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8 Counsel for Plaintiff

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

15 INTERNATIONAL BUSINESS  
16 MACHINES CORPORATION,

17 Defendant.  
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AMENDED CLASS ACTION  
COMPLAINT  
Jury Trial Demanded  
3:19-cv-07261-JD

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20 Plaintiff Mark Comin, individually, and on behalf of all others similarly  
21 situated, brings this Class Complaint against Defendant International Business  
22 Machines Corporation ("IBM") and alleges the following:

23 **INTRODUCTION**

24 1. California Labor Code Section 2751 requires that an employer provide  
25 sales representatives who earn commissions with an enforceable written contract  
26 setting forth the method by which commissions shall be computed and paid that is  
27 signed by the employer.  
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1           2.       IBM employs hundreds, if not thousands, of sales representatives and  
2 managers throughout California who earn sales commissions. However, IBM does  
3 not provide those employees with a written, signed, enforceable contract regarding  
4 their commissions.

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

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

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

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

25          7.       Plaintiff Mark Comin is another victim of IBM's blatant disregard for  
26 California's Labor Code.

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

6 **PARTIES**

7 1. Mr. Comin is a citizen of San Rafael, California, in Marin County.

8 2. Mr. Comin worked for IBM for over seventeen years, from  
9 approximately January 2001 through February 2018.

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

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

13 5. IBM was and is an employer under the California Labor Code and  
14 common law.

15 6. IBM employed Plaintiff and other employees performing sales work for  
16 IBM in California.

17 **JURISDICTION AND VENUE**

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

22 8. This Court may exercise personal jurisdiction over IBM because IBM  
23 conducts substantial business in this State and within the Northern District of  
24 California, receives substantial compensation and profits from the marketing,  
25 distribution, and sales of products and services in this District, and has engaged in  
26 the unlawful practices described in this Complaint in this District.

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1 9. Venue is proper in this District under 28 U.S.C. § 1391(b) because a  
2 substantial part of the events or omissions giving rise to Plaintiff's claims occurred in  
3 this District.

4 **INTRADISTRICT ASSIGNMENT**

5 10. This action is properly assigned to the San Francisco Division of this  
6 District pursuant to N.D. Cal. L.R. 3-2, because a substantial part of the events or  
7 omissions giving rise to Plaintiff's claims arose in the counties served by the San  
8 Francisco Division. Mr. Comin, who is the proposed class representative, as well as  
9 dozens, if not hundreds, of class members reside in the counties served by this  
10 Division. Moreover, IBM conducts substantial business in the counties served by this  
11 Division.

12 **COMMON FACTUAL ALLEGATIONS**

13 11. IBM is a global technology company that provides hardware, software,  
14 cloud-based services, and cognitive computing.

15 12. IBM employs sales representatives and managers throughout the  
16 United States that it tasks with selling its products and services.

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

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

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

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

4           17.    Commissions under these plans are uncapped and paid based on  
5 achievement results (i.e., the amount of products and services sold) rather than on an  
6 assessment of employee contribution.

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

9           19.    Under the pool plans, a set amount of commissions is divided among  
10 groups of employees based on achievement by the group as a whole.

11          20.    The Services Plan is a commissions plan that is available to executives  
12 and other roles that are focused on large contract delivery, customer satisfaction, and  
13 base growth.

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

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

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

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

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

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

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

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

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

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

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

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

25 32. 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 33. 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 34. 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 35. 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 36. The requirement that all employers provide employees earning  
16 commissions with a written commission contract became effective January 1, 2013.

17 37. 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 38. 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 39. 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           40. 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  
3 program cannot satisfy the requirements of California Labor Code Section 2751.

4           41. 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           42. 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  
11 the statute, although it never admitted that the IPL was an "enforceable contract"  
12 and it never specified the alleged "obligations" that the IPL imposed on IBM.

13           43. 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           44. Indeed, any other interpretation would render California Labor Code  
27 Section 2751 a nullity. It would make no difference to employees whether or not  
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1 their employer complies with California Labor Code Section 2751: the employer can  
2 comply with that statute, or it can blatantly violate the statute, but neither choice  
3 has any effect on the employees. Quite obviously that is contrary to the text and  
4 purpose of California Labor Code Section 2751, which was designed to and by its  
5 plain text does give employees something: an enforceable obligation from their  
6 employer. If their employer does not give them that enforceable obligation, then they  
7 are harmed. California Labor Code Section 2751 is a mandate, not some gentle  
8 suggestion to employers that causes no harm when it is ignored.

9 **PLAINTIFF'S FACTS**

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

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

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

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

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

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

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

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

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1           53. The first situation was a deal involving the sale of an IBM product  
2 named IBM Cloud Identity to AECOM in December 2016 ("AECOM Deal").

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

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

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

17           57. The second time that Mr. Comin was not paid his full commissions was  
18 June of 2017.

19           58. This time, Mr. Comin closed a deal for the sale of a third-party product  
20 called Carbon Black Response that IBM licensed to Intel ("Carbon Black Deal").

21           59. The Carbon Black Deal was for two, one-year subscriptions, and totaled  
22 \$3.375 million in commissionable revenue to Mr. Comin.

23           60. In the seven previous sales of this product by other IBM sales  
24 representatives, IBM paid commissions on the full amount of the sale.

25           61. After Mr. Comin closed the deal, the commissionable revenue of \$3.375  
26 million initially registered in his Attainment report.

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

4           63.     Prior to Mr. Comin's closure of this deal, there had been seven prior  
5 sales of this particular product.

6           64.     Each of those seven prior deals resulted in the sales representative  
7 being credited with 100% of the commissionable revenue for the deal..

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

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

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

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

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

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

26          71.     Emptoris was not a product Mr. Comin was responsible for.  
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1 72. IBM booked the Apple Deal at the time it closed in September 2017, but  
2 its finance department refused to flow any commissions to any sales representatives  
3 who were owed commissions on the Apple Deal until either the product was delivered  
4 to IBM or the 18 month mark was reached.

5 73. It has been over 18 months, and Mr. Comin has not been paid any  
6 commissions from the Apple Deal. As the Emptoris product was outside of the scope  
7 of his products, he does not know whether the Emptoris product was ever provided to  
8 Apple.

9 74. Moreover, Mr. Comin was never provided a justification for why his  
10 commissions on the Apple Deal were help up since his products were not related to  
11 the Emptoris product issue.

12 75. Out of frustration with IBM's refusal to pay him the sales commissions  
13 that he earned, Mr. Comin left IBM in February 2018.

14 **CLASS ACTION ALLEGATIONS**

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

19 **A. Class Definition**

20 77. Plaintiff brings this action on behalf of the following class and subclass:

21 Class:

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.

25 Subclass:

26 All persons residing or who resided in the State of  
27 California while working for IBM on a commissions  
28 incentive plan during the Relevant Time Period and that



- 1 c. Whether IBM paid less to the Class members than the formulas
- 2 in the IPLs provided for;
- 3 d. Whether IBM should be ordered to disgorge all or part of the ill-
- 4 gotten profits it received by not paying its sales representatives in
- 5 accordance with their commissions formulas;
- 6 e. Whether the Class is entitled to damages and the amount of
- 7 damages;
- 8 f. The amount of formulaic damages due to each member of the
- 9 Classes;
- 10 g. Whether IBM should be enjoined from continuing to be out of
- 11 compliance with Cal. Labor Code § 2751; and
- 12 h. In other ways as shown in discovery.

13 **c. Typicality**

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

19 87. Plaintiff possesses and asserts each of the claims he asserts on behalf of  
20 the proposed Classes.

21 88. Plaintiff seeks similar relief as other Class members.

22 **d. Adequacy of Representation**

23 89. Plaintiff is an adequate class representative.

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

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

4 92. Plaintiff has retained counsel sufficiently qualified, experienced, and  
5 able to conduct this litigation and to meet the time and fiscal demands required to  
6 litigate a class action of this size and complexity.

7 **e. Predominance & Superiority**

8 93. A class action is superior to other available means for the fair and  
9 efficient adjudication of this controversy.

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

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

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

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

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

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

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

14 **f. Injunctive/Declaratory Relief**

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

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

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

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**FIRST CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

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

110. Accordingly, Plaintiff and the Classes have suffered injury in fact including, including lost money, as a result of IBM’s failure to have enforceable written contracts—which presumably IBM would have complied with, but which could be the basis for an easy breach of contract claim if it did not. Put another way,

1 the obvious purpose of California Labor Code Section 2751's requirement of a written  
2 contract is to legally obligate employers to specify how commissions will be paid and  
3 pay them. If an employer violates California Labor Code Section 2751 by not having  
4 such a contract, then its employees are harmed because the employer is not obligated  
5 to specify and pay commissions under such a contract. Here, if IBM had complied  
6 with California Labor Code Section 2751, it would have had enforceable contracts  
7 with Plaintiff and the Classes; IBM would have complied with those contracts, or its  
8 employees could easily sue if IBM did not, and either way the employees would be in  
9 a better situation than they are now.

10 111. IBM should be made to disgorge these ill-gotten gains and to restore to  
11 Mr. Comin and the Classes the wrongfully withheld wages to which they are entitled,  
12 as well as interest on these wages.

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

20 113. As alleged above, IBM violated section 2751 because the IPL  
21 undisputedly is not a contract, and therefore it is not sufficient under section 2751,  
22 and there is no other document that is a written contract sufficient under section  
23 2751. Furthermore, IBM violated section 2751 because IBM did not sign any  
24 sufficient contract (and it did not sign the IPL), nor did IBM obtain a receipt from  
25 Plaintiff or the Class for their receipt of any written contract.

26 114. A violation of section 2751 serves as a predicate violation for a claim  
27 under the UCL.

28

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

3 116. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts  
4 or practices by Defendant under Cal. Bus. & Prof. Code § 17200 et seq.

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

11 **SECOND CLAIM FOR RELIEF**

12 **(Direct Claim for Violation of California Labor Code § 2751)**

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

15 119. California Labor Code Section 2751 states, in pertinent part: "Whenever  
16 an employer enters into a contract of employment with an employee for services to be  
17 rendered within this state and the contemplated method of payment of the employee  
18 involves commissions, the contract shall be in writing and set forth the method by  
19 which the commissions shall be paid."  
20  
21

22 120. As alleged above, IBM violated section 2751 because the IPL  
23 undisputedly is not a contract, and therefore it is not sufficient under section 2751,  
24 and there is no other document that is a written contract sufficient under section  
25 2751. Furthermore, IBM violated section 2751 because IBM did not sign any  
26 sufficient contract (and it did not sign the IPL), nor did IBM obtain a receipt from  
27 Plaintiff or the Class for their receipt of any written contract.  
28

1 121. IBM's actions alleged herein caused Plaintiff and the Classes to sell as  
2 many of IBM's products and services as they could, often at the expense of quality  
3 time with their families that they would not otherwise have sacrificed had they  
4 known that IBM would not pay them the commissions they earned.

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

18 123. Pursuant to California Labor Code §§ 200 et seq., as a result of IBM's  
19 violation of section 2751, Plaintiff and the Classes are entitled to recover damages,  
20 with interest, attorneys' fees, costs, and penalties all in an amount to be proven at  
21 trial.  
22

### 23 THIRD CLAIM FOR RELIEF

#### 24 (In the Alternative, Breach of Contract)

25 124. Plaintiff re-alleges and incorporates the prior paragraphs of this  
26 Complaint as if fully set forth herein.

27 125. Plaintiff's primary claim is for violation of the UCL through violation of  
28 California Labor Code § 2751, because the IPL does not satisfy California Labor Code

1 § 2751. However, to the extent that IBM claims and/or ultimately proves that the  
2 IPL does satisfy California Labor Code § 2751, then Plaintiff and the Classes would  
3 have a claim for breach of the IPL. Plaintiff makes this claim only in the alternative  
4 to the First Claim for Relief, in the event that IBM claims and/or ultimately proves  
5 that the IPL is an enforceable contract for the payment of commissions that would  
6 satisfy California Labor Code § 2751.

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

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

13 128. Plaintiff and the Class have been damaged by the breach of contract, by  
14 the difference between amount that the IPL's commissions formulas would produce  
15 and the amount that they were actually paid.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Mr. Comin and the Classes pray the Court for the following  
18 relief:

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

21 2. That the Court name Plaintiff as Class Representative and his counsel  
22 as Class Counsel;

23 3. That the Court grant restitution to Plaintiff and the Classes and require  
24 IBM to disgorge ill-gotten gains and monies by which it was unjustly enriched;

25 4. That Mr. Comin and the Classes have and recover from IBM for  
26 violations of the California Unfair Competition Law injunctive relief authorized by  
27 Business and Professions Code Section 17200 et. seq.;

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7 [ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE]

8 Counsel for Plaintiff

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

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

13 Plaintiff, )

14 v. )

15 )  
16 INTERNATIONAL BUSINESS )  
17 MACHINES CORPORATION, )

18 Defendant. )

CERTIFICATE OF SERVICE

19  
20 I hereby certify that I caused the foregoing Amended Class Action Complaint  
21 to be filed via ECF which will notify all counsel of record as to same.

22 Dated: February 18, 2020

23  
24  
25 /s/Alex R. Straus  
26 **Alex R. Straus**