#NELA16
National Employment Lawyers Association
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Panel Presentation

IMPLICIT BIAS IN THE COURTROOM

By Honorable Bernice B. Donald
United States Court of Appeals for the Sixth Circuit

Everything we do, every thought we've ever had, is produced by the human brain. But exactly how it operates remains one of the biggest unresolved mysteries, and it seems the more we probe its secrets, the more surprises we find.

– Neil deGrasse Tyson

Let's talk about the brain. Yes, that three-pound, gray and white ball of matter behind your forehead. What we know about the human brain is simply amazing. It generates enough energy to power a light bulb; it produces an average of 70,000 thoughts, traveling at a speed of 260 mph per day; and it has approximately 100 billion neurons—about as many as there are stars in the galaxy. The brain is awe-inspiring not only based on what we know, but also based on the considerable amount that we do not know.

The technology behind neuroscience is still in its infancy; as a result, the discussion about its role in the legal system has been largely an academic one. As

the use of neurotechnology becomes more widespread, it creeps slowly into our nation's courtrooms, particularly in the criminal context. The budding science is gradually forcing attorneys and judges alike to assess whether our current legal structure is equipped to handle the wellspring of issues—constitutional, evidentiary, and otherwise—associated with the admission of neuroscientific evidence.

One of the chief concerns about the proliferation of the use of neuroscientific evidence in court is the potential that it will usurp the role of the jury. Given the danger of having juror's overreliance on neuroscientific evidence taint verdicts, when should courts admit such evidence? Take the Supreme Court's opinion in *United States v. Scheffer*, 523 U.S. 303 (1998), as an example. In *Scheffer*, the Court confronted a challenge to a per se rule against admission of polygraph (lie detector) evidence. In upholding the ban on the use of polygraph test results, the Court emphasized the longstanding maxim of the American criminal trial system that "the *jury* is the lie detector." *Id.* at 313. On top of that, the Court expressed concern about the lack of a scientific consensus as to the reliability of polygraph testing, as well as the potential for time-consuming and tangential "mini-trials" over the admissibility of the evidence.

Naturally, a subject as complex as brain science must be accompanied by expert testimony in order to be admitted. And, in federal court, it must satisfy the

familiar *Daubert* standard. While applications of "well-established" science can survive the *Daubert* inquiry with ease, specific applications of the still-evolving field of neuroscience stand on shakier ground.

Consider the example of functional magnetic resonance imaging ("fMRI"). Scientists use fMRI to detect "which regions of the brain are working, how much, and for how long during particular tasks." Francis X. Shen & Owen D. Jones, *Brain Scans as Evidence: Truths, Proofs, Lies, and Lessons*, 62 Mercer L. Rev. 861, 864 (2011). In a case before the United States Court of Appeals for the Sixth Circuit, a doctor facing criminal healthcare-fraud charges sought to introduce fMRI testing to indicate that he was telling the truth when he claimed that he "attempted to follow proper billing practices in good faith." *United States v. Semrau*, 693 F.3d 510, 516 (6th Cir. 2012). It was one of the first cases to address the admissibility of fMRI testing for lie-detection purposes. The Sixth Circuit upheld the exclusion of the polygraph evidence. *Id.* at 523–24.

The *Semrau* court emphasized that there were "no known error rates for fMRI-based lie detection outside the laboratory setting, i.e., in the 'real-world' or 'real-life' setting." *Id.* at 521. The court also noted that "the chances of calling a truth teller a truth teller was only roughly six percent." *Id.* at 522. With these and other problems in mind, the court stated "that jurors, most of whom lack advanced scientific degrees and training, would be poorly suited for resolving these disputes

and, thus, more likely to be confused rather than assisted by [expert] testimony." *Id.* at 523.

So, we know about the problem of admissibility of neuroscientific evidence and how lawyers might lodge such evidentiary challenges. But let us assume that courts regularly admit neuroscientific evidence—lie-detection technology, brain scans, cognitive-function tests, and so on. This is a fair assumption indeed, according to recent statistics. *See* Jon Hamilton, *The Case Against Brain Scans as Evidence in Court*, NPR (Nov. 12, 2013, 3:02 AM), http://www.npr.org/blogs/health/2013/11/12/244566090/brain-scans-shouldnt-get-their-day-in-court-scientists-say (noting that approximately five percent of murder trials now involve some neuroscience).

Given the assumption, how should plaintiff-side employment attorneys use the growing body of social science research that exists on implicit bias to better advocate for their clients? Studies show that our minds automatically sort incoming information into categories. This cognitive process is known generally as implicit social cognition. For example, Professor Jerry Kang, who has been at the forefront of researching the nexus between implicit bias and the law, explained this operation with a simple example: "When we see . . . something with a flat seat, a back, and some legs, we recognize it as a 'chair.' . . . [W]e know what to do with an object that fits into the category 'chair.' Without spending a lot of mental

energy, we simply sit." Jerry Kang, NAT'L CTR. FOR STATE COURTS, *Implicit Bias*: *A Primer for Courts* 1 (2009).

Despite an increased awareness of implicit bias and its impact on legal decisions, a critical chasm still remains. Consider the debate as to whether a frequently cited psychological measure of implicit bias, the Implicit Association Test ("IAT"), should be used with legal claims. The IAT requires participants to rapidly classify individual stimuli into one of four distinct categories using only two responses. For instance, in an age-attitude IAT, there are two social categories, "young" and "old," and two attitudinal categories, "good" and "bad." A person with a negative implicit attitude toward "old" is expected to classify, or to make a correlation, when "old" and "bad" share one key, and "young" and "good" the other. *See* Kang, at 8.

To the extent IAT results and statistics are used, advocates only tend to make fairly broad statements regarding how implicit bias manifests itself, but they avoid specific, concrete arguments as to how they are connected. Lawyers must be creative and diligent in connecting legal discourse with a social cognition-informed perspective that derives from research-based approaches to mitigate the impact of implicit bias. From my research and experience, I recommend the following non-exhaustive list of ways.

1. **Know the research and rely on tested intervention techniques that are supported by empirical research rather than relying on intuitive guesses about how to mitigate implicit bias.**

Implicit bias can influence employment discrimination cases in two ways. First, implicit bias causes some employment discrimination. Tester studies demonstrate implicit bias correlations with discriminatory job evaluations. For example, one such experiment demonstrated that participants treated self-promoting and competent women (termed "agentic") worse than equally agentic men. Laurie Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 748–49 (2001). When a job description required an employee to be cooperative and to work well with others, the participants rated the agentic female less hirable than the agentic male. When examined closer, the research showed that the women were penalized for lack of social skills, not incompetence. *Id.* This is a classic example of implicit gender bias causing employment discrimination.

Second, like the rest of society, judges and juries may have implicit bias that may affect their decisions. One study revealed that "judges harbor the same kinds of implicit biases as others; that biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases" and can engage in cognitive correction to avoid the appearance of bias. Jeffrey

Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 Notre Dame L. Rev. 1195, 1196 (2008-2009).

Accordingly, lawyers, particularly plaintiffs' lawyers in employment discrimination cases, need to acquire a working knowledge of what implicit bias is and the many ways it manifests itself against their clients. *See* Casey, et al., NAT'L CTR. FOR STATE COURTS, *Helping Courts Address Implicit Bias: Strategies to Reduce the Influence of Implicit Bias* 11 (2012). Given the pervasiveness of implicit bias, plaintiffs' attorneys must be mindful of the decision-making processes that inevitably involve implicit bias. Plaintiffs' attorneys must do more than simply tailor their approach toward achieving the relief their clients are seeking. Justice is not blind, so it stands as little benefit for employment discrimination lawyers to ignore or permit negative hidden bias against their clients both inside and outside the courtroom. Therefore, an awareness of implicit bias may lend itself to a more strategically effective approach—one that is not divorced from the reality of bias.

2. Invest extra effort in framing the client in many ways other than the attribute for which the alleged discrimination is based but do not use a color-blind approach to mitigate implicit bias.

A practitioner seeking to highlight implicit bias in his or her brief should focus on the attributes underlying the bias. *See* Casey, *supra* at 9. By specifically stating the underlying attributes that compose the particular stigmatized group (e.g.

terrorist-looking), the practitioner might gain more ground than simply stating the plaintiff's race or religion. Avoid using certain environmental cues that might automatically trigger stereotypes, such as images and language that may inadvertently activate implicit bias because they convey stereotypic information. However, this is not to suggest a color-blind (or a gender-blind, ethnicity-blind, class-blind, etc.) approach.

Indeed, it is well established that a color-blind approach only intensifies implicit bias. Neil Macrae, et al., *The dissection of selection in person perception: Inhibitory processes in social stereotyping*, J. OF PERSONALITY & SOC. PSYCHOL. 69, 397–407 (Sept. 1995). Instead, lawyers should individualize their clients before a judge or jury by being specific as to who the client is as a person and not merely as a demographic.

3. Use questions during voir dire to identify those who have not been exposed to counter-stereotype associations of members of stigmatized groups.

One way to reduce the impact of a jury's potential implicit bias is for plaintiffs' lawyers to question individuals during jury selection or voir dire on counter-stereotypic images and associations. Such questions will identify those who have been least exposed to counter-stereotypes. Studies indicate that increased contact with counter-stereotypes—meaning, increased exposure to stigmatized group members that contradict the social stereotypes—can help

individuals "unlearn" the associations that underlie implicit bias. In turn, voir dire can become telling of the extent to which jury candidates harbor unchecked implicit bias. With greater contact with counter-stereotypes may come decreased exposure to stereotypes or, at a minimum, the self-awareness, intention, or conscious choice to routinely check thought processes that may lead to implicit bias. *See* Casey, *supra* at 19. This, in turn, can alleviate the manifestations of implicit bias.

4. Identify sources of situational ambiguity and suggest to the court a criteria for consideration by outlining how to consider various types of evidence and facts.

Situational ambiguity may arise when the formal criteria for judgment is somewhat vague or when the case type is less common. In such cases, plaintiffs' lawyers can preemptively suggest a criteria to the court largely based on precedent that outlines how the court can consider various types of evidence. *See* Casey, *supra* at 13–14. Even if the judge or decision-maker chooses not to follow the suggested criteria, by virtue of the criteria being briefed, the judge will likely address the suggested criteria by either explaining why that criteria is not applicable or replacing the criteria with another—all while deliberatively deciding the issue on a more structured rationale. This tactic could help prevent "autopilot" stereotyping and minimize the impact of implicit bias in areas of ambiguity that are most vulnerable to implicit bias.

5. Host CLE sessions on implicit bias in your local communities.

Last, the key to battling implicit bias is raising judges and lawyers' awareness of it. Because implicit bias is hidden, cognitive, and often automatic, it is difficult to ascertain and measure. For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit bias, so it is important that lawyers too play a role in battling implicit bias in the courtroom. One way lawyers can do this is by hosting CLE sessions that train lawyers and judges on the social science research on implicit bias as well as the methods used to cognitively correct it. There needs to be a sense of openness when it comes to the topic of implicit bias in the legal field.

Therefore, I encourage members of NELA, who stand at the forefront of pressing employment issues in this country, to familiarize themselves with these and other legal challenges that arise with implicit bias both inside and outside the courtroom. As a legal community, we must take proactive steps to confront such challenges and develop well-prepared and well-reasoned responses to address them.

Implicit Bias in the Courtroom
Reflecting on a Decade of Change
National Employment Lawyers Association
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I. 2006-2016: A Decade of Change.

A. In October of 2006, NELA convened "Beyond Stereotypes: Discovering and Proving Hidden Bias in Employment Cases" a two-day seminar in Washington DC that brought together attorneys, judges, legal scholars, and social scientists to discuss the emerging science of implicit bias and to consider its effect on the practice of employment law. In the wisdom of hindsight, it is no exaggeration to label that two-day conference as a game-changing catalyst for the practice of employment discrimination law.

B. At the conference, participants discussed the fact that the legal system's understanding of bias rested upon a paradigm that was no longer viable. This intuitive "folk psychology" of discrimination, rested upon erroneous assumptions about the decision-maker's bias:

- **i.** It is conscious—The person is aware of his or her bias
- **ii.** It is a stable trait or disposition – Once biased, always biased
- **iii.** It is evaluative – a hostile animus, a desire for distance
- **iv.** It operates at the moment of decision.

Gary Blasi, "Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology," 49 UCLA Law Review 1241 (2002).

C. Emerging research in cognitive social psychology was challenging the validity of this paradigm and providing an entirely different picture of how "implicit bias" can affect decision-making in the employment context:

i. It may operate outside of the conscious awareness of the decision-maker.
ii. It may be situational. Whether or not the bias is "actuated" is affected by context.
iii. It may be the result of a cognitive process that affects how we perceive, interpret, retain, and recall information.
iv. It may affect thinking about the stereotyped object way before "the moment of decision."

Anthony Greenwald & Linda Krieger, "Implicit Bias: Scientific Foundations," 94 California Law Review 945 (2006)

D. How, then, does "implicit bias" leads to discrimination? Disparate treatment may occur when implicit social stereotypes act as a "filter" that distorts the perception of neutral or ambiguous behavior and affects the way ambiguous information is perceived, interpreted, stored in memory, retained, recalled, and applied.

Example (mother with young children): An employee with small children leaves a meeting early. Without knowing the reason why she is leaving early (to meet a client who called with an emergency), her supervisor assumes that she has a childcare issue. If the supervisor believes women with children are unreliable employees, her leaving early is interpreted and stored in the supervisor's memory as "putting family before work." This incident and other stereotype-*consistent* behavior is retained in memory, while stereotype-*inconsistent behavior* (staying late to meet a deadline, volunteering to come in on a weekend to work on a project) is forgotten. At performance evaluation time, the stereotype-consistent behavior is recalled more readily, leading to criticism that the employee "lacks commitment to the job."

E. In addition, research on ingroups v. outgroups have identified predictable behavioral patterns that lead to discrimination against perceived outsiders in the workplace.

i. in-group favoritism (benefit of doubt v. strictly by the book)
ii. attribution bias (talent v. luck)
iii. recall bias (facts that fit a stereotype are recalled better than those that do not)
iv. reward allocation (in-group members get larger rewards for same accomplishment)
v. polarized evaluations (heightened scrutiny and exaggerated responses to salient out-group characteristics)

II. Where we stand today: Ten years later it is now generally accepted that implicit bias affects how people react to social stimuli.

A. Since 2006, there has been a veritable explosion of popular interest in cognitive science. From books such as Malcolm Gladwell's Blink, to newpaper and magazine articles discussing the IAT (Implicit Association Test), to public debate over the Trayvon Martin shooting and the "Black Lives Matter" movement, there is heightened awareness that humans are prone to view the world in social categories, and that our reaction to the social world is filtered through biases of which we may be unaware.

B. There has also been an explosion of legal scholarship using the science of cognitive bias to challenge judicial reliance on scientifically dubious inferences (e.g. "same actor" inference, "honest belief" rule). See, e.g., Linda Krieger & Susan Fiske, "Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment," 94 California Law Review 997 (2006)

C. In 1998, MIT Press published Why So Slow? The Advancement of Women, Distinguished Hunter College Professor Virginia Valian identifies the role played by "gender schemas," "microinequities" and "accumulations of small disadvantage" as the basis for the glass ceiling for women in the professions. These concepts continue to be essential to the identification of discriminatory practices in male-dominated industries.

D. Along with the explosion of scientific research into implicit bias, there has been a corresponding surge of interest in legal circles over how to incorporate these new developments in cognitive psychology into the practice of law. See, e.g. Faigman, Dasgupta and Ridgeway, "A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias," 59 Hastings Law Review 1389 (2008).

E. In recent years, both federal and state courts have developed training programs and materials designed to increase judicial awareness implicit bias. See, e.g., The National Center for State Courts' project on implicit bias and judicial education at www.ncsc.org. Our distinguished panelist, Sixth Circuit Judge Bernice Donald, has been at the forefront of judicial education for the federal bench.

III. The Ongoing Challenge: Harnessing the science of implicit bias to prove discrimination in the workplace.

A. The scientific research provides a window into the *mechanism* of bias. If you don't know how the mechanism works, you will not know where to look for or how to present subtle evidence of discrimination. Linda Krieger's "The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 Stan. L. Rev. 1161 (1995) is an excellent introduction to the research that underlies social cognition theory.

B. **Recognize different patterns of bias.**

i. Ingroup/outgroup bias

what is it? Group membership in and of itself leads to exaggeration of perceived similarities and differences. Example: lines varying in length by 5%, when put into two groups….result in estimation that the lines in each group are more similar to each other, and more different from the lines in the other group.

how to spot it? "Minimal group" experiments with people (groups formed on trivial or random factors) demonstrate

that any group membership generates predictable ingroup/outgroup dynamics, including the following:

1. Ingroup members differentiate more internally, and see outgroup members as an undifferentiated mass.
2. Ingroups members judge themselves more favorably than members of outgroups.
3. Ingroup members have worse recall of undesirable behaviors of themselves than of members of the outgroups.
4. Ingroup members attribute their own failures to situational factors and the failure of outgroup members to dispositional factors.

ii. Stereotype bias/social schemas

what is it? Stereotypes are social schemas. They help to structure experience by imputing meaning to behavior and to filling in missing data. Perceptions of an individual are matched against pre-existing implicit or explicit beliefs about social categories, e.g., race, age, sex and when one "fits," it is activated.

how to spot it? Once a schema is activated, it affects how that individual's conduct is interpreted, which in the context of the work environment, can lead to disparate treatment. For example, if a firm's leadership believes that "women kill the buzz" female employees may be denied opportunity to socialize with clients, customers, partners that are essential to develop contacts and mentorship necessary to achieve success.

iii. Role Incongruity – when gender norms clash with requirements for success in the job.

what is it? In professional settings and male dominated industries the gendered expectation that women are "communal" (put the good of the "team" first, take on supporting roles), clashes with a culture that values/demands "agentic" behavior (associated with men) for success on the job (aggressive pursuit of opportunity to advance, "thought leadership").

how to spot it? Role incongruity creates a catch-22 for women: A woman who demonstrates the "agentic" behavior for success (e.g., refusing the note-taker role at meetings, demanding a "seat at the table") is subject to criticism for violating gender norms (e.g., "sharp elbows").

B. Consider developing a "Rules of the Road" strategy to demonstrate implicit bias in the courtroom.

How should NELA members confront the problem of "inference blindness"? A fundamental difficulty faced by plaintiff-side employment discrimination lawyers is that we are required to prove something that no one can "see" – a causal relationship between someone's thoughts and their actions. But by presenting detailed evidence of behavior that violates the employer's own stated values, policies and procedures, reward structure, performance standards, etc. -- its own "rules of the road" for success on the job — you may be able to make the discrimination "visible."

"Little things mean a lot." Don't overlook evidence of microinequities, e.g., (1) differential access to opportunity to learn & develop professional relationships e.g., training, assignments, mentorship, socializing with partners or clients; (2) disparity in reward structure (who is/is not placed on boards when they bring in a client?); (who is/is not made partner for meeting financial goals?); (3) differential expectations as to who takes a subservient or sacrificial role (who is expected to "sit at the table" and who is expected to "be the note taker"? who gets to demand credit for performance (a seat on the Board) and who is expected to "take one for the team?" (Randy needs a win); (4) gender-based criteria for advancement (considering negative input re: "personality," or "relationship with support staff" only in connection with women).

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Panel Presentation

IMPLICIT BIAS IN THE COURTROOM

In the case of *Ellen Pao v. Kleiner Perkins Caufield & Byers* which was tried in San Francisco Superior Court in February and March 2015, implicit or unconscious bias was prevalent on many levels. Preliminarily, we needed to determine which jurors would be best for our client Ellen Pao who alleged that she had been subjected to gender discrimination in venture capital Kleiner Perkins' decision to promote male colleagues rather than Pao and other females. Pao also alleged that she was retaliated against for complaining of discrimination and terminated for having made complaints. The jury questionnaire that we used, submitted here, attempted to elicit basic information about juror's experiences and their knowledge of the venture capital world which is well known for its low percentage of female partners and decision makers. Follow up questions by counsel elicited more detailed information. Determining jurors' biases during voir dire is a difficult task and when the jurors are unconscious of their own biases, perhaps impossible. The challenges are numerous and the tendency to fall back on stereotypes and rely on our own biases (unconsciously or consciously) in selecting jurors is not unusual. In the Pao case, many jurors who identified with Pao vocalized their affinity resulting in their dismissal.

Unconscious/implicit bias was an underlying theme throughout the trial. Numerous actions taken by the partners at Kleiner Perkins indicated that the women were being treated differently than their male counterparts. But the law in California requires proof of intent and a showing that discrimination was a "substantial motivating factor" for the decisions that caused Pao harm. The jury instructions given to the jury in the Pao case are provided here to elicit discussion about proving intentional discrimination where certain acts may be based on unconscious/implicit bias. How is it done? Is it possible where intent must be shown?

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Attachments:

- **Jury Questionnaire** in the case of *Ellen Pao v. Kleiner Perkins Caufield & Byers LLC, et al.*, San Francisco County Superior Court, Case Number CGC-12-520719 (with credit to Karen Jo Koonan of Chopra Koonan Litigation Consulting)

- **Jury Instructions** in the case of *Ellen Pao v. Kleiner Perkins Caufield & Byers LLC, et al.*, San Francisco County Superior Court, Case Number CGC-12-520719

JURY QUESTIONNAIRE

Please Do Not Write On The Back Of Any Page.
If You Need Additional Space For Your Answers,
Use The Blank Space Provided On The Last Page Of The Questionnaire.

Case Statement:

Ellen Pao was an employee of Kleiner Perkins from July 2005 until October 2012. Kleiner Perkins is a venture capital firm based in Silicon Valley. Ms. Pao is now the interim CEO of reddit. Ellen Pao claims that Kleiner Perkins discriminated against her because of her gender and retaliated against her when it did not promote her to Senior Investing Partner in 2011. She also claims Kleiner Perkins terminated her because of her gender, for protesting gender discrimination and harassment, and for filing this lawsuit.

Kleiner Perkins denies that it discriminated or retaliated against her in promotions or engaged in any unlawful behavior.

JUROR'S NAME (Please print): _____

1. Gender: ❑ Male ❑ Female Age: _____ Place of birth?_____

2. Neighborhood where you live:_____ For how long?_____

3. Where else have you lived in the past? _____

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4. a. What is the last level of education you completed? _____

   b. For any education or training after high school please list:

Dates Attended	School(s)	Major Area(s) of Study	Degree(s)

5. What is your employment status?

❑ Employed full-time ❑ Homemaker ❑ Retired for ____ year(s)
❑ Employed part-time ❑ Full-time Student ❑ Other:_____
❑ Unemployed (looking for work) ❑ Unemployed (not looking for work)

Please list the primary jobs you have had in the past, beginning with your current or most recent employment. If retired or unemployed, please indicate the last jobs you had.

Dates	Employer	Occupation	Duties

6. Do you currently or have you ever had any management or supervisory responsibilities? ❑Yes ❑No

If Yes, was it ❑ Senior management ❑ Middle management ❑ Entry-level management

Please describe which job(s) included management or supervisory responsibilities and how many people you supervised:

_____
_____
_____
_____

7. Have you ever been responsible for writing performance reviews for employees in any of your positions? ❑Yes ❑No If Yes, please describe: _____

_____
_____
_____
_____

Have you ever received a written performance review in any of your jobs? ❑Yes ❑No

8. Have you ever received a performance review that you felt was unfair or have you ever been accused of writing an unfair performance review? ❑Yes ❑No

If Yes, please describe: _____

_____
_____
_____

9. What is your marital status: ❑ Single, never married ❑ Married ❑ Divorced/Separated
❑ Living with partner ❑ Widowed ❑ Other:_____

10. What is the education background of other adults in your household?

Dates Attended	School(s)	Major Area(s) of Study	Degree(s)

11. What do you consider to be your spouse/partner's primary employment status?

❑ Employed full-time ❑ Homemaker ❑ Retired for _____ year(s)
❑ Employed part-time ❑ Full-time Student ❑ Other:_____
❑ Unemployed (looking for work) ❑ Unemployed (not looking for work)

12. Please list the jobs your spouse/partner has had in the past beginning with his/her current or most recent employment. If retired or unemployed please indicate the last jobs he/she had.

Dates of Employment	Employer	Occupation	Duties

13. If you have any children please fill in the list below.

Gender	Age	Do they live with you?	Education	Occupation	If married, list their Spouse's Occupation
		❑Yes ❑No			

Gender	Age	Do they live with you?	Education	Occupation	If married, list their Spouse's Occupation
		❑Yes ❑No			
		❑Yes ❑No			
		❑Yes ❑No			
		❑Yes ❑No			

14. If there are any other adults (besides spouse/partner and children) in your household, please list:

Relationship	Age	Occupation	Employer

15. What are/were your parents' occupations? (If deceased or retired, please state previous occupations)

Mother: _____ Father: _____

Stepmother: _____ Stepfather: _____

16. What are/were your parents' educational backgrounds? (If deceased or retired, please state previous occupations)

Mother: _____ Father: _____

Stepmother: _____ Stepfather: _____

17. Have you or anyone close to you ever owned your own business or had a significant ownership interest in a business? ❑Yes ❑No If Yes, please explain including type of business, number of employees, if it is still operating, or how it ended:_____

_____

_____

_____

_____

Was the business ever sued or was a claim ever brought against it? ❑Yes ❑No If Yes, please explain:

18. Have you or anyone close to you ever worked for a business that was classified as a 'partnership'?

❑Yes ❑No If Yes, please describe:

Were you a partner in the business? ❑Yes ❑No

19. Have you or anyone close to you held a seat on a board of directors for any business or other organization?

❑Yes ❑No If Yes, for which organizations/businesses:

20. Have you, a family member, or someone close to you ever had any training, courses or worked in or around the following areas?

Human Resources/Personnel	❑ Yes, self	❑ Yes, family	❑ Yes, someone close
Bank or other Financial Institution	❑ Yes, self	❑ Yes, family	❑ Yes, someone close
Venture Capital Firm	❑ Yes, self	❑ Yes, family	❑ Yes, someone close
Insurance	❑ Yes, self	❑ Yes, family	❑ Yes, someone close
Law/Legal	❑ Yes, self	❑ Yes, family	❑ Yes, someone close

If Yes to any of the above, please explain:

21. Are you familiar with the 'venture capital' industry?

❑ Yes, very ❑ Yes, somewhat ❑ No, not at all

If you are familiar at all, what are your opinions of the venture capital industry?

22. Have you or anyone close to you ever used the services or support of a venture capital firm?

❑ Yes ❑ No If Yes, please explain who and their relationship to you:

23. Have you or anyone close to you ever served in the military? ❑Yes ❑ No If Yes, please list who, branch, and dates of service:

24. What social, political, civic, church, trade or other organizations are you associated with?

25. Have you ever been involved in evaluating the job performance of other employees? ❑ Yes ❑ No If Yes, please explain:

26. Have you ever had the authority to fire, demote, layoff or discipline employees? ❑ Yes ❑ No If Yes, please explain:

27. Have you ever participated in the decision to fire, demote, layoff or discipline an employee? ❑ Yes ❑ No If Yes, please explain:

28. Have <u>you</u> or <u>anyone close to you</u> ever been:

❑ Terminated, laid off, or forced to resign from a job
❑ Subjected to any form of discrimination or harassment
❑ Accused of discrimination or harassment against someone else
❑ Involved in a serious dispute with a coworker, employer, boss, or manager
❑ Subjected to workplace retaliation
❑ Accused of retaliation against someone else
❑ Involved in employment litigation as a plaintiff, defendant, or witness

If you checked any of the boxes above, please explain:

29. To your knowledge, have any of your employers ever had a claim of discrimination, harassment, or retaliation filed against them? ❑ Yes ❑ No If Yes, please explain, including what impact, if any, this had on the company or on your position?

30. Have you ever seen or heard about someone making a claim of discrimination, harassment, retaliation or other workplace mistreatment that you felt was false or not justified? ❑ Yes ❑ No If Yes, please explain:_____

31. Do you read any blogs on the internet? ❑ Yes ❑ No If Yes, which ones:_____

32. Do you post on any blogs? ❑ Yes ❑ No If Yes, which ones:_____

33. Are you familiar with a site called 'reddit'? ❑ Yes ❑ No

Have you or any of your close friends ever posted to it? ❑ Yes ❑ No, not that I know of.

If Yes, what is your opinion of it or what have others said to you about it?_____

34. Are you familiar with a site called 'Flipboard'? ❑ Yes ❑ No

Have you or any of your close friends ever posted to it? ❑ Yes ❑ No, not that I know of.

If Yes, what is your opinion of it? _____

35. To what extent to you agree or disagree with the following statements:

a. There are too many governmental restrictions on what employers can and cannot do regarding their employees.

❑ Strongly Agree ❑ Agree ❑ Disagree ❑ Strongly Disagree ❑ No Opinion

Please explain:_____

b. Employers should be able to layoff or fire whomever they want for whatever reason.

❑ Strongly Agree ❑ Agree ❑ Disagree ❑ Strongly Disagree ❑ No Opinion

Please explain:_____

c. Most people who make claims of workplace discrimination, harassment or retaliation do so as an excuse for their own shortcomings or poor work performance.

❑ Strongly Agree ❑ Agree ❑ Disagree ❑ Strongly Disagree ❑ No Opinion

Please explain:_____

d. People today are too sensitive about how they are treated at work.

❑ Strongly Agree ❑ Agree ❑ Disagree ❑ Strongly Disagree ❑ No Opinion

Please explain:_____

e. Most people who make claims of discrimination, harassment or retaliation tend to exaggerate or make false claims.

❑ Strongly Agree ❑ Agree ❑ Disagree ❑ Strongly Disagree ❑ No Opinion

Please explain:_____

36. Have you ever served on a jury before? ❑ Yes ❑ No If Yes, please complete for each case:

Case Type	When	Where	Reach a verdict?	Served as foreperson?
1)				❑ Yes ❑ No
2)				❑ Yes ❑ No
3)				❑ Yes ❑ No

Was it a ❑ positive or ❑ negative experience? Please explain:_____

37. Do you know any attorneys or judges, court clerks or anyone else who works within the legal profession or court system? ❑ Yes ❑ No If Yes, who, and how do you know them?_____

38. Have you or anyone close to you ever been sued by anyone, or had a claim for money damages made against you/them? ❑ Yes ❑ No If Yes, please explain, including the nature of claim, outcome, and whether or not you or they were satisfied with the result:_____

39. Have you or anyone close to you ever sued anyone or filed a claim for money damages against anyone?

❑ Yes ❑ No If Yes, please explain, including the nature of claim, outcome, and whether or not you or they were satisfied with the result:

40. What do you think of people who brings lawsuit?

41. Do you support caps or limits on the amount of money juries can award in civil cases?
❑ Yes ❑ No
If Yes, please explain:

42. Do you believe that lawsuits brought by employees against employers should be prevented or limited?
❑ Yes ❑ No
If Yes, please explain:

43. How do you feel about awarding money damages for past lost income in an employment case?
❑ Very Positive ❑ Positive ❑ Negative ❑ Very Negative ❑ No Opinion
Please explain:

44. How do you feel about awarding money damages for future lost income in an employment case?
❑ Very Positive ❑ Positive ❑ Negative ❑ Very Negative ❑ No Opinion
Please explain:

45. Would you have any hesitation in making a multi-million dollar award if the evidence supported such an award?

❑ Yes ❑ No

If Yes, please explain: _____

46. Are you familiar with Kleiner Perkins Caufield & Byers, LLC? ❑ Yes ❑ No

a. If Yes, have you heard or read any publicity about the company?

b. Is so, do you recall what you heard or read about the company? If Yes, please describe.

c. What opinions do you have about Kleiner Perkins Caufield & Byers, LLC?

47. Have you heard or read anything, *from any source*, about a lawsuit brought by an employee against Kleiner Perkins Caufield and Byers? ❑ Yes ❑ No ❑ Not sure Please describe: _____

48. Have you or someone close to you ever been employed by a company in which Kleiner Perkins Caufield & Byers LLC has invested? ❑ Yes ❑ No ? ❑ Yes ❑ No ❑ Not sure Please explain:

49. Do you have any health problems, or any ethical, moral, political or other beliefs or opinions that would affect your ability to be a juror in this case? ❑ Yes ❑ No If Yes, please explain: _____

50. Is there any other information that you would like the Court to know about your ability to serve as a juror in this case? ❑ Yes ❑ No If Yes, please explain: _____

51. Do you know or are you familiar in any way with any of the following people?

	YES	NO
John Amster	1	2
Susan Biglieri	1	2
Deborah Biondolillo	1	2
Brook Byers	1	2
Bill Campbell	1	2
Chi-Hua Chien	1	2
Juliet de Baubigny	1	2
Amol Deshpande	1	2
John Doerr	1	2
Amanda Duckworth	1	2
Alan Exelrod	1	2
Jody Gessow	1	2
Paul Gompers	1	2
Bing Gordon	1	2
Susan Frederick	1	2
Lynne Hermle	1	2
Stephen Hirschfield	1	2
Wen Hsieh	1	2
Eric Keller	1	2
Randy Komisar	1	2
Ray Lane	1	2
Therese Lawless	1	2
Aileen Lee	1	2
Christina Lee	1	2
Michelle Lee	1	2
David Lewin	1	2
Jeff Litvak	1	2
Lisa Mak	1	2
Mary Meeker	1	2
Matt Murphy	1	2
Ajit Nazre	1	2
Ellen Pao	1	2
Jessica Perry	1	2
Michael Robbins	1	2
Carl Saba	1	2
Ted Schlein	1	2
Shannon Seekao	1	2
Trae Vassallo	1	2
Allison West	1	2
Rhoma Young	1	2

If you checked any of the above, please explain how you know the person:_____

_____

_____

52. Is there any reason why you cannot be a fair and impartial juror in this case? ❑ Yes ❑ No

If Yes, please explain:_____

_____

_____

_____

I declare the above answers to be true of my own knowledge and I sign this questionnaire under penalty of perjury under the laws of the State of California.

Dated: _____ _____

Signature of Juror

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DEPARTMENT 613

ELLEN PAO,

Plaintiff,

vs.

KLEINER PERKINS CAUFIELD & BYERS LLC and DOES 1-20,

Defendants.

CASE NUMBER: CGC-12-520719

JURY INSTRUCTIONS GIVEN

INTRODUCTORY INSTRUCTIONS

5000

Members of the jury, you have now heard all the evidence. The attorneys will have one last chance to talk to you in closing argument. But before they do, it is my duty to instruct you on the law that applies to this case. You must follow these instructions as well as those that I previously gave you.

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use dictionaries or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone or smart phone, PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, or lawyer. Do not visit or view the scene of any event involved in this case. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial. You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys say anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

5006

Ellen Pao is the only plaintiff in this lawsuit. While you have heard evidence about the experiences of other employees at Kleiner Perkins Caufield & Byers LLC (hereafter referred to as Kleiner Perkins) and you may consider such evidence in keeping with the instructions I have previously given you and will give you now, your job is to decide whether Ms. Pao has proved her

claims that Kleiner Perkins discriminated against her, retaliated against her, and failed to prevent discrimination against her.

Kleiner Perkins is the only defendant in this lawsuit. Kleiner Perkins is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

5001

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

200

With only one exception, which I will discuss in connection with instructions on puntiive damages, all facts that must be proved in this case by either side must be proved by a preponderance of the evidence. Proof by preponderance of the evidence means that a party must persuade you, by the evidence presented in court, that what she or it is required to prove is more likely to be true than not true.

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

EVALUATION OF THE EVIDENCE

5002

You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including the exhibits that were admitted into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side had the right to object to evidence offered by the other side. When I sustained an objection to a question, ignore the question and do not guess why I sustained the objection. If the witness did not answer, you must not guess what he or she might have said. When the witness already answered, you must ignore the answer.

During the trial I granted motions to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.

202

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

5003

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of his or her gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

5019

You are to consider the answers given by the witnesses to your questions in the same manner as you consider the witnesses' answers to the questions posed by the attorneys and myself. Do not give any greater or lesser weight to witnesses' answers because they were given in response to questions posed by yourself or other jurors.

If one of your questions was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a question posed by a juror cannot be asked of a witness. Give the question no further consideration.

5020

During the trial many exhibits were introduced into evidence. You will be provided with all of the exhibits that were admitted into evidence, as well as a list with a brief description of each of those exhibits. For your convenience, you will also be provided with equipment which will enable you to project the exhibits on a screen so all of you can see the exhibits in the same manner in which you saw them here in this courtroom. That equipment will also permit you to listen to the exhibits that consist of audio tapes.

Some of the exhibits that were admitted into evidence have been redacted, which means that certain portions of those exhibits have been excluded from the evidence in this case. You will not be provided with the portions of exhibits that have been redacted. You should not speculate about the content of the redacted portions of an exhibit or why an exhibit has been redacted.

You may not consider the exhibits and other documents and physical items that were mentioned during the trial that were not admitted into evidence because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials. Exhibits and other documents and physical items that were not admitted into evidence will not be provided to you.

203

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

However, neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant. You should not speculate what any person who was not a witness would have testified to in court nor should you speculate about the contents of any document or other item of physical evidence that was not produced during the trial.

206

During the trial, I explained to you that certain evidence was admitted for one or more specified limited purposes. You may consider that evidence only for the limited purposes that I described, and not for any other purpose.

Recall that I earlier gave you instructions about the purposes for which you could consider portions of the testimony of Mr. Hirschfeld. I made an error in those prior instructions, which I will correct now. The error I made was telling you that you may consider the conclusions that Mr. Hirschfeld reached from his investigation of Ms. Vasallo's complaint for all purposes,

including the truth of those conclusions. I now instruct you to disregard that statement and instead instruct you that you may consider the conclusions that Mr. Hirschfeld reached from his investigation of Ms. Vassallo's compaint ONLY for the purpose of whether Kleiner Perkins took reasonable steps to prevent gender discrimination, and not for any other purpose. Please give the copies of the two page document entitled "INSTRUCTION REGARDING THE TESTIMONY OF STEPHEN HIRSCHFELD" to Ms. Fong, who will now provide you with a corrected version entitled "CORRECTED INSTRUCTION REGARDING THE TESTIMONY OF STEPHEN HIRSCHFELD".

In that corrected instruction, as in the earlier version, I stated, and reiterate now, that you may consider the conclusions Mr. Hirschfeld reached from his investigation of Ms. Pao's complaint ONLY for the limited purpose of whether Kleiner Perkins took reasonable steps to prevent gender discrimination, and not for any other purpose. In this regard, it is important to emphasize that you, not Mr. Hirschfeld or any of the other witnesses or any of the people you have heard about in this case, are the judges of the facts in this case, including the judges of the credibility of the testimony of each of the witnesses.

212

A party may offer into evidence any oral or written statement made by an opposing party outside the courtroom.

When you evaluate evidence of such a statement, you must consider these questions:

1. Do you believe that the party actually made the statement? If you do not believe that the party made the statement, you may not consider the statement at all.

2. If you believe that the statement was made, do you believe it was reported accurately?

You should view testimony about an oral statement made by a party outside the courtroom with caution.

~~As pertains to this instruction, a party includes both Ms. Pao and all of the managing partners of Kleiner Perkins~~.

215

A party has an absolute right not to disclose what she or its authorized representative told to her or its attorney in confidence because the law considers this information privileged. Do not consider, for any reason at all, the fact that either side did not disclose what was told to her or its attorneys. Do not discuss that fact during your deliberations or let it influence your decision in any way.

219

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

a. The expert's training and experience;

b. The facts the expert relied on; and
c. The reasons for the expert's opinion.

220

The law allows expert witnesses to be asked questions that are based on assumed facts. These are sometimes called "hypothetical questions."

In determining the weight to give to an expert's opinion that is based on assumed facts, you should consider whether the assumed facts are true.

221

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

223

Witnesses who were not testifying as experts also gave opinions during the trial. You may, but are not required to, accept those opinions. You may give the opinions whatever weight you think is appropriate.

Consider the extent of the witness's opportunity to perceive the matters on which the opinion is based, the reasons the witness gave for the opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

MS. PAO'S CLAIMS

2500

Ms. Pao has alleged four different claims for which she seeks to recover damages against Kleiner Perkins. Those four claims are:

1. Kleiner Perkins discriminated against her because of her gender by failing to promote her and/or by terminating her employment.

2. Kleiner Perkins retaliated against her by failing to promote her because she had conversations in December 2011with and/or gave her memorandum dated Janaury 4, 2012 (exhibit 40) to Kleiner Perkins.

3. Kleiner Perkins failed to take all reasonable steps to prevent gender discrimination against her.

4. Kleiner Perkins retaliated against her by terminating her employment because she had conversations in December 2011with and/or gave her memorandum dated Janaury 4, 2012 (exhibit 40) to Kleiner Perkins and/or filed this lawsuit.

Ms. Pao is not making a claim for sexual harassment.

Kleiner Perkins denies each of Ms. Pao's claims. Kleiner Perkins denies that it discrimnated against Ms. Pao because of her gender, denies that it retaliated against her, and denies

that it failed to prevent gender discrimination against her.

For her first claim, Ms. Pao alleges that Kleiner Perkins discriminated against her because of her gender by failing to promote her and/or by terminating her employment. To establish this claim, Ms. Pao must prove all of the following:

1. That Ms. Pao's gender was a substantial motivating reason for Kleiner Perkins' not promoting her to senior partner, not promoting her to general partner, and/or terminating her employment;

2. That Ms. Pao was harmed; and

3. That Kleiner Perkins' not promoting her to senior partner, not promoting her to general partner, and/or terminating her employment was a substantial factor in causing harm to Ms. Pao.

In her first claim, Ms. Pao asserts that three different actions or inactions by Kleiner Perkins -- not to promote her to senior partner, not to promote her to general partner, and to terminate her employment -- were made because of gender discrimination. You must separately decide whether Ms. Pao's gender was a substantial motivating reason for each of these actions or inactions and, if so, whether Ms. Pao was harmed by that action or inaction and, if so, whether the action or inaction was a substantial factor in causing harm to Ms. Pao.

2505

For her second claim, Ms. Pao alleges that Kleiner Perkins retaliated against her by failing to promote her because she had conversations in December 2011 with and gave her memorandum dated Janaury 4, 2012 (exhibit 40) to Kleiner Perkins. To establish this claim, Ms. Pao must prove all of the following:

1. That Ms. Pao's converations in December 2011 and/or her January 4, 2012 memorandum was a substantial motivating reason for Kleiner Perkins' not promoting her to senior partner and/or not promoting her to general partner;

2. That Ms. Pao was harmed; and

3. That Kleiner Perkins' not promoting her to senior partner and/or not promoting her to general partner was a substantial factor in causing harm to Ms. Pao.

In her second claim, Ms. Pao asserts that two different actions or inactions by Kleiner Perkins -- not to promote her to senior partner and not to promote her to general partner -- were made because of retaliation. You must separately decide whether retaliation was a substantial motivating reason for each of these actions or inactions and, if so, whether Ms. Pao was harmed by that action or inaction and, if so, whether that action or inaction was a substantial factor in causing harm to Ms. Pao.

2527

For her third claim, Ms. Pao alleges that Kleiner Perkins failed to take all reasonable steps to prevent gender discrimination against her at Kleiner Perkins. You must only consider this claim if you find that Ms. Pao has proved all the elements of her first claim for gender discrimination. To establish this claim, Ms. Pao must prove all of the following:

1. That Ms. Pao established all of the elements of her first claim for gender

discrimination as to Kleiner Perkins'not promoting her to senior partner, not promoting her to general partner and/or terminating her employment;

2. That Kleiner Perkins failed to take all reasonable steps to prevent that gender discrimination;

3. That Ms. Pao was harmed; and

4. That Kleiner Perkins' failure to take all reasonable steps to prevent gender discrimination against Ms. Pao was a substantial factor in causing harm to her.

For her fourth claim, Ms. Pao alleges that Kleiner Perkins retaliated against her by terminating her employment because she had conversations in December 2011 and/or gave her memorandum dated January 4, 2012 (exhibit 40) to Kleiner Perkins and/or she filed this lawsuit.. To establish this claim, Ms. Pao must prove all of the following:

1. That Ms. Pao's conversations in December 2011 and/or her January 4, 2012 memorandum and/or her filing this lawsuit was a substantial motivating reason for Kleiner Perkin's' decision to terminate her employment.

2. That Ms. Pao was harmed; and

3. That Kleiner Perkins' decision to terminate Ms. Pao's employment was a substantial factor in causing harm to Ms. Pao.

2513

When employment is "at will," an employer may terminate an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as the termination is not substantially motivated by a discriminatory or retaliatory reason.

Thus, the issues you must decide are not whether Kleiner Perkins' not promoting Ms. Pao and terminating her employment were good, bad, mistaken, unwise or unfair, but only whether those actions or inactions were substantially motivated by gender discrimination and/or retaliation because Ms. Pao had conversations in December 2011 with and/or gave her memorandum dated January 4, 2012 (exhibit 40) to Kleiner Perkins and/or she filed this lawsuit.

2507

A "substantial motivating reason" is a reason that is substantial (as seen from the perspective of the decisionmaker) and that actually contributed to a decision. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the decision.

430

A "substantial factor" in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

There is no legal requirement for an employer to have a company policy or training addressing discrimination and/or retaliation.

2512

In her claims Ms. Pao alleges that she was not promoted to senior partner, not promoted to general partner and her employment was terminated because of her gender and in retaliation for her conversations in December 2011 and/or her January 4, 2012 memorandum and/or for filing this lawsuit, which are unlawful reasons. In response, Kleiner Perkins allleges that it did not promote Ms. Pao and that it terminated her employment because of Ms. Pao's poor job performance, which is a lawful reason.

If you find that gender discrimination and/or retaliation was a substantial motivating reason for the failure to promote Ms. Pao and/or the termination of her employment, you must then consider Kleiner Perkins' stated reason for the failure to promote her and the termination of Ms. Pao's employment.

If you find that Ms. Pao's poor job performance was also a substantial motivating reason for Kleiner Perkins' not promoting Ms. Pao and for terminating her employment, then you must determine whether Kleiner Perkins has proven that it would not have promoted her and would have terminated Ms. Pao's employment anyway based on Ms. Pao's poor job performance even if Kleiner Perkins had not also been substantially motivated by gender discrimination and/or retaliation.

In determining whether any poor job performance by Ms. Pao was a substantial motivating reason, determine what actually motivated Kleiner Perkins not what it might have been justified in doing.

If you find that Kleiner Perkins did not promote Ms. Pao and/or terminated her employment only for a discriminatory and/or retaliatory reason, then Ms. Pao is entitled to compensatory damages for such discriminatory and/or retaliatory action(s) of Kleiner Perkins. If, however, you find that Kleiner Perkins would not have promoted Ms. Pao and/or would have terminated her employment anyway, then Ms. Pao is not entitled to compensatory damages for such action(s).

COMPENSATORY DAMAGES

3900

If you decide that Ms. Pao has proved one or more of her claims against Kleiner Perkins and she is entitled to compensatory damages against Kleiner Perkins, you must decide the amount of such compensatory damages. Compensatory damages is the amount of money that reasonably compensates Ms. Pao for the harm she suffered because of any wrongful conduct committed by Kleiner Perkins against her.

The amount of compensatory damages must include an award for each item of harm that was caused by Kleiner Perkins' wrongful conduct, even if the particular harm could not have been anticipated.

Ms. Pao does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

The items of damages claimed by Ms. Pao are past and future lost earnings.

The amount, if any, of Ms. Pao's lost carried interest and a deduction, if any, for the value of her reddit stock options will be decided later, if there is a need to do so. You must not consider or speculate why these items are not part of your compensatory damages determination at this time.

3934

Ms. Pao seeks compensatory damages from Kleiner Perkins under all four of her claims. However, any particular damages may be awarded only once, regardless of the number of claims that you find that Ms. Pao has proved.

3903C

To recover damages for past lost earnings, Ms. Pao must prove the amount of income and benefits she has lost to date.

To recover damages for future lost earnings, Ms. Pao must prove the amount of income and benefits she will be reasonably certain to lose in the future.

3961

In calculating the amount of past lost earnings, you must:

1. Determine the amount Ms. Pao has proved that she would have earned at Kleiner Perkins if Kleiner Perkins had not engaged in wrongful conduct against her; and

2. Subtract the amount that Kleiner Perkins has proved that Ms. Pao actually earned by returning to gainful employment or could have earned by making reasonable efforts to find gainful employment.

You must not include any amount for loss of carried interest or subtract any amount for the value of reddit stock options or the value of the stock or stock options of any other company.

3962

In calculating the amount of future lost earnings, you must:

1. Determine the amount Ms. Pao has proved that she would have earned at Kleiner Perkins if Kleiner Perkins had not engaged in wrongful conduct against her; and

2. Subtract the amount that Kleiner Perkins has proved that Ms. Pao will earn in the future by returning to gainful employment or could earn by gainful employment.

You must not include any amount for loss of carried interest or subtract any amount for the value of reddit stock options or the value of the stock or stock options of any other company.

3925

The arguments of the attorneys are not evidence of compensatory damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

3924

You must not include in your award of compensatory damages any amount to punish or make an example of Kleiner Perkins. Such damages are called punitive damages, and they cannot be a part of any award of compensatory damages. In determining the amount of compensatory damages, you must award only the damages that fairly compensate Ms. Pao for the harm she suffered as a result of Kleiner Perkins' wrongful conduct.

Nor should you include in your award of compensatory damages any amount for emotional distress or pain and suffering. Ms. Pao is not seeking and and thus is not entitled to any

such damages.

3964

You must not consider attorney fees or expenses that the parties incurred in bringing or defending this lawsuit in determining the amount of compensatory damages, and you must not include such fees or expenses in any award of compensatory damages.

PUNITIVE DAMAGES

3946

If you decide that Ms. Pao has proved all the elements of her first claim for gender discrimination ~~claim~~ or either of her second and fourth claims for retaliation, you must decide whether Kleiner Perkins' wrongful conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

You must decide whether Ms. Pao proved that Kleiner Perkins engaged in conduct against her with malice, oppression, or fraud. To do this, Ms. Pao must prove the following by clear and convincing evidence:

1. That Kleiner Perkins acted with malice, fraud or oppression against Ms. Pao; and

2. The conduct constituting malice, oppression, or fraud was committed by one or more managing partners of Kleiner Perkins who acted on behalf of Kleiner Perkins.

"Malice" means that Kleiner Perkins acted with intent to cause injury or that its conduct was despicable and was done with a willful and knowing disregard of Ms. Pao's rights. A party acts with knowing disregard when it is aware of the probable dangerous consequences of its conduct and deliberately fails to avoid those consequences.

"Oppression" means that Kleiner Perkins' conduct was despicable and subjected Ms. Pao to cruel and unjust hardship in knowing disregard of her rights.

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that Kleiner Perkins intentionally misrepresented or concealed a material fact and did so intending to harm Ms. Pao.

201

Clear and convincing evidence is a higher standard of proof than preponderance of the evidence. To prove a fact by clear and convincing evidence means a party must persuade you that it is highly probable that the fact is true.

VERDICT FORM

5012

Each of you have been given a copy of the verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form in the order they appear. After you answer a question, the form tells you what to do next. All 12 of you must deliberate on and answer each question. At least 9 of you must agree on an answer before all of you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

You will also be provided with a verdict form that is marked "original," which is to be completed by the presiding juror stating the jury's decision on each question. When your presiding juror has completed filling out the original verdict form, he or she must write the date and sign the form on the last page and then notify the bailiff that you are ready to present your verdict in the courtroom.

CONCLUDING INSTRUCTIONS

5009

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the bailiff. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the bailiff that you are ready to present your verdict in the courtroom.

Your decision must be based on your personal evaluation of the evidence presented in

the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

5010

If you have taken notes during the trial, you may take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict. You should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

At the end of the trial, you may choose to retain your notes or to provide them to Ms. Fong, the courtroom clerk, who will put them in a bin to be shredded.

5011

You may request in writing that trial testimony be read to you. You will not be provided with a transcript of all or any portion of any witness' testimony. Instead, if you make a request for trial testimony, the court reporter will read the testimony to you. You may request that all or a part of a witness's testimony be read.

Your request should be as specific as possible. It will be helpful if you can state:

1. The name of the witness;
2. The subject of the testimony you would like to have read; and
3. The name of the attorney or attorneys asking the questions when the testimony was given.

The court reporter is not permitted to talk with you when she is reading the testimony you have requested.

While the court reporter is reading the testimony, you may not deliberate or discuss the case.

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

5017

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed on the answer to each question. Therefore, it is important for each of you to remember how you have voted on each question so that, if the jury is polled, each of you will be able to answer accurately about how you voted. Each of you should use your own copy of the verdict form to keep track of your own votes.

5015

The first twelve jurors will soon begin deliberating. The alternate jurors will be placed on standby while the first twelve juors are deliberating. I will explain the standby procedures to the alternate jurors after the first twelve jurors begin their deliberations. For present purposes, the alternate jurors need to understand that they remain bound by my earlier admonitions about your conduct.

Until the jury is discharged, all of the the jurors, including the alternates, must not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends, and not even with each other, except in the deliberations room. Once the first twelve juors begin their deliberations, the alternates must not have any contact with the deliberating jurors. The alternate jurors must not decide how they would vote if they were deliberating and must not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors or informed that the jury has been discharged.