

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KATHERINE MOUSSOURIS, HOLLY
MUENCHOW, and DANA PIERMARINI,
on behalf of themselves and a class of
those similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:15-cv-01483-JLR

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

NOTE ON MOTION CALENDAR:
FEBRUARY 9, 2018

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Representative Plaintiffs Katie Moussouris and Holly Muenchow (“class
3 representatives”) seek certification of a proposed Class of women who worked for Defendant
4 Microsoft Corporation (“Microsoft”) in Stock Levels 59-67 in the Engineering and/or I/T
5 Operations Professions in the United States from September 16, 2012 to the present.¹ All Class
6 members have claims for systemic compensation discrimination, and Class members in levels
7 60-64 also have claims for systemic discrimination in promotions. Engineering and I/T
8 Operations are the two technical Professions at Microsoft in which the class representatives
9 worked.

10 As the evidence described herein shows, Microsoft has maintained a common,
11 discriminatory pay and promotions process called, alternately, the Calibration or People
12 Discussion Process (collectively “Calibration Process”) throughout the Class period. This
13 Calibration Process results in lower pay and fewer promotions for women compared to their
14 male peers. Plaintiffs allege that the Calibration Process is a specific employment practice that
15 causes gender-based pay and promotion outcomes that violate the disparate impact provisions of
16 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”) and the
17 Washington Law Against Discrimination, Rev. Code Wash. § 49.60.010. *et seq.* (“WLAD”).
18 Plaintiffs also allege that Microsoft engages in a pattern or practice of intentional discrimination
19 against women (disparate treatment) in violation of Title VII and WLAD.

20 Microsoft’s Calibration Process, which determines employees’ pay, promotion, and
21 performance outcomes, is both unreliable—in that its structural features preclude consistent

22 _____
23 ¹ This Court held that the liability period for claims under the Washington Law Against
24 Discrimination (“WLAD”) begins on September 16, 2012. *See* Dkt. 134 at 18. Additionally, the
25 Court denied Microsoft’s motion to strike allegations of extraterritorial application of WLAD to
26 Microsoft employees employed outside the state of Washington but subject to employment
policies originating at Microsoft’s Washington headquarters. Dkt. 52 at 17-18. Accordingly,
absent further order from the Court, the Class liability period begins September 16, 2012 for all
Class members.

1 decision-making between comparable people—and based on invalid criteria. Plaintiffs’ expert
 2 Dr. Ann Marie Ryan, Professor of Organizational Psychology at Michigan State University,
 3 describes the common problems with this process.² Plaintiffs’ expert Dr. Henry Farber, Hughes-
 4 Rogers Professor of Economics at Princeton University, describes statistically significant and
 5 meaningful gender-based pay differentials caused by the Calibration Process. When controlling
 6 conservatively for relevant characteristics (including controls for job type, job complexity, and
 7 performance metrics), women earn less than their male counterparts.³ Dr. Farber also concludes
 8 that women have received over 500 fewer promotions than men with their same characteristics
 9 would have received.

10 The Calibration Process operates within the context of a corporate culture that
 11 systematically devalues women’s contributions. This is evidenced by the declarations of
 12 Plaintiffs and other female employees describing their experiences of gender discrimination in
 13 pay and promotions and Microsoft’s culture of bias; [REDACTED]
 14 [REDACTED]; and
 15 company records showing that Microsoft was well aware of the Calibration Process’s adverse
 16 impact on women and did not fix it. Instead, Microsoft has tried to sidestep this issue by
 17 publishing two misleading “pay equity studies” and pursuing diversity and inclusion (“D&I”)
 18 programs that its own HR professionals dismiss as mere window dressing.

19 Plaintiffs’ claims raise common questions of law and fact, the answers to which will
 20 drive the resolution of this litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).
 21 Plaintiffs seek certification of their claims for injunctive relief under Federal Rule of Civil
 22 Procedure 23(b)(2), certification of their claims for damages under 23(b)(3), and certification of

23 ² See Expert Report of Dr. Ann Marie Ryan (“Ryan”), filed herewith.

24 ³ The analysis of data through June 2016 reflects that in less than four years women in
 25 Engineering and I/T Operations have been underpaid between \$100-\$238 million, depending on
 26 whether job title is included in the model. See Expert Report of Dr. Henry Farber (“Farber”),
 filed herewith, ¶ 80 & Table 8. That number is expected to increase as further years of data are
 analyzed.

1 liability under 23(b)(2), (b)(3), and/or (c)(4). Below Plaintiffs include a proposed trial plan
 2 showing how their claims may be fairly and efficiently adjudicated on a class basis. Plaintiffs
 3 respectfully submit that their motion should be granted.

4 **II. FACTS**

5 **A. Microsoft's Corporate Organization and Common Employment Practices**

6 **1. Microsoft's Job Classification System Organizes Employees**
 7 **Performing Similar Work By Profession, Discipline, and Job Title.**

8 Microsoft is a multinational technology company headquartered in Redmond,
 9 Washington. Microsoft has a uniform system for organizing its employees throughout the
 10 United States. Whittinghill Tr. at 101:4-13.⁴ Microsoft classifies groups of employees doing
 11 similar work into Professions. *Id.* “A profession is a grouping of functional areas—such as
 12 Engineering, Sales, Marketing, and Human Resources—with common functional skillsets,
 13 business results, and success differentiators.” MSFT_MOUSSOURIS_00688508 at 513. Within
 14 Professions, Microsoft classifies employees into subcategories called Disciplines, according to
 15 “the actual work that the individual is currently doing,” such as “software design engineer test
 16 [SDET].” Whittinghill Tr. at 102:16-103:4. Within each Discipline, the next and most specific
 17 level of organization is Standard Title, *id.* at 103:12-16, such as “Program Manager.” The
 18 proposed Class includes employees in just two of Microsoft's Professions: Engineering and I/T
 19 Operations. Standard Titles in these Disciplines come in variations reflecting increasing levels
 20 of seniority, e.g.: I, II, Senior, and Principal.⁵ For instance: Program Manager (equivalent to
 21 “Program Manager I”), Program Manager II, Senior Program Manager, and Principal Program
 22 Manager. Regardless of which business organization they work in (such as Windows & Devices,

23 ⁴ Evidence cited herein is attached to the Declaration of Anne B. Shaver in Support of Plaintiffs'
 24 Motion for Class Certification (“Shaver Decl.”). All corporate documents are attached as
 25 collective Exhibit A in numerical order by Bates Number. Excerpts of Deposition Transcripts
 26 are attached as Exs. E to H, in chronological order by deposition date. Declarations and Reports
 in support of this Motion are submitted separately and referred to herein by last name of author.

⁵ Shaver Decl., Ex. B (Career Stage Profiles for Engineering and I/T Operations).

1 Office Products, etc.), employees are categorized by common Professions, Disciplines, and
2 Standard Titles.

3 Two other aspects of Microsoft’s corporate organization are relevant to this Motion.
4 First, all employees are assigned to a pay band, called a Stock Level, ranging from 59 to 98.
5 Ritchie Tr. 521:2-14. [REDACTED]

6 [REDACTED]. Ritchie Tr. 308:6-13; MSFT_MOUSSOURIS_00688508 at 9.
7 Employees at level 80 or higher are Corporate Vice Presidents or above, Whittinghill Tr. 14:8-
8 19, up to CEO Satya Nadella who holds level 98. Ritchie Tr. 521:13-14. Employees in levels
9 68-70 are partners. *Id.* 416:1-3.

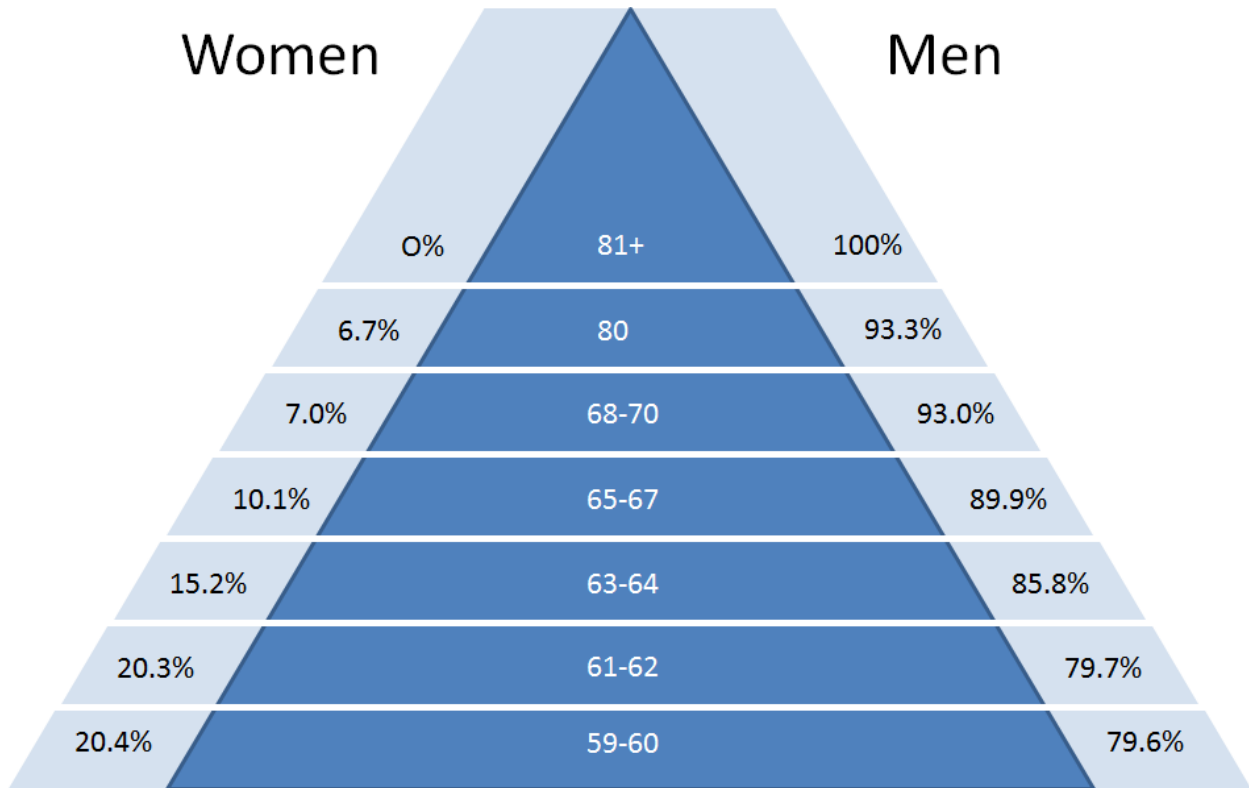
10 Second, employees are classified by Career Stage for purposes of guiding their career
11 progress. Career Stages progress from 2 through 9, and are broken out separately for
12 Independent Contributors (“IC”), Leads, and Managers. The Career Stages overlap with
13 Standard Titles, such that, for example, a Program Manager I is Stage 2, a Program Manager II is
14 Stage 3, a Senior Program Manager is Stage 4, and a Principal Program Manager is Stage 5.⁶
15 Career Stages have associated “competencies” and “key results” that set forth the “how” and
16 “what” of each job.⁷ Each Discipline shares a common set of competencies and key results.⁸

24 ⁶ Shaver Decl., Ex. B.

25 ⁷ MSFT_MOUSSOURIS_00187720 at 5. *See also* Whittinghill Tr. at 137:20-39:13 (explaining
that key results areas are about skills and knowledge, whereas competencies are about behavior).

26 ⁸ Shaver Decl., Ex. B.

1 Women are concentrated in the lowest levels of Engineering and I/T Operations, as
 2 shown in this diagram:⁹



16 **2. Microsoft Has Used the Calibration Process Throughout the Class**
 17 **Period to Make Pay and Promotion Decisions.**

18 The Calibration Process is a process in which managers compare employees within peer
 19 groups to determine performance, pay, and promotion outcomes. From 2011 to May 2014,
 20 Microsoft used the term “calibration meetings” for this process; since May 2014, it is called
 21 “People discussions,” but the function has been the same.¹⁰ At these meetings, managers
 22 compare employees within a peer group, which encompasses employees in multiple stock levels
 23 doing essentially the same work at different rates of pay. [REDACTED]

24 _____
 25 ⁹ Farber Table 1. According to Microsoft’s data, there are no employees in Levels 71-79.
 Accordingly, those levels are not represented in the diagram.

26 ¹⁰ Ritchie Tr. at 136:25-138:22; 157:6-8; 229:16-17; 234:5-235:25.

1 [REDACTED].¹¹ Peer groups correspond to career stages and overlap with standard
2 titles. Farber ¶¶ 17-21. [REDACTED]
3 [REDACTED]. Ritchie Tr. 136:25-137:4; 228:25-229:25. The
4 process was developed by, and is administered by, Microsoft's HR team in Redmond, headed by
5 J. Ritchie. Ritchie Tr. at 42:17-43:7. The discussions, their inputs, and the process for arriving
6 at their outcomes, were not consistently recorded. Ritchie Tr. 129:8-130:18; 133:19-134:11;
7 149:6-13.

8 Plaintiffs' expert in Organizational Psychology, Dr. Ryan, explains that problems with
9 the process itself, as well as with the inputs to the process, undermine its reliability. Ryan, ¶ 25.
10 First, regarding the process itself, Dr. Ryan found a lack of standardization in the types of
11 information serving as inputs into compensation and promotion decisions, as well as in the
12 specific procedures for discussing and making compensation and promotion decisions. *Id.*, ¶¶32-
13 39. For example, the meetings were inconsistent in terms of whether direct supervisors attended,
14 how it was determined which employees were compared to each other, and what information
15 was available when recommendations were made. *Id.*, ¶¶ 35-36, 39, & n.30.

16 Next, regarding the inputs to the process, Dr. Ryan found that decision makers were able
17 to apply variable standards in making compensation and promotion decisions, because Microsoft
18 did not prescribe weights to the underlying criteria. Ryan, ¶¶ 26-31. Thus, evaluators were free
19 to weight criteria for pay and promotions in ways not aligned with job requirements. *Id.* Indeed,
20 Dr. Ryan found that promotion decisions are not adequately linked to what Microsoft has stated
21 are the job requirements in the Career Stage Profiles, so that there is no evidence that managers
22 made decisions based on job related information. *Id.*, ¶¶ 17-24. Job performance, as measured
23 by Microsoft's performance review process, likewise does not explain pay and promotion
24 decisions. Farber ¶ 57.

25
26 ¹¹ MSFT_MOUSSOURIS_00002269 at 2276.

1 Finally, Dr. Ryan notes that Microsoft does not adequately train managers or monitor to
 2 ensure the reliability and validity of outcomes in the Calibration Process. Ryan, ¶¶ 40-42. The
 3 training that is available to managers on these decisions does not provide instruction on how to
 4 weigh criteria in relation to the job requirements. *Id.*, ¶ 43. And Microsoft does not take steps to
 5 test inter-rater reliability, or whether manager decisions are *appropriately* calibrated such that
 6 managers apply the same standards consistently with each other. *Id.*

7 Dr. Ryan concludes that, “[o]verall, there is no evidence that compensation and
 8 promotion decisions are made reliably, and in fact, the processes contain numerous critical
 9 defects.” Ryan, ¶ 37.

10 **3. Microsoft Pays Women Less Than Men for Substantially Similar**
 11 **Work.**

12 Compensation at Microsoft is determined as part of the Calibration Process. The data
 13 show that men and women perform equally well at Microsoft—that is, men’s and women’s
 14 performance review scores are roughly equal. Farber ¶ 57. Yet women are consistently paid
 15 substantially less than men in the same job title and with the same performance. Farber ¶ 5 &
 16 Table 3.

17 Dr. Farber’s pay regression controls for certain employee characteristics in order to
 18 compare employees who are similar to one another in relevant ways. His model controls for
 19 Profession, Discipline, Standard Title, age,¹² tenure,¹³ year, and location.¹⁴ Farber ¶¶ 53-56 &
 20 Table 3. The regression analysis shows that women are paid less than men, to a statistically
 21 significant level of 21.7 standard deviations. *Id.* This finding well exceeds the threshold of 1.96
 22 standard deviations to establish statistical significance that courts routinely accept as probative

23 _____
 24 ¹² Age is commonly used as a proxy for prior work experience where, as here, the employer’s
 25 data does not contain information about employees’ prior work experience. Farber ¶ 45.

26 ¹³ Tenure is equivalent to years of experience at Microsoft. Farber ¶ 45.

¹⁴ Pay is based in part on geographic location to accommodate cost of living differences within
 the U.S., so Dr. Farber’s model accounts for that as well. Farber ¶ 45.

1 evidence of discrimination.¹⁵ The result is also practically significant given that the class
 2 shortfall value ranges from approximately \$100 million to \$238 million dollars, depending on
 3 whether standard title is included. *Id.*, ¶ 80 & Table 8.

4 Microsoft may argue [REDACTED] *see* § II.B.2, *infra*) that
 5 Dr. Farber’s model is wrong because it does not control for Stock Level. However, Dr. Farber
 6 explains that it would be inappropriate to control for Stock Level for two reasons. First, stock
 7 level is a pay band, so regressing compensation based on Stock Level would simply be accepting
 8 pay as an explanation for pay, which is inappropriate. Farber ¶ 47. In other words, it is
 9 tautological that the observed gender pay gap would go to zero if stock level is included in the
 10 model; such an analysis merely confirms that Microsoft adheres to its pay bands and does not
 11 answer any question relevant to this case. Second, Dr. Farber has found that women are
 12 systematically assigned to lower Stock Levels than similar men; thus, controlling for Stock Level
 13 would lead one to underestimate the true pay gap. *Id.*, ¶¶ 48, 56 & Figure 3. In fact, in response
 14 to Microsoft’s publication of two equal pay studies that controlled for Stock Level, over 30
 15 employees wrote to HR that controlling for Stock Level was a mistake. The employees noted
 16 that Stock Level is nothing more than a pay band, and that women receive lower pay (lower
 17 Stock Levels) than males in their peer group and are not promoted into higher Stock Levels at
 18 the same rate as men. *See* note 32 *infra*. In fact, Dr. Farber’s model is overly conservative in

19 ¹⁵ *Bouman v. Block*, 940 F.2d 1211, 1225 n.1 (9th Cir. 1991) (accepting significance at the 5%
 20 probability level as probative of discrimination); *Eldredge v. Carpenters 46 N. Cal. Counties J.*
 21 *Apprenticeship & Training Comm.*, 833 F.2d 1334, 1340 n.8 (9th Cir. 1987) (holding that a
 22 probability level of 4.5%—*i.e.*, below 5%—gave “rise to an inference that the [challenged
 23 practice] rather than chance [was] responsible for” discrimination against women); *Paige v.*
 24 *California*, 233 F. App’x 646, 648 (9th Cir. 2007) (stating that “we have relied upon the 1.96
 25 standard deviation standard”—*i.e.*, a probability level of 5%—in discrimination cases); *Smith v.*
 26 *Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999) (“If an obtained result varies from the expected result
 by two standard deviations, there is only about a 5% probability that the variance is due to
 chance. Courts generally consider this level of significance sufficient to warrant an inference of
 discrimination.”) (internal citations omitted) *overruled on other grounds by Meacham v. Knolls*
Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006); *Malave v. Potter*, 320 F.3d 321, 327 (2d
 Cir. 2003) (same).

1 that it controls for Standard Job title, which overlaps with and bakes in decisions about
2 employees' Career Stage and Stock Level.¹⁶

3 The observed gender-based pay differential in Engineering and I/T Operations has
4 existed across Microsoft locations throughout the United States to a statistically significant
5 degree throughout the entire class period. Farber Table 3. The proposed Class includes women
6 in Levels 59-67. While women at Levels 68 (“partner”) and above may experience gender
7 discrimination in pay, employees at these levels participate in decision making within the
8 challenged process to an extent that likely would preclude their inclusion in the Class. Moreover,
9 there are relatively few women in these senior positions.

10 **4. Microsoft Promotes Men Over Similarly-Situated Women.**

11 Like compensation, promotions at Microsoft are determined in the Calibration Process.
12 Women in Engineering and I/T Operations obtain fewer promotions than men in the same job
13 and with the same characteristics and performance measures.

14 Dr. Farber's promotion regression (which is a probit model)¹⁷ controls for Profession,
15 Discipline, Stock Level,¹⁸ age, experience at Microsoft, location, and performance. Dr. Farber
16 finds that, between 2011-2016 (the last year data was available) women in Engineering and I/T
17 Operations received approximately 518 fewer promotions than would be expected given their
18 characteristics other than gender, and that the difference is statistically significant. Farber ¶ 77 &

19 _____
20 ¹⁶ Standard Title is defined by Profession, Discipline and Career Stage Level. Career Stage
21 Level and Stock Level are intertwined; a Career Stage Level is generally defined as either two or
22 three Stock Levels within a particular Discipline. Farber ¶ 21. Women are in lower Career
23 Stages, and in lower Stock Levels within Career Stage. Farber ¶¶ 59-64 & Figures 1-3.

24 ¹⁷ A probit model is a form of multivariate analysis that can be used when the object of the study
25 is an outcome that takes on one of two discrete values—*e.g.*, promoted or not promoted. Dr.
26 Farber's probit model allows estimation of the difference in probability of promotion between
men and women. Farber ¶¶ 42-43.

¹⁸ Stock Level is not an appropriate control in the compensation regression for the reasons set
forth above in Section II.A.3. However, because Microsoft defines a promotion as a move from
one Stock Level to the next, in order to study advancement from one level to the next, one must
control for Stock Level in this probit regression. Farber ¶ 68.

1 Table 7. This is a properly specified model that controls for the relevant employee
2 characteristics present in the data.

3 The proposed Class members with promotion claims include women in Levels 60-64.
4 While the evidence suggests that women are also under-represented at Levels 65-67 (and
5 above),¹⁹ the relatively small numbers of women at very senior levels means that even a small
6 number of promotions can mask unfairness because the feeder pool of women available to be
7 promoted to the next level is so small.

8 **B. Microsoft Knew That the Calibration Process Disadvantaged Women in Pay**
9 **and Promotions, But Did Nothing to Fix the Problem.**

10 Microsoft knew from the internal and external sources described below that its
11 Calibration Process had an adverse impact on women in Engineering and I/T Operations in terms
12 of both compensation and promotion, but did nothing to remedy the problem.

13 **1. On an Annual Basis, Microsoft Audited Pay and Promotion Decisions**
14 **for Adverse Impact.**

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 ¹⁹ See, e.g., MSFT_MOUSSOURIS_00284174 at _191 (in Windows & Devices group, “L65+
26 Female representation is 20.6% pts below Overall female”).

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[REDACTED]

[REDACTED] and must be aware the disparities in compensation and promotion identified here by Plaintiffs. Nevertheless, it has allowed these issues to persist uninterrupted. Further, as described by Dr. Ryan, the non-privileged “monitoring” that occurs—in other words, that which is shared with actual decisions-makers—is simply HR sitting in on Calibration meetings, and is woefully inadequate. Ryan, ¶¶ 40-43.

2. The Federal Government Audited Microsoft’s Data [REDACTED]

[REDACTED]

²⁰ MSFT_MOUSSOURIS_00065719.
²¹ MSFT_MOUSSOURIS_00801714.
²² MSFT_MOUSSOURIS_00801714 at 0008-9.

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[REDACTED]

²³ MSFT_MOUSSOURIS_00801714 at 0008.
²⁴ MSFT_MOUSSOURIS_00308243 at 248-49.
²⁵ MSFT_MOUSSOURIS_00802741 at 0001.
²⁶ MSFT_MOUSSOURIS_00801714 at 009.
²⁷ MSFT_MOUSSOURIS_00801714 at 010 (emphasis in the original).
²⁸ *Id.*
²⁹ *Id.*

1 [REDACTED]
 2 [REDACTED]
 3 **3. Employee Responses to Microsoft’s Equal Pay Announcements Gave**
 4 **Microsoft Notice of Widespread Concerns of Pay and Promotion Bias.**

5 Microsoft received substantial employee reaction to two equal pay announcements during
 6 the class period. First, after CEO Satya Nadella made headlines for statements he made at the
 7 2014 Grace Hopper Institute (women in technology conference) about equal pay being a function
 8 of “karma”,³⁰ he sent a clarifying email to employees claiming that “the overall differences in
 9 base pay among genders and races (when we consider level and job title) is consistently within
 10 0.5% at Microsoft.” MSFT_MOUSSOURIS_00017963. In response, employees swamped
 11 Microsoft’s leadership team and HR with messages telling the company that analyzing pay by
 12 Stock Level is a logical fallacy, because Stock Level is nothing more than a pay band, and
 13 women are systematically paid less than male peers in the same jobs consistent with their lower
 14 pay bands (Stock Levels). For example, one manager wrote, “The logic seems to be that men
 15 and women in the same pay grade receive roughly the same pay. This is not evidence of equal
 16 pay, but rather that Microsoft enforces an even compa ratio³¹ among men and women employees.
 17 As a manager with direct reports who might ask me whether or not I can provide any evidence
 18 that our pay system is fair, this doesn’t pass the giggle test.” MSFT_MOUSSOURIS_00563277.
 19 Another employee wrote: “I disagree with the stats on equal pay. When people are not promoted
 20 at the same rate as their peers, the fact that they are paid on par within their level hides the facts

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 22 ³⁰ Satya Nadella responded to a question on what advice he would offer women who are not
 23 comfortable asking for pay raises: “It’s not about asking for the raise, but knowing and having
 24 faith that the system will actually give you the right raises as you go along. . . . And that, I think
 25 might be one of the additional superpowers that quite frankly women who don’t ask for a raise
 26 have. Because that’s good karma.” See <https://news.microsoft.com/2014/10/09/satya-nadella-email-to-employees-re-grace-hopper-conference/>.

³¹ A compa ratio is “the result of dividing a person’s base pay rate [] by the midpoint of their salary range,” which is used to determine whether someone is paid at the low, middle, or high end of their Stock Level range. Ritchie Tr. at 393:24-394:11.

1 that they are not paid equally. If I'm doing the exact same job but am at a different level, that's
 2 not pay equality." MSFT_MOUSSOURIS_00150735 at 739. Other comments reflected similar
 3 feedback.³²

4 The response was the same when Microsoft released the results of its April 2016 Equal
 5 Pay Study. The study was undertaken in response to pressure from shareholder Arjuna Capital,
 6 which threatened Microsoft (and other technology companies) with a shareholder resolution
 7 forcing it to disclose pay data. Microsoft decided to make a large public announcement about its
 8 pay data in April 2016 [REDACTED]
 9 MSFT_MOUSSOURIS_00592294. Unfortunately, again Microsoft simply asserted that women
 10 earn 99.9 cents to men's dollar when comparing employees in the same job title and Stock
 11 Level.³³ Once again, employees were quick to respond that the study ignored Microsoft's actual
 12 problems: gender bias in pay across job peer group (leveling) and promotion velocity.³⁴ As one

13 ³² See, e.g., MSFT_MOUSSOURIS_00562093. ("It is vital that when discussing the pay gap, we
 14 don't simply say 'both genders at the same level are marking the same pay' and instead ask 'are
 15 the genders appropriately leveled?"); MSFT_MOUSSOURIS_00231183 ("But there is no check
 16 on promotions. We should put something into the system that does another check by HR to
 17 ensure this is the case. We could create a separate metric on promotions of woman (and
 18 minorities) to be sure we are driving toward it."); MSFT_MOUSSOURIS_00150735 at
 19 739("Have we looked at the data, though, to see if there is a 'promotion gap' between genders?
 20 That is, how long does a man stay in a role without being promoted versus how long a woman
 21 stays in the same role before being promoted? Or whether women and men with the same
 22 number of years' experience come in to Microsoft at different grade levels?").

19 ³³ Kathleen Hogan, Ensuring equal pay for equal work, Official Microsoft Blog (Apr. 11, 2016),
 20 <https://blogs.microsoft.com/blog/2016/04/11/ensuring-equal-pay-equal-work/>.

20 ³⁴ These responses are too numerous to catalog here; they are listed in a chart at Shaver Decl., Ex
 21 B for the Court's reference. Some representative examples include:

22 MSFT_MOUSSOURIS_00744109 at 109-110 ("[T]his report made me feel that Microsoft is not
 23 actually committed to diversity, but rather the appearance of diversity. . . . I think the more
 24 interesting data are the promotion numbers. . . . [I]t is clear that women have much lower levels
 25 than men, and are not in leadership positions. . . . I'm very disappointed that the head of HR, a
 26 woman herself, would publish a report like this, without even including a caveat about
 promotions."); MSFT_MOUSSOURIS_00743994 ("I'm not at all surprised that the pay
 difference for different groups in the same level and title is so small. It's comparatively
 straightforward to make sure that a female L60 PM earns the same as a male L60 PM. What I've
 experienced firsthand and among female friends of mine is that promotion velocity for male

Footnote continued on next page

1 General Manager succinctly put it, “Comparison only of pay at the same level was a big miss.
 2 It’s all about 1) are similar roles/responsibilities leveled [paid] the same between men and
 3 women and also 2) is the promo timeline [the] same for men and women.”³⁵ Dozens of
 4 employees stressed the sentiments that “[t]here is an important distinction between equal pay for
 5 equal level, and equal pay for equal work. The latter presupposes women are appropriately
 6 leveled, and numbers suggest this is not the case at Microsoft,”³⁶ and “[t]he statistics . . . about
 7 equal pay for people at the same level and title aren’t really convincing Correct me if I am
 8 wrong, but the pay is mostly based on a function of someone’s level. . . . [I]t is really promotion
 9 velocity that indicates whether we are truly rewarding different groups equally for their equal
 10 work.”³⁷ One manager even pointed out to HR leaders that Microsoft was repeating the same
 11 mistake as it had in the prior equal pay announcement, and that Microsoft was still refusing to
 12 answer the relevant questions which it had the data to measure: promotion velocity and bias
 13 across peer group due to pay level. MSFT_MOUSSOURIS_00703435. Another manager noted
 14 that “he has been deluged by women here at the company asking him to unpack today’s news.
 15 He said ‘already a bunch of women’ have been pinging him to find out if we’ve done a pay data
 16 comparison between different levels, and is the news bad or did we just not bother to do it.”³⁸
 17 Finally, an email chain from a group of Microsoft Partner-level technical women (“A Life
 18 Without Lines”), stated that it was more of the same “vanity metrics” seen after the Grace

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 20 *Footnote continued from previous page*

21 versus female employees is different. My observation is that it’s harder for a woman to get
 22 promoted at Microsoft than it is for a man.”); MSFT_MOUSSOURIS_00744097 at 098 (“I think
 23 it’s virtually meaningless that people in the same level with the same job title have nearly equal
 24 salaries. The real disparities, as we know, are in hiring, promotion, leadership positions, and
 25 representation in non-traditional roles [W]omen and non-whites are clearly
 26 underrepresented in tech and leadership roles . . . seems disingenuous to slice the report in such a
 way that it looks like we are already at equality.”).

³⁵ MSFT_MOUSSOURIS_00775226 at _227.

³⁶ MSFT_MOUSSOURIS_00705352 at 353.

³⁷ MSFT_MOUSSOURIS_00744107.

³⁸ MSFT_MOUSSOURIS_00806770.

1 Hopper fiasco, and “I’m surprised to see us proudly releasing these figures again. Of course we
 2 make sure not to underpay women and [minorities] at a given level. The much more insidious
 3 problem is promotion velocity.”³⁹

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 Microsoft was well aware of the persistent gender-based pay and promotion disparities
 12 from its own internal audits. Instead of being candid with its employees, investors, and the
 13 public, Microsoft cooked the analysis by adding stock level—*i.e.*, a pay band—to claim success.
 14 Many of its own employees knew the truth: the pay studies were a sham.

15 **4. Knowledge of Gender Bias Went to the Very Top of Microsoft.**

16 Microsoft’s leadership Senior Leadership Team (SLT), which consists of CEO Satya
 17 Nadella and the Executive Vice Presidents (“EVPs”) who report to him, routinely observed
 18 gender bias and culture problems at Microsoft. In Mr. Nadella’s company email clarifying his

19 ³⁹ MSFT_MOUSSOURIS_00797920 at 922-923 (“The question here is not whether two people
 20 of different gender are at the same level are paid equally. The question really is whether two
 21 people of different genders with equal performance are recognized to be the same level this is
 22 where length in level/promo velocity is the more relevant measurement.”) (“This data would be
 23 more meaningful to me if they not only looked at equivalent levels but also other measures like
 equivalent experience and education to make sure women and men were being leveled the same.
 Otherwise where people are in level (through hiring and promotion) could be indicative of a bias
 . . . basically a circular reference on our own practices.”).

24 ⁴⁰ *See, e.g.*, MSFT_MOUSSOURIS_00784718; MSFT_MOUSSOURIS_00705901 at _902;
 25 MSFT_MOUSSOURIS_00592294; MSFT_MOUSSOURIS_00714794;
 26 MSFT_MOUSSOURIS_00744437. Microsoft has also refused to provide its promotion velocity
 data to third parties performing research into how women fare at various technology companies.
 MSFT_MOUSSOURIS_00418344.

1 statements at the 2014 Grace Hopper Institute, Mr. Nadella acknowledged three areas in which
2 Microsoft needed to make progress: 1) “we must ensure not only that everyone receives equal
3 pay for equal work, but that they have the opportunity to do equal work”; 2) “we need to recruit
4 more diverse talent to Microsoft at all levels ... These numbers are not good enough ... and
5 especially in engineering”; and 3) “we need to expand training for all employees on how to foster
6 an inclusive culture.”⁴¹ Mr. Nadella has stressed that “equal opportunity for equal work ... is
7 where [Microsoft] need[s] to do the hard work to bring in and promote into senior ranks more
8 people representing all diverse groups.”⁴² [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 This has not generated appropriate interventions to address known problems. For example, the
14 [REDACTED]
15 [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 ⁴¹ MSFT_MOUSSOURIS_00017963.

24 ⁴² MSFT_MOUSSOURIS_00563277.

24 ⁴³ MSFT_MOUSSOURIS_00678321 at 326.

25 ⁴⁴ MSFT_MOUSSOURIS_00825924 at 928; *see also id.* at 925 ([REDACTED])
26 [REDACTED]

1 MSFT_MOUSSOURIS_00278390 at p. 8. Other records similarly reflect that knowledge of
2 Microsoft’s institutional biases and the way the company masks them went to the very top of the
3 organization. For example, [REDACTED] n

4 [REDACTED]

5 [REDACTED]

6 • [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 MSFT_MOUSSOURIS_00677331 at pp. 16, 19, 24, 25, 34. In another example, in June 2015,
15 the [REDACTED] had a Q&A with the [REDACTED]

16 An attendee asked, “Can you address the gender pay gap?” [REDACTED]

17 [REDACTED], responded: “I think it is more about promo velocity than actual pay
18 gap, because every level has clear pay boundaries.”⁴⁵

19 In sum, Microsoft’s senior leadership knew from multiple sources that it had a pay and
20 promotion problem, but failed to remedy the systemic bias against women as [REDACTED]

21 [REDACTED] MSFT_MOUSSOURIS_00278390
22 at p. 8.

23
24
25 ⁴⁵ MSFT_MOUSSOURIS_00022538 at 540. See also MSFT_MOUSSOURIS_00201435 [REDACTED]
26 [REDACTED] “overall themes determined based on the data we looked at” [REDACTED]
[REDACTED].

1 **C. Microsoft Has Ignored Overwhelming Evidence of Intentional Gender**
 2 **Discrimination and Maintained a Company Culture Biased Against Women.**

3 Microsoft’s discriminatory processes do not operate in a vacuum, but instead are shaped
 4 by a common culture of gender stereotyping and bias against women at the company. The
 5 evidence of intentional discrimination is substantial, from many different sources, which
 6 separately and collectively show Microsoft’s pattern and practice of gender bias and bring “the
 7 cold numbers convincingly to life.” *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 339
 8 (1977). This evidence includes internal complaints by female employees submitted to
 9 Microsoft’s Employee Relations Investigations Team (“ERIT”), comments made by employees
 10 in the Microsoft Poll Survey, civil lawsuits and gender discrimination charges filed against
 11 Microsoft with governmental agencies, and documentary evidence such as corporate emails and
 12 records reflecting persistent biases and systemic problems for women.

13 This constellation of evidence reflects the following themes: 1) an exclusionary “boys
 14 club” atmosphere; 2) a culture rife with sexual harassment; 3) a near-total failure of HR to
 15 properly investigate and redress employee complaints of discrimination and harassment; and 4)
 16 acknowledgment that Microsoft’s diversity and inclusion (D&I) initiatives are mere window-
 17 dressing and have failed to address the underlying problems. This common, classwide evidence
 18 shows that Microsoft “operated under a general policy of discrimination.” *Dukes*, 564 U.S. at
 19 353.

20 **1. Microsoft Maintains an Exclusionary “Boy’s Club” Atmosphere.**

21 Like every other large company in the United States, Microsoft has a written policy
 22 against gender discrimination and sexual harassment. Microsoft does not follow its policy.

23 Microsoft women have reported to senior leadership that Microsoft maintains an abusive,
 24 toxic, “boy’s club” atmosphere, where women are ignored, abused, or degraded. *See, e.g.,*
 25 MSFT_MOUSSOURIS_00792417 at 419 (██████████) “I will not be able to
 26

1 recommend MS to other female engineers. The main reason is that MS culture accepts and
 2 tolerates abuse and toxic behavior, especially towards females.”);
 3 MSFT_MOUSSOURIS_00708659 at 661 (Email to Kathleen Hogan, EVP: “In an Engineering
 4 role, I am surrounded by men and only men in most of my meetings. ...The good ol boy culture
 5 and way of behaving at meetings is alive and well.”); MSFT_MOUSSOURIS_00371657 at 658-
 6 59(Email to [REDACTED] “Our organization is actually empowering a culture
 7 of exclusion. We have [REDACTED] women in [REDACTED] within my group . . .There are
 8 undeniable differences in the level of support, professional growth opportunities and assigned
 9 project tasks for male peers with similar experience and qualifications.”);
 10 MSFT_MOUSSOURIS_00561670 at 562752 ([REDACTED]: “It is
 11 hard to believe behavior like this, especially by a [REDACTED], would be tolerated at Microsoft.
 12 . . . The behavior I am referring to ranges from a development project code named ‘Wrecking
 13 Ball’ after Miley Cyrus’ provocative video, to a hostile t-shirt graphic depicting [REDACTED]
 14 [REDACTED] an email titled ‘Working Backwards’ that stereotypes and degrades women, employees
 15 being called pussy, cunt, and Steve Ballmer being referred to as our limp dick CEO. This
 16 cultural backdrop has had a real effect on me. I consider myself to be a strong person. I have a
 17 strong track record of performance over a long tenure. I should not feel powerless. But I do.
 18 Completely. Powerless.”); MSFT_MOUSSOURIS_00677331 at p.16 [REDACTED]
 19 [REDACTED]).⁴⁶

20
 21 ⁴⁶ See also Boeh Decl., ¶ 7 (culture is “unfriendly toward women”); Dove Decl., ¶ 7 (“Women
 22 and their perspectives are undervalued at Microsoft. On many occasions I have experienced or
 23 witnessed women being cut off in meetings, excluded from meetings, and our opinions dismissed
 24 or undervalued.”); Muenchow Decl., ¶ 6 (“Women are held to a different standard than men:
 25 when they speak up in meetings, they receive negative criticism for being too aggressive, but
 26 men routinely talk over women without criticism.”); Moussouris Decl., ¶ 6 (“Women were
 frequently interrupted or talked over at meetings. I saw on several occasions that women who
 shared their ideas were ignored, but that the same or similar ideas later presented by men would
 be acknowledged and congratulated.”); Smith Decl., ¶ 7 (“The men I worked with created a
 ‘good ol’ boy’s club’ atmosphere, where the men often socialized and drank together. As a

Footnote continued on next page

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 Even Microsoft's Unconscious Bias training is prey to the culture of bias and
 6 stereotyping that it purports to correct. One attendee wrote: "In spite of this being a course about
 7 unconscious bias, the facilitator tended to ignore or pass over the less outspoken women in the
 8 audience in favor of the louder voices. In particular, one woman was given a microphone and
 9 assured she could speak next. At least 15 minutes later, the facilitator still had not acknowledged
 10 the woman with the microphone and encouraged several men who just jumped in and spoke out
 11 of turn." MSFT_MOUSSOURIS_00166305 at 307-308. *See also*
 12 MSFT_MOUSSOURIS_00371657 ("The unconscious bias training has not made any notable
 13 difference."); Muenchow Decl., ¶ 7 (same).

14 2. Microsoft's Culture is Rife With Sexual Harassment.

15 Company records indicate that women at Microsoft are sexualized by their male
 16 managers and coworkers, leading to a substantial number of incidents of alleged sexual
 17 harassment, and even several incidents of sexual assault, that often go unpunished. [REDACTED]

18
 19 _____
 20 *Footnote continued from previous page*

21 woman, I felt objectified and excluded."); Sowinska Decl., ¶ 7 ("I frequently heard stories, and
 22 shared my own experiences, regarding women's contributions being undervalued and women
 23 being denied professional development opportunities. . . . I also spoke with women about the
 24 pressure we felt to hit the sweet spot between being perceived as 'too timid' or 'overly
 25 passionate' and 'too harsh' in Microsoft's male dominated culture."); Underwood Decl., ¶ 6 ("I
 26 was marginalized, excluded, denied resources, and treated differently than my male peers.");
 Vaughn Decl., ¶ 6 ("I am often excluded from meetings I should attend, and more senior male
 employees refuse to respond to my correspondence."); Warren Decl., ¶ 7 ("[M]en are praised for
 exhibiting strong opinions and being assertive, while women are admonished for the same
 behavior.").

⁴⁷ MSFT_MOUSSOURIS_00341320 at 321.

1 [REDACTED]
 2 [REDACTED]

3 Such incidents were often tied to Microsoft work trainings, *see e.g.*,
 4 MSFT_MOUSSOURIS_00819252 at 257-258 (female employee sexually harassed by *three*
 5 different male employees at a Microsoft training), or work social events, which should have been
 6 important professional networking and development opportunities, but instead were threatening
 7 environments for many Microsoft women. *See e.g.*, MSFT_MOUSSOURIS_00816432 (*four*
 8 women raised separate complaints of sexual harassment against one male employee occurring at
 9 a single work social event); MSFT_MOUSSOURIS_00809046 at 048 (intoxicated male
 10 Microsoft employee pulled down the shirt of a female employee at a company function and as a
 11 result the female employee left her role); MSFT_MOUSSOURIS_00818175 (male employee
 12 repeatedly touched leg of female employee during a meal with all Microsoft employees
 13 following the [REDACTED]); MSFT_MOUSSOURIS_00809106 at p. 8 (female
 14 employee groped and sexually harassed by male employee at team happy hour);
 15 MSFT_MOUSSOURIS_00809030 (female employee groped by a male employee at [REDACTED]
 16 [REDACTED]); MSFT_MOUSSOURIS_00631799 (four women groped and sexually
 17 harassed by male employee at several work-related functions);
 18 MSFT_MOUSSOURIS_00814864 at 866 (female employee groped by male employee multiple
 19 times at company event). *See also* Boeh Decl., ¶ 7 (“I was sexually harassed by a co-worker. I
 20 sought advice from [HR] regarding the situation, but HR failed to address the harassment while
 21 increasing the pain and stress of my situation.”); Miller Decl., ¶ 8 (“[My manager] would
 22 regularly make inappropriate comments about what I was wearing, and would touch me and ask
 23 why I was not married.”); Moussouris Decl., ¶ 7 (male manager found to have sexually harassed
 24 his female reports, yet he was simply transferred to another group and eventually promoted);

25 _____
 26 ⁴⁸ The two Employee Relations Investigations Team complaint logs produced by Microsoft are
 attached to the Shaver Declaration as Exhibit C.

1 [REDACTED]
 2 [REDACTED] complaints lodged with
 3 HR by professional women making careers at a Fortune 50 company is shocking enough, what is
 4 even more disappointing is the lackluster response to the issues raised by the Microsoft team
 5 (“ERIT”) tasked with investigating complaints of Microsoft’s anti-discrimination and anti-
 6 harassment policy. [REDACTED]

7 [REDACTED] Indeed, ERIT is
 8 notorious among Microsoft employees for “rubber-stamping” management, and employees have
 9 “little faith” in the investigations. *See e.g.*, MSFT_MOUSSOURIS_00064978 at 79 (“if handled
 10 internally by Microsoft, [it] could only be expected to lead to another finding of ‘unfounded’, no
 11 matter how obvious the evidence ... we already know of Microsoft’s history of making a
 12 determination of ‘unfounded’ even when evidence of wrongdoing has been provided in the
 13 investigations.”).⁵¹

14 _____
 15 ⁴⁹ Shaver Decl., Ex. C.

16 ⁵⁰ Shaver Decl., Ex. C.

17 ⁵¹ *See also* Alberts Decl., ¶ 8 (“I have no idea whether HR investigated my complaint, as HR
 18 never followed up. I believe that complaining to HR can be career-ending at Microsoft and I only
 19 did so because I saw no other option short of leaving the company, which I did when HR did
 20 nothing.”); Boeh Decl., ¶ 5,8 (HR ignored multiple complaints of discrimination, including when
 21 manager explicitly stated he denied her a promotion because he did not want to waste it on
 22 someone who might become pregnant); Dove Decl., ¶ 9 (ERIT found no violation after
 23 complaint of gender discrimination and told her it was technically impossible to remove unfair
 24 comments from her performance review; “This is not plausible at a tech company.”); Hutson
 25 Decl., ¶ 6 (for first complaint, “HR never followed up with me”; for second complaint, “despite
 26 telling me that my manager acted inappropriately, ERIT found no violation”); Miller Decl., ¶ 9
 (complaining to HR “will not make any difference and will only subject the complainants to
 hostility and retaliation”); Muenchow Decl., ¶ 7 (“[M]aking complaints about discrimination to
 Microsoft’s [HR] department does not make any difference.”); Moussouris Decl., ¶ 7 (HR took
 no action on multiple complaints of discrimination and retaliation); Smith Decl., ¶ 9 (“HR sent a
 single email to my work email while I was out of the office and never attempted to reach me
 again, even after I followed up with them upon my return.”); Underwood Decl., ¶ 9 (“ERIT
 collected information from me, but I did not see them take any action to address the
 discrimination. The multiple complaints I made did nothing to improve the hostility I and other
 women faced.”); Vaughn Decl., ¶ 7 (After complaining that male co-workers with less

1 In fact, ERIT often concludes there is no policy violation even when all the evidence
 2 points to the contrary. For example, four female employees raised separate complaints of sexual
 3 harassment against a male employee at a Microsoft event, yet ERIT found no policy violation
 4 despite concluding that the accused harasser touched all four women in a manner that made them
 5 feel uncomfortable.⁵² In another investigation, ERIT concluded that a male employee “engaged
 6 in harassing behavior as described in Microsoft’s Anti-Harassment and Anti-Discrimination
 7 Policy (Sexual Harassment),” yet ERIT still perplexingly found that the behavior did not rise to
 8 the level of a policy violation.⁵³

9 The ERIT team, which operates from the Redmond headquarters, also has no policies or
 10 procedures on how to conduct ERIT investigations. *Id.* 157:6-13. For example, ERIT has no
 11 policies or procedures in place to ensure the safety of Microsoft employees when they allege
 12 sexual harassment or assault. *Id.* See, e.g., MSFT_MOUSSOURIS_00645459 at p. 2 (two
 13 women raised complaints of sexual harassment against a male employee, but one of them was
 14 subsequently left alone on site with the accused harasser). Also troublingly, ERIT does not
 15 monitor for “repeat-offenders.” De Lanoy Sept. 18, 2017 Tr. 89:24-90:4; 86:25-87:2. While
 16 ERIT maintains a database of investigations, the database does not flag where an accused
 17 appears more than once. *Id.* 90:23-25. A repeat offender would only be identified if an
 18 investigator happened to recall the name from an earlier complaint and then searched the records
 19 for prior ERIT activity. *Id.* 95:17-20 (investigator “*might* look in the database to see if that
 20 person’s name was recorded for any prior ERIT activity ... If their name sounded familiar.”).
 21 However, even if a Microsoft investigator is somehow aware of other complaints against an
 22 accused, this knowledge does not inform Microsoft’s investigation. *Id.* 92:14-24; 94:2-8; 89:4-
 23 14 (to consider repeated gender bias offenses would not be “proper” or “fair”).

24

Footnote continued from previous page

25 experience were earning more, “HR told me there was nothing they could do.”).

26 ⁵² MSFT_MOUSSOURIS_00816432.

⁵³ MSFT_MOUSSOURIS_00632037 at 042.

1 Nor does ERIT monitor for retaliation in response to raising a complaint. *Id.* 83:6-20;
 2 85:19-8619, [REDACTED]
 3 [REDACTED]⁵⁴ For example, when a female Microsoft employee asserted that her male manager’s
 4 attempts to demote her from [REDACTED] constituted gender discrimination, “her manager cautioned
 5 her that if she makes those claims in writing, she would likely be terminated from Microsoft.”⁵⁵
 6 *See also*, MSFT_MOUSSOURIS_00815540 at 542 (after raising sexual harassment complaint
 7 with ERIT and HR, female employee’s [REDACTED] retaliated
 8 against her by scrutinizing her use of work time to attend a training, made negative comments
 9 about her performance, and questioned whether she had a future at Microsoft);
 10 MSFT_MOUSSOURIS_00815228 at 232 (female employee alleged she was denied a
 11 promotion and received a negative performance review in retaliation for reporting gender
 12 discrimination); MSFT_MOUSSOURIS_00065680 at 682 (female employee received first
 13 negative performance review in [REDACTED] at Microsoft after complaining about gender
 14 discrimination at a Microsoft women’s event); MSFT_MOUSSOURIS_00623396 at 398 (female
 15 employee alleged [REDACTED] retaliated against her for raising
 16 a gender discrimination complaint by giving her a negative performance review and removing
 17 her from her role).

18 Finally, in determining what discipline to impose on a founded complaint, Microsoft
 19 defers to business leaders—*i.e.*, “[t]he manager or management of the subject of the
 20 complaint”—rather than Human Resources or Legal for the “final say” in any corrective action.
 21 *Id.* 192:1-3; 193: 11-14. Thus, it is unsurprising that Microsoft employees believe HR and ERIT
 22 defend management,⁵⁶ do not follow their own policies or the law, and that ERIT investigations
 23 are a “farce,” “pretextual,” and a “subterfuge”.⁵⁷

24 ⁵⁴ MSFT_MOUSSOURIS_00064918 at 929.

25 ⁵⁵ MSFT_MOUSSOURIS_00064918 at 930.

26 ⁵⁶ MSFT_MOUSSOURIS_00059215 at 217.

⁵⁷ MSFT_MOUSSOURIS_00865592 at 597.

1 Employees within the D&I department, who are tasked with reporting out progress on
 2 D&I for their organizations over time, similarly express frustration at the lack of impact their
 3 programs make. MSFT_MOUSSOURIS_00259655 at 656 [REDACTED]

4 [REDACTED];
 5 MSFT_MOUSSOURIS_00150613 at p.4 [REDACTED]

6 [REDACTED] MSFT_MOUSSOURIS_00677712 at 717 [REDACTED]
 7 [REDACTED]

8 MSFT_MOUSSOURIS_00441086 at 087 [REDACTED]

9 MSFT_MOUSSOURIS_00441092 [REDACTED];

10 MSFT_MOUSSOURIS_00074974 [REDACTED]

11 [REDACTED] MSFT_MOUSSOURIS_00074988 [REDACTED]

12 [REDACTED]; MSFT_MOUSSOURIS_00420916 at 919 [REDACTED]
 13 [REDACTED]

14 [REDACTED] MSFT_MOUSSOURIS_00342925 at 927
 15 [REDACTED].

16 In sum, Microsoft has long been aware of the gender discrimination against female
 17 employees, has not remedied the problem, and instead has focused its efforts on misleading
 18 announcements about pay equity and unproductive D&I initiatives that merely check the box on
 19 commitment.

20 **III. ARGUMENT**

21 **A. Legal Standards**

22 **1. Federal Rule of Civil Procedure 23**

23 The Court may certify a class if the requirements of Federal Rule of Civil Procedure
 24 23(a) are met, along with one of the prongs of Rule 23(b). *Dukes*, 564 U.S. at 344. Although “a
 25 court’s class-certification analysis must be rigorous and may entail some overlap with the merits
 26 of the plaintiff’s underlying claim, Rule 23 grants courts no license to engage in free ranging

1 merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133
2 S. Ct. 1184, 1194-95 (2013) (quoting *Dukes*, 564 U.S. at 351) (quotation marks omitted). *See*
3 *also id.* at 1195 (“Merits questions may be considered to the extent—but only to the extent—that
4 they are relevant to determining whether the Rule 23 prerequisites for class certification are
5 satisfied.”).

6 Here, Plaintiffs seek certification of their claims for injunctive relief under 23(b)(2), for
7 monetary damages under 23(b)(3), and for liability under 23(b)(2), (b)(3), and/or (c)(4) of the
8 following class:

9 All women who have worked at Microsoft within the Engineering and/or I/T Operations
10 Professions in the United States at any time from September 16, 2012 to the present in
11 Stock Levels 59 to 67, inclusive.

12 As described below, Plaintiffs readily satisfy the standards for certification.

13 **2. Liability Under Title VII and WLAD**

14 To determine whether the requirements of Rule 23 are met, the Court must first look to
15 the elements of the underlying substantive claims. *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir.
16 2014); *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014). Here,
17 Plaintiffs bring class claims for disparate impact and disparate treatment under Title VII and
18 WLAD. The claims under both statutes are co-extensive and Plaintiffs’ arguments herein apply
19 to both. *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wash. 2d 675, 678 (1986) (finding that disparate
20 impact and treatment theories are available under WLAD, and that WLAD “is patterned after
21 Title VII” and “decisions interpreting the federal act are persuasive authority for the construction
22 of [WLAD]”). “Generally, litigation of both disparate treatment and disparate impact claims are
23 divided into two phases: liability and remedial.” *Williams v. Boeing Co.*, 225 F.R.D. 626, 634
24 (W.D. Wash. 2005).

1 **a. Disparate Impact Liability**

2 “Disparate impact claims assert that the employer has a facially neutral policy or practice
3 that causes a disparate impact on a protected group, even if the employer has no intent to
4 discriminate.” *Williams*, 225 F.R.D. at 634 (citation omitted). To establish a prima facie case of
5 disparate impact, a plaintiff must “identif[y] the specific employment practice that is
6 challenged,” “show that there are statistical disparities in the employer’s work force,” and the
7 “statistical disparities must be sufficiently substantial that they raise such an inference of
8 causation.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). If the prima
9 facie case is established, the burden shifts to the employer to show that its employment practices
10 are based on legitimate business reasons, and that there was no less discriminatory alternative.
11 *Id.* at 998; *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 505 (2012). This is commonly
12 referred to as the “liability phase.”

13 If liability is established, the entire class is entitled to a presumption of make whole
14 relief. *Ellis*, 285 F.R.D. at 505. A class member seeking relief “need only show that he or she
15 suffered an adverse employment action and therefore was a potential victim of the proved
16 discrimination. After such a showing, the employer bears the burden of persuading the trier of
17 fact that its decision was made for lawful reasons; otherwise, the employee is entitled to
18 individualized relief[.]” *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012)
19 (citations and alterations omitted). This is commonly referred to as the “remedial” or “damages”
20 phase.

21 **b. Disparate Treatment**

22 Disparate treatment claims arise where the employer “utilizes a pattern or practice of
23 intentional discrimination” such that it is “the employer’s standard operating procedure.”
24 *Williams*, 225 F.R.D. at 634. In contrast to disparate impact claims, “disparate treatment does
25 not require the identification of a specific employment policy responsible for the discrimination.”
26 *Rollins v. Traylor Bros.*, No. C14-1414 JCC, 2016 WL 258523, at *7 (W.D. Wash. Jan. 21,

1 2016) (citing *Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015)).⁵⁹ It does, however,
 2 require “significant proof” that Defendants “operated under a general policy of discrimination.”
 3 *Dukes*, 564 U.S. at 353. Significant proof of such a policy can be shown entirely through
 4 statistics and anecdotal evidence that demonstrate “a pattern of discrimination.” *Rollins*, 2016
 5 WL 258523, at *7; *Beck v. Boeing Co.*, 60 F. App’x 38, 39 (9th Cir. 2003) (stating plaintiffs may
 6 establish prima facie case “through statistics alone”).⁶⁰ If the prima facie case is established, the
 7 burden shifts to the employer to “demonstrate that the plaintiffs’ statistical evidence ‘is either
 8 inaccurate or insignificant.’” *Id.* (quoting *Teamsters*, 431 U.S. at 360). Whoever prevails on the
 9 preponderance of the evidence wins the liability phase.

10 If plaintiffs prevail, they are entitled to “a rebuttable inference that all class members
 11 were victims of the discriminatory practice, [which] will justify ‘an award of prospective relief’
 12 such as ‘an injunctive order against the continuation of the discriminatory practice.’” *Dukes*, 564
 13 U.S. at 352 n.7 (quoting *Teamsters*, 431 U.S. at 361). “If individual relief is sought, as it is here,
 14 “a ‘district court must usually conduct additional proceedings to determine the scope of
 15 individual relief.’ At this phase, the burden of proof will shift to the company, but it will have the
 16 right to raise any individual affirmative defenses it may have, and to ‘demonstrate that the
 17 individual applicant was denied an employment opportunity for lawful reasons.’” *Id.* (quoting
 18 *Teamsters*, 431 U.S. at 361-62). This is the “damages phase” in the disparate treatment case.

19 **B. Plaintiffs’ Disparate Impact and Disparate Treatment Claims Satisfy Rule**
 20 **23(a).**

21 Rule 23(a) requires that: “(1) the class is so numerous that joinder of all members is
 22 impracticable; (2) there are questions of law or fact common to the class; (3) the claims or
 23

24 ⁵⁹ *Rollins* was subsequently decertified for failure to satisfy the numerosity requirement. 2016
 WL 5942943 (W.D. Wash. May 3, 2016).

25 ⁶⁰ See also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (“Where gross
 26 statistical disparities can be shown, they alone may in a proper case constitute prima facie proof
 of a pattern or practice of discrimination.”).

1 defenses of the representative parties are typical of the claims or defenses of the class; and (4)
 2 the representative parties will fairly and adequately protect the interests of the class.” Fed. R.
 3 Civ. P. 23(a). Together, these requirements seek to “limit the class claims to those fairly
 4 encompassed by the named plaintiff’s claims.” *Dukes*, 564 U.S. at 349.

5 **1. The Class Is Sufficiently Numerous.**

6 While there is no threshold number of class members required, “[g]enerally, 40 or more
 7 members will satisfy the numerosity requirement.” *Dunakin v. Quigley*, 99 F. Supp. 3d 1297,
 8 1326-27 (W.D. Wash. 2015). The question is whether joinder of all potential plaintiffs would be
 9 impracticable. *Id.* Here, there are approximately 8,630 proposed Class members, readily
 10 satisfying this requirement. Farber ¶ 11.

11 **2. There Are Common Questions of Law and Fact That Will Drive the**
 12 **Resolution of Plaintiffs’ Claims.**

13 To satisfy commonality, class members’ claims must share common questions of fact or
 14 law that are “capable of class wide resolution.” *Dukes*, 564 U.S. at 350. A contention is capable
 15 of classwide resolution if “the determination of its truth or falsity will resolve an issue that is
 16 central to the validity of each one of the claims in one stroke.” *Id.* Commonality poses a “limited
 17 burden” because it “only requires a single significant question of law or fact.” *Mazza v. Am.*
 18 *Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012).

19 **a. Disparate Impact Commonality**

20 Plaintiffs’ disparate impact claim raises the common questions of whether Microsoft’s
 21 Calibration process has a disparate impact on women in pay and promotions. These questions
 22 are capable of class wide resolution because a determination—yes or no—will establish whether
 23 plaintiffs have met their prima facie case of disparate impact. If they have, two other significant
 24 common questions arise: whether the practice is based on business necessity and whether there is
 25 a less discriminatory alternative. Together, the answers to these common questions will establish
 26 or defeat liability for the Class.

1 As other courts have held, commonality is easily satisfied in these circumstances. For
 2 instance, in *Ellis*, the plaintiffs challenged “specific employment practices within Costco’s
 3 promotion system,” such as a tap-on-the-shoulder appointment process, a lack of posting for
 4 open positions, and reliance on common but unvalidated criteria for assessing candidates. 285
 5 F.R.D. at 531. The court held that, “Plaintiffs’ argument—that such companywide practices lead
 6 to disparate outcomes—is a common question subject to classwide proof and rebuttal.” *Id.*
 7 Similarly, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.
 8 2012), the plaintiffs alleged that their employer’s teaming and account distribution policies
 9 caused an adverse impact on African American brokers. The court found that, “whether [the
 10 teaming policy] causes racial discrimination and whether it nonetheless is justified by business
 11 necessity are issues common to the entire class and therefore appropriate for class-wide
 12 determination. And likewise with regard to account distributions.” *Id.* at 489. *See also Parra v*
 13 *Bashas’, Inc.*, 291 F.R.D. 360, 375 (D. Ariz. 2014) (where, like here, company used common
 14 pay scales to vary pay for white employees versus comparable Hispanic employees causing
 15 disparate impact on Hispanic employees, commonality satisfied because “if a trier of fact finds
 16 that Bashas’ wage scales lead to disparate outcomes, that is a common question subject to
 17 classwide proof and rebuttal”) (citing *Ellis*, 285 F.R.D. at 531). As these authorities make clear,
 18 Plaintiffs’ disparate impact claims raise common questions that will “generate common *answers*
 19 apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350.

20 **b. Disparate Treatment Commonality**

21 Plaintiffs’ disparate treatment claim raises the common question of whether
 22 discrimination was Microsoft’s “standard operating procedure,” to be shown through “significant
 23 proof” that Microsoft “operated under a general policy of discrimination.” *Dukes*, 131 S. Ct. at
 24 2553. This question is capable of class wide resolution because its determination—yes or no—
 25 will establish whether plaintiffs have met their prima facie case of disparate treatment. If they
 26 have, another significant common question arises: whether Plaintiffs’ statistical evidence “is

1 either inaccurate or insignificant.” *Beck*, 60 F. App’x at 39. Together, the answers to these
 2 common questions will establish or defeat liability for the Class.

3 Here, Plaintiffs’ evidence of a general policy of discrimination is substantial, including:
 4 1) statistically significant evidence of discrimination in the common Calibration process; 2)
 5 evidence that Microsoft’s senior leadership knew of the pay and promotion disparities and yet
 6 did not fix the problem; and 3) evidence that Microsoft has a corporate culture hostile to women,
 7 and that the HR organizations tasked with investigating and curbing discrimination failed at both.

8 Other courts have relied on the same categories of evidence to support a finding of
 9 commonality for a disparate treatment claim. *See, e.g., Ellis*, 285 F.R.D. at 510-531 (finding
 10 commonality satisfied with “significant proof that the entire class was subject to the same
 11 allegedly discriminatory practices,” falling into three categories: common promotions practices
 12 relying on common criteria, a companywide culture, and statistical evidence of gender
 13 disparities); *Rollins*, 2016 WL 258523 at *7-10 (finding commonality satisfied by substantial
 14 anecdotal evidence of discrimination in the workplace and statistical evidence of racial
 15 disparities); *Brown v. Nucor Corp.*, 785 F.3d 895, 914 (4th Cir. 2015) (same) (“[T]he workers’
 16 statistical and anecdotal evidence, especially when combined, thus provide precisely the ‘glue’ of
 17 commonality that *Wal-Mart* demands.”); *Beck v. Boeing*, 203 F.R.D. 459, 464 (W.D. Wash.
 18 2001) (“[S]tatistically significant results of adverse impacts on female employees in every
 19 facility and at every level within the Puget Sound area [] establishes sufficient indicia of class-
 20 wide disparate treatment to satisfy the certification criteria of commonality and typicality.”),
 21 *vacated in part on other grounds*, 60 F. App’x 38 (9th Cir. 2003). The evidence proffered here is
 22 on par with or more substantial than these and other cases finding commonality.

23 **3. The Representative Plaintiffs’ Claims Are Typical of the Class**
 24 **Claims.**

25 “Under the rule’s permissive standards, representative claims are ‘typical’ if they are
 26 reasonably co-extensive with those of absent class members; they need not be substantially

1 identical.” *Parsons*, 754 F.3d at 685 (quotation marks and citations omitted). “Typicality refers
 2 to the nature of the claim or defense of the class representative, and not to the specific facts from
 3 which it arose or the relief sought.” *Id.* (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
 4 508 (9th Cir. 1992).

5 Here, Representative Plaintiffs Moussouris and Muenchow both worked in the
 6 Engineering profession during the class period, and Plaintiff Muenchow worked in the I/T
 7 Operations profession as well. More importantly, the nature of their claims is co-extensive with
 8 the class claims for discrimination in pay and promotions. Plaintiff Moussouris alleged that
 9 Microsoft paid her less than her male peers throughout her tenure at the company and
 10 discriminated against her in the promotion process. Sec. Am. Compl., ¶¶ 65-68; *see also*
 11 Moussouris Dec., ¶¶ 3-5. For example, “[f]rom 2010 to 2014, Microsoft passed her over for
 12 promotions in favor of less qualified and less experienced men.” Sec. Am. Compl., ¶¶ 66-68; *see*
 13 *also* Moussouris Dec., ¶ 4. Similarly, Ms. Muenchow alleges that she has been paid less than
 14 comparable male coworkers and that men have been promoted to higher levels for which she was
 15 qualified and not considered. Sec. Am. Compl., ¶¶ 75-76; *see also* Muenchow Dec., ¶¶ 3-4.⁶¹
 16 Typicality is satisfied.

17 **4. The Representative Plaintiffs and Class Counsel Will Adequately**
 18 **Protect the Interests of the Class.**

19 To determine whether Representative plaintiffs will adequately represent a class, courts
 20 must resolve two questions: ““(1) do the named plaintiffs and their counsel have any conflicts of
 21 interest with other class members and (2) will the named plaintiffs and their counsel prosecute
 22 the action vigorously on behalf of the class?”” *Ellis*, 657 F.3d at 985 (quoting *Hanlon v.*
 23 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Here, neither the Representative Plaintiffs

24 ⁶¹ *See also* Alberts Decl., ¶¶ 5-6; Boeh Decl., ¶¶ 5-6; Dove Decl., ¶¶ 5-7; Hutson Decl., ¶ 5;
 25 Miller Decl., ¶¶ 5-6; Smith Decl., ¶¶ 5-6; Sowinska Decl., ¶¶ 5-6; Underwood Decl., ¶ 5; Vaughn
 26 Decl., ¶ 5; Warren Decl., ¶¶ 5-6 (collectively describing experiencing discrimination in pay and
 promotions).

1 nor their counsel have any conflicts of interest with the Class; to the contrary, their interests in
 2 remedying the systemic gender discrimination at Microsoft are directly aligned with the interests
 3 of the Class. Also, the Representative Plaintiffs and counsel have demonstrated that they will
 4 vigorously prosecute this action on behalf of the Class. The Representative Plaintiffs have
 5 demonstrated their commitment to the Class throughout this litigation by answering document
 6 requests and interrogatories, appearing for depositions, and serving as advisors to counsel.
 7 Moussouris Dec., ¶ 8; Muenchow Dec., ¶ 8. Counsel for Plaintiffs have also prosecuted this
 8 action vigorously—by, *e.g.*, litigating multiple motions to dismiss and motions to compel, and
 9 engaging in extensive discovery (over 220,000 documents exchanged and 13 depositions taken)
 10 through which counsel have demonstrated their dedication to the Class—and will continue to do
 11 so. Shaver Decl., ¶ 4. Further, counsel have extensive experience in prosecuting gender
 12 discrimination class actions and will continue to commit the time and resources to represent this
 13 Class. Dermody Decl., ¶¶ 4-8; Klein Decl., ¶¶ 4-7, Subit Decl., ¶¶ 6-8.

14 **C. Certification Under Rule 23(b)(2) is Warranted for Liability and Injunctive**
 15 **Relief.**

16 “Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party
 17 opposing the class has acted or refused to act on grounds generally applicable to the class.’ Civil
 18 rights cases against parties charged with unlawful, class-based discrimination are prime
 19 examples.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citations omitted). *See*
 20 *also Parsons*, 754 F.3d at 686 (“[T]he primary role of this provision has always been the
 21 certification of civil rights class actions.”). In fact, “subdivision (b)(2) was added to Rule 23 in
 22 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be
 23 brought as class actions.” Wright & Miller, *7AA Fed. Prac. & Proc. Civ.* § 1776 (3d ed.).

24 In *Dukes*, the Supreme Court has explained:

25 The key to the (b)(2) class is the indivisible nature of the injunctive
 26 or declaratory remedy warranted—the notion that the conduct is
 such that it can be enjoined or declared unlawful only as to all of
 the class members or as to none of them. In other words, Rule

1 23(b)(2) applies only when a single injunction or declaratory
 2 judgment would provide relief to each member of the class. It does
 3 not authorize class certification when each individual class
 member would be entitled to a *different* injunction or declaratory
 judgment against the defendant.

4 *Dukes*, 564 U.S. at 360 (quotation marks and citation omitted). Here, Plaintiffs seek a
 5 declaration that Microsoft's existing Calibration process is unlawful (*i.e.*, declaratory relief), and
 6 an order enjoining Microsoft from using it to make pay and promotion decisions in the future.
 7 All class members have been subjected to the Calibration process, and an order pronouncing it
 8 unlawful and preventing its further use would provide relief to the Class as a whole. Not only
 9 would it stop the use of a discriminatory practice, but it would also entitle all Class members to a
 10 presumption of make whole relief in the damages phase of the case. *Ellis*, 285 F.R.D. at 505;
 11 *Dukes*, 564 U.S. at 352 n.7, 366 (quoting *Teamsters*, 431 U.S. at 361). *See also Parsons*, 754
 12 F.3d at 688 (“[Rule 23(b)(2)’s] requirements are unquestionably satisfied when members of a
 13 putative class seek uniform injunctive or declaratory relief from policies or practices that are
 14 generally applicable to the class as a whole.”).⁶²

15 For exactly these reasons, courts have long recognized that disparate impact and disparate
 16 treatment claims for declaratory and injunctive relief are appropriate for certification under
 17 23(b)(2). *See, e.g., McReynolds*, 672 F.3d at 491-92 (certifying (b)(2) class for liability and
 18 injunctive relief in disparate impact case); *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y.
 19 2014) (same); *Easterling v. Connecticut Dep't of Correction*, 278 F.R.D. 41, 47 (D. Conn. 2011)

20 ⁶² *Parsons* is an Eighth Amendment case in which plaintiffs alleged that a class of inmates was
 21 subjected to common policies and practices of the Department of Corrections that created a
 22 substantial risk of serious harm, injury, or death. 754 F.3d at 663. The common practices that
 23 plaintiffs complained of included inadequate staffing, denials of dental care, lack of emergency
 24 treatment, failure to stock and provide critical medication, substandard dental care, and failure to
 25 provide therapy and psychiatric medication to mentally ill patients. *Id.* The court found that
 26 “these policies and practices are the ‘glue’ that holds together the putative class; either each of
 the policies and practices is unlawful as to every inmate or it is not.” *Id.* at 678. Though not a
 Title VII case, *Parsons* is still instructive as to the Ninth Circuit’s application of the requirements
 of 23(a)(2) and (b)(2) to class claims for liability and injunctive relief against a common set of
 policies and practices, as Plaintiffs present here.

1 (same); *Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 907 F. Supp. 2d 492, 509
 2 (S.D.N.Y. 2012), *aff'd sub nom. Gulino v. Bd. of Educ. of New York City Sch. Dist. of City of*
 3 *New York*, 555 F. App'x 37 (2d Cir. 2014) (same); *Ellis*, 285 F.R.D. at 537 (certifying (b)(2)
 4 class for liability and injunctive relief in disparate treatment and disparate impact case); *Scott v.*
 5 *Family Dollar Stores, Inc.*, No. 3:08-cv-00540, 2016 U.S. Dist. LEXIS 105267 (W.D.N.C. June
 6 24, 2016) (same); *Williams*, 225 F.R.D. at 632, 638 (same); *Beck*, 60 F. App'x at *39 (affirming
 7 certification of (b)(2) class for liability and injunctive relief in disparate treatment case). The
 8 claims in this case also warrant certification for liability and injunctive relief.

9 **D. Certification Under Rule 23(b)(3) is Warranted for Liability and Monetary**
 10 **Damages.**

11 The Supreme Court has clarified that “individualized monetary claims belong in Rule
 12 23(b)(3).” *Dukes*, 564 U.S. at 362. Rule 23(b)(3) requires that common issues predominate over
 13 individual issues, and that a class action be superior to other available methods for the fair and
 14 efficient adjudication of the case. Fed. R. Civ. P. 23(b)(3). “Predominance is not, however, a
 15 matter of nose-counting. Rather, more important questions apt to drive the resolution of the
 16 litigation are given more weight in the predominance analysis over individualized questions
 17 which are of considerably less significance to the claims of the class.” *Torres v. Mercer*
 18 *Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (citation omitted).

19 **1. Common Questions of Liability and Damages Predominate Over**
 20 **Individual Damages Issues.**

21 For both Plaintiffs’ disparate impact and disparate treatment claims, common questions
 22 of liability and damages predominate over individual damages issues.

23 With respect to Plaintiffs’ disparate impact claim, whether Microsoft’s Calibration
 24 process has a disparate impact on women in pay and promotions, whether that practice is
 25 nonetheless justified by business necessity, and whether alternative less-discriminatory practices
 26 exist, are common issues which will be proved or disproved using only common evidence. *Ellis*,

1 285 F.R.D. at 538. The first question will be determined based on statistical evidence, and the
2 second based on common, classwide evidence about the policies themselves, including the
3 testimony of the parties' Industrial Organizational psychology experts. These common issues of
4 liability clearly predominate; indeed, "adjudicating these issues on a classwide basis is necessary
5 before any individualized proceeding can occur." *Id.* See also *Moore v. Napolitano*, 926 F.
6 Supp. 2d 8, 33-34 (D.D.C. 2013) (holding predominance satisfied where "all members of the
7 class will rely on the same statistical evidence to make the same [disparate impact] claim");
8 *Parra*, 291 F.R.D. at 392 (adopting the rationale of *Ellis* and holding that "the common questions
9 regarding liability as to the pay claim are 'a significant aspect of this case and they can be
10 resolved for all members of the class in a single adjudication'"); *Easterling*, 278 F.R.D. at 48-49
11 (certifying liability and damages claims under Rule 23(b)(3) because both prima facie case of
12 disparate impact and defenses thereto are subject to generalized proof).

13 With respect to Plaintiffs' disparate treatment claim, whether Microsoft operated under a
14 general policy of discrimination, such that all class members are entitled to a presumption of
15 discrimination under *Teamsters*, is a common question that will be proved or disproved based on
16 common evidence. First and foremost, Plaintiffs offer statistical evidence of significant
17 disparities in pay and promotions for females in Engineering and I/T Operations. Second,
18 Plaintiffs offer evidence of a pervasive companywide culture that underlies and informs the
19 Calibration process from which these disparities emerge. Third, Plaintiffs offer evidence that
20 senior leadership at Microsoft knew of both the disparities and the cultural bias, and failed to
21 correct them. This evidence is substantial and is common to the class. Similarly, Microsoft's
22 predicted defense to this claim—that Plaintiffs' statistical evidence is inaccurate or
23 insignificant—also rests on common evidence. "This pattern and practice question predominates
24 because it has a direct impact on every class member's effort to establish liability and on every
25 class member's entitlement to . . . monetary relief." *Ellis*, 285 F.R.D. at 538 (quoting *Ingram v.*
26 *The Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001). See also *Scott*, 2016 U.S. Dist.

1 LEXIS 105267 at *26 (“[T]he predominance standard of Rule 23(b)(3) is satisfied because
2 plaintiffs have proffered evidence of class-wide pattern-or-practice and/or disparate impact that
3 could establish liability, and result in class-wide entitlement to: (1) affirmative injunctive and
4 declaratory relief to undo the effects of such disparate impact and/or class-wide pattern-or-
5 practice; and (2) a presumption of individualized harm for each class member.”); *Sellars v. CRST*
6 *Expedited, Inc.*, No. C15-117-LTS, 2017 WL 1193730, at *21-22 (N.D. Iowa Mar. 30, 2017)
7 (certifying liability phase of disparate treatment claim under Rule 23(b)(3) and holding that
8 “[t]he potential need for individual damage calculations at a later stage is typically not decisive
9 of the predominance factor”).

10 Although every Title VII case presents some individualized questions with respect to
11 class member entitlement to relief, the Ninth Circuit has long held that individualized damages
12 issues do not defeat predominance. *See, e.g., Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514
13 (9th Cir. 2013) (“The amount of damages is invariably an individual question and does not defeat
14 class action treatment.”) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975)). This is
15 no less true in the Title VII context than any other, as every case cited herein certifying a Title
16 VII claim makes clear. The Court may deal with damages issues in one of at least two
17 recognized ways. First, the Court may employ the *Teamsters* framework, whereby individual
18 class members will present their eligibility for relief in a second phase of trial if liability is
19 established. Importantly, these “individualized hearings that may be conducted in the second
20 phase of the trial ‘are narrow in scope and significance when compared to the threshold, class-
21 wide issues subject to generalized proof.” *Rollins*, 2016 WL 258523 at *15 (quoting *Ellis*,
22 *supra*). They also are made more efficient by the “presumption of individualized harm for each
23 class member” afforded by a class victory in the liability phase. *Scott*, 2016 U.S. Dist. LEXIS
24 105267 at *26. Alternatively, the Court may choose to certify both liability and damages for
25 class treatment based on the common issues presented with respect to damages, which include:
26 classwide calculation of baseline backpay on a year-by-year basis; class-wide determination on

1 how to calculate compensation for lost promotions; class-wide establishment of what non-
2 discriminatory bases Microsoft may use to claim a plaintiff would not have been promoted; and a
3 class-wide process to collect information from plaintiffs regarding mitigation. *See Gulino v. Bd.*
4 *of Educ. of City Sch. Dist. of City of New York*, No. 96 CV 8414 KMW, 2013 WL 4647190, at
5 *11 (S.D.N.Y. Aug. 29, 2013) (certifying liability and damages in disparate impact case under
6 23(b)(3) where “resolving common issues with respect to damages at a class-wide proceeding
7 will save substantial time and prevent the relitigation of common claims”). *See also Easterling*,
8 278 F.R.D. at 48-49 (certifying liability and damages in disparate impact case under 23(b)(3)
9 because common issues as to damages, including the total amount of back pay that should be
10 awarded to the class, predominated over individual issues, which included each member’s
11 eligibility to be in the class and qualification for position).

12 Plaintiffs’ proposed trial plan (set forth below) reflects the Court’s options. While
13 Plaintiffs believe that both liability and damages should be certified here, at minimum the Court
14 should certify the liability phase under Rule 23(b)(2), (b)(3) or (c)(4) (issue certification).

15 **2. Plaintiffs Satisfy Superiority.**

16 The superiority inquiry directs the Court to consider four factors—the class members’
17 interests in controlling litigation, the nature and extent of litigation, the desirability of
18 concentrating the litigation of the claims, and the manageability of the case as a class action.
19 Fed. R. Civ. P. 23(b)(3).

20 All four factors readily support certification. Plaintiffs are not aware of any pending
21 gender discrimination litigation commenced by or against Class members on the same issues.
22 Class members’ interests are not served by individual suits under their control. As this Court has
23 recognized, these are “negative value” claims such that the cost of prosecuting them would
24 exceed the potential income, particularly “against a resource-heavy organization such as
25 defendants’.” *Beck*, 203 F.R.D. at 466-67. In addition, Class members benefit from remaining
26 anonymous, rather than risking their reputations and careers by bringing a lawsuit in their own

1 names. Likewise, Plaintiffs have already conducted extensive discovery and litigation in this
 2 forum. It would be far more efficient and convenient to continue litigating common questions
 3 here. *Easterling*, 278 F.R.D. at 50.

4 As for manageability, Plaintiffs' proposed trial plan shows how this case may be
 5 efficiently litigated as a class action:

6 **Stage One: Liability**

- 7 1) Disparate Treatment Liability: the parties will litigate whether Microsoft is liable
 8 for disparate treatment. This claim will be tried to a jury. Plaintiffs will have the
 9 initial burden to show that discrimination was Microsoft's standard operating
 10 procedure. If that prima facie case is established, Microsoft will have the
 11 opportunity to rebut the Plaintiffs' evidence by showing it to be either inaccurate
 12 or insignificant. Whichever party prevails on the preponderance of the evidence
 13 will win the liability phase. If Plaintiffs prevail, the jury will determine whether
 14 punitive damages should be awarded, but not the amount of punitive damages.⁶³
- 15 2) Disparate Impact Liability: the parties will litigate whether Microsoft is liable for
 16 disparate impact. This claim will be tried to the Court. Plaintiffs have the initial
 17 burden to show that Microsoft's Calibration process causes statistically significant
 18 pay and promotion disparities for the proposed Class. If Plaintiffs establish their
 19 prima facie case, the burden will shift to Microsoft to prove, as an affirmative
 20 defense, that its Calibration process is based on legitimate business necessity.

21
 22
 23 ⁶³ See *Ellis*, 285 F.R.D. at 542 (“The Court concludes that while the availability of punitive
 24 damages should be adjudicated in Stage One of the trial, determination of the aggregate amount
 25 and individual distribution of punitive damages should be reserved for Stage Two. Such an
 26 arrangement will take advantage of the bifurcated trial procedure while safeguarding
 Defendant's right to ensure that any punitive damages award remains tethered to the
 compensatory damages actually awarded in Stage Two, consistent with *State Farm*.”) (citing
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)).

1 Plaintiffs will then have the opportunity to show that Microsoft could have used a
2 less discriminatory alternative practice.

- 3 3) Result of Verdicts: If Plaintiffs prevail on either claim, the entire class is entitled
4 to a declaration of liability, a presumption of individual make-whole relief, and,
5 importantly, a class-wide injunction against the continuation of the discriminatory
6 practice as well as other reforms that may be fashioned by the Court, if warranted.
7 The case would then proceed to Stage Two. If Plaintiffs do not prevail on either
8 claim, the case is over.

9 **Stage Two: Damages**

- 10 1) Option One: The Court first resolves common damages questions, which can
11 include the aggregate amount of backpay owed to the Class if the Court deems
12 that approach appropriate. Then the Court (or special master) will hold *Teamsters*
13 hearings, or use written questionnaires, to narrow and/or adjudicate issues around
14 individual class members' eligibility for relief, the amount of relief, and share of
15 punitive damages each is entitled to recover.
- 16 2) Option Two: The Court (or special master) will hold *Teamsters* hearings to
17 adjudicate individual entitlement to backpay and compensatory damages, as well
18 as the individual's share of any punitive damages.

19 This proposed trial plan follows a well-trodden path in Title VII class litigation, both
20 before and after *Dukes*. See, e.g., *Teamsters*, 431 U.S. at 361; *Ellis*, 285 F.R.D. at 505; *Robinson*
21 *v. Metro-North Commuter R.R Co.*, 267 F.3d 147, 161 (2d. Cir. 2001); *U.S. v. City of New York*,
22 276 F.R.D. 22, 32-33 (E.D.N.Y. 2011); *Velez v. Novartis Pharma. Corp.*, 244 F.R.D. 243, 243
23 (S.D.N.Y. 2007).

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