

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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ORDER

TINA HUANG VS. TWITTER, INC. ET AL

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F I L E D

Superior Court of California
County of San Francisco

JUL 03 2018

CLERK OF THE COURT

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Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

TINA HUANG, for herself, and all others
similarly situated,

Plaintiff,

v.

TWITTER, INC. and DOES 1-10,

Defendants.

No. CGC-15-544813

ORDER DENYING PLAINTIFF'S MOTION
FOR CLASS CERTIFICATION

INTRODUCTION

In *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 352, 355-357 (*Dukes I*), the United States Supreme Court held that in a disparate *impact* case, an employer's policy of giving managers discretion over promotion decisions cannot satisfy the commonality requirement necessary to achieve class certification, unless a plaintiff can demonstrate that the employer had a "common mode of exercising discretion" or a "uniform employment practice" that serves as the "glue" that ties class members' claims together. In the instant case, Plaintiff Tina Huang ("Plaintiff") claims that Defendant Twitter, Inc. ("Defendant" or "Twitter") gives its managers discretion over whether the software engineers ("SWEs") they supervise are nominated and considered for promotions, and that such policy has had a disparate impact on women software engineers at Twitter in that they are not promoted at the same rate as their male counterparts. Plaintiff seeks to certify a class of 135 women SWEs who fall within the following eight job levels in Twitter's Technical Ladder: (1) SWE 1, (2) SWE II, (3) Senior SWE, (4) Staff SWE, (5) Senior Staff SWE, (6) Principal SWE, (7) Distinguished SWE, and (8) Fellow SWE. As discussed

1 further below, the Court finds that Plaintiff failed to demonstrate that Twitter’s managers employed a
2 “common mode of exercising discretion” or that Twitter had a “uniform employment practice” that
3 affected the way managers exercised discretion and resulted in disparate impact on women SWEs.
4 Bound by the United States Supreme Court’s decision in *Dukes I*, this Court concludes that Plaintiff
5 failed to satisfy the commonality requirement necessary to certify the proposed class. In addition, the
6 Court also finds that Plaintiff’s claims are not typical of the class, and that Plaintiff failed to demonstrate
7 that the class action mechanism is the superior method for adjudicating class members’ claims in this
8 case. For these reasons, the Court denies Plaintiff’s motion.

9 Because a *Belaire* notice has been given and Plaintiff has contact information for 117 SWEs in the
10 putative class, Plaintiff must notify these SWEs that class certification has been denied and to apprise
11 them of their right to move to intervene in this case or file an individual action. A Case Management
12 Conference is set for July 25, 2018 at 9:30 a.m. for setting of pretrial and trial deadlines in Plaintiff’s
13 individual case.¹

14 I. PROCEDURAL HISTORY

15 A. Plaintiff’s Complaint.

16 On March 19, 2015, Plaintiff Tina Huang filed this putative class action against Defendant
17 Twitter, Inc. Plaintiff’s operative complaint, filed April 1, 2016, alleges that Twitter’s policy of giving
18 managers discretion over whether the SWEs they supervise are nominated and/or considered for
19 promotions within the company has disparately impacted women SWEs on Twitter’s “Technical
20 Ladder.”² First Amended Complaint (“FAC”) ¶ 2. Specifically, Plaintiff claims that Twitter “does not
21 have a formal job posting or job application procedure” with respect to promotions within the company.
22 *Id.* ¶ 23. Instead, while employees can ask to be considered for a promotion by checking a box on their
23 regular performance reviews, the promotion process is essentially initiated when an employee’s manager,
24

25 ¹ In conjunction with its Opposition to Plaintiff’s Motion for Class Certification, Twitter filed a Motion to
26 Exclude approximately 75 putative class members from inclusion in the class on the basis of signed
27 separation agreements (3) and arbitration agreements (72). This motion is moot in light of the Court’s
28 ruling on the instant motion and is addressed in a separate Order.

² Plaintiff’s proposed class is limited to women SWEs who are on the “Technical Ladder,” and does not
include women on the “Engineering Managers Ladder,” a separate career ladder for employees who
perform software engineering duties and also manage employees. Declaration of Julie Drake ISO
Defendant Twitter, Inc.’s Opposition to Plaintiff’s Motion for Class Certification ¶ 9.

1 at his or her own discretion, “proposes” a promotion case for a particular employee. *Id.* ¶ 24. The
2 proposal is then reviewed by the employee’s colleagues and superiors, and then by a promotion
3 committee that ultimately decides whether to promote the employee or not. *Id.* Plaintiff further alleges
4 that “manager[s] ha[ve] complete discretion over what is included in or excluded from the committee’s
5 review of the employee’s candidacy” for promotion. *Id.* ¶ 25. In other words, if a manager does not
6 support a promotion case, the employee would not be considered for a promotion. *Id.*

7 Plaintiff alleges that managers in Twitter’s “Technical Ladder” exercise their “gatekeeping”
8 function into the promotion process in a manner that is “tainted with conscious or unconscious prejudices
9 and gender-based stereotypes.” *Id.* ¶ 26. As a result, Plaintiff alleges that women SWEs are promoted to
10 the upper rungs of the “Technical Ladder” in fewer numbers and at a slower rate than their male
11 counterparts. *Id.* ¶ 28. Plaintiff asserts one cause of action against Twitter on behalf of herself and a
12 putative class of women SWEs for sex discrimination in violation of the California Fair Employment &
13 Housing Act, California Government Code section 12940 *et seq.*

14 **B. The Motion for Class Certification.**

15 On December 21, 2017, Plaintiff moved the Court for an order certifying a class in connection
16 with her claims against Twitter. Twitter opposed the motion. The motion came on for hearing on May 9,
17 2018, and appearances are as noted in the record. On May 31, 2018, Twitter submitted further authority,
18 and the Court deemed the matter submitted on that date.

19 Plaintiff’s proposed class is defined as:

20 “All current and former female employees of Twitter with job titles Software Engineer
21 I, Software Engineer II, Senior Software Engineer, Staff Software Engineer, Senior
22 Staff Software Engineer, Principal Engineer, Distinguished Engineer, Engineering
23 Fellow, or similarly titled positions, employed in California between January 27, 2014,
24 through the resolution of this action.”

25 FAC ¶ 14.

26 Plaintiff contends that there are approximately 135 class members. Declaration of Jason Lohr ISO
27 Motion for Class Certification (“Lohr Decl.”) ¶ 7. Plaintiff argues that she satisfies the criteria for class
28 certification applicable to disparate impact claims. More specifically, she argues that this case satisfies
the commonality requirement because: (1) all managers act as “gatekeepers” in the promotion process,
and (2) all managers are required to apply what Twitter calls the “Impact” and “How” criteria in deciding

1 whether an employee should be nominated and/or considered for a promotion.

2 In opposing Plaintiff's motion, Twitter argues that expert analysis of data shows no disparate
3 impact, that Plaintiff cannot establish commonality based solely on Twitter's policy of "delegated
4 discretion," that Plaintiff's claims are not typical of the class, that Plaintiff and class counsel are not
5 adequate representatives of the class, and that the class action vehicle is not superior because Plaintiff has
6 not demonstrated manageability or a viable trial plan.

7 **II. THE PARTIES' EVIDENCE**

8 **A. Twitter's Organizational Structure for Software Engineers.**

9 In 2010, Twitter had approximately 130 employees, 40-50% of whom were SWEs. Declaration of
10 Julie Drake ISO Defendant's Opposition to Motion for Class Certification ("Drake Decl.") ¶ 4. Between
11 2011 and 2013, the number of employees increased to almost 3,000. *Id.* ¶ 5. Currently, there are
12 approximately 3,500 employees, and approximately 850 are SWEs. *Id.* ¶ 13. SWEs work in various
13 "branches" or "pillars," such as Data Scientists, Data Analysts, Program Managers, etc. *Id.* ¶ 11. These
14 "pillars" changed over time during the class period. *Id.* For example, in 2015, Twitter had 13 pillars,
15 each containing anywhere from zero to hundreds of SWEs who reported to different levels of over 100
16 engineering managers. *Id.* In 2016, there were nine pillars, each focusing on different Twitter services or
17 products, and the engineering managers reported to different vice presidents of each organization. *Id.* ¶¶
18 11-12.

19 Moreover, in 2012, Twitter established formal job levels and titles in the form of "job ladders" in
20 order to streamline the promotion process. *Id.* ¶ 5. The SWE Technical Ladder in particular consists of
21 eight job levels: (1) SWE I, (2) SWE II, (3) Senior SWE, (4) Staff SWE, (5) Senior Staff SWE, (6)
22 Principal SWE, (7) Distinguished SWE, and (8) Fellow SWE. *Id.* ¶ 6. The SWEs on the Technical
23 Ladder are "individual contributors," meaning that they do not manage other employees. *Id.* ¶ 9.

24 Plaintiff's proposed class is limited to 135 women SWEs who are on the Technical Ladder. Lohr
25 Decl. ¶ 7. According to Julie Drake, Twitter's Director of Compensation, no employee has ever held the
26 role of Fellow SWE, only one employee has ever held the position of Distinguished SWE, and only four
27 people in the history of the company have held the position of Principal SWE. Drake Decl. ¶ 7.

1 **B. Twitter’s Promotion Practices During the Class Period, Managers’ “Gatekeeping”**
2 **Role, and the “Impact” and “How” Criteria.**

3 Promotion policies varied throughout the class period. Drake Decl. ¶ 14. As of early 2013, to be
4 considered for a promotion, an employee needed a promotion packet that included feedback from a
5 specified number of peers, depending on the level of promotion sought. *Id.* ¶ 17. By late 2013,
6 promotions to SWE II, Senior SWE, and Staff SWE were decided in manager meetings within the pillar
7 in which the employee worked, while promotions to Senior Staff SWE and above were decided by “cross-
8 pillar” promotion committees, which were comprised of other SWEs who held positions in the promotion
9 level sought or higher. *Id.* ¶¶ 17-19, 25. From the beginning of the class period, employees were allowed
10 to “self-select” via a drop-down menu whether they thought they should be promoted, and employees
11 were tasked with securing peer feedback in connection with their promotion packets while their managers
12 were free to provide supplemental feedback. *Id.* ¶ 20. In late 2014, Twitter changed the promotion
13 process such that promotion committees were required to determine promotions for the Staff SWE
14 position. *Id.* ¶ 23. In 2015, Twitter changed the promotion process again, requiring that promotions to
15 SWE II and Senior SWE be decided by a promotion committee made up of eight to ten engineers from
16 within the pillar. *Id.* ¶ 25.

17 Plaintiff claims that Twitter’s managers act as “gatekeepers” in the promotion process by deciding
18 who is nominated and/or considered for a promotion, and when. Mtn. at 4. In her declaration, Plaintiff
19 states as follows: “Though Twitter claimed anyone could be up for a promotion at any time, in practice
20 your manager and the top engineering leadership were the gatekeepers. Unless you got a ‘tap on the
21 shoulder’ from the manager, there was no realistic way you could even get a promotion packet to the
22 promotion committee, let alone be approved.” Declaration of Tina Huang (“Huang Decl.”) ¶ 7. Plaintiff
23 also submitted the declarations of two other putative class members who stated that it was “common
24 knowledge” in Twitter that managers had to “sell” an employee’s promotion to the promotion committee,
25 and that she was discouraged by two separate managers from pursuing a promotion. *See* Declaration of
26 Sarah Brown (“Brown Decl.”) ¶ 7; Declaration of Muffy Barkocy (“Barkocy Decl.”) ¶¶ 4-6.³

27
28 ³ In her moving papers at p. 4, Plaintiff cited to exhibits “Twitter_00000906” and “Twitter_00001443” as
evidence of the “gatekeeping” role of managers at Twitter. However, nothing in these exhibits support
the proposition for which they are cited.

1 In 2014, Twitter established a criteria for evaluating promotions based on two “overarching”
2 concepts: “Impact” and “How.” Drake Decl. ¶ 24. “Impact” focuses on the employee’s contribution to
3 Twitter’s projects, whereas “How” focuses on the employee’s work quality and overall value to the team.
4 *Id.* Twitter provides some guidelines to help managers evaluate “Impact” and “How,” but ultimately
5 delegates discretion to the managers so that they may assess “Impact” and “How” for their team. *Id.*

6 **C. Anecdotal Evidence Regarding Disparate Impact.**

7 In support of her motion, Plaintiff submitted her declaration and five other declarations from other
8 current and former women SWEs at Twitter. Plaintiff stated in her declaration that she was denied a
9 promotion to the position of Senior SWE, while seven male employees were promoted to that position.
10 Huang Decl. ¶¶ 11, 13. She also stated that she felt Twitter’s failure to promote her was an example of “a
11 more systemic bias against women that is inherent in Twitter’s promotion system specifically, and its
12 culture generally.” *Id.* ¶ 14. Ms. Jane Roe’s declaration stated she was hired as a SWE II even though
13 she had over 12 years of experience as a software developer, that other employees in that position had
14 significantly less experience, and that women SWEs were outnumbered by men SWEs. Declaration of
15 Jane Roe (“Roe Decl.”) ¶¶ 2, 4. Ms. Sarah Brown stated that, while she did not experience any behavior
16 that was overtly discriminatory, she still felt that Twitter had a male-dominated environment. Brown
17 Decl. ¶ 10. Ms. Muffy Barkocy stated that the work environment or culture in Twitter appeared to be a
18 culture of “young college-aged men,” sometimes referred to at Twitter as “brogrammer” culture, and that
19 such culture adversely impacted women. Barkocy Decl. ¶ 7. Similarly, Ms. Jane Doe stated in her
20 declaration that she believed women were treated differently than men at Twitter. Declaration of Jane
21 Doe (“Doe Decl.”) ¶ 7. Finally, Ms. Penny Loftesness, who does not appear to be a class member
22 because she left Twitter in February 2013, described a “bro” culture, and stated that the promotion process
23 was arbitrary and controlled by a few male “gatekeepers.” Declaration of Penny Loftesness ¶¶ 2, 12.

24 Twitter submitted nine declarations from current and former putative class member SWEs and
25 SWE managers who stated that they have not been disadvantaged by gender, that the higher up the
26 technical ladder, the more difficult it is to achieve promotions, that Twitter is committed to promoting
27 gender diversity and inclusion, and that they have not been disadvantaged by Twitter’s promotion
28 process. *See* Declarations of Jo Pu, Svetlana Nelson, Jan Chong, Anna Slukina, Jillian Crossley, Jenny

1 Hylbert, Yao Yue , Tzvetelina Txeneva, and Kathleen Vignos.

2 **D. Expert Evidence.**

3 Plaintiff presented the expert testimony of Dr. C. Daniel Vencill. Dr. Vencill concludes that
4 women SWEs at Twitter are promoted less frequently than men, that the time spent in each position
5 before promotion is much greater for women, and that promotions become more infrequent as employees
6 move to more senior positions on the Technical Ladder. *See generally* Declaration of Dr. C. Daniel
7 Vencill ISO Plaintiff's Motion for Class Certification ("Vencill Decl.") and Declaration of Dr. C. Daniel
8 Vencill ISO Plaintiff's Reply Brief ("Vencill Supp. Decl.").⁴

9 Twitter presented the expert testimony of Dr. Paul F. White. Dr. White vigorously disputes Dr.
10 Vencill's methodology and conclusions. Dr. White analyzed the data and concluded that women are
11 promoted at a rate that is not statistically significantly lower than that of men and that women do not take
12 statistically significantly longer to be promoted from one position on the Technical Ladder to the next
13 during the relevant time period. He notes that Dr. Vencill's "Glass Ceiling Risk Index" is not an actual
14 index number, lacks supporting data, and does not support for his specific conclusions. *See generally*
15 Declaration of Dr. Paul F. White ISO Twitter's Opposition ("White Decl."), Ex. A ("White Analysis").

16 **E. Evidence Specific to Plaintiff Tina Huang.**

17 Plaintiff began working as a Software Engineer at Twitter in October 2009. Huang Decl. ¶ 2.
18 Plaintiff was promoted several times up the SWE Technical Ladder, eventually being promoted to the
19 position of Staff SWE in 2012. *Id.* ¶ 5. Plaintiff testified during her deposition that her managers
20 supported her promotions. *See* Declaration of M. Lawson ISO Defendant Twitter, Inc.'s Opposition to
21 Plaintiff's Motion for Class Certification ("Lawson Decl."), Ex. B ("Huang Depo.") at 18:5-19:14.

22 In winter 2013, Plaintiff worked with her manager, James Waldrop, to put together a promotion
23 packet for the position of Senior Staff SWE. Huang Decl. ¶ 8; *see also* Huang Depo. at 217:6-17.
24 Plaintiff stated that she received excellent performance reviews and that she did not have any disciplinary
25 issues or receive any criticisms. Huang Decl. ¶ 11. The promotion committee, consisting of 10 male

26 ⁴ Twitter seeks to exclude all of Dr. Vencill's expert testimony and both of his reports on multiple
27 grounds. *See* Twitter's Objections to Evidence ("Twitter's Obj."). Twitter's objections to the entirety of
28 Dr. Vencill's reports are overruled. Rulings on Twitter's specific objections are set forth in the Court's
Orders re Twitter's Objection to Evidence filed this same day.

1 senior SWEs and one female senior engineer, ultimately decided not to promote Plaintiff, as well as four
2 other male SWEs, to the position of Senior Staff SWE. Drake Decl. ¶¶ 31-32. Plaintiff stated that she
3 was not given any explanation as to why she was denied the promotion. Huang Decl. ¶ 11. Plaintiff later
4 discovered that the same promotion committee decided to promote seven male SWEs to the position of
5 Senior Staff Engineer. *Id.* ¶ 13.

6 After Plaintiff requested a formal investigation of her promotion case, she was placed on an
7 “indefinite leave” pending the investigation. *Id.* ¶ 15. After three months, and without receiving any
8 response from Twitter with respect to the investigation, Plaintiff voluntarily resigned in June 2014. *Id.*

9 III. LEGAL STANDARD

10 Under section 382 of the Code of Civil Procedure, the party seeking class certification bears the
11 burden of establishing “the existence of an ascertainable and sufficiently numerous class, a well-defined
12 community of interest, and substantial benefits from certification that render proceeding as a class
13 superior to the alternatives.” *Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021. The
14 party seeking certification must present substantial evidence showing that the requirements of section 382
15 have been met. *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 328-29.

16 While courts ordinarily do not reach the merits of an action when considering a certification
17 motion, courts do examine the elements of the alleged claims in the context of deciding whether the
18 community of interest requirement has been met. *Brinker, supra*, 53 Cal.4th at 1023-24. “[I]ssues
19 affecting the merits of a case may be enmeshed with class action requirements, such as whether
20 substantially similar questions are common to the class and predominate over individual questions or
21 whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses.”
22 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443.

23 IV. ANALYSIS

24 Plaintiff’s primary complaint regarding Twitter’s promotion process is that managers act as
25 “gatekeepers” into the promotion process by deciding which of the SWEs they supervise are nominated
26 and/or considered for promotions, and that Twitter influences managers’ decisions through the use of the
27 “Impact” and “How” criteria. However, of the six putative class member declarations submitted by
28 Plaintiff, only Plaintiff’s declaration, and the Brown and Barkocy declarations, addressed managers’

1 alleged “gatekeeping” function with respect to the promotion process, and in fact, Plaintiff stated that her
2 own manager supported her promotion. Moreover, Dr. Vencill concluded that there is a gender disparity
3 in promotions at Twitter, but testified during deposition that he does not know the cause of such disparate
4 impact. As such, the Court finds that Plaintiff failed to satisfy her burden of presenting substantial
5 evidence to show that managers at Twitter acted as “gatekeepers” with respect to the promotion process
6 involving the putative class.

7 However, even if the Court found that Plaintiff’s evidence were sufficient to establish the
8 existence of such a policy or practice, the Court finds, based upon the rule set forth in *Dukes I*, that
9 Plaintiff failed to meet her burden of establishing through substantial evidence: (a) the existence of a well-
10 defined community of interest; (b) that Plaintiff’s claims are typical of class members; (c) and that
11 certification would produce substantial benefits that would render proceeding with this case as a class
12 action either manageable or superior to the alternative. Accordingly, the Court must deny Plaintiff’s
13 motion for class certification.

14 **A. The Proposed Class is Ascertainable and Numerous.**

15 Whether a class is ascertainable is determined by examining “(1) the class definition, (2) the size
16 of the class, and (3) the means available for identifying class members.” *Evans v. Lasco Bathware, Inc.*
17 (2009) 178 Cal.App.4th 1417, 1422 (quotations omitted). “The purpose of the ascertainability
18 requirement is to ensure it is possible to give adequate notice to class members and to determine after the
19 litigation has concluded who is barred from relitigating.” *Sevidal v. Target Corp.* (2010) 189
20 Cal.App.4th 905, 918-19 (quotations omitted). Moreover, “[t]he requirement of Code of Civil Procedure
21 section 382 that there be ‘many’ parties to a class action suit is indefinite and has been construed liberally.
22 . . . No set number is required as a matter of law for the maintenance of a class action.” *Rose v. City of*
23 *Hayward* (1981) 126 Cal.App.3d 926, 934.

24 There are 135 women software engineers who have been identified as members of the putative
25 class. Lohr Decl. ¶ 7. The Court finds that the class is easily ascertainable and sufficiently numerous.

26 **B. Plaintiff Failed to Demonstrate a Well-Defined Community of Interest.**

27 The “community of interest requirement embodies three factors: (1) predominant common
28 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class

1 representatives who can adequately represent the class.” *Brinker, supra*, 53 Cal.4th at 1021. For the
2 requisite community of interest to exist, “[q]uestions of law or fact common to the class [must]
3 predominate over the questions affecting the individual members.” *Lockheed Martin Corp. v. Super. Ct.*
4 (2003) 29 Cal.4th 1096, 1104. Moreover, Plaintiff bears the burden of establishing through substantial
5 evidence that her “common contention . . . [is] of such a nature that it is capable of classwide resolution –
6 which means that determination of its truth or falsity will resolve an issue that is central to the validity of
7 each one of the claims in one stroke. . . . What matters to class certification . . . is not the raising of
8 common questions – even in droves – but, rather the capacity of a classwide proceeding to generate
9 *common answers* apt to drive the resolution of the litigation.” *Dukes I, supra*, 564 U.S. at 350 (internal
10 citations and quotations omitted).

11 In *Dukes I*, plaintiffs sought to certify a nationwide class of 1.5 million current and former
12 Wal-Mart female employees, alleging that Wal-Mart’s local managers exercise their discretion over pay
13 and promotions disproportionately in favor of men, resulting in disparate impact on women. 564 U.S. at
14 342. When selecting candidates for promotion, Wal-Mart managers were required to assess for certain
15 objective criteria, such as “an above-average performance rating, at least one year’s tenure in the
16 applicant’s current position, and a willingness to relocate.” *Id.* at 343. Other than those requirements,
17 Wal-Mart allowed its managers to exercise their own discretion. *Id.* Plaintiffs in that case argued that the
18 commonality requirement was met because Wal-Mart’s managers exercised “discretionary
19 decisionmaking” in a manner that was common to all Wal-Mart female employees. *Id.* at 345, 355. The
20 U.S. Supreme Court stated that a “‘policy’ of *allowing discretion* . . . is just the opposite of a uniform
21 employment practice that would provide the commonality needed for a class action; it is a policy *against*
22 *having* uniform employment practices.” *Id.* at 355 (emphasis in original). The Court further stated that,
23 other than the mere fact of delegated discretion, plaintiffs failed to identify a “specific employment
24 practice” that applies uniformly throughout the class, and that simply showing that Wal-Mart’s policy of
25 discretion has produced an overall sex-based disparity does not suffice. *Id.* at 357. *Dukes I* thus stands
26 for the rule that, in a disparate impact case based on a company’s policy of delegated discretion, a plaintiff
27 seeking to certify a class must identify a “common mode of exercising discretion” that would tie class
28 members’ claims together. *Id.* at 356, 358 (internal quotation marks omitted).

1 In the instant case, Plaintiff challenges two components of Twitter's promotion system: (1)
2 Twitter's managers' "gatekeeping" function with respect to the promotion process; and (2) the managers'
3 use of the "Impact" and "How" criteria in assessing an employee's candidacy for promotion. Mtn. at 18.
4 Specifically, Plaintiff argues that in order for SWEs in the Technical Ladder to be nominated and/or
5 considered for promotions, their managers must support their promotion, and that managers are required
6 to use the "Impact" and "How" criteria to assess whether an employee should be nominated and/or
7 considered for a promotion. Reply at 4. Like the delegated discretion policy that was challenged in *Dukes*
8 *I*, Plaintiff's "gatekeeping" claim challenges Twitter's policy of giving managers discretion over
9 promotions. Here, Plaintiff claims that Twitter's policy of requiring managers to use the "Impact" and
10 "How" criteria constitutes a "specific employment practice" or a "common mode of exercising discretion"
11 that would satisfy the commonality requirement. But the evidence demonstrates that the "Impact" and
12 "How" criteria is a vague and highly-subjective one, the application of which depends on a multitude of
13 factors. Indeed, Kathleen Vignos, a Senior Engineering Manager at Twitter, indicated that
14 "demonstrating impact is different for every team." Declaration of Kathleen Vignos ISO Defendant
15 Twitter, Inc.'s Opposition to Plaintiff's Motion for Class Certification ("Vignos Decl.") ¶ 7. To
16 demonstrate "Impact" for her team, Ms. Vignos "created a list of examples of the types of projects that
17 [she] believe[s] demonstrate[s] impact." *Id.* Ultimately, the "Impact" and "How" criteria are simply
18 subjective guidelines for managers' exercise of their discretion that do not rise to the level of a "common
19 mode of discretion." *See Dukes v. Wal-Mart Stores, Inc.* (N.D. Cal. 2013) 964 F.Supp.2d 1115, 1126
20 (*Dukes II*) (court denied certification following remand, finding that the "common subjective criteria"
21 used by managers was nothing more than "repackaged delegated discretion").

22 The facts in this case are distinguishable from those in *Ellis v. Costco Wholesale Corp.* (N.D. Cal.
23 2012) 285 F.R.D. 492, where the court certified a class of current and former employees alleging gender
24 discrimination in the employer's promotion practices in a disparate *treatment* and disparate *impact* case.
25 In *Ellis*, plaintiffs presented evidence showing that Costco had a culture that reinforced gender
26 stereotypes, which adversely affected women's opportunities for promotion. *Id.* at 52-21. Plaintiffs also
27 presented substantial evidence of upper management involvement in the promotion process, including
28 with respect to which employees are considered for promotions. *Id.* at 513 (promotable lists of candidates

1 were maintained at the regional level). Additionally, Costco imposed “consistent substantive criteria” for
2 promotions into the General Manager (GM) and Assistant General Manager (AGM) positions that was
3 uniformly applied throughout the class, such as, the requirement that candidates for GM must be AGMs
4 and candidates for AGM must be Senior Staff employees, candidates for AGMs must have merchandising
5 experience in the Merchandise Manager position, and should have experience in most of the Senior Staff
6 positions. *Id.* at 514. Based on these and other evidence, the court in *Ellis* found that plaintiffs
7 demonstrated “a pervasive companywide culture that, along with the common policies and practices,
8 guide Costco’s managers’ discretion in making promotion decisions.”. *Id.* at 511. In contrast to *Ellis*,
9 Plaintiff’s evidence in this case highlights the “gatekeeping” role of individual managers for a large
10 number of teams within Twitter’s SWE Technical Ladder as opposed to upper management’s role. More
11 importantly, Twitter’s “Impact” and “How” criteria, in contrast to Costco’s criteria as described in *Ellis*, is
12 vague and subjective, and does not lend itself to a uniform system of assessing candidates for promotions.
13 Accordingly, unlike the plaintiffs in *Ellis*, Plaintiff in this case failed to present substantial evidence of a
14 common policy or practice that guided Twitter managers’ decisions with respect to promotions.

15 As noted above, Plaintiff submitted a number of declarations from putative class members
16 describing a “brogrammer” culture at Twitter, and Plaintiff’s expert, Dr. Vencill concluded that fewer
17 women SWEs are promoted to the upper rungs of the Technical Ladder compared to their male
18 counterparts. However, because Plaintiff failed to identify a “specific employment practice” or a
19 “common mode of exercising discretion,” any evidence showing the existence of a disparate impact on
20 women SWEs at Twitter is insufficient to establish that common questions of fact or law predominate in
21 this case. *See Dukes I, supra*, 564 U.S. at 357 (merely showing that a policy of delegated discretion has
22 produced an overall sex-based disparity does not suffice); *see also Ellis, supra*, 285 F.R.D. at 531-33
23 (requiring plaintiffs to identify a “specific companywide employment practice” responsible for the
24 disparate impact).

25 **C. Plaintiff Failed to Establish that Her Claims are Typical of the Class.**

26 Apart from failing to establish that common questions of fact or law predominate, Plaintiff further
27 failed to establish that her claims are typical of the entire class. The typicality of a class representative’s
28 claims is determined by examining whether the absent class members have the same or similar injury,

1 whether the action is based on conduct which is unique to the named plaintiffs, and whether other class
2 members have been injured by the same course of conduct. *Seastrom v. Neways, Inc.* (2007) 149
3 Cal.App.4th 1496, 1502. Plaintiff argues that her claims are typical of the class because she was also a
4 SWE in the Technical Ladder, subject to the same “Impact” and “How” criteria, and was similarly denied
5 a promotion as a result. Reply at 12-13.

6 However, notwithstanding Plaintiff’s claim that managers at Twitter prevented and or discouraged
7 women from receiving promotions, Plaintiff testified during deposition that her managers initiated
8 promotion cases on her behalf and supported her promotions. Huang Depo. at 19:3-14, 217:6-17. Thus,
9 unlike the class she seeks to represent, Plaintiff’s promotions were not hindered by her manager’s
10 “gatekeeping.” The fact that Plaintiff’s experience differs from those of class members who allege their
11 promotions were thwarted by their managers suggests that her claims are not typical of the rest of the
12 class.

13 **D. Plaintiff Failed to Demonstrate that the Class Action is the Superior Method for**
14 **Resolving the Case.**

15 In assessing superiority, a court generally considers the following: “(1) The interest of each
16 member in controlling his or her own case personally; (2) The difficulties, if any, that are likely to be
17 encountered in managing a class action; (3) The nature and extent of any litigation by individual class
18 members already in progress involving the same controversy; [and] (4) The desirability of consolidating
19 all claims in a single action before a single court.” *Basurco v. 21st Century Insurance Co.* (2003) 108
20 Cal.App.4th 110, 121(citations and quotations omitted). Because Plaintiff failed to identify a specific
21 employment practice that uniformly applied to the class, it follows that Plaintiff also failed to demonstrate
22 how class members’ claims can be fairly and efficiently adjudicated in one proceeding. Indeed, numerous
23 individual factual inquiries would have to be undertaken regarding, for example, whether or not individual
24 managers acted as “gatekeepers” into the promotion process for the employees they supervise, how they
25 applied the “Impact” and “How” criteria, if at all, etc. Accordingly, the Court finds that Plaintiff has not
26 met her burden of showing that a class action is a superior device for resolving this controversy.

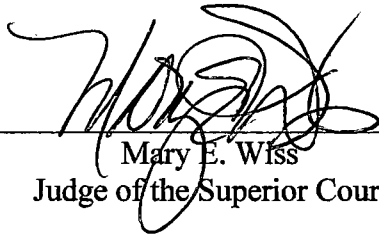
27 **V. CONCLUSION**

28 Based upon the state of the evidence presented to the Court and the holding in *Dukes I*, Plaintiff’s

1 Motion for Class Certification is denied. The Court will hold a Case Management Conference on July 25,
2 2018 at 9:30 a.m. to discuss further proceedings in this action and to establish pretrial deadlines and a trial
3 date for Plaintiff's individual claims, including the second and third causes of action for retaliation and
4 wrongful termination. A joint case management statement must be filed, and two copies delivered to
5 Department 305, no later than three court days prior to the conference.

6 IT IS SO ORDERED.

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8 Dated: July 3, 2018

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11 Mary E. Wiss
12 Judge of the Superior Court
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Superior Court of California
County of San Francisco

TINA HUANG, for herself, and all others
similarly situated,

Plaintiff,

vs.

TWITTER, INC. and DOES 1-10,

Defendants.

Case Number: CGC-15-544813

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On July 3, 2018, I electronically served the ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: July 3, 2018

T. Michael Yuen, Clerk

By: _____



Sean Kane, Deputy Clerk