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.

INDEX NO. 11-CV-3743 (LGS)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF DENIAL OF CLASS CERTIFICATION UNDER RULE 23

INTRODUCTION

Under Local Civil Rule 6.3, Plaintiffs respectfully request that this Court reconsider its Order denying class certification entered on November 30, 2018. Order Denying Class Cert. ("Order"), Dkt. 831. In this Motion for Reconsideration, Plaintiffs challenge a clear factual error about the analyses performed by Plaintiffs' statistical expert, Dr. Alexander Vekker. The Court repeatedly notes that Dr. Vekker's analyses failed to consider the Service Line assignment of KPMG employees, yet this is incorrect. Dr. Vekker conducted the exact analysis the Court found missing. As detailed in Dr. Vekker's reply expert report, when controlling for Service Line, pay and promotion disparities remain at statistically significant levels, which is common evidence for class discrimination claims. Vekker Reply Report Tables 1, 9, Tables 1R-6R, Dkt. 799-91.

This error has pronounced implications for the Court's core Rule 23 findings. The Court's denial of Plaintiffs' disparate treatment class claim expressly rested on Dr. Vekker's apparent failure to conduct a Service Line analysis. Order at 47. The Court's finding that Plaintiffs lacked common evidence that the uniform policies resulted in disparities *at the level at which policies were implemented* was also fatal to the Plaintiffs' disparate impact class claim. Thus, Dr. Vekker's analysis of Service Line, which provided common evidence of discrimination at the level of decision-making the Court found relevant, bears directly on disparate impact as well. *See id.* 39-40, 41. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Reconsideration and issue a new Order granting Plaintiffs' Motion for Class Certification.

While this Motion for Reconsideration is pending, Plaintiffs also respectfully request that the Court withdraw its class certification Order (Dkt. 831). In the absence of such withdrawal, Plaintiffs may be required to file a petition for permission to the appeal by December 14, 2018, as per Federal Rule of Civil Procedure 23(f).[1] A withdrawal of the class certification Order

[1] The Second Circuit has not definitively ruled on the impact of a motion to reconsider on the timing of a Rule 23(f) petition, *see Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 n.6 (2d Cir. 2011), and regardless of sister circuit

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pending decision on this motion for reconsideration will ensure that the Court has sufficient time to consider the important issues raised by this Motion and, if the Court deems it appropriate, revise its Order accordingly. It will also prevent burdening the Second Circuit with a Rule 23(f) petition filed prematurely on an Order that may still be developing.

LEGAL STANDARD

Local Rule 6.3 provides that a party may request reconsideration of a court order determining a motion by "setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked." S.D.N.Y. Civ. R. 6.3. A motion for reconsideration should be granted if "the moving party can point to . . . *data* that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Berg v. Kelly*, No. 12-3391, 2018 WL 6252383, at *3 (S.D.N.Y. Nov. 30, 2018) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (emphasis added)); *see also Schoolcraft v. City of N.Y.*, 298 F.R.D. 134, 136 (S.D.N.Y. 2014) (holding that the "burden is on the movant to demonstrate that the Court overlooked . . . material facts that were before it on the original motion, and that might materially have influenced its earlier decision" (internal quotation marks omitted)). Likewise, a motion for reconsideration should be granted based "on the need to correct a clear error or prevent manifest injustice." *Kolel Beth Techiel Mechil v. YLL Irrevoc. Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

ARGUMENT

Plaintiffs respectfully request that this Court reconsider its Order on the basis that the Court overlooked Dr. Vekker's analyses of pay and promotion outcomes by Service Line (including his separate analysis showing that Service Line was a tainted variable), and therefore

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authority, the Supreme Court may soon address this question in *Nutraceutical Corp. v. Lambert*, 17-1094 (argued Nov. 27, 2018).

erred in its foundational holding that Plaintiffs failed to present *common evidence* of pay and promotion discrimination.

I. Plaintiffs Presented Common Evidence of Discriminatory Decision-Making Pursuant to the Uniform Policies Identified by the Court.

In its Order, the Court detailed evidence of uniform and common pay and promotion policies. *See, e.g.*, Order at 5-10, 38. However, the Court found Plaintiffs' statistical evidence wanting, as the Court viewed the level of decision-making to be at the Service Line. *Id.* at 14-16.[2] In rebuttal, however, Dr. Vekker conducted alternative analyses accounting for Service Line assignment by including Service Lines as control variables in his regressions. Vekker Reply Report 8-9, 14.[3] This allowed Dr. Vekker to compare pay and promotion outcomes between men and women *within* the same Service Lines, as the Court believed appropriate.[4]

Plaintiffs presented Dr. Vekker's alternative analyses to the Court in their Reply In Support of Class Certification. Reply ISO Class Cert. at 14 ("[W]hen Dr. Vekker tests this by controlling for service line . . . he finds . . . statistically significant gender disparities in both Tax and Advisory in pay for each year from 2008 to 2016; and in promotions over the 2008 to 2016 period."), Dkt. 801. Plaintiffs also addressed Dr. Vekker's Service Line Analyses and the implications of that analysis in their Opposition to KPMG's motion to exclude Dr. Vekker. *See* Pls.' Opp'n to Def.'s Motion to Strike Expert Alexander Vekker, Ph.D. 3-4 ("Dr. Vekker also explained that his findings of statistically significant gender disparities in pay and promotions are robust and are not sensitive to the alternative factors suggested by Dr. Bloom, including service

[2] Dr. Bloom conducted 766 *separate* regressions for differing combinations of Service Line, job title, and year, but was unable to report results for almost 30% of these combinations because the sample size of the disaggregated data was smaller than 30. *See, e.g.*, Bloom Report 29, 29 n.27, 29 n.29 (no reporting for 211 of Bloom's separate regressions because of small sample size), Dkt. 799-46.

[3] While Dr. Vekker studied Service Line as a rebuttal point, he also questioned the validity of its inclusion in the model due to Service Line assignment being a "tainted" variable within KPMG's control, rendering its use as a common defense to justify pay and promotion disparities suspect. Vekker Reply Report 8-9, 14.

[4] Because Dr. Vekker did not disaggregate into small sample sizes, he was able to analyze the whole population by Service Line. Vekker Reply Report 11 ("When I consider each of Dr. Bloom's alternatives, including the *service line* control, the disparities persist.") (emphasis added).

line . . . ."), 6 n.7, 10 n.12, 12, 12 n.17, Dkt. 804. *See also, e.g.*, August 2, 2018 Hearing Tr. 21:9-11, 14-16; ("Dr. Vekker ran a regression analysis that added service line into the model, and . . . what you see is robust statistical significance even when you add service line . . . .")

Importantly, Dr. Vekker found that statistically significant gaps in pay and promotions remained even while accounting for Service Line assignment. Vekker Reply Report Tables 1R-6R. Specifically, when controlling for all of the objective characteristics already in his model,[5] as well as Service Line—that is, comparing women to men at the same job title within the same Service Line—Dr. Vekker made the following statistically significant findings.[6]

- The base pay of women in Tax was 1.5% lower than the base pay of men within the same Service Lines, at 6.11 standard deviations (far in excess of the 1.96 generally required by courts to establish an inference of discrimination), over the 2008 to 2016 time period collectively and separately within each year of that time period. Vekker Reply Report Table 1R.

- The base pay of women in Advisory was 2.2% lower than the base pay of men within the same Service Lines, at 8.89 standard deviations, over the 2008 to 2016 time period collectively and separately within each year of that time period. Vekker Reply Report Table 2R.

- The total compensation of women in Tax was 2.2% lower than the total compensation of men within the same Service Lines, at 5.28 standard deviations, over the 2008 to 2016 time period collectively and separately within each year of that time period, except in 2010, when the standard deviation was, at 1.95, nearly at the standard level of statistical significance. Vekker Reply Report Table 3R.

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[5] These elements are function, job title, work experience, education, performance rating, location, year, and, for promotion regressions, CPA license. *See, e.g.*, Vekker Reply Report Table 5R.

[6] Plaintiffs note that the Court's Order compares the national gender pay gap to the pay gap of this case, but this is a misleading comparison. *See* Order at 2. The national pay statistic cited is a raw snapshot of the overall difference in pay between men and women nationally across all categories and backgrounds. Here, the gender pay gap identified by Plaintiffs is from a regression analysis that accounts for all potentially relevant objective characteristics in KPMG's data that could explain pay differences, yet still the regression does not erase the statistically significant gender pay gap at KPMG. With respect to the raw national snapshot the Court cites, the Pew Research Center advises that its figure does not account for "differences in the types of jobs (occupations) women and men do" or "attributes employers value but that are not captured in the available [Bureau of Labor Statistics] data" it analyzes. Rakesh Kochhar, *How Pew Research measured the gender pay gap*, Pew Research Center (Dec. 11, 2013), *available at* http://www.pewresearch.org/fact-tank/2013/12/11/how-pew-research-measured-the-gender-pay-gap/.

- The total compensation of women in Advisory was 2.2% lower than the total compensation of men within the same Service Lines, at 6.96 standard deviations, over the 2008 to 2016 time period collectively and separately within each year of that time period. Vekker Reply Report Table 4R.

- The probability of promotion of women within Tax was 3 percentage points lower[7] than the probability of promotion for men within the same Service Lines, at 6.87 standard deviations, for all job titles. Additionally, the probability of promotion from the Senior Associate position was 5.2 percentage points lower for women than for men within the same Service Lines, at 5.70 standard deviations. The probability of promotion from the Manager position was 3.4 percentage points lower, at 3.27 standard deviations, and the probability of promotion from the Senior Manager position was 2.3 percentage points lower, at 2.77 standard deviations. Vekker Reply Report Table 5R.

- The probability of promotion of women within Advisory was 1.3 percentage points lower than the probability of promotion for men within the same Service Lines, at 3.65 standard deviations, for all job titles. Additionally, the probability of promotion from the Senior Associate position was 1.6 percentage points lower for women than for men within the same Service Lines, at 2.26 standard deviations. The probability of promotion from the Manager position was 2.0 percentage points lower, at 2.71 standard deviations. Vekker Reply Report Table 6R.

Dr. Vekker's study of differences in pay and promotion outcomes *within* KPMG's Service Lines thus provides the necessary common evidence of discrimination at the level at which the Court found decisions to be implemented day-to-day.[8] Dr. Vekker's Service Line analysis demonstrates that service line *in no way obviates the statistically significant pay disparities*. *See* Vekker Reply Report 8-9. Notwithstanding KPMG's defense that it just happens to be that women must work in lower paying Service Lines than men, *see id.*, Dr. Vekker's analysis controlling for Service Lines demonstrates that *KPMG also pays women less*

[7] A single-digit percentage-point difference in the *probability* of promotion can equate to much larger differences in the actual *rates* of promotion. *See* Pls.' Mem. ISO Mot. for Class Cert. at 12 n.56, Dkt. 797-1.

[8] Indeed, Dr. Vekker's analyses not only demonstrate that Service Line *did not* explain the gender disparity in compensation and promotions—that is, KPMG paid women less than men even when controlling for the Service Line in which they worked—but went further in showing that the gender disparity in compensation and promotions was also not explained by differences in skills reflected in education specialties. *See* Vekker Reply Report 6-7, 9-11. In other words, KPMG paid women less than men in the same jobs with the same skills. *See* Vekker Reply Report Tables 7R-12R (showing, for example, a 2.3% pay gap in Tax, at 8.61 standard deviations, and a 2.4% pay gap in Advisory, at 9.38 standard deviations, when controlling for education specialty).

than men in the same jobs within Service Lines. That statistically significant disparity is the result of the pay decisions at issue in this case.

II. The Order Denying Class Certification Overlooked Analysis in the Record and the Implications of that Analysis, Thus Committing Clear Error.

Notwithstanding the factual record on class certification summarized above, the Court critiqued Dr. Vekker's regressions as only "comparing all relevant employees at the Function level . . . in line with Plaintiffs' theory that KPMG's Function- and firm-wide pay and promotion policies had a disparate impact on women." Order at 47. The Court is certainly correct that Dr. Vekker's initial report presented a Function-level analysis. *See* Vekker Report at 4 n.4, Dkt. 797-38. But by failing to recognize the existence of Dr. Vekker's further rebuttal analyses in his reply report, Dkt. 799-91, the Court ultimately made numerous erroneous findings that affect all aspects of the Court's class certification Order and that, if corrected, would mandate a different outcome as to both disparate impact and disparate treatment.

To illustrate the extent to which the Court's Order was premised on Dr. Vekker's purportedly having failed to render relevant findings and how this premise permeated its key rulings, Plaintiffs set forth the following rulings by the Court:

- "Dr. Vekker ran aggregate linear regressions using KPMG data from 2008 to 2016 and found statistically significant differences in compensation—both in terms of base pay and total pay—between men and women who held Class Positions, when controlling for job level, experience, education, job location and performance ratings." Order at 12 (failing to recognize the existence of Dr. Vekker's rebuttal analyses controlling for Service Line).

- "With respect to promotions, . . . Dr. Vekker used the same controls as those for the compensation regressions but included an additional control or having a CPA license." Or. at 13 (failing to recognize the existence of Dr. Vekker's rebuttal analyses controlling for Service Line).

- "Dr. Vekker and Dr. Bloom may both be correct; women in Class Positions were paid less than men who held the same job titles (per Dr. Vekker), but that discrepancy is associated predominantly with Service Line or Cost Center[9] (per Dr. Bloom) . . . ." Order at 12.

- "Dr. Bloom's regressions suggest that the gender pay disparity Dr. Vekker found reflects a heavier concentration of men in higher compensated units and heavier concentration of women in lesser compensated units." Order at 15.
- "Dr. Vekker's finding of disparity 'may be attributable to only a small set of [KPMG decision makers at the practice-area level] . . . ." Order at 47.
- "Service Line, rather than gender, accounts for any pay and promotion disparities." Order at 47.
- "Dr. Vekker's decision to aggregate data across function, thereby equating job and job title, obfuscated the principal explanatory variable." Order at 47.
- "Dr. Vekker's results are likely explained by a higher concentration of men in the best compensated Service Lines . . . ." Order at 47.
- "Dr. Vekker's statistical evidence is insufficient to show any common issue that would warrant a nationwide class." Order at 47.

In sum, Plaintiffs respectfully submit that the Court should reconsider its ruling to "correct a clear error" and "prevent manifest injustice," *YLL Irrevoc. Tr.*, 729 F.3d at 104, namely a misapprehension of the factual record with respect to the statistical analyses Plaintiffs' expert performed, which support a commonality finding here. These analyses, in fact, adhere precisely to the framework adopted by the Court with respect to policy implementation and decision-making at KPMG and provide the statistical proof required for certification of Plaintiffs' disparate impact and disparate treatment claims.

CONCLUSION

Plaintiffs respectfully request that the Court Grant Plaintiffs' Motion for Reconsideration.

[9] Because of the very low sample size involved, Bloom does *not* analyze the data by Cost Center. *See, e.g.*, Bloom Report Table 8A, Dkt. 799-46 (showing analysis by Service Line *but not* Cost Center).

Dated: December 6, 2018

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