

# **EXHIBIT A**

## SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into between plaintiffs Mark Comin and Mark Briggs, on their own behalf, on behalf of the State of California, and on behalf of Class Members and Subclass Members as defined below, and defendant International Business Machines Corporation (“IBM” or “Defendant”), subject to the approval of the U.S. District Court for the Northern District of California in *Mark Comin, et al. v. International Business Machines Corporation*, No. 3:19-cv-07261-JD. The Parties expressly acknowledge that this Agreement is entered into solely for the purpose of compromising disputed legal and factual issues and that nothing in this Settlement Agreement is an admission of liability or wrongdoing by Defendant.

### I. DEFINITIONS

As used in this Agreement, the following terms shall have the following meanings:

- A. Action. The “Action” means the civil action captioned *Mark Comin, et al. v. International Business Machines Corporation*, No. 3:19-cv-07261-JD.
- B. Agreement. “Agreement” means this Settlement Agreement.
- C. Class Counsel. “Class Counsel” means Milberg Coleman Bryson Phillips Grossman PLLC.
- D. Class Members. “Class Members” means all persons residing or who resided in California while working for IBM on a commissions incentive plan at any time between November 4, 2015 and the date of preliminary approval of the settlement by the Court.
- E. Class Period. “Class Period” means the period from November 4, 2015 through the date of final approval of the settlement by the Court.

- F. Class Representatives. “Class Representatives” means Plaintiffs Mark Comin and Mark Briggs.
- G. Court. “Court” means the U.S. District Court for the Northern District of California.
- H. Effective Date. “Effective Date” means the date upon which any right to appeal the final approval of the settlement expires or, if an appeal is filed, the date any appeal is finally adjudicated and an order affirming the final approval order is final.
- I. Final Judgment. “Final Judgment” means the order granting final approval of the Settlement and entering judgment thereon.
- J. LWDA. “LWDA” means the California Labor and Workforce Development Agency.
- K. Parties. “Parties” means the parties to the Agreement, specifically, plaintiffs Mark Comin and Mark Briggs, individually and on behalf of all Class Members, Subclass Members, the State of California, and the PAGA Group, and International Business Machines Corporation.
- L. PAGA. “PAGA” means the California Labor Code Private Attorneys General Act, Cal. Labor Code §§2698 *et seq.*
- M. PAGA Group. “PAGA Group” means all persons residing or who resided in California while working for IBM on a commissions incentive plan at any time between September 5, 2020 and the date of preliminary approval of the settlement by the Court.

- N. PAGA Period. “PAGA Period” means the period from September 5, 2020 through the date of final approval of the settlement by the Court.
- O. Settlement Administrator. “Settlement Administrator” means KCC Class Action Services, a settlement administrator that was jointly selected by the Parties. IBM shall separately pay the costs of settlement administration.
- P. Settlement Payment. “Settlement Payment” means four million seven hundred fifty thousand dollars (\$4,750,000) which shall be allocated among Plaintiffs, Class Members, Subclass Members, PAGA Group, the LWDA, and Class Counsel (for reasonable attorneys’ fees and costs) in accordance with the terms of this Agreement, subject to Court approval. The Parties agree that, with the exception of the Settlement Administrator costs, under no circumstances shall IBM be obligated to pay any amount over the Settlement Payment under the terms of this Agreement. Neither the Court nor the Settlement Administrator shall have the power to increase the Settlement Payment, unless agreed to by the parties.
- Q. Released Parties. “Released Parties” means IBM and its former and present employees, directors, shareholders, officers, owners, attorneys, agents, insurers, agents, successors, assigns, parents, subsidiaries, affiliates, or legal representatives and any individual or entity which could be jointly liable with IBM and all persons or entities acting by, through, under, or in concert with any of them.
- R. Response Deadline. “Response Deadline” means the deadline by which Class and Subclass Members must deliver or postmark to the Settlement Administrator valid opt out requests, or deliver or postmark to the Clerk of the Court objections to the



Settlement. The Response Deadline will be ninety (90) calendar days from the initial mailing of the Notice by the Settlement Administrator, unless the 90th day falls on a Sunday or Federal holiday, in which case the Response Deadline will be extended to the next day on which the U.S. Postal Service is open.

- S. Subclass Members. “Subclass Members” means all persons residing or who resided in California while working for IBM on a commissions incentive plan at any time from November 4, 2015 through June 30, 2022 who Plaintiffs allege were not paid the amount of commissions reflected in the individual’s commissions formula.

## II. RECITALS

- A. The Action was filed by Plaintiff Mark Comin on November 4, 2019. On August 27, 2021, Plaintiff Mark Briggs filed a separate putative class action, which was amended to add a PAGA representative claim on November 9, 2021. As relevant here, IBM filed a motion to dismiss both as to Briggs’ initial and amended complaints, but neither motion was decided because Plaintiffs filed a motion to consolidate the two actions, which led to the Court consolidating the two actions under the *Comin* caption on December 3, 2021. Plaintiffs then filed a consolidated complaint on December 16, 2021. The consolidated complaint asserted four claims for relief: (1) violation of the California unfair competition law (UCL); (2) unjust enrichment; (3) breach of contract; and (4) violation of California’s Labor Code Private Attorneys General Act (PAGA).
- B. IBM denies all of the allegations against it and denies that it is liable for damages to anyone with respect to the causes of action asserted in the Action. IBM further

denies that class certification is appropriate or that this case should continue as a representative action under PAGA. IBM agrees to class certification solely for settlement purposes only.

- C. On February 23, 2022 the Parties engaged in a private mediation session with an experienced mediator, A. Lee Parks of Henning Mediation, who focuses his practice on employment cases. Mr. Parks has assisted in the resolution of many commissions cases involving IBM. The Parties made progress at that mediation and scheduled a second session with Mr. Parks. Leading up to the second session, the Parties exchanged additional information and continued to make progress.
- D. On May 20, 2022, the Parties engaged in a second private mediation session with Mr. Parks and in arms-length negotiations reached a settlement, the principal terms of which were memorialized in a Memorandum of Understanding signed by the Parties at the mediation.
- E. The Parties maintain their respective convictions as to the merits of the Action. Nonetheless, the Parties recognize that continued litigation, including any appeals, would be protracted, expensive, uncertain, and contrary to their respective best interests. Accordingly, the Parties believe that this Agreement is the most efficient and beneficial method to resolve the Action.

**NOW THEREFORE**, in consideration of the recitals listed above and the promises, releases, and warranties set forth below, and with the Parties' intent to be legally bound and to acknowledge the sufficiency of the consideration and undertakings set forth herein, the Class Representatives, individually and on behalf of the Class and Subclass Members, the PAGA Group, and the State of California, on the one hand, and IBM, on the other hand, agree that the

Action shall be and is finally and fully compromised and settled as to the Released Parties, on the terms and conditions set forth herein, subject to Court approval:

**III. PRELIMINARY APPROVAL, CLASS NOTICE, SETTLEMENT ADMINISTRATION, FINAL SETTLEMENT HEARING, AND EFFECTIVE DATE**

- A. Procedures. The Parties agree to the following procedures for obtaining the Court's preliminary approval of the Settlement, notifying Class and Subclass Members, obtaining final Court approval of the Settlement, and administering the Settlement. The Parties shall cooperate in good faith in attempting to coordinate timelines and distribution schedules for this Settlement, to minimize costs and promote the efficient administration of the Settlement.
- B. Preliminary Approval of Settlement and Request for Preliminary Approval Order. After the Settlement Agreement is executed, the Parties shall jointly file a motion requesting that the Court enter the Preliminary Approval Order preliminarily approving the proposed settlement, certifying the requested classes for purposes of settlement, approving notice, and setting a date for the Final Settlement Hearing. IBM agrees to conditional certification of the Class and Subclass for purposes of this settlement only. The requested Preliminary Approval Order shall:
1. Preliminarily approve the proposed Settlement and this Agreement;
  2. Certify classes of Class Members and Subclass Members for purposes of settlement only;
  3. Approve the plan for providing notice to Class Members and Subclass Members under this Agreement, including the form of the Class Notice;
  4. Approve the procedures for distribution of payments to Class Members

- and Subclass Members under this Agreement;
5. Approve the procedures for Class Members and Subclass Members to object to the Settlement or opt out of the Settlement, including by setting appropriate deadlines;
  6. Approve designation of Class Counsel as counsel for the Class Members and Subclass Members for purposes of settlement, and Plaintiff Comin as class representative of the Class and Subclass and Plaintiff Briggs as PAGA representative for purposes of settlement; and
  7. Schedule the filing deadline for the motion for final approval of the settlement, and schedule the Final Settlement Hearing for final approval of this Settlement and entry of Final Judgment.

Class Counsel will take the lead on preparing the joint motion for preliminary settlement approval and supporting papers, including drafting the proposed Preliminary Approval Order, as well as drafting the joint motion for final settlement approval and any supporting papers. The Parties will cooperate to finalize the joint motion for preliminary settlement approval and supporting papers in form and content mutually agreed to by the Parties. The Parties will also cooperate to finalize the joint motion for final settlement approval and supporting papers in form and content mutually agreed to by the Parties.

- C. Notice of Settlement to Appropriate Government Officials. Pursuant to California Labor Code § 2699(1)(2), Class Counsel shall notify the LWDA of the Settlement on the same day that the parties file the joint motion for preliminary approval of the Settlement.

- D. Class Action Fairness Act (“CAFA”) Notice. No later than ten (10) calendar days following the filing of this Settlement Agreement and the Motion for Preliminary Approval, IBM shall, through the Settlement Administrator, provide notice of this settlement to the United States Attorney General, the Attorney General of the State of California, and the Attorneys General of any state in which a Class or Subclass Member resides as of the existence of this Settlement Agreement, based on the last known mailing address in Defendant’s HR system of record. The Settlement Administrator shall provide counsel for the Parties with a reasonable amount of advance time to review the CAFA notices prior to serving them. Counsel for Defendant will file with the Court the proof of service of the CAFA notice (and only the proof of service) within five (5) business days after such notice is given. The CAFA Notice, to be provided not later than ten (10) days following the filing of this Settlement Agreement and the Motion for Preliminary Approval, shall include the following to the extent available,
1. A copy of the complaint and any amendments to the complaint;
  2. A schedule of upcoming hearing dates, if any, in the Action;
  3. A copy of the Parties’ proposed Notice;
  4. A copy of this Agreement;
  5. A copy of any proposed final judgment or order of dismissal filed with the Court at the time of the motion for preliminary approval;
  6. An estimate of the number of Class Members (and their names if feasible) who reside in the jurisdiction of the entity or agency receiving the notice;
  7. The estimated proportionate share of the entire settlement being offered to

the individuals who reside in the jurisdiction of the entity or agency receiving the notice; and

8. Any written judicial opinion or order of the Court relating to the items (3)-(5) above.

Class Counsel agree that the process described in this Section III(D) complies with 28 U.S.C. § 1715. The parties will seek approval of these procedures for CAFA Notice in the Motion for Preliminary Approval and will include a provision in the proposed final order and/or Final Judgment adjudicating the validity of the CAFA Notice and barring any Class Member's claim to void or avoid the settlement under CAFA.

- E. Class Notice. Notice of the Settlement shall be provided to Class Members. The Parties believe and agree that the following procedures for such notice provide the best practicable notice to Class Members, comply with Fed. R. Civ. P. 23, and are consistent with the requirements of due process:

1. The Settlement Administrator shall be responsible for preparing, printing, and mailing to all Class Members an individualized version of the Class Notice approved by the Court, and such other materials as may be required to be distributed, all as approved and directed by the Court.
2. Not later than 10 days after the Court's entry of an Order of Preliminary Approval, IBM shall provide to the Settlement Administrator a list of all Class Members (the "Class List"), which also identifies each member of the Subclass, that IBM will diligently and in good faith compile from its HR system of record. The Class List will be formatted in Microsoft Office

Excel, will be password protected, and will contain the name, last known telephone number, last known mailing address, and social security number during the Class Period of every Class Member. IBM shall at the same time also provide a Class List to Class Counsel that includes the name of each Class Member and whether they are also members of the Subclass and omits the last known telephone number, last known mailing address, and social security number. The Settlement Administrator shall keep the Class List strictly confidential, except as needed to verify Class Member identity and contact information. The data provided by IBM to the Settlement Administrator pursuant to this Agreement (other than address information) shall be presumed to be accurate.

3. Based on the information in the Class List and the terms of this Settlement, the Settlement Administrator shall promptly calculate an Estimated Settlement Amount for every Class Member and Subclass Member, pursuant to the formulas spelled out herein, to be included in the individualized Notice to be sent to that Class Member, and shall prepare and email a spreadsheet setting forth those calculations to Class Counsel and IBM's counsel no fewer than five business days before mailing the Class Notice to Class Members.
4. No later than 30 days after the Court's entry of an Order of Preliminary Approval, the Settlement Administrator shall mail the Class Notice to every individual on the Class List. Prior to mailing, the Settlement Administrator will perform a search based on the National Change of

Address Database for information to update and correct for any known or identifiable address changes. The mailing shall be sent by first-class U.S. mail, postage pre-paid. Any Class Notices returned to the Settlement Administrator as non-deliverable with a forwarding address on or before the Response Deadline will be sent via regular First-Class mail to the forwarding address within five calendar days of receipt of the forwarding address, and the Settlement Administrator will indicate the date of such re-mailing on the Class Notice.

5. For any Class Notice that is returned by the post office as undeliverable without a forwarding address or addressee unknown, the Settlement Administrator shall perform a skip trace that shall use such public and proprietary electronic resources as are available to the Settlement Administrator that lawfully collect address data from various sources such as utility records, property tax records, motor vehicle registration records, and credit bureaus. If the Settlement Administrator is successful in locating an alternate subsequent address or addresses, the Settlement Administrator shall perform a single re-mailing of the Class Notice to the new address(es) within 10 calendar days of receipt of the undeliverable notice.

6. The Settlement Administrator shall not re-mail Notice Packets after the Response Deadline.

- F. Objecting to the Settlement. Any Class Member who does not opt out of the Settlement may object to the Settlement. The Class Notice shall provide that



Class Members who wish to object to the Settlement must mail or file a written statement of objection to the Clerk of the Court. To be considered, the objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection. Furthermore, the objections must be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, or by filing them in person at any location of the United States District Court for the Northern District of California, and be filed or postmarked on or before the Response Deadline. The Parties may file with the Court written responses to any filed objections together with their motion for final approval of the settlement prior to the Final Settlement Hearing. Class Members who fail to submit written objections in the time and manner specified herein shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement, and the Settlement shall be fully binding upon them (unless they timely opt out).

G. Opting Out of the Settlement.

1. A Class Member may opt out of the Settlement by timely mailing a valid opt-out statement to the Settlement Administrator.
2. The Class Notice shall provide that Class Members who wish to opt out of the Settlement must:
  - a. Mail a signed letter to the Settlement Administrator, postmarked no later than the Response Deadline, stating the Class Member's name, telephone number, current address, last four digits of the

Class Member's Social Security number, and the following statement: "I, [NAME], voluntarily choose not to participate in the settlement of the Class Action against International Business Machines Corporation and hereby waive any rights I may have to participate in the class settlement in the federal court lawsuit entitled *Mark Comin, et al. v. International Business Machines Corp.*, U.S.D.C. Case No. 3:19-cv-07261-JD."

3. The Class Notice shall state that any Class Member who has questions about the settlement may contact Class Counsel.
4. The Class Notice shall also state that a Class Member's right to opt out applies only to the class action portion of the Settlement and that no opt out right applies to the settlement of PAGA claims in the Action.
5. Absent a showing of good cause, as determined by the Settlement Administrator after input from Class Counsel and IBM, no opt-out statement shall be honored or valid if postmarked after the Response Deadline. Requests to opt out that do not include all required information shall be deemed null, void, and ineffective.
6. Class Members who submit valid and timely requests to opt out of the Settlement shall not receive a payment for settlement of Class claims pursuant to the Settlement, nor shall such Class Members be bound by the terms of the Settlement of their individual claims against IBM pursuant to this Settlement. However, Class Members who submit a valid opt out request will nevertheless be bound by the settlement and release of PAGA

claims in the Settlement to the extent they are a member of the PAGA Group and will receive a payment for their individual share of the PAGA Payment in settlement of PAGA claims pursuant to the terms of this Agreement.

- H. Defendant's Right to Terminate Based On Excessive Opt-Outs. IBM shall have the absolute discretionary right to terminate this Agreement at any time prior to Final Approval in the event that ten percent (10%) or more of Class Members timely submit opt-out statements.
- I. Non-Interference with Claims Procedure and Settlement. The Parties and their counsel agree that they shall not seek to solicit or otherwise encourage Class Members to submit opt-out requests or objections to the Settlement. However, Class Members do have the right to ask Class Counsel questions about the settlement. It shall not be a breach of this provision for Class Counsel to answer questions about the settlement.
- J. Interim Reports by the Settlement Administrator. No later than five business days prior to the deadline for filing a motion for final settlement approval, the Settlement Administrator shall provide counsel for the Parties with a declaration setting forth: (a) its efforts to provide notice to the class and proof of mailing of the Class Notice; (b) the total number of individuals on the Class List who were sent a Class Notice; (c) the total number of those individuals whose Class Notices were returned as undeliverable or addressee unknown; (d) the total number of those individuals whose Class Notices were subsequently sent to a corrected address; and (e) the total number of Class Members who filed valid requests to

opt out, including complete copies of all such requests, and including the postmark dates for each. The Settlement Administrator shall provide an updated declaration on these matters three calendar days prior to the date of the Final Settlement Hearing if any changes or additions have occurred.

- K. Motion for Final Approval and Judgment and Final Settlement Hearing. After expiration of the deadlines for submitting objections, and no later than the deadline set by the Court in the Preliminary Approval Order, the Parties will file a joint motion for final settlement approval and judgment in which the Parties shall request: (1) an order granting final certification, for settlement purposes only, of the Class and Subclass under Rule 23 of the Federal Rules of Civil Procedure, (2) final approval of this Agreement, including a ruling that the Agreement is final, fair, reasonable, adequate and binding on all Class Members and Subclass Members who have not timely opted out pursuant to Section III(G); (3) entry of judgment in a form agreed to by the Parties and in accordance with this Agreement; and (4) dismissal of the Action with prejudice, subject to the Court's retention of jurisdiction to oversee enforcement of the Agreement. The Motion for Judgment and Final Approval will be considered separate and apart from the Court's consideration of any applications for attorneys' fees and costs and/or enhancement payment, and the Court's ruling on any such separate applications will not terminate this Agreement or otherwise affect the Court's ruling on the Motion for Judgment and Final Approval. Class Counsel will separately seek an order determining the amounts to be paid from the Settlement Payment for attorneys' fees and expenses and enhancement payments, and any other matter as

required herein.

- L. Final Judgment. The Proposed Final Judgment to be submitted to the Court shall be in a form mutually agreed to by the Parties. The Parties shall not object to any final judgment that is substantially in the form submitted to the Court by the Parties.
- M. Effect of Termination or Failure to Obtain Preliminary or Final Approval. In the event this Agreement is not approved in its entirety by the Court, and/or the Court does not grant Preliminary Approval or Final Approval; or in the event that this Agreement is terminated, cancelled, declared void, or fails to become effective in accordance with its terms; or if the judgment agreed to by the Parties does not become Final; or if the Effective Date does not occur, the Parties shall proceed as follows:
- i. Defendant shall have no obligation to make any payments provided for by this Agreement.
  - ii. The Memorandum of Understanding (previously agreed to by the Parties) and this Agreement (other than the non-admission provisions in Section VII(A), this Section III(M), and the confidentiality provisions in Section VI) shall be deemed null and void, and their terms and provisions shall have no further force or effect.
  - iii. Neither this Agreement, nor any other related papers or orders, nor the negotiations leading to the Agreement shall be cited to, used, or deemed admissible in any judicial, administrative, or arbitral proceeding for any purpose or with respect to any issue, substantive or procedural.

- iv. The Action shall proceed without prejudice as if this Agreement had not been executed, unless the Parties jointly agree to: (1) seek reconsideration or appellate review of the decision to deny Preliminary Approval or Final Approval in the form agreed to by the Parties, or (2) attempt to renegotiate the settlement and seek Court approval of the renegotiated settlement if the Court denies Preliminary Approval or Final approval of this Agreement.
- v. The Parties shall not be deemed to have waived any claims, objections, defenses, or arguments with respect to the issue of class action certification or the merits of Plaintiffs' claims in the Action or any other issue, but rather shall retain the right to assert or dispute all claims and allegations, to assert or dispute all applicable defenses, and to assert or dispute the propriety of class action certification on all applicable grounds.
- vi. Any judgment or order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*.
- vii. None of the information provided by Defendant to Plaintiffs or Class Counsel for purposes of settlement negotiations or obtained by Plaintiffs or Class Counsel about Class Members as a result of the settlement approval process shall be used by Plaintiffs or Class Counsel in the Action, unless the information is obtained later through the litigation process.

- viii. Notwithstanding any other provision of this Agreement, no order of the Court, or modification or reversal on appeal of any order of the Court, reducing the amount of any attorneys' fees or costs to be paid to Class Counsel, or reducing the amount of any enhancement payment, shall constitute grounds for cancellation or termination of this Agreement or grounds for limiting any other provision of the judgment agreed upon by the Parties. Class Counsel retains and reserves all rights to appeal or seek reconsideration of any order of the Court reducing the amount of attorneys' fees or costs to be paid to Class Counsel and/or any order of the Court reducing the amount of any enhancement payment.
- ix. If this Agreement is terminated after Notice is sent, or if for any other reason the Effective Date does not occur after Notice is sent, the Settlement Administrator shall provide notice to all Class Members informing them that the settlement did not become effective, that as a result, no payments will be made to Class Members under this Agreement, and that the Action will continue, along with any additional information jointly agreed to by Class Counsel and Defendant. Such notice shall be mailed by the Settlement Administrator via United States First Class Mail, postage prepaid, to the addresses to which Notice was sent. The costs of such mailing shall be split equally between the Parties unless the Agreement is terminated, in which case those costs shall be paid by the party who terminated the Agreement.

- x. If the Class and/or Subclass has already been certified for settlement purposes, the Class and/or Subclass that was certified as part of this Agreement shall be decertified and the Parties shall jointly move as soon as practicable to obtain an order granting decertification, and the fact of certification shall not be cited to, used, or admissible in any judicial, administrative, or arbitral proceeding for any purpose or with respect to any issue, substantive or procedural.

**IV. SETTLEMENT FUNDS AND SETTLEMENT PAYMENT CALCULATION**

- A. Timing of Payment of Settlement Payment. The Settlement Administrator shall issue the payment for Class Counsel Fees and Costs within 14 days after the Effective Date, and shall issue all other payments from the Settlement Payment within 30 calendar days after the Effective Date.
- B. Allocation of Settlement Payment. The Settlement Payment shall be allocated as follows:
  - 1. Class Counsel Fees and Costs. The Parties agree that Class Counsel may apply for an award of attorneys' fees payable to Class Counsel in the total amount of up to \$1,583,333.33 plus costs and expenses not to exceed \$34,396.38 ("Class Counsel Fees and Costs"). IBM will not oppose a request made by Class Counsel for Class Counsel Fees and Costs as long as the amount requested is no more than that stated in this paragraph. Defendant's payment of the Class Counsel Fees and Costs shall constitute full satisfaction of the obligation to pay any amounts to any person, attorney or law firm for attorneys' fees, expenses or costs in the Action



incurred by any attorney on behalf of the Plaintiffs, Class and Subclass Members, and PAGA Group, and shall relieve Defendant and the Settlement Administrator of any other claims or liability to any other attorney or law firm for any attorneys' fees, expenses, and/or costs to which any of them may claim to be entitled on behalf of the Plaintiffs and the Class Members, Subclass Members and PAGA Group, and the fee and cost award by the Court shall supersede and extinguish, as of the Effective Date, any prior agreement between Class Counsel and Plaintiffs (and/or, as the case may be, any Class Member) concerning attorneys' fees and costs associated with the Action. All Class Counsel Fees and Costs approved by the Court shall be paid from the Settlement Payment. Prior to receiving any payment of such fees and costs, Class Counsel shall provide validly completed current IRS Forms W-9 to the Settlement Administrator. The amount of any attorneys' fees or costs sought but not awarded shall become part of the Net Settlement Amount to be distributed to Class Members. The Parties agree that regardless of any action taken by the Court or any appellate court with respect to Class Counsel Fees and Costs, the validity of the underlying Settlement shall not be affected.

2. Class Representative Enhancement Payments. In exchange for Plaintiffs each executing a general release of all claims as set forth herein, and in recognition of their effort in prosecuting the Action on behalf of Class Members, IBM agrees not to oppose or impede any application or motion for a Class Representative Enhancement Payment of up to ten thousand

dollars (\$10,000) each to Plaintiff Comin and Plaintiff Briggs, to be paid from the Settlement Payment. Provided however that Plaintiffs will not receive a Class Representative Enhancement Payment until: (1) the Court approves the payment, (2) any applicable revocation period has expired without revocation by Plaintiffs, and (3) Plaintiffs shall have provided a validly completed current IRS Form W-9 to the Settlement Administrator. The Class Representative Enhancement Payment shall constitute a special award to Plaintiffs and shall not be considered as a payment of overtime, salary, wages and/or compensation to Plaintiffs under the terms of any company benefit plan or for any purpose except for tax purposes. The receipt of a Class Representative Enhancement Payment shall not affect the amount of, contribution to, or benefit under any company benefit plan. The Parties agree that regardless of any action taken by the Court or any appellate court with respect to Class Representative Enhancement Payments, the validity of the underlying Settlement shall not be affected.

3. PAGA Penalty Payment. \$200,000 will be paid from the Settlement Payment as the PAGA Penalty Payment for settlement and release of any and all claims for which penalties under PAGA may be sought or are otherwise available to any member of the Class, which the Parties believe in good faith is a fair and reasonable apportionment. Pursuant to Labor Code § 2699(i), the PAGA Penalty Payment shall be allocated as follows: \$150,000 (75%) to the LWDA for the enforcement of labor laws and education of employers, and \$50,000 (25%) to the PAGA Group. Each

PAGA Group Member's individual share of the \$50,000 total allocable to the PAGA Group shall be calculated on a pro rata basis with each PAGA Group Member receiving an equal share.

4. Class Member and Subclass Member Individual Settlement Payments.

The Net Settlement Amount shall be used to satisfy Individual Settlement Payments to Class Members and Subclass Members in accordance with this Agreement. The Net Settlement Amount is the sum remaining after the Court-approved deductions from the Settlement Payment for: Class Counsel Fees and Costs, Class Representative Enhancement Payments, and the PAGA Penalty Payment. The Net Settlement Amount is the amount which constitutes the total sum from which all Class Members and Subclass Members shall be paid. Class Member Individual Settlement Payments and Subclass Member Individual Settlement Payments shall be calculated based on the following method:

- a. Class Member Individual Settlement Payments: Each Class Member shall be paid \$300;
- b. Subclass Individual Settlement Payments: The Subclass List provided to the Settlement Administrator shall be based on the spreadsheet used by the parties at the May 20, 2022 mediation and include the alleged commission adjustments reflected on that spreadsheet.<sup>1</sup> That shall provide the basis for the amounts that

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<sup>1</sup> For named Plaintiffs Comin and Briggs, the Subclass List shall reflect alleged unpaid commissions of \$273,500 for Comin and \$192,043.79 for Briggs.

Subclass Members are eligible to recover. Following deductions from the Net Settlement Amount for Class Member Individual Settlement Payments, the remaining funds shall be distributed to the Subclass Members pro-rata based on (i) the amount of unpaid commissions for any given individual reflected on that spreadsheet and (ii) the amount of remaining settlement funds. In other words, hypothetically, if there were only two Subclass Members, A and B, and Subclass Member A had unpaid commissions of \$90,000 and Subclass Member B had unpaid commissions of \$30,000, and there was \$80,000 in remaining settlement funds to distribute pro-rata, Subclass Member A would receive \$60,000 and Subclass Member B would receive \$20,000.

- C. Checks shall be mailed by first class mail to the last known address of all Class Members, as reflected in the Settlement Administrator's records following the Notice procedures of Section III(E). If any check is returned or not cashed, the Settlement Administrator shall engage in reasonable skip tracing efforts.
- D. Each check mailed to a Class Member shall plainly state on its face that the check must be cashed within 180 calendar days, and that any check uncashed after 180 calendar days shall be invalid. If a Class Member has not cashed their check, they will be entitled to request that the original check be cancelled and a new check be issued one time within 180 days of the original check being issued. The Class Member must cash the reissued check within the original 180 calendar day period.
- E. Each settlement check will contain the following affirmation:

“By endorsing and/or depositing this check, I understand and acknowledge that I am bound by the release of claims set forth in Section 8 of the Notice I was provided in connection with the *Comin v. IBM* lawsuit.”

- F. Class Members who do not cash their settlement checks within 180 calendar days after mailing by the Settlement Administrator shall be deemed to have waived irrevocably any right in or claim to a settlement payment but shall still be bound by the Settlement and the release of claims provided therein. Any uncashed or unclaimed settlement check amounts shall be redistributed to Subclass Members via the weighted pro rata procedure set forth above if the total amount remaining in the settlement fund because of uncashed checks is greater than \$50,000. Otherwise, the remaining funds shall be paid to the cy pres recipients as specified herein.

1. Cy Pres. Any uncashed funds remaining after the second payment (if any) will be sent to cy pres recipient State Bar of California Justice Gap Fund. There shall be no reversion of unclaimed funds to Defendant. The Settlement Administrator shall void any tax documents issued to Class Members who did not cash or deposit their settlement checks.

- G. Settlement Administration Costs. All costs and fees of the Settlement Administrator shall be paid separately by IBM. The amounts paid to the Settlement Administrator shall not be paid or deducted from the Settlement Payment. The Parties agree to cooperate in the administration of the Settlement and to make all reasonable efforts to control and minimize the costs and expenses incurred in the administration of the Settlement.

H. Allocation of Each Settlement Payment and Tax Issues. Each payment of settlement funds to a Class Member, other than any enhancement payment to a named Plaintiff, shall be allocated as follows: (1) 100% of the Individual Settlement Payment shall be allocated to wages and shall be subject to any required withholdings, payroll taxes, deductions, and contributions; and (2) 100% of the PAGA Group Member's individual share of the PAGA Penalty Payment shall be allocated to alleged civil penalties. The Settlement Administrator will be responsible for issuing to Plaintiffs, Class Members, and Class Counsel any tax forms as may be required by law for all amounts paid pursuant to this Agreement. The Settlement Administrator will also be responsible for forwarding all payroll taxes and other legally required withholdings to the appropriate government authorities. Neither IBM nor its counsel, nor Class Counsel makes any representation, and have made no representations as to the tax treatment or legal effect of the payments called for in this Settlement Agreement, and Plaintiffs and Class Members are not relying on any statement, representation, or calculation by IBM, the Settlement Administrator, or Class Counsel in this regard. Plaintiffs and Class Members understand and agree that Plaintiffs and Class Members will be solely responsible for the payment of any taxes and penalties assessed on the payments described in this Settlement Agreement. Plaintiffs and any Class Member who receives any payment under this Agreement should consult with their tax advisors concerning the tax consequences of the individual settlement payments they receive under the Settlement.

V. **RELEASED CLAIMS**

- A. Release of Claims by All Class Members. Upon the Effective Date, in consideration of the monetary sum provided by IBM, Plaintiffs and each of the Class Members (except for Class Members who timely opted out of the Rule 23 Class portion of the settlement) shall waive, fully release and forever discharge the Released Parties from any and all claims, rights, demands, liabilities, and causes of action of any kind, arising from the alleged violation of any provision of common law, California law and/or federal law which was or could have been raised in the Action, including but not limited to claims based on California Labor Code sections 201, 202, 203, 204, 226, 226.3, 558, 1174, 1194, 1197, 1197.1, 1198, 2751, 2698 et seq., California Code of Regulations, Business & Professions Code section 17200-17208, any and all claims for unpaid commissions, claims for breach of contract (express or implied), unjust enrichment, promissory estoppel, fraud, misrepresentation (negligent or intentional), or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees, and that arose on or before the date of final settlement approval (the "Settled Claims"). Class Representatives and Class Members shall be permanently barred and enjoined from the institution or prosecution of any and all Settled Claims against the Released Parties, except as to such rights or claims as may be created by the Settlement, subject to the continuing jurisdiction of the Court.
- B. Release of PAGA Claims. For the avoidance of doubt, Class Members have no opt out rights as to the PAGA portion of the settlement of the Action. Accordingly, upon the Effective Date, in consideration of the PAGA Penalty

Payment, Plaintiffs, on behalf of themselves and the State of California, and all PAGA Group members, waive, fully release and forever discharge the Released Parties from any and all claims under PAGA which were or could have been raised in the Action and that arose on or before the date of final settlement approval.

- C. Additional General Release of All Claims by Class Representatives. Except as otherwise provided herein, in consideration for the promises set forth herein, in addition to the Settled Claims, each of the Class Representatives, for themselves and their respective agents, heirs, predecessors, successors, assigns, representatives and attorneys, shall waive, release, acquit and forever discharge each of the Released Parties from any and all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever, known or unknown, asserted or that might have been asserted, whether in tort, contract, or for violation of any state or federal statute, rule or regulation arising out of, relating to, or in connection with any act or omission by or on the part of any of the Released Parties, including but not limited to any claims arising out of or related to Plaintiffs' employment, wages, hours, or working conditions with IBM or the separation of their employment with IBM, committed or omitted prior to the date of Final Judgment except as limited herein and by law. This additional release includes all known and unknown claims. Without limiting the foregoing, it is understood and agreed by the Class Representatives that, as a condition of this Agreement, and with respect to the general releases pursuant to this Section V(C), they each hereby expressly waive and relinquish any and all claims, rights,



or benefits that they may have under California Civil Code §1542, which provides: **“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”**

1. Voluntary Agreement. Section V(C) of this Agreement is subject to the terms of the Older Workers Benefit Protection Act of 1990 (the “OWBPA”). The OWBPA provides that an individual cannot waive a right or claim for employment discrimination in violation of the Age Discrimination in Employment Act (“ADEA”) unless the waiver is knowing and voluntary. Pursuant to the terms of the OWBPA, Class Representatives agree that they have executed this Agreement with full knowledge of its consequences, and that they are receiving benefits to which they are not otherwise entitled. In addition, Class Representatives agree that: (i) this Agreement has been written in a manner that is calculated to be understood, and is understood, by them; (ii) the release provisions of this Agreement apply to any rights Class Representatives may have under the ADEA, including the right to file a lawsuit in state or federal court for age discrimination in violation of the ADEA; (iii) the release provisions of this Agreement do not apply to any rights or claims Class Representatives may have under the ADEA that arise after the date of Final Judgment; (iv) IBM advises Class Representatives to consult with an attorney prior to signing this Agreement, and Class Representatives

have been given the opportunity to consult with counsel prior to executing this Agreement; (v) Class Representatives understand and agree that they have been offered a period of at least 21 days to consider Section V(C) of this Agreement and that they may waive the full 21-day period of review and sign this Agreement at any time upon receipt. If Class Representatives sign and return this Agreement to IBM prior to the 21-day review period, they acknowledge that they will have chosen, of their own free will without any duress, to waive their right to the full twenty-one (21) day period; and (vi) Class Representatives have the right to revoke Section V(C) of this Agreement within seven days after its execution. To revoke Section V(C) of this Agreement, Class Representatives shall send written notice by the time period noted above by e-mail to counsel for IBM Aaron Agenbroad at [alagenbroad@jonesday.com](mailto:alagenbroad@jonesday.com). If said written notice of revocation is not received by IBM by the close of business on the seventh day following Class Representatives' signing of this Agreement, Class Representatives agree that this Agreement shall be final, binding, and irrevocable. If Class Representatives do exercise their right to revoke Section V(C) of this Agreement, all of the terms and conditions of the Agreement shall be of no force and effect and IBM shall not have any obligation to make payments to Class Representatives as set forth in this Agreement.

**VI. CONFIDENTIALITY**

A. The Parties and counsel shall keep confidential all settlement communications

regarding the negotiation and drafting of the Agreement. The Parties and counsel agree that they will not make any public statements, including any statement to the media regarding the Settlement or its terms. This does not include, and counsel may make, statements to state or federal courts when that information is requested or required. Class Representatives and Class Counsel will not issue a press release, post on social media or any website, or otherwise communicate with the media regarding the Settlement. Class Counsel shall not include materials on Class Counsel's website regarding the Action. Nothing in this paragraph shall restrict Class Representatives or Class Counsel from making any disclosures necessary to seek Court approval or to communicate with Class Members. Similarly, nothing in this paragraph shall prohibit IBM from making any internal statements to its employees. This Section VI is a material provision of this Agreement, and IBM reserves the right to seek monetary sanctions against Class Representatives and/or Class Counsel for any breach thereof.

## **VII. MISCELLANEOUS**

- A. No Admission of Liability or Wrongdoing. The Parties acknowledge that IBM has denied throughout this Action and continues to deny that it has violated any law, breached any agreement or obligation to the Plaintiffs or the Class Members, or engaged in any wrongdoing with respect to the Plaintiffs or the Class Members. The Parties agree that neither this Agreement nor any actions undertaken by IBM in satisfaction of the Agreement shall constitute, or be construed as, an admission of any liability or wrongdoing. The Parties further agree and recognize that this Agreement shall not be admissible as evidence, offered as evidence, or cited or

referred to by IBM or Plaintiffs in any action or proceeding, except in an action or proceeding brought to enforce its terms or by IBM in defense of any claims brought by the Plaintiffs or any Class Members.

- B. Binding upon Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the successors or assigns of the Parties hereto and the Released Parties as defined herein.
- C. Extension of Time. The Parties may, by mutual agreement, agree upon a reasonable extension of time for deadlines and dates reflected in this Settlement Agreement, subject to Court approval.
- D. Amendment or Waiver Only in Writing. This Agreement may be amended or modified only by a written instrument signed by counsel for all Parties or their successors-in-interest, subject to any required Court approval. No rights hereunder may be waived except in writing. Any failure by any party to insist upon the strict performance by the other party of any of the provisions of this Settlement Agreement shall not be deemed a waiver of any of the other provisions of this Settlement Agreement, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of all of the provisions of this Settlement Agreement.
- E. Entire Agreement. This Agreement constitutes the entire agreement between the Parties relating to the Settlement and the related transactions contemplated herein. All prior or contemporaneous agreements, understandings and statements, whether oral or written, and whether by a party or its counsel, are merged herein. No oral or written representations, warranties, or inducements have been made to

any party concerning this Agreement other than the representations, warranties, and covenants contained herein.

- F. Execution. This Agreement shall become enforceable in accordance with its terms upon its execution by: (a) the Class Representatives; (b) Class Counsel on behalf of the Class Representatives and the Class (approved as to form only); (c) IBM; and (d) counsel for IBM (approved as to form only). Provided, however, that counsel for the Parties shall sign this Agreement affirmatively with respect to Section VI concerning Confidentiality.
- G. Authorization to Execute Agreement and Effectuate Settlement and Agreement to Cooperate. Counsel for all Parties hereto warrant and represent that they are expressly authorized by the Parties whom they represent to negotiate this Settlement and to take all appropriate action required or permitted to be taken by such Parties pursuant to this Agreement to effectuate its terms and to execute any other documents required to effectuate the terms of this Agreement. The Parties and their respective counsel shall cooperate with each other and use their best efforts to effect the implementation of this Agreement. In the event the Parties are unable to reach agreement on the form or content of any document needed to implement this Agreement or on any supplemental provisions that may become necessary to effectuate the terms of this Agreement, the Parties may seek the assistance of the Court to resolve such disagreement. The person or persons signing this Agreement on behalf of IBM represents and warrants that he or she is authorized to sign this Agreement on behalf of IBM.
- H. No Prior Assignment. The Parties hereto represent, covenant, and warrant that

they have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action, or rights herein released and discharged except as set forth herein.

- I. Governing Law. This Agreement shall be governed by, construed, interpreted, and enforced in accordance with the laws of the State of California.
- J. Counterparts. This Agreement may be executed in one or more counterparts and by facsimile. All executed copies of this Agreement and photocopies thereof (including facsimile copies of signature pages) shall have the same force and effect and be as legally binding and enforceable as the original.
- K. Construction. The Parties have reached this Agreement through extensive arms-length negotiations, and with the assistance of an experienced mediator. This Agreement has been drafted jointly by counsel for the Parties. The Agreement shall not be construed against either party as the principal drafter of the Agreement.
- L. Retention of Jurisdiction. The Parties stipulate that the Court shall retain jurisdiction over the Parties to enforce the terms of this Agreement and all aspects of the Parties' settlement for three years from the Effective Date.
- M. Titles and Captions of No Force. Paragraph titles or captions contained herein are inserted for convenience and ease of reference and do not define, limit, extend, or describe the scope of the terms of the Agreement and its provisions.
- N. Mutual Cooperation. The Parties hereto agree to cooperate with each other to accomplish the terms of this Agreement, including but not limited to executing

further documents and taking such other action as may reasonably be necessary to implement and effectuate the terms of this Agreement.

**IT IS SO STIPULATED AND AGREED.**

Dated: Aug 19, 2022, 2022

By: *Mark Comin*  
Mark Comin (Aug 19, 2022 18:32 PDT)  
Mark Comin

Dated: Aug 19, 2022, 2022

By: *Mark Briggs*  
Mark Briggs (Aug 19, 2022 18:23 PDT)  
Mark Briggs

Dated: Aug 19, 2022, 2022

By: *Matthew E. Lee*  
Matthew E. Lee (Aug 19, 2022 21:18 EDT)  
Milberg Coleman Bryson Phillips Grossman  
PLLC  
Counsel for Class Representatives and the Class  
(Approved as to form and to Section VI)

Dated: Aug 22, 2022, 2022

By: *Jennifer Pavane Kenter*  
Jennifer Pavane Kenter (Aug 22, 2022 15:06 EDT)  
Jennifer Pavane Kenter  
For International Business Machines Corporation

Dated: Aug 22, 2022, 2022

By: *Cindi Ritchey*  
Cindi Ritchey (Aug 22, 2022 11:18 PDT)  
Jones Day  
Counsel for International Business Machines  
Corporation  
(Approved as to form and to Section VI)