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9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO

13 ELLEN PAO,

14 Plaintiff,

15 v.

16 KLEINER PERKINS CAUFIELD & BYERS  
LLC AND DOES 1-20,

17 Defendants.  
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CASE NO. CGC-12-520719

[REDACTED]  
TRIAL BRIEF OF DEFENDANT  
KLEINER PERKINS CAUFIELD &  
BYERS LLC

Trial Date: February 17, 2015

ELECTRONICALLY

**FILED**

*Superior Court of California,  
County of San Francisco*

**FEB 17 2015**

Clerk of the Court  
BY: MICHAEL RAYRAY  
Deputy Clerk

1 Defendant Kleiner Perkins Caufield and Byers LLC (“KPCB”) submits this trial brief  
2 regarding Ellen Pao’s claims of discrimination, retaliation, and failure to take reasonable steps to  
3 prevent discrimination, pled in her First Amended Complaint filed October 16, 2013. During the  
4 two years she spent as a KPCB junior investing partner, Pao, a Harvard-trained former Cravath  
5 lawyer, failed to earn an invitation to the firm’s general partnership. She was ultimately asked to  
6 leave (with a six month fully paid transition period) because she could not demonstrate the skills  
7 necessary for success as an investing venture capitalist. Pao had conflicts with most of her  
8 colleagues, men and women, and frequently complained about them. Despite coaching by an  
9 outside expert and KPCB partners, she failed to develop the expertise needed for success in the  
10 investing partner role and earn the trust of her partners. Soon after her departure Pao began  
11 working with reddit, a news amalgamation emerging company. She is currently the interim CEO.

12 **I. FACTUAL BACKGROUND**

13 **A. KPCB Background, Structure, Partner Compensation & Decision-making**

14 KPCB is a partnership and one of Silicon Valley’s leading venture capital firms. It has  
15 long been a strong supporter of women entrepreneurs and executives, and has consistently hired  
16 more female partners than its peer firms. Women partners lead key areas of the firm’s initiatives  
17 and head important operating roles; for example, Mary Meeker leads the KPCB Digital Growth  
18 Fund and Dr. Beth Seidenberg leads KPCB’s Life Sciences investment group and is a Managing  
19 Member of multiple funds. Juliet deBaubigny is a senior operations partner, and Sue Biglieri is in  
20 charge of all finance operations as the firm’s CFO. KPCB also has many other junior women  
21 partners.

22 KPCB partners (including Pao) are employed by or are members of Defendant KPCB  
23 LLC (also referred to by the parties as the “Management Company”). KPCB partners typically  
24 fundraise for a venture capital fund (typically known as KP12, KP12 or KP14 and referred to  
25 herein generally as “Funds”), as well as specialty venture funds (such as for example, Digital  
26 Growth Fund (“DGF”), Green Growth Fund (“GGF”) or China and also referred to herein  
27 generally as “Funds”). The most recent digital growth funds were raised four years apart. The  
28 partners provide advisory services to the Funds. Each Fund is managed by a corporate entity

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1 called a Managing LLC, made up of a subset of KPCB partners designated as Managing  
2 Members (also called General Partners or “GPs”). The Managing Members vary depending on  
3 the Fund. They are the key decision makers regarding Fund investments, including which  
4 investments the Fund will make, which partners take board seats on Fund companies, and how  
5 partners are compensated within the Fund.

6 Partners are compensated in different ways. Some partners, like Pao, receive salary and  
7 bonus, some receive a significantly higher salary but no bonus, and the most senior partners  
8 receive no salary or bonus, but instead take a share in KPCB’s profits, known as “Net Fee  
9 Income”. Decisions regarding partner compensation in the form of salary, bonus and Net Fee  
10 Income, and promotions to Senior Partner are made by a subset of partners who are designated  
11 the Managing Members of KPCB (which also varies depending on the year). During the period  
12 that Pao contends she was discriminated against, KPCB’s Managing Members included John  
13 Doerr, Ted Schlein, Ray Lane, Brook Byers, Bill Joy, Joe Lacob, and Bing Gordon.<sup>1</sup>

14 Most partners also receive an additional form of remuneration directly from the Managing  
15 LLCs that manage the Funds, called “carried interest,” when those funds make profitable  
16 investments. Carried interest decisions are made by the Managing Members of the Managing  
17 LLC and the interests themselves are heavily restricted by the specific terms of the LLC  
18 agreements for each Managing LLC. Accordingly, for any given year and for any given  
19 Managing LLC, compensation and promotion decisions for KPCB partners are made by a variety  
20 of different people and depend on many varying factors.

21 **B. KPCB Hires Pao Into an Aid Role in 2005**

22 KPCB hired Pao in 2005 in a much different role than that she ultimately left. Pao was  
23 brought on board as an aid to John Doerr, one of the world’s leading venture capitalists. Pao did  
24 not go to KPCB with the idea of working in venture capital, communicating instead that “she  
25 pictures herself moving into a key operating role and wants to make sure that is a real possibility  
26

27 <sup>1</sup> As discussed herein, Pao attacks the lack of women in the KPCB Managing Member role,  
28 requiring KPCB to present expert testimony as to the context of the industry. *See* KPCB’s  
Opposition to Plaintiff’s Motion in Limine No. 10 to Exclude the Expert Report and Testimony of  
Paul Gompers.

1 for her after her tenure.”<sup>2</sup> Pao’s offer letter specified that she would be expected to comply with  
2 “KPCB’s personnel and other policies including, but not limited to, our policies prohibiting  
3 discrimination and unlawful harassment”, and she understood she was required to comply with  
4 those policies.<sup>3</sup> Pao worked closely with Doerr for the next five years, forming a relationship she  
5 described as positive, supportive, and like that of a father and daughter.

6 As early as in her first review at the firm, Pao received feedback about her style and  
7 conflicts with others:

8 “Above all, remember how small partnerships are – unlike a  
9 Company our partnership is a family, with occasional disputes. But  
10 each of us must work with and respect everyone... You say that  
11 you’d like to be valued as a respected leader at KPCB. To do that  
12 you need to create trusting relationships with all partners,  
13 irrespective of different styles.”

14 And these comments were consistent in her following reviews:

- 15 • “One style issue that we have noticed is that you can be dismissive, occasionally  
16 publicly, of peers that do not meet your expectations.”
- 17 • “At times appears to be pushing too hard to establish herself, instead of being  
18 collaborative.”
- 19 • “Other junior partners have cited issues with her and the way she treats them.”
- 20 • “Can be political – complains about other partners at times.”
- 21 • “For some reason, there’s always some team controversy swirling around Ellen.  
22 At any moment in time, Ellen is not getting along with someone.”
- 23 • “Ellen seems to have ‘clashes’ or issues with many different partners at different  
24 times. More so than I have seen with anyone else in the partnership.”

### 25 C. Pao’s Sexual Relationship with Co-worker Nazre

26 Less than a year after her hire, Pao began a romantic and sexual relationship with Ajit  
27 Nazre, a colleague (not her supervisor; Pao reported directly to Doerr). After a trip to Europe  
28 that, according to Pao, was the first occasion of Nazre’s advances to her, Pao sent Nazre the  
following email:

... I left the chocolate in your office. Thanks for a great trip. Your  
thought process is so clean and so quick it just amazes me; I learned a ton this

<sup>2</sup> As used at KPCB and in the industry, “operating” roles are those that are responsible for company operations, such as CEO, COO or CFO, as opposed to “investing” roles focused on making investment decisions.

<sup>3</sup> Despite her current allegations that the policies did not exist, Pao admitted that she never asked to see any of them during her employment. In fact, CFO Sue Biglieri had implemented an anti-discrimination policy before Pao’s hire, obtaining it from outside counsel at the Brobeck firm.

1 week and working with you in general. And I hope you understand how much I  
2 value working with you and your friendship. I wouldn't risk it for anything.  
3 Look forward to seeing you in a week.

4 Pao and Nazre's emails became increasingly familiar. In May 2006, Pao engaged in  
5 consensual sex with Nazre at a work event and continued a sexual relationship with him for  
6 several months. Pao admits that she told Nazre she loved him, wanted a relationship with him,  
7 and that she was interested in having children with him. Pao could allegedly recall nothing  
8 whatsoever about the sexual encounters during her deposition, but does not deny that she  
9 consented to them. During their sexual relationship, Pao knew Nazre was married but alleges he  
10 told her he had separated from his wife.

11 Pao and Nazre's relationship became strained when she began doubting that Nazre had  
12 left his wife. In early November 2006, Pao overheard another KPCB partner tell Nazre that it was  
13 good seeing Nazre and his wife in Half Moon Bay the prior weekend. By the end of 2006, Pao  
14 and Nazre's romantic relationship was over. Their text messages (edited by Pao before  
15 production here) documented their tumultuous break up:

16 Pao: "You are so fucked"

17 Nazre: "What happened? I am already screwed. Worst thing is that I die . . ."

18 Pao: "You tell me what happened. What really happened you lying sack of shit"

19 Pao: "What excuse are you going to come up with now? I'm very curious. You've been  
20 so clever. I can't believe you would gratuitously lie to my face"

21 Pao: "I can't believe I was so wrong about you."

22 Nazre: "let us talk face to face so that I can tell you what happened. U can call me  
23 whatever you want after that. U can shoot me if u so please."

24 Pao: "Fuck you"

25 Pao: "Why don't you try to tell me what happened?"

26 Pao: "Like your imaginary divorce filing?"

27 Pao: "An [sic] your wife's imaginary apartment?"

28 Nazre: "I will bring u the proof".

1 Neither Pao nor Nazre told KPCB about their affair or breakup as the events happened.

2 **D. Tired of Her Administrative Role, Pao Resigns**

3 By late spring of 2007, Pao continued to chafe at the administrative nature of the COS  
4 work she was doing for Doerr. After announcing that she was resigning for other reasons, Pao  
5 revealed the former relationship with Nazre to managing partners. Pao urged the firm not to take  
6 action against Nazre (“John seems to want to punish him professionally, which I told him is the  
7 wrong thing to do right now...I told him that if he wants to get rid of anyone, I would remove  
8 both Trae AND Wen before Ajit. I also was very explicit about the fact that I’m not leaving  
9 because of Ajit”). Pao ultimately withdrew her resignation and continued working as Doerr’s  
10 COS, insisting that she and Nazre could work together.

11 Pao remained in her original COS position supporting Doerr for five years, until mid-  
12 2010. During those years, Pao continued to have conflicts with colleagues, including women.  
13 While Pao occasionally included Nazre among the many about whom she complained, those  
14 complaints were no different than her complaints about everyone else. Given this and her  
15 description of their affair as consensual, KPCB management had no reason to believe Pao was  
16 making protected complaints about Nazre. But although she was not putting KPCB on notice of  
17 her claims, beginning in 2008, Pao consulted approximately eight to ten employment lawyers,  
18 retained and was advised by some of them, sent herself hundreds of emails about the many ways  
19 she believed she was mistreated, and kept materials she thought might be helpful later.<sup>4</sup>

20 Doerr continued to be loyal and supportive of Pao, frequently interceding on her behalf  
21 with her colleagues. In mid-2010, the firm gave Pao the opportunity to transition into a full-time  
22 junior investing partner role in KPCB’s digital investment group. Here, for the first time, she was  
23 no longer judged as a COS but rather a junior investing partner, as her alleged comparators Chi-  
24 Hua Chien, Amol Deshpande, and former joint COS Hsieh were. Pao’s conflicts followed her  
25 into her investing role, in which collaboration and group dynamics were even more critical, and

26 <sup>4</sup> Pao’s actions are central to KPCB’s contention that evidence regarding the incredibly stale  
27 events alleged throughout her claims is inadmissible because Pao cannot meet the requirements  
28 for the continuing violation doctrine. *See* KPCB’s Motion in Limine No. 1. KPCB moves to  
exclude these documents themselves because they are laden with double and triple hearsay and  
are otherwise inadmissible. *See* KPCB’s Motion in Limine No. 5.

1 her reviews repeatedly reflect the same criticisms of her:

- 2 • “Seems to tolerate a system to pursue her own agenda.”
- 3 • “Territorial about herself”
- 4 • “Not sure I really trust her motivations.”
- 5 • “I am not inclined to seek out Ellen because she can complicate relationships. She can appear to work at cross-purposes regardless of her intent. She has been a great service provider but she is not one hundred percent reliable with my back.”
- 6 • “some peers as well as most senior/general/managing partners would like her to be more proactive, collaborative, trustworthy, and impactful.”
- 7 • “Group dynamics require good interpersonal skills that lead to trust, desire to work together, etc. Ellen is not sought out by other partners”
- 8 • “Team dynamics: territorial and too frequently clashes with partners. Not cited as team player.”

9  
10 Again, none of her conflicts had anything to do with protected complaints; many of the partners  
11 involved were not aware that Pao had ever had a sexual relationship with Nazre.

12 Additionally, while Pao had performed well many of the duties of Doerr’s COS, she  
13 lacked the experience and domain expertise needed to succeed in the role of an investor or a  
14 board member, as mixed *outside* input reflected (“Not a visionary type board member”; She  
15 seems very insecure and without self-confidence”; “She is reluctant to speak out”; “She can get  
16 spun up over things that others don’t sweat” ; “in terms of street smarts there is not a lot there.  
17 May not have it or may not care”).

18 In mid-2011, after a year of Pao’s very mixed performance in the full time investing role,  
19 senior members of the digital investing team decided it was time for Pao to move on to an  
20 operating role at a KPCB portfolio company. This was a common transition for a junior partner,  
21 and indeed Pao herself came to KPCB with the plan of moving into such an operating role (like  
22 the one she quickly obtained at reddit after her departure). The message was included in the  
23 initial draft of Pao’s 2011 performance review (“you are not on track to become a Senior Partner  
24 at KPCB. We highly recommend that you find a position in an operating role at one of the  
25 portfolio companies that can best utilize your many talents”). However, staunch supporter Doerr  
26 intervened and argued that Pao was performing well. Despite extensive disagreement on this  
27 point, language regarding Pao’s exit was therefore deleted from the review and replaced with a  
28

1 development plan expressing her performance defects and what she needed to do to improve. Pao  
2 continued to be coached on ways to improve her performance.

3 **E. Pao Raises Protected Complaint to KPCB About Discrimination and**  
4 **Retaliation in 2012 and KPCB Promptly Investigates her Complaint**

5 In mid-December 2011, Pao heard that another employee complained about Nazre. Pao  
6 then went to the office of KPCB COO Eric Keller, and told him she'd had a relationship with  
7 Nazre years ago and it had not ended well.<sup>5</sup> Keller promptly reached out to trusted outside  
8 counsel Michael Celio at the Kecker Van Nest firm, and asked for a recommendation for an  
9 investigator. Celio recommended San Francisco attorney Steven Hirschfeld as highly qualified  
10 and thorough, as well as experienced in working with partnerships and similar organizations.  
11 After reviewing Hirschfeld's website, Keller retained him and Hirschfeld rearranged his schedule  
12 to begin the investigation promptly. Despite multiple requests, Pao refused to meet with  
13 Hirschfeld, stating that she had vacation plans and it would "ruin" her Christmas vacation.

14 In early January 2012, Pao for the first time submitted a written complaint clearly alleging  
15 retaliation and discrimination and citing her hiring of a lawyer. Contrary to what she had told the  
16 partners back in 2007, she now stated that she had been bullied into a relationship by Nazre and  
17 that he had retaliated against her for years. She suggested an "open dialogue" to discuss "how the  
18 firm will support me in my exit and transition." Pursuant to her letter, Keller met with her the  
19 next week to discuss how she wished to proceed. Regarding her proposed exit, Pao made several  
20 demands, informing Keller that she would require a large cash payment of "eight figures", she  
21 wanted to stay on the portfolio company boards on which she currently served, and she wanted to  
22 be compensated for that board service. Neither party mentioned "settlement", "resolution of  
23 claims", "release of claims", or any similar phrases. She also met with Doerr about her potential  
24 exit and they discussed the possibility of KPCB providing assistance to Pao to start her own  
25 venture fund.<sup>6</sup>

26 <sup>5</sup> Pao had heard that a colleague was planning to raise a complaint before she went to Keller. On  
27 July 23, 2014, the Court ordered that Pao was not entitled to seek discovery into this third party  
28 complaint because it was private and not directly relevant to her claims.

<sup>6</sup> Pao fights to keep these discussions out of evidence. None are inadmissible under California  
Evidence Code sections 1152 and 1154 because they are not being offered to prove the validity of  
any claim and do not fall within the sections. See KPCB's Opposition to Pao's Motion in Limine  
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1 After hearing Pao's demands, KPCB asked Hirschfeld to proceed with an investigation  
2 into Pao's claims and he did so. After much back and forth, and Pao's advance criticisms of the  
3 investigator she had not met, Pao finally agreed to meet with Hirschfeld, along with her attorney.<sup>7</sup>  
4 Hirschfeld interviewed her (with counsel present) as well as 17 different KPCB partners –  
5 including every female partner – and concluded that Pao's claims were not substantiated.  
6 Throughout the investigation, Pao was represented by counsel. She was offered the opportunity  
7 to record her interviews with Hirschfeld, and to provide him with her extensive notes to herself,  
8 but did neither.

9 Hirschfeld ultimately concluded that Pao's allegations were meritless. He offered to meet  
10 with Pao and her counsel regarding his findings, but she refused that meeting as well. She made  
11 several more meritless allegations, now about Hirschfeld—including falsely contending that he  
12 was seeking additional legal work from KPCB and was biased against her. KPCB responded to  
13 her further allegations, noting that she continued to misconstrue and misrepresent conversations.  
14 She was not provided with the huge exit payment she demanded, and remained at the firm in the  
15 junior investing partner role.

16 **F. Pao Files A Complaint Full of Unnecessary and Salacious Details**

17 In May 2012, Pao filed this lawsuit alleging gender discrimination, retaliation (for  
18 allegedly complaining that Nazre sexually harassed her in 2007), and failure to prevent  
19 discrimination. Simultaneously, Pao's husband, Alphonse "Buddy" Fletcher Jr., filed for  
20 bankruptcy on behalf of his hedge fund Fletcher Asset Management ("FAM") when FAM failed  
21 to pay back pension funds that requested reimbursement of their investments.<sup>8</sup> The appointed  
22 bankruptcy trustee ultimately issued a report stating that FAM had not had a single profitable  
23 investment since 2007 (the year Fletcher married Pao) and had committed several improper acts,  
24 including using FAM assets to pay for Fletcher's own expenses (such as his personal litigation,

25 No. 1.

26 <sup>7</sup> Pao found her attorney, Brendan Dolan, through her husband Buddy Fletcher. Dolan's firm,  
27 Kasowitz Benson, was representing Fletcher in his discrimination lawsuit against the Dakota  
28 building in New York and Fletcher referred Pao to the firm. See KPCB's Opposition to Pao's  
Motion in Limine No. 2.

<sup>8</sup> FAM's bankruptcy filings identified at least 13 law firms that FAM had retained throughout the  
prior years.

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1 his brother's movie business, and a salary for his mother). The trustee concluded that FAM's  
2 business was similar to a Ponzi scheme, and media reports state that FAM is currently under  
3 investigation by the SEC. Some of Fletcher's lawyers and thirteen law firms resigned from their  
4 retentions. One of them, the Kasowitz firm, recently obtained a judgment against Fletcher  
5 personally in the amount of \$2.7 million dollars for unpaid fees.

6 Also in 2012, the year Pao filed suit, Pao and Fletcher sold their luxury condominium at  
7 the St. Regis in San Francisco at a loss. Fletcher received multiple notices of tax liens for millions  
8 of dollars in past due personal state and federal income taxes, some of which were served on  
9 Pao's KPCB partnership interests. Pao fought the liens to obtain payments from KPCB.

10 **G. Pao's Performance Fails to Improve and KPCB Informs Her That it is Time**  
11 **to Transition**

12 Pursuant to the development plan laid out in Pao's 2011 review, senior partner Matt  
13 Murphy met with Pao in 2012 (both before and after she filed the lawsuit) for coaching and  
14 mentoring sessions aimed at improving her performance. Murphy coached Pao on skills needed  
15 to be a good investing partner and to advance at KPCB, including being a good team member,  
16 networker, investment sourcer, thought leader and board member. Murphy also provided Pao  
17 with specific suggestions regarding what she could do to improve in these areas. KPCB also  
18 provided Pao coaching with Bill Campbell, Chairman of the Board for Intuit, former executive at  
19 Apple, Claris, and GO Corporation, and CEO coach at Google and Twitter. Pao interviewed  
20 outside of KPCB, seeking a venture position at Google Ventures, but did not receive an offer.

21 Despite the coaching and mentorship at KPCB, Pao's performance did not improve and, in  
22 2012, her performance review reflected the same deficiencies noted in her 2011 review. Murphy  
23 and Ted Schlein informed Pao that she would be strong (in fact, "world class") in an operations  
24 role, and they would check in with her in sixty days regarding her performance as a partner.  
25 During that period, Pao continued to receive performance improvement coaching by Murphy.  
26 Murphy and Pao met frequently to discuss how Pao could improve. Pao, however, did not  
27 improve to the level needed to become a successful investing partner.

1 On October 1, 2012, approximately sixty days after the review, Murphy and Schlein met  
2 with Pao and told her she was not on track to be a senior investing partner at KPCB and it was  
3 time for her to move on. Murphy covered a prepared term sheet, telling her that *if* she cooperated  
4 in transitioning her board duties to a KPCB partner in an orderly way, she would stay on the  
5 payroll for six months (with equity vesting in KPCB funds during that entire period), be  
6 compensated for COBRA costs, get a prorated bonus, and, if she did not obtain another job during  
7 the paid six month period, receive an additional \$200,000 in severance—without release of any of  
8 her vigorously disputed claims. Pursuant to that offer, laid out in the term sheet, Pao need only  
9 have fulfilled her existing responsibilities to the company boards on which she served and  
10 cooperatively transitioned her responsibilities to others at KPCB.

11 Instead, Pao immediately announced publicly that she'd been fired, changed her KPCB  
12 voicemail to announce expressly that she'd been terminated, and promptly called the KPCB  
13 portfolio companies on whose boards she sat to inform them of her termination without notifying  
14 KPCB that she planned to do so (or asking who would replace her on the boards). Therefore, on  
15 October 10, 2012, KPCB rescinded its offer of a six month paid transition period and changed her  
16 termination date to be effective October 31, 2012. KPCB paid Pao for the additional future five  
17 months as a lump sum payment, along with a prorated bonus, and allowed her to continue to vest  
18 carried interest. Because Pao obtained new employment with reddit before the additional  
19 \$200,000 of severance payments were due (and indeed was consulting with reddit for \$600 an  
20 hour), she was not entitled to them and they were not paid. Although she accepted the benefits  
21 offered under the term sheet, Pao simply ignored the requirement that she return all KPCB  
22 property before her separation date. She subsequently produced approximately 700,000 pages of  
23 KPCB documents in the course of the litigation. Pao also amended her complaint to add her  
24 termination as another act of alleged retaliation by KPCB.

25 **H. Significant Evidentiary Issues Inherent in Pao's Claims**

26 KPCB's evidence will show that Pao was treated better than her alleged male peers and  
27 was, in fact, paid more than them during key periods at issue. The evidence will rebut her  
28 contentions that she was the victim of retaliation, and that "complaints" she allegedly made prior

1 to 2012 were protected activity. Pao's statements about Nazre lying about leaving his wife do not  
2 rise to the level of a protected complaint – nor do they transform their consensual “I love you”  
3 relationship into a nonconsensual one. Pao's contentions that Nazre was “retaliating” by  
4 excluding her from meetings and the like were similarly unprotected—and so viewed by KBCB  
5 partners familiar with her ongoing conflicts and disputes. And, importantly, the decision to  
6 terminate Pao's employment was initiated in 2011, six months before Pao's protected written  
7 complaint.

8         There are many key evidentiary issues inherent in Pao's claims. Many arise from Pao's  
9 efforts to rely on and to twist legal issues, or her attempts now to bolster her claims by pointing—  
10 typically without competent evidence—to allegations about treatment of female co-workers  
11 (including those she herself urged the firm to fire). This Court has repeatedly rejected Pao's  
12 efforts to pry into the personal information of other employees, including by confirming that Pao  
13 cannot meet the standard of direct relevance sufficient to invade the privacy rights of others at  
14 KPCB, including other KPCB women. See KPCB's Motion in Limine No. 2.<sup>9</sup>

15         Other issues arise from Pao's reliance on allegations clearly irrelevant as a matter of law.  
16 For example, Pao's third cause of action alleges that KPCB failed to take reasonable steps to  
17 prevent discrimination. First Amended Complaint (“FAC”), ¶¶ 47 and 48. To succeed with that  
18 claim, Pao must prove the underlying discrimination; she cannot succeed by proving harassment  
19 or retaliation. *Trujillo v. N. County Transit*, 63 Cal. App. 4th 280, 286, 288-89 (1998) (failure to  
20 prevent claim is contingent on plaintiff proving the underlying unlawful harassment,  
21 discrimination or retaliation claims; the reasonable steps claim fails if the plaintiff's underlying  
22 claims do not succeed); *Ortiz v. Pacific*, 973 F. Supp. 2d 1162, 1185 (E.D. Cal. 2013) (plaintiff  
23 must prove the underlying FEHA violation alleged as the basis for the claim: “Employers should  
24 not be held liable to employees for failure to take necessary steps to prevent such conduct, except

25 \_\_\_\_\_  
26 <sup>9</sup> The most recent ruling was earlier this month, when the Court refused to allow Pao to invade the  
27 privacy rights of a female Kleiner partner who, according to Pao (only), was mistreated by the  
28 firm. See Order Granting In Part And Denying In Part Defendant's Motion For A Protective  
Order Precluding Deposition And For An Order Quashing Subpoena dated February 2, 2015  
(strictly limiting deposition questioning to Pao matters only: “Plaintiff may ask questions  
regarding plaintiff's employment, termination and communications with Stephen Hirschfeld”).

1 where the actions took place and were not prevented”); *see also* section III.C *infra*; KPCB’s  
2 Motion in Limine Nos. 1 and 3. Yet Pao consistently attempts to rely on harassment training and  
3 policies (legal requirements limited to harassment only), despite the fact that she has no  
4 harassment claim and cannot show they have anything to do with her claim of failure to prevent  
5 discrimination.

6 There are also significant problems with Pao’s damage theories. The bulk of her claimed  
7 damages are for supposedly lost carried interest from KPCB’s funds, which consist largely of  
8 investments in emerging, non-public companies. But aside from the substantial offset by her  
9 current equity in reddit, the defendant here, management company KPCB, has no control over  
10 those funds. Instead, the decisions are vested with the Managing LLCs of the funds themselves,  
11 entities Pao deliberately avoided suing to stay clear of arbitration. *See* KPCB Motion in Limine  
12 No. 3.

## 13 **II. PROCEDURAL BACKGROUND**

14 Pao filed her original Complaint on May 10, 2012. On June 13, 2012, KPCB answered  
15 and moved to compel arbitration, citing Pao’s arbitration agreements with the LLCs which  
16 manage the KPCB Funds and Pao’s litigation demands for carried interest. After several rounds  
17 of briefing, that motion was denied on July 20, 2012 and the denial affirmed on appeal on June  
18 26, 2013. In the course of the dispute, Pao admitted that she “is not asking for the Managing  
19 LLCs to increase the carried interest being paid to her” and, therefore, the Court found that the  
20 agreements were not applicable to her claims. The Court noted that KPCB has no authority to  
21 provide carried interest to Pao; that authority lies solely with management of the Managing LLCs,  
22 not parties to this lawsuit. Accordingly, as noted in KPCB’s Motion in Limine No. 3 and  
23 damages section below, Pao has no basis for seeking carried interest damages here. On October  
24 16, 2013, Pao filed a First Amended Complaint, adding a claim related to her October 2012  
25 termination; she made no effort to change or correct facts falsely alleged in her original  
26 complaint.

27 Pao’s complaint expressly lists the men she contends are her comparators for purposes of  
28 her claims: Chi-Hua Chien, Amol Deshpande and Wen Hsieh. FAC ¶ 34 (“In March 2012 KPCB

1 announced internally that three men, Chi-Hua Chien, Amol Deshpande and Wen Hsieh, and no  
2 women were promoted to General Partner...Plaintiff was employed at KPCB longer than any of  
3 the men promoted.”). Pao’s complaint cites the following acts as forming the basis of her  
4 discrimination claim: denial of promotion, denial of wages and carried interest in KPCB’s funds,  
5 differences in the number of investments Pao as compared to men were allowed to make,  
6 exclusion of Pao from business events, meetings and opportunities, and managerial functions, and  
7 her termination. FAC ¶ 40. These same acts form the basis for her retaliation claims – she  
8 brings one cause of action for retaliation based on her termination, and one cause of action for  
9 retaliation based on all of the other acts. See FAC ¶ 52 (termination) and ¶ 44 (all other acts).  
10 Pao asserts KPCB failed to take all reasonable steps to prevent discrimination based on this same  
11 conduct, as well as allowing Nazre to allegedly retaliate against her. FAC ¶ 48.

12 The initial filing of Pao’s complaint generated significant media attention. The salacious  
13 details she chose to include, including Pao’s description of sex with Nazre on an unspecified “two  
14 or three occasions”, along with the naming of high profile partners and significant detail about  
15 their supposed interactions and conversations with Pao, resulted in a media firestorm. In  
16 response, Doerr issued a public statement defending himself and the firm: “it is not easy to stand  
17 by as false allegations are asserted against the firm...In the end, facts – not unfounded claims –  
18 will determine the outcome of the suit.”

19 Lacking any compelling evidence of malice, Pao bases her request for punitive damages  
20 on this plain vanilla statement due to its supposedly malicious nature. The parties recently battled  
21 Pao’s deposition notices of the partner at KPCB in charge of public relations and communication,  
22 as well as KPCB’s outside media consultant. Pao contends that KPCB’s communications to the  
23 press somehow (inexplicably, given her conflicting testimony regarding her paltry job search)  
24 influenced her ability to find another job or could possibly be the basis for her punitive damages  
25 claim. Given that the statement is protected opinion, it could do neither. See Cal. Civ. Code §  
26 3294(c)(for purposes of punitive damages, “despicable conduct” is conduct that is “so vile, base,  
27 contemptible, miserable, retched or loathsome that it would be looked down upon and despised  
28 by ordinary decent people.”); *Lieberman v. Fieger*, 338 F.3d 1076,1080 (9th Cir. 2003) (litigation

1 related statements to the press that plaintiff “mentally unbalanced”, “a terrible witness who was  
2 disliked by the jury”, “one of the Looney Tunes”, “the court ‘laughed at her and gave her zero’”;  
3 description “of the nuts growing on trees” in California was “not that far off” constitutionally  
4 protected opinion); KPCB’s Motion in Limine No. 6; KPCB’s Opposition to Pao’s Motion in  
5 Limine No. 2.

6 **A. EXPERTS**

7 Each party has several experts. KPCB has an expert on aspects of the venture capital  
8 industry related to Pao’s allegations, who will rebut, among other things, Pao’s attack on the  
9 gender numbers of the firm’s Managing Partners and suggestions that KPCB should have more  
10 senior women. Pao and KPCB have economic experts, who disagree (among other things) about  
11 the amount of damages Pao can reasonably claim given her reddit compensation and options.

12 Pao has an investigation expert, who attacks Hirschfeld’s investigation in mind-boggling  
13 picayune detail (without any basis in law for these quibbles), despite KPCB having relied on a  
14 trusted referral to Hirschfeld as well as his expertise, and having no internal experience in  
15 investigation protocols. *See* KPCB’s Motion in Limine No. 4. KPCB has its own investigations  
16 expert rebutting those attacks. Pao also offers her investigation expert to opine on general Human  
17 Resource practices, such as KPCB’s supposed lack of training, appropriate policies and HR  
18 structure. KPCB opposes Pao’s attempt to sweep in HR practices that are irrelevant to her failure  
19 to prevent discrimination claim (see KPCB’s Motion in Limine No. 1), and has a responsive  
20 expert.

21 **III. PAO’S CLAIMS AND THE EVIDENTIARY PROBLEMS**

22 **A. Gender Discrimination Claim (Gov’t Code Section 12940(a))**

23 In her gender discrimination claim, Pao alleges six allegedly discriminatory events: (1)  
24 denial of promotion, (2) denial of wages and carried interest in KPCB’s investment funds, (3)  
25 denial of investments, (4) exclusion from business events, meetings and opportunities, (5)  
26 exclusion from important managerial functions at KPCB, and (6) termination from KPCB. FAC  
27 ¶ 40. To establish this claim, Pao must prove all of the following:

- 28
  - KPCB was Pao’s employer (not disputed, except as to the decisionmaker issue laid

1 out below and in KPCB's Motion in Limine No. 3);

- 2
- 3 • KPCB failed to promote and terminated Pao's employment (disputed as to  
4 promotion decisions not made by KPCB, but instead by the Managing entities Pao  
5 avoided suing);
  - 6 • Pao's gender was a substantial motivating reason for KPCB's decisions (not the  
7 Managing entity decisions not at issue here) not to promote her and to terminate  
8 her;
  - 9 • Pao was harmed; and
  - 10 • KPCB's conduct was a substantial factor in causing Pao's harm.

11 CACI 2500; *see Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013) ("Requiring the  
12 plaintiff to show that discrimination was a substantial motivating factor, rather than simply a  
13 motivating factor, more effectively ensures that liability will not be imposed based on evidence of  
14 mere thoughts or passing statements unrelated to the disputed employment decision. At the same  
15 time, for reasons explained above, proof that discrimination was a *substantial* factor in an  
16 employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer  
17 to liability") (emphasis in original).

18 As is laid out in KPCB's Motion in Limine Nos. 1 and 2, serious legal and evidentiary  
19 issues abound in the final three out of these five factors, including Pao's improper attempts to rely  
20 on: harassment contentions (without a harassment claim); time barred allegations, and speculation  
21 concerning the circumstances of former colleagues ("her too" allegations).

22 **1. Pao's Gender was Not a Factor in KPCB's Employment Decisions**

23 One of the significant impediments to Pao's gender claim is the requirement that the many  
24 KPCB partners and Fund Managing Members making the challenged decisions (salary, bonus,  
25 promotions, carried interest, board seats, general partner membership in a Fund, invitations to  
26 meetings, invitations to dinners and other events, inclusion on emails, inclusion on interview  
27 schedules, seating during meetings, office location, Fund investment decisions, mentorship,  
28 termination, among others) all discriminated against Pao on the basis of her gender – especially  
given that some of these decision-makers were women. Pao's gender claim becomes even less  
credible when one considers the hiring and promotion of many other female partners at KPCB



1 including Mary Meeker, Dr. Beth Seidenberg, Aileen Lee, Trae Vassallo, Megan Quinn – among  
2 others.

3 Nothing about KPCB’s treatment of Pao evidences gender discrimination. Pao was paid  
4 more than her alleged male peers. For instance, from 2008 to 2011, Pao’s salary ranged from  
5 \$300,000 to \$380,000, while alleged male comparators made between [REDACTED]. And there  
6 is no evidence that KPCB’s decision-making was tied in any way to Pao’s gender.

7 Moreover, Pao enjoyed many benefits her male colleagues did not, including the ongoing  
8 mentorship and protection of Doerr. Doerr, a vehement supporter, nominated her for the  
9 prestigious Henry Crown Fellowship Program – into which Pao was accepted and ultimately  
10 attended (and met her husband). At Doerr’s request, Pao had mentorship meetings with Bill  
11 Campbell – one of the most highly respected executives in Silicon Valley. But more important,  
12 Doerr zealously advocated that Pao not be terminated in 2011 and ensured that she had one more  
13 year to attempt to prove herself as an investing partner. This conduct flies squarely in the face of  
14 any alleged discriminatory intent.<sup>10</sup>

15 **2. Many of Pao’s Alleged Slightings are not Adverse Actions and Cannot Be**  
16 **Discrimination Under the Law**

17 Many of the actions Pao challenges cannot possibly be considered adverse employment  
18 actions. An adverse employment action must result in a substantial adverse change in the terms  
19 and conditions of plaintiff’s employment. “A change that is merely contrary to the employee’s  
20 interests or not to the employee’s liking is insufficient.” *Murdock v. County of Fresno*, No. CV-  
21 F-09-0547 LJO SMS, 2010 U.S. Dist. LEXIS 122343 at \*34 (E.D. Cal. Nov. 18, 2010), *citing*  
22 *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1445 (2002). Here, many of the alleged  
23 discriminatory acts involve such minutiae as Pao not sitting in the front row at a meeting, Pao not  
24 sitting at the table during an event, Pao’s office not being in “the power corridor” (whatever that

25 <sup>10</sup> Where the same person is responsible for both hiring and promoting the plaintiff and both  
26 actions occur within a short period of time, a strong inference arises that there was no  
27 discriminatory motive. *Vaughn v. Roadway Express* (8th Cir. 1998) 164 F.3d 1087, 1091  
28 (plaintiff’s prior promotion by same person who terminated plaintiff shows lack of bias); *Hartsel*  
*v. Keys* (6th Cir. 1996) 87 F.3d 795, 804 n.9 (same); *see also Bradley v. Harcourt, Brace & Co.*,  
104 F.3d 267, 270-71 (9th Cir. 1996); *see also Horn v. Cushman & Wakefield Western, Inc.*, 72  
Cal. App. 4th 798, 809 (1999) (dismissing discrimination case when same actor hired and fired  
plaintiff over four and half year period).

1 means), Pao not being included on an applicant's interview schedule, Pao being asked to take  
2 notes during a meeting – among many, many others. None of these alleged actions even comes  
3 close to being an adverse employment action sufficient to constitute unlawful discrimination.

4 **3. Pao Suffered No Harm**

5 As discussed above, Pao was actually paid more than her male comparators and thus  
6 suffered no harm. Moreover, any alleged damages she suffered by virtue of her failure to be  
7 promoted into the general partnership and termination are eclipsed by the compensation she has  
8 earned and stands to earn at reddit.

9 **4. Defendant KPCB Does Not Make the Decisions Pao Challenges**

10 Many of the decisions Pao challenges – promotion to General Partner in a Fund, carried  
11 interest allocation, board seats, and investment decisions – are not made by KPCB. As a matter  
12 of clear and express contract, these decisions are vested exclusively in the Managing Members for  
13 the Managing LLCs for each Fund (which vary depending on the Fund) and cannot be made by  
14 KPCB. Since Pao has not sued the Managing LLCs in this matter, she has no basis for  
15 challenging decisions made by corporate entities that are not parties to this lawsuit. Nor could  
16 she recover damages from KPCB for the conduct of the Managing LLCs. *See Reporter's*  
17 *Transcript of Proceedings, July 10, 2012 at 8:21-26 (THE COURT: "...I don't see that she is*  
18 *seeking carried interest. I see that she is seeking damages for the failure to be given the carried*  
19 *interest. Am I stating your claim exactly? MR. EXELROD: Exactly correctly, Your Honor.");*  
20 *California Court of Appeal Decision at 14-15 (citing trial court: "Even assuming that there was*  
21 *any discrimination or retaliation by [KPCB], there couldn't have been discrimination or*  
22 *retaliation by [KPCB] as to the carried interest because any such actions as to the carried interest*  
23 *would have had to have been done by a third party. But that third party is not sued. So that*  
24 *would be—if [KPCB is] right, that would be a complete defense at least to the carried interest*  
25 *allegations.")*.

26 **5. Many of the Allegedly Discriminatory Acts are Barred by the Statute**  
27 **of Limitations and Laches**

28 Pao filed a charge of discrimination, retaliation and failure to prevent harassment,

1 discrimination, and retaliation with the California Department of Fair Employment and Housing  
2 on March 6, 2012, and filed this lawsuit on May 10, 2012. KPCB's answer raises affirmative  
3 defenses, including statute of limitations (No. 8) and laches (No. 9).

4 Pursuant to these defenses, the Court must exclude any alleged evidence of alleged  
5 discriminatory (or, as discussed below retaliatory) acts that occurred before March 6, 2011.  
6 There is a strict one-year statute of limitations for FEHA claims. *See* Cal. Gov. Code §12960 ("no  
7 complaint may be filed after the expiration of one year from the date upon which the alleged  
8 unlawful practice or refusal to cooperate occurred"); *Acuna v. San Diego Gas & Elec. Co.*, 217  
9 Cal.App.4th 1402, 1412 (2013). This is a jurisdictional mandate. *Martin v. Lockheed Missiles &*  
10 *Space Co.* 29 Cal. App. 4th 1718 (1994) ("in the context of the Fair Employment and Housing  
11 Act... The failure to exhaust an administrative remedy is a jurisdictional, not a procedural,  
12 defect"); *Okoli v. Lockheed Technical Operations Co.*, 36 Cal. App. 4<sup>th</sup> 1607, 1613 (1995)  
13 (same); *Pearson Dental Supplies, Inc. v. Super. Ct.*, 48 Cal. 4th 665, 671 n.1 (2010) ("Under  
14 FEHA, an administrative complaint filed with the DFEH must be filed within one year of the date  
15 of the alleged discriminatory action."); *Murray v. Oceanside Unified School Dist.*, 79 Cal. App.  
16 4th 1338, 1360 (2002) (same). Here, Pao cannot rely on time-barred events or acts (or failures to  
17 act) to support her case.

18 Although she has not alleged reliance on it, the California Supreme Court has held that the  
19 continuing violations doctrine may toll FEHA claims that occurred outside the statutory time  
20 period if, and only if, an employer engages in repetitive violations of an employee's FEHA rights  
21 and the employer's actions were "(1) sufficiently similar in kind; (2) have occurred with  
22 reasonable frequency; (3) and have not acquired a degree of permanence." *Richards v. CH2M*  
23 *Hill, Inc.*, 26 Cal. 4th 798, 823 (2001) (claims of discrimination and harassment).

24 But the allegations that Pao makes are not "sufficiently similar in kind". Pao's  
25 discrimination allegations include several dissimilar contentions. For example, Pao's timely  
26 failure to promote claim is dissimilar from her stale contentions regarding a 2007 book gift, and  
27 her timely termination claim is dissimilar from her stale contentions she didn't get invited to a  
28 dinner, had to sit in an undesirable seat during a meeting or wasn't included on an email. Merely

1 claiming conclusorily that everything Pao didn't like was part of an ongoing pattern of  
2 discrimination does not satisfy the second prong of the continuing violations test.

3 Next, Pao can't meet the requirement that the events be insufficiently permanent. In the  
4 context of the continuing violations doctrine, "permanence" means employer conduct that triggers  
5 an employee's awareness of, and duty to, assert her rights. *Richards, supra*, 26 Cal.4th at 823.  
6 The *Richards* Court explained that "the limitations period begins to accrue once an employee is  
7 on notice of the violation of his or her rights." *Id.*

8 Here, Pao's own emails demonstrate that she believed KPCB acted unlawfully for years  
9 before she filed a complaint—showing that she herself believed that KPCB's alleged actions were  
10 "permanent". Pao, who is a Harvard trained lawyer, sent emails to friends as early as 2007  
11 describing "sexual harassment" and "retaliation"; asked a friend in 2008 for "a good lawyer for  
12 employment law issues that will represent employees...I need to get one of the partners in my  
13 office to stop harassing me, and the management at KP won't help, so I'd love to understand my  
14 rights and their obligations"; consulted in 2008 with a friend who had sued an employer, getting  
15 coaching on how to selectively retain documentation to support future claims ("I've been through  
16 this sort of stuff and I'm pretty creative about it. When I started having problems in my old  
17 company, I started deleting sent-mail and only saving sent-mail that could help...it makes  
18 discovery a lot easier if you ever got through it...Sometimes when people are really into  
19 retaliating, you can email them and get them to admit all of it").

20 And as she discussed in her emails, Pao began consulting lawyers years ago ("I'm still  
21 putting together all my notes and emails, and have only contacted one lawyer"). Pao admitted in  
22 her deposition that she started meeting with attorneys as early as January 2008, that she  
23 subsequently consulted with close to a dozen attorneys over several years, and that she retained  
24 more than one. Consistent with her friends' coaching, starting in 2008 Pao wrote herself notes and  
25 forwarded emails to herself, and testified that she did "so that I could see patterns and understand  
26 them". This included "documenting" the events underlying her discrimination claims (examples:  
27 May 2008 email to herself complaining she was excluded from meetings, left off of emails, not  
28 invited to events, not selected for a board seat, and not given credit for her work; August 2009

1 email to herself complaining about KPCB failing to promote and transfer her).

2 It is clear that Pao believed as early as 2008 that KPCB had potentially violated her rights,  
3 confirming the permanence that dooms any continuing violation contentions. And although she  
4 consulted and hired counsel and mustered her evidence, she sat on those rights. She did so  
5 knowing, as a trained lawyer, about statutes of limitation (Q. “You were aware, as a result of your  
6 legal training, as to what a statute of limitations was, Ms. Pao? A. Yes. Q. You know there’s a  
7 period of time in which people are able to assert claims after a wrong has happened? A. Yes”).

8 Therefore, all evidence of allegedly discriminatory conduct prior to March 11, 2011  
9 should be excluded. This is particularly important here because Pao’s case rests largely on her  
10 own testimony – which is predominantly based on the self-serving notes she wrote throughout her  
11 employment that are inadmissible hearsay. *See* KPCB’s Motion in Limine No. 5. In fact, it  
12 became clear during Pao’s deposition that, without her notes, Pao doesn’t remember much of  
13 anything – which is not surprising given that Pao waited six years to bring her claims. For  
14 example, as stated above, Pao doesn’t remember her sexual relations with Nazre (how many  
15 times, where it happened, how it happened). Pao also doesn’t remember other significant details  
16 about the allegations in her complaint, including the specifics of her alleged “complaints” to the  
17 Managing Partners about Nazre, why she forwarded notes to herself throughout her employment,  
18 which lawyers (or how many) she consulted about her KPCB employment over the 7 years she  
19 worked there, which three administrative assistants allegedly complained about Nazre (or what  
20 they complained about and/or whether it had anything to do with Nazre), where her office was  
21 located, or why she quit her employment in 2007.

22 For all of these reasons, the Court should preclude Pao from violating the fairness  
23 doctrines underlying the FEHA one year statute of limitations by introducing stale allegations to  
24 support her claims here.

25 **B. Retaliation (Gov’t Code Section 12940(h))**

26 Pao makes two separate claims for retaliation: one based on the same actions she alleges  
27 constitute gender discrimination, and the second based on her termination.

1                   1.       Retaliation Based on Allegedly Discriminatory Action

2           Because Pao’s gender discrimination and retaliation claims are based on the same  
3 conduct, her retaliation claim fails for the same reasons described above. It also fails for several  
4 additional reasons.

5           To prove that she was subjected to unlawful retaliation, Pao must show:

- 6           • She complained internally to KPCB that Nazre had discriminated against her  
7           because of her gender;
- 8           • KPCB (and not the Managing entities Pao has avoided suing) then subjected her to  
9           adverse action;
- 10          • Her internal complaint of gender discrimination by Nazre was a substantial  
11          motivating reason for the adverse action;
- 12          • Pao was harmed; and
- 13          • KPCB’s conduct<sup>11</sup> was a substantial factor in causing Pao harm.

14          CACI 2505. Pao cannot establish any of these elements.

15                   a.       Pao Did Not Engage in Protected Activity

16           Prior to December 2011, Pao did not engage in a protected activity – which is essential to  
17 state a claim for retaliation. To constitute a “protected activity,” an employee must complain of  
18 or oppose a practice that is forbidden by FEHA (*e.g.*, sex, race, or age discrimination). *See* Cal.  
19 Gov. Code § 12940(h) (“It is an unlawful employment practice...to discharge, expel or otherwise  
20 discriminate against any person because the person has opposed any **practices forbidden under**  
21 **this part**”) (emphasis added). “Protected activity” occurs “when the circumstances surrounding  
22 the employee’s conduct are sufficient to establish *an employer knew* that an employee’s  
23 [complaint] was based on the *employee’s reasonable belief* that the [conduct] is discriminatory . .  
24 . [and] the employee [need] not explicitly inform the employer that she believed the [conduct]  
25 was discriminatory.” *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1048 (emphasis

26  
27 <sup>11</sup> Again, as with her discrimination claim, Pao must show that KPCB subjected her to adverse  
28 action and that KPCB’s conduct caused her harm. Pao cannot rely on the conduct of parties not  
named in her lawsuit, such as the Managing entities which made decisions on carry amounts,  
promotions, and board seats.

1 added). Pao thus has two big hurdles: showing that (1) she had a reasonable belief of unlawful  
2 conduct (particularly in light of her undisputed circumstances) and (2) KPCB understood she was  
3 raising a protected complaint.

4 Here, Pao alleges that her discussions with the partners in 2007 about her relationship with  
5 Nazre constituted a complaint of sexual harassment. But Pao never said that Nazre harassed her  
6 or that Nazre's conduct was unwelcome. *Deering v. Lassen Cmty. College Dist.*, 2011 U.S. Dist.  
7 LEXIS 5706, \*15 (E.D. Cal 2011) (ending an affair did not constitute a protected activity under  
8 the FEHA). Rather, Pao told the partners that Nazre had lied about leaving his wife. The  
9 circumstances simply cannot show that Harvard Law-trained Pao (who had written extensively  
10 about harassment while a student at Princeton) had a reasonable belief that she had been subjected  
11 to unlawful conduct. *See Ekerman v. City of Chicago*, No. 01-C-9689, 2002 U.S. Dist. LEXIS  
12 8711 at \* (N.D. Ill. 2002) (plaintiff's "subjective belief that [ ] sex-neutral remarks were  
13 motivated by her sex was unreasonable); *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136  
14 F.3d 276, 292 (2nd Cir. 1998) ("there was no basis for a rational finding that Ambrosini's belief  
15 that she was being discriminated against because she was a woman—even if genuine—was  
16 reasonable").

17 Nor do the circumstances show that KPCB knew (or even that it should have known) that  
18 Pao was making a complaint about protected activity – rather than merely discussing a personal  
19 matter with her coworkers.<sup>12</sup> Thus, the discussions did not constitute protected activity. *Galdieri-*

20  
21 <sup>12</sup> Pao insinuated in her deposition that Nazre's conduct – though welcome – was welcome under  
22 false pretenses and therefore should be considered harassment. This is not the test. *Henson v.*  
23 *City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (the challenged conduct must be unwelcome  
24 "in the sense that the employee did not solicit or incite it, and in the sense that the employee  
25 regarded the conduct as undesirable or offensive."); *EEOC v. Prospect Airport Services Inc.*, 621  
26 F.3d 991, 997-998 (9th Cir. 2010) ("For the conduct to be unwelcome for purposes of employer's  
27 liability for not stopping it, unwelcomeness has to be communicated. Sometimes the past conduct  
28 of the individuals and the surrounding circumstances may suggest that conduct claimed to be  
unwelcome was merely part of a continuing course of conduct that had been welcomed warmly  
until some promotion was denied or employment was terminated"). Under Pao's reasoning, any  
work relationship based on a false belief about the other person would constitute sexual  
harassment – whether it be lying about one's marital status, financial condition, religious  
background, desire to have children, sexual history or prowess—even if the falsity was revealed  
only years later. Employers are not required to delve into such personal private details of an  
employee's relationship to determine whether an employee complaining about her sexual  
partner's lies constitutes a protected complaint.

1 *Ambrosini*, 136 F.3d at 292 (“*Ambrosini’s* complaints ...did not state that *Ambrosini* viewed  
2 *Simon’s* actions as based on her gender, and there was nothing in her protests that could  
3 reasonably have led National Realty to understand that that was the nature of her objections”).  
4 Moreover, as stated above, Pao’s subsequent “complaints” about Nazre excluding her from  
5 meetings or emails were no different than her complaints about anyone else at the firm.  
6 Accordingly, KPCB had no basis for believing Pao was raising protected complaints. As a  
7 Harvard-trained lawyer, Pao knew how to complain about unlawful conduct and would have done  
8 so clearly if she actually believed she was making such complaints (as she ultimately did in  
9 2012).

10 **b. Pao Was Not Subjected To Adverse Action**

11 Again, many of the slights Pao perceived cannot possibly qualify as adverse action for  
12 purposes of a retaliation claim. *Jones v. Dep’t of Corr. and Rehab.*, 152 Cal. App. 4th 1367,  
13 1381-82 (2007) (no adverse action for a retaliation claim where an employee “never experienced  
14 a loss or reduction in her classification, position, salary, benefits and work hours ... her  
15 employment was not terminated,” she was not constructively discharged, and there is no evidence  
16 that her “work conditions were materially altered”); *McRae v. Dep’t of Corr. and Rehab.*, 142  
17 Cal. App. 4th 377, 357 (2006) (an involuntary position transfer to another facility “that is merely  
18 contrary to the employee’s interests or not to the employee’s liking is insufficient” to establish an  
19 adverse employment action for a retaliation claim. “[W]orkplaces are rarely idyllic retreats, and  
20 there mere fact that an employee is displeased by an employer’s act or omission does not elevate  
21 that act or omission to the level of a materially adverse employment action.” [citations omitted]);  
22 *Thomas v. Dep’t of Corr.*, 77 Cal. App. 4th 507, 511-12, (2000) (no adverse action: plaintiff  
23 alleged undeserved negative evaluations that resulted in a punitive job change and negative  
24 reports in her personnel file, assigned more duties than others in her unit, refusal to allow her to  
25 receive medical treatment, improper pay docking, interference with an appointment and failure to  
26 deliver her check on a timely basis).

27 Pao’s complaints that she did not sit in the front row at a meeting, was not sitting at a table  
28 during an event, her office was not in “the power corridor” (whatever that means), she was not



1 included on someone's interview schedule, she was asked to take notes during a meeting – among  
2 many, many others – are simply not even close to being adverse employment actions sufficient to  
3 constitute retaliation. Nor is her contention that a colleague at another firm (Wesley Chan from  
4 Google) was told to work with more senior partners at KPCB.

5 And as KPCB argues in its Motion in Limine No. 3, Pao cannot seek to ascribe liability to  
6 entities she refused to sue, including those that made decisions on promotions, investments, board  
7 seats and carried interest.

8 c. **Pao's Disclosure of Her Affair with Nazre Did Not Impact**  
9 **KPCB's Decisions**

10 As Pao admits, many of the decisionmakers of the alleged retaliatory actions had no  
11 knowledge of Pao's relationship with Nazre or her alleged complaints about him. In fact, many  
12 partners at KPCB found out about her relationship with Nazre for the first time when Pao filed  
13 this lawsuit. Accordingly, it would have been impossible for them to retaliate against Pao for a  
14 "complaint" of which they had no knowledge. *Joaquin v City of Los Angeles*, 202 Cal. App. 4th  
15 1207, 1227 (2012) ("Joaquin has not identified any evidence that Sands played a role in the  
16 Internal Affairs investigation of his complaint or had the power to direct its result").

17 Moreover, many of the allegedly retaliatory acts are far too removed in time, and there is  
18 no causal link between Pao's allegedly protected complaints and the conduct about which she  
19 complains. For example, Pao apparently claims that KPCB retaliated against her in 2012 by  
20 failing to promote her in retaliation for her "complaint" in 2007 that Nazre lied to her and thus  
21 she entered the sexual relationship under false pretenses. *Cohen v. Fred Meyer, Inc.*, 686 F.2d  
22 793, 796 (9th Cir.1982) ("Essential to a causal link is evidence that the employer was aware that  
23 the plaintiff had engaged in the protected activity."). Putting aside Pao's less than credible  
24 explanation for her affair with Nazre (and the contemporaneous emails and instant messages that  
25 express their feelings and show otherwise), and all the events during the intervening five years,  
26 there is no plausible explanation for why KPCB would take action against Pao in 2012 for  
27 conduct she claims she reported in 2007. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273,  
28 121 S. Ct. 1508, 1511 (2001) (citing cases that 3-month and 4-month gaps insufficient);

1 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (same). Additionally, as  
2 discussed above, Pao believed as early as 2008 that KPCB had potentially violated her rights, yet  
3 she sat on those rights; therefore all evidence of allegedly retaliatory conduct prior to March 11,  
4 2011 should be excluded.

5 Finally, there is simply no evidence of retaliatory intent, a key element of the claim.  
6 *Joaquin*, 202 Cal. App. 4th at 1230-31 (reversing judgment where jury instruction failed to  
7 include key element: “retaliatory intent is an essential element of a cause of action for unlawful  
8 retaliation under FEHA”). That is particularly true given that following her supposed complaint  
9 about Nazre in 2007, Pao continued to receive salary increases and bonuses (and in fact continued  
10 to be paid more than her male peers), the firm allowed her to move into an investing partner role  
11 in 2010 and Doerr supported it, she was repeatedly given the chance to succeed, Doerr nominated  
12 her for the prestigious Crown Fellowship, she joined company boards, and KPCB arranged for  
13 her to be mentored by CEO coach Bill Campbell. *See Manatt v. Bank of America*, 339 F.3d 792,  
14 802 (9th Cir. 2003) (employer’s decision to give plaintiff a pay raise and selection for prestigious  
15 assignment between time of plaintiff’s complaint and decision not to promote her dispelled any  
16 causal link necessary for retaliation claim).

17 **d. Pao Suffered No Harm**

18 As discussed above, Pao was actually paid more than her male comparators and thus  
19 suffered no harm. Moreover, any alleged damages she suffered by virtue of her failure to be  
20 promoted and termination are eclipsed by the compensation she has earned and stands to earn at  
21 reddit.

22 **2. Retaliation Based on Pao’s Termination**

23 To succeed on her retaliation claim based on her termination, Pao must show that the  
24 substantial motivating factor of KPCB’s decision to terminate her employment in October 2012  
25 was her filing of a DFEH charge and lawsuit earlier in 2012. But Pao cannot do so. As shown  
26 above, the decision to terminate Pao’s employment was initially made in 2011 – six months  
27 before Pao ever complained to KPCB. The decision was ultimately deferred a year based on  
28

1 Doerr's request that Pao be given a second chance to prove herself – but the foundation for the  
2 decision made in 2012 was already in place well before Pao complained. *Clark County Sch. Dist.*  
3 *v. Breedon*, 532 US 268, 272 (2001) (granting summary judgment on retaliation claim where  
4 supervisor considered transferring plaintiff before learning of her lawsuit even though the actual  
5 transfer occurred one month after plaintiff filed suit); *Munoz v. Sociedad Espanola de Auxilio*  
6 *Mutuo y Beneficiencia de P.R.*, 671 F. 3d 49, 56 (1st Cir. 2012) (finding plaintiff's termination  
7 one day after his deposition insufficient evidence of retaliation where decision to terminate was  
8 made three weeks before the deposition); *Charles v. Nike, Inc.*, 255 Fed. Appx. 127, 129 (9th Cir.  
9 2007) (affirming summary judgment on retaliation claim where alleged protected activity  
10 occurred after manager's decision to terminate plaintiff).

11 Moreover, at the time KPCB informed Pao that the firm would no longer employ her, it  
12 offered to help her transition outside the firm and pay her for the next six months of work, allow  
13 her to stay on so she could vest equity carry for six months, pay for COBRA, and provide  
14 additional severance if she did not obtain a position in the six month paid period. These are not  
15 the actions of an employer motivated by retaliatory animus.

16 **C. Reasonable Steps to Prevent Discrimination (Gov't Code Section 12940(k))**

17 Pao alleges that KPCB failed to take reasonable steps to prevent discrimination pursuant  
18 to Government Code section 12940(k) by engaging in the same conduct that supports her  
19 discrimination claims, and allowing Nazre to allegedly retaliate against her.

20 To maintain a reasonable steps cause of action, Pao must establish:

- 21 • She was subjected to discrimination;
- 22 • KPCB failed take all reasonable steps to prevent discrimination; and
- 23 • This failure caused Pao to suffer injury, damage, loss or harm.

24 *Ortiz v Georgia Pacific*, 973 F. Supp. 2d 1162, 1184-85 (E.D. Cal. 2013).

25 There are several important legal and evidentiary problems with this claim. First, Pao  
26 does not allege, either in her original or amended complaint, that KPCB failed to take reasonable  
27 steps to prevent either harassment or retaliation, only discrimination in the specified actions. The  
28 only retaliation contention supporting this claim involves alleged retaliation by Nazre, and not

1 retaliation by other partners or by KPCB in general. And Pao does not allege harassment as an  
2 underlying basis for this claim; in fact, as a matter of law she has no claim for allege failure to  
3 take reasonable steps to prevent harassment, because she does not have an underlying harassment  
4 claim (and certainly could not allege one based on the events of years ago she alleged in her  
5 complaint).

6 This means that Pao must prove the underlying discrimination for the claim to proceed to  
7 the jury. As the court made clear in *Trujillo v. N. County Transit Dist.*, a failure-to-prevent claim  
8 is contingent on the plaintiff proving the underlying unlawful harassment, discrimination or  
9 retaliation claims; the reasonable steps claim fails if the plaintiff's underlying claims do not  
10 succeed. 63 Cal. App. 4th 280, 288-89 (1998). In *Trujillo*, plaintiffs alleged discrimination,  
11 harassment, retaliation, and failure to take reasonable steps to prevent these FEHA violations.  
12 *Id.* at 283. The jury found defendants did not discriminate, harass, or retaliate against plaintiffs,  
13 but that defendants violated section 12940(i) by failing to take reasonable steps necessary to  
14 prevent these acts from occurring. *Id.* The jury awarded compensatory and punitive damages.  
15 The trial court granted defendants' JNOV motion, reasoning: "There's no logic that says an  
16 employee who has not been discriminated against can sue an employer for not preventing  
17 discrimination that didn't happen, for not having a policy to prevent discrimination when no  
18 discrimination occurred." *Id.* at 284. The court of appeal affirmed the JNOV, noting:

19 Employers should not be held liable to employees for failure to take necessary  
20 steps to prevent such conduct, except where the actions took place and were not  
21 prevented. Plaintiffs have not shown this duty was owed to them, under these  
22 circumstances. Also, there is a significant question of how there could be legal  
23 causation of any damages (either compensatory or punitive) from such a statutory  
24 violation, where the only jury finding was the failure to prevent actionable  
25 harassment or discrimination, which, however, did not occur.

26 *Id.* at 289.<sup>13</sup>

27 Thus, courts have consistently refused to allow failure to take reasonable steps claims to  
28 proceed upon dismissal of the underlying harassment, retaliation or discrimination claim. *See,*

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<sup>13</sup> Moreover, under the reasoning in the cases linking the failure to prevent with the harm caused by the underlying actions, the discrimination or retaliation must have been by the employer KPCB, and not by Managing entities which could not have caused the alleged damages at issue here.

1 e.g., *Oliver v. Microsoft Corp.* 966 F Supp. 2d. 889, 898 (N.D. Cal 2013) (“Oliver’s claim against  
2 Microsoft for its alleged failure to prevent or remedy discrimination or harassment fails in the  
3 absence of a viable underlying claim”); *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir.  
4 2004) (“Tritchler argues that the district court erred in requiring the jury to find that she had been  
5 sexually harassed as a prerequisite to reaching the question whether her complaint had been  
6 investigated. A finding of discrimination is required before a failure to investigate a  
7 discrimination complaint would become actionable”).

8 Where multiple underlying claims are at issue, courts have carefully tied the failure to  
9 prevent claim to the specific underlying allegations, dismissing the failure to prevent allegations  
10 upon dismissal of the underlying harassment or discrimination claims. *See Ortiz*, 973 F. Supp. 2d  
11 at 1185 (analyzing reasonable steps allegation only for retaliation and harassment claims:  
12 “Because Defendant is entitled to summary judgment on Plaintiff’s sex discrimination claim, he  
13 cannot maintain FEHA failure to prevent claim based upon that allegation”); *Gonzales v City of*  
14 *Martinez*, 638 F. Supp. 2d 1147, 1162 (N.D. Cal. 2009) (failure to take reasonable steps claim  
15 allowed to proceed *only* as to discrimination allegations narrowed on summary judgment: “the  
16 Court found that Plaintiff’s claim for discrimination survives summary judgment on the claim that  
17 Smith failed to speak with the background investigator. Therefore, Plaintiff’s claim for failure to  
18 prevent discrimination similarly survives summary judgment on Plaintiff’s narrowed  
19 discrimination claim”); *Beagle v. Rite Aid*, No. C-08-1517 PJH, 2009 U.S. Dist. LEXIS 87073 at  
20 \*27 (N.D. Cal. Sept. 23, 2009) (“The court finds that summary judgment must be GRANTED as  
21 to the claim of failure to prevent discrimination, as plaintiff has no evidence of discrimination.  
22 However, because ... triable issues exist with regard to the cause of action for harassment.... the  
23 court finds that triable issues also exist with regard to the claim of failure to prevent  
24 harassment”); *see Morrow v City of Oakland*, No. C-11-02351 LB, 2012 U.S. Dist. LEXIS 81318  
25 at \*54-55 (N.D. Cal. June 12, 2012) (allowing claim to proceed only with respect to  
26 discrimination claim not dismissed on summary judgment: “with respect to Mr. Morrow’s failure-  
27 to-prevent-discrimination claim under Section 12940(k), Mr. Morrow has sufficiently alleged  
28 only a claim against the City based upon his transfer denial”).

1 Here, because Pao relies on discrimination as the basis for her failure to take steps claim,  
2 she must focus her reasonable steps allegation on the steps that would have prevented the specific  
3 discrimination she alleges; her claim fails otherwise. She cannot rely on the failure to take steps  
4 to prevent harassment or retaliation, or on specific discrimination allegations that fail. That is  
5 particularly true with respect to harassment, given that the legislature, California Supreme Court  
6 and courts of appeal have consistently made clear that harassment and discrimination are  
7 fundamentally different as a matter of law and fact. *Compare* Cal. Gov. Code § 12940(a), (h) and  
8 (j); *see also* *Roby v. McKesson*, 47 Cal. 4th 686, 705-06 (2009) (noting FEHA defines  
9 discrimination and harassment as distinct wrongs; “there is no reason to construe the FEHA’s  
10 prohibition against discrimination broadly to include harassment”); *Reno v. Baird*, 18 Cal. 4th 640  
11 (1998) (concluding that discrimination and harassment are fundamentally different types of  
12 claims and approving the *Janken* court’s analysis of the “fundamental distinction” between  
13 harassing conduct and discriminatory conduct and the different remedies available for each type  
14 of conduct); *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 63 (1996) (“significant  
15 distinction underlies the differential treatment of harassment and discrimination in the FEHA”).

16 Despite this, Pao has consistently focused on KPCB’s alleged harassment obligations,  
17 arguing that such contentions support this claim. For example, throughout the depositions in this  
18 matter, Pao has sought to argue that KPCB failed to provide statutorily mandated sexual  
19 harassment training (despite the lack of evidence that KPCB met the 50 employee minimum  
20 before it provided the training in 2012), and that it did not have an anti-harassment policy before  
21 2012 (despite KPCB’s sworn evidence to the contrary). But none of these harassment-focused  
22 obligations can succeed in proving the claim she has—failure to take steps to prevent  
23 *discrimination*. As the FEHA makes clear, these statutory obligations are designed to prevent  
24 sexual *harassment*. Indeed, given that Pao does not have a harassment or failure to prevent  
25 harassment claim, any evidence focused on those claims is irrelevant, and Pao should not be  
26 permitted to introduce it in a misplaced effort to cause the jury to believe that additional statutory  
27 violations support this claim. *See* KPCB’s Motion in Limine No. 1.

28 Focusing on the evidence that *is* relevant to this claim, KPCB will show that it did take

1 reasonable steps to prevent unlawful discrimination. KPCB has had a policy preventing  
2 discrimination since before Pao started working for KPCB. KPCB CFO Sue Biglieri worked  
3 with outside counsel to implement the policy, which Pao admitted she never asked to see during  
4 her employment (including when she was allegedly subjected to advances by Nazre).<sup>14</sup>  
5 Compliance with that EEO policy was explicitly required in KPCB offer letters, including that of  
6 Pao (“you would be expected to comply with KPCB’s personnel and other policies,  
7 including...policies prohibiting discrimination and unlawful harassment”). The policy is  
8 supplemented by postings on EEO issues in KPCB’s offices. And when Pao ultimately  
9 complained in January 2012, as shown above, KPCB promptly hired a third party, neutral,  
10 experienced investigator who investigated her claims.

#### 11 **IV. DAMAGES AND OTHER RELIEF**

12 There are several significant evidentiary and legal issues related to the relief Pao seeks.

##### 13 **A. Pao Cannot Recover Carried Interest and Promotion Damages**

14 Pao chose not to sue the decision-makers for the carried interest and promotions she  
15 seeks—the Managing LLCs which make those decisions. To avoid her contractual obligations to  
16 arbitrate with the Managing LLCs, Pao admitted that she “is not asking for the Managing LLCs to  
17 increase the carried interest being paid to her” (*See* Pao Opp. to Supp. brief re Equitable Estoppel  
18 at 3). Therefore, the Court found that the arbitration agreements were not applicable to her claims  
19 against KPCB. Specifically, the appellate court noted that KPCB has no authority to provide  
20 carried interest to Pao; that authority lies solely with management of the Managing LLCs, which  
21 are not parties to this lawsuit.

22 Given that decisions regarding carried interest, promotions, investments, and board seats  
23 are made exclusively by the Managing LLCs, which are separate corporate entities and not parties  
24 to this lawsuit, Pao is not entitled to any damages for failed promotions or lost carried interest in

25 \_\_\_\_\_  
26 <sup>14</sup> Biglieri could not find a copy of the EEO policy in 2012, when Pao made her claims. She went  
27 to outside counsel who had written and provided it to her years ago, but since the firm (Brobeck)  
28 was defunct, those former Brobeck partners could not locate it. Biglieri found the fax cover sheet  
from the Brobeck partner who wrote the policy and that has been produced, along with her very  
clear testimony and hire letters mandating compliance with the policy. That Brobeck partner,  
Brendan Dolan, represented Pao in this matter prior to Pao’s current counsel.

1 this matter, which is too speculative in any event. *See also, supra*, n.1 (Pao's admissions that she  
2 is not seeking carried interest); KPCB's Motion in Limine No. 3. KPCB accordingly asks the  
3 court to preclude Pao from introducing any evidence to support a demand for carried interest or  
4 promotions to General Partner in a KPCB fund.

5 **B. Pao's Damages are Cut Off By Subsequent Events**

6 KPCB has several arguments regarding its affirmative defense of mitigation.

7 First, rather than cooperating with KPCB's offer to keep Pao on the payroll for six months  
8 while she transitioned into an outside operating role, Pao publicly announced she was fired on the  
9 evening she learned that she would transition over the next six months. Second, Pao did not  
10 engage any headhunters or contact any of her KPCB contacts (internally or externally) during her  
11 job hunt, and made virtually no efforts whatsoever to seek comparable venture capital  
12 employment. Third, Pao quickly took a job with emerging company reddit, making  
13 [REDACTED] per year (less than half of what Pao was making at KPCB) and stopped searching  
14 for a comparable venture capital job at that time.

15 Several other junior investing partners have left KPCB to find lucrative careers. For  
16 instance, Chi-Hua Chien and Aileen Lee went on to start their own successful VC funds, Isaac  
17 Ciechanover became CEO of his own company that recently filed to go public (his annual  
18 compensation is [REDACTED]), among many, many others. KPCB will argue that any alleged  
19 damages should be reduced by what a reasonable mitigation should have been, and at a minimum,  
20 by her actual mitigation at reddit.

21 Additionally, members of Pao's alleged peer group (as well as other more senior partners)  
22 transitioned out of the partnership effective September 30, 2014, as KPCB determined it should  
23 become a smaller firm, consistent with its roots and the economic environment. Therefore, Pao's  
24 damages should be cut off on that date because her position would have been eliminated in any  
25 event. Moreover, Pao admitted that she did not see herself in venture capital long term and that  
26 she planned to leave KPCB after her carry vested in November 2011 (which is consistent, of  
27 course, with her failure to seek a job in the venture capital industry).



1           **C. Pao's Compensation at reddit Eclipses Any Possible Damages from KPCB**

2           Of the various damages scenarios put forward by Pao's damages expert Carl Saba, Pao's  
3 highest damages demand seeks \$16 million from KPCB as purported lost wages and carried  
4 interest and promotions for the next 10 years. While she cannot recover these amounts from  
5 KPCB as explained above, even if she could, her compensation at reddit exceeds what she would  
6 have been paid at KPCB, and thus she has no damages.

7           **D. Punitive Damages**

8           Pao cannot show, by clear and convincing evidence, the existence of fraud, oppression or  
9 malice. First, given KPCB's wealth of documentary evidence and witnesses, Pao cannot prove  
10 that the alleged unlawful conduct occurred, let alone that can she prove it through "clear and  
11 convincing" evidence. Pao admits that Doerr and others were strong supporters of and mentors to  
12 her during her employment. Even when she was informed of her termination, KPCB offered her  
13 extensive benefits without seeking a release of her highly public claims (including several  
14 demonstrably false allegations).

15           Pao's attempt to inflict punitive damages on KPCB appears to be based on Doerr's  
16 restrained statement of opinion to the press that "it is not easy to stand by as false allegations are  
17 asserted against the firm...In the end, facts – not unfounded claims – will determine the outcome  
18 of the suit" cannot possibly meet the standard. The statement does not refer to Pao by name, does  
19 not disparage her in any way, and is simply a plain vanilla statement of denial. Doerr's first  
20 amendment right to defend himself cannot possibly be a basis for punitive damages.

21           **E. Pao's Request for Injunctive Relief**

22           Pao's Motion in Limine Nos. 7, 8, 10 and 11 are mystifying. Pao's Prayer for Relief  
23 contains a request for "injunctive relief to prevent sexual harassment, discrimination and  
24 retaliation." See FAC, Prayer for Relief, ¶ 5. Thus, KPCB's efforts to hire, promote and retain  
25 women, how KPCB's female partner statistics compare the industry as a whole, and what efforts  
26 it is currently making are all highly relevant to Pao's request for injunctive relief. Additionally,  
27 whatever efforts KPCB continued to make after Pao's termination are also relevant given her  
28 assumption she would have remained at KPCB for the next 10 years and is entitled to recover

1 damages on that basis.

2 **V. WITNESSES**

3 KPCB expects the parties will call the following current or former KPCB employees or  
4 partners to testify at trial: John Doerr, Ted Schlein, Ray Lane, Juliet deBaubigny, Susan Biglieri,  
5 Matt Murphy, Randy Komisar, Beth Seidenberg, Mary Meeker, Paul Vronsky, Chi-Hua Chien,  
6 Amol Deshpande, and Wen Hsieh. KPCB also expects the parties to call third party witnesses  
7 Stephen Hirschfeld (the outside investigator of Pao's complaint), John Amster (CEO of RPX, one  
8 of KPCB's portfolio companies) and Jody Gessow (affiliated with a KPCB portfolio company).

9 KPCB has retained five expert witnesses, whom it expects to call at trial: Paul Gompers  
10 (economics, structure, and investment processes at venture capital firms; characteristics of  
11 successful venture capital investments and venture capitalists; career paths of venture capitalists;  
12 women in the venture capital industry; and the career advancement and compensation of Pao and  
13 her alleged male comparators at KPCB), Jeff Litvak (business valuation, valuation of carried  
14 interest, valuation of Pao's reddit stock options, any potential valuation of KPCB's net worth if  
15 there is a finding of malice, oppression or fraud), David Lewin (economic damages and  
16 mitigation), Rhoma Young (human resources and EEO policies, practices and procedures to  
17 prevent potential discrimination, harassment, and retaliation), and Michael Robbins (adequacy of  
18 KPCB's investigation).

19 **VI. MOTIONS IN LIMINE**

20 KPCB served Pao with motions *in limine* on February 11, 2015:

- 21 1. Motion in Limine No. 1 to Exclude Evidence Regarding Harassment or Alleged  
22 Failure to Prevent Retaliation or Harassment;
- 23 2. Motion in Limine No. 2 to Exclude "Her Too" Evidence Relating to Other Female  
24 Employees;
- 25 3. Motion in Limine No. 3 to Exclude Evidence Based on Carried Interest;
- 26 4. Motion in Limine No. 4 to Exclude the Testimony of Allison West;
- 27 5. Motion in Limine No. 5 to Exclude Plaintiff's Notes and Emails to Herself;
- 28 6. Motion in Limine No. 6 to Preclude Pao from Introducing Discussions with the

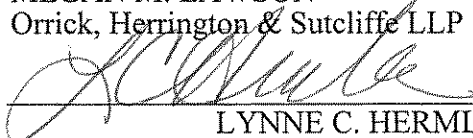
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- Media;
- 7. Motion in Limine No. 7 to Exclude Evidence Regarding Pao’s Emotional Distress/Reaction;
- 8. Motion in Limine No. 8 to Bifurcate Trial and to Exclude Testimony and Evidence Regarding Irrelevant Financial Matters;
- 9. Motion in Limine No. 9 to Exclude Certain Testimony and Evidence of Carl Saba;
- 10. Motion in Limine No. 10 to Exclude Spectators; and
- 11. Motion in Limine No. 11 to Permit KPCB to Conduct Direct Examination of Defense Witnesses that Plaintiff Call in Her Case-in-Chief

**VII. CONCLUSION**

Pao’s claims lack merit. KPCB looks forward to proving so in this trial.

Dated: February 17, 2015

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