Exhibit F

Case No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION,

Defendant-Respondent.

Appeal from the United States District Court
for the Western District of Washington
District Judge James L. Robart, Case No. 15-cv-01483 (JLR)

PLAINTIFFS' FED. R. CIV. P. 23(F) PETITION FOR PERMISSION TO APPEAL DENIAL OF CLASS CERTIFICATION UNDER SEAL

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CORPORATE DISCLOSURE STATEMENT

No corporation is a petitioner in this case. Therefore, no corporate disclosure statement is required under Rule 26.1 of the Federal Rules of Appellate Procedure.

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I. INTRODUCTION

Petitioners respectfully seek Rule 23(f) review of the District Court's June 25, 2018 Order (the "Order") denying certification of a class of female technical workers at Microsoft Corporation ("Microsoft") who bring disparate impact and treatment pay and promotion claims under Title VII and Washington State law.

The Order raises unsettled and fundamental legal issues relating to Title VII class actions that this Court has not squarely addressed since *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), was decided, that are important to this case and to Title VII litigation generally, and that are likely to evade end-of-the-case review. Additionally, the District Court manifestly erred in interpreting and applying Rule 23(a), and the Order will effectively end the litigation for Plaintiffs and preclude class members from pursuing individual claims. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Clarity from the Court is needed on several issues:

First, the District Court held that company-wide practices for making pay and promotion decisions using common, specific criteria "prone to different interpretations" could not support commonality in a disparate impact case because the criteria invite discretion by the managers applying them. Order at 32, 39. This holding fundamentally misapprehends *Dukes* and conflicts with other Circuits that

have addressed this issue.[1] *See, e.g.*, *McReynolds v. Merrill Lynch,* 672 F.3d 482, 489-90 (7th Cir. 2012); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013).

Second, the District Court failed to credit statistical evidence—and the class-wide proof that brought the numbers to life—as "significant proof" of a general practice of discrimination. The District Court erroneously held both that Plaintiffs' disparate treatment claim required Plaintiffs to establish a company-wide policy of discrimination *and* that they failed to do so. Neither is correct. In fact, the District Court disregarded substantial evidence of a common, gender-biased culture at Microsoft, instead crediting (on the merits) Microsoft's class-wide evidence of its defense of centralized anti-discrimination efforts. In holding that Microsoft did not show an intent to discriminate, the District Court improperly reached and decided a merits issues untethered to an element of Rule 23. Guidance is needed on what quantum of proof is necessary to certify a disparate treatment claim.

Third, the District Court found a low-level supervisory employee could not be an adequate class representative, even though supervisory employees in the proposed class merely followed common, discriminatory policies that all class

[1] Although this Court has addressed the requirement that courts conduct a "rigorous analysis" of commonality under *Dukes* to discern whether plaintiffs identify a common pattern or practice that affects the class, it has not addressed directly whether a common pattern or practice that permits some manager discretion in its application may support commonality. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011) ("*Ellis I*").

members have an interest in remedying. Guidance is needed regarding what degree of involvement in policy compliance is allowed for a class representative seeking to challenge that policy.

II. BACKGROUND

Katherine Moussouris and Holly Muenchow ("Plaintiffs") moved to certify a class of approximately 8,600 women in two subdivisional "Professions"—Engineering and I/T Operations. Ex. 25 (Class Cert. Mot.) at 1, 32. Ninety percent of class members worked in Washington, and over seventy percent worked in Microsoft's Redmond headquarters. Ex. 23 (Class Cert. Reply) at 2; Ex. 22 (Farber Rebuttal Rpt.) at ¶ 4.

Plaintiffs challenge Microsoft's company-wide practices for setting pay and granting promotions—the "Calibration Process." Ex. 25 at 2. For pay, managers must assign performance ratings and make pay recommendations to employees using specific, uniform criteria that Microsoft determined. *Id.* at 5-6; Ex. 23 at 2-3. Managers then meet at "calibration meetings" to compare employees' performance within peer groups (consisting of employee peers across specified pay bands or "Stock Levels"), and submit their recommendations to senior managers and Executive Vice Presidents ("EVPs") for approval. *Id.* Microsoft requires managers to set employees' pay based on their performance evaluations within

peer groups but then pays equivalent peer performers differently due to their respective pay bands. Ex. 25 at 4-6; Ex. 4 (Ryan Expert Rpt.) at 2-3.

For promotions, Microsoft also requires managers to evaluate candidates based on specific criteria. Ex. 23 at 3; Ex. 2 (Def.'s Opp. to Class Cert.) at 7, 9. Managers compare candidates and submit promotions recommendations to EVPs for approval. Ex. 2 at 7, 9. Microsoft does not contest that it requires all managers to pay and promote employees using these common processes. *Id.* at 5-9.

Plaintiffs sought class certification based on disparate impact and treatment theories. Ex. 25 at 30-34. Economist Dr. Henry Farber presented statistical evidence showing that class members are paid less and promoted less often than similarly situated men, controlling for legitimate explanatory factors such as year, experience, tenure, location, performance, discipline, and job title. Ex. 21 (Farber Expert Rpt.) ¶¶ 5, 48, 53-57, 77, Tables 3, 6E-7E.[2] Plaintiffs presented evidence that: (1) Microsoft knew—based on internal audits, REDACTED, and numerous employee complaints to senior leadership about gender disparities—that its pay and promotions processes disadvantaged women, yet it did not fix the problem, Ex. 25 at 10-18; and (2) Microsoft maintained a gender-biased culture denounced by female employees, and reflected in 238 formal sex discrimination

[2] The District Court denied Microsoft's motion to exclude Dr. Farber's evidence, rejecting Microsoft's argument that Dr. Farber improperly aggregated data in his analysis. Ex. 3 (Order re Motions to Exclude) at 18-19.

complaints, *id.* at 19-28. Dr. Farber's statistical evidence plus evidence of bias showed that Microsoft operated under a general policy of discrimination. *Id.* at 33-34.

At oral argument, the District Court expressed doubt regarding how to apply *Dukes*, whether the class's size militated against commonality, whether it could rely on internal complaints of gender discrimination in addition to class member declarations to find "significant proof" of discrimination, and how the standards for commonality under disparate impact and treatment theories differed. Ex. 1 (Hr'g Tr.) 12:2-11, 16:13-18, 19:11-22:2.

The District Court denied certification because the exercise of manager discretion in the compensation and promotions processes precluded a finding of commonality, and Plaintiffs' statistical evidence, which evaluated the *processes*' impact on women and not at the level of individual managers, was "of no assistance." Order at 45-50, 54-55. The District Court also found that Plaintiffs' "anecdotal evidence" and "culture evidence" was insufficient to show a general policy of discrimination. *Id.* at 56-61.

The District Court further found that the manager discretion used to implement Microsoft's policies defeated typicality under Rule 23(a), *id.* at 61-64, and that Plaintiffs could not adequately represent the class because supervisory

employees in the class implemented the Calibration Process and other class members did not. *Id.* at 64-68.

III. QUESTIONS PRESENTED

A. Does any exercise of manager discretion prevent a finding of commonality under *Dukes*, even when that discretion is directed by Microsoft pursuant to a company-wide policy or practice using common evaluation criteria?

B. Where common evidence of gender bias and refusal to remedy gender disparities exists alongside statistical evidence of discrimination, must plaintiffs also identify a uniform employment practice to certify a disparate treatment claim?

C. What type and quantity of evidence of bias is required for a disparate treatment claim at class certification?

D. Can low-level managers who must follow discriminatory policies, but did not create or institute the policies, be adequate representatives for non-managerial class members?

IV. RELIEF SOUGHT

Petitioners seek permission to appeal the denial of class certification under Federal Rule of Civil Procedure 23(f).

V. STANDARD OF REVIEW

The Court has "'unfettered discretion' to grant or deny permission to appeal based on 'any consideration that [it] finds persuasive.'" *Chamberlan*, 402 F.3d at 957. Three non-exhaustive factors guide this determination, though this is not a rigid test: (1) there is a death-knell situation for plaintiff or defendant, coupled with a questionable class certification decision; (2) the decision "presents an unsettled

and fundamental issue of law relating to class actions . . . that is likely to evade end-of-the-case review"; or (3) the class certification decision is "manifestly erroneous." *Id.* at 959.

VI. ARGUMENT

Although all of the *Chamberlan* factors favor interlocutory review, the second factor provides the most compelling reason for granting Plaintiffs' Petition.[3]

A. The Court Should Clarify That A Common Mode of Exercising Discretion Under Company-Wide Employment Policies Supports Commonality In A Disparate Impact Case.

The District Court misapprehended *Dukes* when it found that "all putative class members are subject to the 'same, uniform compensation and promotion process,'" Order at 45, but then held such a process could not establish commonality because the company-wide criteria managers must use to make decisions leave room for discretion. *Id.* at 46-47.

1. Discretion Does Not Preclude Commonality.

Dukes affirmed that a policy that allows discretion "does not in and of itself preclude class certification." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492,

[3] Denial of class certification will effectively end the litigation for the Plaintiffs, and the decision is highly questionable and largely based on first impression issues. This case is unlikely to proceed to judgment, and thus likely to evade review. *See Chamberlan*, 402 F.3d at 957 ("[D]enial of class status [may] sound[] the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation.").

518-19 (N.D. Cal. 2012) ("*Ellis II*"). As here, in *Ellis II*, plaintiffs challenged criteria for making promotion decisions that they "allege[d] to be subjective and unvalidated[,]" and thus prone to discriminatory outcomes. *Id.* On remand, the district court rejected Costco's claim that the "challenged practices allow for a certain degree of discretion among managers in making promotion decisions, and that this negates commonality." *Id.* at 518.

Other Circuits have held that plaintiffs may establish commonality in a disparate impact case where, as here, they challenge a company-wide policy even though employees retain discretion in carrying it out. In *McReynolds*, the plaintiffs challenged two company policies: (1) allowing brokers to form teams to share clients, that allegedly disparately impacted African American brokers; and (2) requiring local managers to consider brokers' "past success" (which could be impacted by teaming) in re-assigning departing brokers' accounts. 672 F.3d at 489. Although Merrill did not require teaming, left discretion to individual brokers to make teams, and gave managers discretion to adopt additional criteria for re-assigning accounts, the teaming and "past success" policies nevertheless "influenced" the exercise of discretion. *Id.* at 489-90. The Seventh Circuit rejected Merrill's argument that "any discrimination here would result from local, highly-individualized implementation of policies rather than the policies themselves." *Id.* at 490.

The Fourth Circuit followed this approach in *Brown v. Nucor*, 785 F.3d 895 (4th Cir. 2015), where the plaintiffs asserted that Nucor's "bid" on open promotions policy disparately impacted African American employees. *Id.* at 916. "For purposes of class certification, . . . such a policy, paired with the exercise of discretion by supervisors acting within it," was sufficient to establish commonality, because the process may have "created or exacerbated racially disparate results." *Id. See also Scott*, 733 F.3d at 110 ("*Wal–Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. Rather, where subjective discretion is involved, *Wal–Mart* directs courts to examine whether 'all managers [ ] exercise discretion in a common way with [ ] some common direction.'") (quoting *Dukes*, 564 U.S. at 356).

Similarly, in *Chen-Oster*, plaintiffs established commonality because all class members were subjected to the performance review and tap-on-the-shoulder process informing pay and promotions—even though managers exercised discretion in applying uniform criteria. *Chen-Oster v. Goldman Sachs & Co.*, --- F.R.D. ---, No. 10 Civ. 6950, 2018 WL 1609267, at *12-13 (S.D.N.Y. Mar. 30, 2018). Plaintiffs' theory falls squarely within this line of cases, and is consistent with *Dukes*.

2. Microsoft's Practices Firmly Guide Managers' Discretion.

a. Pay

Rather than a policy of unguided discretion, Microsoft requires managers to use the Calibration Process to evaluate employees for the purpose of setting pay:

> [A]ll employees, including the putative class members, are first evaluated by their direct managers, then placed in peer groups of similar Stock Levels, and discussed in a broader meeting of managers—whether in a calibration meeting or a people discussion—with the consensus recommendation rolled up the management chain.

Order at 45. Microsoft sets pay based on each employee's performance rating across peers of differing Stock Levels (pay bands), within the pay band to which the employee is assigned in the peer group. *See id.* at 5-10; Ex. 25 at 4-6; Ex. 4 at 2-3; Ex. 24 (Helf Decl.) ¶ 8.

i. Common procedures with common criteria

Calibration requires managers to use common criteria to assess employees—*i.e.*, "**What** results were achieved, **How** they were achieved, and [the] **Proven Capability**" of the employee, and later in the class period the "impact the employee's performance makes," *see* Order at 6, 9—similar to *Ellis II*. *See* 285 F.R.D. at 514. Microsoft defines the criteria, *see* Ex. 24 ¶ 8, and familiarizes managers on their required use. *See* Order at 47. Declarations submitted by Microsoft describe common training and understanding on the meaning of

"impact." *See* Ex. 7 (Liuson Decl.) ¶ 15; Ex. 8 (Ku Decl.) ¶ 10; Ex. 6 (Mao Decl.) ¶ 7; Ex. 10 (Alvarez Decl.) ¶ 6; Ex. 9 (Jarvis Decl.) ¶ 9.

The District Court incorrectly determined that Plaintiffs' expert Dr. Ryan, a organizational psychologist, opined that Microsoft's processes lack any standards, *see* Order at 42, 47, 49-50, when actually Dr. Ryan found Microsoft's criteria are not sufficiently job-related. Ex. 4 ¶¶ 12-13. Microsoft developed a competency model, but then failed to tie criteria for compensation and promotion decisions to the model. *Id.* ¶¶ 26-31. The Calibration Process also fails to ensure that similar employees are evaluated similarly, based on common competencies. *Id.* ¶¶ 12, 32-38 (Microsoft "does *not* calibrate raters in their use of job related standards across employees, but instead calibrates employees as to relative performance within a group."). Similarly, in *McReynolds*, the teaming practice suffered from a lack of "objective criteria" and "uncertainty," but the existence of the practice itself—a decision made by top management—was sufficient to establish commonality. 672 F.3d at 489. Likewise, in *Ellis II*, "Costco [did] not have any written policy explaining . . . the criteria . . . for [promotions]," but the court found that broad common criteria that plaintiffs criticized as invalid—including prior relevant experience, scheduling flexibility, and willingness to relocate—guided manager discretion and supported commonality. 285

F.R.D. at 498, 514. Guidance from this Court is needed regarding whether consistent application of standards that are unvalidated or insufficiently job-related constitute an employment practice subject to challenge under a disparate impact theory.

ii. Upper management design and direction

The District Court found commonality lacking despite evidence that four EVPs reviewed and approved "all pay and promotion decisions," because it found that EVPs rarely change employees' ratings.[4] Order at 48. This sets too high a standard. In *Dukes*, there was no evidence of senior management involvement in the challenged process. 564 U.S. at 343. Here, top management not only reviewed personnel decisions, they designed the process that managers follow. Ex. 2 at 5, 8 (describing prior process for compensation and promotion decisions, and how Microsoft "redesigned its . . . approach").[5]

iii. Parameters setting pay

Whether Microsoft's uniform practice of requiring managers to pay peer employees based on their pay band (Stock Level), rather than their performance

[4] Microsoft's own declarations describe how the recommendations at issue have been changed by senior management. Ex. 9 ¶ 15.

[5] Although there may have been greater hands-on involvement by the CEO in *Ellis II*, such involvement there may have been necessary to establish commonality because of the absence of a formal promotions policy. *See* 285 F.R.D. at 498. Here, Microsoft's top management created and oversaw a formal pay and promotion system with uniform criteria. Direct involvement in decision-making by senior management is less critical. *See McReynolds*, 672 F.3d at 489.

relative to peers, disparately impacted women is a common question. *See* Order at 5 (Stock Levels are "compensation ranges"); *Scott*, 733 F.3d at 110, 116-17 (whether company's "mandatory salary range" locks in gender disparities supported commonality); *see also Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9th Cir. 2008). That Stock Level is "determined by promotions," Order at 43 n.12, militates in favor of commonality—not against it—because it demonstrates how the pay and promotions processes are interconnected and how one potentially exacerbated the disparities caused by the other. *See McReynolds*, 672 F.3d at 489-90.

b. Promotions

Unlike in *Dukes*, where store managers had complete discretion to make promotion decisions once candidates met minimum qualifications, *see* 564 U.S. at 343, 371, Microsoft requires managers to: (1) discuss candidates in calibration; (2) assess candidates based on three common criteria—business need, employee readiness or performance, and budget; and (3) roll up promotion recommendations for top management approval. Order at 8-10.

That managers have flexibility in justifying their promotion recommendations, *see* Order at 10,[6] does not negate the obligation to apply common criteria or transform this case into *Dukes*:

> [A] common mode [of exercising discretion] need not strip managers of all flexibility in compensation and promotion decisions . . . . That is because, if 'common mode' were so defined, it would divest lower-level managers of *all* discretion, and, as a result, would render the phrase 'common mode of exercising discretion' oxymoronic.

Chen-Oster, 2018 WL 1609267, at *12. Here, as in *Chen-Oster*, there is a required process for generating, assessing, and justifying promotion decisions, which is precisely the common mode of exercising discretion that supports commonality. *Id.* at *13 (that "all promotions . . . were awarded through the [promotion] cross-ruffing process" was a "critical fact[] distinguish[ing] the instant case from *Dukes*").

3. The Size And Concentration Of The Class Distinguish It From *Dukes*.

Dukes addressed "one of the most expansive class actions ever"—1.5 million women in 3,400 stores across 50 states. *Ellis II*, 285 F.R.D. at 507 (quoting *Dukes*, 564 U.S. at 342). By contrast, this class is a small fraction of

[6] The declaration on which the District Court relied simply states that managers have discretion to choose what to write in the form justifying their promotion recommendation—not that they can deviate from Microsoft's prescribed criteria. *See* Ex. 24 ¶ 39.

that—8,600 women, with 90 percent working in one state, 72 percent working in one location, and *98 percent reporting to the same four EVPs*. *See* Ex. 22 ¶¶ 4, 16.

Nonetheless, comparing the class size and scope of this case to some smaller certified classes in Title VII cases, the District Court concluded that the somewhat larger size and scope here weighed against a finding of commonality.[7] Order at 44; *compare Parra v. Bashas', Inc.*, 291 F.R.D. 360, 376 (D. Ariz. 2013) (certifying class of thousands of employees because each challenged use of two-tiered pay scales; thus, class's size and scope were less relevant than in *Dukes*). Clarity is needed regarding the import of class size on commonality—which the District Court acknowledged is a "ground that's not charted in the law." Ex. 1 at 16. *See Houser v. Pritzker*, 28 F. Supp. 3d 222, 242, 245 (S.D.N.Y. 2014) (certifying class of several hundred thousand denied applicants).

[7] The District Court asserted that out of 8,600 class members there are "thousands" of "unique positions" in the class. Order at 58. That is a vast overstatement. All class members worked in two Professions, defined by Microsoft as "people doing similar work," Ex. 25 at 3 (citing Whittinghill Tr. 101:2-12), and frequently moved between these Professions. Ex. 22 (Farber Rebuttal) ¶ 26. The "unique positions" to which the District Court pointed are projects or products class members worked on during the class period—not discrete jobs. *See* Order at 4; Ex. 5 (Whittinghill Decl.) at 10, 36-39 (Standard Titles define roles, though within each Title employees work on different products).

B. The Court Should Clarify The Standard For Establishing Commonality In A Disparate Treatment Case.

The Ninth Circuit has not yet reviewed the application of *Dukes* to certification of a disparate treatment claim. At oral argument, the District Court "tr[ied] to make sense out of" disagreements in the case law and asked "[w]hat, if any, are the differences in analyzing commonality [f]or disparate impact versus disparate treatment?"[8]

1. Disparate Treatment Claims Do Not Require Plaintiffs To Show The Elements Of Disparate Impact.

The District Court first correctly stated that "[u]nlike disparate impact claims, disparate treatment claims do not require plaintiffs to identify a specific company-wide employment practice responsible for the discrimination," and Plaintiffs' "burden may be met through statistics alone."[9] However, it then erred by merging the two standards and repeatedly requiring exactly that type of policy showing to credit Plaintiffs' disparate treatment theory and statistical evidence.[10] This Court should clarify that "[u]nlike a disparate impact claim, a showing of

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[8] Ex. 1 at 12:10-11; *see also id.* at 19:13-14 ("Is it one standard? Is it two standards?").

[9] Order at 53 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977)).

[10] *See* Order at 54 n.19 ("Because Plaintiffs have not identified the existence of common pay and promotion practices that apply to the class as a whole, . . . they cannot predicate commonality for their disparate treatment claims on a 'common, companywide promotion system . . . made up of numerous common components.'"); *id.* at 55.

disparate treatment does not require the identification of a specific employment policy responsible for the discrimination." *Brown*, 785 F.3d at 915.

2. The Court Should Clarify The Quantum Of Evidence Required To Certify A Disparate Treatment Class Claim.

The District Court erroneously focused only on whether any of Plaintiffs' "proffered categories of evidence"—in *isolation*—"constitute[d] the necessary 'significant proof,'" Order at 54, instead of considering the evidence together. *See, e.g.*, *Teamsters*, 431 U.S. at 339 (statistical evidence comes "to life" when considered in conjunction with other forms of evidence, such as personal anecdotes); *Brown*, 785 F.3d at 914 ("[T]he workers' statistical and anecdotal evidence [including internal complaints], especially when combined, thus provide precisely the 'glue' of commonality that *Wal-Mart* demands.").

The type and quantity of evidence that Plaintiffs presented at certification—statistical proof, class member declarations, formal complaints of sex discrimination, internal communication alleging company-wide bias, audits revealing gender disparities, and senior-management awareness of gender equity problems—have regularly been found sufficient to support class certification. *See Ellis II*, 285 F.R.D. at 510-31; *Chen-Oster*, 2018 WL 1609267, at *15-16; *Brown*, 785 F.3d at 914; *Beck v. Boeing*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), *vacated in part on other grounds*, 60 F. App'x 38 (9th Cir. 2003).

After first crediting Dr. Farber's analysis in its denial of Microsoft's *Daubert* motion,[11] the District Court reversed course and rejected this analysis for not analyzing the data at the level of each employee's immediate supervisor.[12] Order at 55-56. But Microsoft does not organize its workforce or implement pay and promotion policies at the level of individual supervisors. Moreover, neither at this stage nor at the liability phase are Plaintiffs required to show with statistical evidence that *all* managers discriminated; instead, Plaintiffs' burden is to show *a pattern* of discriminatory treatment. *Ellis II*, 285 F.R.D. at 518. The District Court fundamentally misunderstood the role and meaning of statistical evidence in a Title VII case by requiring manager-level disaggregation of data. *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) ("[I]t is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. . . .The plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies.").

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[11] In denying Microsoft's motion, the District Court found that "even if Microsoft is correct that the effects of the Calibration Process vary across decision-maker, that variety does not render an aggregate statistical analysis wholly irrelevant." Ex. 3 at 18.

[12] The District Court wrongly faulted Dr. Farber for not opining on how Microsoft's *policies* cause this gender disparity. Order at 56 n.21. As noted above, Plaintiffs need not identify a specific policy causing this disparity to establish their disparate treatment claim. In addition, Dr. Farber's analyses of pay and promotion *outcomes* are sufficient to provide an inference of a *prima facie* case of discrimination. *Teamsters*, 431 U.S. at 340-42.

Second, the District Court ignored evidence that Microsoft's leadership was aware of these class-wide gender-based pay disparities and failed to remedy them. This included Microsoft's internal audits for pay disparities, REDACTED [redacted], emails from senior leadership regarding "window dressing" in its diversity efforts, and reaction emails from employees and supervisors explaining why Microsoft's pay equity announcements were wrong. *See* Ex. 25 at 10-18. Such evidence demonstrates that Microsoft's leadership knew of the disparities and believed that a company-wide response was required—and the efficacy of that response is a common merits question. *See Williams v. Boeing Co.*, 225 F.R.D. 626, 636 (W.D. Wash. 2016) (internal audits showing senior Boeing executives knew of disparate impact was evidence of intentional discrimination). The District Court appeared to misunderstand Plaintiffs' disparate treatment theory and simply construed this as additional "culture evidence," divorced from the purpose for which it was offered. *See* Order at 58-61. The Court should clarify that notice evidence can support certification of a disparate treatment claim by bringing "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339.

Third, the District Court placed outsized emphasis on the number of declarations Plaintiffs submitted. Order at 56. The court concluded, without support, that Plaintiffs' 12 representative declarations, all speaking uniformly

about the company-wide culture and central HR complaint system,[13] were akin to the 120 store-level declarations for the 3,400 store, 1.5 million-person class in *Dukes*. *Id.* at 56-58. The court also ignored the additional weight of 238 internal complaints that contemporaneously corroborated the same gender bias issues.[14] The District Court similarly swept aside Plaintiffs' robust evidence of a culture of bias against women that creates the context for its discriminatory treatment, despite the evidence all pointing to a common company culture, rather than to the actions of individual managers.[15] *See* Ex. 25 at 19-28. The Court should clarify the amount of evidence required to support class certification of a disparate treatment claim and find that Plaintiffs have presented sufficient evidence here.

Finally, the District Court noted that Microsoft's leadership took companywide action to address gender disparities and a biased culture. Order at 59 & n.24. Instead of recognizing that this was class-wide evidence for the merits

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[13] *See* Ex. 20 (Alberts Decl.) ¶¶ 7-8; Ex. 19 (Boeh Decl.) ¶¶ 7-8; Ex. 18 (Dove Decl.) ¶¶ 8-9; Ex. 17 (Hutson Decl.) ¶ 6; Ex. 16 (Miller Decl.) ¶¶ 8-9; Ex. 15 (Smith Decl.) ¶¶ 7-10; Ex. 14 (Sowinska Decl.) ¶ 7; Ex. 13 (Underwood Decl.) ¶¶ 6, 9; Ex. 12 (Vaughn Decl.) ¶¶ 6-7; Ex. 11 (Warren Decl.) ¶ 7.

[14] The District Court calculated that Plaintiffs had submitted one piece of anecdotal evidence for every 785 class members. Order at 57 n.22. The 12 declarations and 238 complaints, taken together, represent one narrative account for approximately every 34 class members—a far cry from the one per 12,500 class members in *Dukes*.

[15] In addition to declarations, Plaintiffs presented comments made by employees in the Microsoft Poll Survey, civil lawsuits and gender discrimination charges filed against Microsoft with governmental agencies, and documentary evidence such as corporate emails and records reflecting persistent biases and systemic problems for women. *See* Ex. 25 at 19-28.

question whether Microsoft's actions were sufficient to cure the gender-biased pay and promotion disparities, the District Court inappropriately *resolved* the merits question and found that "[s]uch a response [from Microsoft's CEO] does not reflect what Plaintiffs claim to be a culture of evasion and refusal to acknowledge the problem." *Id.* at 59 & n.24. Additionally, because the District Court largely ignored the common evidence discussed above, it effectively decided a common issue against Plaintiffs and in favor of Microsoft on the merits. The Court should clarify that such a merits inquiry is not permissible at the class certification stage.

In addition, because the District Court's finding that Plaintiffs are not typical under Rule 23(a) follows from its erroneous commonality finding, Order at 61-64, the Court should review and reverse that finding as well.

C. The Court Should Clarify That Low-Level Managers Who Neither Create Nor Control Discriminatory Policies Are Adequate To Represent Themselves And Others Subject To Such Policies.

The District Court erroneously found that including low-level supervisors and subordinates in the same class created an insurmountable intra-class conflict. *See* Order at 67-68. Although there is no "per se rule concerning adequacy of representation where the class includes employees at different levels of an employment hierarchy," *Staton v. Boeing Co.*, 327 F.3d 938, 958-59 (9th Cir. 2003) (upholding certification in part because supervisors and subordinates sought the same relief), this case shows that further guidance would be useful.

The Plaintiffs' interests are not in conflict with the class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (adequacy requires the plaintiff to "possess the same interest and suffer the same injury" as class members). They share the class's interest in remedying the pay and promotion practices to which they too were subject, and obtaining monetary relief to address the resulting compensation disparities and promotion shortfalls. *See* Ex. 23 at 20; *In re Johnson*, 760 F.3d 66, 74 (D.C. Cir. 2014) (no conflict where class included supervisors who participated in allegedly discriminatory evaluation process); *Staton*, 327 F.3d. at 959 (no conflict in class consisting of employees at different levels where there was general policy of discrimination).

Donaldson v. Microsoft Corporation, on which the District Court relied, is distinguishable. 205 F.R.D. 558, 568 (W.D. Wash. 2001). The plaintiffs there challenged the "unfettered discretion vested in Microsoft's management," *id.* at 566, not specific employment practices developed and mandated by top management. Class members in this case "allege a uniform policy" and "both supervisors and subordinates . . . have been affected similarly." *Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 215 (E.D. Cal. 2015). The District Court's decision here creates a death knell in any Title VII case where any members of the proposed class have some role in following policies they neither created nor control.

Even if an intra-class conflict existed, the Court should have created subclasses, excluded class members who created a conflict,[16] and/or allowed an adequate class member to intervene to remedy the perceived adequacy issue.

VII. CONCLUSION

Plaintiffs respectfully request permission to appeal the District Court's class certification decision under Rule 23(f).

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Respectfully submitted,

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[16] Plaintiffs suggested this alternative. *See* Ex. 23 at 20 n.47; Ex. 1 at 65:15-23.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned hereby certifies that this document complies with the word limit of Federal Rule of Appellate Procedure 5(c)(1) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 5,149 words.

The undersigned further certifies that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

Date: July 9, 2018

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