SEYFARTH SHAW LLP
Richard B. Lapp (SBN 271052)
E-mail: rlapp@seyfarth.com
Camille A. Olson (SBN 111919)
E-mail: colson@seyfarth.com
Robin E. Devaux (SBN 233444)
E-mail: rdevaux@seyfarth.com
560 Mission Street, 31st Floor
San Francisco, California 94105
Telephone: (415) 397-2823
Facsimile: (415) 397-8549

SEYFARTH SHAW LLP
Jeffrey A. Wortman (SBN 180781)
E-mail: jwortman@seyfarth.com
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017-5793
Telephone: (213) 270-9600
Facsimile: (213) 270-9601

SEYFARTH SHAW LLP
Reiko Furuta (SBN 169206)
E-mail: rfuruta@seyfarth.com
2029 Century Park East, Suite 3500
Los Angeles, California 90067
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

Attorneys for Defendant
HEWLETT PACKARD ENTERPRISE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

R. ROSS and C. ROGUS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HEWLETT PACKARD ENTERPRISE COMPANY, a Delaware corporation, (formerly HEWLETT-PACKARD COMPANY),

Defendant.

Case No. 18 CV 337830

DEFENDANT HEWLETT PACKARD ENTERPRISE COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Date: June 28, 2019
Time: 9:00 a.m.
Department: 1

Complaint Filed: November 8, 2018
Trial Date: Not Set

TABLE OF CONTENT

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Rules

I. INTRODUCTION

Plaintiffs R. Ross and C. Rogus purport to bring the Complaint on behalf of themselves and all women employed by Defendant Hewlett Packard Enterprise Company ("HPE") in California from four years prior to the filing of the Complaint to the present. *See* Complaint ("Compl."), ¶¶ 6; 96-97. Plaintiffs' Complaint asserts causes of action for violations of California's Equal Pay Act; Labor Code violations based on an alleged failure to pay terminated employees all accrued wages; violations of California's Unfair Competition Law; and declaratory relief. *See* Compl.[1] Plaintiffs' claims should be dismissed because, as pleaded, they do not meet the elements of the Equal Pay Act. First, both Plaintiffs fail to describe their positions with sufficient specificity in terms of the skill, effort and responsibility required for their positions. Second, Plaintiffs fail to meet the appropriate pleading standards because they do not (i) identify their comparators or (ii) show that any comparators engaged in equal or substantially similar work.

Plaintiffs' purported class claims fare no better; nor can Plaintiffs salvage their deficient individual claims by purporting to bring those claims on behalf of a class. Indeed, as Plaintiffs currently plead their case, there is no way any common issue could predominate over the disparate circumstances of the putative class, which, notwithstanding Plaintiffs' purported "Covered Positions" limitation, essentially consists of all female employees in California, ranging from engineers to accountants to sales associates to administrative assistants and more, all of whom possessed different educational backgrounds, experience, skills, work histories and worked in different disciplines with distinct duties. Their claims and their putative class implicate and challenge hundreds—if not thousands—of personnel decisions (e.g., hiring, job placement, salary, talent review, bonus, and other compensation) over several years, and attempt to lump together all of these female employees who worked in different locations, departments and classifications. And Plaintiffs do this with no real, well-pleaded and substantiated allegation of a common practice or policy.

[1] As discussed below, Plaintiffs' second, third and fourth causes of action, for failure to pay terminating employees all accrued wages, violations of California's Unfair Competition Law, and declaratory relief are all derivative of the first cause of action for alleged violation of the California Equal Pay Act. As Plaintiffs' Equal Pay Act claims fail, so too do these derivative claims.

HPE's lawful pay policies regarding pay ranges, salaries, and promotions and job levels do nothing to advance class certification because they do not lead to liability. Plaintiffs' sweeping and conclusory allegations such as "[e]ach of the Covered Positions, are, respectively, comparable,.." do not meet the pleading standard either for their individual claims or the putative class claims.

Plaintiffs only make conclusory statements, including repeated hollow allegations of their beliefs—unaccompanied by well-pleaded facts—that HPE pays female employees less than men for substantially equal or similar work. The FPA and EPA are not about broad generic notions of comparability. Rather, those statutes require that the work be equal or substantially similar, requiring equal skill, effort and responsibility and similar working conditions. Because Plaintiffs have alleged no facts sufficient to show the female employees in the Covered Positions performed "equal" or "substantially similar work" to the male employees or that the Covered Positions are comparable, the demurrer should be sustained as to their Fair Pay Act and Equal Pay Act claims.

In sum, the Complaint fails to satisfy California's pleading standards because it rests on nothing more than generic and conclusory allegations. Plaintiffs fail to plead properly either individual or class claims under the Fair Pay Act and Equal Pay Act (and, therefore, cannot succeed with claims derivative of those causes of action). Dismissal now is appropriate because a contrary approach—namely, allowing Plaintiffs to proceed past the pleadings based on mere conjecture and speculation—presents substantial and unnecessary risks of imposing excessive burden on HPE and the Court as Plaintiffs' current allegations are so broad, vague and unsubstantiated that, *inter alia*, discovery will be unmanageable and unwieldy. Therefore, HPE demurs to the Complaint and respectfully requests that the Court dismiss it in its entirety.

II. RELEVANT BACKGROUND

HPE was founded on November 1, 2015, after Hewlett-Packard Company ("H-P") split into HPE and HP, Inc. Compl., ¶¶ 13, 16. Plaintiffs allege HPE maintains pay policies governing pay ranges, salaries and promotions and job levels, none of which on their face are unlawful.[2]

[2] The Hewlett Packard International Bank ("HPIB") Remuneration Policy attached as Exhibit A to the Complaint is irrelevant as HPIB is a separate and distinct company from HPE. *See* Request for Judicial Notice, Exs. A-B.

Plaintiff Ross alleges that she was first employed by H-P and then was employed by HPE after H-P split into separate companies. Compl., ¶ 67. She further alleges that she was most recently employed by HPE as a Director of Sales Operations (The correct title was actually Director Business Operations.). Compl., ¶ 68. Plaintiff Ross contends a former unidentified "superior" told her that her salary was less than her unidentified male "peers," and that her total annual compensation in 2014 when she was working at H-P (which Plaintiffs allege to be HPE's predecessor (Compl., ¶ 13)) was approximately three percent more than her total annual compensation in 2017. Compl., ¶¶ 74-76.

Plaintiff Rogus alleges that she was hired by H-P in April 2013 and following H-P's split, she worked for HPE. Compl., ¶ 78. She further alleges that she worked as an Implementation Project Manager (The correct title was actually Implementation Lead.). Compl., ¶ 79. She asserts that an unidentified person at H-P (not HPE) asked about her prior compensation before she joined H-P. Compl., ¶ 86. She claims that the Project Manager on her team (a man) was paid 14.27 percent more per hour than she was while employed by H-P in 2014, and that when he died and she took his position in 2014, she was given a two percent pay increase. Compl., ¶¶ 87, 90.

III. ARGUMENT

A. Legal Standard

1. A Complaint Is Subject To Demurrer Where It Fails To State Facts Sufficient To Constitute A Cause Of Action

A demurrer is appropriate where a Plaintiff does not state facts sufficient to constitute a cause of action, either because the complaint itself is incomplete or because it discloses a defense that would bar recovery. Cal. Code Civ. P. § 430.10(e); *see also Khoury v. Maly's of Cal.*, 14 Cal. App. 4th 612, 615 (1993); *Guardian North Bay, Inc. v. Superior Court*, 94 Cal. App. 4th 963, 971-72 (2001); *McKenney v. Purepac Pharm. Co.*, 167 Cal. App. 4th 72, 77 (2008). Specifically, the plaintiff "must set forth factual allegations that sufficiently state all required elements of [a] cause of action . . . and, [a]llegations must be factual and specific, not vague or conclusory." *Rakestraw v. Cal. Physicians' Serv.*, 81 Cal. App. 4th 39, 43 (2000). While the facts of the complaint are taken as true, the Court need not assume the truth of "contentions, deductions or conclusions of law." *Aubry v. Tri-City Hospital Dist.*, 2 Cal. 4th 962, 967 (1992).

2. The Class Issue May Properly Be Disposed Of By Demurrer Because The Invalidity Of Plaintiffs' Class Allegations Is Revealed On The Face Of The Complaint.

When the invalidity of class allegations is revealed on the face of a complaint, the class issue may properly be disposed of by demurrer or motion to strike. *Schermer v. Tatum*, 245 Cal. App. 4th 912, 923 (2016) (holding that trial court properly sustained demurrer to class allegations without leave to amend when there was no reasonable possibility lessee plaintiffs could satisfy community of interest requirement in absence of sufficient factual allegations to support conclusion that uniform policy and procedure existed); *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 440 (2000) ("[N]othing prevents a court from weeding out legally meritless suits prior to certification via a defendant's demurrer or pretrial motion. In fact, it is settled that courts are authorized to do so."); *Tucker v. Pacific Bell Mobile Services*, 208 Cal. App. 4th 201, 221-25 (2012) (affirming trial court order sustaining defendant's demurrer, without leave to amend, because class members' awareness of relevant policy necessarily would involve individualized inquiries). When class certification is challenged by demurrer, the task of the trial court is to determine whether there is no "reasonable possibility" that a plaintiff can plead a *prima facie* case for class certification. *Tucker*, 208 Cal. App. 4th at 215. This is just such a case: the Complaint lacks virtually any specific factual allegations and instead is built on nothing more than conclusory allegations, bare legal conclusions and beliefs without any hint of factual information (or reasonable inquiry) whatsoever.

B. Plaintiffs Cannot Sustain Their Claims Premised On Allegations Made "On Information And Belief."

As argued in Defendant's concurrently filed motion to strike, Plaintiffs make numerous inappropriate and baseless allegations "on information and belief"—including several that go to the heart of their Complaint. Each of these allegations lack any pleaded information; rather, they contain only unsupported beliefs and should be ignored. Cal. Civ. Proc. Code § 128.7 provides that a party submitting pleadings to the Court "is certifying that to the best of the person's knowledge, information, and belief, formed after an ***inquiry reasonable under the circumstances***," the allegations are warranted and have, or are likely to have, evidentiary support. Cal. Civ. Proc. Code § 128.7(b) (emphasis added). At the same time, allegations made on information and belief are insufficient where they "merely

assert[] the facts so alleged ***without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true***.'" *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 551 n.5 (2007) quoting *Pridonoff v. Balokovich*, 36 Cal. 2d 788, 792 (1951)) (emphasis added)).

Here, Plaintiffs' allegations on information and belief are deficient because they do not also allege the information leading Plaintiffs to believe the allegations are true. Indeed, Plaintiffs offer no explanation at all as to how they determined it was true, for instance, that HPE "considers or has considered each new hire's prior compensation when determining that employee's compensation" (Compl., ¶ 43), or that "HPE's stereotypes about what men and women can or should do" led the Company to "channel[] women into lower-paying job positions than men" (Compl., ¶ 45; *see also* Compl., ¶ 65 (regarding "channeling" allegations).)

Plaintiff Ross opaquely avers that at some unspecified time, an unnamed "superior…told her that she was underpaid compared to male peers," but she does not explain how she then stretched this to a conclusion that she was "paid less than men for substantially equal or similar work performed under similar working conditions" "*at all times*" that she worked for HPE. Compl., ¶¶ 75-77 (emphasis added).[3] Some of Plaintiff Ross' allegations simply parrot the statute and are utterly conclusory, providing no specifics whatsoever. *See* Compl., ¶ 77. Indeed, she does not even identify the male peers to whom she is comparing herself, their positions, or what basis she has to state that they were performing "substantially equal or similar work under similar working conditions." The Complaint is bereft of any factual allegations that would support Ross' conclusory allegations.

Plaintiff Rogus, meanwhile, offers even less to support her claim; indeed, she is silent as to the basis for her belief that all male PMs were paid more than all female PMs. Compl., ¶ 93. These are fundamental allegations underpinning the entire Complaint, the basis for which appears to be nothing more than speculation.

At best, Plaintiffs vaguely allude to HPE being "the epitome of a company in a male-dominated

[3] Plaintiff Ross also contends that "on at least one occasion" she "received a file including salary information of her male colleagues" and "noted that the base pay of male employees who joined HPE during the class period exceeded the base pay of female employees who joined around the same time and even that of female employees who had more extensive work experience at HPE." Compl., ¶ 73. She does not, however, assert that the male and female employees she was comparing held similar roles or were performing similar work, so this does not reasonably lead to a conclusion that female employees across the board were not paid the same as male employees doing similar work under similar conditions.

industry" and to HPE's decision not to "publically [*sic*] identify specific measures taken to address the gender pay gap" *See* Compl., ¶¶ 4-5. These are irrelevant and fail to justify any basis for the sweeping allegations that Plaintiffs make on information and belief in their Complaint. The California Supreme Court has rejected this tactic, explaining that "[t]he actual belief standard requires more than a hunch, a speculative belief, or wishful thinking: it requires a well-founded belief. We measure the truth-finding inquiry's reasonableness under an objective standard, and apply this standard both to attorneys and to their clients." *Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 82 (1999). Hence, the Court should ignore Plaintiffs' "information and belief" allegations when determining the sufficiency of the Complaint.

C. Plaintiffs' Allegations Regarding The Elements of Labor Code Sec. 1197.5 Do Not Meet California's Minimum Pleading Standard

1. Plaintiffs' Individual Fair Pay and Equal Pay Act Claims Fail

Under the Fair Pay Act, Plaintiffs must establish that: (1) the employer paid Plaintiffs less than employees of the opposite sex; (2) Plaintiffs performed substantially similar work as the employees of the opposite sex, when viewed as a composite of skill, effort and responsibility; and (3) Plaintiffs and the employees of the opposite sex worked under similar working conditions. Lab. Code Sec. 1197.5(a). Before January 2016, Labor Code 1197.5 was the Equal Pay Act. Under the EPA, Plaintiffs had to establish that: (1) the employer paid Plaintiffs less than employees of the opposite sex in the same establishment; (2) Plaintiffs performed equal work as the employees of the opposite sex on jobs which required equal skill, effort and responsibility; and (3) Plaintiffs and the employees of the opposite sex worked under similar working conditions.

For their individual claims, Plaintiffs fail to make any allegations that are factual and specific as to the elements of either the FPA or the EPA, and instead only make conclusory unsubstantiated allegations, made on information and belief, that HPE paid Plaintiffs less than men. Compl., ¶¶ 77, 93. For this reason, Plaintiffs have failed to sufficiently plead their individual causes of action for violations of the FPA or the EPA and their Complaint should be dismissed.

In particular, Plaintiffs fail to describe their positions adequately with any specificity in terms of the skill, effort and responsibility required for the position. Plaintiff Ross does not describe the requirements for her position and vaguely states that her duties include "developing and supporting

operational strategic models" to support worldwide sales and "overseeing sales operations" which include oversight and support to sales teams and conducting analytics. Compl., ¶¶ 71-72. Plaintiff Rogus also fails to describe the requirements or job duties for the Project Manager position that she alleges she performed. Equally fatal, neither Plaintiff identifies a specific, actual comparator, much less any basis for suggesting that those comparators engaged in equal or substantially similar work in terms of skill, effort and responsibility. Plaintiff Ross merely makes the conclusory statement that a former unidentified "superior" told her that her salary was less than "her male peers who were performing substantially equal or similar work under similar working conditions." Compl., ¶ 74. She fails to identify the superior or even to allege whether the superior was her manager, the company where the superior worked, and the time period that the superior allegedly provided this information. Likewise, Plaintiff Rogus states only that she "agreed to take on" the position held by the prior male team Project Manager, without so much as a single allegation describing how she performed work substantially similar to the prior Project Manager . Compl., ¶ 89. But simply sharing a common title is insufficient. *See, e.g., Carey v. Foley & Lardner LLP*, 577 Fed. App'x 573, 579-80 (6th Cir. 2014) (law partner was not comparable to all partners at firm). In fact, she concedes that her previous role as an Implementation Project Manager *did not change* when she was elevated to the Project Manager position. Compl., ¶ 90. Accordingly, as Plaintiff Rogus pleads her cause of action, the Court cannot assume that she was performing equal or substantially similar work as the prior Project Manager.

Plaintiffs cannot rely on boilerplate allegations or mere legal conclusions to satisfy their burden. *Banawis-Olila v. World Courier Ground, Inc.*, 2016 WL 2957131 (N.D. Cal. May 23, 2016) (granting motion to dismiss where plaintiff alleged her job was "same" as her comparator's and holding those bare allegations did not contain sufficient specific factual allegations comparing skill, effort, and responsibility required for positions. Id. at *3-4.); *see also Werner v. Advance Newhouse P'ship, LLC,* 2013 WL 4487475, at *2 (E.D. Cal. Aug. 19, 2013) (dismissing plaintiff's complaint where she merely pleaded legal conclusion that she "was paid less than similarly situated male employees"). So, too, here, Plaintiffs have alleged nothing more than bare conclusions about doing the same or substantially similar work without a single specific fact as to the skill, effort and responsibility for any position and without identifying a single comparator. Therefore, their individual claims fail.

2. Plaintiffs' Fair Pay And Equal Pay Act Claims Fail On A Class-Wide Basis.

Plaintiffs' class allegations fare no better than their own. Plaintiffs fail to sufficiently allege facts pertaining to the putative class members that encompass multiple different positions throughout California. Compl., ¶ 47. The jobs in the five proposed "Covered Positions" (which effectively encompass every job in California at HPE) are not standardized but in fact include significant variation of education, skill, responsibility, and expectations, and Plaintiffs fail to provide any sufficient allegations to the contrary. Here it is instructive to examine cases under the federal Equal Pay Act.[4] It is not enough, for example, to say all professors prepare lessons, instruct students, and input grades. *See Spencer v. Virginia State Univ*., 2019 WL 1233046 at *3 (4th Cir. Mar. 18, 2019) (affirming lower court granting summary judgment for university on female professor's claim under EPA because she failed to show that two male professors that were paid more were appropriate comparators). Nor is it enough to say all reporters write stories. *See Becker v. Gannett Satellite Information Network, Inc.*, 10 Fed. App'x. 135, 139 (4th Cir. 2001) (Olympic sports reporters' responsibilities "quite different" from one another where they covered different aspects of games, had different levels of output, and one wrote columns while other did not).

Titles and generic descriptions are not enough in any field to do a proper comparison under the EPA. *Carey*, 577 Fed. App'x at 579-80. (law partner was not comparable to all partners at firm); *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 255 (2d Cir. 2014) (dismissing claims because plaintiff failed to plead facts showing that same job held by male and female attorneys required equal skill, effort, and responsibility and determining that plaintiff's "allegations supporting its 'an attorney is an attorney is an attorney' theory do nothing to elucidate the skills or effort demanded of the [defendant]'s many attorneys[.]" *Id.* at 258.); *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1416 (9th Cir. 1988) (determining that employer had not violated EPA even though two jobs at issue both "performed the same function for the company" because tasks and underlying skills to do so "were entirely dissimilar").

[4] "It is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws 'differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute.'" *Green v. Par Pools, Inc.*, 111 Cal. App. 4th 620, 623 (2003). For this purpose the differences between the FPA and EPA are not material.

Likewise, differences in supervisory experience and responsibility also weigh against finding employees to be comparable for purposes of Equal Pay Act claims. *Foco v. Freudenberg NOK-General Partnership*, 892 F.Supp.2d 871, 879 (6th Cir. 2012) (distinguishing plaintiff's jobfrom her alleged male comparators' because, among other things, male Account Managers had supervisory responsibility over employees in plaintiff's job position and plaintiff did not have supervisory responsibility at all).

Here, like the professors, Olympic reporters, lawyers, and other positions at issue in the *Spencer*, *Becker*, *Carey*, and *Foco* cases, the various job classifications within the Covered Positions are not standardized and fungible or at the same level. It is simply not possible to lump together all employees within a general classification or title for purposes of making comparisons across and between jobs within the Covered Positions. Yet, that is precisely what the Complaint attempts to do here. Within each classification there are significant differences in skill, work experience, responsibility, and supervisory roles, not to mention differences in work environment, supervision and location that cannot be glossed over. Notwithstanding Plaintiffs' attempts to paint them as such, the female employees in the multiple classifications are not "interchangeable widgets." *Spencer*, 2019 WL 1233046 at *3.

Thus, as set forth above, Plaintiffs fail to allege sufficient facts to adequately plead their individual EPA and FPA claims, and accordingly, their Labor Code section 1197.5 claim should be dismissed. Likewise, because Plaintiffs have alleged no facts sufficient to show the female employees in the Covered Positions performed "equal" or "substantially similar work" to the male employees or that the Covered Positions are comparable, their class allegations should be dismissed.

3. Plaintiffs' Remaining Claims Are Derivative of the FPA and EPA Claims

Each of Plaintiffs' remaining causes of action, for failure to pay terminating employees all accrued wages, violations of California's Unfair Competition Law, and declaratory relief are all entirely derivative of the first cause of action alleging violations of the Equal Pay Act.[5] *See* Compl., ¶¶ 120 (premising second cause of action on Equal Pay Act allegations); 126-127, 132 (premising third cause of action on Equal Pay Act allegations); 137 (premising fourth cause of action on "the legal rights and duties of the parties set forth above"). Accordingly, absent a viable primary claim, these causes of

[5] The UCL claim also purports to be predicated on violations of the California Fair Employment and Housing Act and Labor Code sections 201-203. Compl., ¶¶ 126, 128-129, 133. However, as described in detail in HPE's accompanying motion to strike, these portions of the UCL claim fail as a matter of law and so should be stricken.

action, too, must fail. *Price v. Starbucks Corp*., 192 Cal.App.4th 1136, 1147 (2011).

D. Plaintiffs' Class Allegations Do Not Meet California's Minimum Pleading Standard

Maintenance of a class action requires "a well-defined community of interest." *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1021 (2012). The "community of interest" requirement includes three factors: (1) predominant common questions of law or fact; (2) class representatives with claims typical of the class; and (3) class representatives who can adequately represent the class. *Id.* at 1021. There must also be a sufficiently defined class. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). Plaintiffs define the class as "[a]ll women employed by Hewlett Packard Enterprise Company in a Covered Position." Compl., ¶ 96. Here, Plaintiffs' Complaint fails to define the putative class properly, allege any facts conceivably showing that questions common to the class predominate over questions affecting individual putative class members, or allege that Plaintiffs would have claims that are typical of the class.[6]

1. Plaintiffs Fail To Allege Facts That Demonstrate The Common Questions Of Law And Fact Predominate

Plaintiffs fail to allege facts to show that questions common to the class exist or that they predominate over questions affecting individual putative class members. Merely posing common questions is not sufficient. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).[7] Rather, the questions must generate common answers capable of class-wide resolution. *Id.*; *Brinker*, 53 Cal. 4th at 1021-22 ("A court must…consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible."). For class purposes, Plaintiffs will need to establish that the legal and factual issues are so common that a single proceeding will be desirable and feasible to make each of these determinations. The Complaint fails this test.

The alleged class seeks to include employees in multiple job classifications, yet it identifies just

[6] "[C]lass certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have valid claims can be identified from those who should not be included in the class." *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1533 n. 8 (2008). Here, the Complaint's class definition essentially includes all women employed by HPE in the State of California. But that is obviously overbroad because it cannot be the case that every woman has a valid claim. The proposed putative class is, therefore, impermissibly broad and so unascertainable.

[7] *Wal-Mart* reviewed class certification under Fed. R. Civ. P. 23. In the absence of California authority, California courts may look to the Federal Rules of Civil Procedure and to the federal cases interpreting them. *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal.App.4th 528, 546, (2008).

two positions in which Plaintiffs Ross and Rogus actually worked while at HPE: Plaintiff Ross was employed as a Director Business Operations (incorrectly identified in the Complaint as "Director of Sales Operations") (Compl. ¶ 68) and Plaintiff Rogus was employed as an Implementation Lead (incorrectly identified in the Complaint as "Implementation Project Manager"). (Compl. ¶ 79). Even on the most basic level for the myriad different positions across different departments and locations encompassed by the putative class, Plaintiffs provide no common approach to determine who is performing equal or substantially similar work in terms of the skill, effort and responsibility required to perform the work, nor to determine whether such comparators were working under similar working conditions. There is no allegation, for example, as to how pay practices or working conditions in any of the so-called Covered Positions impact employees in any of the other Covered Positions. Nor is there any allegation as to how Plaintiffs' experience in sales or operations can be applied to the multiple other classifications.

Moreover, with regard to common questions which would bring the class together for determining ultimate liability and relief issues, Plaintiffs simply state that "the common questions of law and fact predominate over any questions affecting only individual members of the Class with respect to the liability and relief issues, . . ." – followed by a laundry list of purported common questions asking whether HPE has systemic policies and/or practices of paying women less than men. Compl., ¶ 101.a. However, commonality requires more than merely asking whether the defendant violated the law. *Wal-Mart*, 131 S. Ct. at 2551. What matters instead is whether a question will generate a common answer capable of resolving class-wide liability in one stroke. *Id*. The Complaint offers no facts suggesting that commonality is anything more than mere speculation. *See Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2007 WL 707475 at *5 (N.D. Cal. Oct. 12, 2007) (plaintiff must plead "substantial allegations that putative class members were together the victims of a single decision, policy, or plan").

Plaintiffs assert that HPE has common companywide policies and practices that applied to all HPE employees in the Covered Positions in California, male and female. Compl., ¶ 7. They then conclusively allege that "[t]hese policies and practices, however facially uniform, do not result in equal pay for women and men, resulting in unequal compensation between the sexes." *Id.* Yet, there is no factual allegation as to how a facially uniform policy produces disparate results. Plaintiffs cite to a

general (HPIB, not HPE) Remuneration Policy that provides no detail as to pay determinations. Compl., ¶¶ 18-19. But that policy as a whole has no application to HPE employees. Regardless, evidence of a common lawful policy by itself cannot sustain certification; rather, there must be common evidence that leads to liability, which necessarily will require individualized inquiries. *See Brinker*, 53 Cal. 4th at 1051 (evidence of a lawful policy prohibiting off-the-clock work by itself insufficient to support class certification); *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341, 1358, 1365 (2012) (Wet Seal's facially lawful dress code and travel expense reimbursement policies necessitated individualized inquiries, thus precluding class certification). Plaintiffs fail to identify whether female employees were paid less in certain positions because of a common policy of HPE or because of specific policies or practices from individual managers.

Plaintiffs do allege that females in the Covered Positions were "channeled" into lower paying salary bands or levels than men. Compl., ¶¶ 45, 65. But this bold allegation rests on nothing more than their supposed "information and belief." Yet, the Complaint is devoid of any factual information about so-called channeling. Plaintiffs only assert that "women" were channeled into lower paying positions, such as Operations jobs, because of HPE's stereotypes. Compl. ¶ 45. Plaintiffs provide no factual details about the policies or practices that resulted in the alleged channeling of either the named Plaintiffs or the putative class members. Without more, such vague conclusory statements cannot save their Complaint. *See Schneider v. Space Systems/Loral, Inc.*, 2012 U.S. Dist. LEXIS 19001, at *6 (N.D. Cal. Feb. 14, 2012) (dismissing complaint because general allegations of a overtime policy without allegations of how it was applied or enforced was ambiguous and conclusory). At bottom, Plaintiffs' beliefs are no more than hunches or wishful thinking and so should be disregarded. *Doe*, 42 Cal. 4th at 551 n.5.

To the extent Plaintiffs allege that female employees' prior salary history was used to unlawfully determine their current salary, Plaintiffs fail to make any specific allegations except upon information and belief that HPE even asked for female employees' prior salary. Compl., ¶ 43. As Plaintiffs again make these allegations only on information and belief, these statements should not be considered. The only specific allegation made by Plaintiffs is that an unknown person at "H-P" asked Plaintiff Rogus about her prior compensation before she joined H-P in April 2013, which is more than two years before she started working for HPE (and before HPE even existed and when such an inquiry would have been

perfectly lawful). Compl., ¶¶ 16, 78, 86. There is no allegation that HPE somehow relied on this information in setting her salary. The Complaint offers no specificity whatsoever for the purpose of showing a common applicability upon which a class could be certified.

Plaintiffs' other allegations regarding supposed HPE statistics and pay practices do nothing to advance their claims. For instance, Plaintiffs aver that statistics from HPE's EEO report show that "women are not proportionally represented at HPE." Compl., ¶ 3. They also claim that HPE (in contrast with Salesforce) "does not publically [*sic*] identify specific measures taken to address the gender pay gap." Compl., ¶ 5.[8] Similarly, Plaintiffs' conclusory allegations that a supposed "stack rank" or bell curve somehow causes a gender pay disparity are pure conjecture and contain no supporting facts about any female employee's performance ranking or pay. Compl. ¶ 54. Moreover, these allegations draw an incorrect conclusion by alleging in conclusory terms that workforce representation perpetuates pay disparities without any allegations relating to the proportion of women that receive high, average or low ratings. And they contend that "HPE does not equate promotions with more pay, which further perpetuates and widens the gender pay gap because HPE is able to point to a promotion as a mechanism for equality…." Compl., ¶ 57. Notably absent from these assertions are ***any*** facts indicating how these allegations pertain to Plaintiffs specifically, let alone how such allegations establish the crux of Plaintiffs' claim in this case—*i.e.*, that HPE paid them, or any other putative class member, less than male employees who worked under similar working conditions and performed substantially similar work.

Accordingly, Plaintiffs' class allegations fail to allege common questions supported by facts from which it plausibly might be concluded that Plaintiffs could proceed on behalf of the entire class. *Ovieda v. Sodexo Operations, LLC*, 2012 WL 1627237 (C.D. Cal. May 7, 2012) (plaintiff failed to allege any facts that "[d]efendants had any statewide policies or practices giving rise to [p]laintiff's causes of action such that common questions of fact and/or law could provide class-wide answers and would be susceptible to class-wide proof").

[8] Plaintiffs also lump together as supposed fact excerpts from websites, articles and online reviews, in an attempt to portray HPE as "leaving employees in the dark about what male counterparts may make and at what level of the pay grade women are as compared to men." *Id.* Aside from lacking any specific fact about HPE, this allegation is irrelevant to any alleged pay disparity.

2. Plaintiffs Fail to Allege Facts That Show Their Claims Are Typical

Plaintiffs fail to plead any facts to support the second community of interest factor – that their claims are typical of the class. "The test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). Plaintiffs do not allege facts establishing that they suffered the same injury from the same conduct as putative class members. Instead, Plaintiffs assert conclusory allegations that "[e]ach Plaintiff was or is an employee of HPE in a Covered Position . . . and was subject to the same compensation policies and practice." Compl., ¶ 101.b.

Plaintiffs fail to allege specific facts to suggest that any other putative class member, much less those in other positions or at other locations who were employed by HPE, suffered similar injuries. Plaintiffs first fail to plead with sufficient specificity as to their own employment history, and then fail to plead a single fact showing how their experiences are in any way representative of the experiences of the putative class members holding the same or different positions at HPE.

Plaintiffs' lack of specificity about their own job experiences cannot be ignored because they are directly relevant to whether their claims are typical of the class. Plaintiff Ross alleges that she was told by a former unidentified superior that her salary was less than her male "peers" (without identifying who those "peers" were) who performed substantially equal or similar work under similar working conditions; however, she does not state when she was told this information, whether she was working at H-P or HPE at the time, or any information about the alleged comparators or the work they performed. Compl., ¶ 74. She further claims that her compensation in 2017 was three percent less than it was in 2014, but fails to explain how this is relevant since she worked at a different company, H-P, in 2014. Compl., ¶ 75. She also alleges that a superior told her when she left HPE in January 2018 that she was underpaid compared to male peers, but does not state any specific information about her job position or the positions to which she was allegedly being compared at the time. Compl., ¶ 76. Finally, she does not make any allegation that she was asked about her prior compensation when she was hired for either H-P or HPE.

Plaintiff Rogus claims she was asked about her prior compensation before she was first hired by H-P, but does not make any allegation that she was asked about her prior compensation when she started working for HPE. Compl., ¶ 86. She further claims that she was given a two percent performance-related pay increase after her prior male Project Manager died in September 2014 (before HPE even existed), where the Project Manager was paid 14.27 percent more than she, but does not explain how she was similarly qualified as the previous male employee, whether she actually performed the same functions that the prior Project Manager performed, or anything about how the 2014 pay determinations—presumably made by H-P—in some way indicate a disparity in pay at HPE. Compl., ¶¶ 86-90.

Beyond their own deficiencies, nowhere in Plaintiffs' allegations do they allege specific facts that any other female employee across the vast set of positions had similar experiences as theirs. Plaintiff Ross only makes the conclusory allegation, again improperly made upon her unsupported belief, that she was paid less than men when she worked at HPE—without reference to any putative class members. Compl., ¶ 77. Plaintiff Rogus makes similar conclusory statements upon information and belief that more men than women held PM positions and that male PMs were paid more than female PMs, without explaining how these allegations would extend to the rest of the putative class members. Compl., ¶¶ 92-93. Accordingly, Plaintiffs' Complaint fails to plead facts to support an essential element of a class action, that their claims are typical of the class.

IV. CONCLUSION

For the foregoing reasons, HPE respectfully requests that its demurrer be sustained and that the Complaint and its class allegations be dismissed with prejudice.

DATED: April 2, 2019

SEYFARTH SHAW LLP

By: _____
Richard B. Lapp
Attorneys for Defendant
HEWLETT PACKARD ENTERPRISE COMPANY