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)

PLAINTIFFS' REPLY IN SUPPORT OF RULE 23 CLASS CERTIFICATION AND FINAL CERTIFICATION OF THE EQUAL PAY ACT COLLECTIVE

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INTRODUCTION

KPMG's opposition to class certification is without merit. KPMG ignores its firm-wide and centrally administered pay-setting and promotion practices that make certification appropriate, and attempts to recast the firm as though it were Wal-Mart in *Wal-Mart Stores, Inc. v. Dukes*, where the Court found there were no company-wide practices and all pay and promotion decisions were left to individual store managers. 564 U.S. 338, 344-45 (2011).

Here, Plaintiffs challenge specific uniform and firm-wide compensation and promotion practices that have a disparate impact on women. The evidence shows that senior executives oversee the annual pay-setting process from start to finish, using salary ranges and a software program with prepopulated salary figures to limit the regional practice leaders' influence. Similarly, KPMG's promotion process involves a "tap on the shoulder" system where positions are not posted for application, but rather candidates are selected by leadership based on common invalid criteria. Ultimately, all pay and promotion decisions must be approved by two individuals in KPMG's Tax and Advisory Functions: the Vice Chair and National Managing Partner. Contrary to KPMG's claims, this is not a system of pure manager discretion, but instead a common mode of exercising discretion within strict centralized decision-making authority.

Plaintiffs have also presented "significant proof" of discrimination that is common to the class as a whole, enabling class-wide resolution on the question whether KPMG "operated under a general policy of discrimination." *Dukes*, 564 U.S. at 353. Certification of Plaintiffs' disparate treatment claims is appropriate.

Finally, because all Opt-In Plaintiffs are similar with respect to their pay claims, the Court should grant final certification of the Equal Pay Act collective action.[1]

ARGUMENT

I. The Requirements Of Rule 23(a) Are Satisfied.

Plaintiffs address KPMG's meritless attacks on commonality, typicality, and adequacy.

[1] Citations to discovery documents and deposition transcripts throughout are to exhibits to the Declaration of Tiseme Zegeye submitted in support of Plaintiffs' opening brief and to KPMG's opposition.

A. Commonality Is Satisfied.

1. Plaintiffs' Disparate Impact Claim Relies On Common Evidence Of The Effect Of Specific, Challenged Policies And Practices On Women.

KPMG argues that Plaintiffs "challenge only myriad individual discretionary decisions," Def. Br. 28, unsusceptible to class-wide challenge under *Dukes*. This case, however, is not *Dukes*, in which the plaintiffs described a system of no system at all. Senior leaders at KPMG retain tight control over pay and promotion practices, and ultimately all pay and promotion decisions must be approved by two individuals: the Vice Chair and National Managing Partner for Tax and Advisory ("Functional leaders"). Pls. Br. 7. Plaintiffs challenge specific aspects of these policies.

Compensation. KPMG's Compensation Strategies Department and Functional leaders set compensation policy by establishing pay ranges[2] and distributing prepopulated figures for salary increases and variable compensation for each Class member via a software program known as the Compensation Tool.[3] Then, high-ranking regional practice leaders—not first-level supervisors known as People Management Leaders—review these figures and recommend compensation awards for each Class member to national leadership.[4] The firm conducts trainings on the process to ensure consistency, and regional practice leaders are discouraged from making adjustments to the compensation recommendations received from national leadership. *See* Pls. Br. 7. The Functional leaders must ultimately approve all compensation decisions.[5]

KPMG invests "a significant amount of time, money and effort to develop and implement these compensation strategies and guidelines." Dkt. 194-1, Brandes Decl. ¶ 4 (Nov. 14, 2013). KPMG's suggestion that its investment is wasted and firm-wide efforts are ignored because

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[2] KPMG has asserted that these ranges must remain confidential because disclosure would put it at a competitive disadvantage, Dkt. 194-1, Brandes Decl. ¶¶ 6, 7 (Nov. 14, 2013), indicating that the firm expects actual compensation decisions to be based on its ranges; *see also* Brandes Tr. 118:11-19; Newinski I Tr. 89:12-25.

[3] *See, e.g.*, KPMG-KASS0091075 at 83; KPMG-KASS0008993 at 9005-09; KPMG-KASS0009255 (2013 Year-end timelines); Doughtie II Tr. 73:2-6; KPMG-KASS0066411.

[4] *See* KPMG-KASS0066411, KPMG-KASS0139629, 139632; *see also* KPMG-KASS0036444 at 36450 (for Advisory: "[i]n spite of any tweaks and changes," "the end process [] still reflect[s] overall . . . strategy at a high level"); KPMG-KASS0008888, 8900 (for Tax: stating that KPMG's salary "increases are [] designed to be competitive with the market and [KPMG] achieve[s] this by using the compensation tool").

[5] *See* KPMG-KASS0066411; Newinski II Tr. 416:20-417:5, Ex.19 (KPMG-KASS0001631); KPMG-KASS0139629 at 139632.

compensation is determined through "tens of thousands of decentralized discretionary decisions" lacks credibility. Def. Br. 1. Courts routinely reject self-serving characterizations of decision making as decentralized, where, as here, such characterizations are inconsistent with the factual record. *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 120 (S.D.N.Y. 2015) ("[T]he defendants cannot now reject [its own job] classification system as an input in creating a model for calculating expected pay and advancement."); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 530 (N.D. Cal. 2012) (rejecting contention that decisions were localized where "discrete companywide policies guided and supervised by a relatively small and coherent group of company executives"). Likewise, KPMG's current assertion that Functional leaders only broadly review pay and promotion decisions, Def. Br. 12, is inconsistent with the record,[6] and with KPMG's prior representations to the Court that compensation decisions are changed as a result of review by "Firm and functional leaders." Dkt. No. 194 at 8. Common evidence demonstrates that KPMG ensures that employees are paid according to its common strategies, guidelines, and direction.

Promotions. KPMG also exercises centralized control over promotion decisions, in part to ensure consistency across the firm.[7] Promotions at KPMG operate via a closed system with no job postings or applications. First, promotion recommendations are discussed at assessment meetings, which occur at the same time and in a similar manner across the firm. Doughtie I Tr. 182:19-183:10; 201:8-15; KPMG-KASS068192; Def. Br. Ex. A ¶13 (confirming that promotion conversations happen through firm-wide "career development process" that is standard for all KPMG job levels); Def. Br. Ex. H ¶ 20 (assessment meetings cover same topics "as a matter of course"). Functional leaders approve all promotion decisions.[8] Pls. Br. 10-11.

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[6] *See, e.g.*, KPMG-KASS0066411 (providing national leaders—Vice Chair, National Managing Partner, and National Head of Human Resources execute final approval of pay decisions, which are not communicated before approval); *see also* Def. Br. Ex. B ¶ 17 (Advisory National Managing Partner, testifying she reviews pay decisions); Brown Tr. 94:18-19, 95:24-25, 96:11 (promotion decisions made by Functional leaders).

[7] *See, e.g.*, KPMG-KASS-000850R at 851R; KPMG-KASS0587375 at 77 (decisions made above service-line level).

[8] KPMG's declarations also indicate senior leaders retain control over the process. *See, e.g.*, Def. Br. Ex. A ¶ 20 (CEO, noting she has control over advancement decisions); Def. Br. Ex. D ¶¶ 18-20 (centralized diversity department collaborates with chairman's office to monitor promotions).

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In response to KPMG's assertions that Plaintiffs failed to identify a specific employment policy, Plaintiffs provide the following list of specific employment policies that Plaintiffs have challenged in briefing and expert reports, any one of which supports class certification.[9]

Compensation	*Promotion*
Use of Overlapping Salary Ranges: • KPMG divorces pay from performance through the use of common salary ranges that overlap, failing to distinguish among employees based on performance ratings. Pls. Br. 9-10; Goldberg Rep. 12. • A gender pay gap exists even when controlling for performance. Vekker Rep. 8 n.7. • Salary ranges and relative position within a salary range substantially affects an employee's salary. Pls. Br. 9; Goldberg Rep. 7-9. **Use of Common, Invalid Criteria**: • KPMG regional partners recommend pay within range based on common, ill-defined, and unvalidated criteria unrelated to job duties or performance thus invalid. This adversely affects women. Pls. Br. 9-10; Goldberg Rep. 9-10. **Use of Prior Salary to Set Current Salary**: • KPMG's centralized, computerized, and non-discretionary "Compensation Tool" ties each employee's future pay to existing pay through percentage increases, perpetuating pre-existing gender disparities. Pls. Br. 7; Goldberg Tr. 123:19-24.	**Closed Promotions System**: • KPMG maintains a closed tap-on-the-shoulder promotion system, leading to under-promotion of women in KPMG's male-dominated environment. Pls. Br. 10-11; Goldberg Rep. 15-17.[10] **Use of Common, Invalid Criteria**: • While KPMG has established common requirements for each position, it has failed to define the specific Knowledge, Skills, and Abilities ("KSAs") needed by level or to tie those KSAs to promotion decisions. Pls. Br. 12-13; Goldberg Rep. 17-20. • KPMG uses common criteria for all promotions that are unvalidated and not tied to the job at issue, such as "professionalism," "integrity," "reputation," and potential to be a "partner candidate." KPMG's criteria are thus invalid. Pls. Br. 11; Goldberg Rep. 17-18.[11] • In KPMG's male-dominated environment, these common criteria adversely affect the promotional opportunities for women. Pls. Br. 11; Goldberg Rep. 17-19.

[9] Because the effect of each element of KPMG's decision-making processes "are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i); *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 154 (2d Cir. 2012) (finding "steps" in promotion practice inseparable as they were "neither necessary nor sufficient for promotion," their "weight . . . in the process was both unclear and variable," and they "played an indeterminate role in the integrated . . . process").

[10] *See* Doughtie I Tr. 180:21-22 (KPMG does not post all jobs); *id.* at 257:10-15 (no one way for KPMG employees to express interest in promotion); *id.* at 267:6-11 (no specific instruction on how to express interest in promotion).

[11] *See* KPMG-KASS0183890 (2013 Advisory Promotion Criteria); Tax Promotion Criteria: KPMG-KASS139758; KPMG-KASS0139748; KPMG-KASS0139769; KPMG-KASS0046705; KPMG-KASS0133724; KPMG-KASS121941; KPMG-KASS0139758; KPMG-KASS0139748; KPMG-KASS0139769; KPMG-KASS0058130 (Tax Expectation Guidelines and Self-Assessment Guides); Doughtie I Tr. 189:2-190:6.

2. In The Face Of Similar Policies And Evidence, Courts Hold Disparate Impact Commonality Is Satisfied.

The effect of the specific policies identified above may be adjudicated on a class basis. The facts here are completely unlike those in *Dukes*. Plaintiffs' challenge here is instead akin to the policies at issue in the certified cases of *Chen-Oster v. Goldman, Sachs & Co.*, No. 10-CV-6950, 2018 WL 1609267 (S.D.N.Y. Mar. 30, 2018); *Ellis*, 285 F.R.D. 492; and *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

Since Plaintiffs' opening brief, a court in this District rendered a particularly instructive opinion in *Chen-Oster*, certifying disparate impact and disparate treatment claims on behalf of approximately 2,300 professional women in three divisions of Goldman Sachs working in hundreds of business units across all U.S. offices. 2018 WL 1609267, at *2. The plaintiffs challenged a performance review system based on common and invalid criteria, such as "communication skills," and "leadership," that resulted in lower review scores for women. *Id.* at *3. The plaintiffs also challenged poorly defined compensation-setting criteria, such as "indispensability" and "specialized contribution[s]," and promotion criteria, such as "role model" and "effective coach." Mem. in Supp. of Pls. Mot. For Class Cert. at 10-11, *Chen-Oster v. Goldman, Sachs & Co.*, 2014 WL 9910654 at *10-11 (S.D.N.Y. July 1, 2014). The court found commonality: to the extent managers vary in their interpretations of these criteria, a "common mode of exercising discretion [] pervade[s] the entire company," because all class members were subject to the same "common policies or processes," not "a variety of regional policies that all differ[]." *Chen-Oster*, 2018 WL 1609267, at *12 (citing *Dukes*, 564 U.S. at 356, 359-60).

The court also certified a promotion claim founded on a practice present here: maintenance of a closed promotions system. Like KPMG, employees at Goldman Sachs "who seek promotion cannot 'apply,'" Mem. in Supp. of Pls. Mot. For Class Cert. at 10, *Chen-Oster*, 2014 WL 9910654, at *10, and the court accepted that statistical evidence could play a role in establishing a link between a promotion policy and significantly inferior outcomes for women, 2018 WL 1609267, at *20-21. Additionally, compensation and promotion decisions at Goldman Sachs were based on manager recommendations subject to senior management approval. *Id*. at

*4. Like Goldman Sachs, compensation and promotion recommendations at KPMG are made within a common, highly regimented process that provides "a common mode of exercising discretion." *Id.* at *13. Notably, the court found that commonality does not require an employer's policies to "strip managers of all flexibility in compensation and promotion decisions," as such a rule "would render the phrase 'common mode of exercising discretion' oxymoronic." *Id.* at *12.

KPMG's brief fails to address why this court should deviate from *Ellis* and *McReynolds*, both of which demonstrate certification is appropriate despite defendants' common refrain of manager discretion. In *Ellis*, the court certified a disparate impact challenge to Costco's promotion policy at more than 350 stores where, as here, promotions proceeded via "a tap-on-the-shoulder appointment process (without an application or interview)," pursuant to common, vague criteria. 285 F.R.D. 492, 498, 531. Witnesses described the criteria as including "people skills," "merchandising skills," "warehouse experience," "hard work," and "people management"—all metrics that may invite some amount of discretion. *Id*. at 514, 516. The court held that because "common but unvalidated criteria for assessing candidates" were among the "specific company employment practices" allegedly "responsible for the disparate impact," the plaintiffs solved "the *Dukes*-identified problem of decentralized and discretionary individual manager[] decisions." *Id*. at 531. The court rejected the arguments KPMG makes here and found that "the exercise of discretion at particular levels" did not bar certification because "the discretion was guided and influenced by discrete policies, practices, and culture which disfavored women." *Id*. at 533. Like *Ellis*, KPMG's compensation and promotions systems rely on common but unvalidated criteria and common procedures, though unlike in *Ellis*, at KPMG, all decisions require final approval from *national* firm leaders. *Id.* at 512-14.

The Seventh Circuit's reversal of a class certification denial in *McReynolds* also supports certification, as it involved more discretion than KPMG. The court found that the "measure of discretion" managers retained was "influenced by . . . company-wide policies." 672 F.3d at 488-89. These policies allowed (but did not require) brokers working in 600 branch offices under the

supervision of 135 managers to form teams to share clients and allowed managers to "supplement the company criteria" in awarding accounts to brokers. *Id.* Nevertheless, the court rejected the argument that discretion in forming teams and assigning accounts prohibited a class challenge because the practices were "practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim." *Id.* at 490.

Further supporting certification is another case decided since Plaintiffs served their opening brief, *Rizo v. Yovino*, which holds that employers cannot rely on prior salaries because it perpetuates gender disparities. 887 F.3d 453, 467 (9th Cir. 2018) (en banc). KPMG's practice is similarly unlawful in that it establishes, via its Compensation Tool software, pre-populated compensation figures for each Class member that are based in part on prior salary, entrenching pre-existing gender disparities in pay.[12]

Because Plaintiffs challenge specific employment practices and because KPMG ensures—through training, uniform criteria, and the involvement of senior executives—a common mode of exercising discretion, authorities standing for the proposition that a class may not be certified where no specific employment practice is challenged are inapplicable. For example, in *Jones v. National Council of YMCA*, the court denied class certification where the employer "vested its supervisors and managers with substantial discretion" in granting pay and promotion through "many different avenues" and did not constrain that discretion, as KPMG does, through prepopulated salary figures or specific common criteria. 34 F. Supp. 3d 896, 904 (N.D. Ill. 2014). *Serrano v. Cintas Corp.* is unavailing because the plaintiffs specifically argued that "broad hiring discretion," rather than a common, uniform policy providing common criteria, "leads to biases and stereotypes." Nos. 04-40132, 06-12311, 2009 WL 91702, at *4 (E.D. Mich. Mar. 31, 2009). *Moore v. Publicis Group* is also inapposite because plaintiffs did not challenge specific company policies, but rather the concentration of decision-making in a small group of executives—which the court found factually unsupported. No. 11-1279, 2014 WL 11199094, at

[12] *Rizo* applies with full force to Title VII pay discrimination claims. *Rizo v. Yovino*, 887 F.3d 453, 466 n.18 (9th Cir. 2018) (en banc) (under 42 U.S.C. § 2000e-2(h), defenses to EPA claims are defenses to Title VII claims).

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*5-7 (S.D.N.Y. May 15, 2014). KPMG's other cases likewise involve a complete failure to identify a policy other than delegated discretion without a common mode of exercise.[13]

3. Common Evidence of Systemic Bias—Even As Disputed By KPMG—Supports Disparate Treatment Commonality.

At this stage, Plaintiffs must show that the "significant proof" of discrimination they will present on the merits is common to the class as a whole, enabling classwide resolution of the question of whether KPMG "operated under a general policy of discrimination." *Dukes*, 564 U.S. at 353. Plaintiffs have submitted substantial common evidence of a general policy of discrimination, including: 1) statistically significant disparities resulting from common compensation and promotion processes; 2) evidence of knowledge on the part of KPMG's senior leadership, including Chairman and CEO and former Vice Chair of Advisory,[14] who were alerted to disparities by employees and external parties; [15] 3) a failure of KPMG's senior leadership to remedy known disparities; and 4) substantial anecdotal evidence, including 134 Class member

[13] *See Smith v. Jackson*, 544 U.S. 228, 241 (2005) (critiquing plaintiffs for "hav[ing] done little more than point out that the pay plan at issue [was] relatively less generous to older workers"); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 898 (7th Cir. 2012) (describing plaintiffs' hostile work environment challenges as "boil[ing] down to the policy [of] affording discretion to each site's superintendent"); *Lamarr-Arruz v. CVS Pharm., Inc.*, No. 15-CV-04261, 2017 WL 4277188, at * (S.D.N.Y. Sep. 26, 2017) (failing to certify hostile work environment class without "a classwide policy that created a shared hostile work environment across multiple sites" supported by "statistical evidence that is usually used to establish disparate impact claims"); *Zuniga v. Bernalillo Cty.*, 319 F.R.D. 640, 688 (D.N.M. 2016) (rejecting certification where the "practice is for individual managers to make employee selection and compensation decisions"); *Adkins v. Morgan Stanley*, 307 F.R.D. 119, 146 (S.D.N.Y. 2015) (describing system of discretion occurring not by "upper-level, top-management personnel," but by "independent decisions in selection terms"); *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 271 (W.D. Wisc. 2013) (dismissing class allegations in a regional follow-on case to *Dukes* where "Plaintiffs d[id] not even attempt to distinguish the common questions they identif[ied] from those found lacking in *Dukes*"); *Bell v. Lockheed Martin Corp.*, No. 8-6292, 2011 WL 6256978, at *7-8 (D.N.J. Dec. 14, 2011) (same); *Valerino v. Holder*, 283 F.R.D. 302, 313-15 (E.D. Va. 2012) (describing the challenged procedure as "completely discretionary," and the plaintiffs offered "no evidence that there exists a statistically significant bias against women"). KPMG's reliance on *Trawinski v. KPMG LLP*, a wage and hour case, is also misplaced; its commentary on assignments is not preclusive and does not speak to the disparate impact of KPMG's policies on women. No. 11-2978, 2012 WL 6758059, at *7 (Dec. 21, 2012). If anything, *Trawinski* supports Plaintiffs' position that compensation is based on job level. *Id* at *3 (KPMG associates "had the same job qualifications, marketable skills and opportunities for development"); *id.* at *4 (associates paid within salary range).

[14] KPMG notes that it has promoted a woman to CEO, but the existence of a high-ranking female is not a disinfectant for systemic sexism. *See, e.g.*, *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1448 (2d Cir. 1995) (participation of women in plaintiff's tenure review "does not establish she was shielded from sex discrimination").

[15] *See* Pls. Br. 13 (citing a 2009 Diversity Advisory Board meeting attended by the National Managing Partner of Diversity and Corporate Responsibility for which minutes admit knowledge of gender disparities in compensation); *id.* at 16 (citing an external report: "Our data pinpoints KPMG's pay disparities, especially for senior women . . . . Besides an ongoing pay-gap analysis, the issue of why the disparities exist should be thoroughly examined.").

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complaints of gender discrimination and harassment; internal complaint records showing a culture of hostility fostered by the HR organization;[16] 20 Class member declarations;[17] deposition testimony from Opt-In Plaintiffs;[18] emails; and business records. *See* Pls. Br. 8-24. The evidence proffered here is on par with or more substantial than other cases granting class certification in disparate treatment cases.[19]

KPMG's only challenge with respect to the first category of evidence (data) is a dispute over the appropriate level of aggregation. As explained below, this is baseless, and provides a further common merits question that need not be resolved at this stage.[20] With respect to the second category (senior leadership's knowledge of gender disparities), KPMG fails to dispute the firm's knowledge of disparities, suggesting only that senior leaders were justified in ignoring disparities because internal reports also highlighted diversity efforts not challenged in this litigation. Despite this knowledge, Counsel for KPMG has acknowledged that KPMG failed to monitor for gender bias in pay and promotions.[21] KPMG's assertions that KPMG "tracks women's representation" and "benchmark[s] against the market," Def. Br. 21, 43, do not constitute monitoring for gender bias in pay and promotion, as was specifically recommended to KPMG as early as 2011. *See* Pls. Br. 16; KPMG-KASS0529020 at 53.

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[16] While there are 128 distinct reports, Def. Br. 23, one report can include multiple Class member victims and complaints, such as gender discrimination and sexual harassment. *See* Pls. Br. 24; Zegeye Decl. ¶ 5.

[17] KPMG asserts that Plaintiffs have provided a "low quantum of anecdotes," Def. Br. 24, 46, incorrectly citing to *Chen-Oster*. In *Chen-Oster*, the court found commonality with almost half of the number of class member complaints and less than half of the declarations presented here. Reply Mem. in Support of Pls. Mot. For Class Cert. at 38, *Chen-Oster* (No. 10-6950), ECF No. 310.

[18] Contrary to KPMG's representation, Def. Br. 15, 46, Opt-Ins did not make concessions to the contrary. *See, e.g.*, Def. Br. Ex. 11, D. Bonner Tr. 145:21-146:4 (not "admit[ing] KPMG did not treat her 'unfair[ly] on the basis of [her] gender' in promotion, pay, or otherwise," but testifying she cannot recall what she thought about this unfair treatment); KPMG Br. Ex. 40, J. Underhill Tr. 177 (testifying that she did not have proof she was paid less than men and that she did not raise a complaint specifically about gender, but not testifying that KPMG's failure to pay her fairly "had nothing to do with [her] gender").

[19] *See* Pls Br. 35 (collecting cases); *see also Chen-Oster*, 2018 WL 1609267, at *15-16 (finding "significant proof" of disparate treatment claims via statistical and anecdotal evidence, and commonality).

[20] *See Chen-Oster*, 2018 WL 1609267, at *15 ("[T]his is not the stage at which to decide whether there is in fact a pattern of pervasive discrimination."); *see also Hnot v. Willis Grp. Holdings Ltd.*, 241 F.R.D. 204, 211 (S.D.N.Y. 2007) (Even where "the merits and the Rule 23(a) commonality determination significantly overlap" the question of whether defendants actually discriminated is a question for trial.).

[21] *See* Pls. Br. 15 n.73; Zegeye Decl., Ex. 3.

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With respect to Plaintiffs' substantial common evidence of a corporate culture of bias, including declarations,[22] depositions, and complaint records,[23] Pls. Br. 18-22, KPMG asserts that the declarations do not "link the alleged culture of gender bias to the challenged pay and promotion decisions." Def. Br. 47. This is inaccurate.[24] More importantly, however, Plaintiffs' declarations need not themselves provide this link: KPMG misrepresents *Dukes II*, which explained that under *Dukes*, an expert opinion on a "culture of gender bias," standing alone, is itself insufficient of a general policy of discrimination because it did not link the alleged gender bias to the challenged decisions. *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1120 (N.D. Cal. 2013). As Plaintiffs have substantial additional evidence, *Dukes II* is inapplicable. KPMG's inclusion and diversity efforts do not undermine this evidence, as Plaintiffs explained in their opening brief. Pls. Br. 15-17. While KPMG emphasizes its recent diversity and inclusion budget, Def. Br. 3, KPMG's efforts suffer from critical defects.[25]

KPMG's declarations from current employees also do not defeat commonality.[26] These include statements from a token few women who KPMG promoted out of Class positions into Partner roles, and just seven declarations from current Class members.[27] Although these purport to show that KPMG does not have a culture of hostility toward women, courts recognize that an

[22] *See, e.g.*, Alexander Decl. ¶¶ 10-11; Barnes Decl. ¶¶ 9-10; Bennetts Decl. ¶¶ 8-9; Butler Decl. ¶¶ 6-7.
[23] This includes evidence of discrimination against pregnant and caregiving women, Pls. Br. n.91, contrary to KPMG's assertion that Plaintiffs conceded they have no such proof, Def. Br. 2.
[24] *See* Alexander Decl. ¶¶ 10-11; Barnes Decl. ¶¶ 9-10; Bennetts Decl. ¶¶ 8-9; Butler Decl. ¶¶ 6-7; Carey Decl. ¶¶ 10-12; Charity Decl. ¶¶ 7-8; Farley Decl. ¶10; Gracia Decl. ¶¶ 9-10; Guenter Decl. ¶¶ 7,9; Gustafson Decl. ¶ 8; Inman Decl. ¶¶ 4-5; Jones Decl. ¶¶ 4-5; Kassman Decl. ¶¶ 5-6; Luke Decl. ¶ 11; Murray Decl. ¶ 8; Schmaltz Decl. ¶¶ 8-9; Starnes Decl. ¶¶ 8-9; Underhill Decl. ¶¶ 8-9; Wallace Decl. ¶¶ 8-9. This criticism of Plaintiffs' declarations is also inappropriate given that Plaintiffs themselves do not have access to pay data. *See, e.g.*, May 7, 2018 Letter from K. Mueting to J. Schofield at 2.
[25] Contrary to KPMG's assertions, Def. Br. 18, KPMG's trainings are not "interactive," Goldberg Reply 11; KPMG provides no separate "EEO" training, Stockdale Report at 31; KPMG's "recertification" of its Code of Compliance training requires only that employees sign the code document, Stockdale Report at 15; and there is no evidence that HR representatives do anything to mitigate against bias in assessment meetings, Goldberg Reply 21.
[26] For this reason, Plaintiffs did not depose KPMG's Class member declarants.
[27] *See* Shkodina Decl. ¶ 3; Thompson Decl. ¶ 3; Vergarno Decl. ¶ 3; Goodman Decl. ¶ 3; Howarth Decl. ¶ 3; Biddle-Castillo Decl. ¶ 3; Grogan Decl. ¶ 3. The remaining declarations are either from men or from women who did not work in Class positions. *See* Doughtie Decl.; Landau Decl; Brown Decl; Farmer Decl.; Kovatch Decl.; Saran Decl.; Serafi Decl.; Teegan Decl.; Watson Decl.; Park Decl; Masaitis Decl; Iannozzi Decl.

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at-will employment relationship has a high potential for coercion.[28] Such declarations are inherently unreliable.[29] Moreover, based on KPMG's "Explanation of Interview" disclosure to these witnesses (signed after the declarations were signed and in some instances after the brief was served), their testimony should be discounted because they were not provided Plaintiffs' opening brief and expert reports—that is, they were not afforded an opportunity to understand the evidence Plaintiffs have marshaled in support of the case. *See* Decl. of Kate Mueting In Support of Pls.' Reply in Support of Plaintiffs' Mot. for Class Cert. Under Rule 23 and Final Cert, of the Equal Pay Act Collective ("Mueting Decl.") Ex. A.

Plaintiffs also provided substantial evidence of KPMG tolerating discrimination described in internal complaints, contrary to KPMG's unsupported assertion that its complaint process is "industry leading."[30] Combined with Plaintiffs' statistical and anecdotal evidence, the firm's toleration of discrimination through failure to handle complaints appropriately constitutes "significant proof" of discrimination, all of which is common to the class as a whole, enabling class-wide resolution of the question whether KPMG "operated under a general policy of discrimination." *Dukes*, 564 U.S. at 353.

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[28] *See, e.g., Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003) (noting such communications more likely to be coercive); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) (noting the risk of coercion is high for an at-will employee).

[29] *See e.g., Richardson v. Interstate Hotels & Resorts, Inc.*, No. C 16-06772, 2018 WL 1258192, at *7 (N.D. Cal. Mar. 12, 2018) (declining to consider employee declarations even where defense counsel had employees sign "form disclosure"); *Amador v. Morgan Stanley & Co. LLC*, No. 11-4326, 2013 WL 494020, at *8 (S.D.N.Y. Feb. 7, 2013) ("[S]tatements gathered by an employer from its current employees are of limited evidentiary value in the [conditional certification] context because of the potential for coercion.").

[30] KPMG mischaracterizes the record in asserting that the two "lack of professionalism" complaints cited by Plaintiffs were "handled" as harassment complaints. Def. Br. 24. In fact, KPMG concluded that the accused's behavior did not rise to the level of harassment even though he "discuss[ed] topics related to sex, including sexual activity and his sexual conquests, references to genitalia, and the type of condoms he used"; would "tell different associates that they were, respectively, 'his bitch'"; and even though he had "a history of similar unprofessional behavior." KPMG-KASS0632009. Additionally, KPMG misrepresents the record in suggesting witnesses denied incidents when they actually said they were unaware of or did not observe the incidents. Def. Br. 24 (citing KPMG-KASS0632594 at 598).

4. The Parties' Expert Evidence Demonstrates That Common Evidence Will Resolve Common Questions.

Plaintiffs have provided robust expert evidence from Dr. Caren B. Goldberg, a professor of management, and Dr. Alexander Vekker, a labor economist, addressing the common deficiencies in the challenged policies and their adverse effects on women.

Dr. Goldberg identifies multiple aspects of KPMG's policies and practices likely to have a disparate impact on women, such as is observed here, based on her academic experience in the field of management. In particular, Dr. Goldberg finds that KPMG has divorced pay from performance outcomes to the detriment of women through its common policies and practices, including those listed in the above chart, Goldberg Rep. 5-6, 9, that KPMG's unvalidated criteria for compensation and promotion decisions are insufficiently related to actual job requirements to serve a valid human resources purpose, *id.* 9-10, 17-19, and that KPMG's closed promotion system is disfavored in the human resources literature because of its demonstrated negative effect on women, *id.* 15-17. Plaintiffs will show at the merits phase these practices lead to the observed statistically significant gender disparities. The opinions of KPMG's expert, Dr. Margaret Stockdale, further support commonality because they are based on the same evidence, all common to the class, relied on by Plaintiffs.[31] *Houser v. Pritzker*, 28 F. Supp. 3d 222, 243-44 (S.D.N.Y. 2014) ("Although the experts obviously reach different conclusions regarding the merits in this case, the fact that both sides' experts are able to provide classwide answers to the liability question suffices to satisfy the commonality requirement.").

Plaintiffs' statistical expert provides robust common proof that women are disadvantaged in pay and promotions at KPMG. Dr. Vekker's analysis, conducted separately for the Tax and Advisory Functions, is the appropriate method to demonstrate evidence of discrimination because Class Members in each Function are subject to the same compensation and promotion

[31] Dr. Stockdale's opinions, which are the subject of a separate *Daubert* motion, also rely on misstatements or are in conflict with the academic literature of the field. Most salient, Dr. Stockdale contends that there cannot be gender bias at KPMG because of the existence of its published Code of Conduct and stated commitments to business ethics. Stockdale Rep. 13. A code of conduct alone, even if it prohibits discrimination by its own terms, cannot guarantee fairness, especially in an environment without monitoring of systemic gender differences in compensation and promotion outcomes. *See* Goldberg Reply 8 (citing academic literature); Goldberg Rep. 23-24 (same).

policies implemented and overseen by the same Functional leaders. Dr. Vekker's multiple regression compensation analysis shows that there are statistically significant gender disparities in pay in each year from 2008 to 2016 in both Advisory and Tax, regardless of whether performance score is a control variable, showing that performance outcome cannot explain the disparity. Vekker Rep. Tb. 1-4. Likewise, Dr. Vekker's logistic regression promotions analysis shows that from 2008 to 2016, when controlling for relevant variables, including job title, experience, education, performance rating, and location, men have a higher probability of promotion in both Tax and Advisory.[32] *Id.* Tbs. 5-6.[33] Because Dr. Vekker analyzes compensation and promotions consistent with the operation of firm-wide employment practices,[34] Dr. Vekker's analysis at the Tax and Advisory-wide levels is appropriate common proof of disparate impact. *See, e.g., Chen-Oster*, 2018 WL 1609267, at *15 (holding that "funneling of virtually all final decision-making to division heads and either division-wide or firm-wide committees" made "aggregate analysis [] more than adequate proof").

KPMG does not attempt to provide gender-neutral explanations for these disparities, but attacks Dr. Vekker's model for analyzing decision-making at the Function level, at which the challenged policies are administered and approved. KPMG offers Dr. Bloom's analyses, disaggregated nonsensically to scores of individual service lines and cost centers, *see* Bloom Rep. 24-25, 29, that reduce sample size and the likelihood of statistical significance. There is no

[32] Dr. Vekker's base pay and promotion analyses compared only full-time, salaried, regular employees, Vekker Rep. 9 n.11, 10 n.14, undermining KPMG's unsupported suggestion that women and their "work-life" choices are to blame for KPMG's gender disparities, Def. Br. 44.

[33] KPMG's attack on Plaintiffs' contextualization of differences in the probability of promotion by reference to the average rate of promotion of all employees (with no control variables) misses the point. *See* Def. Br. 45 n.87. Plaintiffs simply show that what, at first blush, may seem like a small percentage point difference in the probability of promotion, is actually much larger when one considers that a promotion is already a relatively rare event—*i.e.*, in most years an employee is *not* promoted. KPMG's counsel's calculation of overall promotion rates of men and women does not bear on the question of discrimination because such a calculation does not take into account control variables—*e.g.*, job title, performance rating, etc.—that are considered in Dr. Vekker's promotion regression.

[34] KPMG's authorities do not reject aggregate statistics *writ large* but instead reject them in the context of employers *without* uniform, companywide policies. *See, e.g.*, *Dukes*, 564 U.S. at 356-57 (decisions made at store level without common policies to limit discretion); *cf. Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) ("[I]t is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. . . . The plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." (internal quotation marks and citation omitted)).

scientific basis for Dr. Bloom's disaggregated analyses, *see* Vekker Reply 13-14, and his assumptions that decisions are made at the "cost center" level is inconsistent with the documentary record and based on hearsay statements from interviews he conducted with counsel, the notes of which he destroyed. *See* Pls. Mot. to Strike Regarding Dr. Bloom's Factual Narrative (filed July 6, 2018).

Further, a proper analysis would not account for service line, as KPMG decides who works in various service lines and thus it can be a tainted (discriminatory) variable. Vekker Reply 7. Indeed, when Dr. Vekker tests this by controlling for service line (compared to education specialty as a proxy for skill), he finds 1) 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 and 2) service line is a tainted variable because it has an adverse effect on women greater than any gender differences in skill.[35] *See* Vekker Reply 7-8, Tbs. 1R-6R. Ultimately, however, the methodological dispute between experts is for the factfinder to resolve and not an issue at certification.[36] *See Houser*, 28 F. Supp. 3d at 243-44; *Ellis*, 285 F.R.D. at 524 (dispute about appropriate level of aggregation at class certification need not be resolved at certification but "presents a common question suitable for classwide resolution").[37]

Contrary to KPMG's assertions, Def. Br. 36, whether the challenged policies and practices "caused" the observed disparities within the meaning of anti-discrimination law[38] is a question for the trier of fact at the merits stage—not Plaintiffs' experts.[39] With respect to Plaintiffs' disparate impact claim, once a policy has been identified, "[s]tatistics alone can make

[35] KPMG argues that Dr. Vekker did not aggregate his analyses *enough*, suggesting he should have analyzed other functions even though there was no meaningful discovery—or motion for certification within—those functions.
[36] Plaintiffs addressed arguments regarding the appropriateness of Dr. Vekker's analysis more fully in Plaintiffs' Opposition to KPMG's Motion to Exclude Dr. Vekker.
[37] See also *Williams v. Boeing Co.*, 225 F.R.D. 626, 635 (W.D. Wash. 2005) ("Statistical dueling is not relevant to the class certification determination." (alterations and citation omitted)); *In re Aftermarket Auto Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 373-74 (C.D. Cal. 2011) (post- *Dukes*, finding courts need not choose between experts at certification stage because inquiry limited to determining whether merits issues can be resolved through "generalized proof common to the class" (internal quotation marks omitted)).
[38] Liability under Title VII requires only that discrimination be "a motivating factor." 42 U.S.C. § 2000e-2(m).
[39] The trier of fact may determine whether the analysis is "'sufficiently substantial' as to 'raise such an inference of causation.'" *Paige*, 291 F.3d at 1145 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988)); *Chin*, 685 F.3d at 151 (similar); *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999) (same).

out a prima facie case" of disparate impact. *United States v. City of N.Y.*, 731 F. Supp. 2d 291, 300 (E.D.N.Y. 2010). The "liability stage" of a disparate impact case may be "resolved on the basis of generalized proof . . . via class-wide statistical evidence" that a challenged policy or practice "cause a disparate impact on the basis of" gender. *See e.g. Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 48 (D. Conn. 2011). With respect to the disparate treatment claim, statistical disparities are a primary method of providing these claims. *See* Pls. Br. 9 n.37.

KPMG's authorities are unavailing. In particular, its reliance on *Ross v. Lockheed Martin Corporation*, 267 F. Supp. 3d 174 (D.D.C. 2017), is misplaced, as the plaintiffs (not in filing a contested Rule 23 motion but a complaint and proposed class settlement) failed to present any statistical analysis, let alone one giving rise to an inference that the challenged policy caused the alleged disparate impact. *Id.* at 198. Unlike here, the *Ross* plaintiffs "pointed to no evidence of biased decision making of any kind, and certainly not statistical evidence of the type that demonstrates that the discretionary ratings decisions led to racially disparate outcomes *in a common way*." *Id*. Nor does *Dukes* stand for the proposition that statistical evidence cannot serve as class-wide proof of causation. The *Dukes* Court did not, as KPMG suggests, disregard a statistical expert's opinion, but found unconvincing as class-wide proof a sociologist's unspecific opinion on corporate culture. *Dukes*, 564 U.S. at 354-55. Finally, *Pippen v. State of Iowa*, an Iowa state trial court case, is not a class certification decision at all, but instead a *post-trial* order crediting the defendant's "more discrete statistical analysis" over the plaintiffs' analysis. No. LACL107038, 2012 WL 1388902, at 50 (Iowa Dist. Apr. 17, 2002). Thus, the question of causation is determined at the merits phase of this case. What matters now for the purpose of Rule 23 is whether Plaintiffs have demonstrated that their claims can be resolved with common proof that will drive the resolution of each class members' claim. *See McReynolds*, 672 F.3d at 490 ("We are not suggesting . . . that management's teaming and account distribution policies have a racial effect. The fact that black brokers have on average lower earnings than white brokers may have different causes altogether. The only issue at this stage is whether the plaintiffs' claim of disparate impact is most efficiently determined on a class-wide basis[.]").

B. The Representative Plaintiffs Are Typical.

Plaintiffs have established that the representative Plaintiffs are typical, having collectively worked in the Tax and Advisory Functions (across eight service lines), and within eight KPMG offices, because each was subject to the same compensation and promotion policies as the Class.[40] Courts have rejected KPMG's attack on typicality—that the Representative Plaintiffs' outcomes are not the product of unlawful discrimination—because ultimately the asserted defense of no discrimination is a common defense.[41] In addition, "unique defenses" do not defeat typicality in this circuit and cannot become the "the focus of the litigation" where, as here, the defenses KPMG has identified are limited to individual, non-class claims that Plaintiffs do not propose adjudicating in the trial plan. *Gary Plastic Pkg. Corp. v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 176, 180 (2d Cir. 1990), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Moreover, "the so-called unique defense rule," which KPMG references, "is not rigidly applied in this Circuit, and when it is applied, it is generally to protect a plaintiff class rather than to shield [a] defendant[] from a potentially meritorious suit," limited to the circumstance—not applicable here—of a "full defense" to "an individual plaintiff's action." *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 157 (S.D.N.Y. 2017) (citations omitted). Here, there is no unique defense to the Representative Plaintiffs' class claims, and they are typical of the Class they seek to represent.

[40] *See Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 281 F.R.D. 100, 106 (E.D.N.Y. 2011) (holding typicality is satisfied where the representative plaintiffs and "prospective class 'were subject to the same general employment scheme'" (citations omitted)); *see also Robinson v. Metro-North Comm. R.R.*, 267 F.3d 147, 155 (2d Cir. 2001) (noting typicality is satisfied if "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"). Thus, KPMG's objections that the Representative Plaintiffs are not MDs or that they were excluded from Dr. Vekker's analysis are immaterial.

[41] *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 268 (S.D.N.Y. 2007) (holding a defendant "cannot rebut typicality by claiming that something other than discrimination explains the named plaintiffs' experience" (internal quotation marks omitted)); *see also Caridad v. Metro-North Comm. R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (noting typicality "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim") (citation omitted)), *overruled on other grounds by In re IPO Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

C. Adequacy Is Satisfied, And There Is No Intra-Class Conflict.

KPMG's attack on the Representative Plaintiffs' adequacy—that there are intra-class conflicts between the Representative Plaintiffs and the Class because five of the Representative Plaintiffs served as people management leaders ("PMLs")—fails for three reasons.

First, KPMG overstates the role of PMLs in the challenged employment policies. As discussed above, it is the Vice Chair and National Managing Partner for Tax and Advisory who make compensation and promotions decisions at KPMG—not the PMLs. PMLs are not involved at all in developing the compensation tool guidelines or the recommendations for adjustments. As to promotions, their initial recommendations are made in conjunction with partners and must be approved by a partner group. Doughtie Tr. 182:2-183:3; KPMG-KASS0139629, 0139641. KPMG's title-based attack on PMLs is therefore insufficient to render the PML Representative Plaintiffs inadequate. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 595 (2d Cir. 1986) (holding that title was "an insufficient basis for concluding that [the plaintiff] was not an adequate representative of a class of female professionals and managers" because the "decision to recognize or deny class representative status should be based on substance, not mere form").

Second, none of KPMG's authorities hold that a Title VII class cannot include both managers and those they manage. Most simply stand only for the (unchallenged) proposition that representative plaintiffs must be adequate. *See Trawinski v. KPMG LLP*, No. 11-2978, 2012 WL 6758059, at *8 (Dec. 21, 2012) (making no mention of conflicts); *Richman v. Goldman Sachs Grp., Inc.*, 274 F.R.D. 473, 479 (S.D.N.Y. 2011) (same); *Boykin v. Viacom Inc.*, No. 96-8559, 1997 WL 706323, at *5 (S.D.N.Y. Nov. 12, 1997) (making no finding regarding conflicts); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (finding no conflict in securities class action). *Grant v. Morgan Guaranty Trust Company of New York* is a 36-year-old case wherein the court identified "substantial conflict of interest questions arising out of plaintiff's attempt to represent both black males and white females" before observing—in dicta and without citation to any legal authority—that the representative plaintiff also sought to represent both "managers who process promotions and employees who apply for them." 548 F.

Supp. 1189, 1193 (S.D.N.Y. 1982). KPMG's sole remaining authority—*Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001)—is an out-of-circuit case that rests on a 40-year-old opinion that was limited by the D.C. Circuit in 2014[42] and has been roundly rejected by other courts.[43] It also does not hold certification is categorically inappropriate where managers exist within a class. *See id.*

Third, KPMG does not (and cannot) dispute that the Representative Plaintiffs "possess the same interest and suffer the same injury" as Class members, which is the true crux of the conflict of interest analysis. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (internal quotation marks omitted). For example, the conflict in *Amchem* involved irreconcilably different goals for class members with current injuries (who desired "generous immediate payments") and class members with potential future injuries (who desired a fund preserved for the future). *Id*. at 626. Here, by contrast, all Class members (including the PML Representative Plaintiffs) seek the same remedies—injunctive relief and monetary damages—meaning no conflict exists.

II. Plaintiffs Satisfy Rule 23(b)(2) and 23(b)(3).

A. Certification Of An Injunctive Relief Class Under 23(b)(2) Is Appropriate.

KPMG argues that an injunction is not appropriate because any injunction would be too general to satisfy Rule 65(d), and the Class is not cohesive enough to benefit from a single injunction. These points are premature and lack merit.

Plaintiffs have sufficiently identified the employment policies and practices they challenge, and KPMG's assertion that Plaintiffs must now identify exactly what practices would replace those they challenge misapprehends the process of Title VII litigation. Class injunctive relief is addressed after a finding of liability, not at the certification stage. *See United States v. City of N.Y.*, No. 07-2067, 2013 WL 5542459, at *1-2 (E.D.N.Y. Aug. 30, 2013) (hereinafter

[42] In *In re Johnson*, 760 F.3d 66, 74 (D.C. Cir. 2014), the D.C. Circuit limited the holding of *Wagner v. Taylor*, 836 F.2d 578, 579 (D.C. Cir. 1987), by finding (in analogous circumstances) that no conflict is present if some class members applied an allegedly flawed rating system and reached a discriminatory result as to other class members.
[43] *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 958-59 (9th Cir. 2003) (holding that *Wagner* "did not . . . adopt any per se rule concerning adequacy of representation where the class includes employees at different levels of an employment hierarchy" and upholding certification of class including supervisors and their supervisees alleging discrimination in promotion, compensation, and career development decisions).

"*Vulcan Society*"). In *Vulcan Society*, also involving thousands of class members (7,400), after a determination that the practice at issue was discriminatory, the court enjoined the fire department from continuing to use the challenged examination and nearly a year later approved a new examination "developed pursuant to the court's order by the parties and a court-appointed Special Master." *Id*. at *2. Should this Court grant Plaintiffs' motion, and should Plaintiffs succeed at the merits phase, Plaintiffs will engage in a collaborative process with additional experts to reform KPMG's compensation and promotions policies to ensure fairness for both men and women. At the class certification phase, however, it is premature to determine the exact remedy should KPMG be found liable, and KPMG's authorities do not suggest otherwise.[44]

In addition, KPMG's assertion that Plaintiffs seek "thousands of individual injunctions," is a red herring. Def. Br. 51. Plaintiffs seek a "single injunction," *Dukes*, 564 U.S. at 360, appropriate for certification under 23(b)(2) that will not be directed at specific KPMG partners but aimed at specific policies and practices that apply to the Class as a whole.[45] This injunction may, for example, prohibit KPMG's Compensation Tool from using prior salary as a factor.

B. Plaintiffs Satisfy Rule 23(b)(3).

KPMG mistakenly argues that if the Court grants class certification, then every Class members' claims will be "adjudicated thereafter in separate jury and/or bench trials." Def. Br. 53. This is not the law, nor is this what Plaintiffs seek. Plaintiffs do indeed propose a two-phase trial plan with liability addressed first and damages second as the Supreme Court endorsed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), but Plaintiffs do not seek to litigate the career trajectory of every single Class member. Plaintiffs instead seek

[44] The court in *In re MTBE Productions Liability Litigation* declined to certify a class under 23(b)(2) for reasons unique to the environmental tort at issue—the sources and rates of MTBE contamination varied significantly by plaintiff, and the court could not "issue an order directing the defendants to provide 'clean water' to the class . . . without crafting a specific remedy to each class member." 209 F.R.D. 323, 344 (S.D.N.Y. 2002). While *Boykin v. Viacom, Inc*. is a Title VII case, it, too, is inapposite because there was "no overarching company policy or practice" to enjoin. 1997 WL 706323, at *4.

[45] An injunction remedying the effects of a discriminatory policy would be appropriate for all class members, regardless of whether individual damages vary. *Cf. Houser*, 28 F. Supp. 3d at 250 (if portion of class later found not to be subject to the unlawful practice, court will "amend the certification order" and "create subclasses that carve out class members," but "[t]hat this course of action may prove necessary . . . does not preclude certification").

to address whether the challenged compensation and promotion practices have an adverse impact on the Class as a whole, and, for pattern-and-practice disparate treatment liability, whether KPMG operates under a general policy of discrimination—both of which are amenable to class-wide proof. Contrary to KPMG's assertions, common issues in both liability and damages are more substantial than the issues subject to individualized proof.

First, disparate impact liability depends on the effect of common policies; disparate treatment liability depends on whether discrimination is KPMG's standard operating procedure—neither depends on Class members' job duties.[46] Def. Br. 52-53. Nor do Plaintiffs' claims depend on KPMG's agents' individualized intent to discriminate in carrying out its uniform employment policies, *see United States v. City of N.Y.*, 717 F.3d 72, 83 (2d Cir. 2013), (noting intent to discriminate can be showed through a pattern-or-practice claim, in contrast to individualized intent to discriminate against one person), and KPMG's citation to a securities fraud case addressing purchaser intent does not demonstrate otherwise.[47] KPMG's argument that the *Teamsters* hearing procedure defeats predominance defies common sense: the Supreme Court endorsed this procedure to resolve individual defenses after a disparate treatment pattern-and-practice class liability finding.[48] KPMG's reliance on *Johnson v. Nextel Communications, Inc.*, a legal malpractice class action in which the defendant could not be held liable absent a particularized finding on a case-by-case basis of knowing waiver, cannot apply here without ignoring substantial precedent certifying Title VII class actions. 780 F.3d 128, 147 (2d Cir. 2015). Likewise, KPMG's warning of a "separate jury and/or bench trials" for each Class member is without support in the case law,[49] and ignores authorities indicating that *Teamsters*

[46] Tellingly, the cases KPMG cites are class actions for unpaid overtime, where commonality of job duties is determinative. *See Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010); *Tracy v. NVR, Inc.*, 293 F.R.D. 400 (W.D.N.Y. 2013); *see also Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015).
[47] *See* Def. Br. 52 n.99 (citing *In re IPO Secs. Litig.*, 471 F.3d at 44).
[48] *See, e.g., United States v. City of N.Y.*, 276 F.R.D. 22, 34-35 (E.D.N.Y. 2011) (citing *Teamsters* and describing the remedial phase of a disparate treatment class wherein the burden shifts to employer to provide a non-discriminatory reason for adverse action).
[49] KPMG cites *Chen-Oster* for this point, and while this case is like *Chen-Oster* in that the defense of "business necessity" may be litigated with "generalized proof" vis-à-vis Plaintiffs' disparate impact claim, *Chen-Oster* does not hold that every class member will or should receive an *individual* trial. 2018 WL 1609267, at *21.

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hearings may be "narrow in scope and significance," *Ellis*, 285 F.R.D. at 539, and that "the Court could appoint a special master to preside over" them, *Houser*, 28 F. Supp. 3d at 254.

Second, Plaintiffs proposed three reliable methods for addressing individual damages: 1) the Court can determine an overall aggregate backpay amount based on the parties' statistical reports, and the jury can determine whether to award, and the extent of an aggregate, punitive damages,[50] to be divided among Class members pursuant to a second-stage eligibility determination supervised by the Court or special master using streamlined objective characteristics; 2) the Court or special master can employ written or live *Teamsters* hearings to determine individual eligibility for relief in a second phase of trial if liability is established;[51] or 3) the Court can certify a liability class only, deferring resolution of how damages will be addressed until after the liability phase. Pls. Br. 44, 46-47.

KPMG does not discuss Plaintiffs' proposals[52] or address Title VII Supreme Court precedent stating that "individualized monetary claims belong in Rule 23(b)(3)," *Dukes*, 564 U.S. at 362, or Second Circuit precedent noting that "proponents of class certification" need *not* "rely upon a classwide damages model to demonstrate predominance," *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). Instead, KPMG argues, without support, that damages must depend on identification of specific male comparators for each Class member. However, Plaintiffs may rely on a statistical model of underpayment and need not identify thousands of comparator men.[53] *Lavin-McEleney v. Marist College*, a non-class case, does not hold

[50] KPMG's apparent concern that the jury's punitive damages award would not be tied to the total award of compensatory damages is unfounded. The Court can first determine a total backpay award, and inform the jury of the amount only if the jury determines that it will award punitive damages. Then, the jury may be asked to assess a total punitive damages award in reference to the total backpay award. In addition, the case KPMG cites for its assertion that punitive damages cannot be awarded before "determination and award of compensatory damages" "rest[ed] exclusively" on other grounds. *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005).

[51] KPMG's arguments regarding whether a special master may *decide* liability are misplaced because a special master would "make or recommend findings of fact" to the Court. *See* Fed. R. Civ. P. 53(a)(1)(B).

[52] KPMG's citation to *Rollins v. Traylor Bros, Inc.*, is off-point because there the court took issue with a detailed *joint* trial plan submitted *after* class certification—and also decertified the class on the basis of a "small class size." 2016 WL 5942943, at *1 (W.D. Wash. May 3, 2016); *Rollins*, 2016 WL 258523, at *19 (W.D. Wash. Jan. 21, 2016).

[53] For this reason, KPMG's assertions that some Opt-In Plaintiffs were among the highest paid are immaterial and highly misleading. *See* Def Br. 48 (relying on Kovatch Decl. asserting that one Managing Director was the highest paid employee in her office, while ignoring that she had more experience than the one other Managing Director in her office). *See* Mueting Decl. ¶ 5. Likewise, the Court should give no weight to Mr. Kovatch's unsupported

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otherwise; in fact, the court held that "regression analysis, based on a larger pool of male employees and that controlled for differences within each variable as between the plaintiff and members of the male pool," was preferable to a direct comparison. 239 F.3d 476, 482 (2d Cir. 2001).[54]

Plaintiffs also satisfy superiority, Pls. Br. 44-45, and KPMG's arguments to the contrary largely relate to damages and are addressed above. Its additional argument that Class members are "highly paid professionals" who could bring their own lawsuits without fear of professional consequences, Def. Br. 56-57, is belied by the reality of the expense of litigation, including expert fees, and testimony from numerous Opt-In Plaintiffs noting they did not come forward until invited by the collective notice due to fear of retaliation. *See* Pls. Br. 25.

C. The Court May Certify Liability For Resolution Under Rule 23(c)(4).

Plaintiffs have satisfied the requirements of Rules 23(b)(2) and (b)(3), but should the court be inclined to certify solely the issue of liability, it may do so under Rule 23(c)(4). Rule 23(c)(4) provides a means of materially advancing the litigation if the Court is convinced that liability would be most efficiently resolved on a class basis but would prefer to defer determination of how to address damages. *See Robinson v. Metro-North Comm. R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001) ("District courts should take full advantage of this provision to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies.") (alterations and quotation marks omitted)), *abrogated on other grounds by Dukes*, 564 U.S. 338. KPMG is correct that issue certification under 23(c)(4) is only appropriate where it will promote judicial economy, but its argument that determination of liability on a class basis will not "reduce the range of issues in dispute," Def. Br. 57, is

assertion that KPMG has nearly a thousand compensation decision makers, as this is unsupported and a mischaracterization of the record. *See* Kovatch Decl. ¶ 6; Pls. Mot. to Strike Exhibits (filed July 6, 2018).

[54] KPMG's reference to Plaintiff Jones' claim for emotional distress damages fails to establish that individualized damage issues overwhelm common ones, as Plaintiffs do not seek anything other than garden-variety emotional distress damages on a class basis. Plaintiffs also note that KPMG's few authorities specifically on causation, which KPMG addresses only in a footnote, *see* Def. Br. n.99, are inapposite, for they simply state the uncontroversial principle that causation should be subject to "generalized proof." *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 226 (2d Cir. 2008) (smokers' class action).

nonsensical: whether the challenged practices have a disparate impact on women and whether discrimination is KPMG's standard operating procedure are the issues at the core of case, and their adjudication will necessarily promote resolution.

D. Claims Under New York And New York City Law Should Be Certified.

Plaintiffs' evidence of pay and promotion policies are applicable to all of their claims. New York State and City anti-discrimination claims are analyzed under the Title VII framework, and therefore certification of these claims is likewise appropriate.[55] *Mihalik v. Credit Agricole Cheuvreux N. Am.*, 715 F.3d 102, 108-09 (2d Cir. 2013) (noting NYCHRL is construed more liberally in favor of discrimination plaintiffs); *see also* Pls. Br. § II.B.1.b. Plaintiffs are not required to submit statistical analysis specific to the application of KPMG's uniform, *national* employment policies to employees in New York at the class certification phase. KPMG's authorities do not suggest otherwise. *Hoffman v. Parade Publ'ns*, 933 N.E. 2d 744, 747-48 (N.Y. 2010), merely addresses extraterritorial application of State and City laws. Nor does *Forte v. Liquidnet Holdings, Inc.* stand for the principle that New York-specific proof is required. 675 F. App'x 21 (2d Cir. 2017). There, the Court of Appeals in a non-class case declined to remand a City claim in the context of affirming a grant of summary judgment on the Title VII and State claims, where all three were based on the same allegation of discrimination. *Id.* at *25-26. Plaintiffs have not waived their State and City claims.

III. Final Certification of the Equal Pay Act Collective Is Warranted.

KPMG argues that EPA certification is inappropriate because KPMG makes tens of thousands of compensation decisions on a person-by-person basis based on discretion of individual managers and that every individual at KPMG performs very different work from everyone else. KPMG is wrong. All Opt-In Plaintiffs are similarly situated with respect to their compensation claims, and individual defenses do not undermine this. Thus, the first two factors weigh in favor of certification. Pls. Br. 49-50. Additionally, although Plaintiffs are not required

[55] Plaintiffs bring claims under the New York Human Rights Law ("NYHRL"), New York City Human Rights Law ("NYCHRL"), and New York Equal Pay Law.

at this stage to prove they perform equal work to their male comparators, at the merits stage Plaintiffs will rely on substantial common evidence to establish KPMG employees within the same function and job title perform equivalent work and all Opt-In Plaintiffs work in the same "establishment." The final factor, fairness and procedural considerations, also weighs in favor of certification, as explained above.[56]

A. Compensation at KPMG is Set Based on a Consistent, Firm-Wide Policy that Results in Gender Disparities.

Because KPMG makes compensation decisions pursuant to a highly regimented, centralized policy accounting for common factors, Plaintiffs' statistical evidence controlling for those same factors demonstrates that Opt-In Plaintiffs are disadvantaged by the policy in the same way.[57] *See, e.g.*, *Lavin-McEleney*, 239 F.3d at 481-82 (relying on a statistical analysis along with other evidence that she was paid less than male comparator); *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."); *EEOC v. McCarthy*, 768 F.2d 1 (1st Cir. 1985) (affirming EPA verdict based largely on a statistical regression analysis); *Maggio v. CUNY*, No. 5-4211, 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 . . . to arrive at a conclusion of sex discrimination."). Here, like in *Lavin-McEleney*, Plaintiffs have presented evidence that the factors for which Dr. Vekker controlled "accurately

[56] Contrary to KPMG's suggestion, the EPA claims of the more than 1,100 Opt-In Plaintiffs will not disappear upon decertification, but instead all Opt-In Plaintiffs would be required to challenge KPMG's compensation policy individually. *See, e.g.*, *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1026 (D. Minn. 2007) (noting decertification involved "placing each opt-in plaintiff back at square one, without the benefit of pooled resources, and presenting the Court with almost three hundred separate lawsuits to resolve the same question of whether Caribou's exemption classification of all of its store managers was proper"). Just as in class actions, the court "has wide discretion to manage collective actions;" "many fairness and due process concerns can be addressed through trial management" tools such as bifurcation for liability and damages, as discussed above. *See Thompson v. Bruister & Assocs., Inc.*, 967 F. Supp. 2d 1204, 1222 (M.D. Tenn. 2013) (citations omitted).

[57] "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." *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); *see also, e.g.*, *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Harper v. Gov't Empls. Ins. Co.*, No. 09-2254, 2015 WL 9673810, at *3 (E.D.N.Y. Nov. 16, 2015), *report and recommendation adopted*, 2016 WL 98516 (E.D.N.Y. Jan. 6, 2016).

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captured equality of skill, effort, and responsibility" between the jobs.[58] 239 F.3d at 478, 481 (considering regression that controlled for rank, years of service, division, tenure status, and degrees earned); *cf. EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 256 (2d Cir. 2014) (distinguishing *Lavin-McEleney*, with appropriate statistical evidence, from *Port Authority*, without it).

KPMG suggests that statistical evidence is inappropriate because the EPA requires every Opt-in Plaintiff to demonstrate she was paid less than a specifically identified male comparator. Def. Br. 62. However, this argument cannot succeed without eliminating collective enforcement of the EPA, which necessarily allows for claims to be proven through representative proof without proof specific to each class member.[59] 29 U.S.C. § 206(d) (providing for collective action enforcement of the EPA); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("A collective action allows discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources" and benefits the judicial system "by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.").

Because compensation is set based on a consistent, firm-wide policy, cases finding opt-ins were not similarly situated because of local or decentralized decision-making are

[58] This case is thus distinguishable from *Bastian v. New York City Department of Education*, in which plaintiff conceded at his deposition that pursuant to the applicable bargaining agreement all coaches were to be paid at the same rate, and he presented no evidence contradicting that. No. 4-7450, 2008 WL 2930529, at *6 (S.D.N.Y. July 29, 2008). Additionally, KPMG cites *Morano v. Intercontinental Capital Group, Inc.*, where plaintiffs were subject to different timekeeping policies by virtue of the individual agreements they signed with their employers. No. 10-02192, 2012 WL 2952893, at *1-2 (S.D.N.Y. July 17, 2012). The Court specifically noted that differences in, for example, who hired plaintiffs and whether they were paid commission-only or a set biweekly rate, would not necessarily undermine certification. *Id.* That Dr. Vekker did not limit his analysis to the select group of the Opt-In Plaintiffs fails to undermine certification. *See* Pls. Opp'n to Vekker *Daubert* 14 & 14 n.22 (explaining why population-wide analysis was appropriate in this case). Indeed, KPMG pointed to no case holding that statistics must be so limited, and the Second Circuit has endorsed the use of statistics to compare to a "composite" male from the relevant population, as KPMG has acknowledged. Def. Br. 54; *see also Beck-Wilson*, 441 F.3d at 363 (accepting class-wide statistical evidence that predominately male physician assistants were paid more than predominately male nurse practitioners, not requiring that analysis be limited to comparators and opt-ins).

[59] Courts have similarly rejected KPMG's arguments that FLSA claims are inherently unsuitable for certification. *See, e.g.*, *Indergit v. Rite Aid Corp*., No. 8-9361, 2010 WL 2465488, at *9 (S.D.N.Y. June 16, 2010); *Perkins v. S. New Eng. Tel. Co*., 669 F. Supp. 2d 212, 218 (D. Conn. 2009).

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inapplicable.[60] Any individualized defenses, such as equitable tolling, are not a bar to EPA certification, just as they do not automatically defeat certification under Rule 23: "[t]he existence of separate defenses does not necessarily mean that the plaintiffs are not similarly situated" and does not defeat certification under the *Teamsters* model.[61] The Court may address damages through a bifurcated procedure that either resolves common questions collectively and any remaining issues separately, or adjudicates individual entitlement to damages separately. Pls. Br. 47. KPMG's alleged defenses pertaining to damages do not undermine the common proof.

B. At The Merits Stage, Plaintiffs Will Be Able To Establish KPMG Employees Perform Substantially Equal Work In The Same "Establishment."

At this certification stage, Plaintiffs must show that the Opt-In Plaintiffs are similarly situated with respect to their claims, not that they perform substantially equal work as male employees. *See Ayers v. SGS Control Servs.*, No. 03-9077, 2007 WL 646326, at *5 (S.D.N.Y. Feb. 26, 2007) (denying decertification where plaintiffs' claims derived from company-wide policies and practices). Indeed, the "substantially equal" and "similarly situated" inquiries "govern two different relationships and serve two different purposes."[62]

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[60] *See, e.g.*, Def. Br. 62-65 (citing *Desilva v. N. Shore-Long Island Jewish Health System, Inc.*, 27 F. Supp. 3d 313, 320 (E.D.N.Y. 2014) (finding no system-wide policy where decisions were not made consistent with a centralized department and approved or approval by company leaders); *Zivali v. AT & T Mobility, LLC*, 784 F. Supp. 2d 456, 459, 465 (S.D.N.Y. 2011) (finding that any wage violations were due to individual supervisors encouraging off-the-clock work or failing to adjust time records); *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465 (D.N.J. 1988) (noting reductions in force "occurred at various times as a result of various decisions by different supervisiors [*sic*] made on a decentralized employee-by-employee basis"). Similarly, KPMG's reliance on an FLSA exemption case decertifying a collective because some plaintiffs are not entitled due to differences in entitlement to overtime at all are irrelevant here: where every employee is legally entitled to equal pay under the law. *See Harper*, 2015 WL 9673810, at *4 (finding plaintiffs could not litigate FLSA overtime claims collectively due to differences in supervision, which affected affecting whether each was properly exempt).

[61] *See, e.g.*, *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1107 (10th Cir. 2001) (finding failure to certify ADEA case due to manageability concerns raised by individualized defenses was an abuse of discretion); *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 484 (E.D.N.Y. 2001) (same); *see also Andrako v. U.S. Steel Corp.*, 788 F. Supp. 2d 372, 381-83 (W.D. Pa. 2011) (holding individualized damages defenses do not preclude certification).

[62] *Coates v. Farmers Group, Inc.*, No. 15-01913, 2015 WL 8477918, at *8 (N.D. Cal. Dec. 9, 2015) (rejecting argument that "the opt-in plaintiffs must show that they performed 'substantially equal' or 'virtually identical' work to each other and the other proposed class members"); *Barrett v. Forest Labs., Inc.*, No. 12-5224, 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015); *see also Perkins*, 669 F. Supp. 2d at 219 ("At the certification stage, a court need not judge the merits of the plaintiffs' claims because they are irrelevant to the collective action inquiry, as long as plaintiffs assert a plausible basis for their claim."). Many of KPMG's cases regarding the equal work requirement and the establishment requirement are decisions on the merits. *See, e.g.*, *Chiaramonte v. Animal Med. Ctr.*, 677 F. App'x 689 (2d Cir. 2017); *EEOC v. Port Auth. of N.Y. & N.J.*, 786 F.3d 247 (2d Cir. 2014); *Byrne v. Telesector Res. Grp., Inc.*, 339 F. App'x 13 (2d Cir. 2009); *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir.

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At the merits stage, Plaintiffs will demonstrate through common evidence that 1) the jobs held by Opt-In Plaintiffs require equivalent skill, effort, and responsibility as the jobs held by men and 2) all Opt-In Plaintiffs work in the same "establishment" as defined by the EPA.

First, KPMG misstates the extent and import of minor differences among its employees to suggest that each employee performs unique work. This is plainly contradicted by common evidence in the record.[63] KPMG employees do not "embody over 1,000 different stories with no unifying thread," Def. Br. 4, but Tax and Advisory employees fall into only a handful of firm-wide, progressive job titles. KPMG advertised that skills are transferrable across the firm. Dkt. 192 at 6 (citing KPMG website: "We aim to make it easy for you to move around at KPMG—geographically, as well as between different job functions."). Common proof will establish that all Opt-In Plaintiffs perform equal work as men in the same function and title, and this weighs heavily in favor of certifying the collective. *See Ayers*, 2007 WL 646326, at *5.

KPMG's characterization is inconsistent with common job descriptions and common core duties of employees, as evidenced by testimony and KPMG's job descriptions.[64] Within each job title, employees have equal responsibilities, measured in the degree of accountability and supervisory authority.[65] *See, e.g.*, Hanges Appx. D at 65. KPMG's evidence confirms this, with upper-level employees demonstrating more responsibility in staff management, client interaction, and business development.[66] This evidence will weigh in favor of finding equal work.[67]

2001); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994); *Toomey v. Car-X Assocs. Corp.*, No. 12-4017, 2013 WL 5448047 (N.D. Ill. Sept. 30, 2013); *Bastian*, 2008 WL 2930529.

[63] Additionally, at the merits stage, Plaintiffs will provide industry expert testimony. *See generally* Rebuttal Report of John R. McGowan, Ph.D., CPA (Sept. 29, 2017) (testifying there are many consistencies in the work performed by KPMG employees in the same function and level).

[64] *See, e.g.*, Pls. Br. 50-57; Mueting Decl. ¶ 4 (confirming that 171 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"); KPMG-KASS0002775 (Tax Senior Associates); KPMG-KASS0003514 (Advisory Managing Director).

[65] In addition, KPMG mischaracterizes standalone quotes from Opt-In Plaintiffs' testimony to emphasize dissimilarities in job duties. *See* Def. Br. 9-10 (quoting Hillary Bennetts, who repeatedly explained how two sub-groups at KPMG perform substantively similar work, *see* Def. Br. Ex. 9, Bennetts Tr. 70-71; and Sabrina Starnes, who testified that she did perform the same work as her comparators, Def. Br. Ex. 38, Starnes Tr. 76:22-77:1).

[66] *Compare, e.g.*, Def. Br. Ex. U ¶ 13 (Senior Associate); *with* Def. Br. Ex. W ¶ 14 (Managing Director).

[67] *See* 29 C.F.R. § 1620.16(a) (providing common job descriptions and common core duties is evidence of "equal effort" under the EPA); 29 C.F.R. § 1620.17(a)-(b) (providing that employees that have similar degrees of accountability and supervisory authority have equal responsibilities).

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KPMG's characterization is also inconsistent with internal documents describing required skills. KPMG's Skills, Assessment & Development documents outline the expected Function-wide skills.[68] Testimony from the Parties' experts also contradicts KPMG's assertion that all employees perform different work and, in fact, indicates that KPMG employees in the same function and job title perform similar work.[69] *See, e.g.*, Pls. Br. 57; *see also* Hanges ¶ 16. These similarities in a common core of tasks are grounded in the experience of Tax and Advisory professionals.[70] *See Puchakjian v. Twp. of Winslow*, 804 F. Supp. 2d 288, 294 (D.N.J. 2011). They are not just "abstractions" based on job title alone.[71] *Cf. Port Auth.*, 768 F.3d at 255-56; *Chiaramonte v. Animal Med. Ctr.*, 677 F. App'x 689 (2d Cir. 2017).

KPMG ignores this evidence and attempts to contradict it by highlighting minor differences in the work performed by each individual employee, although these differences are not meaningful under 1) the EPA or 2) KPMG's compensation policy. First, a prima facie case under the EPA is concerned primarily with differences between the jobs themselves, not differences between particular individuals holding those jobs.[72] Therefore, while KPMG highlights purported differences in the experiences or skills of *individuals*, these differences fail to undermine the evidence indicating that all KPMG employees in the same function and title perform substantially equal work within the meaning of the Equal Pay Act. Additionally, many of the purported differences emphasized by KPMG and Dr. Banks are minor differences such as the volume of travel, commute times, presence of a "busy season," and client locations, Def. Br. 7-9, that courts routinely recognize are not reasons to decertify the collective.[73]

[68] *See* KPMG-KASS0019482 at 19487-19500 (outlining Advisory-wide skills). *Compare, e.g.*, KPMG-KASS0040396 at 409-10 (Tax IES general skills) *with* KPMG-KASS0068634 at 646 (Tax SALT general skills). *See also* KPMG-KASS0004490 at 94 (indicating skills vary in predictable ways depending on job level within the firm).
[69] Dr. Hanges did not "agree[]" "KPMG professionals differ widely." Def. Br. 10; Hanges Report ¶ 44.
[70] All KPMG employees are evaluated using common performance evaluation scales and criteria, *see* Stockdale Rep. at 37, further supporting a finding of substantially equal work at the merits stage. *See* 29 C.F.R. § 1620.15(a) (providing that the same performance requirements and scales is evidence of equal skills).
[71] This is also different from *Byrne*, where the plaintiff relied solely on same job title, but produced "no evidence demonstrating equal job content." 339 F. App'x at 16.
[72] *See, e.g.*, *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (rejecting that comparator's experience as a manager was relevant to determining whether jobs were equal).
[73] *See, e.g.*, *Brackett v. St. Louis Bd. of Police Com'rs*, No. 12-898, 2014 WL 1377460, at *2 (E.D. Mo. Apr. 8, 2014)(noting certification appropriate "despite 'differences' in job descriptions, geographical locations, and pay

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Rather than decertifying cases solely on minor "differences" in clients or roles, courts look to the primary duties required by the jobs themselves and consider whether any differences change the nature of the job as a whole.[74] Jobs can be equivalent where "major responsibilities" are the same, even if the employees work on, for example, different software platforms and have different management responsibilities.[75] "Fungibility" is not required; the Supreme Court has rejected that jobs need to be identical.[76] Likewise, contrary to KPMG's suggestion, jobs are not necessarily different under the Equal Pay Act simply because they require different sub-specialties, familiarity with a type of software, or a busy season.[77] These differences simply are not "fundamental." *See Garner v. Motorola, Inc.*, 95 F. Supp. 2d 1069, 1076 (D. Ariz. 2000).

In determining whether jobs are similar, courts look to whether the employer treats the jobs similarly *with respect to pay*.[78] Similarly, at the EPA second stage, courts consider whether the employer can prove that it *actually relies on* a legitimate factor other than sex when it sets pay. *See, e.g.*, *Rizo*, 887 F.3d at 465. Here, KPMG treats jobs within the same function and job title as equal for the purposes of pay. As explained above, KPMG policies base salary ranges on job level within function and rely on market data in compensation because employees do not each

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rates," because "each plaintiff asserted a common [pay] claim." (collecting cases)); *see also Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000) (denying decertification, noting "variations in the plaintiffs' duties, job locations and hourly billing rates do not differentiate the collective basis of the class"). KPMG's attempts to distinguish *Brackett* and *Moss* gloss over findings that sub-divisions similar to KPMG's do not render jobs unequal. Def. Br. 64 n.123

[74] *See, e.g.*, *EEOC* v. *Health Mgmt. Grp.*, No. 09-1762, 2011 WL 4376155, at *4 (N.D. Ohio Sept. 20, 2011) (rejecting attempt to differentiate jobs based on a "territory" as "an attempt to compare 'individual segments' of the work rather than an 'overall comparison' of the work").

[75] *See, e.g.*, *Garner v. Motorola, Inc.*, 95 F. Supp. 2d 1069, 1076 (D. Ariz. 2000) (finding software engineer jobs could be equivalent despite different software functions or levels of management responsibilities, where major responsibilities were the same).

[76] *See Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) ("[I]t is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable."); 29 C.F.R. § 1620.13(a) (providing "identical" jobs are not required); *Hein v. Oregon*, 718 F.2d 910, 918 (9th Cir. 1983) (rejecting that positions must be fungible).

[77] *See* 29 C.F.R. § 1620.14(b)-(c) (noting that differences in departments, "expend[ing] greater effort for a certain percentage of their working time," "machines or equipment," and kind of effort are not determinative).

[78] *See* 29 C.F.R. § 1620.14(a) (noting courts should consider "whether and to what extent significance has been given to such differences *in setting the wage levels for such jobs*" and that this may reveal that "the differences are *too insubstantial* to prevent the jobs from being equal"); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1311-12 (2d Cir. 1995) (defendant's "internal job classifications do not differentiate between the [plaintiff and comparator] positions, assigning the same pay range to both"), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Garner*, 95 F. Supp. 2d at 1076 (denying defendant motion for summary judgment on EPA claim where defendant viewed jobs as being in the "same category").

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perform individualized work for which there is no market comparison. *See, e.g.*, KPMG-KASS-0139629 at 636. Thus purported differences in any subdivisions "are too insubstantial to prevent the jobs from being equal in all significant respects under the law." 29 C.F.R. § 1620.14(a).

Likewise, KPMG's argument that the firm has multiple "establishments" within the meaning of the EPA hinges on its inaccurate assertions that decisions are decentralized. Def. Br. 60. However, common evidence will show KPMG is a single establishment, because its operations are highly centralized nationwide.[79] This is not a case where individual partners make decisions untethered to firm-wide salary ranges and reference points.[80] Because KPMG's pay decisions are made at the nationwide level, KPMG should be treated as a single establishment.

CONCLUSION

Plaintiffs respectfully request that the Court Grant Plaintiffs' Motion.

Dated: July 6, 2018

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[79] *See Kassman v. KPMG LLP*, No. 11-3743, 2014 WL 3298884, at *8 (S.D.N.Y. July 8, 2014) ("Courts identify 'a widely followed standard recognizing that central control and administration of disparate job sites can support a finding of a single establishment for purposes of the EPA.") (citing *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994)). KPMG's cases also indicate that separate "establishments" are inappropriate where compensation decisions are determined at a higher level. *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328, 1340-41 (N.D. Ala. 2011) (rejecting that store is appropriate establishment where salary determinations made at district level). *Cf. Toomey*, 2013 WL 5448047, at *6-7 (finding at summary judgment that store was proper establishment because store managers could set pay and freely deviate from ranges).

[80] This case is also different from *Meeks*, in which the plaintiff attempted to introduce additional comparators in her post-verdict appeal. *Meeks*, 15 F.3d at 1017.

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