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Counsel for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARK BRIGGS, on behalf of himself  
and all others similarly situated,  
  
Plaintiff,  
  
v.  
  
INTERNATIONAL BUSINESS  
MACHINES CORPORATION,  
  
Defendant.

Case No.: 3:21-cv-6645

**CLASS ACTION COMPLAINT**  
**Jury Trial Demanded**

Plaintiff Mark Briggs, individually, and on behalf of all others similarly situated, brings this Class Action Complaint against Defendant International Business Machines Corporation (“IBM”) and alleges the following:

**INTRODUCTION**

1. California Labor Code Section 2751 requires that an employer provide sales representatives who earn commissions with an enforceable written contract setting forth the method by which commissions shall be computed and paid that is signed by the employer.

1           2.       IBM employs hundreds, if not thousands, of sales representatives and  
2 managers throughout California who earn sales commissions. However, IBM does not  
3 provide those employees with a written, signed, enforceable contract regarding their  
4 commissions.

5           3.       Instead, IBM provides its sales representatives with a letter that is not a  
6 contract and that IBM has argued (successfully) in court provides no contractual  
7 obligation to pay commissions at all. IBM's policy is that commissions are uncapped.  
8 IBM explains its commissions plans with PowerPoint type presentations that promise  
9 uncapped sales commissions and encourage sales representatives to exceed their  
10 quotas each sales period.

11           4.       However, IBM often caps sales commissions or otherwise does not pay the  
12 full commissions that are due to sales representatives. As a result, it has been sued  
13 over two dozen times around the country (including at least eight times in California)  
14 for failing to pay sales representatives and managers the commissions they were due.  
15 Each time, IBM has taken the position in court that it was not obligated to pay any  
16 commissions to these employees because it did not have a contract that required  
17 payment of the commissions.

18           5.       IBM's sales representatives and even managers are often surprised to  
19 learn that IBM does not have a binding contract to pay them sales commissions.

20           6.       IBM's bait-and-switch – where it makes sales representatives believe that  
21 they will be paid uncapped sales commissions in accordance with their commissions  
22 formula, and then often does not pay as such – is precisely the type of conduct that the  
23 California Labor Code seeks to deter through its requirement that employers provide  
24 written contracts that set forth the method by which commissions will be computed  
25 and paid to their sales representatives.

26           7.       Plaintiff Mark Briggs is another victim of IBM's blatant disregard for  
27 California's Labor Code. As a manager, his story stems from IBM's capping of sales  
28

1 representative David Swafford's commissions when Mr. Swafford reported to Mr.  
2 Briggs.

3 8. Plaintiff filed this action to recover the damages that he has, and  
4 hundreds of other sales employees in California have, incurred from IBM's wrongful  
5 withholding of sales commissions and to stop IBM's deceptive and unlawful practices  
6 in how they structure and administer commissions for all IBM employees in the State  
7 of California who are on commission incentive plans.

8 **PARTIES**

9 9. Mr. Briggs is a citizen of San Clemente, California, in Orange County.

10 10. Mr. Briggs worked for IBM for over 26 years, from approximately January  
11 1995 through present.

12 11. IBM was incorporated, and is existing, under the laws of the State of New  
13 York.

14 12. IBM's principal place of business is in the State of New York.

15 13. IBM was and is an employer under the California Labor Code and  
16 common law.

17 14. IBM employed Plaintiff and other employees performing sales work for  
18 IBM in California.

19 **JURISDICTION AND VENUE**

20 15. This Court has subject matter jurisdiction over Plaintiff's claims  
21 pursuant to 28 U.S.C. § 1332(d), the Class Action Fairness Act. The amount in  
22 controversy exceeds \$5,000,000 and there are members of the proposed Class who are  
23 citizens of a State different from the State of Citizenship of IBM.

24 16. This Court may exercise personal jurisdiction over IBM because IBM  
25 conducts substantial business in this State and within the Central District of  
26 California, receives substantial compensation and profits from the marketing,  
27

1 distribution, and sales of products and services in this District, and has engaged in the  
2 unlawful practices described in this Complaint in this District.

3 17. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because:  
4 (1) IBM resides and is subject to the Court's personal jurisdiction in this judicial  
5 district; and (2) a substantial part of the events or omissions giving rise to Plaintiff's  
6 claims occurred in this judicial district.

7 **FACTUAL ALLEGATIONS**

8 18. IBM is a global technology company that provides hardware, software,  
9 cloud-based services, and cognitive computing.

10 19. IBM employs sales representatives and managers throughout the United  
11 States that it tasks with selling its products and services.

12 20. During all relevant times, IBM's employees that earn sales commissions  
13 have typically been on one of seven types of commissions plans.

14 21. Typically, under these plans the employees are provided with an annual  
15 compensation number called "on-target earnings" ("OTE") which is what the  
16 individual's total compensation will be if the individual achieves 100% of his/her quota  
17 for the year. The OTE is split between a base salary and commissions. The two most  
18 common splits are 55/45 (where 55% of the compensation comes from the base salary,  
19 and 45% comes from sales commissions) and 70/30 (where 70% of the compensation  
20 comes from a base salary, and 30% comes from sales commissions).

21 22. Three of those commissions plans are categorized as Individual Plans,  
22 three are Pool Plans, and one is categorized as a Services Plan.

23 23. The three Individual Plans are: (1) Individual Quota Plan (IQP), (2)  
24 Absolute Sales Plan – Straight Rate, and (3) Absolute Sales Plan – Opportunity Based.

25 24. Commissions under these plans are uncapped and paid based on  
26 achievement results (i.e., the amount of products and services sold) rather than on an  
27 assessment of employee contribution.

1           25.     The three Pool Plans are: (1) Team Quota Plan, (2) Solutions for Growth  
2 Plan, and (3) Performance Pool Plan.

3           26.     Under the pool plans, a set amount of commissions is divided among  
4 groups of employees based on achievement by the group as a whole.

5           27.     The Services Plan is a commissions plan that is available to executives  
6 and other roles that are focused on large contract delivery, customer satisfaction, and  
7 base growth.

8           28.     IBM splits each calendar year into two sales periods and typically refers  
9 to those as the 1H (first half) and 2H (second half).

10          29.     At the beginning of each sales period, IBM provides each sales  
11 representative with a substantially similar, standardized document called an  
12 Incentive Plan Letter (“IPL”).

13          30.     The IPLs are typically about five pages long and contain some limited  
14 information that is specific to each individual sales representative, such as the  
15 representative’s quota for that period, the territory the sales representative is  
16 responsible for, and the rate at which the sales representative will earn commissions  
17 for that period.

18          31.     The majority of the five pages of each IPL is devoted to uniform  
19 disclaimers. These disclaimers are the same in each sales representative’s IPL for each  
20 sales period.

21          32.     Among other things, the disclaimers prior to 1H 2018 state that the IPL  
22 “is not an express or implied contract or a promise by IBM” to pay commissions to that  
23 employee.

24          33.     Since 1H 2018, IBM has continued to argue in court (successfully) that  
25 the IPL, including post-2018 versions of the IPL, is not a contract and that IBM does  
26 not otherwise have a contractual obligation to pay commissions, which is the whole  
27 point of a commissions contract.



- 1 m. *Tang v. IBM*, Case No. 2014-11444 (Cir. Ct. Fairfax Cty., Va.);  
2 n. *IBM v. Khoury*, Case No. 2016-0258 (Sup. Ct. N.H.);  
3 o. *Rapier v. IBM*, Case No. 1:17-CV-4740 (N.D. Ga.);  
4 p. *Snyder v. IBM*, Case No. 1:16-CV-03596 (N.D. Ga.);  
5 q. *Morris v. IBM*, Case No. 18-CV-0042 (W.D. Tex.);  
6 r. *Choplin v. IBM*, Case No. 1:16-CV-1412 (M.D.N.C.);  
7 s. *Stephenson v. IBM*, Case No. 1:17-CV-1141 (M.D.N.C.);  
8 t. *Vinson v. IBM*, Case No. 1:17-CV-00798 (M.D.N.C.);  
9 u. *Middleton v. IBM*, Case No. 1:18-CV-03724 (N.D. Ga.);  
10 v. *Fessler v. IBM*, Case No. 1:18-CV-00798 (E.D.Va.);  
11 w. *Kingston, Temidis, & Lee v. IBM*, Case No. 156289/2018 (Sup. Ct.  
12 N.Y.);  
13 x. *Lamping v IBM*, 2005 WL 4693547 (W.D. Pa.);  
14 y. *Cashman v IBM*, Case No. 05-10306-RWZ (D. Mass.);  
15 z. *Jensen v IBM*, Case No. 04-CA-1316 (E.D. Va.);  
16 aa. *Rudolph v IBM*, Case No. 09-C-428 (N.D. Ill.);  
17 bb. *Camobreco v. IBM*, Case No. 1:19-CV-10242 (D. Mass.); and  
18 cc. *Martignetti v. IBM*, Case No. 1:18-CV-02431 (D. Md.).

19 39. Several of these cases, including at least *Swafford* and *Beard*, involved  
20 incentive plans for California residents from the last four years.

21 40. Despite both *Swafford* and *Beard* involving claims for unpaid  
22 commissions by sales representatives on 55/45 pay mixes (meaning that 45% of the pay  
23 was expected to come from commissions and not salary), IBM's litigation position in  
24 those cases was that the IPLs at issue "did not create a contractual obligation that  
25 required IBM to pay Plaintiff additional commissions."

26 41. Moreover, IBM argued on appeal in *Middleton* that "Middleton's IPL,  
27 while failing to create any contractual obligations requiring IBM to pay him  
28

1 commissions, was a document that spelled out the parties’ respective rights and  
2 responsibilities regarding the payment of commissions.”

3 42. California Labor Code Section 2751 dictates that “[w]henver an  
4 employer enters into a contract of employment with an employee for services to be  
5 rendered within this state and the contemplated method of payment of the employee  
6 involves commissions, the contract shall be in writing and shall set forth the method  
7 by which the commissions shall be computed and paid.” Cal. Lab. Code § 2751.

8 43. This provision clearly requires that an employer provide a sales  
9 representative whose pay includes sales commissions with an enforceable contract for  
10 the payment of the commissions.

11 44. The California requirement that all employers provide employees earning  
12 commissions with a written commission contract became effective January 1, 2013.

13 45. An enforceable contract protects commissioned sales employees from  
14 exactly the type of bait-and-switch behavior IBM is engaging in, where it promises  
15 compensation to sales representatives and managers of a base salary plus uncapped  
16 sales commissions, but then unilaterally decides not to pay the commissions on certain  
17 occasions.

18 46. The situation where an employer “holds all of the cards” with respect to  
19 how much to pay in sales commissions is precisely what this statute is designed to  
20 protect employees from.

21 47. Without an enforceable contract the commissions would simply be  
22 discretionary bonuses, which IBM’s sales commissions undisputedly are not.

23 48. Because IBM has openly admitted that it does not have an enforceable  
24 contract for the payment of commissions to its employees, IBM’s commissions program  
25 cannot satisfy the requirements of California Labor Code Section 2751.

26 49. Indeed, in *Swafford*, in her Order Granting in Part, Denying in Part,  
27 IBM’s Motion for Summary Judgment, the Honorable Lucy H. Koh stated that “the  
28



1 Court agrees with Swafford that the IPL is not a contract and that the IPL therefore  
2 cannot satisfy the requirements of California Labor Code Section 2751.” When IBM  
3 capped Mr. Swafford commissions, it also capped Mr. Briggs’s commissions because  
4 Mr. Briggs was Mr. Swafford’s manager.

5 50. After Judge Koh’s ruling in *Swafford*, the plaintiff in *Beard* moved for  
6 judgment on the pleadings regarding his claim for violation of California Labor Code  
7 Section 2751. IBM claimed in response that the IPL was a document that satisfied the  
8 statute, although it never admitted that the IPL was an “enforceable contract” and it  
9 never specified the alleged “obligations” that the IPL imposed on IBM.

10 51. Plaintiff and the Classes have suffered an injury in fact, including lost  
11 money, as a result of IBM’s failure to have enforceable written contracts—which  
12 presumably IBM would have complied with, but which could be the basis for an easy  
13 breach of contract claim if it did not. Put another way, the obvious purpose of  
14 California Labor Code Section 2751’s requirement of a written contract is to legally  
15 obligate employers to specify how commissions will be paid and pay them. If an  
16 employer violates California Labor Code Section 2751 by not having such a contract,  
17 then its employees are harmed because the employer is not obligated to specify and  
18 pay commissions under such a contract. Here, if IBM had complied with California  
19 Labor Code Section 2751, it would have had enforceable contracts with Plaintiff and  
20 the members of the Classes; IBM would have complied with those contracts, or its  
21 employees could easily sue if IBM did not, and either way the employees would be in a  
22 better situation than they are now.

23 52. Indeed, any other interpretation would render California Labor Code  
24 Section 2751 a nullity. It would make no difference to employees whether or not their  
25 employer complies with California Labor Code Section 2751: the employer can comply  
26 with that statute, or it can blatantly violate the statute, but neither choice would have  
27 any effect on the employees. Quite obviously that is contrary to the text and purpose

1 of California Labor Code Section 2751, which was designed to and by its plain text does  
2 give employees something: an enforceable obligation from their employer. If their  
3 employer does not give them that enforceable obligation, then they are harmed.  
4 California Labor Code Section 2751 is a mandate, not some gentle suggestion to  
5 employers that causes no harm when it is ignored.

6 **PLAINTIFF'S FACTS**

7 53. Mr. Briggs began his employment as an IBM sales representative in  
8 approximately January 1995.

9 54. He became an IBM manager in 1998 and proceeded to hold various roles  
10 at the managerial level from 1998 to present.

11 55. He has been an individual contributor and manager for OEM Embedded  
12 SW Sales since around April 2013.

13 **IBM Promised Mr. Briggs That His Commissions Were Uncapped**

14 56. IBM managers' compensation consists of a base salary paired with  
15 uncapped commissions based on the achievement of their sales representatives.

16 57. Said another way, everything that a seller sells rolls up to the manager's  
17 achievement.

18 58. At all relevant times, Mr. Briggs's compensation consisted of a base salary  
19 paired with uncapped commissions, and the incentive plan he was on was the  
20 Individual Quota Plan.

21 59. During his time at IBM, Mr. Briggs and other sales employees regularly  
22 received PowerPoint presentations describing the terms of the commission plans being  
23 offered to them. These PowerPoints consisted of over 200 pages worth of slides, and  
24 are collectively referred to as the "Educational Materials." Each year, the Educational  
25 Materials explained that sales commissions were uncapped. Nowhere in the  
26 Educational Materials is there anything stating or even suggesting that sales  
27 commissions may be capped in some instances or that IBM reserves the right to cancel  
28

1 or modify whether and to what extent commissions may be capped. The Educational  
2 Materials are unequivocal and state repeatedly that commissions are uncapped. These  
3 Educational materials were also available for Mr. Briggs, and other sales employees,  
4 to download during the entirety of the sales period (July-December of 2016) and  
5 afterwards.

6 60. IBM made a substantially similar version of this PowerPoint available to  
7 Mr. Briggs each year for the purpose of highlighting and explaining the important  
8 terms of his compensation.

9 61. The PowerPoint was titled “Our Purpose, Values & Practices” relating to  
10 “Your 2016 Incentive Plan,” and it stated that the goal of the incentive plan is “to  
11 design and deliver sales incentives that motivate your performance and are  
12 strategically aligned with IBM’s strategy and transformation.” Page 13 of the  
13 PowerPoint specifically stated that “[e]arnings opportunity remains uncapped.” In  
14 fact, the presentation mentions no less than six times in its 18 pages that “payments”  
15 and/or “earnings opportunit[ies]” are “uncapped.”

16 62. These representations were repeated in sales meetings.

17 63. In fact, IBM instructs its managers to tell sales employees during the  
18 sales kickoff calls at the beginning of each sales period, and the managers actually do  
19 tell them, that commissions are uncapped.

20 These representations are also in line with IBM’s written guidance to its managers,  
21 like Mr. Briggs, which provides:

22 Conditions that may lead to an adjustment include the need  
23 to correct errors or the need to balance with employee’s  
24 contribution to the success of a large sales transaction  
25 (which criteria must be clearly provided to Commissions  
26 team).

1                   **Adjustments must not be done only as a ceiling or cap**  
2                   **on the total earnings allowable to employees.**

3 (Emphasis added).

4           64.     Each sales period, Mr. Briggs was provided with a document titled an  
5 IPL, which described some of the terms of his commissions plan, as alleged above.

6           65.     In each sales period before 1H 2018, the IPL expressly stated that it was  
7 not an express or implied contract for the payment of commissions, as alleged above.  
8 In sales periods after 1H 2018, the IPL did not include that provision, but IBM has  
9 still claimed and argued (successfully) that those IPLs are not contracts.

10          66.     At no time during his employment by IBM was Mr. Briggs provided any  
11 other contract for the payment of his commissions.

12          67.     As an IBM manager, Mr. Briggs's commissions were based on the  
13 achievement and commissions of the sales representatives that reported to him,  
14 including Mr. Swafford.

15                   **Mr. Briggs's Commissions Were Capped**

16          68.     In 2016, Mr. Swafford worked on behalf of IBM to close two large deals of  
17 IBM products and services with Oracle ("Oracle Deal") and Sabre, Inc. ("Sabre Deal").  
18 Mr. Swafford was the sole sales representative responsible for the Oracle Deal and was  
19 one of only two sales representatives responsible for the Sabre Deal.

20          69.     Mr. Swafford's effort in closing the Oracle and Sabre Deals resulted in  
21 total sales of approximately \$3,000,000 of IBM products and services. Mr. Swafford's  
22 achieve detail report (IBM's internal record that reflects the revenue credit  
23 attributable to Mr. Swafford) indicated that the total sales revenue attributable to him  
24 for the second half of 2016 (for all deals he closed, including the Oracle and Sabre  
25 Deals) was approximately \$4,983,275. His quota at the time was \$512,600.

26          70.     On the recognized revenue credit of \$4,983,275, Mr. Swafford earned a  
27 commission of \$966,316 which should have been paid to him in January 2017 after the  
28

1 deals were closed at the end of December 2016. He was not paid any of this commission  
2 in January 2017.<sup>1</sup>

3 71. Mr. Swafford was then initially told that he would be paid in full, as both  
4 his first line manager (Mr. Briggs), and second line manager (Richard Wirtenson)  
5 signed off on the commissions amount of \$966,316 due to Mr. Swafford. Inexplicably,  
6 however, Mr. Swafford's third line manager, Don Leeke, did not approve the  
7 commissions payment.

8 72. Mr. Swafford was then emailed by Mr. Briggs on February 23, 2017, who  
9 told Mr. Swafford that he had just been "informed by IBM that [Mr. Swafford's]  
10 attainment has been **capped** at 250% of plan." (emphasis added). The reason why?  
11 Mr. Briggs told Mr. Swafford in a phone call after that email that IBM decided it was  
12 simply too much money to pay Mr. Swafford the full commissions he had earned, and  
13 thus, IBM would be paying him only a portion of those commissions. In other words,  
14 IBM was capping Mr. Swafford's commissions to limit his earnings.

15 73. Shortly after this, the internal IBM system indicated that Mr. Swafford  
16 would in fact be paid in full the commissions he had earned, including those on the  
17 Oracle and Sabre Deals and that he would receive his payment via direct deposit in  
18 March 2017.

19 74. However, before the payment was to be deposited, Mr. Swafford received  
20 a call from an IBM employee informing him that he would be receiving a paper check,  
21 rather than direct deposit for these commissions.

22 75. The commissions check he then received was in the amount of \$153,384.  
23 When Mr. Swafford inquired about this discrepancy with Mr. Briggs, he was told that  
24 the commissions payments were still being reviewed by IBM.

25 \_\_\_\_\_  
26 <sup>1</sup> Mr. Swafford noted that he was overpaid by \$19,375 in the first half of 2016 due to  
27 an error by IBM. This overpayment was to be deducted from the commissions Mr.  
28 Swafford earned in the second half of 2016. Any discussions herein of the commissions  
due and paid/unpaid to Mr. Swafford disregard this \$19,375.

1           76. Mr. Swafford was then paid another \$563,167 of the commissions from  
2 his sales in the second half of 2016, including the Oracle and Sabre Deals and was told  
3 that would be all that he would be paid for his work closing these two Deals. This left  
4 Mr. Swafford still owed approximately \$249,765 in commissions he had earned that  
5 were arbitrarily capped by IBM.

6           77. The only reason Mr. Swafford was ever provided by IBM for why he was  
7 not paid all of the commissions he had earned, was that IBM thought it was simply too  
8 much money to pay Mr. Swafford, and thus, it was unwilling to pay him in full.

9           78. Indeed, after further attempts to learn why he had not been paid in full,  
10 Mr. Wirtenson, his second line manager emailed him on May 1, 2017, and said: “I made  
11 the recommendation to Don that we pay on all other deals 100% but CAP the Oracle  
12 and Sabre transactions at 150% of your quota on each.”

13           79. This reasoning did not make any sense to Mr. Swafford as he had clearly  
14 been promised uncapped commissions, and in fact, Mr. Swafford had earned nearly a  
15 million dollars worth of uncapped commissions the previous year and been paid every  
16 dime of them.

17           80. IBM did not pay any other sales representatives the \$249,765, or any part  
18 of that, that it owed to and withheld from Mr. Swafford, instead keeping the money for  
19 itself.

20           81. IBM’s decision to cap Mr. Swafford’s commissions by limiting his  
21 attainment led to Mr. Briggs’s commissions being capped as well because his  
22 attainment was similarly limited.

23           82. Mr. Swafford filed suit to recover his commissions, in the Northern  
24 District of California. *See Swafford v. IBM*, Case No. 5:18-CV-04916 (N.D. Cal.) (the  
25 “*Swafford Action*”. IBM’s motions to dismiss and for summary judgment were largely  
26 denied by the Honorable Judge Lucy Koh. Indeed, and of particular relevance here, in  
27 her Order Granting in Part, Denying in Part, IBM’s Motion for Summary Judgment,

1 the Honorable Lucy H. Koh stated that “the Court agrees with Swafford that the IPL  
2 is not a contract and that the IPL therefore cannot satisfy the requirements of  
3 California Labor Code Section 2751.”

4 83. Mr. Swafford ultimately resolved his claims to the mutual satisfaction of  
5 the parties prior to trial.

6 84. Even so, IBM still has not paid Mr. Briggs the full commissions he is owed  
7 for the same deals.

8  
9 **Mr. Briggs Has Recently Learned That IBM Routinely**  
10 **Misrepresents That It Does Not Cap Commissions**

11 85. Recently, aside from the information gained in Mr. Swafford’s case, Mr.  
12 Briggs has learned that IBM has a history of capping commissions.

13 86. The sales field in which Mr. Briggs worked for IBM is highly competitive,  
14 and most employers do not cap commissions. Were IBM to actually tell its sales  
15 representatives and managers that their commissions could be capped, it would be  
16 severely hampered in its efforts to recruit good sales representatives and motivate  
17 them to maximize their efforts to increase their sales. As a result, IBM engages in a  
18 practice whereby it tells its salespeople that their commissions will not be capped, both  
19 verbally and in written documents like the PowerPoint presentation, and then it caps  
20 certain high achievers after the fact.

21 87. There are other cases that have been filed around the country, including  
22 in the Middle District of North Carolina, and the Northern District of California that  
23 are very similar to this one and that have yielded significant discovery. One of those  
24 cases is *Bobby Choplin v. International Business Machines Corporation*, No. 16-cv-  
25 1412-TDS-JEP (“the *Choplin Action*”), which was recently resolved. The plaintiff in the  
26 *Choplin Action* had an IPL that was in relevant part identical or substantially similar  
27 to Mr. Briggs’s IPL, and the plaintiff was shown a PowerPoint presentation that was  
28 in relevant part identical or substantially similar to the PowerPoint presentation

1 shown to them. Furthermore, upon information and belief, many of the other facts and  
2 circumstances surrounding the commissions due to Mr. *Choplin*, and what IBM  
3 actually paid him and why, are similar to the facts and circumstances surrounding the  
4 commissions due to Mr. Briggs, and what IBM actually paid him and why.

5 88. In the *Choplin* Action, the plaintiff took four depositions: (1) a Rule  
6 30(b)(6) deposition of IBM, through corporate designee Richard Martinotti (**Exhibit**  
7 **A**); (2) a deposition of Mr. Choplin's first-line (i.e., immediate) manager, Thomas  
8 Batthany (**Exhibit B**); (3) a deposition of Mr. Choplin's second-line (i.e., two levels up)  
9 manager, Haleh Maleki (**Exhibit C**); and (4) a deposition of Mark Dorsey, a former  
10 IBM Vice President of Software Sales (i.e., one of the highest-level sales managers in  
11 the corporation) (**Exhibit D**). Together, Exhibits A, B, C, and D are referred to as the  
12 "Choplin Depositions." All of this testimony taken under oath in the Choplin case,  
13 including the testimony quoted below, applies equally and fully to Mr. Briggs here.

14 89. The testimony in the Choplin Depositions make clear the following,  
15 among other things: (1) because of the statements in the PowerPoints, and in light of  
16 the IPLs, IBM had an "obligation" not to "cap" the commission for sales employees like  
17 Mr. Choplin and Mr. Briggs; (2) sales employees like Mr. Briggs were entitled to rely  
18 on the statements in the PowerPoints that their commissions would be not be "capped,"  
19 and that reliance was understood by IBM and was reasonable; and (3) what IBM in  
20 fact did, when it reduced the commissions in the way that it did for Mr. Choplin and  
21 Mr. Briggs, was "capping." For example:

22 a. IBM testified as follows:

23 Q. The fourth bullet point, you could read that, please.

24 A. "Earnings opportunity remains uncapped."

25 Q. Okay. So you would agree that IBM when explaining his  
26 compensation plan for the first half of 2015 represented to Bobby  
27



1                   Choplin that his earnings opportunity remains uncapped, wouldn't  
2                   you?

3                   A. Correct.

4                   Q. Would you also agree that IBM represented to Bobby Choplin  
5                   regarding his first half of 2015 compensation plan that payments  
6                   were uncapped?

7                   A. Correct.

8                   Q. So would you agree that IBM had an obligation not to cap Bobby  
9                   Choplin's earnings opportunity?

10                  A. Yes.

11                  Q. Would you agree that IBM had an obligation not to cap Bobby  
12                  Choplin's payments?

13                  A. Correct.

14 (Exhibit A, pp. 18-19.) When asked specifically about whether a salesperson could  
15 reasonably rely on the statements in the PowerPoints, IBM testified:

16                  Q. And it would be reasonable for a salesperson like Bobby Choplin to  
17                  rely on the information in Exhibit 65, 66 and 67 [PowerPoints]  
18                  regarding their compensation plan?

19                  A. Yes.

20 (Exhibit A, pp. 67-68.)

21                  b. Mr. Batthany testified as follows about the statements in the  
22                  PowerPoint that commission would be not be capped:

23                  Q. Okay. It would be reasonable for someone to understand that their  
24                  commission payments were uncapped in the first half of 2015,  
25                  wouldn't it?

26                  A. Yes.

27

28

1 (Exhibit B, p. 79.) Mr. Dorsey similarly testified that, if he were a salesperson and  
2 read the statements in the PowerPoint, he would think that his earnings were  
3 uncapped. (Exhibit D, p. 48.)

4 c. Ms. Maleki testified as follows about what exactly constitutes  
5 capping:

6 Q. What does that mean to you?

7 A. Capped?

8 Q. Right.

9 A. Is when your commissions get reviewed, and you know, you're  
10 supposed to get paid X amount, but you get paid Y.

11 Q. Something different than what your commission formula would  
12 produce?

13 A. Correct.

14 (Exhibit C, p. 25.) Mr. Dorsey straight-up testified that IBM's statements in the  
15 PowerPoints that it did not cap were not true, and that IBM often capped:

16 Q. Okay. Would you agree that under the commissions programs at  
17 IBM while you were there from the 2013 to 2015, that a software  
18 salesperson's earnings opportunity was uncapped?

19 A. No. I don't think any -- I don't think since I was there that their  
20 earnings were ever uncapped....

21 Q. And you see that each of these under the earnings opportunity  
22 block on the left side of the page, the third bullet point says,  
23 "Earnings opportunity remains uncapped"?

24 A. I do see that.

25 Q. And that's each of these four, on page 83, page 84, page 85, page  
26 86, every single one of these says, "Earnings opportunity remains  
27 uncapped"; is that correct?

28

1 A. That's what I'm seeing, yeah.

2 Q. But that's not true from what you remember at IBM?

3 A. That's correct. I don't believe that's true.

4 (Exhibit D, pp. 43, 46-47.)

5 90. The Choplin Depositions also make clear that, despite IBM's claim that  
6 it did not "cap" Mr. Choplin's commission when it reduced his commission payments,  
7 IBM employees used that exact term several times in emails when discussing the  
8 reduction in Mr. Choplin's commission payments.

9 91. Indeed, an email was produced in the Choplin case where Randolph  
10 Moorer specifically "recommend[ed] capping" the commissions of another sales  
11 representative, Mr. Stephenson, on both the LabCorp and BB&T Deals by  
12 approximately \$600,000. (**Exhibit E**).

13 92. IBM's Rule 30(b)(6) designee in the Choplin case testified that IBM is not  
14 "capping" commissions, only "adjusting" them. (Exhibit A, p. 45). He further testified  
15 that "as long as IBM's adjustments are to a specific deal and not all deals, IBM's  
16 position is that's not a cap." (Exhibit A, p. 107).

17 93. Contrary to Mr. Martinotti's testimony on behalf of IBM, other IBM  
18 employees, including managers, executives, and sales representatives, are totally  
19 unaware of the distinction that IBM attempts to make between a "cap" and an  
20 "adjustment" and almost exclusively refer to what IBM does as "capping" or a "cap" on  
21 commissions. (Exhibit B, p. 43; Exhibit C, p. 27; and Exhibit E). Indeed, as noted  
22 above, they use that exact word in their internal emails.

23 94. IBM claims that this usage of the word "cap" is a "mistake." (Exhibit A,  
24 p. 119). On behalf of IBM, Mr. Martinotti testified that sales representatives,  
25 managers, and other executives within IBM commonly use the term "capped" but  
26 shouldn't be using that term; they should be using the term "adjusted" instead.  
27 Specifically, he testified:

28

1 Q: Have you had anyone at IBM come to you after an adjustment and  
2 say, you know, “IBM capped me on this deal?”

3 A: And I would go back to them and say that they didn’t cap you; they  
4 adjusted you.

5 Q. Okay. So, first, let me – that has happened?

6 A. Yes.

7 Q. Okay. So you would agree there is some confusion about the difference  
8 between a cap and an adjustment of commissions?

9 A. The answer is yes, there is confusion or, said differently, they use the  
10 term interchangeably incorrectly.

11 Q. Who is “they”?

12 A. The sales representatives.

13 Q. Okay, okay. You think – and managers too right?

14 A. Right. **Every adjustment they consider to be a cap**, and that’s no  
15 – you know, a cap is not an adjustment and adjustment is not a cap.

16 (Exhibit A, p. 108) (emphasis added).

17 95. IBM also testified that executives such as Mr. Moorer (the executive  
18 actually responsible for determining whether and how much to cap Mr.  
19 Choplin’s commissions on the BB&T Deal) are similarly mistaken when  
20 they use the term cap:

21 Q: So Mr. Moorer here is using the word “cap” and “capping” isn’t he?

22 A: Correct. He is using the word “capping.”

23 Q. Okay. He is making that mistake that you would correct him on,  
24 right?

25 A. Exactly.

26

27

28

1           Q. But Mr. Moorer is the one – is one of the people who exercises  
2           judgment on those of how much or how little to pay in commissions,  
3           right?

4           A. Yes.  
5 (Exhibit A, pp. 119-120).

6           96. Despite IBM’s contention that its sales representatives, managers, and  
7 executives are all “confused” and “mistaken” when they refer to IBM’s conduct as  
8 “capping” commissions, IBM makes no efforts to clarify the confusion in its 200 pages  
9 of Educational Materials. (Exhibit A, pp. 80-82). Indeed, none of the Educational  
10 Materials (where IBM repeatedly promises commissions are uncapped) contain any  
11 qualifiers or fine print of any kind.

12           97. IBM does not clarify this confusion because it knows that if sales  
13 representatives knew that IBM might cap their commissions, it would demotivate the  
14 representatives and lead to lower sales for IBM. (Exhibit A, p. 158).

15           98. IBM has even been told by its managers that it cannot continue to make  
16 representations like that in light of IBM’s actual practices. One manager, Tom  
17 Batthany, wrote an email protesting IBM capping the commissions of a sales  
18 representatives he managed, where he says: “We can no longer have folks stand in the  
19 front of the room and say reps make \$1 million and there are no caps.” (**Exhibit F**).

20           99. Another case pending in the Middle District of North Carolina that is very  
21 similar to this one and that has yielded discovery is *William Stephenson v.*  
22 *International Business Machines Corporation*, No. 17-cv-1141 (“the *Stephenson*  
23 *Action*”). Upon information and belief, the plaintiff in the *Stephenson Action* had an  
24 IPL that was in relevant part identical or substantially similar to Mr. Briggs’s IPL,  
25 and the *Stephenson* plaintiff was shown a PowerPoint presentation that was in  
26 relevant part identical or substantially similar to the PowerPoint presentation shown  
27 to Mr. Briggs. Furthermore, upon information and belief, many of the other facts and  
28

1 circumstances surrounding the commissions due to Mr. Stephenson, and what IBM  
2 actually paid him and why, are similar to the facts and circumstances surrounding the  
3 commissions due to Mr. Briggs, and what IBM actually paid him and why.

4 100. In the *Stephenson* Action, the plaintiff took four depositions: (1) a Rule  
5 30(b)(6) deposition of IBM, through corporate designee Richard Martinotti (**Exhibit**  
6 **G**); (2) a deposition of Mr. Stephenson’s first-line (i.e., immediate) manager, Benjamin  
7 Blackwell (**Exhibit H**); (3) a deposition of Mr. Stephenson’s second-line (i.e., two levels  
8 up) manager, Cleo Clarke (**Exhibit I**); and (4) a deposition of Randolph Moorer, a high-  
9 level IBM executive (**Exhibit J**). Together, Exhibits G, H, I, and J are referred to as  
10 the “Stephenson Depositions.”

11 101. The witnesses in the Stephenson Depositions, including Mr. Martinotti  
12 on behalf of IBM, re-affirmed the truth of the key testimony and admissions in the  
13 Choplin Depositions, including those portions quoted above.

14 102. Furthermore, Mr. Martinotti testified that much of his testimony in the  
15 Choplin case would “apply equally” in Stephenson’s case because the relevant facts—  
16 the PowerPoints, the IPLs, and how and why IBM reduced commissions, etc.—were  
17 the same in both cases. The relevant facts in this case are same as those in both the  
18 *Choplin* Action and the *Stephenson* Action, and thus the Choplin Depositions and the  
19 Stephenson Depositions “apply equally” here.

20 103. The Stephenson Depositions establish the following facts, among many  
21 others: (a) the PowerPoint had key information about commissions that was not in the  
22 IPL, it had more specific information than the IPL, its notes stated that it is the  
23 “primary” source for information about the commissions plan, and IBM itself has  
24 testified that the PowerPoint contains “the most detailed information” about a  
25 salesperson’s commission plan; (b) the witnesses testified that IBM does not lie, and  
26 therefore that it is reasonable for salespeople to believe what IBM says—including its  
27 representation in the PowerPoint that “earnings opportunities” and “payments” were  
28

1 “uncapped”; (c) in fact, IBM testified that salespeople can “take that to the bank” when  
2 IBM says that it does not cap and that it’s “not foolish” for them to believe that, and  
3 that IBM has an “obligation” not to cap as a result; (d) internal IBM emails stated  
4 many times that IBM was “capping” Stephenson when it reduced his commissions as  
5 it did; (e) nowhere did IBM ever define “cap,” although the witnesses testified that  
6 “capping” can occur when IBM reduces a commission on one specific deal; (f) IBM  
7 admitted that, at the very least, “reasonable minds could differ about how they use or  
8 understand the term ‘cap’ or ‘capping’”; (g) IBM reduced Stephenson’s commissions in  
9 order to satisfy a secret internal budget of commissions, based on a percentage of a  
10 deal’s revenue—that is, the sole reason that Stephenson’s commissions were reduced  
11 and the amount of the reduction were both based only on IBM’s desire to reduce the  
12 amount of commissions payable to satisfy the budget; (h) IBM focused on the “high  
13 earners” and “high achievers” when deciding whom to cap, and not, for example, on  
14 those who worked less hard relative to their peers or whose commission was  
15 disproportionate to their work; (i) IBM did not purport to cap or actually cap Mr.  
16 Stephenson based on the Significant Transactions Provision of the IPL (j) one of the  
17 witnesses testified that what IBM did to Stephenson surprised her and did not “make  
18 sense” to her; (k) Martinotti, on behalf of IBM, testified that he did not see the emails  
19 about the reasons for Mr. Stephenson’s commissions reduction until his deposition and  
20 that he did not “agree” with capping to stay on budget and that doing so would be  
21 “questionable”; and (l) Mr. Stephenson’s commissions were actually “earned” under the  
22 terms of the IPL when he was capped.

23         104. The testimony in the prior paragraph applies equally to Mr. Briggs, and  
24 in any event Mr. Briggs alleges that: (a) he was reasonable to rely on IBM’s promise  
25 that it would not cap him; (b) when IBM reduced his commission, it “capped” him, just  
26 like Mr. Stephenson was capped, and that internal emails and testimony from IBM  
27 will confirm as much; (c) IBM capped him to meet a budget or otherwise only to reduce

1 the amount that it had to pay in commissions; and (d) IBM did not purport to rely on  
2 or actually comply with the “Significant Transactions Provision” of the IPL.

3 105. Another case that was filed in the Northern District of California, that is  
4 very similar to this one and that has yielded discovery is the *Swafford* Action, also  
5 referenced extensively above. Mr. Swafford had an IPL that was in relevant part  
6 identical or substantially similar to Mr. Briggs’s IPL, and the plaintiff was shown a  
7 PowerPoint presentation with representations that were in relevant part identical or  
8 substantially similar to the representations made to Mr. Briggs. Furthermore, upon  
9 information and belief, many of the other facts and circumstances surrounding the  
10 commissions due to Mr. Swafford, and what IBM actually paid him and why, are  
11 similar to the facts and circumstances surrounding the commissions due to Mr. Briggs,  
12 and what IBM actually paid him and why.<sup>2</sup>

13 106. In the *Swafford* Action, the plaintiff took four depositions: (1) a Rule  
14 30(b)(6) deposition of IBM, through corporate designee Richard Martinotti (**Exhibit**  
15 **K**); (2) a deposition of Mr. Swafford’s first-line (i.e., immediate) manager, Mark Briggs  
16 (**Exhibit L**); (3) a deposition of Mr. Swafford’s second-line (i.e., two levels up) manager,  
17 Richard Wirtenson (**Exhibit M**); and (4) a deposition of Donald Leeke, a high-level  
18 IBM executive (**Exhibit N**). Together, Exhibits K, L, M, and N are referred to as the  
19 “Swafford Depositions.”

20 107. The witnesses in the Swafford Depositions, including Mr. Martinotti on  
21 behalf of IBM, re-affirmed the truth of the key testimony and admissions in the  
22 Choplin Depositions and the Stephenson Depositions, including those portions quoted  
23 above.

24  
25 <sup>2</sup> As mentioned above, Mr. Swafford reported to Mr. Briggs, who was his manager, and  
26 as an IBM manager, Mr. Briggs’s commissions were based on the achievement and  
27 commissions of the sales representatives that reported to him, including Mr. Swafford.  
28 *See, e.g.*, ¶¶ 57, 68-84, *supra*.



1           108. Furthermore, Mr. Martinotti testified that much of his testimony in the  
2 *Choplin* Action and the *Stephenson* Action would “apply equally” in Mr. Swafford’s case  
3 because the relevant facts—the PowerPoints, the IPLs, and how and why IBM reduced  
4 commissions, etc.—were the same in both cases. The relevant facts in this case are  
5 same as those in both the *Choplin* Action and the *Stephenson* Action, and thus the  
6 *Choplin* Depositions and the *Stephenson* Depositions “apply equally” here.

7           109. The Swafford Depositions establish facts that are similar or identical to  
8 those established in the *Choplin* Depositions and *Stephenson* Depositions, as outlined  
9 above. Most importantly, they establish: (a) that Swafford was reasonable in relying  
10 on IBM’s representation that it would not “cap” his commission; and (b) that IBM  
11 “capped” him when they reduced his commissions.

12           110. The key testimony in the Swafford Depositions applies equally to Mr.  
13 Briggs, and in any event Mr. Briggs alleges that: (a) he was reasonable to rely on IBM’s  
14 promise that it would not cap him; (b) when IBM reduced his commission, it “capped”  
15 him, just like Mr. Swafford was capped, and that internal emails and testimony from  
16 IBM will confirm as much; (c) IBM capped him to meet a budget or otherwise only to  
17 reduce the amount that it had to pay in commissions; and (d) IBM did not purport to  
18 rely on or actually comply with the “Specific Transactions Provision” of the IPL.

19           111. And another case that was filed in the Northern District of California,  
20 that is very similar to this one and that has yielded discovery is *Jerome Beard v.*  
21 *International Business Machines Corporation*, No. 18-cv-06783 (the “*Beard* Action”).  
22 The plaintiff in the *Beard* Action also had an IPL that was in relevant part identical  
23 or substantially similar to Mr. Briggs’s IPL, and the plaintiff was shown a PowerPoint  
24 presentation with representations that were in relevant part identical or substantially  
25 similar to the representations IBM made to Mr. Briggs. Furthermore, upon  
26 information and belief, many of the other facts and circumstances surrounding the  
27 commissions due to Mr. Beard, and what IBM actually paid him and why, are similar

1 to the facts and circumstances surrounding the commissions due to Mr. Briggs, and  
2 what IBM actually paid him and why.

3 112. The witnesses in the depositions in the *Beard* Action (the “Beard  
4 Depositions”) also re-affirmed the truth of the key testimony and admissions in the  
5 Choplin Depositions and the Stephenson Depositions, including those portions quoted  
6 above.

7 113. Furthermore, IBM executive Inhi Cho Suh testified that much of the  
8 testimony in the *Choplin* Action and the *Stephenson* Action would “apply equally” in  
9 the *Beard* Action because the relevant facts—the PowerPoints, the IPLs, and how and  
10 why IBM reduced commissions, etc.—were the same in both cases. The relevant facts  
11 in this case are same as those in both the *Choplin* Action and the *Stephenson* Action,  
12 and thus the Choplin Depositions and the Stephenson Depositions “apply equally”  
13 here.

14 114. The Beard Depositions established facts that are similar or identical to  
15 those established in the Choplin Depositions, Stephenson Depositions, and Swafford  
16 Depositions, as outlined above. Most importantly, they establish: (a) that Beard was  
17 reasonable in relying on IBM’s representation that it would not “cap” his commission;  
18 and (b) that IBM “capped” him when they reduced his commissions.

19 115. The key testimony in the Beard Depositions applies equally to Mr. Briggs  
20 and in any event Mr. Briggs alleges that: (a) he was reasonable to rely on IBM’s  
21 promise that it would not cap him; (b) when IBM reduced his commission, it “capped”  
22 him, just like Mr. Beard was capped, and that internal emails and testimony from IBM  
23 will confirm as much; (c) IBM capped him to meet a budget or otherwise only to reduce  
24 the amount that it had to pay in commissions; and (d) IBM did not purport to rely on  
25 or actually comply with the “Specific Transactions Provision” of the IPL.

26 116. In short, of all of the cases alleging facts similar to those alleged in this  
27 case, eight have yielded significant discovery, two of which proceeded in the Northern  
28

1 District of California. In all of these cases, the discovery has shown that the key facts  
2 alleged were in fact true—and those facts apply equally in this case.

3 117. Mr. Briggs has met all conditions precedent to the bringing of this action.

4 118. The statutes of limitation applicable to Mr. Briggs's claims have been  
5 tolled due to the pendency of another class action that Mr. Briggs is a putative member  
6 of: *Mark Comin v. International Business Machines Corporation*, Case No. 19-cv-  
7 07261-JD (N.D. Cal.).

8 **CLASS ACTION ALLEGATIONS**

9 119. Plaintiff brings this action individually and as a class action pursuant to  
10 Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3) seeking injunctive and monetary relief for  
11 IBM's systematic refusal to provide its sales representatives with contracts for the  
12 payment of their sales commissions and improper withholding of sales commissions.

13 **A. Class Definition**

14 120. Plaintiff brings this action on behalf of the following class and subclass:

15 Class:

16 All persons residing or who resided in the State of  
17 California while working for IBM on a commissions  
18 incentive plan during the Relevant Time Period.

19 Subclass:

20 All persons residing or who resided in the State of  
21 California while working for IBM on a commissions  
22 incentive plan during the Relevant Time Period and that  
23 were not paid the amount of commissions reflected in the  
24 individual's commissions formula.

25 121. The Relevant Time Period is November 4, 2015 through the present.

1 122. Plaintiff reserves the right to amend the Class and SubClass definitions  
2 if discovery and further investigation reveal that the Classes should be expanded,  
3 divided into subclasses under Rule 23(c)(5), or modified in any other way.

4 123. Plaintiff is a member of the Classes he seeks to represent.

5 124. The sales commission practices described herein have been and are  
6 continuing in nature.

7 **B. Rule 23(a) and Rule 23(b)(3) Requirements**

8 **a. Numerosity**

9 125. The proposed Classes are so numerous that joinder of all members is  
10 impracticable.

11 126. Upon information and belief, there are hundreds, perhaps thousands, of  
12 members of the proposed Classes.

13 127. The Class and SubClass members are ascertainable through IBM's  
14 centralized and electronically maintained records.

15 **b. Commonality**

16 128. The prosecution of Plaintiff's claims will require the adjudication of  
17 numerous questions of law and fact common to the Class and the SubClass. The  
18 common questions of law and fact predominate over any questions affecting only  
19 individual Class and SubClass members. The common questions include:

- 20 a. Whether the terms of Defendant's standardized IPLs comply with  
21 California law governing earned commission wages;
- 22 b. Whether Defendant's standardized IPLs comply with Cal. Labor Code  
23 § 2751;
- 24 c. Whether IBM paid less to the Class and SubClass members than the  
25 formulas in the IPLs provided for;
- 26  
27  
28

- d. Whether IBM should be ordered to disgorge all or part of the ill-gotten profits it received by not paying its sales representatives in accordance with their commissions formulas;
- e. Whether the Class and SubClass are entitled to damages and the amount of damages;
- f. The amount of formulaic damages due to each member of the Classes;
- g. Whether IBM should be enjoined from continuing to be out of compliance with Cal. Labor Code § 2751; and
- h. In other ways as shown in discovery.

**c. Typicality**

129. Plaintiff has suffered the same violations and similar injuries as other Class and SubClass members arising out of and caused by IBM's common course of conduct. All Class and SubClass members were subject to the same corporate practices as alleged herein, in particular, by being provided standardized commissions plans that were purportedly not a contract and ultimately being subjected to reduced commissions payments.

130. Plaintiff possesses and asserts each of the claims he asserts on behalf of the proposed Classes.

131. Plaintiff seeks similar relief as other Class and SubClass members.

**d. Adequacy of Representation**

132. Plaintiff is an adequate representative of the Class and SubClass.

133. Plaintiff's interests are coextensive with those of the members of the proposed Classes. Plaintiff is willing and able to represent the proposed Classes fairly and vigorously as he pursues his similar individual claims in this action.

134. Plaintiff will fairly and adequately protect the interests of the Classes because they have no interests antagonistic to, or in conflict with, the Classes that Plaintiff seeks to represent.

1 135. Plaintiff has retained counsel sufficiently qualified, experienced, and able  
2 to conduct this litigation and to meet the time and fiscal demands required to litigate  
3 a class action of this size and complexity.

4 **e. Predominance & Superiority**

5 136. A class action is superior to other available means for the fair and efficient  
6 adjudication of this controversy.

7 137. A class action is superior to other available methods for the fair and  
8 efficient adjudication of the controversy – particularly where individual class members  
9 lack the financial resources to vigorously prosecute a lawsuit against a large  
10 corporation such as IBM.

11 138. Class action treatment will permit a large number of similarly situated  
12 persons to prosecute their common claims in a single forum simultaneously, efficiently,  
13 and without the unnecessary duplication of efforts and expense that numerous  
14 individual actions engender.

15 139. Current IBM employees are often afraid to assert their rights out of fear  
16 of direct or indirect retaliation. Former employees are often fearful of bringing claims  
17 because doing so can harm their employment, future employment, and future efforts  
18 to secure employment. Class actions provide class members who are not named in the  
19 complaint a degree of anonymity, which allows for the vindication of their rights while  
20 eliminating or reducing these risks.

21 140. The prosecution of separate actions by individual members of the Classes  
22 would create a risk of inconsistent and/or varying adjudications with respect to the  
23 individual members of the Classes, establishing incompatible standards of conduct for  
24 IBM and resulting in the impairment of Class members' rights and the disposition of  
25 their interests through actions to which they were not parties.

1 141. The issues in this class action can be decided by means of common, class-  
2 wide proof. In addition, the Court can, and is empowered to, fashion methods to  
3 efficiently manage this action as a class action.

4 142. IBM has acted on grounds generally applicable to Plaintiff and the  
5 proposed Class and SubClass by adopting and following systematic policies, practices,  
6 and procedures that deprive sales employees of earned commission wages. Refusal to  
7 pay all commission wages is IBM's standard operating procedure, rather than a  
8 sporadic occurrence.

9 143. IBM has acted or refused to act on grounds generally applicable to  
10 Plaintiff and the proposed Class and SubClass. IBM's systematic conduct justifies the  
11 requested injunctive and declaratory relief with respect to the Classes as a whole.

12 **f. Injunctive/Declaratory Relief**

13 144. Injunctive, declaratory, and affirmative relief are a predominate form of  
14 relief sought in this case. Entitlement to declaratory, injunctive, and affirmative relief  
15 flows directly and automatically from proof of IBM's refusal to comply with California  
16 Labor Code § 2751 and to pay all commission wages due. In turn, entitlement to  
17 declaratory, injunctive, and affirmative relief forms the factual and legal predicate for  
18 the monetary and non-monetary remedies for individual losses caused by IBM's  
19 systemic refusal to pay full commissions.

20 **C. Requirements of Rule 23(c)(4) Issue Certification**

21 145. Additionally, or in the alternative, the Court may grant "partial" or  
22 "issue" certification under Rule 23(c)(4). Resolution of common questions of fact and  
23 law would materially advance the litigation for all Class and SubClass members.

**FIRST CLAIM FOR RELIEF**  
**(Violation of the California Unfair Competition Law)**

1  
2 146. Plaintiff re-alleges and incorporates the prior paragraphs of this  
3 Complaint as if fully set forth herein.

4 147. IBM is a “person” as defined under California Business & Professions  
5 Code Section 17021.

6 148. California Business and Professions Code § 17200 prohibits any  
7 “unlawful, unfair, or fraudulent business act or practices.” IBM has engaged in  
8 unlawful, fraudulent, and unfair business acts and practices in violation of the UCL.

9 149. IBM’s conduct, as described herein, was and is in violation of the UCL.

10 150. IBM’s conduct violates the UCL in at least the following ways:

- 11 a. by establishing and operating an unfair commissions scheme;
- 12 b. by knowingly refusing to provide a written commissions contract
- 13 to Mr. Briggs and the Classes;
- 14 c. by willfully failing to pay all earned commissions wages to Mr.
- 15 Briggs and the Classes; and
- 16 d. by violating other California laws, including but not limited to,
- 17 California Labor Code Section 2751.

18 151. Furthermore, any failure to pay wages is, by definition, an unfair  
19 business practice under Section 17200.

20 152. IBM’s actions alleged herein caused Plaintiff and the Classes to sell as  
21 many of IBM’s products and services as they could, often at the expense of quality time  
22 with their families that they would not otherwise have sacrificed had they known that  
23 IBM would not pay them the commissions they earned.

24 153. IBM’s actions are unfair because they prop up IBM sales employees with  
25 promises of unlimited earnings opportunities when in reality IBM never intends to  
26 stand by that policy and regularly (secretly) reduces commissions payments.



1           154. Accordingly, Plaintiff and the Classes have suffered injury in fact  
2 including, including lost money, as a result of IBM’s failure to have enforceable written  
3 contracts—which presumably IBM would have complied with, but which could be the  
4 basis for an easy breach of contract claim if it did not. Put another way, the obvious  
5 purpose of California Labor Code Section 2751's requirement of a written contract is  
6 to legally obligate employers to specify how commissions will be paid and pay them. If  
7 an employer violates California Labor Code Section 2751 by not having such a contract,  
8 then its employees are harmed because the employer is not obligated to specify and  
9 pay commissions under such a contract. Here, if IBM had complied with California  
10 Labor Code Section 2751, it would have had enforceable contracts with Plaintiff and  
11 the Classes; IBM would have complied with those contracts, or its employees could  
12 easily sue if IBM did not, and either way the employees would be in a better situation  
13 than they are now.

14           155. IBM should be made to disgorge these ill-gotten gains and to restore to  
15 Mr. Briggs and the Classes the wrongfully withheld wages to which they are entitled,  
16 as well as interest on these wages.

17           156. As alleged above, Labor Code Section 2751 states, in pertinent part:  
18 “Whenever an employer enters into a contract of employment with an employee for  
19 services to be rendered within this state and the contemplated method of payment of  
20 the employee involves commissions, the contract shall be in writing and set forth the  
21 method by which the commissions shall be paid.” The statute also provides that an  
22 employer must give a “signed” copy of the contract to the employee and obtain a receipt  
23 for the contract from the employee.

24           157. As alleged above, IBM violated section 2751 because the IPL  
25 undisputedly is not a contract, and therefore it is not sufficient under section 2751,  
26 and there is no other document that is a written contract sufficient under section 2751.  
27 Furthermore, IBM violated section 2751 because IBM did not sign any sufficient  
28

1 contract (and it did not sign the IPL), nor did IBM obtain a receipt from Plaintiff or  
2 members of the Classes for their receipt of any written contract.

3 158. A violation of section 2751 serves as a predicate violation for a claim  
4 under the UCL.

5 159. Plaintiff alleges a claim against IBM for violation of the UCL for its  
6 unlawful conduct in violating the provision of section 2751, as outlined above.

7 160. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts  
8 or practices by Defendant under Cal. Bus. & Prof. Code § 17200 *et seq.*

9 161. Plaintiff requests that this Court enter such orders or judgments as may  
10 be necessary to enjoin IBM from continuing its unfair, unlawful, and/or deceptive  
11 practices and to restore to Plaintiff and the members of the Classes any money it  
12 acquired by unfair competition, including restitution and/or restitutionary  
13 disgorgement, as provided in Cal. Bus. & Prof. Code § 17203; and for such other relief  
14 set forth below, including, but not limited to Plaintiff's attorneys' fees.

15  
16 **SECOND CLAIM FOR RELIEF**  
**(Unjust Enrichment)**

17 162. Plaintiff re-alleges and incorporates the prior paragraphs of this  
18 Complaint as if fully set forth herein.

19 163. At the specific request of IBM and for its use and benefit, Plaintiff and  
20 the Subclass performed work for IBM in the form of making sales of its software and  
21 services.

22 164. IBM received substantial benefits from the sales obtained by Plaintiff and  
23 other members of the Subclass, including benefits from the receipt and unjust  
24 retention of sales commissions notwithstanding IBM's representations and obligations  
25 not to do so.

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1 165. The full value of the work performed for IBM by Plaintiff and the Subclass  
2 for which they have not been paid is tens of millions of dollars, although the exact  
3 amount is for the jury.

4 166. During and since the performance of the work by Plaintiff and the  
5 Subclass, IBM has failed to pay them and there is due and owing to Plaintiff and the  
6 Subclass from IBM a principal sum amount of tens of millions of dollars.

7 167. It is unjust to allow IBM to retain the benefits received because of IBM's  
8 wrongful conduct and at the expense of Plaintiff and other members of the Subclass.

9 168. IBM's retention of those benefits came at the expense of Plaintiff and  
10 other members of the Subclass.

11 169. IBM's continued retention of some or all of the monies it gained through  
12 its wrongful acts and practices described herein was and is unjust considering the  
13 circumstances of IBM obtaining those monies.

14 170. Plaintiff and the other members of the Subclass are entitled to a judgment  
15 against IBM ordering the restitution and/or disgorgement of all monies, benefits, and  
16 other compensation obtained and retained by the IBM by which it has been unjustly  
17 enriched because of its wrongful conduct, in an amount of *at least* \$75,000 with the  
18 exact amount to be determined at trial.<sup>3</sup>

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Mr. Briggs and the Classes pray the Court for the following  
21 relief:

22 1. That the Court certify the Classes pursuant to Rule 23 of the Federal  
23 Rules of Civil Procedure;

24 \_\_\_\_\_  
25 <sup>3</sup> Plaintiff is sending notice letters today to the California Labor & Workforce  
26 Development Agency and IBM regarding his intent to seek civil penalties pursuant to  
27 the Private Attorneys General Act of 2004 (California Labor Code § 2699 *et seq.*) for  
28 IBM's violations of Labor Code Section 2751. Plaintiff expects to file an amended  
pleading that includes such a claim in this lawsuit if appropriate after that pre-suit  
notice process is complete.



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\* application for admission *pro hac vice*  
forthcoming

