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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 MOTION FOR CONDITIONAL COLLECTIVE CERTIFICATION AND ISSUANCE OF COURT-AUTHORIZED NOTICE PURSUANT TO 29 U.S.C. § 216(b)

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INTRODUCTION

Plaintiffs have presented far more than the usual allegations and modest evidence that is typically deemed sufficient: (a) scores of policy documents describing a uniform nationwide hiring process, (b) dozens of emails from corporate managers directing recruiting and hiring efforts toward younger individuals, (c) additional emails from recruiters on the ground implementing management's instructions to disfavor older applicants, (d) 29 declarations from Plaintiffs and class members describing the impact of these policies and practices on their lives, and (e) powerful statistical analyses showing a substantial disparity in outcomes between older and younger applicants, with a less than one in a billion chance that the disparity can be explained by chance. PwC even concedes that its hiring processes are determined by corporate policies and applied "consistently" nationwide. It argues that its policies are not discriminatory, but this is a premature merits argument, and it ignores that Plaintiffs also challenge PwC's policies on a disparate impact theory.

PwC also tries to parse Plaintiffs' evidence and argue that individual components are insufficient, but Plaintiffs' showing must be assessed as a whole. Likewise, PwC hopes to shave down the collective by excluding applicants who failed the first step of the process – but that first step is riddled with the same bias as the rest of the process, and several applicants who would be expected to pass it were rejected at that stage. It is not a reliable basis for excluding collective members here.

Lastly, exclusion of attempted applicants would be improper. PwC stores information about all such individuals in its Smashfly database. PwC takes great pride in Smashfly, which lets it track and nurture the "right" applicants, encourage individuals who "fit" PwC to apply, and send contrary messages to others. Courts here and elsewhere have certified classes of individuals with less concrete application statuses.

Because Plaintiffs have overwhelmingly surpassed the lenient standard for 216(b) certification, Plaintiffs respectfully submit that the motion should be granted.

ARGUMENT

I. Plaintiffs Meet Their Modest Burden in Showing that Collective Members Are Similarly Situated.

A. Plaintiffs' Multifaceted Array of Proof Is More Than Sufficient.

Plaintiffs have submitted a broad swath of largely unrebutted evidence amply demonstrating that PwC's recruitment and hiring practices are uniform and result in significant negative impact on the proposed collective members.[1]

1. Corporate Policies Show That Hiring Practices Are Uniform.

Critically, PwC concedes that its nationwide hiring practices reflect a "consistent" corporate approach. PwC Br. at 2 n.1. PwC acknowledges that uniform policies apply to all applicants, including: recommended qualifications that are similar within each subset of the Covered Positions, *see* PwC Br. at 13; use of standardized screening and interviewing procedures, *see id*. at 12-14 (all applicants are subject to an "initial screen"); and high-level oversight, *id.* at 14 n.31 (hiring partners approve all offers). PwC also concedes that HR oversees hiring nationally, using a single nationwide process to: "identify . . . business need[s]" for new positions, PwC Ex. A (Merschel Decl.) ¶ 3; develop job requisitions, *id.* ¶ 4; recruit for entry-level positions on campus, *id.* ¶¶ 5, 14; collect online applications, *id.* ¶ 6; and screen out "unqualified" candidates, *id.* ¶¶ 8-10; *see also* PwC Ex. B (Farmer Decl.) ¶¶ 5-6 (PwC recruiters use a standardized coding system to track applicants who are rejected during the initial screen in Source1). These uniform processes apply across all Covered Positions, regardless of whether the candidate is applying through the campus or experienced hiring track. *See* Merschel Decl. ¶¶ 3-12; *see also* Farmer Decl. ¶ 3

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[1] Plaintiffs' evidence comfortably satisfies the 216(b) standard. *See, e.g.*, *Heath v. Google, Inc.*, 215 F. Supp. 3d 844, 853-54 (N.D. Cal. 2016) (BLF) (certifying collective based on seven declarations, prior EEOC complaints, and two data points showing basic age disparity); *Coates v. Farmers Grp., Inc.*, No. 15-cv-1913 LHK, 2015 WL 8477918, at *2, *12 (N.D. Cal. Dec. 9, 2015) (four declarations, limited deposition testimony, academic and statistical support, internal policy documents and correspondence constitute evidence of "common and centralized compensation policies, procedures and practices resulting in unequal pay" warranting conditional certification).

("Applicants for Associate, Experienced Associate, and Senior Associate positions in PwC's Tax and Assurance lines of service apply . . . by completing electronic application forms.").

Furthermore, PwC does not dispute Plaintiffs' other evidence of centralized control over recruiting and hiring, *e.g.*, (1) PwC's corporate "Sourcing Leadership Team," which develops and enforces uniform hiring processes at the corporate level, Pltf. Br. at 10 & nn.52-57; (2) PwC's "central[] manage[ment]" of job postings to ensure "consistency," *id.* at 11 & nn.59-60; (3) PwC's use of the "campus gateway" as a means of restricting access to Associate positions on a nationwide basis to college students and recent graduates, *id.* at 11-2 & n.66; and (4) PwC's use of standardized questions and scoring guidelines to ensure uniform interviewing across departments and decision-makers, *id.* at 14 & nn.85-87.

Such evidence of centralized control and nationwide uniformity powerfully supports conditional certification. *See, e.g.*, *Pines v. State Farm Gen. Ins. Co*., No. 89 Civ. 631, 1992 WL 92398, at *3 (C.D. Cal. Feb. 25, 1992) (certifying collective based in part on "centralized nature of the hiring process"); *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 WL 2574742, at *10-11 (S.D.N.Y. June 29, 2012) (same based on centralized corporate policies regarding compensation and job responsibilities).

2. Corporate Documents Show PwC's Systematic Preference for Younger Workers.

Plaintiffs have further identified executive-level documents showing PwC's preference for younger candidates. PwC's U.S. Chairman Bob Moritz bluntly confessed: "PwC's workforce is strikingly young" because of the way "we recruit."[2] In addition, corporate documents show that PwC tailors its hiring procedures to target Millennials and screens out Associate applicants who

[2] Ex. 107 (Bob Moritz, *The U.S. Chairman of PwC on Keeping Millennials Engaged*, https://hbr.org/2014/11/the-us-chairman-of-pwc-on-keeping-millennials-engaged (Nov. 2014)) ("PwC's workforce is strikingly young: Because we recruit approximately 8,000 graduates annually from college and university campuses, two-thirds of our people are in their twenties and early thirties.").

are more than two years past college.[3] PwC's age-based preference disadvantages older candidates. *See* Pltf. Br. at 8 & nn. 29, 41-42; Exs. 34, 40 (targeting "Millennials[:] Most are 20-23" for full-time Associate positions, in contrast to "non-traditional" applicants, who were generally "Baby Boomers" and "Generation X" or "retirees"). This evidence strongly supports certification. *See Beauchamp v. Penn Mut. Life Ins. Co.*, No. 10 Civ. 7170, 2011 WL 3268161, at *2 (E.D. Pa. July 29, 2011) (certifying collective based on evidence of "culture of age discrimination" from executives' statements encouraging hiring younger workers over older ones); *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 483 (E.D.N.Y. 2001) (same).

3. On the Ground, Recruiters Expressed Bias Against Older Workers.

Lower down the chain of command, recruiters and others have implemented leadership's directive to favor younger applicants. Plaintiffs have presented – and continue to uncover – evidence of their bias and policy of steering older workers away from class positions.[4]

PwC's suggestion that discriminatory remarks are only relevant if they are blatant, PwC Br. at 7-8, is wrong. *See E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 684 (9th Cir. 1997) ("Few employers who engage in illegal discrimination, however, express their discriminatory tendencies in such a direct fashion."). Thus, comments about an employee's "fit," "maturity," or "overqualification," can constitute evidence of age discrimination.[5] Such evidence regularly

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[3] *See* Stewart Decl. ¶ 14; Pltf. Br. at 5-6 & nn.24-26, 28-33.

[4] Dozens of recently produced documents, *see* Stewart Decl. ¶ 15, supplement Plaintiffs' earlier showing, *see* Pltf. Br. at 7-8 & nn.34-38.

[5] *See Buckner v. Lynchburg Redevelop. & Hous. Auth.*, 262 F. Supp. 3d 373, 378-79 (W.D. Va. 2017) ("overqualified" and "bad fit" can be pretext for age discrimination); *Trevino-Garcia v. Univ. of Texas Health Sci. Ctr.—Sch. of Med.*, No. 09 Civ. 0572, 2009 WL 3464865, at *4 (W.D. Tex. Oct. 19, 2009) ("not a good fit" was potential pretext for discrimination); *Morris v. Progressive Health Rehab. LLC*, No. 05 Civ. 10, 2007 WL 908646, at *6-7 (M.D. Ga. Mar. 22, 2007) (comment that plaintiff "didn't fit in with this company," along with other remarks, was "direct evidence of discrimination based upon age"); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996) ("didn't fit in with the new culture" supported an inference of age bias); *Maddow v. Procter & Gamble Co.*, 107 F.3d 846, 852 (11th Cir. 1997) ("old and mature" was circumstantial evidence of age discrimination); *Taggart v. Time, Inc.,* 924 F.2d 43, 47 (2d Cir. 1991) ("overqualified" was euphemism for "too old").

supports 216(b) certification.[6]

4. Statistics Reveal Dramatic and Consistent Age-Based Disparities in Hiring for All Covered Positions.

The result of this corporate guidance to favor younger workers is an extreme age disparity in hiring. Plaintiffs' unrebutted statistical evidence shows a "very strong" and statistically significant age disparity in hiring, regardless of position or track. Pltf. Br. at 15-17. The magnitude of the gap is remarkable. Within each of the Covered Positions, Dr. Neumark's analyses showed hiring disparities of 12-19 standard deviations, Pltf. Br. at 16 (citing Ex. 6 (Neumark Report) ¶ 18 & Table 3), with an overall hiring disparity of over 36 standard deviations for all positions, *id.* at 15-16 (citing Ex. 6 (Neumark Report) ¶ 14 & Table 1).

Collective actions are routinely certified with less dramatic disparities. *See, e.g.*, *Barrett v. Forest Labs., Inc.*, No. 12 Civ. 5224, 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015) (EPA collective certified; 2.5-3.6 standard deviations); *Kassman v. KPMG LLP*, No. 11 Civ. 03743, 2014 WL 3298884, at *6 (S.D.N.Y. July 8, 2014) (EPA collective certified; 11 standard deviations); *Hyman*, 982 F. Supp. at 7 (ADEA collective certified; 4.9 standard deviations). This showing is far beyond the 2 to 3 standard deviations threshold used to establish an inference of discrimination. *See Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (noting that a difference of "greater than two or three standard deviations" is suspect).

Notably, PwC does not find fault with Dr. Neumark's findings or present its own analysis. Instead, PwC argues that Dr. Neumark's analysis is somehow "not relevant." PwC Br. at 10-11. To the contrary, the Supreme Court has made it "unmistakably clear" that statistical analysis

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[6] *See, e.g.*, *Hyman v. First Union Corp.*, 982 F. Supp. 1, 7 (D.D.C. 1997) (certifying collective where hiring researcher's notes – describing whether applicants sounded young or old – suggested that age was factor in hiring); *Gentrup v. Renovo Servs., LLC*, No. 07 Civ. 430, 2010 WL 6766418, at *3 n.6 (S.D. Ohio Aug. 17, 2010) ("ADEA cases commonly rely on . . . statements of bias or anecdotal evidence to show discriminatory motive even in cases involving a large class of plaintiffs."); *Beauchamp*, 2011 WL 3268161, at *2 (ADEA) (managers' ageist comments); *Benson v. Asurion Corp.*, No. 10 Civ. 526, 2010 WL 4922704, at *5 (M.D. Tenn. Nov. 29, 2010) (relying on "alleged comments made by a handful of supervisors").

serves "an important role in cases in which the existence of discrimination is a disputed issue[,]" and is therefore highly relevant, both as to the merits and certification.[7] *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (internal quotation marks omitted); *id.* at 339-40 (citing cases). Indeed, courts regularly rely on statistics in granting conditional certification of discrimination claims. *See Barrett*, 2015 WL 5155692, at *3 (relying on statistics); *Kassman*, 2014 WL 3298884, at *6 (same); *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 WL 2574742, at *10-11 (S.D.N.Y. June 29, 2012) (same); *Pagliolo v. Guidant Corp.*, No. 06 Civ. 943, 2007 WL 2892400, at *3-4 (D. Minn. Sept. 28, 2007) (same).

PwC's concern that Dr. Neumark's analysis fails to demonstrate *causation*, PwC Br. at 10-11, prematurely ventures into the merits (discussed in § I(D), below) and ignores that PwC refused to produce the data that would allow him to begin to opine on that question.[8] Similarly, PwC provides no evidence to support its speculation that the hiring gaps derive from factors like salary demands, training, and qualifications.

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[7] PwC's citations are readily distinguishable. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Court held that Rule 23's commonality requirement was not satisfied because plaintiffs pointed only to the "bare existence of delegated discretion," without proof of "common direction." *Id.* at 356-57. In *Mooney v. Arabian Am. Oil Co.*, No. 87 Civ. 498, 1993 WL 739661 (S.D. Tex. Aug. 25, 1993), the court actually granted conditional certification, later decertifying on a full record showing highly "decentralized" "bottom-up" decisions and no "evidence suggesting a unified policy or practice." *Id.* at *9-12. Similarly, in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), the court granted 216(b) certification based, in part, on statistical evidence and later decertified based on evidence of decentralized termination decisions and plaintiffs' failure to show any common policy or practice. *Id.* at 359, 372; *see also Koren v. SUPERVALU, Inc.*, No. 00 Civ. 1479, 2003 WL 1572002, at *16 (D. Minn. Mar. 14, 2003) (decertification decision).

[8] Dr. Neumark's report thoroughly analyzes the full universe of data provided by PwC, but is necessarily limited by the preliminary scope of PwC's data production. PwC produced 40 of the 1,539 fields from Source1 for this analysis. *See* ECF No. 96 at 6-9 (Discovery Letter); ECF No. 105. PwC argued that the limited data production "is correct under the law, as it is closely tied to the needs of the case at this notice stage." ECF No. 96 at 11; *see also* ECF No. 105 (Discovery Order) ("[A]lthough the data . . . may not be robust enough for a merits-stage statistical analysis, it is sufficient to support a [216(b)] motion.").

B. PwC's Attempts To Downplay Plaintiffs' Evidence as "Anomalous" Or Inadequate Fail.

PwC's main response to this wealth of evidence is to tease it apart and challenge the strawman that any one isolated facet of Plaintiffs' proof is insufficient. This approach misconstrues the standard and the basic concept of evidentiary proof, as factfinders evaluate evidence as a whole, not merely as isolated components.[9]

PwC also invites the Court to create a higher evidentiary standard at the notice stage. *See* PwC Br. at 7. The notion that its employees' "ageist comments" can be overlooked misconstrues the 216(b) standard. *Id.* It also ignores the fact that PwC's production was bare bones – "not inconsequential," but "not . . . meaningful," in the Court's words – until just before Plaintiffs' motion was filed. ECF No. 152 at 3 n.3.[10]

Although Plaintiffs have just begun to scratch the surface, the anecdotal evidence of discrimination is substantial (*see* footnote 4), and there is no basis in the record to support PwC's assertion that such evidence is "anomalous." PwC Br. at 7. Plaintiffs' evidence of age bias is not limited it to custodial emails as PwC suggests, but rather spans corporate-level documents,[11] 29 class member declarations, and additional evidence.[12] In addition, Plaintiffs have now found emails with discriminatory comments in the correspondence of 20 of the initial sample set of 26 custodians selected for email discovery,[13] which is by no means "paltry," PwC Br. at 8 n.14.

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[9] *See Wilson v. Maxim Healthcare Servs., Inc*., No. 14 Civ. 789, 2014 WL 7340480, at *8 (W.D. Wash. Dec. 22, 2014) (granting conditional certification based on the "whole" record – including allegations, declarations and job postings); *Kesley v. Entm't U.S.A. Inc.*, 67 F. Supp. 3d 1061, 1068 (D. Ariz. 2014) ("Certification will depend on the facts and circumstances of each individual case; the relevant factors cannot be reduced to a checklist."); *Escobedo v. Dynasty Insulation, Inc*., No. 08 Civ. 137, 2008 WL 11333921, at *3 (W.D. Tex. Sept. 19, 2008) ("Taken as a whole, Plaintiffs' evidence [consisting of allegations, declarations and timesheets] is sufficient").

[10] Approximately 95% of PwC's production occurred just a few weeks before Plaintiffs' opening brief was due, or after it was submitted. Stewart Decl. ¶¶ 5-13, Exs. 150 - 51. Plaintiffs were only able to review 11% of PwC's production at the time their opening brief was due. *Id*.

[11] Plt. Br. at 5 n.25; *Id*. at 6 nn.28-30.

[12] Stewart Decl. ¶ 16.

[13] Stewart Decl. ¶ 17.

Certification is conditional precisely because of this reality—the defendant continues to produce more evidence, the plaintiffs continue to discover more evidence of policies and practices, and, at the close of discovery, the defendant may move for decertification. *Heath*, 215 F. Supp. 3d at 851 ("Plaintiffs need not conclusively establish that collective resolution is proper, because a defendant will be free to revisit this issue at the close of discovery.").[14]

C. The Minor Differences that PwC Highlights Do Not Defeat Plaintiffs' Showing.

Minor differences among collective members with respect to the Covered Positions they sought, the gateway they applied through, the specific discriminatory remarks they were subject to, or the stage of the hiring process at which they suffered discrimination, PwC Br. at 8, do not defeat conditional certification. Ultimately, the "proper inquiry" during conditional certification is whether the named plaintiffs and other potential members of the proposed collective "are similarly situated with respect to their allegations that the law has been violated." *Kassman*, 2014 WL 3298884, at *7 (internal quotation marks omitted; emphasis omitted).[15]

Naturally, the precise details of discriminatory interactions will vary from instance to instance, person to person. *See Khadera v. ABM Indus. Inc.*, No. 08 Civ. 417, 2011 WL 7064235,

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[14] Notably, Plaintiffs' showing here is far more robust than the successful evidence offered in *Heath*, where the court granted conditional certification based on plaintiff's allegations, 7 declarations, a prior lawsuit and EEOC complaints, and a simple statistical comparison of the median age of Google employees verses similarly trained employees nationwide. 215 F. Supp. 3d at 853-54. Here, in addition to their own allegations, Plaintiffs have offered 27 supporting declarations, evidence of common corporate policies favoring younger workers, corporate documents and emails reflecting a widespread culture of bias, and in-depth statistical analyses showing a dramatic age-based disparity in hiring. Such evidence is more than sufficient to meet Plaintiffs' burden.

[15] *See, e.g.*, *Villa v. United Site Servs. of Cal., Inc.*, No. 12-cv-318 LHK, 2012 WL 5503550, at *14 (N.D. Cal. Nov. 13, 2012) (consideration of differences in "employment settings and factual background" among collective members is "properly reserved for after the completion of discovery"); *Heath*, 215 F. Supp. 3d at 852 (same); *Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 443 (N.D. Ill. 1982) (collective notice issued where plaintiffs alleged a "campaign of [age] discrimination . . . which transcends minor differences in their levels of management responsibility, geographic location, and dates of alleged discriminatory actions").

at *3 (W.D. Wash. Dec. 1, 2011) ("If one zooms in close enough on anything, differences will abound[.]") (citation omitted). To deny collective treatment based on such minor differences "would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates . . . in a number of ways." *Heagney v. European Am. Bank*, 122 F.R.D. 125, 128 (E.D.N.Y. 1988) (internal quotation marks omitted).[16]

Likewise, the fact that hiring decisions were effectuated by different personnel is of no moment where, as here, uniform hiring procedures and standards were set at the corporate level. *See, e.g.*, *Schwed v. Gen. Elec. Co.*, No. 94 Civ. 1308, 1997 WL 204394, at *3 (N.D.N.Y. Apr. 11, 1997) (conditionally certifying ADEA collective where different decision makers made hiring selections based on a uniform matrix); *Hyman*, 982 F. Supp. at 3 (conditionally certifying ADEA collective where plaintiffs alleged a "centralized decision-making process" notwithstanding the fact that different managers had some degree of individual discretion).

By the same token, collective treatment remains appropriate even where multiple similar job titles are at issue. *See Diaz v. S&H Bondi's Dep't Store*, No. 10 Civ. 7676, 2012 WL 137460, at *6 (S.D.N.Y. Jan. 18, 2012) ("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."); *Lewis v. Wells Fargo & Co*., 669 F. Supp. 2d 1124, 1128

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[16] The fact that a minority of collective members applied for entry-level positions through the campus gateway, while a majority applied for experienced positions through other means is also inconsequential. First, after the gateway phase, the same policies applied to all collective members (for example, screening requirements, interview procedures, questions, and scoring, and decision-making as to offers). Second, the evidence shows similar disparate effects regardless of the track or forum through which collective members applied. In both the campus and experienced tracks, older candidates are rejected at higher rates than younger candidates, and declarants from both tracks reported being subject to discouraging or discriminatory remarks, and ultimately being screened out or denied employment despite their qualifications. If, after the conclusion of discovery, the Court determines that campus applicants and experienced applicants are not "similarly situated," then separating the collective into subgroups at final certification, rather than denial of collective treatment outright, would be appropriate. *See Coates*, 2015 WL 8477918, at *9 ("[W]hether the disparate factual and employment settings of the individual plaintiffs means that this case cannot proceed collectively, or would need to be prosecuted with subclasses for each of the job titles or geographic locations, is a matter to be determined at the *second* stage of the certification process.") (internal quotation marks omitted).

(N.D. Cal. 2009) (CW) ("courts routinely grant conditional certification of multiple-job-title classes"); *Gerlach v. Wells Fargo & Co*., 05-cv-585 CW, 2006 WL 824652, at *7 (N.D. Cal. Mar. 28, 2006) (conditionally certifying class encompassing multiple positions and levels of seniority).[17]

D. PwC's Merits Arguments Are Premature.

PwC's merits arguments, PwC Br. at 2-8, are not appropriate for consideration at conditional certification.[18] In addition, PwC's arguments are unpersuasive.

PwC is wrong that campus recruiting is irrelevant to ADEA certification. PwC Br. at 3. To the contrary, courts have acknowledged that campus recruiting can support an ADEA claim. *See, e.g.*, *Lumpkin v. Brown*, 898 F. Supp. 1263, 1273-74 (N.D. Ill. 1995) (holding that campus-focused recruitment may "reflect an obvious preference for youth" in violation of the ADEA); *Sterry v. Safe Auto Ins. Co*., No. 02 Civ. 1271, 2003 WL 23412974, at *14 (S.D. Ohio Aug. 25, 2003) (preference for recent college graduates, plus other factors, raised inference of age discrimination).[19]

Similarly, the use of images of youthful employees in recruiting materials is evidence of age discrimination. *See, e.g.*, *E.E.O.C. v. Texas Roadhouse, Inc*., 215 F. Supp. 3d 140, 145, 176-77 (D. Mass. 2016) (images of "young-looking" employees raised question of fact regarding policy of age discrimination); *see also Palasota v. Haggar Clothing Co*., 342 F.3d 569, 576-77

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[17] Minor differences can be addressed later by subclassing. *See Coates*, 2015 WL 8477918, at *9 (subclassing does not undermine the existence of common proof that affects the entire class).

[18] *See Flores v. Velocity Exp., Inc*., No. 12-cv-05790 JST, 2013 WL 2468362, at *7 (N.D. Cal. June 7, 2013) ("[T]he question at this stage is not whose evidence . . . is more believable, but simply whether plaintiffs have made an adequate threshold showing."); *Escobar v. Whiteside Const. Corp*., No. 08-cv-1120 WHA, 2008 WL 3915715, at *4 (N.D. Cal. Aug. 21, 2008) ("It may be true that the evidence will later negate plaintiffs' claims, but this order will not deny conditional certification at this stage in the proceedings."); *Mowdy v. Beneto Bulk Transp*., No. 06-cv-5682 MHP, 2008 WL 901546, at *6 (N.D. Cal. Mar. 31, 2008) ("[I]t is inappropriate for the court to entertain an inquiry on the merits. The fact that such an inquiry will be necessary in the future [after further discovery] does not constitute a sufficient ground to prevent [prospective] class members from receiving notice.").

[19] Contrary to PwC's assertion, PwC Br. at 3 n.3, Plaintiffs' disparate impact claims challenge PwC's over-reliance on campus recruiting, Pltf. Br. at 11-12, 16.

(5th Cir. 2003) (company's campaign to present a more youthful image supported plaintiff's prima facie showing of age discrimination); *Maddow*, 107 F.3d at 852 (same).

II. PwC's Proposal to Limit the Collective Is Premature, Unreliable, and Would Enshrine Discriminatory Conduct.

PwC's argument that it can should be allowed to carve out applicants who did not pass its initial "screen" is flawed, because it prematurely addresses merits questions and presumes the answer to one of the central questions of the litigation: whether PwC's hiring process, including the initial screening by recruiters, is biased.

A. Analysis of Applicant Qualifications is Premature at this Stage.

Courts typically defer questions about qualifications in ADEA cases at conditional certification. *See, e.g.*, *Heath*, 215 F. Supp. 3d at 854-55 ("individualized inquiries" into "qualifications" did not preclude 216(b) certification); *Williams v. Sprint/United Mgmt. Co.*, 222 F.R.D. 483, 487-88 (D. Kan. July 1, 2004) (differences in collective members' qualifications are "not relevant at the notice stage").[20]

B. Older Applicants Fare Significantly Worse in PwC's Pre-Screening Process, Suggesting Bias.

PwC's suggestion that applicants who did not pass its initial "screen" should be excluded risks immunizing the first step in PwC's hiring decisions from scrutiny. PwC's approach is flawed in two ways: (1) PwC has not shown that this "screen" imposes actual requirements that are consistently applied, and (2) courts routinely allow challenges to subjective or non-job-related

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[20] PwC's cited cases are not persuasive. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000) (PwC Br. at 16), is inapplicable because it addresses the proof necessary to support a jury verdict. In *Allen v. Prince George's County*, 538 F. Supp. 833, 836 (D. Md. 1982), *aff'd*, 737 F.2d 1299 (4th Cir. 1984) (PwC Br. at 17), there was no indication that the plaintiffs challenged the hiring screen (the exam) as discriminatory, in winning Rule 23 certification. In *Heath* (PwC Br. at 16), Heath provided "speculative beliefs," only his own declaration, and no statistical evidence. 215 F. Supp. 3d at 857-58. Moreover, unlike Plaintiffs here, he also asked the court to "decline to engage in the similarly situated analysis." *Id.* at 856.

screens,[21] and PwC has not shown that its initial "screen" is age-neutral; in fact, there is significant evidence that it is not.

First, PwC's initial "screen" is unreliable because it includes a discretionary element. Although PwC depicts the "screen" as "strict" and objective (requiring "a [1] degree in a relevant field of study, [2] minimum GPA requirements, and, [3] for Experienced and Senior Associate positions, relevant work experience"), PwC Br. at 13, those are mere *preferences*, not requirements. PwC's actual policy is that "an offer can be extended to a candidate with any GPA." Ex. 154 (PwC Professional – GPA Guidance – FAQs), PWC_00000573. And PwC merely suggests to recruiters that "[m]ajors *should* be relevant to the specific LOS desired," and notes "*[t]ypical* majors are Accounting, Finance, Business, and MIS/Computer Science," without actually *requiring* any particular major.[22]

Second, not only does the "screen" have no true minimum requirements, it also allows for discriminatory filtering of applicants. Recruiters are afforded wide discretion in applying the "screen," such as "ability to self-motivate." Ex. 155 (Guidelines for Campus Referrals), PWC_00010166-67. As a result of this subjective early screening, the pre-interview rejection rate for older applicants exceeds the pre-interview rejection rate for younger applicants at a statistically significant level – over 42 standard deviations. Ex. 152 (Neumark Supplemental Report, Table 6); *see also id.* at Table 7 (Pre-Interview Rejection Rates by Position).

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[21] *See Jauregui v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988) ("[T]his circuit has cautioned that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized.") (internal quotation marks and citation omitted); *Satchell v. FedEx Corp.*, No. 03-cv-2659 SI, 2005 WL 2397522 at *2 (N.D. Cal. Sept. 28, 2005) (Rule 23 class certified where subjective performance evaluation system allowed disparate treatment of class and where promotional test resulted in disparate impact); *Widoe v. Dist. #111 Otoe Cty. Sch.*, 147 F.3d 726, 730 (8th Cir. 1998) ("subjective criteria . . . are particularly easy for an employer to invent in an effort to . . . mask discrimination"); *United States v. City & Cty. of San Francisco*, 656 F. Supp. 276, 288 (N.D. Cal. 1987) (MHP) (granting injunctive relief prohibiting use of illegal exams with disparate impact); *United States v. City of NY*, 717 F.3d 72, 97 (2d Cir. 2013) (affirming district court's injunctive relief banning use of employment screens resulting in disparate impact).

[22] Ex. 153 ("Differences Between LOS"), PWC_00063889 (emphasis added); Ex. 156 ("STEM - School List") PWC_00075868 (showing that the Tax and Assurance lines of service hired nearly 300 STEM majors).

The testimony of Plaintiffs' declarants illustrates the unreliability of PwC's "screen." Many were not interviewed despite having the qualifications that PwC touts as "required." Ex. 127 (Chapman Decl.) ¶¶ 6, 8 (not interviewed for some positions despite graduating *cum laude* with Master's in accounting and passing all four parts of CPA exam); Ex. 124 (Barnhart Decl.) ¶¶ 7, 9 (GPA above 3.6 and a degree in accounting and finance.); Ex. 133 (Iio Decl.) ¶¶ 7, 9-10 & Ex. A at 3 (20 years of audit and accounting experience, Master's in accounting, and CPA status); Ex. 128 (Guerguerian Decl.) ¶¶ 3, 5-7 (licensed CPA with a Master's degree in accounting).[23]

Lastly, PwC's assertion that it is blind to applicant ages at the initial application stage defies the record and common sense. PwC can discern age in phone calls[24] or resumes,[25] both of which are part of the initial screening process. PwC Br. at 13-14. Indeed, several declarants suggest possible age-based screening at the initial pre-interview stage.[26]

III. Attempted Applicants Should Be Included in the Collective.

The proposed collective includes actual applicants (visible in Source1) and attempted applicants (visible in a separate database called Smashfly). Attempted applicants are those who applied to FTN (i.e., non-Covered) positions and those who expressed interest in applying to the Covered Positions but whom PwC screened out or steered away before they could apply. While identifying some types of *deterred* applicants could pose ascertainability challenges, this subset – those who actually *attempted* to apply – is ascertainable.

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[23] It would be particularly inappropriate for PwC to limit the collective based on qualifications, having refused to produce the Source1 fields addressing qualifications.

[24] *Hyman*, 982 F. Supp. 1, 7 (D.D.C. 1997) (hiring researcher noted whether applicant sounded old or young on the phone).

[25] An employer may infer age from resume dates. *See Heath*, 215 F. Supp. 3d at 849 (recruiter told plaintiff to put her graduation date on her resume so that interviewers would know her age); *Shelley v. Geren*, 666 F.3d 599, 603 (9th Cir. 2012) (resumes could allow panelists to estimate applicants' ages); *Ndremizara v. Swiss Re Am. Holding Corp.*, 93 F. Supp. 3d 301, 314-15 (S.D.N.Y. 2015) (defendant could infer age from resume listing graduation year for Master's degree); *Hayes v. Sotera Def. Solutions, Inc.*, 15 Civ. 1130, 2015 WL 9273953, at *2 (E.D. Va. Dec. 17, 2015) (defendant might "ascertain Plaintiff's age from his resume"); *Wehrle v. Phillips*, No. 08 Civ.1461, 2010 WL 906096, at *1 (D.N.J. Mar. 9, 2010) (defendants might be able to approximate plaintiff's age from dates of employment on updated resume).

[26] Stewart Decl. ¶ 18.

PwC recruiters must "continually develop a pipeline of qualified potential applicants," Pltf. Br. at 13.[27] This pipeline is not an amorphous concept – it is memorialized in lists of potential applicants preserved in a "candidate relationship management" ("CRM") database (Smashfly) (and previously in Excel spreadsheets).[28] PwC considers Smashfly even "more important" than Source1,[29] viewing it as the "lobby of the PwC building."[30] Smashfly tracks individuals expressing interest in working for PwC, even if they do not eventually apply.[31] PwC instructs recruiters to use Smashfly to "nurture" potential applicants by selectively reaching out to a subset of Smashfly contacts with promotional materials and encouragement to apply to specific job postings.[32] Recruiters choose targets based on "fit," which PwC concedes can implicate "biases" and "blindspots."[33]

Based on limited discovery, Plaintiffs have already uncovered evidence that lack of "fit" is often a justification for screening out older applicants.[34] Such "non-traditional" applicants are steered away from full-time positions and targeted for less desirable, temporary FTN positions.[35]

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[27] Ex. 23 (Module 3 – Create Requisition), PWC_00006779.
[28] Ex. 157 (HC Recruitment Functions of the Future CRM), PWC_00187956-62.
[29] *Id*. at PWC_00187957 (explaining that having a top of the line CRM database is "more important" than PwC's core applicant tracking database, Source1).
[30] *See* Ex. 158 (Talent Acquisition Training 2016: Smashfly, Source1, and Inclusive Recruiting) PWC_00748919 at slide 10 notes.
[31] *See Id*. at slides 29-31 (explaining that applicants and candidates who never apply but complete a general Talent Network Form are added to Smashfly); Ex. 157 (HC Recruitment Functions of the Future CRM), PWC_00187957 ("Whether an individual encounters us via a campus event, through a link on a website, a social network such as LinkedIn, or through our own career site; the candidate is able to connect with PwC without having to complete a full application [.]").
[32] *Id*. at slide 9 notes ("SmashFly is our Recruitment Marketing Platform that allows us to manage everything we do to attract, engage and nurture candidates BEFORE they apply."); Ex. 159 (Talent Acquisition of the Future), PWC_00750248 at slide 3 (listing four methods of contacting "prospects" using Smashfly); *see also* Ex. 158 (Talent Acquisition Training 2016: Smashfly, Source1, and Inclusive Recruiting), PWC_00748919 at Slide 6 notes (Smashfly will "enable us to influence a candidate's decision to take their careers to PwC").
[33] Ex. 160 (Blindspots – Talent Acquisition Specifics), PWC_00330896 (Smashfly training for recruiters to help avoid "blindspots" and "biases" in recruiting. Includes having a "fit conversation").
[34] Stewart Decl. ¶ 19.
[35] Stewart Decl. ¶ 20.

Because PwC tracks attempted applicants in Smashfly, they are ascertainable.[36] Attempted applicants took concrete steps to apply, making PwC's deterred applicant arguments inapplicable. *See* PwC Br. at 20-24. Rather, this group is at least as concrete as other certified classes. *See, e.g.*, *Hyman,* 982 F. Supp. at 8 (certifying Rule 23 class of individuals who expressed interest in position but never applied); *Pines*, 1992 WL 92398, at *9 (certifying Rule 23 class of candidates "discouraged from continuing with the selection process").

IV. Named Plaintiffs Are Similarly Situated To the Collective.

Plaintiffs Rabin and Chapman's experiences are similar to those of the collective action members, contrary to PwC's claims. Both Mr. Rabin and Mr. Chapman applied unsuccessfully to Covered Positions.[37] In addition, Mr. Rabin attempted to apply to a Covered Position but was prevented because the application requested a school email and mailing address.[38] Mr. Rabin also applied unsuccessfully to an FTN position which was advertised as including the possibility of being converted to a fulltime position.[39] As applicants, both should appear in Smashfly.[40]

CONCLUSION

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

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[36] Discovery into Smashfly has been very limited. *Id.*, ¶ 21. Plaintiffs are willing to meet and confer with PwC to determine which codes and fields identify attempted applicants.
[37] Ex. 142 (Rabin Decl.) ¶¶ 12-13; Ex. 127 (Chapman Decl.) ¶¶ 4, 10.
[38] Ex. 142 (Rabin Decl.) ¶ 14.
[39] *Id.* ¶ 8.
[40] *See* Ex. 158 (Talent Acquisition Training 2016: Smashfly, Source1, and Inclusive Recruiting) PWC_00748919 at slides 29-31 (all applicants are imported to Smashfly).

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Respectfully submitted,

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