UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONNA KASSMAN, LINDA O'DONNELL, SPARKLE PATTERSON, JEANETTE POTTER, and ASHWINI VASUDEVA on behalf of themselves and all others similarly situated, PLAINTIFFS, v. KPMG LLP, DEFENDANT.	)	Civ. No. 11-CV-3743 (LGS)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND AUTHORIZATION OF NOTICE

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Named Plaintiffs Donna Kassman, Sparkle Patterson, Linda O'Donnell and Ashwini Vasudeva ("Plaintiffs" or "Plaintiffs")[1] were employed by Defendant KPMG LLP ("KPMG" or "Defendant") as client service professionals in KPMG's Advisory and Tax practices. All experienced gender discrimination. Plaintiffs allege, under the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d) & 216(b), that KPMG paid them and similarly-situated female employees less than their male counterparts for performing substantially equivalent work.

Plaintiffs worked in KPMG offices coast to coast and were subject to a common practice or scheme on the part of KPMG's male-dominated corporate management to pay female employees significantly less than their male peers. KPMG effectuated this scheme through centralized corporate policies and decision-making. Indeed, the positions at issue in this case – Associate, Senior Associate, Manager, Senior Manager/Director and Managing Director – have uniform job descriptions and share common responsibilities and duties.

At the current stage, well before discovery is complete, Plaintiffs present anecdotal and documentary evidence of pay disparities. This evidence confirms that KPMG's policies—including its compensation and evaluation policies—are applied to all members of the collective, regardless of their geographical location or practice group. Plaintiffs' individual experiences with discrimination are further confirmed by the class-wide compensation data. Plaintiffs' preliminary analysis determined that pay disparities attributable to gender are statistically significant at more than eleven standard deviations (well above the 1.96 generally considered statistically significant). Put another way, the probability that KPMG's compensation could be gender neutral is ***less than 1 in one hundred million*** (0.00000001). All else being equal, KPMG pays female employees in its Tax and Advisory practice groups, on average, approximately 3% less than their male counterparts for doing equivalent work

[1] Plaintiff Jeanette Potter is not seeking relief under the Equal Pay Act as her claims are untimely, although she also faced pay discrimination similar to the other Named Plaintiffs.

within the same job title. To the extent that women are doing the work of men at higher job titles, the disparities only increase. *See* Ex. A, November 4, 2013 Declaration on Preliminary KPMG Equal Pay Act Analysis.

Based on this preliminary evidence, Plaintiffs seek relief that is both basic and critically important. Under the EPA, which is part of the federal Fair Labor Standards Act and incorporates its collective action provisions, employees and former employees must affirmatively "opt-in" to this action to become part of the suit. *See*, *e.g.*, 29 U.S.C. §§ 216(b); 256. Plaintiffs ask the Court to authorize the mailing of notice of this litigation to members of the proposed collective action so they can decide whether to opt-in to the action and thereby preserve their claims while discovery continues. Because of the limited purpose and effect of Plaintiffs' motion, the standard the Court applies is very lenient and Plaintiffs' burden minimal. When faced with such a motion, courts typically grant conditional collective action certification and authorize notice.

Plaintiffs request that notice be issued to all female employees of KPMG within the relevant positions in KPMG's Tax and Advisory practice groups from October 30, 2010 to the present. Those individuals employed by KPMG within the previous three years can opt-in to the collective action, pursuant to the EPA's statute of limitations. *See* 29 U.S.C. § 255(a); *Morales v. New York Dep't of Juvenile Justice*, No. 10 Civ. 829, 2012 U.S. Dist. LEXIS 7277, at *22 (S.D.N.Y. Jan. 20, 2012) (establishing that the statute of limitations is three years if the violation was willful, otherwise two years). Additionally, those employed by KPMG between October 17, 2008[2] and October 30, 2010, should also receive notice, as this Court ruled that it would consider whether equitable tolling applied to the claims of individuals from that time period after notice was issued and interested women had the opportunity to respond.

[2] As discussed further below and in Plaintiffs' Motion for Equitable Tolling of the Statute of Limitations for Absent Collective Action Members Claims Under the Equal Pay Act (Dkt. 87), this date is three years before KPMG filed its Opposition to the Motion for Equitable Tolling on June 3, 2013 (Dkt. 90).

I. Procedural Background

Plaintiff Donna Kassman filed her initial Complaint and First Amended Complaint in early in June 2011. (Dkts. 1; 3). On September 29, 2011, Plaintiff Kassman submitted a routine motion for leave to file her Second Amended Complaint ("SAC"), naming Plaintiffs Linda O'Donnell, Sparkle Patterson, Jeanette Potter, and Ashwini Vasudeva. (Dkt. 7). Defendant filed a twenty-five page Memorandum in Opposition to this routine motion on October 17, 2011. (Dkts. 17; 19).

Before receiving a ruling on the Motion to Amend, Defendant filed a wide-ranging Motion to Dismiss Certain Claims and to Strike Class Claims as Contained in the Third Amended Complaint ("MTDS") on February 3, 2012, on the basis of *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). (Dkt. 37). The MTDS raised several novel questions regarding the applicability of the recently decided *Dukes* case at the pleadings stage, as well as a plethora of other legal issues.

Judge Jesse M. Furman was assigned to the case on April 16, 2012 (Dkt. 44), and over the next ten months the Parties continued to brief the Court on new developments in the case law. A total of 130 pages of legal papers were filed on the MTDS. On February 7, 2013, more than one year after the Defendant filed its MTDS, Judge Furman issued an Order, denying the vast majority of Defendant's MTDS and leaving Plaintiffs' class and individual claims substantially intact. (Dkt. 69).

On March 22, 2013, this case was reassigned to Your Honor. (Dkt. 81). The Initial Case Management Conference took place on April 22, 2013. (Dkt. 82).

On May 13, 2013, Plaintiffs filed a Motion for Equitable Tolling of the Statute of Limitations for Absent Collective Action Members Claims Under the Equal Pay Act ("Motion for Equitable Tolling"). (Dkt 87). Defendant filed its Opposition to the Motion for Equitable Tolling on June 3, 2013, and Plaintiffs filed a Reply on June 10, 2013. (Dkts. 90; 91).

On August 1, 2013, at a hearing on Plaintiffs' Motion for Equitable Tolling, the Court denied the request without prejudice, explaining that its "intention was not to cut off or in any way prejudice the claims of people who would be able to bring those claims if I granted [Plaintiffs'] motion for equitable tolling." *See* Dkt. 100, at 21. The Court noted that "people really don't opt in until they actually get notice that tells them what the suit is about and how to do it." *Id.* at 21-22. Accordingly, the Court explained that it would allow notice to be distributed for the extended time period *as if* tolling had been granted and Plaintiffs could then renew the motion for equitable tolling with the actual opt-ins seeking to benefit from tolling before the Court. *Id.* at 25.

Therefore, the Court ordered KPMG to produce discovery on its policies and data within 60 days (September 30) to enable Plaintiffs to file a Motion for Conditional Certification within 30 days after that 60 day period lapsed (October 30). *Id.* at 23. KPMG produced company-wide policy documents relevant to Plaintiffs' EPA claims in August and September, and compensation data on August 30 and September 3. Plaintiffs posed several questions to KPMG about the data on October 4 and October 7, codifying those questions in Interrogatories propounded on October 18, 2013. KPMG provided limited answers to some of Plaintiffs' data questions on October 25.[3]

II. Facts

A. Plaintiffs are Similarly Situated to Members of the Proposed Collective and their Male Comparators With Regard to Job Duties and Expectations.

The proposed collective consists of women employed within KPMG's Tax and Advisory practices in the client-facing, non-shareholding roles of: Associate, Senior Associate, Manager, Senior Manager/Director and Managing Director. Employees in the Tax practice provide advice and counsel on tax returns and liabilities while employees in the Advisory practice provide advice and counsel on

[3] KPMG produced a large amount of new data in the afternoon of October 29—the day before the filing deadline for this motion. Thus, Plaintiffs' preliminary analysis cited herein does not incorporate this last minute production.

[redacted]

complying with contracts and business performance. There are more than 7,000 women working in the eleven jobs at issue here:

1. Advisory Associate;
2. Advisory Senior Associate;
3. Advisory Manager;
4. Advisory Senior Manager;
5. Advisory Director;
6. Advisory Managing Director;
7. Tax Associate;
8. Tax Senior Associate;
9. Tax Manager;
10. Tax Senior Manager; and
11. Tax Managing Director.

Individuals with the same job titles have the same levels of responsibility; are expected to utilize the same levels of skill and experience; contribute to KPMG's growth and development at the same levels; and report up in the same hierarchies. *See, e.g.*, Ex. B, KPMG Career Snapshots; Ex. C-D, KPMG Job Descriptions.

Professionals with the same jobs also perform the same types of tasks across the two practices. Associates in both practice groups are responsible for entry-level tasks that enable KPMG to serve its clients. *Compare* Ex. E, ¶¶ 14,16 (Tax Associates are responsible for client specific services like understanding and calculating tax assets and liabilities); Ex. C, at KPMG-KASS0003417-8 (Advisory Associates are responsible for assuming responsibility for client specific services like understanding their client's business and industry). Senior Associates in both practices are expected to supervise Associates and to work with management to execute "client engagements." *See* Ex. C, at KPMG-KASS0003500-3502 and 2775-6. (Tax Senior Associates should consult with management on "the overall execution of client engagements;" while Advisory Senior Associates in Advisory should take direction from management "in [the] Execution of engagements.") Both Tax Managers and Advisory Managers supervise a team of professionals on client projects and are responsible for providing training and direction. Ex. C at KPMG-KASS0002658-9 and 3455-3457. Senior Managers in both practices are responsible for higher priority clients and for business development. *See* Ex. D. at KPMG-

[redacted]

KASS0002777-8 and 3503-5 (Tax Senior Managers should generate new business and "manage[] relationships at a senior level" with clients; while Advisory Senior Managers should interact with "C-level client[s]" and participate in business development.).

KPMG also has the same expectations for employees in the same job title. For example, all Managers are required to complete KPMG's standardized "Upward Feedback" forms to evaluate employees senior to them; to mentor at least two employees; and to participate in networking activities and professional organizations. *See* Ex. F, Goal Statements, at KPMG-KASS0002604-6 and 3569-70. Managers at KPMG are expected to leverage their at least four-five years' of experience in the industry to support KPMG's business development efforts. *See* Ex. C, Job Descriptions, at KPMG-KASS0002658-9 and 3455-57. Managing Directors are the highest ranking non-partner professionals in both practices and all KPMG offices, and as such, are responsible for allocating resources, developing the careers of other KPMG employees, leading employee training, and making business, personnel and risk management decisions. *See* Ex. D, Career Snapshots, at KPMG-KASS0003483-5 and KPMG-KASS0002608-7.

In sum, the documentary evidence consistently demonstrates that employees within the same job title have the same or substantially similar responsibilities and qualifications. This is echoed by Plaintiffs' own experiences at KPMG. *See, e.g.*, Ex. G, Declaration of Donna Kassman in Support of Plaintiffs' Motion for Conditional Certification, at ¶9; Ex. H, Declaration of Jeanette Potter in Support of Plaintiffs' Motion for Conditional Certification, at ¶6.

Accordingly, KPMG employees are not constrained to a specific practice group (which KPMG also describes as "functions") or geographic location. Indeed, KPMG's website advertises: "We aim to make it easy for you to move around at KPMG – geographically, as well as between different job functions." WHY KPMG?, http://jobs.kpmgcareers.com/content/why/ (*visited* October 30, 2013).

B. Plaintiffs and the Members of the Proposed Collective Were Subject to the Same Compensation Scheme.

In addition, KPMG's own policy documents indicate that the compensation policies are set at its highest levels and apply consistently across the collective – regardless of job title or office location. *See* Ex. I, 2013 Guidelines for Effective Employee Compensation. These policies are implemented through annual presentations on the firm's salary review guidelines and strategies for talking to employees about KPMG's variable compensation policies. *See generally* Ex. K, KPMG: Understanding and Applying the Salary Review Guidelines. These presentations are developed by KPMG's firm-wide Compensation Strategies Department and delivered by the National Director of Compensation Strategies. *See id.* at KPMG-KASS0008899. KPMG delivers the presentations to those partners who are selected to play "a role in making the salary increase and variable compensation decisions for the current year." *Id.* at KPMG-KASS0008890. At all points, ultimate decisions regarding employee compensation are controlled by the highest levels of firm leadership. *Id.* at KPMG-KASS0008891 (noting that "firm leadership will review compensation recommendations," make necessary revisions, and "notify [KPMG Partners] when all salary and compensation planning has been approved and [they] can begin employee communications").

KPMG has a firm-wide policy for awarding merit-based increases that apply in the same manner to employees regardless of geographical location or practice group. *See* Ex. L, KPMG-KASS0009125, 7 (showing that in both tax and advisory, merit increases are based on KPMG's standardized performance rating,[4] and that only employees who receive a 1, 2 or 3 rating are eligible for an award). KPMG provides uniform training and implementation guidelines for all managers

[4] KPMG evaluates all employees—regardless of geographic location or practice group—using a 9-box matrix, under which employees receive one of nine rankings, ranging from "Exceptional Performer" to "Needs Improvement" based on a set of standardized criteria that evaluates the ability of all employees to exemplify the values of "The KPMG Way." In 2011 KPMG moved to a 5-box matrix, however, the rating system still applies firm-wide. *See* Message from Bruce Pfau: New System to Replace Dialogue, Ex. M. KPMG's compensation policy provides that the firm determines eligibility for incentive compensation based on this firm-wide evaluation system. *See id.* at KPMG-KASS001356 and 0011360.

making compensation decisions. *See, e.g.*, Ex. I, 2013 Guidelines for Effective Employee Compensation Recommendations, at KPMG-KASS0011403.

KPMG policy also provides that employee compensation must be based on the firm's standardized study of the market rate for each position in each geographic location. *See* Ex. K, Understanding and Applying Salary Review Guidelines, KPMG-KASS0008893. Based on these standardized studies, KPMG establishes firm-wide salary bands, which establish uniform compensation for all employees within the firm-wide job titles. *See, e.g.*, Ex. I, 2013 Guidelines for Effective Employee Compensation Recommendations, at KPMG-KASS0011358.

C. Women Are Paid Less Than Men For Doing The Same Work.

1. Plaintiffs' preliminary data analysis reveals gender-based pay disparities across the proposed collective.

Plaintiffs' preliminary analysis shows that KPMG systematically underpaid women in the proposed collective relative each year from 2008 to 2013. *See* Ex. A. While a disparity of 1.96 standard deviations or more is generally considered statistically significant, Plaintiffs' expert found that over the period of 2008-2013, there was a gender differential of 2.8% that was statistically significant to ***11.35 standard deviations***. *See* Ex. A at Table 1.

When conducting the preliminary analysis of pay data relating to client-facing professionals in the proposed collective, Plaintiffs' expert controlled for the effects of gender-neutral variables including: (1) Job within Function;[5] (2) Time in job; (3) Education (4) Years of prior work experience; and (5) Location. *Id.* KPMG paid women in the proposed collective earned systematically less during the applicable period as compared to their male counterparts in the same positions. *Id.* Specifically, KPMG paid women between 2.3% and 3.2% less than it paid men each year. *Id*. at Table 2.

[5] Functions (Advisory, Tax) are also known as practice groups.

Year	Coefficient*	Standard deviation	Probability of occurring by chance
2008	-2.5%	-7.46	Less than 1 in 100,000,000
2009	-2.3%	-6.36	Less than 1 in 100,000,000
2010	-2.7%	-7.30	Less than 1 in 100,000,000
2011	-3.2%	-9.44	Less than 1 in 100,000,000
2012	-2.8%	-8.76	Less than 1 in 100,000,000
2013	-2.9%	-8.89	Less than 1 in 100,000,000

*Coefficient represents the percent by which women are paid less than men

This disparity is extremely unlikely to result from gender-neutral factors; the probability of gender neutrality in this case is less than one in ten million. *Id.*

2. KPMG paid Named Plaintiffs less than comparable male employees.

The statistical disparities are echoed in Named Plaintiffs' own experiences. As described further below, KPMG paid them less than men who performed the same or similar job duties, even though the Named Plaintiffs' performance was equal to or better than the higher-paid men.

i. **Donna Kassman**

Donna Kassman worked for KPMG in the New York metro area for more than seventeen years. Ex. G , Declaration of Donna Kassman, at ¶5. Hired as a Tax Specialist (the equivalent of an Associate today), Ms. Kassman rose through the ranks to Tax Senior Manager. *See* Employee Profiles Ex. O at KPMG-KASS0012888-9. Over the course of her tenure, Ms. Kassman's performance reviews stated that she demonstrated stellar performance at KPMG, showing "excellent leadership abilities," and that she "contributed greatly to the overall success of the practice." *See* Ex. P, Performance Reviews, at KPMG-KASS0001039 and KPMG-KASS0001070.

Despite Ms. Kassman's years of experience with KPMG and contributions to the firm, Defendant paid her less than her male counterparts who performed substantially similar work. For example, KPMG hired John Montgomery, another Tax professional in KPMG's New York office, at a significantly higher salary than Ms. Kassman and increased his salary at a much faster rate. KPMG paid Mr. Montgomery nearly $50,000 more than Ms. Kassman each year. *Compare* Ex. O, KPMG

Employee Profile, at KPMG-KASS0012888-9, *with* Ex. O, KPMG Employee Profile, at KPMG-KASS0012892-3. KPMG paid Ms. Kassman less than Mr. Montgomery even though she had better qualifications. While she has a law degree, Mr. Montgomery holds only a Bachelor's Degree.[6] *Id.*

On top of this inequity, KPMG reduced Ms. Kassman's salary by $20,000 while she was on maternity leave. Ex. G, Declaration of Donna Kassman, at ¶14. KPMG did not reduce Mr. Montgomery's pay, nor, to Ms. Kassman's knowledge, any male employee performing the same job duties. *Id.* When Ms. Kassman asked her superior, Partner Gary Rosen, why KPMG reduced her compensation, he told her to consider her past salary a "loan," and that she did not need the money because she had "a nice engagement ring." *Id.* at ¶15.

ii. Ashwini Vasudeva

KPMG also paid Ashwini Vasudeva less than male employees performing the same job duties. Ms. Vasudeva worked in KPMG's Mountain View, California office in the Advisory[7] practice between 2004 and 2009. Ex. O, KPMG Employee Profiles, at KPMG-KASS0012883-4, 5, 7. Compared to men performing the same job duties, KPMG paid Ms. Vasudeva substantially less during the same period. *Id.* For example, Ryan Wood-Taylor and Bryan Dillon both worked as Associates and Senior Associates in the same practices and location and performed the same duties as Ms. Vasudeva—and KPMG paid both men substantially more than Ms. Vasudeva. *See id.* KPMG paid Mr. Wood-Taylor $5,300 more than Ms. Vasudeva when the two were Associates, and $10,000 more when the two were Senior Associates. *Compare* Ex. O, KPMG Employee Profile, at KPMG-KASS0012883, *with* Ex. O, KPMG Employee Profile, at KPMG-KASS0012885. Similarly, KPMG paid Mr. Dillon $5,500 more than Ms. Vasudeva when the two were Associates and $14,000 more when the two were Senior

[6] Ms. Kassman's story is not unique. Like Ms. Kassman, Named Plaintiff Jeanette Potter worked in KPMG's Tax practice for more than a decade. Like Ms. Kassman, Ms. Potter was severely underpaid relative to her male peers performing the same job duties. *See* Ex. H, Declaration of Jeanette Potter, at ¶¶ 19-31.

[7] Also called "Advisory and Risk" practice in earlier years.

Associates. *Compare* Ex. O, KPMG Employee Profile, at KPMG-KASS0012883, *with* Ex. O, KPMG Employee Profile, at KPMG-KASS0012887. KPMG paid these men more than Ms. Vasudeva, even though her performance was equal to or better than theirs.

iii. Sparkle Patterson

Sparkle Patterson was an Associate in the Tax group in KPMG's Atlanta, Georgia office from 2006 through 2010. Ex. O, KPMG Employee Profiles, at KPMG-KASS0012898. Ms. Patterson excelled and twice received a "Standing Ovation" award, which KPMG gives to employees who go "above and beyond" in their work. *See* Ex. P, Performance Reviews, at KPMG-KASS0000216; Ex. E, at ¶11. In 2010, Ms. Patterson earned her CPA, a qualification for promotion to Manager in KPMG's Tax practice. *Id.* at ¶12.

While Ms. Patterson was an Associate, she performed the same tasks as Senior Associates, such as serving as the initial point of contact for clients, managing engagements, allocating work to other Associates and Tax Technicians and reviewing their work. *See id.* at ¶14-15. Though Ms. Patterson excelled and performed the same tasks as Senior Associates, KPMG did not promote Ms. Patterson to the position and failed to compensate her commensurate with male employees performing the same tasks. *See* Ex. M, Sparkle Patterson Affidavit, ¶¶20, 22-5; Ex. O, KPMG Employee Profiles at KPMG-KASS0012898-9. For example, KPMG paid male employee Stephan Rabbitt approximately $10,000 more than Ms. Patterson. *Id.* KPMG paid Mr. Rabbitt more even though he performed the same tasks that Ms. Patterson did and even though he did not earn a CPA. *See id;* Ex. E at ¶24.

iv. Linda O'Donnell

Finally, KPMG paid Linda O'Donnell less than her male counterparts. She began her career at one of KPMG's international offices in 2003. She transferred to the Atlanta, Georgia office in 2006 as a Senior Associate in KPMG's Advisory practice. *See* KPMG Employee Profiles, Ex. O. KPMG

demoted Ms. O'Donnell and other female employees upon transfer, but did not demote male employees. *See* TAC ¶ 161.

Ms. O'Donnell regularly performed Manager-level tasks, including preparing engagement letters, performing conflict-of-interest checks and compiling budgets, training new Managers to structure reports, communicating with clients, and managing invoices. Nevertheless, KPMG did not compensate her accordingly. TAC ¶ 166. In fact, KPMG paid Ms. O'Donnell approximately $20,000 less than it paid male employees performing the same work. TAC ¶ 167-8. For example, KPMG paid male employee Krupal Mehta more than it paid Ms. O'Donnell, even though they performed precisely the same tasks and had a comparable educational background and experience in Transactional Services. *Compare* Ex. O, at KPMG-KASS0012896 with KPMG-KASS0017284-5

3. Named Plaintiffs' experiences are representative of women at KPMG.

The experiences of Plaintiffs Kassman, Patterson, Vasudeva and O'Donnell are not unique. In KPMG's Tax and Advisory practices, KPMG pays men more than women in every job title at issue here.

For example, the average salary for a male Senior Associate in the Advisory practice in 2008 was $82,200, while the average salary for a female Senior Associate—like Ms. Vasudeva—was only $79,300. Ms. Vasudeva was, in fact, paid less than average, making only $70,000 the majority of the year, and $75,000 after the October salary increases took effect. See Ex. O, KPMG Employee Profiles, at KPMG-KASS0012883. Similarly, KPMG paid men, on average, $1,500 more than women in this position in 2009, $2,900 more in 2010, and $2,800 more in 2011, 2012, and 2013.

The trend continues for Tax Associates like Ms. Patterson. For each year between 2008 and 20013, KPMG paid female tax Associates less than their male colleagues, and for the past two years, KPMG has paid men in this position over $2,000 more than it paid women. Particularly troubling disparities are evident higher in the KPMG hierarchy. As Ms. Kassman's experience demonstrates,

female Senior Managers in KPMG's Tax practice earn significantly less than their male colleagues for the same work. In 2008, KPMG paid male Senior Managers in Tax, on average, $171,900 annually, while it paid female Senior Managers only $154,100. KPMG paid male Senior Managers in Tax an average of $12,300 more in 2009 an average of $13,400 more in 2010, an average of $13,600 more in 2011, an average of $12,000 in 2012, and an average of $11,000 more in 2013.

III. Argument

A. Plaintiffs' Evidence is More than Sufficient to Meet the Minimal Standard for Conditional Collective Action Certification and Issuance of Notice.

Plaintiffs bring this collective action under the Equal Pay Act, 29 U.S.C. § 206(d). The EPA was adopted as an amendment to the FLSA and incorporates its enforcement mechanisms and collective action provisions.[8] Thus, the class action provisions of Federal Rule of Civil Procedure 23 do not apply to a suit brought on behalf of "similarly situated" employees under the EPA. Instead the Court applies the collective action provisions of 29 U.S.C. § 216(b), which provides that employees may bring actions on behalf of "themselves and other employees similarly situated" and that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

In Section 216(b), "Congress has stated its policy that . . . plaintiffs should have the opportunity to proceed collectively" because a collective action serves the twin goals of judicial economy and the lowering "of individual costs to vindicate rights by the pooling of resources." *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). As courts widely acknowledge, collective actions further the broad, remedial purposes of the FLSA and promote efficient adjudication. *See, e.g., Braunstein v. Eastern Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1978) (holding that the issuance of notice

[8] *See, e.g., Anderson v. State Univ. of N.Y.*, 169 F.3d 117, 119 (2d Cir. 1999), vacated on other grounds; *Lifrak v. N.Y. City Council*, 389 F. Supp. 2d 500, 503-504 (S.D.N.Y. 2005); *Douglas v. GE Energy Reuter Stokes*, No. 1:07CV077, 2007 U.S. Dist. LEXIS 32449, at *6 n.2 (N.D. Ohio Apr. 30, 2007); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1133 n.2 (D. Nev. 1999).

comports with the broad remedial purpose of the act as well as the interest of the courts in avoiding a multiplicity of suits); *Andrako v. U.S. Steel Corp.*, 788 F. Supp.2d 372, 383-84 (W.D. Pa. 2011) ("Decertifying this case would potentially result in more than 250 individual trials, which not only is the worst possible outcome in terms of efficiency, but also would place each opt-in Plaintiff back at square one without the benefit of pooled resources to resolve the common liability questions in this case.") (internal quotations omitted).[9] Unlike in Rule 23 class actions, similarly situated employees are not automatically included in EPA collective actions, and, absent a court order, the statutes of limitations on their claims are not tolled until the employees act affirmatively and file written consents to join the litigation. 29 U.S.C. § 216(b).

Because of the unique features of a collective action, courts in this Circuit have adopted a two-stage certification procedure.[10] At the first, or "notice," stage, courts consider whether proposed class members should receive notice of the action, thus giving them the opportunity to opt-in. As the Supreme Court has stated, the purpose of the opt-in provisions of Section 216(b) and collective actions "depend[s] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate."[11] The first stage analysis applies until (i) potential similarly-situated employees have received notice and an opportunity to opt-in *and* (ii) discovery is completed.

Plaintiffs' burden on a motion for conditional certification and authorization of notice is notably

[9] *See also Hamelin v. Faxton-St. Luke's Healthcare*, No. 6:08-CV-1219, 2009 U.S. Dist. LEXIS 9793, at *13-14 (N.D.N.Y. Jan. 26, 2009); *Ayers v. SGS Control Servs., Inc.*, No. 03 Civ. 9078, 2007 U.S. Dist. LEXIS 19634, at *6 (S.D.N.Y. Feb. 27, 2007).

[10] *See Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *26 (S.D.N.Y. June 28, 2012) ("The Second Circuit recently sanctioned the two-step formula commonly followed by the district courts in collective actions."); *see also, e.g., Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010).

[11] *Hoffmann-La Roche*, 493 U.S. at 170; *see also, e.g., Braunstein*, 600 F.2d at 336 ("[N]otice to other potential plaintiffs . . . comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding the multiplicity of suits."); *Ebbert v. Nassau Cty.*, No. 05-CV-5445, 2007 U.S. Dist. LEXIS 58344, at *5-6 (E.D.N.Y. Aug. 9, 2007).

low. Because the prevailing issue in this stage is whether the proposed class members should be afforded an opportunity to preserve their claims and because certification is provisional, courts follow a lenient standard that typically results in certification. Plaintiffs thus need only make a "modest" or "minimal" preliminary showing that they and the class members are "similarly situated."[12] Additionally, courts find that employees are "similarly situated" in cases where their "causes of action accrued in approximately the same manner as those of the named plaintiffs."[13] The result being that "courts in this circuit continue both to grant motions to certify FLSA collective actions and to authorize the sending of notice to potential opt-in plaintiffs."[14]

In fact, "When evaluating whether court-authorized notice is appropriate, the court does not resolve factual disputes, decide ultimate issues on the merits, or make credibility determinations."[15] Plaintiffs' burden to justify notice is so low that courts disregard a defendant's competing evidence.[16]

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[12] *See, e.g., Moore*, 2012 U.S. Dist. LEXIS 92675 at *33 ("The Court concludes that Plaintiffs have met their burden by making a *modest* factual showing to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law."); *Winfield v. Citibank, N.A.*, 843 F. Supp. 2d 397, 403 (S.D.N.Y. 2012) ("In this case, the plaintiffs have satisfied their minimal burden of showing that they are similarly situated to one another and to potential opt-in plaintiffs. Five plaintiffs, one opt-in plaintiff, and four declarants each allege that they were employed as Personal Bankers, a position classified as non-exempt, and were not always compensated for time worked in excess of forty hours per week."); *Pippins v. KPMG, Inc.*, No. 11 Civ. 0377, 2012 U.S. Dist. LEXIS 949 at *15-19 (S.D.N.Y. Jan. 3, 2012); *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819, 2006 U.S. Dist. LEXIS 73090, 9-10 (S.D.N.Y. Oct. 4, 2006).

[13] *Lewis v. Huntington Nat'l Bank*, 789 F. Supp. 2d 863, 868 (S.D. Ohio 2011); *Andrako v. U.S. Steel Corp.*, 788 F. Supp. 2d 372, 379 (W.D. Pa. 2011) ("Plaintiffs contend that this common pay practice outweighs any factual or employment differences . . . . After careful consideration, I agree with Plaintiffs that this factor of the analysis weighs against decertification.")

[14] *McGlone v. Contract Callers, Inc.*, 867 F. Supp. 2d 438, 443 (S.D.N.Y. 2012).

[15] *Diaz v. S&H Bondi's Dep't Store, Inc.*, No. 10 Civ. 7676, 2012 U.S. Dist. LEXIS 5683, at *10 (S.D.N.Y. Jan. 17, 2012) (internal quotation and citations omitted); *see also Winfield*, 843 F. Supp.2d at 402 (noting that at the conditional certification stage, "the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations" (internal quotation omitted)).

[16] *See, e.g., Winfield*, 843 F. Supp. 2d at 407 n.6 ("Courts in this Circuit regularly conclude that such declarations do not undermine the plaintiffs' showing in the first stage of the conditional certification process."); *In re Penthouse Executive Club Comp. Litig.*, No. 10 Civ. 1145, 2010 U.S. Dist. LEXIS 114743, at *4 (S.D.N.Y. Oct. 27, 2010) (noting defendants' submission of competing affidavits "amounts to a premature request to make credibility determinations and factual findings, something that is inappropriate at the notice stage"); *In re Deloitte & Touch Overtime Litig.*, No. 11 Civ. 2461, 2011 U.S. Dist. LEXIS 144977, at *6-7 (S.D.N.Y. Dec. 16, 2011); *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 U.S. Dist. LEXIS 135393 at *78 -80 (S.D.N.Y. Nov. 22, 2011) ; *Ravenell v. Avis Budget Car Rental*, No. 08-CV-2113, 2010 U.S. Dist. LEXIS 72563, at *13-16 (E.D.N.Y. July 19, 2010); *Canales v. 115 Broadway Corp.*, No. 09 Civ. 4674, 2009 U.S. Dist. LEXIS 86745, at *5 (S.D.N.Y. Sept. 22, 2009) (disregarding "voluminous" time and payroll records purporting to show lack of

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It is only during the second stage, after the close of discovery, and on a defendant's motion to decertify that courts apply a more searching inquiry to determine if the named and opt-in plaintiffs are actually "similarly situated" and the case should proceed collectively.[17] At the conditional certification stage, "it is sufficient . . . that plaintiffs attest to knowledge of similarly situated co-workers or complain of a company-wide policy."[18]

Here, four KPMG Plaintiffs, with a total of 37 years of experience, report personal experiences, along with KPMG's firm-wide compensation policies, uniform job descriptions, and statistical evidence – all of which support the motion for conditional certification. Plaintiffs have thus met, if not surpassed, their burden at this stage of the litigation. While KPMG previously argued that Plaintiffs should have moved for conditional certification and the issuance of notice earlier, Plaintiffs would not be able to cite this evidence without the discovery collected thus far – information that is made particularly necessary in light of KPMG's express intent to vigorously oppose conditional certification. Dkt. 100 at 15-16, 19. As this Court has previously noted, Defendants cannot "have it both ways,"

FLSA violations); *Levy v. Verizon Info Servs.*, No. 06 CV 1583, 2007 U.S. Dist. LEXIS 43223, at *12-14 (E.D.N.Y. June 11, 2007) (disregarding 100 declarations except to the extent that they favored plaintiffs' position).

[17] *See, e.g.*, *Myers*, 624 F.3d at 555; *Gortat v. Capala Bros.*, No. 07-CV-3629, 2010 U.S. Dist. LEXIS 35451, at *29-31. (E.D.N.Y. Apr. 9, 2010) (noting that that heightened scrutiny is only appropriate after both discovery and the opt-in period are complete); *Raniere*, 2011 U.S. Dist. LEXIS 135393 at*74-76. The "similarly situated" standard of 29 U.S.C. § 216(b) is, even on a stage-two decertification motion "considerably less stringent than the requirement of Rule 23(b)(3) that common questions predominate." *Ayers*, 2007 U.S. Dist. LEXIS 19634, at *16; *see also, e.g.*, *Myers*, 624 F.3d at 556 (noting the conditional certification inquiry "is quite distinct from the question whether plaintiffs have satisfied the much higher threshold of demonstrating that common questions of law and fact will 'predominate' for Rule 23 purposes"); *Diaz*, 2012 U.S. Dist. LEXIS 5683, at *11, ("[N]o showing of numerosity, typicality, commonality, or representativeness need be made. As a result, the 'similarly situated' standard for authoring that notice be made to potential opt-in plaintiffs is considerably more liberal than class certification under Rule 23."); *Pippins*, 2012 U.S. Dist. LEXIS 949, at *19-20 (holding that the fact that the Rule 23 standards are not applied to the certification of an FLSA collective action under § 216(b) "means that the Supreme Court's recent seminal class action decision in *Wal-Mart Stores, Inc. v. Dukes* . . . is inapplicable in the FLSA context"); *Ebbert*, 2007 U.S. Dist. LEXIS 53844, at *5; *Moore*, 2012 U.S. Dist. LEXIS 92675, at *37 (noting that most federal courts in New York have held that *Dukes* does not heighten the standard in section 216(b) cases and continue to apply the minimal standard). But even at the more stringent post-discovery second stage, courts favor certifying collective actions: "A close call as to whether Plaintiffs are similarly situated should be resolved in favor of certification." *Crawford v. Lexington*, No. 06-299, 2008 U.S. Dist. LEXIS 56089 at *7 (E.D. Ky. July 22, 2008).

[18] *Lewis v. Ambulette Serv. Corp.*, No. 11-CV-442, 2012 U.S. Dist. LEXIS 6269, at *19 (E.D.N.Y. Jan. 19, 2012); *see also Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008) (holding a plaintiff need only show "a 'reasonable basis' for his claim that there are other similarly situated employees"); *Winfield*, 843 F. Supp. 2d at 404 (S.D.N.Y. 2012) ("The plaintiffs need not demonstrate that they are similarly situated in every respect, provided they are similarly situated with respect to the FLSA violations they allege.").

arguing both that Plaintiffs should have moved sooner and still do not have enough to move.

B. There is Sufficient Evidence of a Common Discriminatory Scheme and its Disparate Effects.

Courts routinely grant conditional certification where, as here, Plaintiffs and the proposed class members have provided evidence to support their allegations of a "common discriminatory scheme."[19] Plaintiffs have provided evidence showing that KPMG has standardized compensation policies that apply to all employees in its Tax and Advisory practices. This evidence of a common policy regarding pay is substantially similar to the evidence submitted in *Moore v. Publicis Groupe SA*. No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675 (S.D.N.Y. June 28, 2012). In *Moore*, the court determined that this preliminary evidence of common pay policies, coupled with statistical evidence that the company paid women less than men, showed "that because of a common pay scale, [female employees] were paid wages lower than the wages paid to men for the performance of substantially equal work," and that this was sufficient to show that the plaintiffs were similarly situated under the EPA's conditional certification standard. *Id.* at 33. Plaintiffs' have provided a similar statistical analysis indicating that KPMG pays women less than men in all positions within its Tax and Advisory practices, and the statistical significant of this result is greater than 11 standard deviations.[20] *See* Ex. A.

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[19] *See, e.g., Rehwaldt v. Elec. Data Sys. Corp.*, No. 95-876, 1996 U.S. Dist. LEXIS 22125 at *13 (W.D.N.Y. Mar. 28, 1996) (("Although the information provided by the plaintiff is not strong or conclusive, given the remedial nature of the FLSA . . . without regard to the substantive merit of the . . . claims, the plaintiff has set forth a sufficient factual nexus that supports a finding that potential plaintiffs were subjected to a common discriminatory scheme"); *see also Winfield*, 843 F.Supp. 2d at 402 (holding plaintiffs need make only a "modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law").

[20] Notably, these results only capture the scale of the disparity within proper job title assignments. Plaintiffs have also provided evidence that they performed the same work as men in higher-ranking and higher-paid positions, and in those circumstances, the disparities will be even greater than those calculated to date. In *Ebbert v. Nassau County*, the court conditionally certificated the collective based on the plaintiffs' allegations that the company paid women with one job title less than men with another job title, even though the men and women in different job titles performed "substantially equivalent work." *Ebbert*, 2007 U.S. Dist. LEXIS 58344, at *4-7; *see also Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030-31 (8th Cir. 2002) (affirming a decision that the plaintiff was similarly situated to her supervisor); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 151 (3d Cir. 1985) ("The courts have been required to look beyond the job title to determine whether the jobs are substantially equal."); *Detholoff v. Buchanan*, No. 05-140, 2008 U.S. Dist. LEXIS 80844, at *6-7 (D. Ariz. Sept. 15, 2008) (noting that job titles are not dispositive for the similarly situated analysis under the EPA); *Payne v. Univ. of Ark. Fort Smith*, No. 04-2189, 2006 U.S. Dist. LEXIS 52806, 6-8 (W.D. Ark. July 26, 2006) ("Whether two jobs are substantial equal requires a practical judgment on the basis of all the facts and circumstances of a particular case, including

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C. There is Sufficient Evidence That KPMG's U.S. Offices Constitute One Establishment for Purposes of the EPA.

Plaintiffs have also provided evidence that all KPMG offices constitute a single establishment under the EPA. The EPA prohibits discrimination "within establishment in which such employees are employed," but does not define establishment based on geographical offices. *See* 29 U.S.C. 206(d)(1); *see, e.g.*, *Mulhall v. Advance Sec. Inc*., 19 F.3d 586, 591-92 (11th Cir. 1994) ("A reasonable trier of fact could infer that because of centralized control and the functional interrelationship between plaintiff and the comparators . . . a single establishment exists for purposes of the EPA."); *Brennan v. Goose Creek Consol. Ind. Sch. Dist*., 519 F.2d 53, 57-58 (5th Cir. 1975) (schools in same district were one establishment due to centralized personnel administration). Multiple locations of a business constitute one establishment when they share centralized operations.[21]

For example, in *American Federation v. Nassau*, the court took a functional approach to the EPA's establishment requirement, allowing notice to employees at multiple offices. 609 F. Supp. 695, 706 (E.D.N.Y. 1985). "[P]hysically separate work places can constitute a single establishment under the EPA if there is a significant functional interrelationship between the work of the employees in the various locations." *Id.*; *see also, e.g.*, *Diaz v. S&H Bondi's Dep't Store, Inc.*, No. 10 Civ. 7676, 2012 U.S. Dist. LEXIS 5683, at *6 (S.D.N.Y. Jan. 17, 2012) (finding that courts have found employees to be similarly situated, though they worked in different locations, as long as they complain about the same unlawful compensatory practice); *Garner v. G.D. Searle Pharma. & Co.*, 802 F. Supp. 418 (M.D. Ala. 1991) (both plaintiffs worked as sales representatives in Alabama; discussing potential EPA claims of female sales reps in defendant's Southern Region and authorizing notice to all similarly-situated

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factors such as level of experience, training, education, ability, effort and responsibility. Differences in job titles or classifications are not dispositive." (internal quotation and alteration omitted)).

[21] *See also Rehwaldt*, 1996 U.S. Dist. LEXIS 22125, at *15-18; *AFSCME v. Cty. of Nassau*, 609 F. Supp. 695, 705-706 (E.D.N.Y. 1985) ("I do not believe that it can be said 'beyond doubt' that plaintiffs could not prove that the operations of Nassau County are sufficiently centralized and interrelated so that the entire County constitutes a single establishment under the EPA."); *Glodek v. Jersey Shore State Bank*, 2009 U.S. Dist. LEXIS 77118, at *25 (M.D. Pa. Aug. 28, 2009) (multiple offices were one establishment as "corporate office dictated the conditions of employment").

employees). This reading of "establishment" in the EPA is part of 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." *Mulhall*, 19 F.3d at 591.

D. The Named Plaintiffs Are Similarly Situated to All Potential Collective Members.

Plaintiffs have provided sufficient evidence that Named Plaintiffs are similarly situated to the proposed collective. In *Moore*, Plaintiffs submitted evidence showing that job descriptions were consistent across geographic locations and that employees with the same job titles were expected to perform equivalent duties regardless of location. 2012 U.S. Dist. LEXIS 92675, at *30-37. In determining that this evidence was sufficient to show that proposed collective was similarly situated both to each other and to the Named Plaintiffs, the court noted:

> The submitted information shows that these females worked in various offices across the nation, but had similar responsibilities, despite geographic location. They worked on different client accounts, but the work was similar throughout each account and both male and female employees in other offices, with the same titles, performed substantially the same work as members of the putative class."

Moore, 2012 U.S. Dist. LEXIS 92675, at 29-30.

Furthermore, it is unnecessary to produce evidence related to employees in each geographic location or job category. Evidence from a small percentage of the class will suffice.[22] In *Rochlin v.*

[22] *See, e.g.*, *Mazur v. Olek Lejbzon & Co.*, No. 05 Civ. 2194, 2005 U.S. Dist. LEXIS 30321, at *14-18 (S.D.N.Y. 2005) (holding three affidavits were sufficient to authorize notice to employees in nine job classifications who worked for four different companies); *Harris v. Vector Mktg. Corp.*, No. C-085198, 2010 U.S. Dist. LEXIS 56110, at *6 (N.D.Ca. May 18, 2010) ("A handful of declarations may suffice."); *Winfield*, 843 F.Supp. 2d at 407 (evidence from ten employees at thirteen branches sufficient to show violations across all Citibank locations); *Pippins*, 2012 U.S. Dist. LEXIS 949, at *3-9 (authorizing nationwide notice based largely on six declarations from employees in six states); *Karic v. Major Auto Cos.*, 799 F. Supp.2d 219, 226-27 (E.D.N.Y. 2011) (authorizing notice to at least 150 employees at nine entities based on the complaint and eight declarations, despite the fact that there were no plaintiffs employed by three of the entities and no relevant declarations pertaining to these entities); *Schwerdtfeger v. Demarchelier Mgmt.*, No. 10 Civ. 7557, 2011 U.S. Dist. LEXIS 60338, at *2 (S.D.N.Y. June 6, 2011) (authorizing notice to a collective of more than sixty employees in five positions even though the plaintiffs, who submitted four declarations, worked in only two); *Ravenell*, 2010 U.S. Dist. LEXIS 72563 at *11-12 (authorizing notice to approximately 1,100 employees in 1,000 facilities nationwide even though the seven plaintiffs worked in only three locations); *Cano v. Four M Food Corp.*, No. 08 Civ. 3005, 2009 U.S. Dist. LEXIS 7780, at *28-29 (E.D.N.Y. Feb. 3, 2009) (certifying class of employees at all locations whose duties "can be broadly characterized as general maintenance work," including "shelf stockers, grocery baggers, food packers and wrappers, delivery truck unloaders and loaders, shopping cart retrievers, bathroom cleaners, and . . . general maintenance staff"); *Rubery v. Buth-Na-Bodhaige, Inc.*,

Cincinnati Ins. Co., the Court approved notice to current and former female employees of the Headquarters Claims and Field Claims Departments, as well as female attorneys who acted as in-house counsel, based only on "evidence tending to indicate that 'at least some' female employees were paid less than their equally qualified male counterparts, and that those employees are similarly situated to plaintiffs." No. 00-1898, 2003 U.S. Dist. LEXIS 13759, at *44-51 (S.D. Ind. July 8, 2003). As evidenced in *Rochlin*, while Plaintiffs have provided substantial evidence as to the similarities between the experiences of the Named Plaintiffs in this claim and those of potential collective action members, the employment situations or claims of all notified employees need not be the same. Courts broadly authorize notice to employees allegedly affected by a common policy or practice regardless of job title, location, or reporting relationships: "Class treatment… is not defeated simply because, as here, the plaintiffs performed a variety of jobs in a number of departments at different locations."[23]

In short, Plaintiffs have introduced ample evidence that the Named Plaintiffs perform substantially equivalent work to all other members of the proposed collective for purposes of the EPA, and that all of the members of the proposed collective are "similarly situated" with regard to their EPA claims.

569 F. Supp.2d 334, 337 (W.D.N.Y. 2008) (certifying class of store managers in over 300 locations based on affidavits and time records "indicative of a common policy or plan").

[23] *Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988); *see also, e.g.*, *Diaz*, 2012 U.S. Dist. LEXIS 5683, at *18-19 ("Courts have found employees 'similarly situated'…where they performed different job functions or worked at different locations, as long as they were subject to the same allegedly unlawful policies."); *Schwerdtfeger*, 2011 U.S. Dist. LEXIS 60338, at *12-13 ("Courts have found employees to be similarly situated for purposes of conditional certification despite differences in…job functions or the details of their claims."); *Cano*, 2009 U.S. Dist. LEXIS 7780, at *13 (holding that "variations in specific duties, job locations, working hours, or the availability of various defenses are examples of factual issues that are not considered at this stage."); *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128 (N.D. Ca. 2009) ("Courts routinely grant conditional certification of multiple-job-title classes").

IV. Relief Requested

In light of the substantial evidence that Plaintiffs and potential opt-in collective action members are similarly situated with respect to their EPA claims, and the weight of authority in favor of stage-one certification of collective actions, Plaintiffs request the Court order that Notice be issued to all women employed in at least one of the eleven jobs described herein for at least one day after October 17, 2008. Such notice is consistent with the remedial purposes of the EPA, which allows broad notice to employees who may be victims of the alleged unlawful practices, thus enabling employees to preserve their claims and provide evidence to support tolling and to show they are, in fact, similarly-situated to Plaintiffs. Under the two-stage process for certifying EPA actions, the Court would revisit certification following notice and the completion of discovery. Courts recognize that "it is best to authorize a collective action and then wait to see what the facts bear out," particularly as "the sending of notice does not prejudice the defendant precisely because it is preliminary and may be revisited if it later appears, after appropriate discovery, that the additional plaintiffs who opt to join the lawsuit, if any, are not similarly situated."[24]

While the three-year statute of limitations under the EPA would typically limit notice to those individuals employed in the relevant roles from October 2010 to the present, as discussed above, this Court has already ruled that notice should go out to individuals employed at the Company over a longer period of time. *See* Sec. I, *supra*, at 5. Specifically, the Court ordered that if and when notice was issued, it should be issued in such a way that it did not "cut off or in any way prejudice the claims of people who would be able to bring those claims if I granted [Plaintiffs'] motion for equitable tolling." *See* Dkt. 100, at 21, 25. Had the Court granted Plaintiffs' motion for equitable tolling, the collective would have included employees who worked in the relevant positions for at least one day since October 17, 2008.

[24] *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 55-56 (S.D.N.Y. 2005) (citations omitted).

There are two sets of individuals who, consistent with this Order, should receive special notice: (1) those individuals who were employed by KPMG sometime during the time period of October 17, 2008, and October 30, 2010, but who were no longer at the Company as of October 31, 2010 ("Equitable Tolling Dependents"); and (2) those individuals who were employed by KPMG sometime during the time period of October 17, 2008, and October 30, 2010, and continued on beyond that date ("Equitable Tolling Partial Dependents"). These two groups of potential opt-ins, in contrast with those individuals who only worked at KPMG from some time on or after October 31, 2010 ("Non Tolling Individuals"), will not have all of their claims secured simply by opting in. Instead, they must first opt-in and then second await the Court's subsequent ruling on equitable tolling before the viability of some or all of their claims is determined. The potential opt-ins whose claims depend in part or in all on equitable tolling should have the opportunity to elect to provide more information that might support a renewed motion for equitable tolling. The most reasonable approach for this process would be to have the Equitable Tolling Dependent and Partial Dependent Opt-Ins contact Plaintiffs' Counsel, should they choose, to provide the necessary information as to why those individuals did not opt-in earlier.

In addition, any notice should contain clear language explaining that it is illegal for employers to retaliate against employees for exercising their federally granted rights, so employees are aware that opting-in or seeking to opt-in is a protected activity and that retaliation is prohibited by law. Courts in this jurisdiction routinely include such provisions in collective action notices.[25] An anti-retaliation provision is particularly important in this case, as KPMG terminated or constructively discharged each one of the Named Plaintiffs after she raised internal complaints or filed complaints of gender

[25] *See, e.g., Sanchez v. Gansevoort Mgmt. Group, Inc.* No. 12 Civ. 75, 2013 U.S. Dist. LEXIS 9739, at *6, 11 (S.D.N.Y. Jan. 10, 2013) (authorizing notice that includes a provision explaining retaliation is prohibited by federal law); *Hallissey v. Am. Online, Inc.*, No. 99-CIV-3785, 2008 U.S. Dist. LEXIS 18387, at *12 (S.D.N.Y. Feb. 19, 2008) (authorizing notice containing an anti-retaliation provision over the defendant's objection because potential opt-ins "are entitled to know that it is a violation of the FLSA for [the defendant] to retaliate against them for exercising their right to opt in to the litigation" (internal quotation omitted).

discrimination. As such, a strong statement assuring potential collective members that the law protects them from retaliation is warranted.

Finally, the opt-in period should be set for at least 120 days, and individuals should be able to submit their opt-in form by email, fax or hard copy. Plaintiffs are happy to provide a draft of three potential notices should that be helpful to the Court: (1) Notice to Non-Tolling Individuals; (2) Notice to Equitable Tolling Partial Dependents; and (3) Notice to Equitable Tolling Dependents.

V. Conclusion

Under the lenient standard governing EPA conditional certification, Plaintiffs' evidence is more than sufficient to certify the class and issue notice, so employees have the opportunity to preserve their rights under the EPA and participate in the collective action.

DATED: November 6, 2013

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONNA KASSMAN, LINDA O'DONNELL, SPARKLE PATTERSON, JEANETTE POTTER AND ASHWINI VASUDEVA, individually and on behalf of a class of similarly-situated female employees,	)	**Civ. No. 11-CV-3743 (LGS)**
Plaintiffs,	)	**Jury Trial Demand**
v.	)	
KPMG LLP,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Memorandum of Law in Support of Plaintiffs' Motion for Conditional Certification and Authorization of Notice was served November 6, 2013 upon the following counsel of record via electronic mail.

I hereby certify that a true and correct copy of Exhibit A to the Memorandum of Law in Support of Plaintiffs' Motion for Conditional Certification and Authorization of Notice was served November 6, 2013 upon the following counsel of record via electronic mail.

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