

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**DONNA KASSMAN, SPARKLE  
PATTERSON, JEANETTE POTTER,  
ASHWINI VASUDEVA, TINA BUTLER,  
CHERYL CHARITY, HEATHER INMAN,  
NANCY JONES AND CAROL MURRAY,  
individually and on behalf of a class of  
similarly-situated female employees,**

**Plaintiffs,**

**-against-**

**KPMG LLP,**

**Defendant.**

NO. 11-CV-3743 (LGS)

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION UNDER RULE 23  
AND FINAL CERTIFICATION  
OF THE EQUAL PAY ACT COLLECTIVE**

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**I. INTRODUCTION**

Representative Plaintiffs Donna Kassman, Tina Butler, Cheryl Charity, Heather Inman, Nancy Jones, and Carol Murray seek to certify a class of female Associates, Seniors Associates, Managers, Senior Managers/Directors, and Managing Directors employed within KPMG’s Tax and Advisory functions between October 30, 2009 through the date of judgment (collectively, the “Class members”).<sup>1</sup> In addition, Plaintiff Kassman seeks to certify a class of the same group of employees employed by KPMG in the state of New York from June 2, 2008 through the date of judgment (the “New York Subclass”). Plaintiffs also seek second stage collective action certification of the Equal Pay Act claims of 1,112 Opt-In Plaintiffs. All Opt-In Plaintiffs have been employed in class positions since March 16, 2009.

As the evidence described herein shows, KPMG employs standardized pay and promotion practices that apply uniformly to all Class members.<sup>2</sup> Plaintiffs allege that KPMG’s pay and promotion practices are specific employment practices that violate the disparate impact provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (“Title VII”) and the New York Human Rights Law (“NYHRL”), New York City Human Rights Law (“NYCHRL”), and New York Equal Pay Law, N.Y. Labor Law § 194. Plaintiffs also allege that KPMG engages in a pattern or practice of intentional discrimination against women (disparate treatment) in violation of Title VII and New York law.

Plaintiffs present substantial common proof of their disparate impact and disparate treatment claims. In addition to the substantial common proof from KPMG documents and

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<sup>1</sup> Excluded from the class are employees in KPMG’s client services support groups, such as Human Resources; Information Technology; Facilities; Finance; and Sales, Marketing, and Communications.

<sup>2</sup> Documentary and deposition evidence is attached to the Declaration of Tiseme G. Zegeye. For convenience of review, Bates-stamped KPMG documents with the designation KPMG-KASS or KPMG-BANKS are attached in Bates number order as Exhibits 1 and 2, respectively; a non-party document is attached as Exhibit 3; and deposition testimony is attached as Exhibits 4 – 20.

witnesses evidencing the common and uniformly-applied pay and promotion systems, Plaintiffs offer expert, class member, and other corporate evidence. Dr. Alexander Vekker, a recognized expert in labor economics,<sup>3</sup> demonstrates that Class members are paid less, and promoted less frequently, than their male peers, to a statistically significant degree. Dr. Caren Goldberg, a Human Resources Management expert,<sup>4</sup> identifies the common problems with KPMG's pay and promotion practices. Firm documents show that KPMG senior management was well aware of the adverse impact on women, but did nothing to fix it. Declarations from Plaintiffs and Class members, as well as over 140 internal complaints to Human Resources, describe a culture rife with gender discrimination, sexual harassment, and retaliation. Common company evidence and Opt-In Plaintiff deposition, declaration, and interrogatory sworn testimony illustrate that the collective is similarly situated.

Plaintiffs' claims raise common questions of law and fact, the answers to which will drive the resolution of this litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Plaintiffs seek certification of their claims for injunctive relief under Federal Rule of Civil Procedure 23(b)(2), certification of their claims for damages under 23(b)(3), and certification of liability under 23(b)(2), (b)(3), and/or (c)(4). In addition, Plaintiffs seek second stage certification of the collective. Below, Plaintiffs include a proposed trial plan that shows how their claims can be fairly and efficiently litigated on a class and collective basis. Plaintiffs respectfully ask that their motion be granted.

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<sup>3</sup> Dr. Alexander Vekker is the President of Vekker Consulting, LLC and has taught Economics at the University of Pennsylvania since 2006. He holds a Ph. D. in Economics, with a concentration in Labor Economics and Applied Econometrics, from the University of Pennsylvania, and an Honors Diploma (equivalent to B.S./M.S.) in Applied Mathematics from Moscow State Institute of Radio Engineering.

<sup>4</sup> Dr. Goldberg is an Associate Professor at Bowie State University with two decades of experience teaching doctorate, masters, and undergraduate students. Dr. Goldberg has authored more than 50 peer-reviewed articles and is regularly solicited to author book chapters in her field. Dr. Goldberg conducted an extensive review of KPMG's policies and practices regarding compensation and promotions.

## II. RULE 23 CLASS CERTIFICATION

Plaintiffs' challenge to two uniform employment practices will provide common answers to the common question, "Why was I disfavored?" *Dukes*, 564 U.S. at 352. The facts supporting certification in this case are extensive. Statistical, documentary, and anecdotal evidence reveals that KPMG's uniform compensation and promotion policies result in known and uncorrected gender disparities in compensation and promotion against the backdrop of a firm culture hostile to women.

### A. Relevant Facts

#### 1. KPMG's Uniform Policies and Practices Apply to All Class Members and Result in Gender Disparities.

##### a. KPMG Has a Uniform Management Structure.

KPMG is one of the "Big Four" accounting firms, generating over \$8 billion in income in the 2016 fiscal year.<sup>5</sup> The firm is organized by a central management structure. The Board of Directors, composed of up to 18 of KPMG's top partners, is responsible for adoption of the firm's policies and oversight of the firm's management.<sup>6</sup> The firm's Management Committee is responsible for implementing firm policies as promulgated by the Board.<sup>7</sup> The Management Committee includes leaders from each of the firm's three functions: Tax, Advisory, and Audit. Each of the functions is led by a National Managing Partner, who reports to a Vice Chair, who reports to the Management Committee.<sup>8</sup> This lawsuit involves the Tax and Advisory functions.

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<sup>5</sup> See <https://home.kpmg.com/content/dam/kpmg/us/pdf/2016/12/transparency-report-2016.pdf> (last visited January 26, 2018) at 15.

<sup>6</sup> See <https://home.kpmg.com/content/dam/kpmg/us/pdf/2016/12/transparency-report-2016.pdf> (last visited January 26, 2018) at 2.

<sup>7</sup> See <https://home.kpmg.com/content/dam/kpmg/us/pdf/2016/12/transparency-report-2016.pdf> (last visited January 26, 2018) at 3.

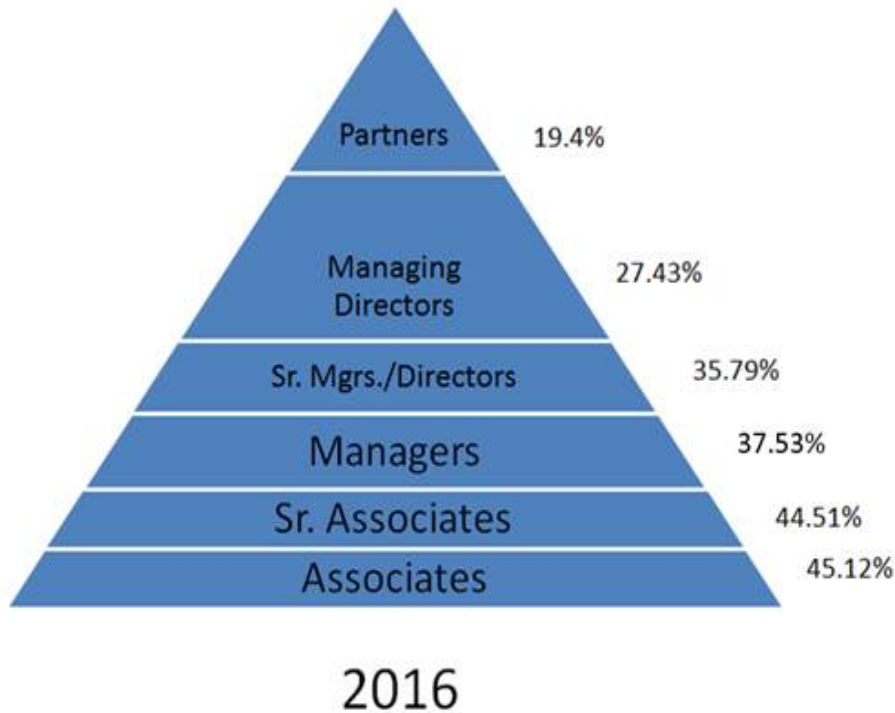
<sup>8</sup> Newinski Tr. March 13, 2014 ("Newinski I Tr.") 73:5-76:7 (explaining the structure of the management committee); Newinski I Tr. 72:11-14 (testifying that the Tax National Managing Partner reports to the Tax Vice

Both follow the same compensation and promotion processes as designed, adopted, overseen, and implemented by the Human Resources division and the Management Committee.<sup>9</sup>

**b. The Gender Glass Ceiling at KPMG.**

Women are concentrated in the lowest levels of the professional workforce at KPMG.

The following chart, based on KPMG’s own data, reflects the proportion of women in each position in 2016:<sup>10</sup>



These numbers are symptomatic of the male-dominated leadership at KPMG. Although women are hired into the Associate position at nearly the same rate as men, they represent only about

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Chair); Doughtie Tr. March 25, 2014 (“Doughtie I Tr.”) 60:10-61:13 (explaining the structure of the management committee); Doughtie I Tr. 88:17-19 (testifying that the Advisory National Managing Partner reports to the Advisory Vice Chair).

<sup>9</sup> See generally KPMG-KASS0008888 (Understanding and Applying the Salary Review Guidelines - presentation developed and presented by firm-wide Compensation Strategies Department, an office in Human Resources).

<sup>10</sup> See KPMG-KASS0183254.xls (Diversity KPI: FY16 Period 1: Headcount Summary); KPMG-KASS0581166 at 168.

one-fourth of the Managing Directors and less than one-fifth of the Partners, reflecting the glass ceiling women encounter at KPMG.<sup>11</sup>

c. **KPMG’s Uniform Compensation Process Applies to All Class Members.**

Throughout the Class period, KPMG has maintained a uniform and centrally-managed compensation process that applies to all Class Members regardless of function, service line (a subgrouping of function), job title, or geographic location. The Management Committee developed the compensation process at a firm-wide level to ensure it is “consistent across functions.”<sup>12</sup> The firm-wide process “involve[s] multiple levels of review and approval,” as “[t]his helps [to] ensure that there is consistency.”<sup>13</sup> As set forth below, a small cadre of senior leaders at KPMG ultimately control all pay decisions. According to its written policies, KPMG purports to base compensation on performance, as well as on an employee’s job level, work experience in the field, time in job, education, and geography.<sup>14</sup> As Plaintiffs will demonstrate, there is another, unstated factor: gender.

There are two components to employee compensation: annual salary increases (called “merit increases”) and variable compensation (bonuses). KPMG determines both through its annual compensation process. Compensation budgets are also centrally determined on a firm-

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<sup>11</sup> KPMG-KASS0471470 at 75 (Women’s Inclusive Initiative, March 2011).

<sup>12</sup> KPMG-KASS0046760 at 61(Tax Variable Compensation Strategy).

<sup>13</sup> KPMG-KASS0139647 at 139655 (Sylvia Brandes’ talking points for compensation training delivered to KPMG employees prior to their compensation discussions).

<sup>14</sup> Doughtie June 12, 2014 Tr. (“Doughtie II Tr.”) 68:17-69:3 (stating that KPMG bases its pay on performance and the market); Teegan Tr. 68:19-25 (testifying that educational degrees and experience play a role in “determining somebody’s compensation” at KPMG); KPMG-KASS0139629 at 139636 (Advisory compensation slide deck stating that “experience in the role” is a primary driver of one’s placement in a salary increase range); KPMG-KASS0139647 at 139654 (Tax compensation slide deck stating “experience” and “job level” is taken into account in compensation decisions); KPMG-KASS0181784 (showing salary percentage differences by KPMG office).

wide basis every year.<sup>15</sup> First, the Vice Chairs and National Managing Partners of each function create financial projections and propose compensation budgets.<sup>16</sup> The budget recommendations are sent to KPMG’s centralized Compensation Strategies Department.<sup>17</sup>

Second, the Compensation Strategies Department undertakes an annual “market study” to determine the market rate compensation for each of the job titles.<sup>18</sup> The Compensation Strategies Department uses the market studies and the budgets to create proposed salary ranges<sup>19</sup> for each job title within each function.<sup>20</sup> The Compensation Strategies Department conducts multiple salary range meetings with the leaders of Tax and Advisory, which often cause slight function-wide revisions to the proposed ranges.<sup>21</sup> Ultimately, the Management Committee must review the market ranges and approve the compensation budgets before KPMG begins the process of determining individual employees’ merit increases and variable compensation.<sup>22</sup>

After the salary ranges and budgets are approved, the Compensation Strategies Department recommends merit increase and variable compensation figures for all the Class Positions via a standardized “Compensation Tool.”<sup>23</sup> These pre-populated<sup>24</sup> salary

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<sup>15</sup> *See, e.g.*, KPMG-KASS0008888 at 8902 (“The amount of the [variable compensation] pool is determined by business results. . . . In keeping with our one-firm approach, we look at business results on a firmwide basis.”); *see also* KPMG-KASS0009255 (2013 Year-end timelines).

<sup>16</sup> Newinski I Tr. 89:12-25.

<sup>17</sup> *See, e.g.*, KPMG-KASS0009255 (2013 Year-end timelines).

<sup>18</sup> Brandes Tr. 113:10-22; Newinski I Tr. 89:7-12, 414:1-24; KPMG-KASS0008888 at 893.

<sup>19</sup> Also known as “guidelines” for Managing Directors in Advisory, a position that does not rely on the same market data for the establishment of salary ranges. *See* KPMG-KASS0181701.

<sup>20</sup> Brandes Tr. 117:17-118:6 (testifying that market data is separated by job title and function).

<sup>21</sup> Brandes Tr. 151:11-153:3 (testifying that she previews the market data and salary ranges to functional leadership in yearly meetings); Brandes Tr. 181:6-182:5 (testifying that at times, changes are made to the salary ranges because of feedback from functional leaders).

<sup>22</sup> Brandes Tr. 197:2-198:2; 203:18-204:5.

<sup>23</sup> *See, e.g.*, Brandes Tr. 118:11-19; Doughtie II Tr. 73:2-6; KPMG-KASS0066411 (YE Rating and Compensation Process, compensation flowchart noting that “Salary Forms are populated based on the following: Budget, market data, YE Rating, Geographic data, Current salary, and other activity”); KPMG-KASS0008993 at 9005-09 (training slides explaining Compensation Tool pre-population).

<sup>24</sup> Although the spreadsheet-based pre-population format did not begin until 2010, the firm provided salary ranges for each position from 2005-2010 in the form of a report. *See* Newinski II Tr. 436:16-437:8.

recommendations are based on a formula, applied firm-wide, that takes into account an employee's existing salary along with other inputs like performance rating, whether they are being promoted, and where their salary is in relation to the Compensation Tool "target."<sup>25</sup> The "target" reflects the firm's estimate of market-rate compensation for a particular employee based on factors such as geography, and the number of years that employee has been in a particular job title.<sup>26</sup>

Third, HR distributes to local Partners the pre-populated merit increase and variable compensation recommendations for specific individuals. The Partners review them and affirm the recommendations or make adjustments.<sup>27</sup> All local Partners participate in centralized compensation training programs and KPMG instructs them to make all recommendations based on these trainings.<sup>28</sup> Any Partner adjustments in recommendations for merit increases and variable compensation are subject to several levels of centralized review to confirm compliance with KPMG's uniform compensation policies.<sup>29</sup> Ultimately, national leaders – the Vice Chair, the National Managing Partner, and the National Head of Human Resources – for Tax and Advisory execute final approval for compensation decisions, and compensation decisions are not communicated to individuals prior to this final approval.<sup>30</sup> Throughout the process, KPMG

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<sup>25</sup> See, e.g., KPMG-KASS0091075 at 83 (Tax); KPMG-KASS0036444 at 50 (Advisory); KPMG-KASS0008888 at 899.

<sup>26</sup> See, e.g., KPMG-KASS0008888 at 96-97.

<sup>27</sup> See, e.g., KPMG-KASS0008888 (Tax 2010 Understanding and Applying Salary Review Guidelines); KPMG-KASS0036444 at 50 (Understanding and Applying the Salary Review Guidelines-Advisory, May 31, 2012).

<sup>28</sup> E.g. KPMG-KASS0008888 (Tax 2010 Understanding and Applying Salary Review Guidelines), KPMG-KASS0036444 (Advisory 2012 Understanding and Applying Salary Review Guidelines).

<sup>29</sup> KPMG-KASS0066411(YE Rating and Compensation Process).

<sup>30</sup> See KPMG-KASS0066411 (YE Rating and Compensation Process); Newinski II Tr. 416:20-417:5, Ex.19 (KPMG-KASS0001631); KPMG-KASS0139629 at 139632 (Tax and Advisory compensation presentations).



discourages employees from discussing compensation of other employees.<sup>31</sup>

**d. Common Evidence Shows That KPMG’s Compensation Process Has An Adverse Impact on Female Employees.**

Dr. Vekker analyzed KPMG’s personnel data and concluded that KPMG’s compensation process has a statistically significant adverse impact on women. Using a multiple regression analysis,<sup>32</sup> Dr. Vekker found that KPMG pays Class members less than similarly-situated men.

Dr. Vekker found that the gender pay disparities are statistically significant even after controlling for legitimate explanatory factors (including those purportedly considered by KPMG), including job title, education, experience, job location, time in job, year, and performance rating.<sup>33</sup>

Importantly, Dr. Vekker found similar disparities when he did not control for performance rating,<sup>34</sup> indicating that the disparities in compensation cannot be explained by differences in performance.

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<sup>31</sup> KPMG’s firm-wide training slides, for example, tell employees before their compensation discussions: “don’t discuss compensation or performance of other employees.” KPMG-KASS0181723 at 32. Indeed, numerous employees testified that KPMG discouraged employees from discussing compensation with one another. *See e.g.*, Lucy Garcia Tr. 176:22-24 (testifying that people were not allowed to discuss compensation at KPMG); Carey Decl. ¶ 11; Gracia ¶ 9; Declaration of Carlynn Alexander ¶ 10 (“I believe KPMG discourages employees from discussing their compensation with other employees.”); Declaration of Nancy Jones ¶ 4 (“I understood from KPMG that I was not to discuss my compensation with other employees.”); *see also* May 12, 2017 Goldberg Rpt. at 13 (“Goldberg Report”). KPMG also discourages women from challenging their compensation, and, for example, informs women they are paid near the top of the salary range when they are not. *Compare* Declaration of Elisa Wu ¶ 10 (testifying she raised concerns about compensation numerous times to a Partner, who informed her she was being paid near the top of her range) *with* Declaration of Kate Mueting (“Mueting Decl.”) ¶ 5 (indicating KPMG compensation data does not support that Elisa Wu was being paid near the top of her range. *See also* Goldberg Report at 13.

<sup>32</sup> Logistic regression analysis is a statistical test that identifies factors, called independent variables, that might influence the outcome of an observed phenomenon, called a dependent variable. In the employment discrimination context the dependent variable is the employment decision, such as hiring, promotion, or compensation. The statistician identifies legitimate factors that could have influenced the decision, *e.g.*, education and experience, and determines through multiple regression analyses how well these legitimate factors account for the employment decision. In this manner the influence of a protected characteristic like gender on the employment decision can be statistically isolated. *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 366-67 (2d Cir. 1989); *see also Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 483-84 (S.D.N.Y. 2005) (discussing control variables used in compensation regression analysis); *Wright v. Stern*, 450 F. Supp. 2d 335, 361-62 (S.D.N.Y. 2006) (same).

<sup>33</sup> Report of Dr. Vekker, May 12, 2017 with supplements from December 15, 2017 correcting errata (“Vekker Report”) at 8. These are also factors KPMG purports to use in setting compensation. *See supra* at n.14.

<sup>34</sup> Vekker Report at 8 n.6.

More particularly, Dr. Vekker's statistical analysis shows a disparity in women's total compensation of -2.7%, at -7.88 standard deviations for the period 2008-2016 in the Tax function, and of -2.8%, at -8.19 standard deviations in the Advisory function.<sup>35</sup> Similarly, Dr. Vekker's statistical analysis shows a disparity in women's base pay of -2.5%, at -9.16 standard deviations, for the period 2008-2016 in the Tax function, and of -2.7%, at -10.41 standard deviations, in the Advisory function.<sup>36</sup> All results are well over two standard deviations, or a probability of occurring by chance of less than 1 in 1 million, which courts treat as evidence supporting an inference of discrimination.<sup>37</sup> Dr. Vekker's regression analyses thus show the systemic underpayment of women in both base pay and total compensation (base plus incentive compensation) in both the Tax and Advisory functions and for each year of the period.

Dr. Goldberg evaluated the pay practices applicable to Class Members. Based on an application of academic research and her own experience, Dr. Goldberg concluded that “[w]hile KPMG purports to pay for performance, it fails to do so, contrary to basic principles of reinforcement theory and its own stated compensation philosophy of differentiating pay based on performance.”<sup>38</sup> Further, as Dr. Goldberg described, KPMG uses common, vague, and unweighted criteria not tied to performance scores, such as considerations of personal goal

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<sup>35</sup> Vekker Report at 10 & tables 3 and 4, which also show *yearly* disparities in women's total compensation of from -2.2% to -3.0% at -3.9 standard deviations or greater in Tax, and from -1.7% to -3.8% at -2.6 standard deviations or greater in Advisory.

<sup>36</sup> Vekker Report at 8-9 & Tables 1 & 2, which also show *yearly* disparities in women's base pay of from -2.1% to -2.9%, at -4 standard deviations or greater in Tax, and from -1.9% to -3.6%, at 4 standard deviations or greater in Advisory.

<sup>37</sup> See, e.g., *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003) (noting that courts generally consider disparities of two standard deviations or more “sufficient to warrant an inference of discrimination”) (internal citations and quotation marks omitted). Lesser disparities may also be probative.

<sup>38</sup> Goldberg Report at 4, 7, 12 (itemizing the specific ways KPMG's compensation structure decouples pay from performance). For example, Dr. Goldberg pointed to specific ways in which pay ranges are established such that the firm can disregard performance ratings in setting compensation. *Id.* at 7, 12.

attainment, to determine merit increase and variable compensation.<sup>39</sup> KPMG’s own corporate designees acknowledge, in so many words, how the vague and unweighted criteria preclude meaningful comparison between employees: *KPMG simply cannot explain how an employee’s performance translates into compensation decisions.*<sup>40</sup>

**e. A Uniform Promotion Process Applies to All Class Members.**

KPMG has also maintained a uniform and centrally managed promotion process applicable to all Class members during the Class period. KPMG developed its promotion process with the goal of having “consistency amongst service lines/geographies.”<sup>41</sup>

KPMG’s “People Management Leaders,” or “PMLs,” make preliminary promotion recommendations that they discuss with other PMLs in annual “assessment meetings.”<sup>42</sup> PMLs are assigned to lower-level employees to guide them through the firm’s centralized personnel processes. Assessment meetings are attended by PMLs who rank higher than the employees under consideration.<sup>43</sup> KPMG distributes common, firm-wide materials on preparing for assessment meetings to all PMLs.<sup>44</sup> During these meetings, the PMLs discuss the performance and promotion-readiness of groups of employees compared against one another.<sup>45</sup> KPMG has

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<sup>39</sup> Goldberg Report at 10.

<sup>40</sup> See Doughtie II Tr.40:15-41:3 (testifying that she “can’t answer” how receiving a 1 versus a 2 as a performance rating would change one’s compensation); Newinski II Tr. 349:13-18 (testifying that it is “impossible” to precisely know the impact of performance alone on an employee’s compensation); see also Goldberg Report at 9-11.

<sup>41</sup> See, e.g., KPMG-KASS0000850R at 851R (goals for improving promotion process to Managing Director and above); see also KPMG-KASS0587375 at 77 (Office Managing Partner noting promotion decisions themselves are made beyond the service line level).

<sup>42</sup> Doughtie I Tr. 182:19-183:10; 201:8-15.

<sup>43</sup> See, e.g., Doughtie I Tr. 202:12-16, 202:25-203:2; Newinski I Tr. 196:15-17; Teegan Tr. 176:23-178:8

<sup>44</sup> KPMG-KASS0237167 (Teegan Ex. 20); 268:5-11.

<sup>45</sup> Doughtie I Tr. 182:19-183:10 (“One of the first stages for consideration of promotions as part of the assessment meetings that happen within the various network groups. So there could be, you know, numerous assessment meetings in, you know, geographies and certain industries, certain service networks, whether there’s collective feedback on the performance of individuals and performance criteria.”); Newinski I Tr. 194:5-197:8 (describing the process of the assessment meeting).

established common qualifications for promotions to each level,<sup>46</sup> such as the number of years served in the prior positions and performance ratings, as well as common, ill-defined criteria such as reputation, professional excellence, professionalism and integrity.<sup>47</sup>

The assessment meetings result in promotion recommendations that are sent to senior firm leaders.<sup>48</sup> As with compensation approval, the National Leaders for Tax and Advisory provide final approval for promotion decisions and retain tight control over the process.<sup>49</sup> All employees who are promoted to a particular level in Tax and Advisory receive the same *percentage* salary increase, which ensures disparities in compensation are exacerbated at each successive level.<sup>50</sup>

Notably, KPMG does not publish vacancies in advance of making promotion decisions, and employees are not informed of whether they are eligible or what they need to do to be promoted.<sup>51</sup> Instead, although KPMG does not instruct the field of this expectation, KPMG's CEO Lynne Doughtie, then Vice Chair of Advisory, stated that KPMG expects that through its "culture," KPMG employees will understand they need to "express an interest" in being

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<sup>46</sup> See, e.g., KPMG-KASS0183890 (2013 Advisory Promotion Criteria); Tax Promotion Criteria: KPMG-KASS0139758; KPMG-KASS0139748; KPMG-KASS0139769; KPMG-KASS0046705; KPMG-KASS0133724; KPMG-KASS0121941.

<sup>47</sup> See, e.g., KPMG-KASS0139758; KPMG-KASS0139748; KPMG-KASS0139769; KPMG-KASS0058130 (Tax Expectation Guidelines and Self Assessment Guides); Doughtie I Tr. 189:2-190:6 (testifying that promotions in Advisory are subject to criteria such as ability to perform tasks and "directing others"); Goldberg Report at 17-18.

<sup>48</sup> Doughtie I Tr. 204:19-205:20; 209:10-13 (stating that assessment meetings result in promotion recommendations that are given to service network leaders); Newinski I Tr. 198:3-8 (explaining that after assessment meetings, Human Resources reports the promotion recommendations to senior firm leaders).

<sup>49</sup> See, e.g., KPMG-KASS0068192 (FY11, May 20 – leadership approves all new 7/1 Manager promotions; June 13 – Leadership approves all remaining ratings and promotion recommendations); KPMG-KASS0001631 (Newinski II Tr. Ex.19). See also P. Brown Tr. 94:18-19; 95:24-5; 96:11 (promotions from associate to senior associate, senior associate to manager, and manager to senior manager are approved by the Vice Chair of Tax and the National Managing Partner of Tax); Newinski I Tr. 190-191 (promotions are determined and approved by functional leaders).

<sup>50</sup> See, e.g., KPMG-KASS0011351 at 11356; KPMG-KASS0136814 at 136822 (showing standard percent salary increases for promotions to each level).

<sup>51</sup> Doughtie I Tr. 180:21-22 (stating that KPMG does not post all jobs); Doughtie I Tr. 257:10-15 (stating that there is no one way for KPMG employees to express interest in promotion); Doughtie I Tr. 267:6-11 (testifying that there is no written or specific communication about how employees should express an interest in promotion).

promoted.<sup>52</sup> KPMG does not inform employees how to express this interest,<sup>53</sup> and KPMG does not train supervisors or mentors on what to do when employees do express an interest in being promoted.<sup>54</sup>

**f. Common Evidence Demonstrates KPMG’s Promotion Process Has An Adverse Impact On Female Employees.**

Dr. Vekker’s analysis demonstrates that KPMG’s promotion process has an adverse impact on women in promotions from Associate to Senior Associate; Senior Associate to Manager; Manager to Senior Manager/Director; and Senior Manager/Director to Managing Director.<sup>55</sup> Using a logistic regression analysis controlling for legitimate explanatory factors, including job title, education, experience, job location, time in job, year, and performance rating, Dr. Vekker found the following statistically significant results in his promotion analysis: The 2008-2016 gender differential in probability of promotion in Tax for all jobs was 3.4 percentage points, with a standard deviation of 7.64.<sup>56</sup> The 2008-2016 gender differential in Advisory for all jobs was 1.6 percentage points, with a standard deviation of 4.93.<sup>57</sup>

With respect to promotions, Dr. Goldberg concluded that “KPMG’s promotion practices contain numerous flaws and create a predictable method through which inconsistent outcomes

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<sup>52</sup> See Doughtie I Tr. 266:5-267:14.

<sup>53</sup> Doughtie I Tr. 265:3-267:14 (current CEO and then Vice Chair of Advisory suggests that employees could send her a letter to express interest in promotion, admits that the various ways to express interest are not written down).

<sup>54</sup> Doughtie I Tr. 264:3-265:2.

<sup>55</sup> This case does not involve a challenge to promotions from the Managing Director level.

<sup>56</sup> Because promotions are relatively rare events, a single-digit percentage-point difference in probability of promotion may equate to a much larger overall difference in percentage terms. For example, in Tax, based on the observed 3.4 percentage-point difference, if the probability of promotion for men is 25%, then for women the probability of promotion is 21.6%. In this scenario, a 3.4 percentage-point difference in the probabilities of promotion means that men’s probability of promotion is **15.7%** higher than women’s probability of promotion. This example is reasonable because the average rate of promotion in Tax from 2008 to 2016 on an annual basis for both men and women for the population Dr. Vekker studied is 24.4%. See Zegeye Decl. ¶ 27.

<sup>57</sup> Vekker Report at 10-11, 10 n.14 & Tables 5 & 6. These tables also show disparities, or negative coefficients, for all jobs in the Tax and Advisory functions and, despite the reduced power of an analysis disaggregating by job, disparities at greater than two (1.96) standard deviations for five of the eight jobs in both functions.

and bias are exacerbated.”<sup>58</sup> Dr. Goldberg describes the specific problems with KPMG’s closed recruitment system and common, vague, and unweighted criteria for promotions. Further, while KPMG has established common requirements for each and every position, it has failed to define the *specific* “KSAs” (knowledge, skills, and abilities) needed by level. This creates a flawed promotion practice that is contrary to HR principles.<sup>59</sup> Overall, Dr. Goldberg explains how the vague promotion criteria and common practices around it are “associated with poor HR practice in the literature.”<sup>60</sup>

**2. Common Evidence Shows That KPMG Has Failed to Correct Known Disadvantages for Women Caused by Its Uniform Compensation and Promotion Processes.**

KPMG has long known that its compensation and promotion processes have an adverse impact on women in Tax and Advisory, yet it has not remedied the problem, and is continuing to use the same flawed policies since the filing of this lawsuit.<sup>61</sup>

**a. KPMG Knew That the Compensation and Promotion Processes Discriminated Against Women.**

Firm documents reveal that KPMG was well aware that the compensation and promotion processes disadvantage women. KPMG acknowledged as early as 2009 that “compensation disparities still exist” for women at KPMG.<sup>62</sup> A presentation by the firm-wide Women’s Inclusion Initiative in 2011 noted that “KPMG’s current record of retaining, promoting, and providing meaningful representation of females in leadership is insufficient to meet our clients’ and our own expectations,” and “our failure to provide succession planning that includes female

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<sup>58</sup> Goldberg Report at 13.

<sup>59</sup> Goldberg Report at 19-20.

<sup>60</sup> Goldberg Report at 21.

<sup>61</sup> See also Goldberg Report at 21-24 (concluding that KPMG failed to conduct training to counter bias and failed to monitor gender differences in compensation and promotions, in derogation of appropriate human resources management principles).

<sup>62</sup> KPMG-KASS0526032 (Diversity Advisory Board Meeting, Dec. 7, 2009, Minutes).

partners is expected to create a long term competitive disadvantage.”<sup>63</sup> The same presentation acknowledged that female employees often express frustration with pay equity.<sup>64</sup>

The record abounds with documents showing that KPMG was aware that its opaque promotion process and unreliable criteria result in the underrepresentation of women. A committee of KPMG’s Woman’s Advisory Board acknowledged the flaws in the process, noting that women face “unclear promotion paths”<sup>65</sup> and “career paths for managers is unclear.”<sup>66</sup> Kathy Hannon, the National Managing Partner of Diversity and Corporate Responsibility, acknowledged in 2011 that “[w]omen at KPMG are beginning to say that KPMG is not serious about diversity” and that “what we don’t have are sponsors – advocates for women when an opportunity arises and their name is put up for consideration.”<sup>67</sup> She has also acknowledged that “even though nearly half our professionals are women, only 11.6% hold leadership roles” and that “female senior managers feel stagnated.”<sup>68</sup> Despite admitting in 2011 that the firm had received a “wake-up call” to improve gender representation “in every practice and office, in the partnership and in leadership roles,”<sup>69</sup> KPMG has elected not to wake up.

External sources also alerted KPMG to gender bias in compensation and promotions. In 2011, DiversityInc conducted a ranking of “Top 50 Companies for Diversity,” and specifically cited gender disparities in KPMG’s compensation and promotions as reasons for KPMG’s low

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<sup>63</sup> See KPMG-KASS0471470 at 475 (Women’s Inclusion Initiative PowerPoint Presentation, Mar. 2011).

<sup>64</sup> KPMG acknowledged that “women state that they leave KPMG due to perceived limitations in . . . compensation.” See KPMG-KASS0471470 at 475 (Women’s Inclusion Initiative PowerPoint Presentation, Mar. 2011).

<sup>65</sup> The Senior to Senior Committee conducted senior associate focus groups at training sessions for Tax, Advisory, and Audit, comprised of nine sessions with approximately 20 Senior Associate women (approximately 180 total) in each. Although these interviews raised numerous issues with the compensation and promotion systems, KPMG did not fix them. See KPMG-KASS0466861 at 863.

<sup>66</sup> KPMG-KASS0466763 at 768.

<sup>67</sup> KPMG-KASS0586575 at 579 (2011 Aligning Our Strategy and Culture Through Gender Diversity presentation).

<sup>68</sup> KPMG-KASS0586575 at 577-578 (2011 Aligning Our Strategy and Culture Through Gender Diversity presentation).

<sup>69</sup> KPMG-KASS0586575 at 577-578 (2011 Aligning Our Strategy and Culture Through Gender Diversity presentation).



ranking.<sup>70</sup> Similarly, in 2015, a KPMG Advisory diversity plan noted that “[e]xternal research suggests evidence of bias in [KPMG’s] performance and promotion process.”<sup>71</sup> The same Plan recognized that “KPMG lags [behind] its peers and other leading companies in key measures of diversity,” including “[w]orkforce representation,” “[p]romotions into management,” and “[r]epresentation in firm management.”<sup>72</sup>

**b. KPMG has Continued to Maintain these Policies and Failed to Implement Basic Preventative or Corrective Measures.**

Despite knowledge of persistent gender bias in the compensation and promotion processes described above, KPMG has continued to apply these policies and has failed to implement even the most basic measures to satisfy its obligation to ensure it was paying and promoting women fairly, such as monitoring for biased outcomes or conducting effective training to combat bias. KPMG has failed to act, and, as explained above, the gender disparities in compensation and promotion have persisted throughout the pendency of this lawsuit.

Significantly, KPMG has admitted that it does not review or analyze the centrally determined compensation and promotion decisions to see if women are paid or promoted equally.<sup>73</sup> Dr. Goldberg reports that this failure to monitor, including failure to implement even basic monitoring of gender representation by level, is “a departure from common practice” and places KPMG at odds with its competitors.<sup>74</sup>

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<sup>70</sup> KPMG-KASS0529020 at 32 (“The firm’s representation of women in the CEO-and-direct-reports level is very low” and “Representation of women in the ‘10 percent highest paid’” at KPMG was just 19.3% for calendar year 2010 compared to 24.3% in the same time frame for its competitors).

<sup>71</sup> KPMG-KASS0578794 at 802 (KPMG Advisory Diversity Plan, September 2015, slide 8).

<sup>72</sup> KPMG-KASS0578794 at 796 (KPMG Advisory Diversity Plan, September 2015, slide 2).

<sup>73</sup> Zegeye Dec., Ex. 3 (Stockdale Tr., Ex. 4, page 1 (letter from KPMG counsel reporting, “We are not aware of any analyses being conducted of any alleged gender impact of KPMG’s compensation, promotion, or evaluation systems on the firm, function, service line, region, cost center, or office level” from the period of 2008 through the present.)).

<sup>74</sup> Goldberg Report at 23 (citing a 2017 McKinsey study found that 91% of companies surveyed tracked gender representation by level).



KPMG failed to conduct this analysis despite recommendations in 2011 from DiversityInc advising KPMG to conduct gender bias monitoring given KPMG's poor showing on diversity metrics and to "thoroughly examine[]" "the issue of why the disparities exist."<sup>75</sup> DiversityInc also recommended that KPMG "evaluate whether this gap has been rectified and hold people accountable for results."<sup>76</sup> Yet nothing in the record reflects any effort to determine the causes of these disparities or to amend firm policies to prevent such disparities from continuing or increasing.<sup>77</sup>

Similarly, KPMG failed to implement appropriate training to mitigate bias. KPMG does not conduct any training to address or ameliorate bias of firm leaders and other Partners in making compensation and promotion recommendations or decisions.<sup>78</sup> Again, Dr. Goldberg found that KPMG has no training that effectively counters the effects of bias.<sup>79</sup> The trainings KPMG offers are so poorly designed as to be "window dressing" at best.<sup>80</sup> By contrast, KPMG's employee trainings on matters relating to business operations are robust, in-person, and extensive.<sup>81</sup> KPMG's trainings on diversity and avoiding bias, however, are demonstrably ineffective at affecting behavior.<sup>82</sup>

Additionally, although KPMG maintained an internal group for female employees called KPMG's Network of Women (KNOW), the KNOW programming purportedly aimed at helping

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<sup>75</sup> KPMG-KASS0529020 at 53.

<sup>76</sup> KPMG-KASS0529020 at 53.

<sup>77</sup> Zegeye Decl., Ex. 3 (Stockdale Ex. 4, page 1 (and evidence cited therein)); *see also* Farmer Tr. 43:6-44:24.

<sup>78</sup> Goldberg Report at 21-22.

<sup>79</sup> Goldberg Report at 21-22.

<sup>80</sup> Reply Report of Dr. Goldberg, September 29, 2017 ("Goldberg Reply"), at 6 (relying on scientific studies critiquing as wholly ineffective trainings like those offered at KPMG, which are one-off trainings, passive, short format, and/or computer-based).

<sup>81</sup> KPMG Advisory employees, for example, attend week-long, in-person training meetings called "Advisory University." KPMG-KASS0395866. KPMG Tax employees participate in week-long hands-on training academies in which they engage in client simulations and role playing. *See* KPMG-BANKS-0000070 at 74.

<sup>82</sup> Goldberg Reply at 6.

women advance is also ineffective and instead reinforces outmoded gendered stereotypes. Leaders in KNOW agree: “[KNOW] is more window dressing than actually assisting women to further their careers and fight the gender discrimination at KPMG.” Tan Tr. 182:21-183:7 (referencing a KNOW leader comment). This is echoed by employee perceptions of KNOW: “this appears to be [a] ‘window dressing’ program. It is more important for local office management to ‘walk the walk’” and “does it truly help women at KPMG advance or is it a forum for women to get together and talk?” KPMG-KASS0466914. The critiques are not surprising given that KNOW events include fashion shows, cookie baking, spa days, cooking classes, branding seminars using Kim Kardashian and Lady Gaga as role models, and events that reinforce and emphasize gender stereotypes by assuming women have “exceptional empathy” and “uncanny intuition,” and by asking them to “use their flair and sense of style to create a stronger visual identity through clothing, hairstyle, make up and accessories.” KPMG-KASS0470258; KPMG-KASS0468716.<sup>83</sup> One Office Managing Partner noted that KPMG’s diversity efforts are “largely cheerleading” and ineffective given KPMG’s structural barriers for women. KPMG-KASS0574834 at 35.

**3. Common Evidence Shows That Discrimination in Compensation and Promotions Arises from a Firm Culture Rife with Sexual Harassment and Gender Bias.**

KPMG’s common policies are implemented in a firm culture of gender stereotyping and hostility towards women, which shapes the compensation disparities and promotion shortfalls. Common evidence from many sources across the firm provides substantial proof of intentional discrimination (disparate treatment). It collectively shows KPMG’s pattern and practice of gender bias and brings “the cold numbers convincingly to life.” *Int’l Bd. of Teamsters v. United*

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<sup>83</sup> See also KPMG-KASS0466355 at 360-62.

*States*, 431 U.S. 324, 339 (1977).

The evidence, detailed below, includes testimony from Named and Opt-In Plaintiffs; internal complaints by female employees of gender discrimination, sexual harassment, retaliation, and hostile work environment submitted to KPMG’s centralized Human Resources and Ethics & Compliance departments during the discovery period; concerns articulated by women in annual employee surveys and exit interviews; and other firm emails and records reflecting persistent biases and systemic problems for women.

This constellation of evidence shows that KPMG tolerates, condones, and facilitates a hostile “boys’ club” culture that is rife with gender bias and sexual harassment, that KPMG fails to respond appropriately to complaints by female employees,<sup>84</sup> and that complaining does not lead to remedies, but rather to retaliation.<sup>85</sup>

**a. KPMG Tolerates, Condone, and Facilitates a Hostile “Boys’ Club” Culture and Widespread Sexualization of Women.**

Substantial common evidence from KPMG’s internal files and deposition testimony describes a sexualized and sexist workplace that creates a hostile work environment for women

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<sup>84</sup> Common evidence also indicates that KPMG fails to investigate individual complaints of pay discrimination. Declaration of Anna Gracia ¶ 11 (testifying her complaints about compensation and promotion were not acted on); Declaration of Holly Barnes ¶ 11 (testifying she complained about unfair compensation to her PML and Partner, who did nothing to rectify the issue); Declaration of Lauren Guenter ¶ 8 (testifying that her regular complaints to management about compensation were disregarded); Declaration of Marilyn Farley ¶ 11 (testifying she complained about her compensation but KPMG did nothing to rectify the issue); Declaration of Lisa Schmaltz ¶ 10 (testifying she discussed her compensation with her PML multiple times without any results); Declaration of Carlynn Alexander ¶ 12 (testifying she complained of discrimination to several Partners and did not receive any follow up); Declaration of Jessica Luke ¶ 12 (testifying she complained about her unfair compensation, but KPMG did not remedy the issue); Declaration of Cheryl Charity ¶ 9 (testifying her PML never investigated or followed up on her complaint about compensation); Declaration of Tina Butler ¶ 8 (testifying her complaints to PMLs and Partners about discrimination in pay and promotion were not addressed); Declaration of Nancy Jones ¶ 6 (testifying she complained to a Partner and her PML regularly about compensation and KPMG’s failure to promote her, but KPMG failed to take action); Declaration of Donna Kassman ¶ 8 (testifying her complaints about compensation and hostile work environment were not resolved by complaints to management); Declaration of Sabrina Starnes ¶ 10 (testifying her complaints to managers about compensation and promotion were not acted on); Wallace ¶ 10 (testifying she complained to HR about pay disparities but was told there was nothing HR could do).

<sup>85</sup> KPMG’s internal complaints vastly understate the instances of pay discrimination because, as explained above, KPMG’s practice of discouraging employees from discussing compensation prevents many women from identifying pay equity issues and challenging their unfair compensation. *See also* Section II.A.1.c, *supra*.

in Tax and Advisory. This hostile work environment is not isolated to a handful of offices or “bad apple” managers, but instead permeates the entire firm.<sup>86</sup> KPMG management tolerates this sexism, which fosters a culture that denigrates women and their roles. Against this backdrop, women are sidelined and excluded from opportunities for valuable professional networking and development, ensuring they are further disadvantaged during the compensation and promotion process.

In fact, male employees appear to treat strip clubs as a second office or a benefit of working at KPMG. Substantial testimony and documentary evidence details how male professionals network with one another and clients at strip clubs, either excluding female colleagues or subordinates from valuable networking and development opportunities or forcing them to endure those opportunities in an environment degrading to women.<sup>87</sup> Not only are women excluded from the networking opportunities that come with socializing with their

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<sup>86</sup> See, e.g., McElvain Tr. 134:18-135:3; Inman Tr. 273:16-278:23; Leiphardt Tr. 101:11-102:5; KPMG-KASS0148956; KPMG-KASS0148674 (testimony about male employee’s frequent practice of visiting strip clubs from KPMG employees in the Atlanta, St. Louis, Denver, New York City, and Chicago offices, and IES Tax, IT Audit Advisory, Transaction Services Advisory, Federal Tax, and Forensic Services Advisory service lines); KPMG-KASS0148944; KPMG-KASS0148538; J. Potter Tr. 317:19-318:10; 320:19-24; 324:9-12; KPMG-KASS0149028; KPMG-KASS0149147; KPMG-KASS-0149245; KPMG-KASS0149267 (testimony about female employees experiencing sexual harassment, objectification, and assault at KPMG from employees in the Philadelphia, Dallas, New York City, St. Louis, and Dallas offices and EVS Tax, Forensic Services Advisory, IES Tax, IT Advisory, Federal Tax, and IARCS Advisory service lines, as well as at conferences involving employees from multiple offices and service lines).

<sup>87</sup> See e.g., McElvain Tr. 134:18-135:3 (KPMG Partner “called [a male KPMG employee] at home on a Saturday” and insisted they go to a strip club together); Inman Tr. 273:16-278:23 (male KPMG employees took clients to strip clubs and excluded female employees); Leiphardt Tr. 101:11-102:5 (“I was in my hotel room, had already gone to sleep, and I received a message from [male colleagues at KPMG] to go to a strip club, which I declined... it did not feel as though it was a one-time event from those individuals, that it was something that they would do frequently. And my concern was that for a company to condone that sort of behavior from their associates ... resulting in just an overarching view of women in more degraded position.”); KPMG-KASS0148674 (male Advisory Manager forced a gay male associate to go to a strip club with him and bought him a “private room”); KPMG-KASS0148956 at 958, KPMG-KASS0149002 (over the course of several years, male Senior Manager regularly pressured male and female colleagues to go to New York “piano bars,” where he fondled waitresses and made advances on female KPMG colleagues and billed thousands of dollars each month to the firm and clients for these outings); KPMG-KASS0148695 (female Advisory Senior Associate alleging her team members visit strip clubs together); Leiphardt Tr. 101:5-14 (testifying that while in her hotel room on a work trip her male colleague messaged her about going to a strip club); Inman Tr. 275:22-277:19 (testifying she was excluded from team lunches because they took place at a restaurant where women were dressed in lingerie or body paint).

colleagues and clients, but they are often excluded from business trips entirely so that male bonding, including at strip clubs, can occur.<sup>88</sup>

Additionally, the record shows that women at KPMG are subjected to sexual harassment and that they are valued based on conforming to sexualized stereotypes and being sexually available, rather than their professional abilities, providing further evidence of intentional discrimination. *See e.g.*, I. Kassman Tr. 198:23-199:12 (testifying that her male supervisor suggested she wear a particular skirt to work and that he could “put his dick between my tits and rub”); KPMG-KASS0148944 (a female Senior Tax Manager alleged that a male Tax Partner sexually harassed her on four occasions, asking her to come to his hotel room to review work but then touching her below the waist and inviting her to sit on his lap); KPMG-KASS0148538 (a female Advisory Director alleged that a male Advisory Managing Director “inappropriately touched her at a client event”); J. Potter Tr. 317:19-318:10; 320:19-24; 324:9-12 (testifying that KPMG Partners did body shots off female employees); P. Brown Tr. 222:23-223:18 (same); KPMG-KASS0149028 (female Advisory Manager reporting that a male Audit Partner focused his attention on her at a client event and suggesting he did not want to “behave” when he saw her); KPMG-KASS0149122 (a female Advisory Associate reporting that a male Advisory Director who sat next to her at work stroked her hand, stared at her chest, and called her “baby”); KPMG-KASS0149147 (a male Tax Senior Associate sexually harassed a female Tax Associate by grabbing her buttocks and kissing her at a firm-sponsored party); KPMG-KASS0149019 (female Advisory Manager reported a Male Advisory Partner who placed his arm around her and tapped her on the thigh, and pressured her to drink more at a company outing); KPMG-

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<sup>88</sup> *See, e.g.*, KPMG-KASS0148465 at 72 (reporting her group had an “old boys club, locker room mentality” and that the male Advisory Partner in charge “ensures that the males are staffed for out of town travel so that they can visit exotic dance venues”).

KASS0148776 (a male Tax Associate made unwanted sexual advances toward a female Tax Manager at a work event, including “smack[ing] her on the buttocks,” and continued to make advances throughout the week-long training).<sup>89</sup>

Even more disturbingly, Class members have reported criminal sexual assault, including rape and attempted rape by male KPMG co-workers at work events. *See* KPMG-KASS-0149245 (during a Tax Skills Seminar a male Tax Senior Associate made unwanted sexual advances towards two female Tax Associates; and grabbed one of the female Tax Associates by the neck, pushed her into the corner, tried to kiss her, and refused to leave her hotel room until she screamed); KPMG-KASS0139929 at 34-38 (after a KPMG training seminar, a male Associate groped two female Associates’ breasts beneath their blouses while sitting in between them in a car; another male associate told the police that the way the victims were dressed made it easy for accidents to happen); KPMG-KASS0149267 (a female Advisory Associate was raped by a male Associate who had previously barged in on her using the restroom and said, “when are we going to f---?”). This widespread evidence that women are routinely mistreated, and even assaulted, at work events provides further proof that women are working within a culture of permissive harassment and intentional discrimination.

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<sup>89</sup> *See also, e.g.*, KPMG-KASS0149516 (a male Advisory Manager told a female employee to “put on lipstick and use what God gave you”); KPMG-KASS0148956 (a female Tax Associate reported that a male Senior Manager “asked her bra size” and later called her a “hag” when he learned she was married); KPMG-KASS0148527 (male Senior Associate walks the halls of KPMG to comment on the appearance of female colleagues); KPMG-KASS0148703 at 711 (female senior Tax Associate alleged that a male Tax Managing Director frequently attempted to have her “attend off-work dinners with him” and bragged in the office about being a “partyer” who “lived by 3 words - booze, bitches, and basketball”); KPMG-KASS0148686 (investigation found that a male Advisory Managing Director talked about sexualizing teenage girls); KPMG-KASS0149760 at 773-774 (male Advisory Partner, who had not hired or promoted any women in his group in 2.5 years, talked about prostitutes and said “lube me up and stick it in”); *see also* McElvain Tr. 64:6-12 (Partner commented at a work event that he “wished the women in our group dressed like the women in [another KPMG] group” and a male employee asked “What kind of body type do you like? I’ll hook you up.”); McElvain Tr. at 130:9-11 (KPMG Partner calling a woman a “cunt” on an office phone call); Declaration of Anna Gracia ¶¶ 12, 13 (testifying that her male Managing Director locked her in his office until she agreed to look at pictures of him weight lifting, and that her male supervisor said she was “attractive” and “looked like Scarlett Johansson”); Declaration of Lauren Guenter ¶ 10 (testifying that she was told by male coworkers that she should wear heels to secure engagements for the firm).

Women who refuse to conform to the desires of their male supervisors often fail to advance.<sup>90</sup> KPMG also minimizes the contributions of women with young children on the basis of stereotyped assumptions about their commitment to work.<sup>91</sup>

This common evidence indicates that the ability for female employees to make meaningful professional contributions is undervalued and minimized, thus disadvantaging women in the compensation and promotion process.<sup>92</sup>

**b. KPMG Fails to Address Appropriately Complaints of Sexual Harassment.**

Even more troubling, KPMG often allows sexual harassment to go unpunished, enabling the behavior to continue, often by the same individuals. Common evidence produced from KPMG's centralized complaint database establishes that there have been numerous complaints of sexual harassment, often characterized as simply a "lack of professionalism" rather than

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<sup>90</sup> See, e.g., Roop Tr. 67:11-23, 86:6 (female Advisory Senior Associate's supervisor insisted on having one on one dinners with her and discussing personal matters and when she started declining his invitations, she was immediately put on a PIP and he told her to be "nicer"); KPMG-KASS0148737 (woman informing KPMG she was resigning after 6 years as a Senior Manager because "the firm is sexist and a male dominate[d] company" where she was told by a partner in her review she "needs to smile more" and "stop acting . . . 'pushy'"); Declaration of Carlynn Alexander ¶ 16 (testifying that a male Partner notorious for having sexual affairs with more junior employees consistently made inappropriate comments about his preferences for women's appearances); Declaration of Cheryl Charity ¶ 11 (testifying that a Partner told that her being a "single woman" made it more likely she would leave the firm, making her a less desirable candidate for promotion).

<sup>91</sup> See, e.g., KPMG-KASS0149259 (a male Tax Partner telling other employees that a woman needed to have her work reassigned because she "already has one child and she could get burned out or have another child and quit"); KPMG-KASS0149648 (a male Tax Partner commented that certain engagements would not be the right fit for a working mother); Morales Tr. 69:23-72:15 (testifying that supervisors failed to assign her to big projects, assuming that she would not travel because she had children); Carey ¶ 14 (KPMG Partner ██████ stated he had a "boycott" on babies and called pregnant women useless at work due to "baby brain"); Murray ¶ 10 (when she was expecting her first child and told KPMG Partner ██████, he responded "That's why I don't hire women.").

<sup>92</sup> Inman 233:24-240:11 (testifying that she did not attend a networking event with firm leaders because her global service line leader repeatedly hit on her); KPMG-KASS0148569 (resignation letter from female Advisory Director with over 16 years tenure at KPMG stating that a male Director prevented her from meaningful client contact); KPMG-KASS0149760-774 (a female Advisory Manager alleged that a male Advisory Partner repeatedly asked her to enter his time because she was the only woman in her group, detracting from her professional development); KPMG-KASS0149884 at 85 (exit interview from female senior associate explaining she was routinely sidelined during meetings, demonstrating KPMG's failure to give her opportunities to develop more valuable skills: "I was always the designated person to write meeting minutes on so many occasions! I AM NOT an Administrative Assistant! I have 10+ years of professional experience and multiple degrees & professional certifications: BS, MBA, and MS; PMP, SFC! Men CAN write meeting minutes too!").



harassment<sup>93</sup> and at least three reported complaints of criminal sexual assault and rape against women in Class positions.<sup>94</sup>

KPMG acknowledges that it does not apply standardized sanctions in response to substantiated complaints.<sup>95</sup> Instead, KPMG routinely takes action that is woefully inadequate.<sup>96</sup> The widespread pattern at KPMG is to protect the men who engage in these behaviors and merely give them a slap on the wrist (if that).<sup>97</sup> As a result, the sexual harassment remains wholly unaddressed and continues. For instance, even though a male KPMG Advisory Manager had previously been reprimanded for “similar issues”,<sup>98</sup> KPMG merely issued a written warning instructing him to take a one-hour online course<sup>99</sup> after his repeated misconduct, including determining that on multiple occasions at work the Manager shared with his coworkers photos of young women he was “checking out,” explicit personal emails,<sup>100</sup> and videos of scantily clothed women dancing,<sup>101</sup> and had asked a female Advisory employee to stand on a table in a skirt and heels.<sup>102</sup> As Dr. Goldberg explained, KPMG’s poorly designed and superficial training is

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<sup>93</sup> KPMG often designates sexual harassment complaints as “lack of professionalism.” *See e.g.*, KPMG-KASS0149037 (categorizing a complaint that a male Advisory Director repeatedly reached out to a female Advisory Manager in a suggestive manner and stated during a meeting at a client site that female Advisory Manager should perform oral sex on him as a “lack of professionalism”); KPMG-KASS0632009 (categorizing a complaint that Advisory Director spoke about his sexual conquests, genitalia, his use of condoms as a “lack of professionalism”).

<sup>94</sup> *See* KPMG-KASS0149267, KPMG-KASS-0149245, KPMG-KASS0139929 at 934-938.

<sup>95</sup> *See* DiLeonardo Tr. 217:12-25 (“There are no standard sanctions, every case is different. You have to look at the facts and circumstances of every case. There are no cookie cutter processes for determining sanctions.”).

<sup>96</sup> *See, e.g.*, KPMG-KASS0630571 (male Tax Associate given only a reprimand after making inappropriate sexual advances toward a female Tax Manager at a training event, including touching her leg, smacking her buttocks, asking her to dance, forcing her to hug him, and making inappropriate comments); KPMG-KASS0631942 (Male Tax Associate given only a verbal reprimand after making several inappropriate and suggestive comments to women at the office).

<sup>97</sup> This culture of sexual harassment is so deeply ingrained that male KPMG employees are incredulous when a female colleague complains and they are questioned by the firm. *See* KPMG-KASS0149313 (male Tax Manager told HR, “I don’t understand why I’m suddenly being asked about these things when I’ve worked here for 8 years and have always been known to make ‘off color’ jokes to the team”).

<sup>98</sup> KPMG-KASS0148674.

<sup>99</sup> *See* KPMG-KASS0148670.

<sup>100</sup> KPMG-KASS0148667 at 669.

<sup>101</sup> KPMG-KASS0148667 at 668.

<sup>102</sup> KPMG-KASS0148674.



ineffective at changing behavior.<sup>103</sup> Additionally, Plaintiff Heather Inman was harassed by her male superiors on at least *four* occasions, including being touched sexually and propositioned at several work events, but the firm either issued verbal reprimands or took no action against those who harassed her.<sup>104</sup> *See also, e.g.*, KPMG-KASS0149019 (male Advisory Partner who touched a female Advisory Manager’s thigh, placed his arm around her, and pressured her to attend social events was issued a “verbal reprimand”); KPMG-KASS0148776 (male Tax associate who “smacked [a female Tax Manager] on the buttocks” was issued a written reprimand); Wallace ¶ 11 (woman at KPMG reported sexual harassment to KPMG partners and they did nothing about it).

c. **KPMG Discourages Complaints of Discrimination and Harassment.**

From 2008 to 2016, a complaint of gender bias, harassment, or retaliation was lodged with KPMG HR or Ethics and Compliance for 1 in every 75 KPMG women employed in the professional jobs of Associate through Managing Director in Tax and Advisory.<sup>105</sup> While it is surprising to see professional women lodge a high volume of complaints with HR, it is also clear that those numbers are only the tip of the iceberg. Evidence from numerous sources indicates that female employees do not complain because they fear KPMG will not do anything in

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<sup>103</sup> Goldberg Reply at 6.

<sup>104</sup>Inman Tr. 210:7-219:3 (testifying that at a work dinner, a male Partner propositioned her to return to his “penthouse” and explained his wife was out of town). KPMG gave him “a verbal reprimand” and an alcohol treatment program, and allowed him to remain in his position of authority. KPMG-KASS0148758. *See also* Inman Tr. 233:24-240:11 (testifying that her global service line leader put his arm around her, touched her thigh, and pressured her to socialize with him). The firm gave him a verbal reprimand. KPMG-KASS0149019-027. Inman Tr. 240:18-246:24 (testifying that a male Partner suggested in front of clients he could not “behave” around her and would “wait[] on [her] personally” at firm events). The firm took no action in response to her complaint. KPMG-KASS0149028-035. On a fourth occasion, a male partner told Ms. Inman in a suggestive manner to get on her knees at a client site to plug-in a laptop cable and then sent her a series of messages asking if she missed him; HR substantiated the allegations but took no action. *See* Inman Tr. 250:5-254:18; KPMG-KASS0149037-044.

<sup>105</sup> Zegeye Decl. ¶5.

response to complaints.<sup>106</sup> Indeed, the vast majority of over 1,100 women who joined the case as Opt-In Plaintiffs did not first complain to HR.<sup>107</sup> The evidence indicates that KPMG discourages women from reporting complaints.<sup>108</sup> Class members cite the futility of HR<sup>109</sup> and fear of retaliation among the top reasons they avoid KPMG's complaint process.<sup>110</sup> *See e.g.*, KPMG-KASS0631559 (female Advisory Senior Associate was subject to retaliation from her managers and team for raising gender discrimination complaints; reported retaliation to HR but HR failed to provide any assistance); KPMG-KASS0631757 (HR asked female Advisory Senior Associate

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<sup>106</sup> *See, e.g.*, Garcia Tr. 137:12-143:9, 154:15-20, 204:7-205:4 (testifying that things got worse after she complained to HR and she left KPMG after HR made no progress on her harassment or retaliation complaints); KPMG-KASS0631559 (female Advisory Senior Associate was subject to retaliation from her managers and team for raising gender discrimination complaints; reported retaliation to HR but HR failed to provide any assistance); Declaration of Holly Barnes ¶ 12 (testifying she complained to HR about compensation and promotion discrimination on the basis of her gender but nothing changed); Declaration of Jessica Luke ¶ 12 (testifying she complained to HR about compensation and never saw a change); Declaration of Donna Kassman ¶ 8 (testifying she complained to Ethics and Compliance about her compensation issues but they were never resolved; *see also* Wallace ¶ 10; Declaration of Jody Underhill ¶ 10; Declaration of Sabrina Starnes ¶ 10; Carey ¶ 10; Declaration of Hillary Bennetts ¶ 10.

<sup>107</sup> Goldberg Reply at 9, n.7.

<sup>108</sup> *See e.g.*, Adilah Tr. 14:18-20:4 (male PML successfully pressured female employee not to submit a complaint to Human Resources); Tan Tr. 77:15-78:10 (Partner discouraged female Advisory Director from reporting a complaint, noting that it would "affect [his] reputation"); *see also* Leiphardt Tr. 121:14-19 (reported to her manager that she was invited by male KPMG colleagues to go to a strip club and her Director's only response was to state that he was glad she did not go).

<sup>109</sup> *See, e.g.*, Declaration of Donna Kassman ¶ 8 ("I believe that making complaints about discrimination to KPMG management or Ethics and Compliance will not make any difference."); Declaration of Anna Gracia ¶ 14 ("[D]iscrimination and harassment at KPMG was so open and obvious that there was no point in formally reporting it."); Declaration of Lauren Guenter ¶ 11 ("I did not complain to HR about the discrimination I experienced at KPMG because I believed it was futile and I would not be taken seriously."); Declaration of Marilyn Farley ¶ 12 (testifying she "believed it would be futile" to complain to HR); Declaration of Holly Barnes ¶ 12 ("I believe that complaining of discrimination to Human Resources does not accomplish anything at KPMG"); Declaration of Jessica Luke ¶ 12 ("I believe that making complaints about discrimination to KPMG's Human Resources Department or management does not make any difference."); Declaration of Carlynn Alexander ¶ 13 (testifying that she was "not optimistic that anything would be done" if she complained to HR); Declaration of Carolyn Gustafson ¶ 10 ("Discrimination at KPMG was so open and obvious that there was no point in formally reporting it."); Declaration of Cheryl Charity ¶ 10 ("I was not optimistic that anything would be done, as I believe that HR protects the interests of KPMG's Partners."); Declaration of Tina Butler ¶ 9 ("I did not complain to HR about the discrimination I experienced at KPMG because I believed it was futile because KPMG operated as a "good 'ol boys" network and I did not think my complaint would be taken seriously."); Declaration of Nancy Jones ¶ 7 (testifying she believed that HR "could not accomplish anything more than [her] superiors had to address [her] concerns.").

<sup>110</sup> *See, e.g.*, Notes 106 & 108, *supra*; *see also* KPMG-KASS0459413 (exit interview in which the female employee stated that she did not go to HR because she thought it might "come back to hurt her"); KPMG-KASS0631757 (female Advisory Senior Associate reported she was "concerned about going to HR for fear reporting it would negatively impact her."); *see also* Inman Decl. ¶¶ 6-8; Murray Decl. ¶9.

why she waited eight months to report sexual harassment by a male Advisory Director, she responded that she was “concerned about going to HR for fear reporting it would negatively impact her.”); KPMG-KASS0148465 at 472 (female Advisory Associate told HR that she was being laid off as part of a reduction in retaliation for standing up to male Advisory Partner who harassed her; Associate refused to provide more details in her exit interview because she feared retaliation).

KPMG is well aware that women fear speaking up about misconduct and discrimination at KPMG, and the Women’s Advisory Board has informed management that many women do not “feel comfortable going to management regarding unfair treatment” and do not believe “they can report unethical treatment without fear for reprisal.”<sup>111</sup> This has not spurred KPMG to change. By deliberately looking away from complaints of discrimination and tacitly sanctioning retaliation against those who do complain, KPMG has maintained a firm-wide policy and practice of gender discrimination.

Because sexist stereotypes and sexual harassment permeate KPMG’s work culture and are allowed to go unchecked, KPMG’s written “Code of Conduct” policy that purports to prohibit gender discrimination and sexual harassment is entirely ineffective at doing so, as Dr. Goldberg explained.<sup>112</sup> Even KPMG’s industrial-organization psychology expert, Dr. Margaret Stockdale, relies on sources that acknowledge “what companies live and breathe

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<sup>111</sup> KPMG-KASS0553873 at 881 (2014 Women’s Advisory Board); KPMG-KASS0553871 (January 6, 2014 email to Lynne Doughtie, current Chairman and CEO and former Advisory Vice Chair).

<sup>112</sup> Goldberg Reply at 4 (writing that “There is an insufficient scientific basis for the assertion Dr. Stockdale makes regarding the utility of KPMG’s Code of Conduct” and that Dr. Stockdale has “not studied Codes of Conduct generally, to determine if KPMG’s Code is different—or better or worse—than any other company), and at 11 (writing that “Dr. Stockdale points to the number of diversity initiatives at KPMG as evidence of their mitigation against bias. However, the whole is not more than the sum of its parts, and I disagree with her as to the substance and utility of these efforts. Indeed, if any one initiative is ineffective, it is not saved by its combination with another ineffective program”).

matters, likely more than any written corporate code of conduct.”<sup>113</sup> Here, KPMG clearly disregards any written prohibition on discrimination and sexual harassment and instead maintains a firm-wide workplace that lives and breathes sexism and hostility toward female professionals.

**B. ARGUMENT**

**1. Legal Standards**

**a. Federal Rule of Civil Procedure 23**

The Court may certify a class if the requirements of Federal Rule of Civil Procedure 23(a) are met, along with one of the prongs of Rule 23(b). *Dukes*, 564 U.S. at 345. Although “a court’s class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff’s underlying claim, Rule 23 grants courts no license to engage in free ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013) (quoting *Dukes*, 564 U.S. at 351) (quotation marks omitted). *See also id.* at 466 (“Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”). Therefore, the Court’s task at the Rule 23 stage is “not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently.” *Id.* at 460 (internal quotation marks and original alteration omitted).

Here, Plaintiffs seek certification of their claims for injunctive relief under 23(b)(2), for monetary damages under 23(b)(3), and for liability under 23(b)(2), (b)(3), and/or (c)(4) of the following class:

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<sup>113</sup> Bohnet, I. (2016), *What works: Gender equality by design*. Harvard University Press, at 264.

All women who have worked at KPMG LLP within the Tax and/or Advisory functions in the roles of Associate, Senior Associate, Manager, Senior Manager/Director, and/or Managing Director<sup>114</sup> in the United States at any time from October 30, 2009 through the date of judgment and within the state and/or city of New York from June 2, 2008 through the date of judgment.

As described below, Plaintiffs readily satisfy the standards for Rule 23 class certification.

**b. Legal Standards Under Title VII, the New York Human Rights Law, New York City Human Rights Law, and New York Equal Pay Law**

Class certification depends on whether “the determination of” a common contention’s “truth or falsity will resolve an issue that is central to the validity” to the class members’ claims. *Dukes*, 564 U.S. at 350. Thus, a court’s inquiry begins with the claims at issue.

Here, Plaintiffs bring class claims for disparate impact and disparate treatment under Title VII, NYHRL, NYCHRL, and the New York Equal Pay Law. The state and local anti-discrimination claims “are analyzed under the Title VII framework.” *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 498 n.1 (2d Cir. 2009). If Plaintiffs satisfy the requirements for class certification under Title VII, then Plaintiffs’ analogous state and city claims must also be certified. *See* N.Y. Exec. Law § 300 (“The provisions of [the NYHRL] shall be construed liberally . . . .”); *Ferrante v. Am. Lung Ass’n*, 687 N.E.2d 1308, 1311 (N.Y. 1997) (“The standards for recovery under [the NYHRL] are in accord with Federal standards under title VII of the Civil Rights Act of 1964.”); N.Y.C. Admin. Code § 8-130(a) (stating that the NYCHRL “shall be construed

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<sup>114</sup> The titles of Associate, Senior Associate, Manager, Senior Manager/Director, and Managing Director are defined as “Class Positions.” In particular, Plaintiffs allege disparate impact and disparate treatment claims of discrimination in pay for those in all Class Positions. Plaintiffs allege disparate impact and disparate treatment claims of discrimination in promotions for those denied promotions from the Associate, Senior Associate, Manager, and Senior Manager/Director levels. This case does not involve a challenge to promotions to Partner or Principal.

liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights law . . . have been so construed”); *Albunio v. City of N.Y.*, 947 N.E.2d 135, 477-78 (N.Y. 2011) (“We must construe . . . the City’s Human Rights Law[] broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.”).

### **1. Legal Standard for Disparate Impact Under Title VII**

Anti-discrimination laws prohibit “discrimination resulting from employment practices that are facially neutral, but which have a ‘disparate impact’ because they fall more harshly on a protected group than on other groups.” *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1374 (2d Cir. 1991). “Disparate-impact claims do not require a showing of discriminatory intent.” *United States v. Brennan*, 650 F.3d 65, 90 (2d Cir. 2011). To establish a *prima facie* case of disparate impact, a plaintiff must “identif[y] the specific employment practice that is challenged,” “show that there are statistical disparities in the employer’s work force,” and the “statistical disparities must be sufficiently substantial that they raise such an inference of causation.” *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994-95 (1988).

If the *prima facie* case is established, the burden shifts to the employer to show that its employment practices are based on legitimate business reasons, and that there was no less discriminatory alternative. *Watson*, 487 U.S. at 998; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160-62 (2d Cir. 2001), *abrogated on other grounds by Dukes*, 564 U.S. 338. This is commonly referred to as the “liability phase.”

If liability is established, the entire class is entitled to a presumption of make-whole relief. *Easterling v. Conn. Dep’t of Corr.*, 278 F.R.D. 41, 49 n.5 (D. Conn. 2011) (“The court notes that there is a strong presumption in favor of granting back-pay awards to plaintiffs who have established that they were victims of unlawful discrimination.”); *see also EEOC v. Sheet*

*Metal Workers' Int'l Ass'n*, 532 F.2d 821, 832 (2d Cir. 1976) (“The Supreme Court has made clear that back pay is to be the rule rather than the exception under Title VII . . .”). A class member seeking relief “need only show that he or she suffered an adverse employment action and therefore was a potential victim of the proved discrimination.” *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012) (internal quotation marks omitted). “After such a showing, the employer bears the burden of persuading the trier of fact that its decision was made for lawful reasons; otherwise, the employee is entitled to individualized relief . . .” *Id.* This is commonly referred to as the “remedial” or “damages” phase.

## 2. Legal Standard for Disparate Treatment Under Title VII

Class-wide disparate treatment claims may arise under a pattern-or-practice theory where intentional discrimination may be established by showing that “discrimination was the defendant’s ‘standard operating procedure.’” *Robinson*, 267 F.3d at 158 (quoting *Teamsters*, 431 U.S. at 336). “Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for discrimination.” *Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015)). It does, however, require “significant proof” that Defendants “operated under a general policy of discrimination.” *Dukes*, 564 U.S. at 353. Liability for a pattern-or-practice disparate treatment claim typically is established through statistical and anecdotal evidence. *See Robinson*, 267 F.3d at 158. If the *prima facie* case is established, the burden shifts to the employer to “demonstrat[e] that the plaintiffs’ proof is either inaccurate or insignificant.” *Robinson*, 267 F.3d at 159 (quoting *Teamsters*, 431 U.S. at 360) (original alteration omitted). Whoever prevails on the preponderance of the evidence wins the liability phase.

If plaintiffs prevail, they are entitled to “a rebuttable inference that all class members were victims of the discriminatory practice, [which] will justify ‘an award of prospective relief’

such as ‘an injunctive order against the continuation of the discriminatory practice.’” *Dukes*, 564 U.S. at 352 n.7 (quoting *Teamsters*, 431 U.S. at 361). If individual relief is sought, as it is here, “a district court must usually conduct additional proceedings to determine the scope of individual relief.” *Id.* at 366 (quoting *Teamsters*, 431 U.S. at 361) (original alteration omitted). “At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to ‘demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.’” *Id.* at 367 (quoting *Teamsters*, 431 U.S. at 362). This is the “remedial” or “damages” phase in the disparate treatment case, often referred to as “*Teamsters*’ hearings.”

2. **Plaintiffs’ Disparate Impact and Disparate Treatment Claims Satisfy Rule 23(a).**

Rule 23(a) requires that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

a. **The Class Is Sufficiently Numerous.**

Rule 23(a)(1) requires Plaintiffs to show that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, the class totals more than 10,000 women<sup>115</sup>; therefore, the numerosity requirement is unquestionably met. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (presuming numerosity at 40 class

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<sup>115</sup> Vekker Report at 2.



members); *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 257 (S.D.N.Y. 2007) (finding numerosity where class size “in the thousands”).

**b. There Are Common Questions of Law and Fact That Will Drive the Resolution of Plaintiffs’ Claims.**

To satisfy commonality, class members’ claims must share common questions of fact or law that are “capable of class wide resolution.” *Dukes*, 564 U.S. at 350. Commonality poses a limited burden because “‘even a single common question’ is enough to satisfy Rule 23(a).” *Gulino v. Bd. of Educ.*, No. 96-8414, 2013 WL 4647190, at \*8 (S.D.N.Y. Aug. 29, 2013); *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (affirming class certification commonality finding where district court found plaintiffs’ “injuries derive[d] from a unitary course of conduct by a single system”); *see also Stockwell v. City & County of S.F.*, 749 F.3d 1107, 1116 (9th Cir. 2014) (recognizing “whether a policy has an impermissible disparate impact . . . necessarily has a single answer”).

**i. Plaintiffs’ Disparate Impact Claims Raise Common Questions.**

Plaintiffs’ disparate impact claim raises the common questions of whether KPMG’s compensation and promotion processes, described above, had a disparate impact on women in pay and promotions. These questions are capable of class-wide resolution because a determination—that is, simply *yes* or *no*—will establish whether Plaintiffs have met their *prima facie* case of disparate impact. If they have, two other significant common questions arise: whether the policies are based on business necessity and whether there are less discriminatory alternatives. Together, the answers to these common questions will establish or defeat liability for the Class.

As other courts have held, commonality is easily satisfied when challenging common employment policies such as the common compensation and promotion policies Plaintiffs’

challenge here. For instance, in *Gulino v. Board of Education of the New York City School District*, the post-*Dukes* court determined that it could determine on a class-wide basis whether the defendant violated Title VII by requiring an exam that “was not properly validated”. 907 F. Supp. 2d 492, 525 (S.D.N.Y. 2012), *aff’d*, 555 F. App’x 37 (2d Cir. 2014).

Addressing a compensation policy in *Scott v. Family Dollar Stores, Inc.*, the court found the plaintiffs had raised a common question as to whether a salary range policy “impos[ing] an annual pay raise limit which is linked to a percentage of base pay,” just as KPMG links salary increases to existing salaries, could “lock in disparities between male[s] and female[s] as they appear to work hand-in-hand,” “perpetuat[ing] initial pay disparities”. No. 08-540, 2016 WL 9665158, at \*6 (W.D.N.C. June 24, 2016). Similarly, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the plaintiffs alleged that their employer’s teaming and account distribution policies, which allowed senior employees to “choose . . . people who are like themselves,” caused an adverse impact on African-American brokers. The court found whether the policies “cause[] racial discrimination and whether” they are nonetheless “justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination.” 672 F.3d 482, 489 (7th Cir. 2012); *see also Porter v. Pipefitters Ass’n Local Union 597*, 208 F. Supp. 3d 894, 906 (N.D. Ill. 2016) (citing *McReynolds* and finding commonality where plaintiffs challenged policy of allowing individual contractors to hire for the majority of available union jobs thereby “exacerbat[ing]” the racial discrimination experienced by African American members who were not part of informal hiring networks). Likewise, in *Ellis v. Costco Wholesale Corp.*, the plaintiffs, like Plaintiffs here, challenged “specific employment practices within Costco’s promotion system,” including a tap-on-the-shoulder appointment process, a lack of posting for open positions, and reliance on common but

unvalidated criteria for assessing candidates. The court held that the “[p]laintiffs’ argument—that such companywide practices lead to disparate outcomes—is a common question subject to classwide proof and rebuttal.” 285 F.R.D. 492, 531 (N.D. Cal. 2012).<sup>116</sup> See also *Parra v Bashas’, Inc.*, 291 F.R.D. 360, 375 (D. Ariz. 2014) (in a race discrimination case, finding that “if a trier of fact finds that [the employer]’s wage scales lead to disparate outcomes, that is a common question subject to classwide proof and rebuttal.”) (internal quotation marks omitted).

**ii. Plaintiffs’ Disparate Treatment Claims Raise Common Questions.**

Plaintiffs’ disparate treatment claim raises the common question of whether discrimination was KPMG’s “standard operating procedure,” to be shown through “significant proof” that KPMG “operated under a general policy of discrimination.” *Dukes*, 564 U.S. at 353. This question is capable of class-wide resolution because its determination—*yes* or *no*—will establish whether Plaintiffs have met their *prima facie* case of disparate treatment. If they have, another significant common question arises: whether Plaintiffs’ statistical evidence “is either inaccurate or insignificant.” *Robinson*, 267 F.3d at 159 (quoting *Teamsters*, 431 U.S. at 360). Together, the answers to these common questions will establish or defeat liability for the Class.

Here, Plaintiffs’ evidence of a general policy of discrimination is substantial, including:

(1) statistically significant evidence of discrimination in the common compensation and promotion processes; (2) evidence of knowledge on the part of KPMG’s senior leadership,

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<sup>116</sup> Relatedly, courts have found class certification appropriate when plaintiffs have raised disparate impact challenges to selection policies. In *Houser v. Pritzker*, 28 F. Supp. 3d 222, 229, 242 (S.D.N.Y. 2014), for example, the court found that a common question supporting class certification was presented as to whether use of a criterion for excluding candidates had a disparate impact on minority applicants. Likewise, in *Easterling*, the court found that whether an employment test had a disparate impact on female applicants and “whether that impact was justified by business necessity” were questions that supported class certification. 278 F.R.D. at 49-50. And in *United States v. City of New York*, a post-*Dukes* court confirmed propriety of certification as to the question of class-wide liability on a race discrimination disparate impact challenge to the requirement that job applicants pass a written examination. 276 F.R.D. 22, 35, 43-44 (E.D.N.Y. 2011) (denying motion to decertify liability-phase class).

including its Chairman and CEO and former Vice Chair of the Advisory function, who were alerted both by their own employees and external parties of pay and promotion disparities; (3) a failure on behalf of KPMG's senior leadership to remedy known pay and promotion disparities; and (4) evidence that KPMG maintains a corporate culture hostile to women that is fostered by an HR organization that is purportedly tasked with investigating and curbing discrimination but fails to do so.

Other courts have relied on the same categories of evidence to support a finding of commonality for a disparate treatment claim. *See, e.g., City of N.Y.*, 276 F.R.D. at 31, 49 (maintaining certification of pattern-or-practice disparate treatment claim post-*Dukes* where the plaintiffs had “marshaled significant statistical and testimony evidence” of intentional discrimination); *see also Brown*, 785 F.3d at 914 (finding that “statistical and anecdotal evidence,” including evidence of managerial inaction “especially when combined, thus provide precisely the ‘glue’ of commonality that *Wal-Mart* demands”); *Scott*, 2016 WL 9665158, at \*7 (finding that “statistical evidence of . . . a pattern-or-practice of discrimination”—specifically, of gender-based pay discrimination—“provides the ‘glue’ which makes the class cohesive,” satisfying the commonality requirement); *Ellis*, 285 F.R.D. at 510-531 (finding commonality satisfied with “significant proof that the entire class was subject to the same allegedly discriminatory practices,” falling into three categories: common promotions practices relying on common criteria, testimony regarding a companywide culture, and statistical evidence of gender disparities); *Beck v. Boeing*, 203 F.R.D. 459, 464 (W.D. Wash. 2001) (“[S]tatistically significant results of adverse impacts on female employees in every facility and at every level within the [area] . . . establish[] sufficient indicia of class-wide disparate treatment to satisfy the certification criteria of commonality and typicality.”), *vacated in part on other grounds*, 60 F. App'x 38 (9th

Cir. 2003). The evidence proffered here is on par with or more substantial than these and other cases finding commonality.

c. **The Representative Plaintiffs' Claims Are Typical of the Class Claims.**

Rule 23(a)(3) requires that the claims of the representative plaintiffs be typical of those of the class. The typicality rule is satisfied “when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *Marisol A.*, 126 F.3d at 376 (citations and internal quotation marks omitted).

“[M]inor variations in the fact patterns underlying individual claims” do not defeat typicality when the defendant directs “the same unlawful conduct” at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, Representative Plaintiffs Donna Kassman, Tina Butler, Cheryl Charity, Heather Inman, Nancy Jones, and Carol Murray all worked in the United States within the Tax and Advisory functions, and collectively have held each of the titles within the proposed Class since 1993. Specifically, Ms. Kassman worked in Tax and held the titles of Associate, Senior Associate, Manager, and Senior Manager. Fourth Am. Compl., Dkt. No. 548 ¶¶ 11, 61. Ms. Butler worked in Advisory as a Manager and has also held the titles of Associate and Senior Associate. *Id.* ¶¶ 65, 331. Ms. Charity worked in Advisory as a Senior Manager/Director and has also held the titles of Senior Associate and Manager. *Id.* ¶¶ 66, 342. Ms. Inman worked in Advisory as a Manager. *Id.* ¶¶ 67 and 357. Ms. Jones worked in Advisory as a Senior Associate. *Id.* ¶¶ 68, 369. Ms. Murray works in Tax as a Senior Manager and has also worked in Tax as a Senior Associate and Manager; in addition, she *also* formerly worked as an Associate and Senior Associate in Advisory. *Id.* ¶¶ 69, 383. Additionally, Ms. Kassman worked for KPMG in New York state during the time period for NY claims (since 1993). *Id.* ¶61.

The Representative Plaintiffs' claims challenge the same compensation and promotion processes and general policy of discrimination at KPMG upon which the class claims are based. All Representative Plaintiffs allege they were paid less than their similarly situated male peers. Fourth Am. Compl., ¶¶ 81, 334, 345, 360, 372, 386. And Representative Plaintiffs Kassman, Butler, Charity, Inman, and Jones allege that they were denied promotions offered to lesser-qualified male employees. *Id.* ¶¶ 89, 336 (“As she languished in the Senior Associate position, Ms. Butler saw less qualified and less experienced men promoted over her.”), 362 (“Though [Ms. Inman] worked at KPMG as a Manager for over nine years, she was never promoted to Senior Manager.”), 373 (“Ms. Jones was eligible for promotion, but despite her stellar performance ratings, and the fact that she was consistently performing work at or above the level of her male peers, Ms. Jones was not promoted during her tenure at KPMG.”). None of the Representative Plaintiffs' claims are “subject to unique defenses which threaten to become the focus of the litigation.” *Baffa v. Donaldson Secs. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). Typicality is satisfied.

**d. The Representative Plaintiffs and Class Counsel Will Adequately Protect the Interests of the Class.**

To determine adequacy, the Court must find that the Proposed Representative Plaintiffs (1) “have an interest in vigorously pursuing the claims of the class”; and (2) “have no interests antagonistic to the interests of the other class members.” *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)).

Here, neither the Representative Plaintiffs nor their counsel have any conflicts of interest with the Class; to the contrary, their interests in remedying the systemic gender discrimination at

KPMG are directly aligned with the interests of the Class. Also, the Representative Plaintiffs and counsel have demonstrated that they will vigorously prosecute this action on behalf of the Class. The Representative Plaintiffs have demonstrated their commitment to the Class throughout this litigation by answering document requests and interrogatories, appearing for depositions, and serving as advisers to counsel. *See* Kassman Decl. ¶ 9, Butler Decl. ¶ 10, Charity Decl. ¶ 12, Inman Decl. ¶10, Jones Decl. ¶ 9, Murray Decl. ¶ 11.

Counsel for Plaintiffs have also prosecuted this action vigorously by, for example, litigating two motions to dismiss, securing equitable tolling on Equal Pay Act claims, obtaining, reviewing, and producing substantial discovery, litigating myriad discovery disputes, and managing the collective of Opt-Ins. *See, e.g.*, Dkts. 39, 88, 91, 147, 408, 457. In each discovery dispute—whether in successfully compelling production of internal complaint files or company emails and presentations—counsel have zealously fought to marshal evidence in support of Class members’ claims. Discovery has been an enormous undertaking, with over 1.5 million pages of documents exchanged and 76 depositions taken to date. Zegeye Decl. ¶ 4. Moreover, in the related collective action under the Equal Pay Act, counsel have completed discovery for 203 individuals (who are also Rule 23 putative Class members). Counsel have demonstrated their dedication to the Class, and counsel will continue to do so. *Id.* ¶ 4. Further, counsel have extensive experience in prosecuting gender discrimination class actions and will continue to commit the time and resources to represent this Class post-certification. Declaration of Kelly M. Dermody ¶¶ 3,4; Declaration of David Sanford ¶¶ 4-16.

**3. Certification Under Rule 23(b)(2) is Warranted for a Finding of Liability and Injunctive Relief.**

“Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class.’ Civil

rights cases against parties charged with unlawful, class-based discrimination are prime examples.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citations omitted). In fact, “subdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions.” Wright & Miller, 7AA *Fed. Prac. & Proc. Civ.* § 1776 (3d ed.).

In *Dukes*, the Supreme Court explained:

The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.

564 U.S. at 360 (quotation marks and citation omitted).

Here, Plaintiffs seek a declaration that KPMG’s existing compensation and promotion processes are unlawful, and an order enjoining KPMG from using these processes to make pay and promotion decisions in the future. All Class members have been subjected to the compensation and promotion processes, and an order pronouncing them unlawful and preventing their further use would provide relief to the Class as a whole. Not only would it stop the use of a discriminatory practice, but it would also entitle all Class members to a presumption of make-whole relief in the damages phase of the case. *Dukes*, 564 U.S. at 352 n.7; *Easterling*, 278 F.R.D. at 49 n.5; *Ellis*, 285 F.R.D. at 505.

For exactly these reasons, courts have long recognized that disparate impact and disparate treatment claims for liability and injunctive relief are appropriate for certification under 23(b)(2). *See, e.g., Houser*, 28 F. Supp. 3d 222 (certifying (b)(2) class for liability and injunctive relief in disparate impact case); *Gulino*, 907 F. Supp. 2d at 509, *aff’d*, 555 F. App’x 37 (2d Cir. 2014) (same); *Easterling*, 278 F.R.D. at 47 (same); *see also McReynolds*, 672 F.3d at 491-92 (same);



*Scott*, 2016 WL 9665158, at \*7 (same); *Ellis*, 285 F.R.D. at 537 (same). The claims in this case also warrant certification for liability and injunctive relief.

**4. Certification Under Rule 23(b)(3) is Warranted for Liability and Monetary Damages.**

The Supreme Court has clarified that “individualized monetary claims belong in Rule 23(b)(3).” *Dukes*, 564 U.S. at 362. Rule 23(b)(3) requires that common issues predominate over individual issues, and that a class action be superior to other available methods for the fair and efficient adjudication of the case. Fed. R. Civ. P. 23(b)(3). “Predominance is satisfied if resolution of *some* of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.” *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (emphasis added) (internal quotation marks omitted). “[I]ndividual questions need not be absent,” and “[t]he text of Rule 23(b)(3) itself contemplates that such individual questions will be present,” “requir[ing] only that those questions not predominate over the common questions affecting the class as a whole.” *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81 (2d Cir. 2015).

**a. Common Questions of Liability and Damages Predominate Over Individual Damages Issues.**

Common questions of liability and damages predominate over individual issues relating to entitlement to or amount of damages, as illustrated by Plaintiffs’ proposed trial plan.

With respect to Plaintiffs’ disparate impact claim, whether KPMG’s compensation and promotion processes have a disparate impact on women in pay and promotions, whether those practices are nonetheless justified by business necessity, and whether alternative less-discriminatory practices exist, are common issues which will be proved or disproved using only common evidence. The first question will be determined based on statistical evidence, and the

second based on common, class-wide evidence about the policies themselves, including the testimony of the parties' human resources management and industrial organizational psychology experts. These common issues of liability predominate; indeed, "adjudicating these issues on a classwide basis is necessary before any individualized proceeding can occur." *Ellis*, 285 F.R.D. at 538. *See also Easterling*, 278 F.R.D. at 48-49 (certifying liability and damages claims under Rule 23(b)(3) because both a *prima facie* case of disparate impact and defenses thereto are subject to generalized proof); *Moore v. Napolitano*, 926 F. Supp. 2d 8, 33-34 (D.D.C. 2013) (holding predominance satisfied where "all members of the class will rely on the same statistical evidence to make the same [disparate impact] claim"); *Parra*, 291 F.R.D. at 392 (adopting the rationale of *Ellis* and holding that predominance was met as "the common questions regarding liability as to the pay claim are 'a significant aspect of th[is] case and they can be resolved for all members of the class in a single adjudication'" (citations omitted).

With respect to Plaintiffs' disparate treatment claim, whether KPMG operated under a general policy of discrimination, such that all class members are entitled to a presumption of discrimination under *Teamsters*, is a common question that will be proved or disproved based on common evidence. First and foremost, Plaintiffs offer statistical evidence of significant disparities in pay and promotions for females in Class Positions in Tax and Advisory at KPMG. Second, Plaintiffs offer evidence of a pervasive companywide culture that underlies and informs the compensation and promotion processes from which these disparities emerge. Third, Plaintiffs offer substantial common evidence that senior leadership—including even the Chairman and CEO—at KPMG knew of compensation and promotion disparities and cultural bias against women, continued to employ the same policies, and failed to correct these problems. Similarly, KPMG's defense—that Plaintiffs' statistical evidence is inaccurate or insignificant—

also rests on common evidence. *See, e.g., Robinson*, 267 F.3d at 158-59; *Ellis*, 285 F.R.D. at 538 (“This ‘pattern and practice question predominates because it has a direct impact on every class member’s effort to establish liability and on every class member’s entitlement to . . . monetary relief.’” (quoting *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001))); *Scott*, 2016 WL 9665158, at \*8 (“[T]he predominance standard of Rule 23(b)(3) is satisfied because plaintiffs have proffered evidence of class-wide pattern-or-practice and/or disparate impact that could establish liability, and result in class-wide entitlement to: (1) affirmative injunctive and declaratory relief to undo the effects of such disparate impact and/or class-wide pattern-or-practice; and (2) a presumption of individualized harm for each class member.”); *Sellars v. CRST Expedited, Inc.*, 321 F.R.D. 578, 608 (N.D. Iowa 2017) (certifying liability phase of disparate treatment claim under Rule 23(b)(3) and holding that “[t]he potential need for individual damage calculations at a later stage is typically not decisive of the predominance factor).

Although every Title VII case presents some individualized questions with respect to class member entitlement to relief, courts have long held that individualized damages issues do not defeat predominance. *See, e.g., Dukes*, 564 U.S. at 362 (“[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3).”); *City of N.Y.*, 276 F.R.D. at 48 (“[T]he resolution of these individual questions [at the remedial phase] is of relatively minimal significance to the litigation as a whole.”); *Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114, 126 (S.D.N.Y. 2014) (“[T]he Second Circuit has found that individualized calculations of damages do not defeat the predominance requirement.”); *see also In re U.S. Foodserv. Inc. Pricing Litig.*, No. 07-1894, 2011 WL 6013551, at \*16 (D. Conn. Nov. 29, 2011) (“It is a rare case where computation of each individual’s damages is so complex, fact-specific, and difficult that the burden on the court is intolerable.”), *aff’d*, 729 F.3d 108 (2d Cir. 2013); *Scott*, 2016 WL

9665158, at \*2 (“Individualized questions are not relevant to either disparate impact or pattern-or-practice claims.”); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (“The amount of damages is invariably an individual question and does not defeat class action treatment.”) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

The Court may address damages issues in one of at least two recognized ways. First, the Court may employ the *Teamsters* framework, whereby individual class members will present their eligibility for relief in a second phase of trial if liability is established. Importantly, these individualized hearings that may be conducted in the second phase of the trial “are narrow in scope and significance when compared to the threshold, classwide issues subject to generalized proof,” *Ellis*, 285 F.R.D. at 539, and “the Court could appoint a special master to preside over” them, *Houser*, 28 F. Supp. 3d at 254. These hearings may be made more efficient by the “presumption of individualized harm for each class member” afforded by a class victory in the liability phase. *Scott*, 2016 WL 9665158, at \*8. Alternatively, the Court may choose to certify both liability and damages for class treatment based on the common issues presented with respect to damages, which may include: classwide calculation of total aggregate damages; classwide calculation of baseline backpay on a year-by-year basis; class-wide determination on how to calculate compensation for lost promotions; class-wide establishment of what non-discriminatory bases KPMG may use to claim a plaintiff would not have been promoted; and a class-wide process to collect information from plaintiffs regarding mitigation. *See Gulino*, 2013 WL 4647190, at \*11 (certifying liability and damages in disparate impact case under 23(b)(3) and identifying potential common methods of damages calculations, where “resolving common issues with respect to damages at a class-wide proceeding will save substantial time and prevent the relitigation of common claims”). Such class adjudication may allow for a streamlined

process “managed by a special master” aimed at dividing a total damages award. *Id.* at \*13. *See also Easterling*, 278 F.R.D. at 48-49 (certifying liability and damages in disparate impact case under 23(b)(3) because common issues as to damages, including total amount of class back pay, predominated over individual issues, such as each member’s eligibility or qualification for position).

Plaintiffs’ proposed trial plan (set forth below) reflects the Court’s options. While Plaintiffs believe that both liability and damages should be certified here, at minimum the Court should certify the liability phase under Rule 23(b)(2), (b)(3) or (c)(4) (issue certification).<sup>117</sup> The standard of issue certification is readily met here, as resolution of common issues in Phase I—such as whether class-wide disparities exist and whether KPMG’s policies cause those disparities—would materially advance the litigation and achieve important efficiencies.<sup>118</sup>

**b. Plaintiffs Satisfy Superiority.**

The superiority inquiry directs the Court to consider four factors—the class members’ interests in controlling litigation, the nature and extent of litigation, the desirability of concentrating the litigation of the claims, and the manageability of the case as a class action. Fed. R. Civ. P. 23(b)(3).

All four factors readily support certification. Plaintiffs are not aware of any pending gender discrimination litigation on behalf of potential class members against KPMG. The alternatives to class litigation—(1) either thousands of individual proceedings (including by over

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<sup>117</sup> A court may employ Rule 23(c)(4) “when common questions predominate only as to the ‘particular issues.’” *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006). *See, e.g., Houser*, 28 F. Supp. 3d at 253-54 (certifying class under Rules 23(b)(2) and (c)(4) as to liability).

<sup>118</sup> *Robinson*, 267 F.3d at 167-68 (“[L]itigating the pattern-or-practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial economy.”); *McReynolds*, 672 F.3d at 491 (recognizing that single proceeding challenging defendant’s policies will efficiently determine class issues); *Houser*, 28 F. Supp. 3d at 253-54 (certifying a class for purposes of liability and injunctive relief; reserving judgment on damages phase).

1,100 Opt-Ins) on the same subject, inefficiently expending Court resources; or (2) given the widespread fear among Class members of retaliation and blacklisting by KPMG<sup>119</sup> and other professional services firms, potentially no cases challenging systemic gender discrimination—are not superior alternatives at all. Moreover, the pattern-and-practice method of proof for disparate treatment claims is not available to individual plaintiffs. *Chin*, 685 F.3d at 149. Class members’ interests are better served by a single suit with access to substantially more evidence. In fact, “the larger the number of victims of . . . discrimination”—here, potentially 10,000—“the greater the economies of scale achieved by adjudicating common claims in a class proceeding.” *City of N.Y.*, 276 F.R.D. at 48. Without class adjudication, the litigation costs—including, for example, expert fees in a complex case challenging employment policies—would overwhelm the dollar value of each plaintiff’s claim. The potential for such negative value claims is elevated here where the defendant possesses substantially greater means than any single plaintiff. Class adjudication also promotes efficiency because Plaintiffs have already conducted extensive discovery and litigation in this forum over many years. It would be far more efficient and convenient to continue litigating common questions here. *See, e.g., Easterling*, 278 F.R.D. at 50 (“It would be absurd to have more than a hundred class members separately litigate the issue of aggregate back pay, just as it would be absurd to have them separately litigate the question of class-wide liability.”).

Finally, Plaintiffs’ proposed trial plan below shows how this case may be efficiently litigated as a class action:

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<sup>119</sup>*See supra*, Section II.A.3.c.

## 5. Trial Plan

### Stage One: Liability

- 1) Disparate Impact Liability: The parties will litigate whether KPMG is liable for disparate impact. This claim will be tried to the Court. Plaintiffs have the initial burden to show that KPMG's compensation and/or promotion processes cause statistically significant pay and/or promotion disparities for the proposed Class. If Plaintiffs establish their *prima facie* case with respect to at least one policy, the burden will shift to KPMG to prove, as an affirmative defense, that its process or processes is/are based on legitimate business necessity. Plaintiffs will then have the opportunity to show that KPMG could have used a less discriminatory alternative practice.
- 2) Disparate Treatment Liability: The parties will litigate whether KPMG is liable for disparate treatment. This claim will be tried to a jury. Plaintiffs will have the initial burden to show that discrimination was KPMG's standard operating procedure. If that *prima facie* case is established, KPMG will have the opportunity to rebut the Plaintiffs' evidence by showing it to be either inaccurate or insignificant. Whichever party prevails on the preponderance of the evidence will win the liability phase. If Plaintiffs prevail, the jury will determine whether punitive damages should be awarded and the aggregate amount of punitive damages.<sup>120</sup>
- 3) Result of Verdicts: If Plaintiffs prevail on either the disparate impact or disparate

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<sup>120</sup> *EEOC v. Dial Corp.*, 259 F. Supp. 2d 710, 713 (N.D. Ill. 2003) (ordering a trial plan in Title VII case in which the jury resolving the questions of liability and malice/reckless indifference for a pattern-and-practice disparate treatment claim would also determine "an amount to be awarded to the aggrieved persons of the class as punitive damages").

treatment claims,<sup>121</sup> the entire class is entitled to (a) a declaration of liability, (b) a presumption of individual make-whole relief, (c) a class-wide injunction against the continuation of the discriminatory practices, (d) aggregate backpay determined by the Court for disparate impact, as well as (e) other reforms that may be fashioned by the Court, if warranted. The case would then proceed to Stage Two. If Plaintiffs do not prevail on either the disparate treatment or disparate impact claims, the case is over.

**Stage Two: Damages**

- 1) Option One: The Court first resolves common damages questions, which can include the aggregate amount of backpay owed to the Class if the Court deems that approach appropriate. Then, the Court (or special master) will hold *Teamsters* hearings, or use written questionnaires, to narrow and/or adjudicate issues regarding individual Class members' eligibility for relief, the amount of relief, and share of punitive damages each is entitled to recover.
- 2) Option Two: The Court (or special master) will hold *Teamsters* hearings to adjudicate individual entitlement to backpay and compensatory damages, as well as the individual's share of any punitive damages.

This proposed trial plan follows a standard path in Title VII class litigation, both before and after *Dukes*. See, e.g., *Teamsters*, 431 U.S. at 361; *Robinson*, 267 F.3d at 161; *Hill v. City of*

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<sup>121</sup> Liability under the Equal Pay Act will be litigated during this same trial as well. Of note, under the Bennett Amendment, Title VII incorporates as affirmative defenses certain statutory defenses to Equal Pay Act claims, namely differences in pay based on seniority, merit, productivity, or "any other factor other than sex." See 42 U.S.C. § 2000e-2(h); 29 U.S.C. § 206(d). Determining liability under the Equal Pay Act at the same trial is also appropriate because KPMG's asserted good faith defenses to punitive damages for disparate treatment claims and to liquidated damages under the Equal Pay Act are coextensive. KPMG's Answer to Fourth Amend. Compl. ¶¶ 36, 50.



*N.Y.*, 136 F. Supp. 3d 304, 334 (E.D.N.Y. 2015); *City of New York*, 276 F.R.D. at 32-33; *Velez*, 244 F.R.D. at 271; *Ellis*, 285 F.R.D. at 505.

### **III. THE COURT SHOULD GRANT FINAL CERTIFICATION OF AN EQUAL PAY ACT COLLECTIVE ACTION.**

Under 29 U.S.C. § 216(b), a plaintiff may pursue claims under the Equal Pay Act (or the Fair Labor Standards Act<sup>122</sup>) on behalf of “other employees similarly situated.” In enacting § 216(b), Congress has stated its policy that EPA plaintiffs should have the opportunity to proceed collectively. *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

The Second Circuit has endorsed a two-step approach to certifying collective actions under § 216(b). *See Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010) (two-step approach is “sensible”). This Court granted stage-one certification and issued notice to the EPA collective. *See Kassman v. KPMG LLP*, No. 11-03743, 2014 WL 3298884, at \*6-9 (S.D.N.Y. July 8, 2014). To date, 1,112 employees are Opt-In Plaintiffs.

Second stage certification asks whether the Opt-In Plaintiffs are “similarly situated” for the purposes of their EPA claims. *See, e.g., Diaz v. S&H Bondi’s Dep’t Store*, No. 10-7676, 2012 WL 137460, at \*6 (S.D.N.Y. Jan. 18, 2012) (“Courts have found employees ‘similarly situated’ for purposes of the FLSA where they performed different job functions or worked at different locations, as long as they were subject to the same allegedly unlawful policies.”). This inquiry examines whether the proposed collective members are similar specifically with respect

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<sup>122</sup> Because the EPA uses the same enforcement mechanism as the FLSA, courts generally apply the same body of case law to both type of actions. *Kassman v. KPMG LLP*, No. 11-3743, 2014 WL 3298884, at \*4 (S.D.N.Y. July 8, 2014) (“As part of the FLSA, the EPA utilizes the FLSA’s enforcement mechanisms and employs its definitional provisions.” (citing *Anderson v. State Univ.*, 169 F.3d 117, 119 (2d Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000))). The Age Discrimination in Employment Act (ADEA) similarly incorporates the FLSA’s class action mechanism. *See Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 91 (D.N.J. 1983) (“There can be no doubt that the express language of § 7(b) of the ADEA selects the class action mechanism defined in § 16(b) of the FLSA, not that set forth in Rule 23.”).

to their claims that the law has been violated.<sup>123</sup> *Id.* Here, given the Opt-In Plaintiffs were common victims of KPMG’s systematically applied company policy, collective litigation is appropriate.

Plaintiffs here are similarly situated, as evidenced by the fact that “their claims may be supported by generalized proof.” *Ayers v. SGS Control Servs.*, No. 03-9077, 2007 WL 646326, at \*5 (S.D.N.Y. Feb. 26, 2007) (citations omitted). In determining whether the collective is similarly situated, courts in this circuit typically consider three factors set out by the Tenth Circuit in *Thiessen v. General Electric Capital Corporation*, 267 F.3d 1095, 1103 (10th Cir. 2001): “(1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.” *Jacob*, 2016 WL 3221148, at \*7 (citation omitted); *accord McGlone v. Contract Callers, Inc.*, 49 F. Supp. 3d 364, 367 (S.D.N.Y. 2014) (same); *see also Brackett v. St. Louis Bd. of Police Comm’rs*, No. 12-898, 2014 WL 1377460, at \*2 (E.D. Mo. April 8, 2014) (denying motion to decertify FLSA collective, noting employees across classifications shared some of the same principal duties and each asserted a common claim (collecting cases)). This is distinct from the merits inquiry of whether the collective is performing substantially equal work to male comparators. The presence of “generalized proof” weighs strongly in favor of second-stage certification. *Ayers*, 2007 WL 646326, at \*5.<sup>124</sup>

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<sup>123</sup> “It is often said that the similarly situated requirement of 29 U.S.C. § 216(b) is considerably less stringent than the requirement of Fed. R. Civ. P. 23(b)(3) that common questions predominate, even at the second stage of the litigation.” *See, e.g., Jacob v. Duane Reade, Inc.*, No. 11-0160, 2016 WL 3221148, at \*7 (S.D.N.Y. June 9, 2016) (internal quotation marks and citations omitted). Here, Plaintiffs satisfy both Rule 23’s predominance requirement and the more lenient standard of stage-two collective action certification.

<sup>124</sup> The nature of the “similarly situated” inquiry depends on the nature of the plaintiffs’ claims. *Morgan v. Fam. Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008) (noting that courts consider “legally significant differences” in determining whether collective treatment is appropriate). For example, in FLSA exemption and misclassification cases, courts inquire into whether the job duties of the collective are similar because job duties are at the center of the inquiry into the proper classification of those jobs. *See Myers v. Hertz Corp.*, 624 F.3d 537, 555

All three *Thiessen* factors favor second stage certification here.

**A. Plaintiffs’ Factual and Employment Settings Favor a Collective Action.**

First, certification is appropriate because the Plaintiffs’ factual and employment settings favor a collective action. The Opt-in Plaintiffs are similarly situated under 29 U.S.C. § 216(b) because they were subject to the same discriminatory compensation scheme and share “substantially similar” employment settings.

**1. Generalized Proof Shows that the Opt-In Plaintiffs Were Subject to the Same Discriminatory Compensation Scheme.**

The Opt-in Plaintiffs share similar employment settings because all are subject to a systematically applied discriminatory compensation policy and practice. *See Ayers*, 2007 WL 646326, at \*5 (denying decertification where plaintiffs’ claims derived from company-wide policies and practices); *see also Wilks v. Pep Boys*, No. 02-837, 2006 WL 2821700 at \*3-5 (M.D. Tenn. Sept. 26, 2006) (“One of the factors material to many courts’ analysis of the plaintiffs’ factual and employment settings is whether they were all impacted by a ‘single decision, policy, or plan’”), *aff’d*, 278 F. App’x 488 (6th Cir. 2008); *Wilkerson v. Martin Marietta Corp.*, 875 F. Supp. 1456, 1461 (D. Colo. 1995) (certifying ADEA collective where plaintiffs “alleged they have been victimized by a pattern or policy of age discrimination”).

Here, the Opt-In Plaintiffs are seeking relief from common policies and practices that

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(2d Cir. 2010) (noting that because FLSA exemptions are based on “job requirements,” courts look at whether members of the collective are similarly situated with respect to those job requirements). In contrast, in age discrimination cases brought under the ADEA, which are more akin to this case, courts focus on whether opt-in plaintiffs were subject to similar discriminatory treatment. *See Wilkerson v. Martin Marietta Corp.*, 875 F. Supp. 1456, 1461 (D. Colo. 1995) (certifying ADEA collective where plaintiffs “alleged they have been victimized by a pattern or policy of age discrimination which motivated the series of layoffs,” finding similarity in claim “transcends the differences existing among levels of management responsibility as well as differences stemming from employment in different divisions or operating units of the Defendant corporation”). Although a conditional certification case, *Earl v. Norfolk State University* is instructive here, as the Court noted that a plaintiff faculty member could be similarly situated to faculty in other departments because they were subject to same evaluation criteria and brought common claims, even though faculty in other departments were not appropriate comparators because they had different skills and responsibilities. No. 13-148, 2014 WL 6608769, at \*7 (E.D. Va. Nov. 18, 2014).

were designed, adopted, overseen, and implemented by KPMG management. Generalized proof, as explained above, illustrates that KPMG ensures that its compensation policy is applied uniformly to all collective members,<sup>125</sup> including requiring review of salary ranges and revisions at the highest levels of the firm.<sup>126</sup> Therefore, all potential collective members are “similarly situated” for the purposes of their EPA claims. *See Jacob*, 2016 WL 3221148, at \*8 (denying decertification where opt-in plaintiffs were all subject to a systematically applied company policy); *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 481-83 (E.D.N.Y. 2001) (noting that the challenged employment practice was the same for each of the potential class members weighed “very strongly” in favor of second stage certification of collective action); *Ayers*, 2007 WL 646326, at \*5 (denying decertification in FLSA case despite defendants’ arguments about differences in job duties; noting that the plaintiffs’ principal claims derive from company-wide policies and common practice or scheme).

**2. Generalized Proof Shows The Opt-In Plaintiffs Share Substantially Similar Employment Settings.**

Additionally, generalized proof, such as internal KPMG documents, testimony from Opt-In Plaintiffs, and the results of a “job analysis” study done by KPMG’s expert witness, demonstrates that members of the collective within the same function and job title have similar responsibilities and working conditions.

**a. KPMG’s Documents Evidence Similarity Among The Opt-In Plaintiffs.**

First, KPMG’s documents illustrate the similarities between members of the collective in the same function and job title. KPMG maintains common job descriptions for employees in

<sup>125</sup> *See, e.g.*, KPMG-KASS0008888 (Tax 2010 Understanding and Applying Salary Review Guidelines), KPMG-KASS0036444 (Advisory 2012 Understanding and Applying Salary Review Guidelines).

<sup>126</sup> *See* KPMG-KASS0066411 (YE Rating and Compensation Process); KPMG-KASS0001631 (Newinski II Tr. 416:3-417:5, Ex.19); KPMG-KASS0139629 at 139632 (Tax and Advisory compensation presentations).

every job title within Tax and Advisory to “build consistency” across service lines.<sup>127</sup> In fact, KPMG’s centralized “Career Architecture” website contains these common job descriptions, and indicates that employees within the same function and job title are expected to have similar skills and perform similar work.<sup>128</sup> KPMG also uses the Career Architecture site to help employees easily move around between service lines and functions.<sup>129</sup>

KPMG’s internal documents evidence that employees in KPMG’s Tax function help clients comply with tax law and implement efficient tax strategies.<sup>130</sup> All Tax employees are expected to be able to distinguish tax authorities, identify and analyze tax issues,<sup>131</sup> and use tax technologies.<sup>132</sup> Tax Senior Associates review work done by Associates.<sup>133</sup> Common evidence from KPMG’s job descriptions indicates that Tax Managers have more formal responsibilities for managing their teams and providing feedback.<sup>134</sup> They are also involved in managing engagements, and thus ensure staffing and the completion of projects.<sup>135</sup> Tax Senior Managers

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<sup>127</sup> See KPMG-KASS0046529 at 31 (noting that in developing job descriptions “the major focus has been trying to build consistency”); *see also, e.g.*, KPMG-KASS0002775; KPMG-KASS0002777; KPMG-KASS0003514.

<sup>128</sup> KPMG-KASS0020388; *see also* KPMG-KASS0019482 at 19484-19500.

<sup>129</sup> *See, e.g.*, KPMG-KASS0020176 (KPMG’s “Career Mobility Interest Database”); KPMG-KASS0020178, KPMG-KASS0020180 (discussion guides for employees and performance managers regarding rotation, transfer, or relocation); KPMG-KASS0007551 at 7599 (displaying tools used to explore potential career paths and movement between functions and practices); Roop Tr. at 49:18-20, 50:1-5, 51:9-12 (testifying that KPMG allows “a lot of opportunities to move throughout the organization” and that she could leverage her skills in other groups as well).

<sup>130</sup> *See* KPMG-KASS0070247 at 49 (noting Tax employees “help[] develop business, improve processes, manage costs, and stay in step with regulatory requirements”).

<sup>131</sup> *See, e.g.*, KPMG-KASS0040396 at 40409 (Skills, Assessment & Development documents for IES Senior Associates); KPMG-KASS0068634 at 68646 (Skills, Assessment & Development documents for SALT Managers/Senior Managers).

<sup>132</sup> *See, e.g.*, KPMG-KASS0040396 at 40410; KPMG-KASS0068634 at 68646.

<sup>133</sup> *See* KPMG-KASS0002775 (providing Tax Senior Associates “leverage the engagement team,” “review the work product of associates and provide direction and training as necessary”).

<sup>134</sup> KPMG-KASS0002658 (job description noting Tax Managers “provide direction and training to staff, manage assigned staff, and make certain that resources are utilized appropriately while providing direction as necessary. Participate[] in office practice decisions including: resource allocation, career development of staff, risk and other people management decisions”).

<sup>135</sup> The job description provided by KPMG explains that Tax Managers “manage one or more client engagements or components of engagements.” *See* KPMG-KASS0002658. Tax Managers respond to Banks’ survey questions that they are responsible for setting up and overseeing the engagement. *See* KPMG-BANKS-0001811-1821 at 1818, Respondents 20, 13, 29, 1.

share common job descriptions<sup>136</sup> and have more formal business development responsibilities.<sup>137</sup> Tax Managing Directors are responsible for negotiating fee arrangements and managing the working capital of the firm.<sup>138</sup>

Employees in Advisory also perform work with a common set of skills and responsibilities. They help clients improve business performance, leverage information technology, protect assets, and manage risk.<sup>139</sup> KPMG Advisory employees work closely with their clients to understand their business processes and operations, their industries, challenges, and potential risks.<sup>140</sup> They present solutions, and help clients implement those solutions.<sup>141</sup> All Advisory employees are invited to attend KPMG's annual centralized "Advisory University."<sup>142</sup> Centralized documents also indicate that KPMG expects all Advisory employees to have similar skills and perform similar work.<sup>143</sup> All Advisory employees, for example, are expected to be skilled in research, preparing work papers, and using the same computer programs.<sup>144</sup> All Advisory employees must be able to manage risk and have strong decision-making skills.<sup>145</sup> KPMG also expects that all of its Advisory employees will have excellent project management and time management skills, and will understand the client's business and industry.<sup>146</sup> KPMG expects that all of its Advisory employees, regardless of job title or service line, have these skills,

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<sup>136</sup> See KPMG-KASS0002777.

<sup>137</sup> See KPMG-KASS0002777 (indicating Tax Senior Managers/Directors "will identify additional opportunities to introduce other Tax Service Lines to the Clients/Prospects").

<sup>138</sup> See KPMG-KASS0046533 at row 5.

<sup>139</sup> See KPMG LLP, KPMG Advisory Careers | KPMG Careers (2018), <http://us-jobs.kpmg.com/careers/PracticeAreasAdvisory> (last visited Jan. 29, 2018).

<sup>140</sup> See KPMG LLP, KPMG Advisory Careers | KPMG Careers (2018), <http://us-jobs.kpmg.com/careers/PracticeAreasAdvisory> (last visited Jan. 29, 2018).

<sup>141</sup> See KPMG LLP, KPMG Advisory Careers | KPMG Careers (2018), <http://us-jobs.kpmg.com/careers/PracticeAreasAdvisory> (last visited Jan. 29, 2018).

<sup>142</sup> See KPMG-KASS0513791.

<sup>143</sup> See e.g., KPMG-KASS0019482 (Business Performance Services), KPMG-KASS0019743 (Internal Audit, Risk and Compliance).

<sup>144</sup> See KPMG-KASS0019482 at 19484; KPMG-KASS0019743 at 19746.

<sup>145</sup> See KPMG-KASS0019482 at 19485; KPMG-KASS0019743 at 19747.

<sup>146</sup> See KPMG-KASS0019482 at 19485; KPMG-KASS0019743 at 19747.

although employees are expected to have greater mastery of these skills as they advance through the job title ranks at the firm.<sup>147</sup>

Advisory Associates take direction from supervisors and submit drafts of deliverables and work papers for others to review.<sup>148</sup> Advisory Associates gather information for their clients, conduct research, and prepare work papers.<sup>149</sup> Advisory Senior Associates begin to oversee the work of more junior staff, while being supervised themselves.<sup>150</sup> Advisory Senior Associates also provide some input into engagement decisions.<sup>151</sup> Advisory Managers oversee engagement set-up and management, and are also involved in establishing and monitoring the engagement timeline, budgets, and staffing.<sup>152</sup> They are responsible for managing the projects to achieve the specific revenue and profit objectives.<sup>153</sup> Advisory Managers are also engaged in people development activities, such as training other KPMG employees.<sup>154</sup> At this level, KPMG also expects that its Advisory employees will be more involved in supporting business generation for the firm.<sup>155</sup> Common evidence also indicates that Advisory employees at the Senior Manager/Director level are more actively involved in firm management and decision-

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<sup>147</sup> See, e.g., KPMG-KASS0019743 at 19745.

<sup>148</sup> See KPMG-KASS0003514 at 3522 (KPMG's job description stating that an Advisory Associate "Takes direction from others in completing tasks and assignments. Actively seeks out work from senior associate or manager. Meets or exceeds individual and team goals and supports KPMG Employer of Choice, office and practice initiatives.

<sup>149</sup> KPMG-KASS0019482 at 19487-88.

<sup>150</sup> See, e.g., KPMG-KASS0003514 at 3520 (Advisory Senior Associate Job description: "Take direction from the Manager, Sr. Manager or Director in execution of engagements. Supervises staff level engagement team(s) in the field. Directs and reviews the work product of Associates and provides direction and training as necessary.").

<sup>151</sup> See KPMG-KASS0003514 at 3520 (Advisory Senior Associate job description).

<sup>152</sup> See, e.g., KPMG-KASS0003514 at 3518.

<sup>153</sup> See, e.g., KPMG-KASS0003514 at 3518 (KPMG's job description providing that an Advisory Manager "Manages engagements or projects to consistently achieve specific revenue and profit objectives and deliver designated engagement realization").

<sup>154</sup> See, e.g., KPMG-KASS0003514 at 3518 (KPMG's job description stating that an Advisory Manager "Manages and provides leadership to teams of staff level professionals and becomes actively involved in recruiting, staff development and practice management. This role has an increasing focus on business development and people development activities").

<sup>155</sup> See, e.g., KPMG-KASS0003514 at 3518.



making.<sup>156</sup> For example, Advisory Managing Directors are responsible for new engagements and clients, managing complex project teams and project plans, coaching subordinates in managing projects, and coordinating cross-office efforts.<sup>157</sup>

**b. Testimony Overwhelmingly Demonstrates Similarity Between The Opt-In Plaintiffs.**

Second, the sworn testimony from Opt-In Plaintiffs overwhelmingly shows that, consistent with KPMG's internal documents, employees in the same function and service line perform similar work. Plaintiffs present representative testimony from Opt-In Plaintiffs in interrogatories and depositions, as well as employee declarations demonstrating that employees at the same titles in Tax and Advisory perform substantially similar work as others within their titles and functions, with managerial and supervisory responsibilities increasing as their careers progress through KPMG's job titles.

One hundred and seventy-seven Opt-In Plaintiffs stated in sworn interrogatory responses that "men in the same Function and Job Title performed 'similar work' for purposes of her claims." *See*, Mueting Dec. ¶ 4. Additionally, KPMG selected thirty-three Opt-In Plaintiffs to depose, and these individuals worked in each job title in the proposed collective.<sup>158</sup> Opt-In Plaintiffs consistently testified that their job duties are similar to the duties performed by others in the same job title and function.<sup>159</sup>

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<sup>156</sup> *See* KPMG-KASS0003514 at 3516.

<sup>157</sup> *See* KPMG-KASS0003514; KPMG-KASS0019743 at 19798, 19800, 19801; KPMG-KASS0004490 at 4542, 4543, 4545.

<sup>158</sup> Additionally, with the exception of the Tax Managing Director position, KPMG's chosen deponents covered every job title within each function.

<sup>159</sup> *See, e.g.*, McElvain Tr. 202:2-3 ("I believe all tax seniors at KPMG did roughly similar work.").



Tax professionals, regardless of service line, provided similar descriptions of their work.<sup>160</sup> Likewise, regardless of service line, professionals within the same job title in Advisory described their work in similar ways.<sup>161</sup>

Testimony from the Named Plaintiffs also confirms that similar work is performed across offices and service lines. *See, e.g.*, Declaration of Carol Murray ¶¶ 3-7 (testifying that people in different service lines and offices perform work that is similar); Declaration of Cheryl Charity ¶¶ 3-6 (testifying that work for Senior Associates, Managers, and Directors in Advisory was similar in other offices and service lines, and that she personally worked in two different offices at KPMG where the work was similar); Declaration of Tina Butler ¶¶ 3-5 (testifying that work for Senior Associates and Managers in Advisory was similar in other offices and service lines, and that she personally worked in two different offices at KPMG where the work was similar); Declaration of Donna Kassman ¶¶ 3-4 (testifying that work for Senior Managers in Tax was similar in other offices and service lines and that she personally worked in several offices and two different service lines at KPMG where the work was similar); Declaration of Nancy Jones ¶

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<sup>160</sup> *See, e.g.*, Declaration of Holly Barnes ¶¶ 7-8 (testifying that work for Senior Associates and Managers in Tax was similar in other offices and service lines); Declaration of Lisa Schmaltz ¶¶ 7 (testifying that work for Senior Managers in Tax was similar in other offices and service lines); Declaration of Marilyn Farley ¶¶ 7-9 (testifying that work for Managers, Senior Managers, and Managing Directors in Tax is similar in other offices and service lines); Declaration of Anna Gracia ¶¶ 6-7 (testifying that work for Senior Associates in Tax was similar in other offices and service lines, and that she was able to switch from Federal Tax to State and Local Tax “without significant additional training.”). For example, Opt-in Plaintiffs in the Tax function, regardless of service line, overwhelmingly testified that preparing or reviewing tax returns was a core job duty. *See, e.g.*, McElvain Tr. 24:14, 202:7-8; Garcia Tr. 17:17-19.

<sup>161</sup> *See* Declaration of Carol Murray ¶ 3 (stating that her day-to-day activities included “conducting research, drafting reports and analyses”); Declaration of Jessica Luke ¶¶ 7-10 (testifying that work for Associates, Senior Associates, and Managers in Advisory was similar in other offices and service lines, and that she personally worked in three different offices at KPMG where the work was similar); Declaration of Carlynn Alexander ¶¶ 7-9 (testifying that work for Senior Associates, Managers, and Directors in Advisory was similar in other offices and service lines); Declaration of Elisa Wu ¶¶ 7-8 (testifying that work for Managers and Directors in Advisory is similar in other offices and service lines); Declaration of Lauren Guenter ¶¶ 6 (testifying that work for Associates in Advisory was similar in other offices and service lines).

3 (testifying that work for Senior Associates in Advisory was similar in other offices and service lines).

c. **Expert Evidence Demonstrates Similarity Among the Opt-In Plaintiffs.**

Third, expert testimony from Plaintiffs' experts and KPMG's expert Dr. Cristina Banks underscores that all employees in the same function and job title describe their duties similarly.<sup>162</sup> The "job analysis" study offered by Dr. Banks is methodologically flawed on multiple grounds. For example, Dr. Banks combines *all* responses of employees without regard to function or level in order to simulate the appearance of pronounced variability across jobs. Notably, though, when those responses are sorted properly—for example when those in junior positions are not compared to those in senior positions—the responses show dramatic consistency of job duties within job title at KPMG.<sup>163</sup> *See* Rebuttal Report of Paul J. Hanges, Sept. 29, 2017 ("Hanges Report") at 6 ("The progression of responsibility from Associate to Senior Manager/Director provides evidence that these job titles all belong to the same job family."); *id.* at Appx. D (showing clustered responses as a function of job title for KPMG Advisory jobs); *id.* at Appx. E (showing same for KPMG Tax jobs).

For example, her report demonstrates the similarities within the Tax Function,<sup>164</sup> and by job title.<sup>165</sup> Similarly, regardless of the clients' industry, the day-to-day duties of KPMG

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<sup>162</sup> Dr. Banks' report was produced to Plaintiffs on August 4, 2017.

<sup>163</sup> *See also, e.g.*, KPMG-BANKS-0000736-0747 at 0744 (Tax Manager responding that "On the associate level, they do the day to day stuff like drafting – and they get guidance from higher ups about what they should do. Senior associates do the reviewing and help associates on things. You take on more responsibilities as you move up."); KPMG-BANKS-0000768-0778 at 0775 (Tax Associate reporting that "all of the first drafts are done by the associates and the work is then reviewed by the people above (senior associates, managers, partners)"); KPMG-BANKS-2137-2145 at 2140 (Advisory Senior Associate #10 reporting that "Managers and directors review and participate in planning. In terms of field work and testing, typically I will assign work to the other people on the team...").

<sup>164</sup> *See, e.g.*, KPMG-BANKS-0000001-03 (noting Tax employees prepare tax returns, Federal Tax employees consult about their tax obligations and tax efficiency, State and Local Tax employees help clients understand

employees in Advisory and the ultimate objectives for the client are similar across the function,<sup>166</sup> and by job title.<sup>167</sup>

Plaintiffs also present statistical analysis, based on KPMG's data, that shows statistically significant pay disparities after controlling for function and job title, and the similarities between members of the proposed collective supports Plaintiffs' use of one regression model—which

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obligations for local and state laws, M&A Tax involves the tax implications on mergers and acquisitions, and International Executive Services work with foreign tax obligations); KPMG-BANKS-0001811-1821 at 1818 (indicating Respondents 20, 13, 29, 1, 5 in Banks' survey reported having a role in people management); KPMG-BANKS-0001798-1811 at 1809-1811 (indicating Respondents 4, 16, 2, 14, 80, 59 said they submit drafts for review and/or are supervised by higher level employees, and indicating Respondents 4, 65, 2, 14, 80, 51, 59 said tax returns and/or research is a major job responsibility).

<sup>165</sup> See, e.g., KPMG-BANKS-0000074 (Interview with Christine Griffith, Partner in Charge of Tax Business School, describing Tax Senior Associate client-simulation trainings); KPMG-BANKS-0001811-1821 at 1818 (Respondents 20, 13, 29, Tax Managers, indicating that they are responsible for setting up and overseeing the engagement); KPMG-BANKS-0001811-1821 at 1817-18 (indicating Banks survey respondents 6 and 70 report market development efforts as a major job responsibility).

<sup>166</sup> See KPMG-BANKS-0001867-1870 at 1868-9; KPMG-BANKS-0001798-1811 at 1799-1800 (noting that Advisory employee 75 who works in the "financial services industry (commercial banks and retail banking)" has the major job responsibilities of "doing a variety of assessments" for clients and "formulat[ing] [a] strategy" and implementing it); KPMG-BANKS-0001798-1811 at 1802 (noting Advisory employee 76 in the technology industry has the major job responsibilities of testing an analysis and communicating the results to a client); KPMG-BANKS-0001798-1811 at 1802-03 (noting Advisory employee 34 working in healthcare is responsible for helping clients gather requirements and implement processes). In addition, many Advisory employees assist clients across a variety of industries. See KPMG-BANKS-0001867-1870 (noting Respondents 77, 12, 27, 68, 40, 61, 45, 79, 28, 43, 35 indicated they assisted clients in a variety of industries).

<sup>167</sup> See, e.g., Banks Report ¶¶ 99, 103, 106, 109, 114 (recounting the daily tasks of Senior Associates who review work of Associates and provide guidance); *id.* ¶¶ 119, 123, 127 (recounting the daily tasks of Managers who review work product and manage Associates); KPMG-BANKS-0001798-0001811 at 1800-02 (Respondent 81 explaining that she acts in a "manager capacity for...junior staff"; Respondent 73 "manage[s] several people below [her]...review[s] deliverables that [her] team members produce"; Respondent 62 "manage[s] associates on the project," Respondent 49 "manage[s] the associates below [her]."); KPMG-BANKS-0001811-1821 at 1815 (Respondent 61 explaining she "oversee[s] staff below me on the team"; Respondent 10 "supervis[es] . . . staff associates"; Respondent 38 "help[s] any staff that are also assigned to the engagement"); KPMG-BANKS-0001798-01811 at 1801-1803 (indicating Respondents 81, 73, 62, 76, 34, 61, 10, 38, 44 reference client-interaction as a major job responsibility); KPMG-BANKS0001798-0001811 at 1802-03 (Respondent 76 explaining she is involved with "Planning (drafting the audit program, staffing requests, helping to plan out the timeline for the engagement)...assisting with managing the budget" and Respondent 38 explaining "I work on planning the engagement and setting a timeframe"); KPMG-BANKS-0001798-0001811 at 1799-1800 (noting Respondents 42, 63, 12, 75, 11 describe their engagement management duties as major job responsibilities); KPMG-BANKS-0001811-1821 at 1812-13 (noting Respondents 77, 24, 75, 11, and 50 are involved in recruiting, managing employees, training team members, and/or business development); KPMG-BANKS-0001811-1821 at 1811-1812 (indicating all Advisory Senior Managers/Directors in Banks' survey indicate that a major job responsibility is to make firm decisions and manage projects); KPMG-BANKS-0001811-1821 at 1811-12 (indicating Banks' survey respondents 52, 26, 41, 19, 39, 48 report people management as a major job responsibility); KPMG-BANKS-0001811-1821 at 1811-12 (indicating Respondents to Banks' survey 26, 21, 41, 19, 48 report business development as a primary responsibility).

controls for function and job title—to illustrate the common negative effects of KPMG’s compensation policies on female professionals in Tax and Advisory jobs.

Because Opt-In Plaintiffs within the same job level and function perform the same principal duties under similar working conditions, certification of this collective is appropriate. *See Brackett*, 2014 WL 1377460, at \*2 (E.D. Mo. April 8, 2014). Any marginal variation between Opt-in Plaintiffs’ job duties does not undermine the collective nature of the claims.<sup>168</sup>

**B. There Are No Individualized Defenses Weighing Against Final Certification.**

The second factor also favors certification, as KPMG’s potential defenses do not defeat collective treatment and do not require individualized proof.<sup>169</sup> Specifically, KPMG argues that the substantive requirements of the EPA, which requires the comparison of the pay of women to men, somehow necessitates individual analysis of one opt-in to one identified

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<sup>168</sup> *See Cottle v. Falcon Holdings Mgt., LLC*, 892 F. Supp. 2d 1053, 1066 (N.D. Ind. 2012) (finding, in FLSA action at second stage, where parties did not dispute that all plaintiffs were hourly wage earners subject to overtime provisions, differences in job duties were not “meaningful” differences that would make plaintiffs not similarly situated); *Alonso v. Uncle Jack’s Steakhouse, Inc.*, No. 8-7813, 2011 WL 4389636, at \*3 (S.D.N.Y. Sept. 21, 2011) (certifying collective at second stage challenging company-wide overtime, contract, and credit card interchange fee policies, finding “[t]hose issues outweigh Defendants’ concerns about Plaintiffs’ varying job titles, locations, and work schedules”); *Perkins v. So. New England Tel. Co.*, 669 F. Supp. 2d 212, 219 (D. Conn. 2009) (holding at the second stage of certification “[a] [FLSA] collective action should be certified if, on balance, the differences among the plaintiffs do not outweigh the similarities in the practices to which they claim to have been subjected.” (internal quotation marks omitted and emphasis added)); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000) (certifying FLSA collective at second stage where each of the plaintiffs asserted a common overtime claim, noting “variations in the plaintiffs’ duties, job locations and hourly billing rates do not differentiate the collective basis of the class . . .”). Additionally, in light of KPMG’s argument that certification is inappropriate because Plaintiffs must identify comparators within the same establishment, Plaintiffs note that, at the merits stage, Plaintiffs will be satisfy that burden. Plaintiffs will show that KPMG qualifies as a single establishment in part because it centrally administers its compensation policy and job descriptions. *See Brennan v. Goose Creek Consol. Ind. Sch. Dist.*, 519 F.2d 53, 57-58 (5th Cir. 1975) (finding schools in same district were one establishment due to centralized personnel administration); *see also Grover v. Smarte Carte, Inc.*, 836 F. Supp. 2d 860, 867-68 (D. Minn. 2011) (collecting cases).

<sup>169</sup> To the extent KPMG raises the statutory affirmative defenses to EPA claims—e.g., that pay disparities are justified by a factor other than sex or that the pay system is a seniority or production system (for example)—these too will be adjudicated by generalized proof about the nature of the compensation system. KPMG will have the burden of proof on such defenses. *See Jacob v. Duane Reade, Inc.*, No. 11-0160, 2016 WL 3221148, at \*8 (S.D.N.Y. June 9, 2016) (denying decertification of FLSA collective, noting that “[p]laintiffs are vulnerable to the same common defenses”); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 411 (W.D. Pa. 2000) (denying decertification of FLSA collective, finding that coordinated resolution of common defenses “asserted against every member of the class” served judicial efficiency).

comparator.<sup>170</sup> But this unsupported interpretation of the EPA would preclude any EPA collective, contrary to the Fair Labor Standards Act and decades of law. KPMG’s argument also completely ignores the role of statistical analysis in making apples-to-apples comparisons between men and women, an analysis that is more rigorous and reliable than the *ad hoc* pair matching KPMG advocates. *See, e.g., Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (noting that circuit courts “have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability”); *Beck-Wilson v. Principi*, 441 F.3d 353, 364 (6th Cir. 2006) (“[A]n EPA plaintiff can rely upon statistical evidence of a gender-based disparity in pay when establishing a prima facie EPA case.”); *Maggio v. City Univ. of N.Y.*, No. 05-4211, 2008 WL 466211, at \*2 (E.D.N.Y. Feb. 17, 2008) (“In the usual EPA case, the plaintiff submits statistical evidence through an expert, via a regression analysis, that factors for legitimate employment criteria to arrive at a conclusion of sex discrimination.”).

Finally, if KPMG raises defenses that cannot be litigated on a class-wide basis, the Court could adopt a *Teamsters*-like bifurcated procedure, where remedial proceedings follow a class liability phase of the action. *See Thiessen*, 267 F.3d at 1105-08; *Ayers*, 2007 WL 646326, at \*6; *Rodolico*, 199 F.R.D. at 483-84.

C. **Fairness and Procedural Considerations Weigh Heavily in Favor of Final Certification.**

The third factor also favors certification, as the collective action is far superior to the more than 1000 individual cases that would be pending in the absence of collective treatment.

“The Supreme Court has held that a FLSA collective action allows plaintiffs to take ‘advantage

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<sup>170</sup> In light of KPMG’s pre-filing argument that certification is not appropriate under *Equal Employment Opportunity Commission v. Port Authority of New York and New Jersey*, Plaintiffs reiterate that this Court has already determined that Plaintiffs have adequately pled their EPA claim and, unlike the attorneys in Port Authority, have a statistical model that limits comparators who are in the same job title and function. *Cf.* 768 F.3d 247, 249 (2d Cir. 2014).

of lower individual costs to vindicate rights by the pooling of resources,’ and allows the judicial system to benefit by ‘efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [violation].’” *McGlone*, 49 F. Supp. 3d at 369 (quoting *Hoffman-LaRoche*, 493 U.S. at 170) (alteration in original).

As all three factors weigh in favor of litigating this case as one EPA collective action rather than as more than a thousand individual actions, final certification of the collective is warranted.<sup>171</sup>

#### IV. CONCLUSION

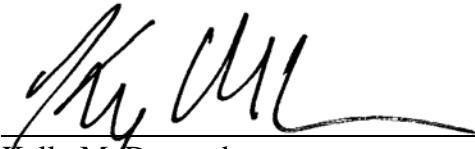
For the reasons set forth above, Plaintiffs respectfully request that the Court a) grant the motion for class certification, certifying liability issues under Rule 23(b)(2), (b)(3), and/or (c)(4), injunctive relief under Rule 23(b)(2), and damages under Rule 23(b)(3); and grant final certification to the Equal Pay Act collective.

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<sup>171</sup> Plaintiffs will establish that KPMG’s violation of the EPA was willful using the same common evidence described above, including evidence of complaints to KPMG’s Human Resources and Ethics & Compliance departments; employee comments made in annual employee surveys and exit interviews; and documentary evidence such as corporate emails and records reflecting persistent biases and systemic problems for women. *See Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (“A defendant’s violation of the Equal Pay Act is willful or reckless within the meaning of § 255(a) if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” (internal quotation marks and citations omitted)). Thus, Plaintiffs’ EPA claims will be subject to a three-year statute of limitations. Consistent with this Court’s ruling at Docket No. 413, “[c]laims running back to March 16, 2009 . . . would therefore be deemed timely.” Dkt. No. 413 (Sept. 4, 2015).

Dated: February 14, 2018

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