

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARK COMIN and MARK BRIGGS, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant.

Case No. 3:19-cv-07261-JD

**ORDER RE PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

1 At the Court's direction, the parties revised the proposed class settlement and application  
2 for preliminary approval. *See* Dkt. No. 134. The revisions have addressed the Court's concerns  
3 about notice, the scope of the release, the method of payment, and other issues. Consequently,  
4 preliminary approval is granted on the ensuing terms. This order is based on a draft lodged by the  
5 parties and modified to conform to the Court's practices and conclusions. Counsel are directed to  
6 Paragraph 11 in particular, in addition to reviewing the entirety of this order from start to end.  
7 Some deadlines and due dates have been changed, among other modifications.

8 1. "Plaintiffs" are Mark Comin and Mark Briggs. "IBM" and "Defendant" are  
9 International Business Machines Corporation. Both sides are collectively the "Parties."

10 2. The Court preliminarily approves the Settlement Agreement and Settlement  
11 (including the revised terms recounted in the Parties' preliminary approval filings) as fair,  
12 reasonable and adequate. The dissemination of the Long Form Notice is authorized to the members  
13 of the Settlement Class under Rule 23(e) of the Federal Rules of Civil Procedure, subject to further  
14 consideration at the Fairness Hearing. This determination is not a final finding that the Settlement  
15 Agreement is fair, adequate, and reasonable.

16 3. The Court appoints Plaintiff Mark Comin as the Class Representative for purposes  
17 of this Settlement.

18 4. The Court appoints the law firm of Milberg Coleman Bryson Phillips Grossman,  
19 PLLC as Class Counsel for purposes of this Settlement. Solely for purposes of effectuating the  
20 Settlement, Class Counsel are authorized to act on behalf of the Class Representative, and all other  
21 Settlement Class Members with respect to all acts or consents required by or that may be given  
22 pursuant to the Settlement Agreement, including all acts that are reasonably necessary to  
23 consummate the Settlement, subject to final approval by the Court of the Settlement.

24 5. Pursuant to Rule 23, the Court conditionally certifies the following Class and  
25 Subclass (collectively the Settlement Classes) for purposes of the Settlement only:

26 **Class:** All persons residing or who resided in California while working for IBM on  
27 a commissions incentive plan at any time between November 4, 2015, and the date  
28 of preliminary approval of the settlement by the Court.

1           **Subclass:** All persons residing or who resided in California while working for IBM  
2           on a commissions incentive plan at any time from November 4, 2015, through the  
3           date of preliminary approval of the settlement by the Court and who Plaintiffs  
4           alleged were not paid the amount of commissions reflected in the individual's  
5           commissions formula.

6           6.     For purposes of effectuating the proposed Settlement only, the Court finds the  
7     prerequisites to certifying a settlement class under Rule 23(a) are satisfied in that:

- 8                     a.   The members of the Class and Subclass defined in the Settlement  
9                     Agreement are so numerous as to make joinder impracticable. The class is  
10                    estimated to have 1,500 members and the subclass includes approximately  
11                    60 individuals;
- 12                   b.   There are questions of law or fact common to the Settlement Classes;
- 13                   c.   The claims or defenses of the Class Representative are typical of the claims  
14                    or defenses for the Settlement Classes; and
- 15                   d.   The Class Representative and Class Counsel will fairly and adequately  
16                    protect the interests of the Class and Subclass Members.

17           7.     For purposes of effectuating the proposed Settlement only, the Court finds, pursuant  
18     to Rule 23(e)(1), that the prerequisites for class certification under Federal Rule of Civil Procedure  
19     23(b)(3) are likely to be found satisfied as: the questions of law or fact common to the Settlement  
20     Classes predominate over individual questions and class action litigation is superior to other  
21     available methods for the fair and efficient adjudication of this controversy.

22           8.     The Court retains exclusive jurisdiction over this action to consider all further  
23     matters arising out of or connected with the Settlement.

24                             **Administration and Notice to the Settlement Classes**

25           9.     The Court appoints KCC Class Action Services, LLC as Settlement Administrator.  
26     The Settlement Administrator will supervise and administer the notice procedures, establish and  
27     operate the Settlement Website, distribute cash payments according to the processes and criteria set  
28

1 forth in the Settlement Agreement, and perform any other duties that are reasonably necessary  
2 and/or provided for in the Settlement Agreement.

3 10. All costs and expenses of settlement administration will be paid by IBM pursuant to  
4 the provisions of the Settlement Agreement.

5 11. The Court approves the form and content of the proposed Long Form Notice  
6 submitted for approval at Docket Number 130-1, and finds that its dissemination via U.S. mail and  
7 email, including to IBM work email addresses for current employees, to all Settlement Class  
8 Members after the Court grants preliminary approval of the Settlement, meets the requirements of  
9 Fed. R. Civ. P. 23(C)(2)(B) and due process, constitutes the best notice practicable under the  
10 circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto of the  
11 pendency of the Action, the effect of the proposed Settlement (including the releases contained  
12 therein), the anticipated Motion for Attorneys' Fees and Expenses and Service Awards, the  
13 proposed Plan of Allocation, and Class Members' rights to participate in, opt out of, or object to  
14 any aspect of the proposed Settlement. This approval is contingent upon the sending of all notices  
15 required herein to IBM work email addresses for class members to the fullest extent possible.  
16 Counsel for IBM will file a declaration attesting under oath that this condition has been satisfied  
17 no later than 10 business days after the dissemination of the notices is complete. A failure to file a  
18 declaration, or inadequate use of IBM work email contacts and addresses for class notice, will result  
19 in denial of final approval and the prompt setting of a trial date.

20 12. Pursuant to Section III.E of the Settlement Agreement, the Settlement Administrator  
21 shall complete dissemination of the Notice within thirty calendar days from the entry of this  
22 Preliminary Approval Order (the Notice Date). On or before the Notice Date, the Settlement  
23 Administrator shall complete the distribution of the Long Form Notice (via email and mail), and  
24 establish the Settlement Website which shall contain relevant documents relating to the Settlement  
25 such as the Long Form Notice, the operative complaint filed in the Action, the Settlement  
26 Agreement, the Preliminary Approval Order, any application for Attorneys' Fees and Expenses and  
27 Service Awards, any briefs filed by Plaintiffs and Defendants in support of the Settlement, and the  
28 Final Approval Order and Judgment.



1 verified electronic method, (b) mailed to the Settlement Administrator at the address in the notice  
2 to the Settlement Classes, and (c) postmarked on or before the Exclusion Deadline. Any Settlement  
3 Class Member who does not submit a valid and timely Request for Exclusion shall be bound by the  
4 terms of the Settlement Agreement upon entry of the Final Approval Order and Judgment.  
5 Furthermore, opt-out rights do not extend to members of the Settlement Classes with respect to  
6 settlement of the PAGA claims in this action.

7 **Fairness Hearing**

8 16. The Fairness Hearing shall be held by the Court on August 10, 2023, at 10:00 a.m.,  
9 in Courtroom 11, 19<sup>th</sup> Floor, of the United States District Court for the Northern District of  
10 California, 450 Golden Gate Avenue, San Francisco, CA 94102.

11 17. At or after the Fairness Hearing, the Court will determine whether: (1) the  
12 requirements for certification of the Settlement Classes have been met; (2) the proposed Settlement  
13 of the Action on the terms set forth in the Settlement should be approved as fair, reasonable,  
14 adequate, and in the best interest of the Settlement Classes' Members; (3) Class Counsel's Motion  
15 for Attorneys' Fees and Expenses and Service Awards should be approved; and (4) Final Approval  
16 Order and Judgment approving the Settlement and dismissing the Action on the merits with  
17 prejudice should be entered. The Court may enter the Order and Final Approval Order and  
18 Judgment approving the Settlement regardless of whether it has awarded Attorneys' Fees and  
19 Expenses or Service Awards.

20 18. The Court may continue or adjourn the Fairness Hearing without further notice to  
21 the Settlement Classes' Members. The Court may approve the Settlement, with such modifications  
22 as may be agreed to by Plaintiffs and Defendants, if appropriate, without further notice to members  
23 of the Settlement Class Members.

24 19. On or before ninety (90) days after the Notice Date, members of the Settlement  
25 Classes shall submit any Objections or Requests for Exclusion, in accordance with paragraphs 13  
26 and 15 of this Order (the Exclusion Deadline).

1           20.     On or before forty-five (45) days prior to the Exclusion Deadline, Class Counsel  
2 shall file all papers in support of the Motion for Final Approval of the Settlement and/or Motion  
3 for Attorneys’ Fees and Expenses and Service Awards.

4           21.     On or before thirty (30) days after the Exclusion Deadline, Class Counsel shall file  
5 any responses to any objections to the Motion for Final Approval of the Settlement and/or Motion  
6 for Attorneys’ Fees and Expenses and Service Awards.

7           22.     Objections by any Settlement Class Member to the Motion for Final Approval of  
8 the Settlement and/or Motion for Attorneys’ Fees and Expenses and Service Awards shall be  
9 considered by the Court at the Fairness Hearing if such member of the Settlement Classes files with  
10 the Court a notice of his or her objections in accordance with paragraph 13 of this Order and states  
11 the basis for such objections, by the Exclusion Deadline, or as otherwise permitted by the Court.

12           23.     The following timeline summarizes the deadlines set by the Court:

<b>Event</b>	<b>Deadline</b>
Settlement Administrator to Disseminate Notice (Notice Date)	Thirty (30) days after entry of the Preliminary Approval Order
Deadline to submit Objections or Requests for Exclusion (Exclusion Deadline)	Ninety (90) days after the Notice Date
Deadline to file Motion for Final Approval of the Settlement and Motion for Attorneys’ Fees and Expenses and Service Awards	Forty-Five (45) days prior to the Exclusion Deadline
Deadline to respond to Objections to the Motion for Final Approval of the Settlement and Motion for Attorneys’ Fees and Expenses and Service Awards	Thirty (30) days following the Exclusion Deadline
Fairness Hearing	August 10, 2023

1           24. Any appeal from any order or judgment relating solely to Class Counsel's Motion  
2 for Attorneys' Fees and Expenses and Service Awards, or any reversal or modification of any such  
3 order or judgment, shall not operate to terminate, vacate, or cancel the Settlement.

4           25. All proceedings and deadlines in this matter, except those necessary to implement  
5 this Order and the Settlement, are vacated pending further order of the Court.

6           26. Neither this Order nor the Settlement Agreement, nor any of their respective terms  
7 or provisions, nor any of the negotiations, discussions, proceedings connected with them, nor any  
8 act performed or document executed pursuant to or in furtherance of the Settlement Agreement, the  
9 Settlement or this Order may be construed as an admission or concession by IBM or any other  
10 Released Parties of the truth of any of the allegations in the Action, or of any liability, fault, or  
11 wrongdoing of any kind, or offered or received in evidence, or otherwise used by any person in the  
12 Action, or in any other action or proceedings, whether civil, criminal, or administrative, in any  
13 court, administrative agency, or other tribunal, except in connection with any proceeding to enforce  
14 the terms of the Settlement Agreement or this Order. The Released Parties, Plaintiffs, and IBM  
15 may file the Settlement Agreement, this Order and/or the Final Approval Order and Judgment in  
16 any action that may be brought against them in order to support a defense or counterclaim based  
17 on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or  
18 reduction or any other theory of claim preclusion or issue preclusion or similar defense or  
19 counterclaim.

20           27. If the Court conditions its approval of either the Preliminary Approval Order, the  
21 Final Approval Order and Judgment on any modifications of the Settlement Agreement that are not  
22 acceptable to all Parties, or if the Court does not approve the Settlement or enter the Final Approval  
23 Order and Judgment, or if the Settlement fails to become effective as defined in the Settlement  
24 Agreement or is terminated, then in any such event, the Settlement Agreement, including any  
25 amendment(s) thereof, shall be null and void, of no further force and effect, and without prejudice  
26 to any Party, and the Parties shall be deemed to have reverted to their respective litigation positions  
27 as of March 10, 2022.

28



**PAGA Settlement**

1  
2 28. In addition to resolving claims brought on behalf of the Settlement Classes, the  
3 Parties have also resolved claims brought under the California Private Attorney General Act  
4 (PAGA). The PAGA Group is defined as follows: “All persons residing or who resided in  
5 California while working for IBM on a commissions incentive plan at any time between September  
6 5, 2020 through the date of preliminary approval of the settlement by the Court.” \$200,000 will be  
7 paid from the gross settlement fund as the PAGA Penalty Payment for settlement and release of  
8 any and all claims for which penalties under PAGA may be sought or are otherwise available to  
9 any member of the Class, which the Court finds to be in good faith and a fair and reasonable  
10 apportionment. Pursuant to Labor Code § 2699(i), the PAGA Penalty Payment shall be allocated  
11 as follows: \$150,000 (75%) to the California Labor and Workforce Development Agency (LWDA)  
12 for the enforcement of labor laws and education of employers, and \$50,000 (25%) to the PAGA  
13 Group. Each PAGA Group Member’s individual share of the \$50,000 total allocable to the PAGA  
14 Group shall be calculated with each PAGA Group Member receiving an equal share.


15 Members of the Settlement Classes have no opt out rights as to the PAGA portion of the  
16 settlement of the Action. Accordingly, upon the Effective Date, in consideration of the PAGA  
17 Penalty Payment, Plaintiffs, on behalf of themselves and the State of California, and all PAGA  
18 Group members, waive, fully release, and forever discharge the Released Parties from any and all  
19 claims under PAGA which were or could have been raised in the Action and that arose on or before  
20 the date of final settlement approval.

**Class Action Fairness Act Notice**

21  
22 29. The Court finds that the procedures set forth in Section III.D of the Settlement  
23 Agreement comply with the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715.

24 **IT IS SO ORDERED.**

25 Dated: March 2, 2023

26  
27   
28 \_\_\_\_\_  
JAMES DONATO  
United States District Judge