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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STEVE RABIN and JOHN CHAPMAN, on behalf of themselves, and all others similarly situated,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

Case No. 16-cv-02276-JST

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CONDITIONAL COLLECTIVE ACTION CERTIFICATION AND ISSUANCE OF COURT-AUTHORIZED NOTICE PURSUANT TO 29 U.S.C. § 216(b)

Date:	November 1, 2018
Time:	2:00 p.m.
Courtroom:	9, 19th Floor
Judge:	The Honorable Jon S. Tigar

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INTRODUCTION

The Ninth Circuit's emphatic lowering of the bar for 216(b)'s "similarly situated" standard in *Campbell v. City of Los Angeles* last week underscores how well-suited this case is to proceed to notice and further discovery at this early stage. – F. 3d – , No. 15-56990, 2018 WL 4354379, at *18 (9th Cir. Sept. 13, 2018). Plaintiffs here present allegations and evidence far beyond mere "plausibility" or pleadings "sometimes . . . supplemented by declarations or limited other evidence." *Id*. at *11. The proposed collective of qualified older applicants to three similar positions are "similarly situated" because "they share a *similar issue of law or fact material* to the disposition of their [ADEA] claims," *id.* at *18 (emphasis added): whether PwC's challenged constellation of uniform hiring practices have a disparate impact or intentionally discriminate against older applicants.

Plaintiffs' revised collective definition addresses the Court's concern in *Rabin v. PricewaterhouseCoopers, LLC*, No. 16-cv-02276-JST, 2018 WL 3585143, at *4 (N.D. Cal. July 26, 2018) ("*Rabin I*") that unqualified applicants cannot be included, by hewing to PwC's own definition of minimum qualifications – requiring a 3.0 GPA, a degree in a relevant field, a commitment to obtain a CPA, and, for Experienced and Senior Associate applicants, minimum levels of experience. This is a reasonable collective of individuals who share at least one "similar" legal or factual issue.

PwC does not spend much effort contesting this; rather, it raises questions about the logistics of compiling the notice list. But PwC has already compiled applicants' qualifications during the application process, using its powerful database (Source1). PwC then used its knowledge of those qualifications (mixed with subjective assessments of candidates' "fit," which are subject to bias) to determine which applicants to invite for interviews and further evaluation. After the Court rules, the parties can collaborate to check PwC's applicant data and internal guidance to recruiters about minimum qualifications to note what PwC has already determined constitute relevant fields and experience. Notice can then be sent to a few thousand potential

opt-ins, excluding those who facially fail those minimum qualifications (the "Notice List"). The Notice will include an Attachment detailing the information on PwC's minimum qualifications (e.g., relevant fields and experience) compiled by the parties. Individuals who meet the collective definition, by reference to the Attachment, can decide whether to opt in.

PwC's opposition suffers from an attempt to ratchet up the certification standard well beyond even the old requirements, let alone *Campbell*'s lowered bar. PwC improperly collapses stage-one certification, stage-two certification, Rule 23, and summary judgment: The specter of "mini-trials" and the merits question of whether particular hiring practices are lawful have no bearing on the 216(b) stage-one analysis. *Campbell* even warns that a stage-one motion cannot be denied because issues are merely "procedurally challenging." *Id.* at *18. Rather, the collective must be certified simply because the collective members share similar issues. Once notice issues, opt-ins join, and discovery proceeds, the Court can "take a more exacting look," based on a fuller record. *Campbell*, 2018 WL 4354379, at *12.

ARGUMENT

I. Plaintiffs Surpass the Ninth Circuit's New Lowered "Similarly Situated" Standard.

Under both old authority and the Ninth Circuit's new 216(b) guidance, Plaintiffs far surpass the lenient standard for notice dissemination.[1] *Campbell*,[2] at *18 ("reject[ing]" the trend of imposing a higher standard than what 216(b)'s "similarly situated" standard requires). Plaintiffs have resoundingly shown that "they share a similar issue of law or fact material to the disposition of their [ADEA] claims." *Id.* The stage-one standard is "loosely akin to a plausibility standard, commensurate with the stage of the proceedings," typically satisfied by the

[1] The Ninth Circuit clarified that the term conditional "certification" is a "misappropriation[] from the Rule 23 context", because it "calls to mind an affirmative decision by the district court . . . . Yet, unlike in the Rule 23 context, the district court in a collective action plays no such gatekeeping role. Preliminary certification in the FLSA context does not 'produce a class with an independent legal status. . . . [rather, t]he sole consequence" is the sending of notice. *Campbell*, at *4 (internal quotation marks and citation omitted).

[2] For readability, this brief will not continue to repeat *Campbell*'s Westlaw cite.

pleadings, "sometimes" supplemented "by declarations or limited other evidence." *Id.* at *11. The standard is far lower than the Rule 23 standard, and also "lower in some sense even than Rules 20 and 42," because those rules are discretionary, while 216(b) "declares a right to proceed collectively" if its conditions are met. *Id.* at *14. "[T]he two-step process . . . has the advantage of ensuring early notice of plausible collective actions, then eliminating those whose promise is not borne out by the record." *Id.* at *12.

Even under the old higher standard, this Court found that "Plaintiffs have adequately shown a uniform decision, policy, or plan on the basis of PwC's centralized and uniform hiring policies, and the substantial evidence of age disparities in hiring." *Rabin I*, 2018 WL 3585143, at *4. With a proper collective definition of qualified applicants established, the task will shift to compilation of the notice list and confirmation of the opt-in process.

In its opposition, PwC does not deny that minimally qualified applicants who were subject to PwC's uniform policies are "similarly situated." Instead, PwC focuses on supposed difficulties in the process for issuing notice to these qualified collective members. However, *Campbell* prohibits courts from refusing to certify, let alone decertifying a collective, due to "likely inconvenience." *Campbell*, at *18. The collective must proceed even if "procedurally challenging," as opposed to "truly infeasible." *Id.* In any case, each of PwC's concerns are unfounded and exaggerated, as discussed below.

II. PwC's Minimum Qualifications Are Similar Across the Covered Positions.

"PwC requires applicants to have a degree in a relevant field, have earned a minimum undergraduate GPA, and, for Experienced and Senior Associate positions, relevant work experience." *Rabin I*, 2018 WL 3585143, at *5; *see also* Initial Opp. at 13 [Dkt. No. 211] ("PwC requires applicants to meet strict qualifications for Covered Positions" then listing the same three qualifications). These entry-level "Associate" accounting roles (below Manager, Director, Partner, and other managerial roles) have understandably modest requirements: 3.0 GPA, a degree in a relevant field, and at least 1-2 years of experience for Experienced Associates and 2-4 years for Senior Associates (no experience required for Associates). Renewed Mot. at 17 [Dkt.

No. 241].

III. PwC Collects Qualifications Data from Applicants.

PwC collects detailed qualifications data from applicants via forms like the "Gateway Questionnaire" and "Talent Profile," storing them in its applicant database (Source1). Initial Opp. at. 13 (describing how applicants submit a resume and complete an online form); *id.* at 14 ("a candidate's written application materials" are used "to confirm that she meets basic qualifications and preferred skills"). PwC designed this process to be uniform (so that all applicants for a position would be subject to the same qualification standards) and efficient (allowing recruiters to smoothly sort 86,782 applicants, select 27,805 applicants to interview, and make 13,932 job offers, presumably without the assistance of lawyers or courts). *See* Ex. 33 (Second Supplemental Report), Table 8; Initial Opp. at 13-14. (Plaintiffs do not have access to any of the qualifications data – except for the two named Plaintiffs – given the early stage of litigation.[3]) The named Plaintiffs' Source1 data show their qualifications (e.g., GPA, majors, and experience). Ex. 1 (PWC_0000070) (Chapman employment application); Ex. 2 (PWC_0000400) (Rabin employment application).[4] Based on this information, PwC could conclude that they were "facially qualified: they possessed a college degree in a relevant major,

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[3] Astonishingly, PwC states that "Plaintiffs had an opportunity to request data from PwC" and somehow failed to do so. Renewed Opp. at 4-5 & n.4. In reality, PwC opposed Plaintiffs' motion to compel data, ECF No. 96, successfully limiting its production to a class list with contact information, position, line of service, and application outcome, but no data regarding qualifications or PwC's impressions of candidates. The Court held that such data were not necessary for this motion. ECF No. 105 at 3. Recently, Plaintiffs again requested qualifications data and PwC again refused. *See* ECF No. 249-6 at 4; ECF No. 249-6 at 2-3; ECF No. 236 at 10-12. Similarly, the data deposition focused on database structure and data extraction logistics (in response to PwC's assertion that an export would be unduly burdensome), not the content of the data fields (information that PwC has not produced). *See* Renewed Opp. at 5 n.5.

[4] In analyzing the Source1 data that Plaintiffs do not have, PwC argues that seven data fields it cherrypicked from Plaintiffs' request of about 143 qualifications fields are rarely populated in Source1, Renewed Opp. at 5 n.6, but refused to provide information about the other 136 fields (or identify other fields that would be useful indicators). *See* Ex. 3 (Aug. 7, 2018, J. Sagafi email and attachment).

had attained the required GPA, and had passed the CPA examination." *Rabin I*, 2018 WL 3585143, at *5.

IV. Plaintiffs Present a Reasonable Way to Disseminate Notice.

A. The Notice List Can Be Pulled from PwC's Data, and Individuals Satisfying the Collective Definition Can Choose Whether to Opt in.

As in any collective action, Plaintiffs can send notice to all individuals who appear to satisfy the minimum requirements based on PwC's applicant data (the "Notice List"). The Notice List will comprise all older applicants to the Covered Positions during the relevant time period who are not facially unqualified based on PwC's Source1 data (i.e., where PwC's data are incomplete or show the individual to be facially qualified, she will be included). The Notice will have attachments listing the college majors and work experience deemed relevant by PwC, to confirm the definition of "minimum qualifications." Recipients will review the attachments to the Notice, determine if they satisfied the minimum qualifications when they applied to PwC, decide whether to opt in, and, if so, sign the consent to join form affirming that they satisfy the collective definition. Below is a detailed description of the three steps required here.

Step One: Defining "relevant" majors and experience. PwC knows what it considers to be "relevant" college majors and prior work experience as required minimum qualifications, but discovery has not focused on this question. PwC's definition of relevant majors and experience can be confirmed using either or both of two simple methods. First, PwC can copy the data entries in the relevant Source1 fields for college major and work experience from each successful applicant, to compile a list of entries that meet minimum requirements. Second, PwC can share the instructions it gives to its recruiters who cull applications to weed out unqualified applicants.[5]

[5] An applicant either has minimum qualifications or does not. If the inquiry is murkier than that, then the inquiry is no longer about minimum qualifications – it is about the employer's subjective preferences, which Plaintiffs challenge as subject to bias.

Step Two: Filtering PwC's Source1 data. PwC will then be able to compile the Notice List. Specifically, using the results from step one, and in cooperation with Plaintiffs, PwC will filter the Source1 data to exclude "facially unqualified" unsuccessful older applicants, *Rabin I*, 2018 WL 3585143, at *5, and assemble a list of applicants who met the minimum qualifications (3.0 GPA and relevant major for Associates, and relevant experience for Experienced and Senior Associates; or by reference to a field reflecting a summary assessment of basic qualifications). The individuals who are not facially unqualified (i.e., those clearly qualified and those for whom data are not dispositive)[6] will comprise the Notice List.

Step Three: Dissemination of Notice to the Notice List. Notice will be disseminated to the individuals on the Notice List. The definition of minimum GPA, relevant major, relevant experience, and CPA or a commitment to obtain one[7] (as a list of entries or a description) will be attached as an Appendix to the Notice, so that recipients can confirm whether they met the minimum qualifications as defined by PwC. Each recipient will review the Notice and Appendix, confirm whether she met the minimum qualifications at the time of application and meets all other aspects of the collective definition, and if so, decide whether to opt in.

B. PwC's Objections to this Process Are Inconsistent with the Law.

1. Defendants Routinely Compile Notice Lists.

Compiling the notice list is routinely done by the defendant employer, since it holds the necessary data. *See, e.g.*, *Deatrick v. Securitas Sec. Servs. USA, Inc.,* No. 13-cv-05016-JST, 2014 WL 5358723, at *5 (N.D. Cal. Oct. 20, 2014) ("Courts routinely require defendants to produce the contact information of putative class members"). This is so even when defendants

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[6] Declarant Darryl Tolliver, highlighted by PwC, Renewed Opp. at 6, is illustrative. His declaration is silent as to one qualification – CPA or commitment to get one. This does not make him unqualified; a high-level PwC employee said he *was* qualified, Ex. 24 (Tolliver Decl.) ¶ 6, as he had a degree in Finance and relevant experience. Barring Mr. Tolliver's participation would be inappropriate, unless he stated his refusal to obtain a CPA.

[7] A "commitment to obtain a CPA license" is a state of mind and therefore can be confirmed by opt-ins attesting that they had such a commitment at the time of application.

may be required to engage in factual inquiries and expend some measure of time and resources to identify collective members. *See, e.g.*, *Ribot v. Farmers Ins. Grp.*, No. 11 Civ. 02404, 2013 WL 3778784, at *18 (C.D. Cal. July 17, 2013), *modified on clarification,* No. 11 Civ. 02404, 2013 WL 5351085 (C.D. Cal. Sept. 24, 2013) (certifying collective of employees who held a specified job title "or a similar . . . position" with the same central duties); *Deatrick*, 2014 WL 5358723, at *4 (ordering defendant to produce class list for all employees who worked under one of several enumerated policies governing vacation pay); *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128-29 (N.D. Cal. 2009) (Wilken, J.) (ordering defendants to produce collective list of exempt employees whose job responsibilities entailed specified primary duties, "including but not limited to network engineers"); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294, 299, 310 (N.D. Cal. 1991) (Jensen, J.) (ordering defendants to produce names of collective members whose employment terminated over an three-year period "as a result of" the company's reorganization through various means including discharge, constructive discharge, forced resignation, "or otherwise").[8] PwC's argument that certification should be denied whenever a plaintiff fails to identify an "automated" method for generating the notice list, Renewed Opp. at 4 [Dkt. No. 249], is utterly unsupported.

2. The Notice List Can Be Broader Than the Collective Definition; Defendants' Data Deficiencies Generally Result in Overinclusive Notice.

PwC's suggestion that the Notice List and the collective definition must be identical is conspicuously unsupported by authority, because it is wrong. Renewed Opp. at 12 (notice must be "sent only to those applicants that are similarly situated"); *id.* at 8 (arguing that notice to an "overbroad group" is unprecedented). The two concepts address different purposes: the Notice List provides information to people so that they can decide whether to opt in, and the collective

[8] *Cf. Byrd v. Aaron's Inc.*, 784 F.3d 154, 170-71 (3d Cir. 2015), *as amended* (Apr. 28, 2015) ("There will always be some level of inquiry required to verify that a person is a member of a class. . . . Such a process of identification does not require a 'mini-trial,' nor does it amount to 'individualized fact-finding;" rather it is something that "must be done in most successful class actions").

definition defines who is eligible to opt in. Within reason, there is no harm in sending notice to too many people.[9]

Indeed, courts routinely do so, even in the more restrictive Rule 23 context. For example, in a wage and hour class action, Judge Orrick held that "the best notice practicable" may be "notice to a group that was broader than the class definition." *Bowerman v. Field Asset Servs., Inc.*, No. 13-cv-00057-WHO, 2015 WL 5569061, at *4 (N.D. Cal. Sept. 21, 2015). Judge Orrick rejected the same argument PwC asserts here, holding that overinclusive notice "d[id] not implicitly rewrite the class definition" or "transform individuals who would not otherwise qualify as class members into such, simply because they received the class notice." *Id.*; *see also Alberton v. Commonwealth Land Title Ins. Co.*, No. 06 Civ. 03755, 2010 WL 1049581, at *3-4 (E.D. Pa. Mar. 17, 2010) (rejecting argument that proposed mailing list for class notice was improper because it "does not track the contours of the class certified by the Court" and noting that "the notice proposed by plaintiffs is merely a notice of the pendency of the class action and does not guarantee that an individual receiving a . . . notice is entitled to participate"); *cf. Pizano v. Big Top Party Rentals, LLC*, No. 15 Civ. 11190, 2018 WL 2193245, at *5 (N.D. Ill. May 14, 2018) ("the Court is inclined to be overinclusive with respect to who receives the § 216(b) notice").

Overinclusiveness is even more common in consumer cases, where a retailer may not maintain transaction data. *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 237 (N.D. Cal. 2014) (Tigar, J.) (Rule 23 certification appropriate where the "class definition is based on objective criteria that do not depend on the resolution of the merits"); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (Seeborg, J.) (Rule 23 certification granted despite lack of identifying records); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (class members' identities need not be known at the time of certification). The Ninth Circuit has affirmed Rule 23

[9] In contrast, there is harm in excluding those who are eligible. Collective members have a "*right* to proceed collectively" if they are similarly situated. *Campbell*, at *33-34 (emphasis added).

certification even where the plaintiffs could not "proffer a reliable way to identify" class members and the class members "would not be able to reliably identify themselves." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123-25 (9th Cir. 2017), *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno,* 138 S. Ct. 313 (2017). This is why Rule 23 allows for publication notice (which is usually vastly overinclusive).

Self-certification by opt-ins is a ready solution. Courts also regularly approve notice procedures that require recipients to certify that they meet the class definition. For example, in *White v. Experian Info. Sols. Inc.*, No. 05 Civ. 1070, 2010 WL 11515655, at *3 (C.D. Cal. Dec. 14, 2010), the settlement procedure "rightfully erred on the side of overinclusiveness," making it "entirely likely" that notice was disseminated to non-class members. *Id.* at *3-4. In order to "screen[] out individuals who did not qualify for settlement relief," however, notice recipients were instructed to attest to their "belief" that they fit the class definition as part of the claims submission process. *Id.* at *4; *see also Brewer v. Salyer*, No. 06 Civ. 1324, 2010 WL 1558413, at *1-2 (E.D. Cal. Apr. 19, 2010) (RICO class action where notice was disseminated to overinclusive group due to limitations of available class records, along with requirement that recipients attest that they met various qualification requirements). Concerns about the accuracy of "self-serving affidavit[s]" as proof of class membership need not be resolved even at Rule 23 certification. *Briseno*, 844 F.3d at 1132.[10]

C. A Meet and Confer Procedure Is Appropriate Following 216(b) Certification.

To the extent issues arise at any step in Plaintiffs' proposed process, the proper procedure is for the parties to meet and confer and resolve disputes, if any. This is common after 216(b) certification.[11] For example, in *Heath v. Google Inc*., the defendant argued that it faced an

[10] PwC's analysis of Sherene Lane-Pryce, Renewed Opp. at 9, illustrates how this process will work. If PwC confirms that Criminal Justice, English, and Public Administration are not "relevant" majors, she does not fit the collective definition. Her subjective belief that she was "highly qualified" as a general matter is irrelevant. She will understand that regardless, she does not fit in this particular case. She can bring a separate lawsuit if she wishes.

[11] Collectives are sometimes narrowed as discovery unfolds, including by stipulation. *See, e.g.*, Ex. 4 (*Strauch v. Computer Scis. Corp.*, No. 14 Civ. 956, ECF No. 339 (D. Conn. Aug. 1, 2017))

"overwhelming burden" in developing a collective list because it allegedly did not maintain age data on job applicants. 215 F. Supp. 3d 844, 859 (N.D. Cal. 2016) (Freeman, J.). Therefore, "*after briefing* on Plaintiffs' motions to conditionally certify collective actions *was completed*, the parties filed a joint case management statement addressing these issues." *Id.* (emphasis added). The court then ordered the parties to meet and confer as to "how to use" applicant data in Google's database "to identify the candidates" to whom notice should be sent. *Id.* Two months later, the parties jointly proposed notice and consent to join procedures, *Heath*, No. 15-cv-1824-BLF, ECF No. 125 (N.D. Cal Dec. 6, 2016), which the court ultimately approved. *Id.*, ECF No. 126; *see also Sanchez v. Sephora USA, Inc.*, No. 11-cv-03396-SBA, 2012 WL 2945753, at *5 (N.D. Cal. July 18, 2012) (ordering parties to meet and confer regarding defendant's argument that it needed more time to compile a collective list, observing that notice-related issues "typically [are] resolved by mutual agreement among the parties"); *Deane v. Fastenal Co.*, No. 11-cv-00042-SI, 2011 WL 5520972, at *4 (N.D. Cal. Nov. 14, 2011) (ordering parties to meet and confer where defendant objected to plaintiff's proposed notice as "overbroad and misleading").

D. PwC's Interview Decisions Should Not Be Used to Exclude Qualified Collective Members from the Collective Definition.

Notably, PwC does not contest Plaintiffs' showing that PwC's interview screen rejects applicants based on *more* than just minimum qualifications (e.g., based on a bias-prone assessment of "fit") and therefore excludes many qualified older applicants (e.g., Plaintiff Chapman). Renewed Opp. at 12. Plaintiffs' suspicions about the validity of the interview screen are supported by the age difference in interview rates: 11.8% of older applicants get an interview compared to 34.4% of younger applicants.[12] This demonstrates that PwC's interview invitation

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(stipulation to carve one of three positions from certified collective) (Outten & Golden as counsel); *Strauch*, 2017 WL 5972886, at *4 (D. Conn. Nov. 30, 2017) (denying decertification before successful jury trial).

[12] An interview invitation would confirm collective membership; the inverse is not true.

is simply one link in the chain of biased decision-making that Plaintiffs challenge, rather than a neutral sorting for facially unqualified applicants.[13]

PwC proposes that the collective be limited to those interviewed. Renewed Opp. 11-12.[14] However, PwC should not be allowed to exclude collective members based on a filter that Plaintiffs challenge as discriminatory. *Heath*, the primary authority on which PwC relies, does not require acceptance of a defendant's interview decisions. Rather, Judge Freeman wisely rejected a request from one plaintiff (Heath), while granting that of a competing plaintiff (Fillekes). Heath (1) asked Judge Freeman to certify a 630,000-person collective of all older applicants, regardless of qualifications, (2) rejected "the similarly situated analysis," (3) offered "no evidence beyond his own speculative beliefs" of similar situation, and (4) moved four months late. *Id*. at 856-58 & n.6. Judge Freeman had no choice but to reject this sprawling collective (over 60 times the size of Plaintiffs' proposed collective here). *Id*. at 857.

In a subsequent order denying decertification, Judge Freeman confirmed that the collective members' "qualifications support[] a finding that there is a meaningful nexus that binds the Plaintiffs together." *Heath II*, at 21-22 (quotation marks omitted). The court also "note[d] the remarkable difference" in offer rates, *id.* at 22; here, the difference is 2.7% (older) vs. 17.6% (younger). Ex. 31 (Neumark Report), Table 1. Interview decisions can be one way to exclude unqualified applicants, but they are not the only one. *See, e.g*., *id.* at 21-22 (rejecting argument that candidates who advanced to the "Hiring Committee" stage were differently situated than those who did not, as making "too fine a point"); *Pines v. State Farm Gen. Ins. Co*.,

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[13] A "systematic policy" of discrimination "is no less common across the collective if those subject to it are affected at different times, at different places, in different ways, or to different degrees." *Campbell*, at *17; *see also Heath v. Google, Inc. ("Heath II")*, No. 15-cv-1824-BLF, ECF No. 337 (N.D. Cal. Aug. 27, 2018) at 19-20 (decertification rejected because, even if "some Plaintiffs were ensnared by different filters than others," all were subject to employer's "umbrella" hiring policy encompassing several component parts that "combine to . . . discriminate").

[14] Given that only 1,075 of 9,103 older applicants are interviewed, it is understandable that PwC would want to slice the collective to 1/8 its potential size. At a 10% opt-in rate, that is the difference between a 108- or 910-person collective.

No. 89 Civ. 631, 1992 WL 92398, at *8 (C.D. Cal. Feb. 25, 1992) (certifying a class of all applicants over 45 regardless of interview status). The proposed collective here, excluding unqualified applicants, "share[s] a similar [material] issue of law or fact." *Campbell*, at *18.

V. PwC's Remaining Arguments Are Unfounded and Premature.

PwC's argument that the qualifications for different positions vary, Renewed Opp. at 5-6, reflects its effort to collapse the entire litigation – notice, decertification, merits, and remedies – into the initial notice phase. *See Heath II*, at 12 (denying decertification where defendant "emphasize[d] differences that largely apply to [*Teamsters*] phase two . . . or the merits"). Even at the decertification stage, a collective can survive with some diversity. *See id.* at 21 (noting "differences among the 'three job families'. . ., job roles, and job levels (i.e., manager/non-manager)"). All that is needed, even at decertification, is "a legal or factual similarity material to the resolution of the party plaintiffs' claims, in the sense of having the potential to advance these claims, collectively, to some resolution." *Campbell*, at *16.

Similarly, PwC skips ahead to the merits when it notes that practices like campus-focused recruiting, rejecting applicants for "too much" experience, and prioritizing incumbent applicants over outsiders are facially neutral or even unsuccessfully attacked in other lawsuits. Renewed Opp. at 16-18. In addition to being premature, this misconstrues the nature of disparate impact challenges, which, by definition, challenge facially neutral policies. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 239 (2005). It is the "*consequences* of [particular] employment practices" that matter. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (emphasis in original) (internal quotation marks and citation omitted). Courts routinely certify class actions challenging apparently lawful practices that have a disparate impact on a protected group. *See, e.g.*, *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107 (9th Cir. 2014) (facially neutral police examination used for promotions); *Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55, 81 (S.D.N.Y. 2018) (facially neutral performance review process); *see also Buckner v. Lynchburg Redevelopment & Hous. Auth.*, 262 F. Supp. 3d 373, 378-79 (W.D. Va. 2017) ("overqualified" can be pretext for age discrimination); *E.E.O.C. v. Wheeler Cnty.*, No. 07 Civ.

1350, 2009 WL 2044813, at *9 (D. Or. July 8, 2009) ("[T]he Ninth Circuit cautioned that 'reliance on 'overqualification' as a disqualifying factor in hiring can easily mask age discrimination[.]'") (internal quotations and citation omitted).

VI. Plaintiffs' Notice Plan Is Appropriate.

PwC challenges three aspects of the notice. First, Plaintiffs are willing to add the language Judge Chhabria has required: class members "might be required to provide information relevant to the lawsuit if they join." Renewed Opp. at 21. Second, Plaintiffs believe that 75 days is a reasonable compromise between 60 and 90. Third, PwC's effort to insert a warning about individuals' liability for PwC's costs is designed to dissuade opt-ins. The strong weight of authority is against it, because costs are virtually never awarded in collective actions, and it can have an *in terrorem* effect. *See, e.g.*, *Wellens v. Daiichi Sankyo, Inc.*, No. 13-cv-00581-WHO, ECF No. 128 (N.D. Cal Jun. 10, 2014); *Gerlach v. Wells Fargo & Co.*, No. 05-cv-0585-CW, 2006 WL 824652, at *4 (N.D. Cal. Mar. 28, 2006); *Williams v. U.S. Bank Nat. Ass'n*, 290 F.R.D. 600, 613 (E.D. Cal. 2013) (it "would have the sole effect of chilling . . . participation"); *Carrillo v. Schneider Logistics, Inc.*, No. 11 Civ. 8557, 2012 WL 556309, at *14 (C.D. Cal. Jan. 31, 2012), *aff'd*, 501 F. App'x 713 (9th Cir. 2012) (discussing "potential chilling effect"); *Green v. Executive Coach and Carriage*, 895 F. Supp. 2d 1026, 1030 (D. Nev. 2012) (collecting cases); *Austin v. CUNA Mut. Ins. Soc'y*, 232 F.R.D. 601, 608 (W.D. Wis. 2006) (collecting cases). [15]

CONCLUSION

For the foregoing reasons, Plaintiffs' renewed motion for 216(b) certification should be granted.

Respectfully submitted,

Dated: September 17, 2018

By: /s/ *Jahan C. Sagafi*
Jahan C. Sagafi

[15] In Plaintiffs' counsel's experience, defense counsel rarely even request costs language. *See, e.g.*, *Godhigh v. TVI, Inc.*, Case No. 16-cv- 2874-WHO, ECF No. 64-1 (N.D. Cal. Jan 12, 2017); Ex. 5 (*Walton v. AT&T Services, Inc.*, Case No. 15-cv-3653-VC, FLSA notice); Ex. 6 (*Brown et al. v. The Permanente Medical Group, Inc.*, Case No. 16-cv-05272-VC, FLSA notice).

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