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10 Counsel for Plaintiffs

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA

13 IN RE: IBM SALES COMMISSIONS
14 PRACTICES LITIGATION

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**CONSOLIDATED CLASS ACTION
COMPLAINT
Jury Trial Demanded**

21 Plaintiffs Mark Comin and Mark Briggs, individually, and on behalf of all others
22 similarly situated, bring this Second Amended Class Complaint against Defendant
23 International Business Machines Corporation (“IBM”) and allege the following:

24 **INTRODUCTION**

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

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

7 3. Instead, IBM provides its sales representatives with a letter that
8 expressly states it is not a contract or promise by IBM to pay any sales commissions.
9 IBM explains its commissions plans with PowerPoint type presentations that promise
10 uncapped sales commissions and encourage sales representatives to exceed their
11 quotas each sales period.

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

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

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

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1 common splits are 55/45 (where 55% of the compensation comes from the base salary,
2 and 45% comes from sales commissions) and 70/30 (where 70% of the compensation
3 comes from a base salary, and 30% comes from sales commissions).

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

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

8 19. Commissions under these plans are uncapped and paid based on
9 achievement results (i.e., the amount of products and services sold) rather than on an
10 assessment of employee contribution.

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

13 21. Under the pool plans, a set amount of commissions is divided among
14 groups of employees based on achievement by the group as a whole.

15 22. The Services Plan is a commissions plan that is available to executives
16 and other roles that are focused on large contract delivery, customer satisfaction, and
17 base growth.

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

20 24. At the beginning of each sales period, IBM provides each sales
21 representative with a substantially similar, standardized document called an
22 Incentive Plan Letter (“IPL”).

23 25. The IPLs are typically about five pages long and contain some limited
24 information that is specific to each individual sales representative, such as the
25 representative’s quota for that period, the territory the sales representative is
26 responsible for, and the rate at which the sales representative will earn commissions
27 for that period.

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1 26. The majority of the five pages is devoted to uniform disclaimers. These
2 disclaimers are the same in each sales representative’s IPL for each sales period.

3 27. Among other things, the disclaimers state that the IPL “is not an express
4 or implied contract or a promise by IBM” to pay commissions to that employee.

5 28. IBM does not have any other contract with its California based sales
6 employees who earn commissions regarding the calculation and payment of those
7 commissions.

8 29. In the past several years, IBM has routinely failed to pay employees the
9 commissions reflected by the quotas contained in IPLs and other inputs shown on
10 IBM’s online commissions workplace.

11 30. As a result, several sales representatives and managers have sued IBM
12 for not paying them commissions that they were owed.

13 31. Each time, IBM’s defense has been the same: IBM owes nothing because
14 the employees do not have an enforceable contract for the payment of commissions.
15 IBM claims that the IPL is not an enforceable contract, nor is there any other
16 enforceable contract.

17 32. Indeed, IBM has argued that the IPL is not an enforceable contract, nor
18 is there any other enforceable contract in each of the following cases:

- 19 a. *Gilmour v IBM*, Case No. CV 09-04155 SJO (C.D. Cal.);
- 20 b. *Schwarzkopf v. IBM*, Case No. CV 08-2715 JF (N.D. Cal.);
- 21 c. *Kemp v. IBM*, Case No. 3:09-cv-03683 (N.D. Cal.);
- 22 d. *Pfeister v. IBM*, Case No. 17-cv-03573 (N.D. Cal.);
- 23 e. *Swafford v. IBM*, Case No. 5:18-CV-04916 (N.D. Cal.);
- 24 f. *Beard v. IBM*, Case No. 3:18-CV-06783 (N.D. Cal.);
- 25 g. *Geras v. IBM*, Case No. 10cv-00001-WDM-CBS (D. Colo.);
- 26 h. *Bereuter v. IBM*, Case No. 8:10-cv-327 (D. Neb.);
- 27 i. *Kavitz v IBM*, Case No. 4:08-cv-5591 (S.D.N.Y.);

- 1 j. *Chiaffitelli v. IBM*, Case No. 003150/11 (Sup. Ct. NY, Nassau
- 2 County);
- 3 k. *Pero v. IBM*, Case No. 12-cv-07484 (D.N.J.);
- 4 l. *Wilson v. IBM*, Case No. 1:12-cv-1406 (N.D. Ga.);
- 5 m. *Tang v. IBM*, Case No. 2014-11444 (Cir. Ct. Fairfax Cty., Va.);
- 6 n. *IBM v. Khoury*, Case No. 2016-0258 (Sup. Ct. N.H.);
- 7 o. *Rapier v. IBM*, Case No. 1:17-CV-4740 (N.D. Ga.);
- 8 p. *Snyder v. IBM*, Case No. 1:16-CV-03596 (N.D. Ga.);
- 9 q. *Morris v. IBM*, Case No. 18-CV-0042 (W.D. Tex.);
- 10 r. *Choplin v. IBM*, Case No. 1:16-CV-1412 (M.D.N.C.);
- 11 s. *Stephenson v. IBM*, Case No. 1:17-CV-1141 (M.D.N.C.);
- 12 t. *Vinson v. IBM*, Case No. 1:17-CV-00798 (M.D.N.C.);
- 13 u. *Middleton v. IBM*, Case No. 1:18-CV-03724 (N.D. Ga.);
- 14 v. *Fessler v. IBM*, Case No. 1:18-CV-00798 (E.D.Va.);
- 15 w. *Kingston, Temidis, & Lee v. IBM*, Case No. 156289/2018 (Sup. Ct.
- 16 N.Y.);
- 17 x. *Lamping v IBM*, 2005 WL 4693547 (W.D. Pa.);
- 18 y. *Cashman v IBM*, Case No. 05-10306-RWZ (D. Mass.);
- 19 z. *Jensen v IBM*, Case No. 04-CA-1316 (E.D. Va.);
- 20 aa. *Rudolph v IBM*, Case No. 09-C-428 (N.D. Ill.);
- 21 bb. *Camobreco v. IBM*, Case No. 1:19-CV-10242 (D. Mass.); and
- 22 cc. *Martignetti v. IBM*, Case No. 1:18-CV-02431 (D. Md.).

23 33. Several of these cases, including at least *Swafford* and *Beard*, involved
24 incentive plans from the last four years.

25 34. Despite both *Swafford* and *Beard* involving claims for unpaid
26 commissions by sales representatives on 55/45 pay mixes, IBM's litigation position in
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1 those cases was that the IPLs at issue “did not create a contractual obligation that
2 required IBM to pay Plaintiff additional commissions.”

3 35. Moreover, IBM argued on appeal in *Middleton* that “Middleton’s IPL,
4 while failing to create any contractual obligations requiring IBM to pay him
5 commissions, was a document that spelled out the parties’ respective rights and
6 responsibilities regarding the payment of commissions.”

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

12 37. This provision clearly requires that an employer provide a sales
13 representative whose pay includes sales commissions with an enforceable contract for
14 the payment of the commissions.

15 38. The requirement that all employers provide employees earning
16 commissions with a written commission contract became effective January 1, 2013.

17 39. An enforceable contract protects commissioned sales employees from
18 exactly the type of bait and switch behavior IBM is engaging in, where it promises
19 compensation to sales representatives of a base salary plus uncapped sales
20 commissions, but then unilaterally decides not to pay the commissions on certain
21 occasions.

22 40. The situation where an employer “holds all of the cards” with respect to
23 how much to pay in sales commissions is precisely what this statute is designed to
24 protect employees from.

25 41. Without an enforceable contract the commissions would simply be
26 discretionary bonuses, which IBM’s sales commissions undisputedly are not.

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

4 43. Indeed, in *Swafford*, in her Order Granting in Part, Denying in Part,
5 IBM’s Motion for Summary Judgment, the Honorable Lucy H. Koh stated that “the
6 Court agrees with Swafford that the IPL is not a contract and that the IPL therefore
7 cannot satisfy the requirements of California Labor Code Section 2751.”

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

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

26 46. Indeed, any other interpretation would render California Labor Code
27 Section 2751 a nullity. It would make no difference to employees whether or not their
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1 employer complies with California Labor Code Section 2751: the employer can comply
2 with that statute, or it can blatantly violate the statute, but neither choice has any
3 effect on the employees. Quite obviously that is contrary to the text and purpose of
4 California Labor Code Section 2751, which was designed to and by its plain text does
5 give employees something: an enforceable obligation from their employer. If their
6 employer does not give them that enforceable obligation, then they are harmed.
7 California Labor Code Section 2751 is a mandate, not some gentle suggestion to
8 employers that causes no harm when it is ignored.

9 **PLAINTIFFS' FACTS**

10 **Mark Comin**

11 47. Mr. Comin began his employment as an IBM sales representative in
12 approximately January 2001.

13 48. During his time with IBM, Mr. Comin was responsible for selling various
14 IBM products and services.

15 49. At all relevant times, Mr. Comin's compensation consisted of a base salary
16 paired with uncapped commissions, and the incentive plan he was on was the
17 Individual Quota Plan.

18 50. Each sales period, Mr. Comin was provided with a document titled an
19 IPL, which described some of the terms of his commissions plan, as alleged above.

20 51. However, in each sales period the IPL expressly stated that it was not an
21 express or implied contract for the payment of commissions, as alleged above.

22 52. At no time during his employment by IBM was Mr. Comin provided any
23 other contract for the payment of his commissions.

24 53. During his employment with IBM, three different times IBM refused to
25 pay him the full commissions he earned on deals that he closed.

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1 54. Each of these situations would have been avoided had IBM provided him
2 with a contract that complied with Cal. Labor Code Section 2751 that set forth how his
3 commissions would be calculated and paid.

4 55. The first situation was a deal involving the sale of an IBM product named
5 IBM Cloud Identity to AECOM in December 2016 (“AECOM Deal”).

6 56. The AECOM Deal consisted of revenue to IBM from Mr. Comin’s products
7 of approximately \$6.4 million over the life of the deal. Of this, \$925,000 should have
8 been credited to him for purposes of calculation of his commissions. Instead, IBM paid
9 him nothing for this deal.

10 57. Despite the fact that Mr. Comin performed the work, and closed the deal
11 related to his products, after the AECOM Deal closed IBM assigned all of the revenue
12 attributed to the products and services that he sold to another department, and
13 credited Mr. Comin with nothing from the sale.

14 58. Mr. Comin received credit for commissions purposes for products booked
15 under Software Group part numbers, but not for Global Technology Services part
16 numbers. In the AECOM Deal, IBM decided that it was going to book the revenue
17 under a Global Technology Services part number so that it would not have to pay Mr.
18 Comin his commissions even though he performed the work necessary to close the deal.

19 59. The second time that Mr. Comin was not paid his full commissions was
20 June of 2017.

21 60. This time, Mr. Comin closed a deal for the sale of a third-party product
22 called Carbon Black Response that IBM licensed to Intel (“Carbon Black Deal”).

23 61. The Carbon Black Deal was for two, one-year subscriptions, and totaled
24 \$3.375 million in commissionable revenue to Mr. Comin.

25 62. In the seven previous sales of this product by other IBM sales
26 representatives, IBM paid commissions on the full amount of the sale.

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1 63. After Mr. Comin closed the deal, the commissionable revenue of \$3.375
2 million initially registered in his Attainment report.

3 64. However, after initially registering in his attainment report at the full
4 value as it should have, IBM reversed the credit and only provided him with 10% of
5 the commissionable revenue.

6 65. Prior to Mr. Comin's closure of this deal, there had been seven prior sales
7 of this particular product.

8 66. Each of those seven prior deals resulted in the sales representative being
9 credited with 100% of the commissionable revenue for the deal..

10 67. Mr. Comin was not provided any explanation why he was only credited
11 with 10% of the commissionable revenue on this deal until after he noticed the reversal
12 on his commission statement.

13 68. IBM did not credit the remaining 90% of the sale to any other sales
14 representative. IBM routinely does not credit sales to other employees when it cuts
15 commissions.

16 69. The third time that Mr. Comin was not paid the full commissions he
17 earned was in September 2017, regarding a sale of IBM products and services to Apple
18 ("Apple Deal"). The product Mr. Comin sold to Apple was named IBM Security
19 Gaurdium.

20 70. The Apple Deal closed September 30, 2017 and should have been for
21 approximately \$1.15 million in commissionable revenue to Mr. Comin.

22 71. However, as the Apple Deal was closing, an IBM executive expressed a
23 desire to include other products in the deal and close it as one larger deal known as an
24 ELA.

25 72. One of the products that executive wanted to include was a product called
26 Emptoris. However, Apple needed a component of Emptoris that IBM was going to
27 need to develop separately, which would take approximately 18 months.

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1 82. Said another way, everything that a seller sells rolls up to the manager's
2 achievement.

3 83. At all relevant times, Mr. Briggs's compensation consisted of a base salary
4 paired with uncapped commissions, and the incentive plan he was on was the
5 Individual Quota Plan.
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7 84. During his time at IBM, Mr. Briggs and other sales employees regularly
8 received PowerPoint presentations describing the terms of the commission plans being
9 offered to them. These PowerPoints consisted of over 200 pages worth of slides, and
10 are collectively referred to as the "Educational Materials." Each year, the Educational
11 Materials explained that sales commissions were uncapped. Nowhere in the
12 Educational Materials is there anything stating or even suggesting that sales
13 commissions may be capped in some instances or that IBM reserves the right to cancel
14 or modify whether and to what extent commissions may be capped. The Educational
15 Materials are unequivocal and state repeatedly that commissions are uncapped. These
16 Educational materials were also available for Mr. Briggs, and other sales employees,
17 to download during the entirety of the sales period (July-December of 2016) and
18 afterwards.
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21 85. IBM made a substantially similar version of this PowerPoint available to
22 Mr. Briggs each year for the purpose of highlighting and explaining the important
23 terms of his compensation.
24

25 86. The PowerPoint was titled "Our Purpose, Values & Practices" relating to
26 "Your 2016 Incentive Plan," and it stated that the goal of the incentive plan is "to
27 design and deliver sales incentives that motivate your performance and are
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1 strategically aligned with IBM’s strategy and transformation.” Page 13 of the
2 PowerPoint specifically stated that “[e]arnings opportunity remains uncapped.” In
3 fact, the presentation mentions no less than six times in its 18 pages that “payments”
4 and/or “earnings opportunit[ies]” are “uncapped.”
5

6 87. These representations were repeated in sales meetings.

7 88. In fact, IBM instructs its managers to tell sales employees during the
8 sales kickoff calls at the beginning of each sales period, and the managers actually do
9 tell them, that commissions are uncapped.
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11 89. These representations are also in line with IBM’s written guidance to its
12 managers, like Mr. Briggs, which provides:

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

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

18 (Emphasis added).

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

21 91. In each sales period before 1H 2018, the IPL expressly stated that it was
22 not an express or implied contract for the payment of commissions, as alleged above.
23 In sales periods after 1H 2018, the IPL did not include that provision, but IBM has
24 still claimed and argued (successfully) that those IPLs are not contracts.
25

26 92. At no time during his employment by IBM was Mr. Briggs provided any
27 other contract for the payment of his commissions.
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1 signed off on the commissions amount of \$966,316 due to Mr. Swafford. Inexplicably,
2 however, Mr. Swafford's third line manager, Don Leeke, did not approve the
3 commissions payment.
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5 98. Mr. Swafford was then emailed by Mr. Briggs on February 23, 2017, who
6 told Mr. Swafford that he had just been "informed by IBM that [Mr. Swafford's]
7 attainment has been **capped** at 250% of plan." (emphasis added). The reason why?
8 Mr. Briggs told Mr. Swafford in a phone call after that email that IBM decided it was
9 simply too much money to pay Mr. Swafford the full commissions he had earned, and
10 thus, IBM would be paying him only a portion of those commissions. In other words,
11 IBM was capping Mr. Swafford's commissions to limit his earnings.
12

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

18 100. However, before the payment was to be deposited, Mr. Swafford received
19 a call from an IBM employee informing him that he would be receiving a paper check,
20 rather than direct deposit for these commissions.
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22 101. 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

26 102. Mr. Swafford was then paid another \$563,167 of the commissions from
27 his sales in the second half of 2016, including the Oracle and Sabre Deals and was told
28 that would be all that he would be paid for his work closing these two Deals. This left

1 Mr. Swafford still owed approximately \$249,765 in commissions he had earned that
2 were arbitrarily capped by IBM.

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

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

12 105. This reasoning did not make any sense to Mr. Swafford as he had clearly
13 been promised uncapped commissions, and in fact, Mr. Swafford had earned nearly a
14 million dollars worth of uncapped commissions the previous year and been paid every
15 dime of them.
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17 106. 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.

20 107. 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.
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24 108. Mr. Swafford filed suit to recover his commissions, in the Northern
25 District of California. *See Swafford v. IBM*, Case No. 5:18-CV-04916 (N.D. Cal.) (the
26 “*Swafford Action*”. IBM’s motions to dismiss and for summary judgment were largely
27 denied by the Honorable Judge Lucy Koh. Indeed, and of particular relevance here, in
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1 her Order Granting in Part, Denying in Part, IBM's Motion for Summary Judgment,
2 the Honorable Lucy H. Koh stated that "the Court agrees with Swafford that the IPL
3 is not a contract and that the IPL therefore cannot satisfy the requirements of
4 California Labor Code Section 2751."
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6 109. Mr. Swafford ultimately resolved his claims to the mutual satisfaction of
7 the parties prior to trial.

8 110. Even so, IBM still has not paid Mr. Briggs the full commissions he is owed
9 for the same deals.

10 **CLASS ACTION ALLEGATIONS**

11 111. Plaintiffs bring this action individually and as a class action pursuant to
12 Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3) seeking injunctive and monetary relief for
13 IBM's systematic refusal to provide its sales representatives with contracts for the
14 payment of their sales commissions and improper withholding of sales commissions.
15

16 **A. Class Definition**

17 112. Plaintiffs bring this action on behalf of the following class and subclass:

18 Class:

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

21 Subclass:

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

26 113. The Relevant Time Period is four years prior to the date the complaint
27 was filed in this action through the present.
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1 114. Plaintiffs reserve 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.

4 115. Plaintiffs are members of the Classes they seeks to represent.

5 116. 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**

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

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

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

15 **b. Commonality**

16 120. The prosecution of Plaintiffs' claims will require the adjudication of
17 numerous questions of law and fact common to the class. The common questions of law
18 and fact predominate over any questions affecting only individual Class members. The
19 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
23 Code § 2751;
24 c. Whether IBM paid less to the Class members than the formulas in
25 the IPLs provided for;
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- 1 d. Whether IBM should be ordered to disgorge all or part of the ill-
- 2 gotten profits it received by not paying its sales representatives in
- 3 accordance with their commissions formulas;
- 4 e. Whether the Class is entitled to damages and the amount of
- 5 damages;
- 6 f. The amount of formulaic damages due to each member of the
- 7 Classes;
- 8 g. Whether IBM should be enjoined from continuing to be out of
- 9 compliance with Cal. Labor Code § 2751; and
- 10 h. In other ways as shown in discovery.

11 **c. Typicality**

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

17 122. Plaintiffs possess and assert each of the claims they assert on behalf of
18 the proposed Classes.

19 123. Plaintiffs seeks similar relief as other Class members.

20 **d. Adequacy of Representation**

21 124. Plaintiffs are adequate class representatives.

22 125. Plaintiffs' interests are coextensive with those of the members of the
23 proposed Classes. Plaintiffs are willing and able to represent the proposed Classes
24 fairly and vigorously as they pursues his similar individual claims in this action.

25 126. Plaintiffs will fairly and adequately protect the interests of the Classes
26 because they have no interests antagonistic to, or in conflict with, the Classes that
27 Plaintiffs seek to represent.

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

4 **e. Predominance & Superiority**

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

7 129. 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.

11 130. 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.

15 131. 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.

21 132. 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.

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1 133. 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.

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

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

12 **f. Injunctive/Declaratory Relief**

13 136. 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**

21 137. 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 members.

24 **FIRST CLAIM FOR RELIEF**

25 **(Violation of the California Unfair Competition Law)**

26 138. Plaintiffs re-allege and incorporate the prior paragraphs of this
27 Complaint as if fully set forth herein.

28

1 139. IBM is a “person” as defined under California Business & Professions
2 Code Section 17021.

3 140. California Business and Professions Code § 17200 prohibits any
4 “unlawful, unfair, or fraudulent business act or practices.” IBM has engaged in
5 unlawful, fraudulent, and unfair business acts and practices in violation of the UCL.

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

7 142. IBM’s conduct violates the UCL in at least the following ways:

- 8 a. by knowingly refusing to provide a written commissions contract
9 to Mr. Comin, Mr. Briggs, and the Classes;
- 10 b. by willfully failing to pay all earned commissions wages to Mr.
11 Comin, Mr. Briggs, and the Classes; and
- 12 c. by violating other California laws, including but not limited to,
13 California Labor Code Section 2751.

14 143. Furthermore, any failure to pay wages is, by definition, an unfair
15 business practice under Section 17200.

16 144. IBM’s actions alleged herein caused Plaintiffs and the Classes to sell as
17 many of IBM’s products and services as they could, often at the expense of quality time
18 with their families that they would not otherwise have sacrificed had they known that
19 IBM would not pay them the commissions they earned.

20 145. Accordingly, Plaintiffs and the Classes have suffered injury in fact
21 including, including lost money, as a result of IBM’s failure to have enforceable written
22 contracts—which presumably IBM would have complied with, but which could be the
23 basis for an easy breach of contract claim if it did not. Put another way, the obvious
24 purpose of California Labor Code Section 2751's requirement of a written contract is
25 to legally obligate employers to specify how commissions will be paid and pay them. If
26 an employer violates California Labor Code Section 2751 by not having such a contract,
27 then its employees are harmed because the employer is not obligated to specify and
28

1 pay commissions under such a contract. Here, if IBM had complied with California
2 Labor Code Section 2751, it would have had enforceable contracts with Plaintiff and
3 the Classes; IBM would have complied with those contracts, or its employees could
4 easily sue if IBM did not, and either way the employees would be in a better situation
5 than they are now.

6 146. IBM should be made to disgorge these ill-gotten gains and to restore to
7 Mr. Comin, Mr. Briggs, and the Classes the wrongfully withheld wages to which they
8 are entitled, as well as interest on these wages.

9 147. As alleged above, Labor Code Section 2751 states, in pertinent part:
10 “Whenever an employer enters into a contract of employment with an employee for
11 services to be rendered within this state and the contemplated method of payment of
12 the employee involves commissions, the contract shall be in writing and set forth the
13 method by which the commissions shall be paid.” The statute also provides that an
14 employer must give a “signed” copy of the contract to the employee and obtain a receipt
15 for the contract from the employee.

16 148. As alleged above, IBM violated section 2751 because the IPL
17 undisputedly is not a contract, and therefore it is not sufficient under section 2751,
18 and there is no other document that is a written contract sufficient under section 2751.
19 Furthermore, IBM violated section 2751 because IBM did not sign any sufficient
20 contract (and it did not sign the IPL), nor did IBM obtain a receipt from Plaintiffs or
21 the Class for their receipt of any written contract.

22 149. A violation of section 2751 serves as a predicate violation for a claim
23 under the UCL.

24 150. Plaintiffs alleges a claim against IBM for violation of the UCL for its
25 unlawful conduct in violating the provision of section 2751, as outlined above.

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

28

1 158. It is unjust to allow IBM to retain the benefits received because of IBM's
2 wrongful conduct and at the expense of Plaintiffs and other members of the Subclass.

3 159. IBM's retention of those benefits came at the expense of Plaintiffs and
4 other members of the Subclass.

5 160. IBM's continued retention of some or all of the monies it gained through
6 its wrongful acts and practices described herein was and is unjust considering the
7 circumstances of IBM obtaining those monies.

8 161. Plaintiffs and the other members of the Subclass are entitled to a
9 judgment against IBM ordering the restitution and/or disgorgement of all monies,
10 benefits, and other compensation obtained and retained by the IBM by which it has
11 been unjustly enriched because of its wrongful conduct, in an amount of *at least*
12 \$75,000 with the exact amount to be determined at trial.

13
14
15 **THIRD CLAIM FOR RELIEF**
16 **(In the Alternative, Breach of Contract)**

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

19 163. Plaintiff's primary claim is for violation of the UCL through violation of
20 California Labor Code § 2751, because the IPL does not satisfy California Labor Code
21 § 2751. However, to the extent that IBM claims and/or ultimately proves that the IPL
22 does satisfy California Labor Code § 2751, then Plaintiff and the Classes would have a
23 claim for breach of the IPL. Plaintiff makes this claim only in the alternative to the
24 First Claim for Relief, in the event that IBM claims and/or ultimately proves that the
25 IPL is an enforceable contract for the payment of commissions that would satisfy
26 California Labor Code § 2751.

1 164. If the IPL satisfies California Labor Code § 2751, then it is an enforceable
2 contract. It is supported by consideration and is valid in all respects.

3 165. If the IPL satisfies California Labor Code § 2751, such that the IPL is an
4 enforceable contract, then IBM has breached the Plaintiff's IPL and the similar IPLs
5 of the Class by failing to fulfill its obligations under the IPL, including the obligation
6 to specify the method by which commissions are paid and pay them.

7 166. Plaintiff and the Class have been damaged by the breach of contract, by
8 the difference between amount that the IPL's commissions formulas would produce
9 and the amount that they were actually paid.

10 **FOURTH CLAIM FOR RELIEF**
11 **(Violation of Private Attorneys General Act of 2004,**
12 **Labor Code §§ 2698, *et seq.*)**

13 167. Plaintiff Briggs re-alleges and incorporates the prior paragraphs of this
14 Complaint as if fully set forth herein.

15 168. The policies, acts, and practices described in this Second Amended
16 Complaint were and are unlawful acts in violation of applicable Labor Code sections.

17 The unlawful policies, acts, and practices include, but are not limited to:

- 18 a. Failure to provide a timely, written, signed commission contract as
19 required by Section 2751; and
20
21 b. Failure to provide a commission contract setting forth the method by
22 which commission wages are calculated and paid as required by Section
23 2751.
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25 169. The lack of required commissions contracts, as well as IBM's policies,
26 acts, and practices described in this Second Amended Complaint violate applicable
27 Labor Code sections. These violations are ongoing and continuing.
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