that that caused him any harm. Any broader argument in a future reply brief would be improper.[5]

In any event, any such argument right now would fail, because the amended complaint has alleged: (1) that the IPL itself plainly states that it is not an enforceable contract (FAC ¶ 25); (2) that IBM has consistently claimed for years that the IPL is not an enforceable contract (FAC ¶ 30), meaning that IBM should be judicially estopped from arguing to the contrary now; and (3) one

[4] The fact that IBM chose not to move to dismiss the claim for breach of the IPL is telling. Had IBM done so, it would have made its argument to dismiss the section 2751 claim very difficult. Comin suspects that IBM's strategy is to: (1) ask the Court to dismiss the section 2751 claim now, without having to explicitly admit that the IPL does not satisfy section 2751 because it is not an enforceable contract; and (2) later, after the section 2751 claim is hopefully dismissed, then argue that the IPL is not an enforceable contract to pay commissions.

[5] IBM cites a few cases for general propositions that are undisputed. IBM does not focus on any of those cases, and none of those cases are directly on point here. *See Johnson v. PNC Mortgage*, No. C 14-02976 LB, 2014 WL 6629585, at *6 (N.D. Cal. Nov. 21, 2014); *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1349–50, 90 Cal. Rptr. 3d 589, 625–26 (2009); *In re Turner*, 859 F.3d 1145, 1151 (9th Cir. 2017).

judge in this district recently concluded in denying IBM's motion for summary judgment that the IPL does not satisfy section 2751 (FAC ¶ 41).[6] IBM keeps talking about how the IPL is in writing, how it deals with commissions, and how section 2751 does not mandate any certain amount of commissions…all of which is true but misses the actual and simple point: the IPL is not an enforceable contract, and section 2751 requires an enforceable contract.[7]

B. A Private Right of Action Exists Under Section 2751.

It is undisputed that a violation of section 2751 is a predicate violation of the UCL, and Comin has alleged a violation of the UCL based on a violation of section 2751. However, Comin has also alleged a direct claim under section 2751. IBM argues that there is no such direct claim, but it is wrong.

It is critical to recount the history of section 2751 and its former companion, section 2752. Both provisions were first enacted in 1963, but they only applied to out-of-state employers. Section 2751 required a written contract, and section 2752 provided as follows: "Any employer who does not employ an employee pursuant to a written contract as required by Section 2751 shall be liable to the employee in a civil action for triple damages." *See Lett v. Paymentech*, 81 F. Supp. 2d 992, 94 (N.D. Cal. 1999). In *Lett*, this Court held that both provisions violated the Dormant Commerce Clause and the Equal Protection Clause because they applied only to out-of-state employers. *Id.* at 1000-02.

In 2011, the Legislature decided to fix the problem identified by *Lett*. The main fix, of course, was simply re-writing section 2751 to apply to both out-of-state employers and in-state employers. That was the primary express intent of the bill. Exhibit A (2011 Cal. Stat. ch. 556). The Legislature also decided to get rid of the triple damages provision, and it did that by repealing section 2752. In doing so, the Legislature did *not* intend to remove the ability of people to sue

---

[6] *Swafford v. Int'l Bus. Machines Corp.*, 408 F. Supp. 3d 1131, 1152 (N.D. Cal. 2019).

[7] IBM also neglects to mention that section 2751 requires that the written contract be signed by the employer, and that employers who do not sign the contracts violate the statute. *See Piccarreto v. Presstek, LLC*, 2017 U.S. Dist. LEXIS 137255, at *5 (C.D. Cal. August 24, 2017). Comin has alleged that IBM did not sign any of the IPLs here (FAC ¶ 114), and that allegation by itself would defeat any argument by IBM that is has satisfied section 2751.

under section 2751; rather, the Legislature intended only to remove the ability of employees to obtain triple damages under section 2752. The legislative history says exactly that:

> 3. **Repeal of award of treble damages to address oppositions' concerns**
>
> This bill would repeal the ability of an employee to be awarded treble damages against an employer who fails to provide a written contract detailing the method of computation of commissions to be paid to the employee. Existing law provides that an out-of-state employer who does not employ an employee pursuant to a written contract detailing the method of computation of commissions shall be liable to the employee in a civil action for triple damages. (Lab. Code Sec. 2752.) The *Letts* court held this statute to be in violation of the Commerce Clause because it suffered the same constitutional deficiencies as Labor Code Section 2751 by implication. (Id at p. 998.)
>
> California Employment Law Council (CELC), an opponent of this bill, argues that existing law for commission contracts has worked well and additional reporting requirements could lead to increased litigation. Further, CELC expressed concerned that this bill, by requiring in-state employers to provide a written commission contract with a treble damages penalty under existing law for out-of-state employers, would subject in-state employers to triple damage awards for failing to execute a commission contract. **Accordingly, this bill was amended to repeal the statute that awards treble damages. This revision does not remove an employee's ability to file a claim against an employer who fails to provide the required written contract; rather, the employee will just not be able to receive treble damages for the employer's omission.** The California Chamber of Commerce (CalChamber) and the Civil Justice Association of California (CJAC) were also opposed to the prior version of this bill, but the recent amendments have moved both CalChamber and CJAC to neutral positions.

Exhibit B (Senate Judiciary Committee Legislative History, pp. 4-5 (emphasis added)).

Other statements in the legislative history reiterate that legislative intent, and nothing in the legislative history suggests anything to the contrary. *See* Exhibit C, p. 2 (Labor and Employment Committee Legislative History, p. 2 ("The California Chamber of Commerce and the Civil Justice Association of California have stated they are now neutral with the deletion of the treble damages provisions.")); Exhibit D (Senate Rules Committee Legislative History, p. 4 (noting that the bill was "identical" to an earlier one vetoed by Governor Schwarzenegger, which had left section 2752 intact, "with the exception of the repeal of the treble damages for employers who violate the

employment law provisions")). Exhibit D makes clear that the Legislature believed that its repealing section 2752 did nothing but repeal the right to treble damages, since the final bill was "identical" to the earlier bill that left section 2752 intact "with the exception of the repeal of the treble damages…."[8]

IBM is correct that the key question here is whether the Legislature intended to allow a private right of action under section 2751. (Br. at 8 (citing *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 596 (2010)). "Such legislative intent, if any, is revealed through the language of the statute and its legislative history." *Lu*, 50 Cal. 4th at 596 (citing *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 300 (1988)). If the statute is silent as to whether the Legislature intended a private right of action, then "resort to its legislative history is next in order." *Id.* Both *Lu* and *Moradi-Shalal* analyzed legislative history at length. *Lu*, 50 Cal. 4th at 598-601; *Moradi-Shalal*, 46 Cal. 3d at 300-01; *cf. Amalgamated Transit Union Local 1309, AFL–CIO v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006).

Here, the plain language of section 2751 is not clear—in fact, the statute mentions nothing about a private right of action one way or another—and thus legislative history comes into play. And that clearly expressed intention is for employees to have a private right of action under 2751, as they had for 39 years before the statute was struck down. The Legislature made clear that its intent in repealing section 2752 was *only* to remove treble damages.

IBM itself has invoked the legislative history of the 2011 bill in its brief, and thus it cannot now complain about Comin invoking the same. (Br. at 8). Unfortunately, IBM deceptively quoted the legislative history that it included in its brief. IBM wrote the following:

> However, in 2011, the California legislature amended 2751 to apply to both in-state and out-of-state employers, and repealed Section

[8] It makes sense as a matter of the plain text that the Legislature, intending to remove the treble damages provision and not the private right of action, would simply repeal section 2752. Section 2752 did not provide two separable rights, a private right of action and then treble damages; to the contrary, section 2752 was a single sentence that provided a single right, stating that employers "shall be liable to the employee in a civil action for triple damages." That sentence speaks directly to and only to treble damages, and so a reasonable legislator wanting to remove treble damages (but not a private right of action) would simply repeal section 2752.

> 2752. *See* Cal. Lab. Code. § 2752; 2011 Cal. Stat. ch. 556, 2011 Cal. Adv. Legis. Serv. 556 (Lexis) (stating that the 2011 bill that amended Section 2751 "would [also] repeal the provision making an employer who violates [Section 2751] liable in a civil action….).

(Br. at 8). What IBM omitted with its ellipsis is key. Here is the full quote from Chapter 556 of the 2011 Statutes: "In addition, the bill would repeal the provision making an employer who violates this requirement liable in a civil action *for triple damages*." (emphasis added). IBM's omission of the words "for triple damages" wrongfully changes the entire meaning of that sentence. When the sentence is read as a whole, it is clear, and it is consistent with the legislative history's statement that "[t]he revision does not remove an employee's ability to file a claim against an employer who fails to provide the required written contract; rather, the employee will just not be able to receive treble damages for the employer's omission."[9]

IBM correctly states that two other courts have held that section 2751 does not provide a private right of action. (Br. at 8-9 (citing *Swafford* and *Beard*)). However, neither of those courts addressed the legislative history cited here, particularly the language directly on point stating that the repeal of section 2752 was meant to remove the right to treble damages but not the private right of action. The legislative history provided to the Court here, which is clear and dispositive, simply was not considered by those courts.

Not only that, but *Swafford* and *Beard* reached their results not by relying on the plain text of sections 2751 and 2752, but by relying entirely on the fact that section 2752 once existed and then was repealed, reading into that bare fact a legislative intent to remove the private right of action. *Beard v. IBM*, 2019 WL 1516592, at *6 (N.D. Cal. Apr. 7, 2019); *Swafford v. IBM*, 383 F. Supp. 3d 916, 934 (N.D. Cal. 2019). In other words, those courts properly sought to determine the legislative intent, but they simply did not have the key facts of the legislative history before them.

[9] IBM was aware of the full legislative history before it filed the motion to dismiss here, including the key provision quoted in bold above, because counsel for Beard handed up that full legislative history to the Court and IBM's counsel in the hearing on the motion for judgment on the pleadings in *Beard*, which occurred well before IBM filed its motion to dismiss here. (Counsel for Beard first discovered that legislative history in connection with the hearing on the motion for judgment on the pleadings in that case, which was after the courts in *Beard* and *Swafford* had concluded that section 2751 provided no private right of action, the two opinions that IBM now cites, as discussed immediately below.)

This Court, now having the full legislative record before it, can give effect to what the Legislature clearly intended when it repealed section 2752.

Furthermore, the only court that has *actually analyzed* the legislative history of section 2751 has concluded that section 2751 still provides a private right of action even though section 2752 was repealed. *Belderol v. Glob. Tel*Link*, No. CV1305440SJOMANX, 2013 WL 12142537, at *5 (C.D. Cal. Oct. 15, 2013). In *Belderol*, the court held that "[w]hile a claim under Section 2751 can be brought even without Section 2752, it is not the province of the Court, or Defendant's duty, to speculate regarding the nature of Plaintiff's damages or theory of recovery on this claim." In reaching that conclusion, the court noted that "[w]hile Section 2752 has been repealed, and treble damages are no longer available for a violation of Section 2751, an employee can likely still 'bring a claim against an employer who fails to provide the required written contract' but 'the employee will just not be able to receive treble damages for the employer's omission.' Assemb. B. 1396 Hearing 4-5." *Id.* The court in *Belderol*, being the only court that actually analyzed the legislative history, got it right.

Finally, while the Legislature's intent is clear here, to the extent that the Court might conclude otherwise, it's important to note the key principle of California law that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." *Murphy v. Kenneth Cole Prods. Inc.*, 40 Cal. 4th 1094, 1103 (2007). To whatever extent that the intent of the Legislature is unclear here, the tie goes to the employee.

C. IBM's Motion to Strike is Premature and Should be Denied.

First, Rule 23 does not contemplate making decisions on class certification before the pleadings are closed. Before 2004, Rule 23(c)(1)(A) required that the determination whether to certify a class be made "as soon as practicable after commencement of an action." Effective December 1, 2003, this language was amended to require instead that "the court must—at an early practicable time—determine by order to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). According to the Advisory Committee Notes, the "as soon as practicable" language was changed because "[t]ime may be needed to gather information necessary to make the

certification decision." In other words, Rule 23(c) was amended expressly to forestall class action decision-making until after the pleadings have closed and discovery has occurred. *See id.*

Second, many judges in this Court have held that a motion to strike class allegations are not proper at the motion to dismiss stage. *E.g.*, *Swift v. Zynga Game Network, Inc.*, 2010 WL 4569889, at *10 (N.D. Cal. Nov. 3, 2010) (denying motion to strike class action allegations based on Ninth Circuit precedent indicating that Rule 12(f) is not the proper vehicle for such a motion); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 2014 WL 1048710, at *3-4 (N.D. Cal. Mar. 14, 2014); *Clerkin v. MyLife.Com*, 2011 WL 3809912, at *3 (N.D. Cal. Aug. 29, 2011); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2011 WL 2111796, at *13–14 (N.D. Cal. May 26, 2011). Further, "[p]roceeding with a motion to strike almost inevitably is a less efficient way of moving towards a resolution on the merits. Even if the motion were granted as a result of the technical deficiencies in the pleading, leave to amend would be required under nearly all conceivable circumstances." *Lee v. Hertz Corp.*, 330 F.R.D. 557, 562 (N.D. Cal. 2019).

This very Court has disposed of at least four similar motions at the pleading stage because they were premature.[10] *Machlan v. Procter & Gamble Co.*, 77 F. Supp. 3d 954, 964 (N.D. Cal. 2015); *Milan v. Clif Bar & Co.*, 2019 WL 3934918, at *3 (N.D. Cal. Aug. 20, 2019); *Miranda v. Coach, Inc.*, 2015 WL 636373, at *3 (N.D. Cal. Feb. 13, 2015); *Long v. Graco Children's Prod. Inc.*, 2014 WL 7204652, at *1 (N.D. Cal. Dec. 17, 2014). Moreover, two very similar motions to strike class allegations were denied in this district in the past two weeks. *Rice-Sherman v. Big Heart Pet Brands, Inc.*, 2020 WL 1245130, at *15 (N.D. Cal. Mar. 16, 2020); *Taylor v. Shutterfly, Inc.*, No. 18-CV-00266-BLF, 2020 WL 1307043 (N.D. Cal. Mar. 19, 2020). In *Rice-Sherman*, the court concluded: "Striking class allegations at the pleading stage is only appropriate where the

[10] Plaintiff's counsel located only one instance where this Court granted a motion to strike class allegations, and that case, *In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051 (N.D. Cal. 2015), is easily distinguished. Unlike here, that motion sought to strike a nationwide class. *Id.* at 173-74. Unlike here, that motion dealt with a potential conflict between state laws that allowed one type of plaintiff, but only one type, to sue for antitrust injuries. *Id.* at 174. This Court concluded that "the issue of whether the different state's laws conflict will not change significantly as this action progresses," and it struck the nationwide class as a result. *Id.*

defendant presents an argument that completely precludes certification of *any class*, not just the class currently defined in the complaint," and that "[t]his is 'because the shape and form of a class action evolves only through the process of discovery.'" The court in *Taylor* denied the motion to strike because "Defendant's standing argument is not as clear-cut as Defendant would wish and thus is more appropriately addressed at class certification."

Here, IBM does not argue that no class could ever be certified, but only that Comin's proposed class definition is "overly broad" because it allegedly includes employees who didn't suffer an injury. The fundamental premise of IBM's argument is true: putative class members must have suffered an injury. IBM then seeks to limit the scope of who is injured to only those who were not paid according to their commissions formula. IBM seems to concede that those employees suffered an injury, as alleged. But that's the only injury that IBM recognizes. There are, of course, other ways for employees to have suffered injury by IBM's illegal commissions plan and failure to have a contract. For example, some employees likely accepted a lower guaranteed salary because of the higher upside of uncapped commissions, yet there actually was no such upside. Other employees improperly received no credit for certain sales made in their territories, meaning that while the output of their formulas may have been correct, the inputs to their formulas were not. *See, e.g.*, (FAC ¶¶ 53-56). Both of these types of employees suffered a real, ascertainable injury from IBM's conduct, yet both may be excluded from IBM's preferred class definition.

On the other hand, discovery may reveal that there actually were no such injuries and a class that included those employees shouldn't be certified. Even if Comin continued to press this broader class definition after discovery revealed no injury to those employees (which he would not), the Court "could potentially certify a narrower class than the one proposed by Plaintiff." *Winans by & through Moulton v. Emeritus Corp.*, 2014 WL 970177, at *11 (N.D. Cal. Mar. 5, 2014). Notably, "[e]ven where plaintiffs' class definitions are suspicious and may in fact be improper, plaintiffs should be given the opportunity to make the case for certification based on appropriate discovery." *Ramirez v. Baxter Credit Union*, 2017 WL 1064991, at *7 (N.D. Cal. Mar.

31, 2017).[11] And that is exactly why motions like this are not appropriate at this early stage, as this district has held time and time again.

D. Plaintiff Agrees That He Lacks Standing to Seek Prospective Relief.

Comin agrees that he lacks standing to seek injunctive and declaratory relief because he is no longer employed by IBM, and those claims should be dismissed.

E. Plaintiff is Entitled to a Jury Trial On the Non-UCL Claims.

Comin agrees that there is no right to a jury trial on the UCL claim, but he is entitled to a jury trial on the rest of the claims.

IV. CONCLUSION

The partial motion to dismiss should be denied, except as noted above.

Respectfully submitted this 31st day of March, 2020.

/s/ Matthew E. Lee
Matthew E. Lee (*pro hac vice*)
Jeremy R. Williams (*pro hac vice*)
WHITFIELD BRYSON & MASON, LLP
900 W. Morgan Street
Raleigh, NC 27603
Telephone: (919) 600-5000
Facsimile: (919) 600-5035
matt@wbmllp.com
jeremy@wbmllp.com

Mark R. Sigmon (*pro hac vice*)
SIGMON LAW, PLLC
5 West Hargett Street, Suite 1001
Raleigh, North Carolina 27601
Telephone: (919) 451-6311
Facsimile: (919) 882-9057
mark@sigmonlawfirm.com

Attorneys for Plaintiff

[11] The few cases cited by IBM in which courts have granted motions to strike are factually distinguishable. *See, e.g., Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990–91 (N.D. Cal. 2009) (striking class allegations for an express warranty claim where the court already dismissed plaintiff's express warranty claim for failure to adequately plead reliance and timely notice).