Engel v International Bus. Machs. Corp.
2026 NY Slip Op 31268(U)
March 28, 2026
Supreme Court, New York County
Docket Number: Index No. 654556/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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THOMAS ENGEL,

Plaintiff,

- v -

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

INDEX NO. 654556/2020

MOTION DATE

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 243, 244, 245, 251, 252, 253

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 246, 247, 248, 254, 255, 256

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

This action arises from plaintiff Thomas Engel's attempt to recover damages from International Business Machines Corporation (IBM) for its alleged practice of wrongfully withholding sales commissions from present and former IBM sales representatives in New York. (NYSCEF Doc. No. [NYSCEF] 51, Amended Complaint [AC] ¶¶ 2, 5.)

In motion sequence 007 plaintiff moves for an order "(i) certifying the claims asserted on behalf of the Class[1] in this Action pursuant to CPLR 901 and 902; [and] (ii) designating Klafter Lesser LLP and Milberg Coleman Bryson Phillips Grossman PLLC as Class counsel." (NYSCEF 243, Notice of Motion.)

[1] The Class is defined as "individuals residing or who resided in the State of New York while working for IBM on a commission incentive plan since September 18, 2014, none of whom were provided with the terms of their commissions in a written contract signed by IBM." (NYSCEF 173, Plaintiff's MOL [mot. seq. no. 005] at 1.)

In motion sequence 008 plaintiff moves for an order "(i) granting partial certification of two [of] the issues germane to the claims of the Subclass[2] in this Action pursuant to CPLR 906; (ii) designating Thomas Engel as Subclass representative; (iii) designating Klafter Lesser LLP and Milberg Coleman Bryson Phillips Grossman PLLC as Subclass counsel; [and] (iv) deeming this motion to be timely filed if necessary." (NYSCEF 246, Notice of Motion.)

Discussion

Motion 007

CPLR 901(a), which "should be broadly construed" (*City of New York v Maul*, 14 NY3d 499, 509 [2010] [internal quotation marks and citation omitted]), provides that a class action may be maintained if:

> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4. the representative parties will fairly and adequately protect the interests of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (CPLR 901 [a].)

This court previously found that plaintiff has sufficiently established the numerosity, commonality, typicality, and superiority prerequisites to class certification. (NYSCEF 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 7-9, 13, 17.) Thus, these

[2] The Subclass is defined as "the salespeople whose commissions were manually adjusted by IBM, either directly or by manipulating the revenues on which commissions were based, and who: (1) worked for IBM under one of two types of commissions plans, an Individual Quota Plan or a Straight Rate Absolute Sales Plan; (2) earned commissions after September 18, 2014; (3) had those commissions reduced through the exercise of discretion by an IBM manager or executive; and (4) reside or resided in New York when their commissions were reduced." (NYSCEF 173, Plaintiff's MOL [mot. seq. no. 005] at 1.)

criteria will not be reconsidered. Instead, the court will, on this renewed motion for certification of the class, only consider whether plaintiff has established the fourth prerequisite to class certification, adequacy of representation.

In its July 10, 2024 Decision, this court denied class certification on the grounds that "plaintiff fail[ed] to proffer any evidence to show that he has the financial resources to prosecute this action on behalf of the class." (*Id.* at 16.) A plaintiff's financial ability to represent the class may be "adequately shown by counsel's assumption of the risk of costs and expenses in the litigation." (*Gudz v Jemrock Realty Co., LLC*, 105 AD3d 625, 626 [1st Dept 2013].) Here, plaintiff discloses that its counsel, Matthew E. Lee, Esq. of Milberg Coleman Bryson Philips Grossman, PLLC, have "agreed to be responsible for all costs and expenses necessary for the prosecution of this action, and have ben doing so since the commencement of this case." (NYSCEF 244, Plaintiff's MOL at 1; NYSCEF 245, Lee aff ¶ 3.) Defendant "does not object to [p]laintiff's showing of adequacy of representation given that [p]laintiff's counsel is now 'responsible for all costs and expenses necessary for the prosecution of this action.'" (NYSCEF 252, Defendant's MOL in Opposition at 1.)[3]

Accordingly, the court finds that plaintiff has established all the prerequisites for class certification.

[3] To the extent defendant's MOL raises the issues of plaintiff's (and the proposed class') (i) standing, (ii) use of declaratory judgment, and (iii) wage claim, these arguments go beyond the issue of class certification and are, therefore, not considered on this motion. (*See* NYSCEF 252, Defendant's MOL in Opposition.)

Motion 008

In motion sequence 008 plaintiff moves for an order "granting partial certification of two [of] the issues germane to the claims of the Subclass in this Action pursuant to CPLR 906." (246, Notice of Motion.) Defendant opposes the motion on the grounds that (i) the court previously denied plaintiff's motion for certification of the Subclass with prejudice, (ii) the motion is untimely, and (iii) the requested issue class certification is improper.

Collateral Estoppel

In the July 10, 2024 Decision and Order, this court denied plaintiff's motion to certify the Subclass with prejudice. (NYSCEF 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 18.) Defendant argues that the court's decision bars plaintiff's current motion for issue certification. The court disagrees. The court's prior decision precludes plaintiff from renewing its motion to certify the Subclass. However, plaintiff's current motion for issue certification is distinct from its prior request to certify the Subclass. This is evidenced both by the fact that plaintiff brings this motion pursuant to CPLR 906(1), instead of CPLR 901 and 902, and by the court's statements in the July 10, 2024 decision that "[p]laintiff's request to certify an issue class . . . will not be considered as plaintiff fails to articular which issues it seeks to have resolved on a subclass-wide basis" and "certification of an issue class is not sought in the Notice of Motion." (*Id.* at 13 n 12.)

Accordingly, the court finds that plaintiff's motion to certify two of the issues relevant to the claims of the Subclass is not precluded by the court's prior decision.

Timeliness of Motion

Defendant further opposes plaintiff's motion seeking certification of the issue classes pursuant to CPLR 906 on the grounds that motions for class certification were due July 14, 2023 (NYSCEF 192, Status Conference Order at 2), and plaintiff did not file this motion until August 6, 2024. Plaintiff argues that the motion is timely because the Status Conference Order did not address "whether the Court's ultimate class certification decision would provide a basis for a partial class certification motion." (NYSCEF 247, Plaintiff's MOL at 7.) Moreover, plaintiff argues that good cause has been demonstrated to modify the Status Conference Order because "[i]t is only now, with the benefit of the Court's Class Certification Decision that [p]laintiff has been able to make this focused motion for partial class certification." (*Id.*)

Plaintiff's arguments fail for two reasons. First, though the Status Conference Order does not explicitly address issue class certification, plaintiff clearly contemplated such certification at the time of filing its first motion to certify this action as a class action, as demonstrated by plaintiff's request therein to certify an issue class. (*See* NYSCEF 173, Plaintiff's MOL [mot. seq. no. 005] at 12 n 9.) Thus, plaintiff's argument that he would know whether a basis existed for issue class certification only upon the court's determination of class certification is unconvincing. Second, even if the court's class certification decision, entered on July 10, 2024, provided a good reason to modify the Status Conference Order, plaintiff never requested such a modification. Moreover, in its decision, the court directed that "plaintiff's motion to renew [its motion for class certification] shall be made within 20 days of this decision, otherwise waived." (NYSCEF 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 18.) On July

30, 2024, plaintiff timely renewed its motion for certification of the class. (NYSCEF 243, Notice of Motion [mot. seq. no. 007].) Meanwhile, plaintiff waited until August 6, 2024, to file its motion for issue class certification. (NYSCEF 246, Notice of Motion [mot. seq. no. 008].) Thus, regardless of which deadline was operative, plaintiff failed to comply with either. (*See Shah v Wilco Systems, Inc.*, 27 Add 169, 173 [1st Dept 2005] ["[p]laintiff's motion for class certification should have been denied with prejudice since the motion was untimely."].)

Accordingly, the court finds that plaintiff's motion is untimely.

Issue Class Certification

CPLR 906(1) provides that "an action may be brought or maintained as a class action with respect to particular issues." (CPLR 906 [1].) Plaintiff seeks herein to certify two issues: "(1) Did IBM have an express policy not to cap commissions of its salespersons on an Individual Quota Plan (IQP) or Straight Rate Absolute Plan; and (2) if so, what types of reductions in commissions that IBM engaged in violated that policy?" (NYSCEF 247, Plaintiff's MOL at 1-2.)

On a motion pursuant to CPLR 906 plaintiff does not escape the prerequisites set forth in CPLR 901(a); plaintiff must still demonstrate numerosity, typicality, adequacy, and superiority. (*Maddicks v 106-108 Conven BCR, LLC*, 2022 NY Slip Op 32752[U], *12, *20 [Sup Ct, NY County 2022].) However, as to the commonality requirement, plaintiff

> "must demonstrate the predominance of common issues of law or fact among prospective class members with respect to the issue for which they seek certification . . . [but] need not demonstrate that common issues of law or fact predominate over individual issues with respect to the portions of the case as to which they do not seek class certification." (*Stafford v A&E Real Estate Holdings, LLC*, 2025 NY Slip Op 30665[U], *3-4 [Sup Ct, NY County 2025].)

Here, plaintiff fails to meet the requirements of CPLR 901.

Numerosity

As set forth in the court's July 10, 2024 Decision and Order, plaintiff has established the numerosity requirement by submission of a spreadsheet listing 110 IBM New York sales representatives that worked either on the Individual Quota Plan or the Straight Rate Absolute Sales Plan, and whose commissions have been allegedly reduced. (NYSCEF 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 8; NYSCEF 177, Spreadsheet.) Again, defendant does not challenge this estimate. Thus, the numerosity requirement is met as to the issue class.

Commonality

On a CPLR 906 motion, plaintiff "does not have to show that common issues predominate over individual issues." (*Maddicks*, 2022 NY Slip Op 32752[U] at *20.) Nevertheless, plaintiff must establish the existence of common issues. Plaintiff seeks herein to certify the issue of whether IBM have an express policy not to cap commissions of its salespersons on an Individual Quota Plan (IQP) or Straight Rate Absolute Plan, and if so, what types of reductions in commissions that IBM engaged in violated such policy. (*See* NYSCEF 247, Plaintiff's MOL at 1-2.) Though the court noted in its prior decisions that "the issue of whether defendant had a secret policy of capping commissions, which it promised not to cap, is common to the subclass" (NYSCEF 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 11), "[p]artial certification is inappropriate when it does not materially advance the disposition of a case" (*Geiger v American Tobacco Co.*, 181 Misc 2d 875, 887 [Sup Ct, Queens County 1999], *affd* 277 AD2d 420 [2d Dept 2000]). That appears to be the situation here.

Though the factual issues of whether IBM has an express policy to cap commissions and what types of reductions in commissions amounted to a violation of such a policy could perhaps be resolved in a class action format, "these issues are thoroughly intertwined with those which must be determined individually." (*Id.*) Plaintiffs argue that determination of these common issues will allow class members to "only prove in some type of individual proceeding . . . that their commission were reduced for a prohibited reason." (NYSCEF 247, Plaintiff's MOL at 5.) Exactly because the issue of liability still requires individual determination as to each class member as to whether their commissions were capped in violation of the alleged policy, or instead, adjusted for other reasons (*see* 242, July 10, 2024 Decision and Order [mot. seq. no. 005] at 11 ["plaintiff's evidence does not establish that any commission adjustment would necessarily be due to capping."]), "the judicial economy to be reaped and the advantages for litigants of a partial class action will be relatively small" (*Geiger*, 181 Misc 2d at 887 [citing *Rosenfeld v A. H. Robins Co.*, 63 AD2d 11, 20 (2d Dept 1978)]; *see also Selden Sanitary Corp. v Elstroth*, 69 AD2d 402, 404 [2d Dept 1979] ["the single common legal issue . . . would effect no substantial judicial economy since actions would still have to be brought [on behalf] of each individual"]. Thus, plaintiff fails to establish the commonality requirement.

Typicality

The typicality prerequisite to class certification is satisfied if plaintiff's claims "derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory." (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 [1st Dept 2010] [internal quotation marks

omitted].) Even though plaintiff's first question of whether defendant has an express policy not to cap the commissions of its salespersons applies to the entire class, the second question regarding the types of reductions that may have violated such policy may not. In fact, the types of reductions engaged in by defendant may be different for each class member. Where "factual issues involving liability are [not] common to the class" the typicality requirement is not satisfied. (*See Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]; *see also Rivera v Sadet Island Holdings, LLC,* 2025 NY Slip Op 34706[U], *15 [Sup Ct, Kings County 2025] ["[t]ypical claims are those that arise from the same facts and circumstances"].) Thus, because plaintiff's claims do not necessarily "derive from the same practice or course of conduct" that may give rise to the remaining claims of other class members (*Kozak v Kushner Vil. 329 E. 9th St. LLC*, 232 AD3d 542, 545 [1st Dept 2024]), plaintiff fails to establish the typicality requirement.

Adequacy of Representation

"The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel." (*Id.* [citation omitted].) Defendant does not dispute plaintiff's adequacy as class representative. Moreover, because plaintiff's counsel has assumed responsibility for all litigation expenses and costs, plaintiff has satisfied the financial resources requirement. (*See* NYSCEF 245, Lee aff ¶ 3.) Upon reviewing the affidavits submitted, plaintiff has also demonstrated that the law firms of Klafter Lesser LLP and Milberg Coleman Bryson Phillips Grossman PLLC are competent as their attorneys have years of experience in employment litigation and

consumer protection class actions. (*See* NYSCEF 174, Lesser[4] aff ¶ 4; NYSCEF 176, Lee[5] aff ¶¶ 4-5, 9, 12, 15.) Therefore, plaintiff has established the adequacy requirement.

Superiority

As detailed above, even if it is established that the defendant had a policy to cap commissions and certain types of reductions constituted a violation of such policy, the issue of liability still requires an individual determination as to each class member whether their commissions were capped in violation of the alleged policy, or instead, adjusted for other reasons. "[T]he greater the number of individual issues the less likely superiority can be established." (*Burdick v Tonoga, Inc.*, 2018 NY Slip Op 51075[U], *5 [Sup Ct, Rensselaer County 2018].) Because defendant's liability as to each class member can only be determined on an individual basis, plaintiff fails to establish the superiority requirement.

For the reasons set forth, plaintiff fails to establish the commonality, typicality, and superiority prerequisites. Regardless, this motion is untimely. Therefore, the court denies plaintiff's motion to certify the two issue classes pursuant to CPLR 906(1).

Accordingly, it is

ORDERED that motion sequence 007 is granted; and it is further

ORDERED that the following class is hereby certified pursuant to CPLR Article 9: individuals residing or who resided in the State of New York while working for IBM on a

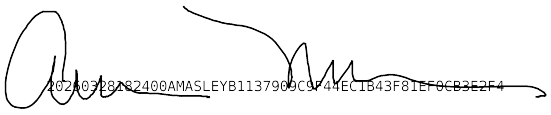
[4] Seth R. Lesser is a partner at Klafter Lesser LLP. (NYSCEF 174, Lesser aff ¶ 1.)
[5] Matthew E. Lee is a senior partner at Milberg Coleman Bryson Phillips Grossman. (NYSCEF 176, Lee aff ¶ 5.)

commission incentive plan since September 18, 2014, none of whom were provided with the terms of their commissions in a written contract signed by IBM; and it is further

ORDERED that defendants shall provide plaintiffs with a class list within 15 days of the entry of this Decision and Order, including mailing addresses, telephone numbers, and e-mail address where available, to permit plaintiffs to provide the necessary notice to members of the class; and it is further

ORDERED that Klafter Lesser LLP and Milberg Coleman Bryson Phillips Grossman PLLC are appointed Class counsel; and it is further

ORDERED that motion sequence 008 for issue class certification is denied with prejudice.



3/28/2026
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE