Jahan C. Sagafi (Cal. Bar No. 224887)
OUTTEN & GOLDEN LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
E-mail: jsagafi@outtengolden.com

Adam T. Klein (admitted *pro hac vice*)
Melissa L. Stewart (admitted *pro hac vice*)
Daniel Stromberg (admitted *pro hac vice*)
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Telephone: (212) 245-1000
Facsimile: (646) 509-2060
E-mail: atk@outtengolden.com
E-mail: mstewart@outtengolden.com
E-mail: dstromberg@outtengolden.com

Lucy B. Bansal (admitted *pro hac vice*)
OUTTEN & GOLDEN LLP
601 Massachusetts Avenue NW,
Second Floor West
Washington, D.C. 20001
Telephone: (202) 847-4400
Facsimile: (202) 847-4410
E-mail: lbansal@outtengolden.com

Daniel Kohrman (admitted *pro hac vice*)
Laurie McCann (admitted *pro hac vice*)
Dara Smith (admitted *pro hac vice*)
AARP FOUNDATION LITIGATION
601 E. Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060
Facsimile: (202) 434-2082
E-mail: dkohrman@aarp.org
E-mail: lmccann@aarp.org
E-mail: dsmith@aarp.org

Jennifer L. Liu (Cal. Bar No. 279370)
THE LIU LAW FIRM, P.C.
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 896-4260
Facsimile: (415) 231-0011
E-mail: jliu@liulawpc.com

Attorneys for Plaintiffs and Proposed Class and Collective Members

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

Case No. 16-cv-02276-JST

PLAINTIFFS' OPPOSITION TO DEFENDANT'S ADMINISTRATIVE MOTION FOR LEAVE TO FILE UNDER SEAL JOINT DISCOVERY LETTER BRIEF

Date: N/A
Time: N/A
Courtroom: A – 15th Floor

In its Administrative Motion For Leave to File Under Seal Joint Discovery Letter Brief, ECF No. 172, filed Wednesday, November 8, 2017 ("PwC Mot."), PricewaterhouseCoopers LLP ("PwC") fails to show good cause to seal the estimated number of potential class members (individuals over 40 years old who applied to the relevant positions and were not successful) from the parties' Joint Discovery Letter Brief.[1] This single number (the "Applicant Figure") is the sole focus of PwC's motion. *See* Declaration of Jennifer Farmer, ECF No. 172-1 ("Farmer Decl.") ¶ 3.

I. ARGUMENT

A. PwC Has Not Satisfied Its Burden To Show Compelling Reasons To Seal the Applicant Figure By Showing Specific Prejudice Or Harm.

PwC has the burden to show the "specific prejudice or harm [that] will result" from disclosure of this information. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). Courts interpret this standard bearing in mind the "strong presumption in favor of access" that applies to all civil discovery documents. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Sealing would only be appropriate if there are "specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Id.* at 1178-79. So, while revelation of many different types of facts about a party (especially a defendant) "might harm a litigant's competitive standing," *Bohannon v. Facebook, Inc.*, 12-cv-1894, 2014 WL 5598222 (N.D. Cal. Nov. 3, 2014), the vast majority of such facts (e.g., evidence of discriminatory intent, evidence of the way in which a defendant discriminated, or details about a defendant's hiring process) are still appropriately part of the public record. A party seeking to seal information must show more.

[1] While a party must typically show "compelling reasons" to seal judicial records, *see Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1102 (9th Cir. 2016), a "good cause" standard is sometimes applied to discovery motions that are "tangentially related to the merits of a case." *Id*. at 1097. Here, the size of the collective (like similar non-individualized, anonymous statistical data that will be submitted to the Court in upcoming briefing) is central to the issues in the case.

However, PwC's argument and evidence do not meet this burden to justify concealing this information from public view. PwC's only argument is that the information is *inaccurate*, PwC Mot. at 1 ("PwC disputes Plaintiffs' estimate, which is misleading given neither a class nor a collective has been certified"), and the supporting declaration simply asserts that the document it derives from was marked highly confidential. Farmer Decl." ¶ 3.[2] PwC's assertion does not point to a specific harm. In fact, it is not even logical – Plaintiffs' estimate is of a "potential class members," explicitly acknowledging that the collective has not been certified, as it is merely a potentiality. ECF. No. 171 at 5.

PwC cannot meet its burden because there is no harm to overcome the strong presumption in favor of access. The Applicant Figure is no trade secret, and has no capacity to meaningfully harm PwC's business interests. It simply provides a rough sense of the scope of the case – the size of the proposed ADEA collective. It is relatively meaningless to anyone other than the parties to this case. In the absence of other data points, it provides no meaningful information about PwC's hiring process. Because the proposed ADEA collective covers several years of applications but only covers individuals over 40 years old, the Applicant Figure does not even allow someone to calculate the total number of PwC applicants in any given year. In fact, the public docket already reflects (a) an estimate of the total number of applicants across the relevant time period (140,000, per ECF No. 150 at 2:16-17), and (b) the time period for the proposed collective (46 months).[3] From (a) and (b), one can already calculate the approximate average number of applicants per year to the relevant positions. The Applicant Figure likewise does not disclose how many people PwC ultimately hired (since it is a total number of unsuccessful applicants).

[2] The underlying document (containing data about individual applications to the covered job positions), has never been filed or sealed in this litigation (or, to Plaintiffs' knowledge, in any other litigation).

[3] This figure is calculated as follows: the beginning of the ADEA liability period is October 18, 2013, ECF No. 42 at ¶ 51 (First Amended Complaint), and the date on which PwC made the 140,000-applicant estimate was August 8, 2017, ECF No. 150 at 2:16-17.

B. *Heath v. Google* Is Distinguishable.

The fact that the Applicant Figure discloses no useful information about PwC's hiring process distinguishes PwC's request from *Heath v. Google Inc.*, 215 F. Supp. 3d 844, 853 (N.D. Cal. 2016). Although the size of the ADEA collective in *Heath* was redacted, the order sealing the information applied to entire documents that "disclose[d] confidential information about Google's hiring process," *see* Ex. A (*Heath v. Google*, N.D. Cal. No. 15 Civ. 1824, ECF No. 105 (Aug. 17, 2016)), and that is the information that was discussed in the *Heath* motion for conditional certification. *See* Ex. B (*Heath*, ECF No. 75) at 3, 6, 8, 15-16.

C. Information Like This Is Commonly Public.

Preserving public access to information about the size of the collective is in keeping with the "strong presumption" in favor of access to judicial documents. *Foltz*, 331 F.3d at 1048. It is also consistent with how courts have historically treated such facts in class and collective actions, where they are treated more as background facts about the litigation than as proprietary trade secrets. *See, e.g., Patterson v. W. Dev. Labs. Div. of Aeronutronic Ford Corp.*, No. 74 2177, 1976 WL 13321, at *2 (N.D. Cal. Sept. 14, 1976) (in race discrimination class action, noting that 5,000 applicants applied "in person" while 8,000 additional applicants applied "by mail"); *Houser v. Pritzker*, 28 F. Supp. 3d 222, 229 (S.D.N.Y. 2014) (certifying class of 854,000 applicants alleging race discrimination, from total of 3.8 million applicants); *Williams v. Boeing Co.*, 225 F.R.D. 626, 629 (W.D. Wash. 2005) (certifying class of 15,000 to 22,000 employees alleging race discrimination); *Sondel v. NW Airlines, Inc.*, No. 92 Civ. 381, 1993 WL 559031, at *6 (D. Minn. Sept. 30, 1993) (certifying class of 350 female flight attendants alleging discrimination, out of a total of 802 female flight attendants); *Sandoval v. Saticoy Lemon Ass'n*, No. 88 Civ. 2257, 1990 WL 484150, at *1 (C.D. Cal. Apr. 27, 1990) (certifying class of 105 applicants and deterred applicants alleging sex discrimination).

D. Sealing Drives Up Litigation Costs, Undermining Enforcement of Civil Rights Statutes.

Sealing imposes significant burdens on the parties. It triggers the administrative motion process, which drives up the cost of litigation and drains Court resources. Each administrative

motion filing (including the meet and confer process beforehand, the redaction process, the filing itself) imposes several thousand dollars of Plaintiffs' attorney and staff time. Driving up the cost of litigation chills individuals from invoking the protections of civil rights and other remedial statutes, undermining Congress's goals of eliminating discrimination against and exploitation of workers.

E. Sealing Disproportionately Harms Individual Civil Rights Plaintiffs.

Sealing also exacerbates the information asymmetry between plaintiffs and defendants. Defendants facing repeat litigation for similar or overlapping claims are free to use their own information again and again, even if it has been sealed in a prior action. Individual plaintiffs in different actions cannot gain access to sealed information from other actions. Thus, each instance of sealing of information regarding defendants' conduct in civil rights litigation like this action degrades individual plaintiffs' chances of obtaining much needed discovery and, ultimately, remedies.

II. CONCLUSION

The number of potential plaintiffs in this case is not privileged, protectable as a trade secret, or otherwise entitled to legal protection. PwC has failed to satisfy the operative compelling reasons standard (or even the good cause standard) by failing to make any factual showing or argument justifying departure from core principles of access to information in judicial proceedings. In view of the powerful public interest in resolution of disputes in open court, Plaintiffs respectfully request that the Court deny PwC's motion to seal.

Respectfully submitted,

Dated: November 13, 2017

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

Jahan C. Sagafi (Cal. Bar No. 224887)
OUTTEN & GOLDEN LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
E-mail: jsagafi@outtengolden.com

Adam T. Klein (admitted *pro hac vice*)
Melissa L. Stewart (admitted *pro hac vice*)
Daniel Stromberg (admitted *pro hac vice*)
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017
Telephone: (212) 245-1000
Facsimile: (646) 509-2060
E-mail: atk@outtengolden.com
E-mail: mstewart@outtengolden.com
E-mail: dstromberg@outtengolden.com

Lucy B. Bansal (admitted *pro hac vice*)
OUTTEN & GOLDEN LLP
601 Massachusetts Avenue NW,
Second Floor West
Washington, D.C. 20001
Telephone: (202) 847-4400
Facsimile: (202) 847-4410
E-mail: lbansal@outtengolden.com

Daniel Kohrman (admitted *pro hac vice*)
Laurie McCann (admitted *pro hac vice*)
Dara Smith (admitted *pro hac vice*)
AARP FOUNDATION LITIGATION
601 E. Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060
Facsimile: (202) 434-2082
E-mail: dkohrman@aarp.org
E-mail: lmccann@aarp.org
E-mail: dsmith@aarp.org

Jennifer L. Liu (Cal. Bar No. 279370)
THE LIU LAW FIRM, P.C.
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 896-4260
Facsimile: (415) 231-0011
E-mail: jliu@liulawpc.com

Attorneys for Plaintiffs and Proposed Class and Collective Members

Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ROBERT HEATH, et al.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Case No. 15-cv-01824-BLF

ORDER REGARDING SEALING MOTIONS PERTAINING TO MOTION FOR CONDITIONAL CERTIFICATION BRIEFING

[Re: ECF 74, 94, 102]

Before the Court are the parties' administrative motions to file under seal portions of their briefing and exhibits in connection with the pending motion for conditional certification. ECF 74, 94, 102. For the reasons stated below, the motions are GRANTED IN PART and DENIED IN PART.

I. LEGAL STANDARD

"Historically, courts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). Consequently, access to motions and their attachments that are "more than tangentially related to the merits of a case" may be sealed only upon a showing of "compelling reasons" for sealing. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101–02 (9th Cir. 2016). Filings that are only tangentially related to the merits may be sealed upon a lesser showing of "good cause." *Id.* at 1097.

In addition, sealing motions filed in this district must be "narrowly tailored to seek sealing only of sealable material." Civil L.R. 79-5(b). A party moving to seal a document in whole or in part must file a declaration establishing that the identified material is "sealable." Civ. L.R. 79-

5(d)(1)(A). "Reference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable." *Id.*

II. DISCUSSION

The Court has reviewed the parties' sealing motions and respective declarations in support thereof. The Court finds the parties have articulated compelling reasons to seal certain portions of most of the submitted documents. The proposed redactions are also narrowly tailored. The Court's rulings on the sealing request are set forth in the tables below:

A. ECF 74

Identification of Documents to be Sealed	Description of Documents	Court's Order
Portions of Motion for Conditional Certification	References below exhibits	GRANTED for any portions referencing Exhibits 1-2, 4-5, 15-19 and DENIED for any portions referencing Exhibits 3, 8, 13-14.
Exhibits 1-2	Discloses confidential information about Google's hiring process	GRANTED
Exhibits 4-5 and 15-19	Employment applications containing personal information	GRANTED
Exhibits 3, 8, 13-14	Designated Highly Confidential – Attorneys' Eyes Only by Google	DENIED because supporting declaration at ECF 80 did not provide any reasons to seal.

B. ECF 94

Identification of Documents to be Sealed	Description of Documents	Court's Order
Google's Opposition to Plaintiff Fillekes' Motion For Conditional Certification and Heath's Partial Joinder	References exhibits filed in connection with Motion and below	GRANTED except for any portion referencing Exhibit 3, 8, and 13-14 to the Motion for Conditional Certification.
Declaration of Brian Ong In Support of Google's Opposition to Plaintiff Fillekes' Motion For Conditional Certification of Collective Action and Heath's Partial Joinder	Contains personal information of non-party declarants	GRANTED
Exhibits 1-9	Confidential gHire records for nine separate candidates for employment positions at	GRANTED

	Google	
Exhibits 10-12	Confidential gHire Committee notes	GRANTED

C. ECF 102

Identification of Documents to be Sealed	Description of Documents	Court's Order
Reply Brief	References Exhibit 1 to the Motion for Conditional Certification, which contains confidential information about Google's hiring process	GRANTED

III. ORDER

For the foregoing reasons, the sealing motions at ECF 74, 94, 102 are GRANTED IN PART and DENIED IN PART. Under Civil Local Rule 79-5(e)(2), for any request that has been denied because the party designating a document as confidential or subject to a protective order has not provided sufficient reasons to seal, the submitting party must file the unredacted (or lesser redacted) documents into the public record no earlier than 4 days and no later than 10 days form the filing of this order.

IT IS SO ORDERED.

Dated: August 17, 2016

BETH LABSON FREEMAN
United States District Judge

Exhibit B

Daniel L. Low, CA Bar No. 218387
dlow@kotchen.com
Daniel Kotchen (*pro hac vice*)
dkotchen@kotchen.com
KOTCHEN & LOW LLP
1745 Kalorama Road NW, Suite 101
Telephone: 202.841.7164
Facsimile: 202.280.1128

Attorneys for Plaintiff
CHERYL FILLEKES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT HEATH, and CHERYL FILLEKES, Plaintiffs, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

GOOGLE INC., a Delaware corporation,

Defendant.

Case No. 15-cv-01824-BLF

PLAINTIFF CHERYL FILLIKES' NOTICE OF MOTION AND MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION PURSUANT TO 29 U.S.C. § 216(b)

Date: November 10, 2016
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor, San Jose

Complaint Filed: April 22, 2015
Trial Date: May 1, 2017

PLAINTIFF CHERYL FILLEKES' NOTICE OF MOTION AND MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION PURSUANT TO 29 U.S.C. § 216(b)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on November 10, 2016 at 9:00 a.m., in Courtroom 3, 5th Floor of the above-titled court, located at 280 South 1st Street, San Jose, California 95113, Plaintiff Cheryl Fillekes ("Plaintiff") will, and hereby does, move this Court pursuant to 29 U.S.C. § 216(b), to conditionally certify an opt-in Fair Labor Standards Act collective action of certain applicants age 40 and older who allegedly were discriminated against by Defendant Google, Inc. ("Google") in violation of the Age Discrimination in Employment Act. Plaintiff provided notice to all parties of its intent to file this Motion, and provided written notice to Google on June 28, 2016. Google does not consent to Plaintiff's Motion for Conditional Certification. Pursuant to Local Rule 7-1(b), Plaintiff requests that this motion be decided without oral argument.

Dated: June 28, 2016

Respectfully submitted,

By: /s/ Daniel Low
Daniel L. Low, SBN: 218387
Daniel Kotchen (*pro hac vice*)
Kotchen & Low LLP
1745 Kalorama Road NW, Suite 101
Washington, DC 20009
202-471-1995
202-280-1128 (fax)
dlow@kotchen.com
dkotchen@kotchen.com

Attorneys for Plaintiff Cheryl Fillekes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM IN SUPPORT OF MOTION FOR CONDITIONAL CERTIFICATION

Plaintiff Cheryl Fillekes ("Plaintiff"), pursuant to 29 U.S.C. § 216(b), moves the Court to conditionally certify an opt-in Fair Labor Standards Act ("FLSA") collective action of certain applicants age 40 and older who allegedly were discriminated against by Defendant Google, Inc. ("Google") in violation of the Age Discrimination in Employment Act ("ADEA"). This case meets the lenient standard for conditional certification as Plaintiff has shown through substantial allegations and declarations that the proposed class members are "similarly situated" pursuant to 29 U.S.C. § 216(b) and were affected by a common policy or plan.

I. PROPOSED CLASS

Ms. Fillekes requests that the Court conditionally certify the following class:

> All individuals who interviewed in-person for any Software Engineer ("SWE"), Site Reliability Engineer ("SRE"), or Systems Engineer ("SysEng") position with Google in the United States during the time period from August 13, 2010 through the present; were age 40 or older at the time of the interview; and were refused employment by Google.

The class is objectively defined in a way that allows class members to easily determine whether they are part of the class. Ms. Fillekes was a candidate for each of the positions in the proposed class. The proposed class includes only candidates who participated in an in-person interview. Candidates for Google positions typically participate in a phone-screening interview(s) before being invited to an in-person interview, and only

a subset of candidates who are interviewed by phone are invited to an in-person interview.[1] Limiting the class to candidates who participated in an in-person interview helps ensure that only highly qualified candidates are included in the proposed class. Further, the class is limited to the in-person interview stage of the hiring process, *i.e.*, situations where Google interviewers could observe the approximate age or life stage of the proposed class member.

II. BACKGROUND

Ms. Fillekes alleges that "Google has engaged in a systematic pattern and practice of discriminating against individuals (including [Ms. Fillekes]) who are age 40 and older in hiring, compensation, and other employment decisions with the resultant effect that persons age 40 or older are systemically excluded from positions for which they are well-qualified." Am. Compl. ¶ 52 (Dkt. #18). This pattern and practice includes: "(a) knowingly and intentionally, in the company's hiring and employment practices, treating adversely individuals who are 40 years old and older, and treating preferentially individuals who are under 40 years old, and (b) filling a disproportionately large percentage of its workforce with individuals under 40 years old (such that the median workforce age is 29 years old) even when there are many

[1] Approximately [redacted]% of all candidates considered for SWE positions are invited for an on-site intervi[redacted] at Google. GOOG-HEATH-00004596-97 at 4596 (Ex. 1).

individuals age 40 or older who are available and well-qualified for the positions at issue." *Id.* ¶ 55.

Hiring decisions at Google for SWE, SRE, and SysEng positions are made by [redacted]. *See* GOOG-HEATH-00005454-5543 (Ex. 2); GOOG-HEATH-00003452-54 at 3453 (Ex. 3). Candidates for these positions are often [redacted]. *See* Ex. 1 at 4596; Ex. 3 at 3452-53. Candidates who receive from interviewers [redacted]. *See* Ex. 3 at 3453. Not all candidates, however, [redacted]. *See, e.g.*, A.B. Decl. ¶14 (Jan. 28, 2016), Fillekes 0008184-88 (Ex. 4); A.H. Decl. ¶¶ 7, 11, 14 (Jan. 17, 2016), Fillekes 0008189-93 (Ex. 5). The [redacted], among other things, a candidate's "Googleyness" to determine whether to extend an offer to the candidate. *How We Hire,* Google, Inc., https://www.google.com/intl/en/about/careers/lifeatgoogle/hiringprocess/ (last visited June 28, 2016) (Ex. 6).

In comparison to the 29 year-old median age of Google's workforce, the median age in the United States for "computer programmers" is 42.8 years old, and for "computer hardware engineers" is 41.7 years old. Am. Compl. ¶¶ 2, 5. On its website,

Google acknowledges that "We're not where we want to be when it comes to diversity." *Id.* ¶ 6.

The EEOC has received multiple complaints of age discrimination by Google, and is currently conducting an extensive investigation into Google's employment policies and practices. *Id.* ¶ 49; Google Answer ¶ 49 (Dkt. #21).

While Plaintiffs' Complaint seeks recovery for age-related discrimination only in hiring, Google pattern and practice of age discrimination also manifests itself in discriminatory pay, promotions, performance reviews, and terminations. For instance, in a prior lawsuit, *Reid v. Google, Inc.*, the California Supreme Court held that former Google executive Brian Reid (formerly Google's Director of Operations and Director of Engineering) had presented sufficient evidence in alleging age discrimination to warrant a trial and denial of summary judgment, including statistical evidence supporting preferential performance reviews and bonuses for workers under 40 and negative statements by high-level executives concerning older workers. Am. Compl. ¶ 50. Mr. Reid presented evidence that executives and colleagues at Google had made negative statements reflecting animus towards workers over the age of 40, including: (a) that a supervisor had made age-related comments to Reid "every few weeks," including statements to Reid that his opinions and ideas were "obsolete," and "too old to matter;" (b) that other colleagues at Google had referred to Reid as an "old man," an "old guy," and an "old fuddy-duddy," and had told him his knowledge was ancient;

(c) that Reid alleged that in a performance evaluation he received, his supervisor stated "Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment;" (d) that Reid was told he was not a "cultural fit" as a reason for his job termination; and (e) that a former Google recruiter testified that the term "cultural fit" was used in company circles only to describe older workers. *Id.*; *Reid v. Google, Inc.*, 235 P.3d 988, 992, 993 (Cal. 2010). Google, and its employees, refer to older workers at Google as "greyglers." *See Google Diversity*, Google, Inc., https://www.google.com/diversity/at-google.html (last visited June 27, 2016) (Ex. 7); GOOG-HEATH-00000441-44 at 441 (Ex. 8).

Plaintiff Cheryl Fillekes' personal experience reflects age discrimination by Google. Ms. Fillekes started programming as a high school student in 1976, received a B.A. in engineering at Cornell University in 1982, received a Ph.D. from the University of Chicago in 1990 in computational geophysics, and served as a Postdoctoral Fellow at Harvard University in 1993. Am. Compl. ¶ 32. She has approximately 40 years of programming experience in a variety of programming languages. *Id.* Between 2007 and 2014, Google interviewed her on separate occasions for four different openings, including some occasions when Google affirmatively reached out to her about the opening based on her impressive qualifications. *Id.* ¶¶ 4, 33-42. On each occasion, she performed well during her phone interviews and was

invited to Google's offices for an in-person interview. *Id.* After each in-person interview, and review by [redacted] on at least two occasions, Google refused to hire Ms. Fillekes despite her highly-pertinent qualifications and programming experience. *Id.*

In May 2010, Ms. Fillekes interviewed for a position as Software Engineer. A Google recruiter told Ms. Fillekes that she needed to put her dates of graduation on her resume "so the interviewers can see how old you are." Fillekes Depo. Tr. 152:3-15 (Dec. 17, 2015) (Ex. 9); *accord* Heath-Fillekes 00005043-49 at 0005044 (Ex. 10); Fillekes 0008221 (Ex. 11); Heath-Fillekes 0008181-83 at 8181 (Ex. 20). She performed well at her in-person interview, but received a rejection the following week stating that "[a]lthough you have an impressive background, there wasn't a strong enough match to move forward at this time." Heath-Fillekes 00002118 (Ex. 12).

On another occasion, in 2014, Ms. Fillekes interviewed to be a Systems Engineer. She received [redacted]. *See* GOOG-HEATH-00000848-49 at 848 (Ex. 13). In considering her application, one Google employee expressed: "[redacted][.]" GOOG-HEATH-00001487-98 at 1487 (Ex. 14). A few days later, an internal e-mail about bringing Ms. Fillekes for an on-site interview similarly expressed: "[redacted][.]" Ex. 13 at 848.

Other highly qualified older applicants have had similar experiences, passing phone interviews and performing well at in-person interviews, but were rejected after the in-person interview allowed screeners to judge the age of the applicant. For example:

- J.W. has interviewed with Google five or six times, beginning when she was 41. J.W. Decl. ¶¶ 4, 6 (Dec. 23, 2015), Fillekes 0008204-07 (Ex. 15). Despite performing well at in-person interviews, she was not hired. One interviewer expressed concern about a cultural fit, noting that she might not be up for the "lifestyle." *Id.* ¶ 10. Although J.W. assured him that she was willing to work long hours, the interviewer replied that he was still worried that she was "not Googley enough." *Id.*
- M.B. was recruited by Google, passed phone interviews, and performed well at an in-person interview in 2014. M.B. Decl. ¶¶ 4, 7-9 (Jan. 19, 2016), Fillekes 0008212-16 (Ex. 16). M.B., who was 60, was repeatedly questioned about how he would "fit into their culture" and handle "the fast pace at Google," and the interviewers expressed skepticism. *Id.* ¶¶ 5, 9. M.B. was rejected by the hiring committee, and believes that he was rejected because of his age. *Id.* ¶¶ 11-12.
- A.B. was considered for positions in 2014 and 2015. Ex. 4 ¶¶ 4-5, 9. Despite performing well in an in-person interview in 2015, and despite receiving a

glowing recommendation, A.B. was rejected, and he believes that he "was not hired by Google because of my age." *Id.* ¶¶ 13-16.

- A.H. has interviewed with Google three times after being contacted by a Google recruiter, starting in 2002 or 2003, when he was 41 years old. Ex. 5 ¶¶ 4-6. After an in-person interview in 2010 or 2011, he left "feeling that I had been treated unfairly because of my age," and believes that he was not hired "because of my age." *Id.* ¶¶ 14-15.
- A.M. interviewed with Google in 2011, when he was 51 years old, and all six of his interviewers appeared to be in their twenties. A.M. Decl. ¶¶ 11, 12 (Jan. 17, 2016), Fillekes 0008194-98 (Ex. 17). He believes that he "was not hired by Google because of my age," and declined to pursue other opportunities at Google because he believed that it would be futile to pursue those opportunities because of his age. *Id.* ¶¶ 14-15.
- D.A. was recruited to interview with Google three times, likely based on his [redacted]. D.A. Decl. ¶¶ 2, 4-5 (Jan. 19, 2016), Fillekes 0008199 – Fillekes 0008203 (Ex. 18). In 2007, he was told he ranked highest in one category on a technical phone interview. *Id.* ¶¶ 7, 10. He performed well at the in-person interviews in 2007 and 2009, and was told by one interviewer that the interviewer was surprised that D.A. was not hired. *Id.* ¶ 7. D.A. believes that he "was not hired by Google because of my age." *Id.* ¶ 15.

- K.T. performed well at in-person interviews, but was rejected from employment at Google, and was told on one occasion that it was because he was not a good "fit" for the role. K.T. Decl. ¶¶ 8-11 (Jan. 27, 2016), Fillekes 0008208-11 (Ex. 19). K.T. believes that he "was not hired by Google because of my age." *Id.* ¶ 12.

III. LEGAL STANDARDS

Collective actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly incorporates collective action enforcement provisions of the FLSA, 29 U.S.C. § 216(b). Under § 216(b), a collective action is appropriate if the proposed opt-in class of employees is "similarly situated":

> An action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other *employees similarly situated*. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

Courts take a two-step approach to determine whether plaintiffs are similarly situated. *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009). First, the court makes an initial, conditional "determination of whether plaintiffs are similarly situated, deciding whether a collective action should be certified for the purpose of sending notice of the action to potential class members." *Id.* "The standard

for certification at this stage is a lenient one that typically results in certification." *Id.* (citing *Wynn v. Nat'l. Broad. Co.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002)). The sole consequence of conditional certification is the sending of court-approved written notice to potential class members. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1043 (2016).

Plaintiff need only show "some identifiable factual or legal nexus [that] binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010). Plaintiff "must simply provide 'substantial allegations, supported by declarations or discovery.'" *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1203 (N.D. Cal. 2013) (quoting *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 627 (E.D. Cal. 2009)). "And, courts *need not even consider* evidence provided by defendants at this stage." *Id.* (citing *Kress*, 263 F.R.D. at 628). Because a motion for conditional certification comes before discovery is complete and "is made in anticipation of a later more searching review, a movant bears a *very light burden* in substantiating the allegations at this stage." *Prentice v. Fund for Pub. Interest Research, Inc.*, No. C-06-7776SC, 2007 WL 2729187, at *2 (N.D. Cal. Sept. 18, 2007) (emphasis added).

"[C]ourts in this circuit overwhelmingly 'refuse to depart from the notice stage

analysis prior to the close of discovery.'" *Ramirez*, 941 F. Supp. 2d at 1203 (quoting *Kress*, 263 F.R.D. at 629).

The second determination in the two-step process is made after the close of discovery, usually on a motion for decertification by the defendant, utilizing a stricter standard for "similarly situated." *Id*.

Notably, collective actions under the FLSA are not subject to the requirements of Fed. R. Civ. P. 23, and the FLSA requirements are "considerably less stringent." *Hill*, 690 F. Supp. 2d at 1009; *see also Morden v. T-Mobile USA, Inc.*, No. C05-2112, 2006 WL 2620320, at *1-2 (W.D. Wash. Sept. 12, 2006) (rejecting argument that class representative holding one employment position could not also bring collective action on behalf of a second position because the Rule 23 typicality requirement did not apply).

Numerous courts have granted conditional certifications for collective actions alleging violations of the ADEA. *See, e.g.*, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-73 (1989) (authorizing notice to ADEA class); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1107-08 (10th Cir. 2001) (reversing de-certification of ADEA collective action); *Pines v. State Farm Gen. Ins. Co.*, No. CV 89-631, 1992 WL 92398, at *4, 13 (C.D. Cal. Feb. 25, 1992) (certifying ADEA class in part based on statistical evidence); *Williams v. Sprint / United Mgmt. Co.*, 222 F.R.D. 483, 487 (D. Kan. 2004) (finding differences in positions, managers, performance ratings, etc.

between plaintiffs or class members "simply not relevant at the notice stage when plaintiff … has set forth substantial allegations that all plaintiffs were subjected to a pattern or practice of age discrimination").

Statistical evidence of an imbalanced workforce "is often a telltale sign of purposeful discrimination," and can be used to establish a prima facie case of discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977); *see also Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1476 (9th Cir. 1995) (statistics relevant to proving pattern and practice of intentional age discrimination); *Pagliolo v. Guidant Corp.*, No. 06-943, 2007 WL 2892400, at *3 (D. Minn. Sept. 28, 2007) (conditionally certifying ADEA class where "[f]acially, plaintiffs have demonstrated a pattern based on their preliminary statistical analysis").

IV. ARGUMENT

A. This Case Satisfies the Lenient First-Step Standard for Conditional Certification.

Plaintiff has satisfied her "very light burden" of providing substantial allegations, along with declarations or other discovery showing that class members are "similarly situated" because she and the class members will rely on common evidence to demonstrate that workers over 40 years old were similarly affected by a pattern or practice of age discrimination. *Ramirez*, 941 F. Supp. 2d at 1203; *Prentice*, 2007 WL 2729187, at *2.

For example, Plaintiff has made detailed allegations of statistical evidence showing a pattern of age discrimination. Statistical analysis demonstrates that the median age of workers at Google is 29 years old, compared to an average age in the U.S. workforce of 42.8 for "computer programmers" and 41.7 for "computer hardware engineers." Am. Compl. ¶¶ 2, 5, 5 n.1.[2] Statistical evidence also shows that workers under 40 received preferential performance reviews and bonuses. *Id.* ¶ 50. Such statistical evidence can provide prima facie evidence of a pattern or practice of age discrimination. *Int'l Bhd. of Teamsters*, 431 U.S. at 339 n.20; *Mangold*, 67 F.3d at 1476; *Pagliolo*, 2007 WL 2892400, at *3.

Plaintiff has also offered evidence of how Google's practice of intentional age discrimination was enacted. Google screens out older candidates like Ms. Fillekes at the in-person interview stage after observing and gaining other evidence of the applicant's age. Ms. Fillekes, for example, reached the in-person interview stage of the screening process on all four occasions when she was considered for a position,

[2] The complaint cites Bureau of Labor Statistics data for U.S. workforce statistics. Am. Compl. ¶ 5 n.1 (citing http://www.bls.bov/cps/occupation_age.htm). Google's median employee age of 29 years old is reflected in data from Pay Scale. *See* http://www.payscale.com/data-packages/employee-loyalty/full-list (reporting median age of Google employee at 29 years old); *see also Dark Side of Social Media: Age Discrimination*, CBS News, *available at* http://www.cbsnews.com/news/dark-side-of-social-media-age-discrimination/ ("According to PayScale, which claims to have the world's largest employee compensation database, the median age[] of employees at . . . Google [is] 31," compared to HP and IBM, "both of which have a median employee age of 44.").

but each time was denied employment despite performing well in the interviews. On one of those occasions, a Google recruiter required Ms. Fillekes to put her dates of graduation on her resume "so the interviewers can see how old you are." Ex. 9 152:3-15; *accord* Ex. 10 at 5044, Ex. 11; Ex. 20 at 8181 (Ex. 20). Although she performed well at her in-person interview, and was told she had "an impressive background," she was rejected for not being a good "match." Ex. 12 at 2118.

Plaintiff has further satisfied the requirements for conditional certification by offering a variety of other detailed allegations, declarations, or discovery to support her claim of a pattern or practice of age discrimination similarly affecting class members. *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 468 (N.D. Cal. 2004) ("courts usually rely only on the pleadings and [] affidavits," and "[s]ome courts only require that plaintiffs make 'substantial allegations' that the putative class members were subject to a single illegal policy, plan or decision.") For example, as described in the Background section above, Ms. Fillekes offers the following allegations or evidence:

- Google admitted in its answer that the EEOC has received complaints of age discrimination by Google and is currently investigating Google. Google Answer ¶ 49; *see also* Am. Compl. ¶ 49.
- As alleged in the complaint, and as reflected in evidence accepted as admissible in other court proceedings, high-level Google executives and

supervisors have made negative statements concerning older workers, including negative statements to former Google executive Brian Reid by his supervisor "every few weeks," such as statements that his ideas were "obsolete" and "too old to matter;" that Google colleagues referred to Reid as an "old man," an "old guy," and an "old fuddy-duddy"; that Reid was told he was terminated because of a lack of "cultural fit," which is a term that a former Google recruiter testified was used in company circles only to describe older workers. *Id.* ¶ 50; *Reid,* 235 P.3d at 992, 993.

- The declaration of applicant J.W. that a Google interviewer expressed concern that she might not be up for the "lifestyle" and might not be "Googley enough." Ex. 15 ¶ 10.
- Declarations from six applicants who believe that they were not hired by Google because of their age. Ex. 4 ¶ 16; Ex. 5 ¶ 15; Ex. 16 ¶ 12; Ex. 17 ¶ 15; Ex. 18 ¶ 15; Ex. 19 ¶ 12.
- As reflected [redacted] on Google's own website, Google sometimes refers to older works as "greyglers." Ex. 7; Ex. 8 at 441.
- Plaintiff Cheryl Fillekes' allegations and testimony reflect that, despite her impressive credentials and experience, and after passing phone interviews with high scores, Plaintiff Cheryl Fillekes was repeatedly rejected for

positions at Google after interviewers met her in person and knew her approximate age. Am. Compl. ¶¶ 4, 32-42; Ex. 9 12:23-13:6.

- Discovery documents reflect that Google expressed concern about Ms. Fillekes' age: "[redacted][,]" Ex. 14 at 1487, "[redacted][.]" Ex. 13 at 848.

Plaintiff's statistical evidence, combined with the declarations and other discovery evidence, are sufficient for plaintiff to meet her minimal burden of establishing that conditional certification is appropriate. *Pines*, 1992 WL 92398, at *3-4 (relying on statistics and other evidence of a practice of age discrimination); *Pagliolo*, 2007 WL 2892400, at *3 (relying on affidavit, interrogatory answers, and preliminary statistical analysis).

The fact that Plaintiff is seeking to certify three (3) different types of positions – Software Engineer ("SWE") positions, Site Reliability Engineer ("SRE") positions, and Systems Engineer ("SysEng") positions – for discrimination in hiring and employment is immaterial to the "similarly situated" analysis in this case, as they were subjected to the same pattern or practice of age discrimination. *See*, *e.g.*, *Tyson Foods*, 136 S. Ct. at 1045-50 (affirming verdict for plaintiffs in FLSA collective action involving multiple jobs with varying amounts of time required for donning and doffing protective gear); *Pagliolo*, 2007 WL 2892400, at *2 (granting conditional certification

despite "different job duties, . . . [and] different supervisors, . . . ages and lengths of service"); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294, 298 (N.D. Cal. 1991) (notice appropriate in ADEA action even though class members "were employed at 112 different locations in 74 different jobs and left employment on 103 different dates" and defendants argued that decision-making was "highly decentralized").

Similarly, any argument offered by Google attacking the merits of Plaintiff's claims is premature, as "[t]he initial 'notice stage' is not the appropriate time for a court to evaluate the merits of plaintiffs' . . . claims." *Shaia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 272 (N.D. Cal. 2015); *see also Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 838 (N.D. Cal. 2010) ("The fact that a defendant submits competing declarations will not as a general rule preclude conditional certification.").

In sum, Plaintiff has offered enough evidence of Google's pattern and practice of age discrimination to meet the lenient standard for conditional certification.

B. Class Notice Should Be Authorized.

The only consequence of conditional certification is the sending of court-approved written notice to potential class members, who join the collective action only if they file written consent with the court. *Tyson Foods*, 136 S. Ct. at 1043. Court approval and facilitation of written notice serves the goals of "avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche*, 493 U.S. at 172.

Plaintiff has attached a proposed notice and consent form as Exhibit 21. Plaintiff proposes a 90-day opt-in period, consistent with what other courts have approved for large potential classes. *Woods v. Vector Mktg. Corp.*, No. C-14-0264, 2015 WL 1198593, at *4 (N.D. Cal. Mar. 16, 2015) (citing *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 542 (N.D. Cal. 2007)).

Plaintiff proposes that notice be given as follows: notice will be delivered to all potential class members by e-mail; an official case web page will be created where potential collective action members can review the official notice and submit an opt-in form; and depending on the number of undeliverable e-mails, Plaintiff will be permitted, but not required, to send a follow-up postcard notice via U.S. mail to potential class members whose email notice was returned as undeliverable, and the postcard will direct them to the official case web page. Collective action members will be permitted to submit opt-in claim forms on the official case web page using online signatures, and may be permitted to submit claim forms via e-mail if they are incapable of submitting their claim online.

When, as here, "[t]he potential class members [are technology workers, they] are likely to be particularly comfortable communicating by email and thus this form of communication is just as, if not more, likely to effectuate notice than first class mail." *Lewis*, 669 F. Supp. 2d at 1128-29. Courts have often approved notice via e-mail. *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524, 2013 WL 4552493, at *5 (N.D.

Cal. Aug. 27, 2013) (approving notice by email as "the most appropriate method for effectuating notice in this case"); *Guy v. Casal Inst. of Nev., LLC*, No. 2:13-cv-02263, 2014 WL 1899006, at *7 (D. Nev. May 12, 2014) (authorizing notice by email and/or first class mail).

Courts have authorized the use of an official case website and submission of online claim forms through the case website using electronic signatures. *Woods*, 2015 WL 1198593, at *4, 6.

Plaintiff requests that the Court approve the proposed notice and consent form.

C. Google Should Be Ordered to Produce Names and Contact Information of Potential Class Members.

Google should be ordered to provide, within 15 days, the names and contact information for potential class members, *i.e.*, every applicant who interviewed for any SWE, SRE, or SysEng position and was, based on date of birth (if known) or college graduation date, was 40 years of age or older at the time of application. *See Hoffmann-La Roche*, 493 U.S. at 170 ("The District Court was correct to permit discovery of the names and addresses of the discharged employees."). This contact information should be provided in electronic format in an excel spreadsheet, and should include: position applied for; dates of employment interview(s) for SRE, SWE, or SysEng positions, along with their: name, e-mail address, mailing address, telephone number, college and (if applicable) graduate school graduation date(s), and date of birth (if known). Courts have approved discovery of such information. *See, e.g., Lewis*, 669 F. Supp. 2d

at 1129-30.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court conditionally certify the proposed class, authorize notice, and require production of the names and conduct information of potential class members.

Dated: June 28, 2016

Respectfully submitted,

By: /s/ Daniel Low
Daniel L. Low, SBN: 218387
Daniel Kotchen (*pro hac vice*)
Kotchen & Low LLP
1745 Kalorama Road NW, Suite 101
Washington, DC 20009
202-471-1995
202-280-1128 (fax)
dlow@kotchen.com
dkotchen@kotchen.com

Attorneys for Plaintiff Cheryl Fillekes