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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.: 18CV337830

Assigned for all purposes to the Honorable Brian C. Walsh

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO CLASS ACTION COMPLAINT

Date: June 28, 2019
Time: 9:00 AM
Department: 1

Complaint Filed: November 8, 2018
Trial Date: TBD

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I. INTRODUCTION

Plaintiffs are women who worked for Defendant Hewlett Packard Enterprise Company ("HPE") and allege that HPE violated California's Equal Pay Act by systematically paying women less than men for equal and similar work on a class-wide basis.

Notably, HPE does not actually dispute that it pays women less than men in California. Rather, it argues that Plaintiffs have not alleged gender pay inequality with the laser-like precision that companies like HPE often argue is required in federal court and cite numerous federal cases. As discussed below, HPE's demurrer misses the mark. California's Equal Pay Act only requires Plaintiff to plead that the employer failed to pay women the same as men for similar work (after January 1, 2016) or substantially equal work (before then). The remaining claims based on the Labor Code and unlawful-prong of the UCL are derived from the same allegations.

Plaintiffs easily satisfy the pleading requirements. Unlike pleading a complex antitrust conspiracy, satisfying an Equal Pay Act ("EPA") claim is not and should not be particularly difficult. Indeed, the EPA has been amended in recent years to make it easier for workers to plead claims and more difficult for employers to justify unequal pay based on sex, race, or ethnicity. First, Plaintiffs are not required to negate any affirmative defenses that HPE believes it may have. Rather, the proper medium for asserting any of HPE's affirmative defenses would have been to answer the complaint and move for summary judgment. Second, a complaint is not required to include all, every, or perfect allegations of a claim that a plaintiff will eventually be required to prove. Plaintiffs' Complaint alleges sufficient facts to state the causes of action alleged. Accordingly, HPE's demurrer should be overruled.

II. RELEVANT FACTUAL BACKGROUND

This action arises from HPE's failure to pay women—including Plaintiffs—the same as men for substantially equal or similar work under similar working conditions, in violation of the Equal Pay Act, Labor Code section 1197.5(a). Plaintiffs and the putative class are women who worked at HPE in California in jobs within one of five categories during the proposed class period and were paid less than male employees "for substantially similar work (through December 31, 2015) or similar work (January 1, 2016 to present)." Compl. ¶¶ 101b; *see also id.* ¶¶ 6, 8, 10, 11, 96.

The details of HPE's job levels and compensation structure, including salary bands, are uncertain at this time due to HPE's lack of transparency (*id.* ¶¶ 5, n.5, 57), but HPE organizes employees by job levels and ladders, and sets compensation ranges on a company-wide basis. *Id.* ¶¶ 21-24, 42. HPE's Global Base Pay Policy, which is included in Exhibit A to the Complaint, confirms, among other things, the existence of assigned salary ranges ("[s]alary ranges are assigned to each position in each country to define a range of pay which is appropriate and market competitive"), and the universal application of its compensation policy ("[t]his policy applies to all regular HPE employees worldwide with the exception of Section 16 Officers.)" Compl., Ex. A at 20. (HPE also moves to strike Exhibit A based on "relevancy", which Plaintiffs address in their opposition to that motion.) "HPE's pay policies mask a wide pay range within job codes, which enables HPE to place female and male employees in the same job code but pay the female employees much less." *Id.* ¶ 58.

Through these pay policies and other practices, HPE has paid and continues to pay Plaintiffs and other women in Covered Positions systematically lower compensation than HPE has paid and continues to pay men performing substantially equal or substantially similar work under similar working conditions. *Id.* ¶ 35. Through its pay policies, HPE acknowledges that persons in the same job position and pay grade or job level perform substantially equal or substantially similar work. *Id.* ¶ 37. HPE's pay discrimination manifests in multiple ways, including paying Plaintiffs and other women employees less than similarly situated men and advancing Plaintiffs and other women employees at a lower rate than men who perform equal or substantially similar work. *Id.* ¶ 8.

Plaintiffs assert causes of action for: (1) Violation of the California Equal Pay Act; (2) Violation of Labor Code §§ 201-203; (3) Violation of Business and Professions Code § 17200 *et seq.*; and (4) declaratory judgment. *Id.* ¶¶ 104–38.

III. LEGAL STANDARD

The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action—not whether they are true. *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981). Thus, a court must "treat the demurrer as admitting all material facts." *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 866 (2012) (quotation omitted). A demurrer based on

affirmative defenses may only be sustained "where the face of the complaint discloses that the action is necessarily barred by the defense." *Casterson v. Superior Court*, 101 Cal. App. 4th 177, 183 (2002).

A pleading is adequate so long as it contains enough facts to apprise the defendant of the factual basis for the plaintiff's claim. *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1469-70 (2006). The question raised by a demurrer is simply whether a complaint alleges sufficient facts to state a cause of action; a demurrer is not concerned with whether plaintiffs have evidence to support their allegations. *Gervase v. Super. Ct.*, 31 Cal. App. 4th 1218, 1224 (1991).

A demurrer to class allegations must be overruled unless "it is clear there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members." *Gutierrez v. Calif. Commerce Club, Inc.*, 187 Cal. App. 4th 969, 975 (2010) (internal citation omitted). "In order to effect this judicial policy [of allowing potential class action plaintiffs to have their action measured on its merits], the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." *Beckstead v. Superior Court*, 21 Cal. App. 3d 780, 783 (1971).

Lastly, a court must provide leave to amend a complaint so long as "there is a reasonable possibility that the defect can be cured by amendment." Failure to permit such amendment is an abuse of discretion. *Zelig v. Cty. of L.A.*, 27 Cal. 4th 1112, 1126 (2002).

IV. ARGUMENT

A. Plaintiffs' Assertions on Information and Belief are Sufficiently Pleaded

Plaintiffs' make only fifteen assertions "on information and belief" in a 138-paragraph complaint. This is hardly unusual and more than sufficient to meet the pleading rules, including that Plaintiffs conducted a reasonable inquiry and have evidentiary support or would have it after discovery.

California has long allowed pleading on "information and belief". *See Campbell-Kawannanakoa v. Campbell*, 152 Cal. 201, 206 (1907) (clarifying that "[t]here can be no question that . . . allegations may properly be based on information and belief" when they involve matters that "are peculiarly within the knowledge of defendants."). Decades after *Campbell*, the California Supreme Court again confirmed this rule. "Plaintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are

true." *Pridonoff v. Balokovich*, 36 Cal. 2d 788, 792 (1951).

Citing *Pridonoff*, the California Supreme Court not only reaffirmed the rule in 2007, it noted too that the pleading standard is appropriately more relaxed when a "wrongdoing employer" knows of or has concealed evidence. *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 550 (2007). *See also, e.g.*, *J.W. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 29 Cal. App. 5th 1142, 1166 (2018) (citing *Pridonoff*); *Pich v. Lightbourne*, 221 Cal. App. 4th 480, 495 (2013) (citing *Doe* and *Pridonoff*).

Information-and-belief pleading is also codified in California's civil rules. In relevant part, the applicable rule provides that in filing a pleading with the court, an attorney is certifying that to the best of the person's knowledge, *information, and belief*, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

> (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Cal. Code Civ. P. § 128.7(b) (emphasis added). Plaintiffs have more than satisfied this rule.

1. Plaintiffs made a reasonable inquiry under the circumstances regarding the pleaded matters.

Plaintiffs' inquiry was reasonable because the assertions in question are based on information peculiarly within HPE's knowledge. It is well established that when a plaintiff lacks direct knowledge of matters peculiarly within the knowledge of the adverse party, she may plead what she believes to be true from information or hearsay she has received. *See, e.g.*, *Dey v. Cont'l Cent. Credit*, 170 Cal. App. 4th 721, 725 n.1 (2008); *Boeseke v. Boeseke*, 255 Cal. App. 2d 848, 852 (1967) (citing "rule that facts peculiarly within the knowledge of an adversary may be pleaded on information or belief"); *Schessler v. Keck*, 125 Cal. App. 2d 827, 835 (1954) (reversing and ordering demurrers overruled as to allegations "patently within the superior knowledge of defendants"); *Lewis v. Beeks*, 88 Cal. App. 2d 511, 521 (1948) (less certainty required in pleading "matters which are peculiarly within the knowledge of the defendant, and as to which the plaintiff can learn only from statements made to him by others"); c*f.*

Okun v. Super. Ct., 29 Cal. 3d 442 (1981) (opining that "[l]ess particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense."); *Wysinger v. Auto. Club of S. California*, 157 Cal. App. 4th 413, 425 (2007) (observing that employees do not have access to an employer's internal information).

Here, Plaintiffs performed a reasonable inquiry. The Complaint addresses HPE's total lack of transparency. *See* Compl. ¶ 5 ("lack of transparency") ¶ 5 n.5 ("[e]verything is secret"). It should come as no surprise that Plaintiffs had to rely on information and belief given HPE's tight control of information. Four of the fifteen allegations involve information about Plaintiffs' pay and job authority and information they obtained from others or from company records—all of which is "peculiarly within" HPE's knowledge. *Id.* ¶¶ 77, 85, 92–93. Indeed, because Plaintiffs indicated just how they came to believe these allegations, they satisfy Rule 128.7(b). *See Babcock v. Omansky*, 31 Cal. App. 3d 625, 631 (1973) (finding allegations on information and belief sufficiently pleaded because "the matters alleged were within defendants' knowledge" and the supporting facts were "set forth in the pleading.").

A reasonable investigation also supports the remaining eleven information-and-belief allegations. A cited entry from the Glassdoor website supports Paragraph 21, asserting that HPE does not publicly disclose its pay-grade or job-level structure. Compl. ¶ 5 n.5 ("Pay grades are a joke . . . ."). Counsel's research of public information including published court decisions easily supports Paragraphs 22 and 23, asserting that HPE provides wide ranges of salaries that employees may receive at a particular job level and identifying employees as having specific job levels. *See, e.g.*, *Conroy v. Hewlett-Packard Co.*, No. 3:14-CV-01580-AC, 2016 WL 1276552, at *8 (D. Or. Mar. 31, 2016) (providing examples in age-discrimination lawsuit).[1] Paragraph 24 is supported by Exhibit A to Plaintiffs' Complaint and by a complaint recently filed against HPE in Kentucky. *See Allen v. HP Enter.*

[1] *See also* https://www.paysa.com/salaries/hewlett%E2%80%94packard--senior-director--palo-alto,-ca (reporting in May 2018 that a Senior Director at Hewlett-Packard in Palo Alto, CA earned an average of $280,416, ranging from $220,704 at the 25th percentile to $327,189 at the 75th percentile, with employees in the top 10% earning more than $390,613). Although *Conroy* and the Paysa data involved HP, it is a reasonable inference and Plaintiffs suggest it would be confirmed in discovery that HPE has a similar structure. *See* https://careers.hpe.com/job/Hewlett-Packard-Enterprise-Houston-Texas/59478972 (example from HPE's careers web site).

Servs., LLC, No. 216CV147WOBCJS, 2018 WL 4289383, at *2 (E.D. Ky. Sept. 7, 2018) (explaining HPE's structure as to job titles, job families, job categories, salary grades, and pay bands). Paragraph 34 states that HPE has not published a pay-gap audit or other analysis regarding its employees in California or the United States. Through their investigation, Plaintiffs confirmed this; HPE has not indicated otherwise. Paragraph 58 has the same source as Paragraph 24.

2. Plaintiffs meet the remaining, relevant conditions of rule 128.7(B).

Plaintiffs easily satisfy the rule's other requirements. First, HPE does not contend the fifteen paragraphs in question are presented for an improper purpose, *see* Cal. Code Civ. P. § 128.7(b)(1); Def.'s Br. at 4–6. Second, the allegations support claims under the California Equal Pay Act. Plaintiffs' other causes of action are similarly derived from their experience of being paid less than men on the basis of gender. *See* Cal. Code Civ. P. § 128.7(b)(2); Compl. ¶¶ 20–25. Third, Plaintiffs' allegations all have evidentiary support or will have it after discovery. Cal. Code Civ. P. §128.7(b)(3).[2] As noted above, four of the fifteen allegations involve information about Plaintiffs themselves, which they obtained from other persons or from company records. The remaining allegations' sources are cited in or are apparent from the Complaint, also as explained above. *See Babcock*, 31 Cal. App. 3d at 631. Plaintiffs had information on which they based each of their assertions and thus satisfy Rule 128.7(b)(3).

HPE's cited authorities do not support HPE's arguments. HPE cherry-picks *Doe*, omitting that the California Supreme Court also made clear that a plaintiff may allege matters not within his personal knowledge "if he has information leading him to believe that the allegations are true." *Doe*, 42 Cal. 4th at 550 (citing *Pridonoff*, 36 Cal. 2d at 792). *Doe* and *Pridonoff* essentially caution against boilerplate allegations, an argument not even advanced by HPE because the allegations are, in fact, far from boilerplate. Although they will be fleshed out further in discovery, they are directly informed by Plaintiffs' experiences and information they have received.

HPE's reliance on *Bockrath* provides HPE no help either. There, the court was concerned about

[2] Although not expressly noted in Plaintiffs' Complaint, Plaintiffs believe the assertions made on information and belief are likely to have evidentiary support after reasonable opportunity for further investigation and discovery. Plaintiffs can easily amend their Complaint to make this clear, and hereby offer to do so. *See* Cal. Code Civ. P. § 128.7(b)(3) (containing discovery-related rule language); *cf.* Cal. Code Civ. P. § 128.7(c)(1) (providing safe-harbor period for parties to correct documents in question).

a plaintiff's prolix complaint against 55 defendants, speculating that contact with or exposure to chemicals in many common products led to the chemicals causing his cancer. *See Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 77–78 (1999). The court recognized that plaintiffs may plead "in a conclusory fashion" if they have limited knowledge of the precise cause of injury in a product-liability case, but plaintiff had not met this standard. 21 Cal. 4th at 80.[3]

Here, Plaintiffs' allegations are not based on a hunch, are not speculative, and are far from "wishful thinking." *See Bockrath*, 21 Cal. 4th at 82. Plaintiffs indisputably worked for HPE, they have personal knowledge about the work that they and others perform, they have personal experience with HPE's culture and lack of transparency in regard to pay decisions, and they received information that men made more money for the same jobs. *See* Compl. ¶¶ 67–94. Plaintiffs and their counsel also researched HPE and its predecessor. Plaintiffs have done exactly what the drafters intended in Rule 128.7(b): assert what they know directly and what they believe from other sources.[4]

For all these reasons, the paragraphs containing information-and-belief language stated a claim for relief and should not be dismissed.

B. Plaintiffs' Labor Code § 1197.5 Claims Are Sufficiently Pleaded

Plaintiffs' EPA claims are proper and should not be dismissed. HPE ignores Plaintiffs' allegations supporting the discrimination "pattern or practice" component of the case where the focus is on whether the employer had a policy or practice of discrimination rather than whether any individual decision or conduct was discriminatory. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (in pattern and practice case, plaintiffs must ultimately prove at trial that "discrimination was the company's standard operating procedure."). Because Plaintiffs have alleged that HPE "has common,

[3] The language cited from *Bockrath* by HPE is also inapposite here because the California Supreme Court was specifically discussing the "actual belief standard" that applies in a toxic-tort case, not Rule 128.7 or the pleading standard more generally. *See Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*, 129 Cal. App. 4th 577, 586 (2004) (observing that *Bockrath* "set out the rules for pleading causation in 'a complaint alleging harmful long-term exposure to multiple toxins.'").

[4] HPE suggests that because some of the information-or-belief assertions cite unnamed sources or unnamed comparators, the Court should ignore the assertions. But this conflates the pleading standard—which HPE has wrong, as already discussed above—and the rules for information-or-belief pleading. Moreover, such a specific level of detail is not required to sustain a claim at the pleading stage. "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A.*, 53 Cal. 4th at 872. *See also Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.*, 132 Cal. App. 4th 1076, 1099 (2005) (stating that "[i]t has been consistently held that a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action.") (internal quotation marks and citations omitted).

companywide policies and practices for setting compensation that applied to all HPE employees in the Covered Positions in California" (Compl. ¶ 7) and that these policies and practices result in unequal compensation and pay discrimination to the disadvantage of women, Plaintiffs' claims for violation of the Equal Pay Act are sufficiently pled under both iterations of the statute (pre- and post-2016). *See id*. ¶¶ 7–9, 17–20, 35–36.

1. Plaintiffs do not assert "individual" claims.

This case was filed as a class action and, while they could have alleged claims individually, Plaintiffs have alleged class claims only. Compl. ¶¶ 6, 96. Accordingly, Plaintiffs do not have "individual causes of action" (Def.'s Br. at 6), they assert class claims.[5]

This is not a distinction without a difference. Asserting class claims allows Plaintiffs to pursue relief by alleging a pattern or practice. *See, e.g. Gutierrez*, 187 Cal. 4th at 972 ("As long as the lead plaintiff 'alleges institutional practices ... that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis,' no more is required at the pleading stage.") (citations omitted). Indeed, "a class action is, by definition, a pattern or practice claim. 'Pattern-or-practice suits, by their very nature, involve claims of classwide discrimination. Such claims involve an allegation that the defendant's actions constitute a pattern of conduct in which the defendant intentionally has discriminated against the plaintiff's protected class.'" *Alch v. Super. Ct.*, 122 Cal. App. 4th 339, 379 (2004) (citing 1 Lindemann & Grossman, Emp't Discrimination Law (3d ed.1996) p. 44, fn. 168.)

HPE contends that Plaintiffs' "individual" allegations are conclusory and unsubstantiated, claiming that Plaintiffs failed to describe their positions with any specificity in terms of the skill, effort, and responsibility required for the position. In *Alch*, the court rejected the defendant's similar argument that "[a]t the pleading stage … each writer must allege "facts to support that each was over 40, each sought an available writing job with each Employer Defendant for which he or she was qualified, and each was refused." *Alch,* 122 Cal. App. 4th at 378. Here, as in *Alch*, Plaintiffs are not required to "plead facts supporting an individual prima facie case of discriminatory [pay practices] in order to survive

[5] Although Plaintiffs' class claims could be converted to individual claims if the Court grants HPE's Motion to Strike or declines to certify a class or should the Court upon ruling on Plaintiffs' eventual class certification motion, these hypotheticals are irrelevant to determination of HPE's demurrer.

demurrer." *Id.*[6]

Tellingly, the cases cited by HPE all involved individual, non-class cases. *See Carey v. Foley & Lardner LLP*, 577 Fed. App'x 573 (6th Cir. 2014) (affirming order granting defendant's summary judgment motion against individual plaintiff), *Banawis-Olila v. World Courier Ground, Inc.*, No. 16-CV-0982-PJH, 2016 WL 2957131 (N.D. Cal. May 23, 2016) (unpublished order granting defendants' motion to dismiss individual plaintiff's causes of action where plaintiff failed to plead elements of Equal Pay Act in effect during employment), *Werner v. Advance Newhouse P'ship LLC*, No. 1:13–cv–01259–LJO–JLT, 2013 WL 4487475 (E.D. Cal. Aug. 19, 2013) (same).[7] Individual plaintiffs cannot assert a pattern and practice claim; so they *must* allege the specific elements of the claim. *See Schuler v. PricewaterhouseCoopers, LLP*, 739 F. Supp. 2d 1, 6 n.2 (D.D.C. 2010) ("Courts in every other Circuit that have touched on this issue have indicated that an individual plaintiff cannot maintain a pattern and practice claim.") (collecting cases).

2. Plaintiffs have alleged detailed facts supporting their claims.

Plaintiffs' claims are not unsupported. Plaintiffs alleged that they worked for HPE in California, and that they were paid less for performing substantially equal or similar work to that of men. Compl. ¶¶ 10–11. Plaintiffs pled details regarding the nature of their jobs, the basis for believing they were paid less for substantially similar or equal work, and the basis for believing that HPE's discriminatory pay practice extends beyond themselves into the five categories of jobs asserted in this case. *Id.* ¶¶ 9, 17-20, 42–45, 67–94. They provided their educational and employment background. *Id.* ¶¶ 67–70, 80–87.

a. Plaintiff Ross

Plaintiff Ross alleged that, in her role as Director of Sales Operations[8] she performed at least the following work: "developing and supporting operational strategic models to support success in

[6] The court in *Alch* further states, "No such rule of law exists. On the contrary, nothing in FEHA prohibits classwide claims of systemic discrimination, which is the functional equivalent of a 'pattern or practice' claim. Moreover, the writers have properly pled such a claim, and are not required to plead individual prima facie cases of discrimination under the *McDonnell Douglas* model." *Id. See also* Employment Discrimination Law, 5th Ed. Vol. I at 2-116 ("In class disparate treatment cases the plaintiff is not required to produce direct or comparative evidence of discrimination pertaining to each member of the class for whom relief is sought. Instead, the plaintiff generally relics primarily upon statistical evidence to create an inference of classwide discrimination.").

[7] Using these cases for support of its arguments is flawed in other respects. *Carey* was decided at the summary judgment stage and *Banawis-Olila* and *Werner* were decided based on the higher federal *Twombly-Iqbal* "plausibility" standard. Additionally, *Werner* considered only the federal Equal Pay Act.

[8] HPE has stated that Plaintiff Ross' position was actually Director of Business Operations. Plaintiff does not dispute this title but refers to her position as Director of Sales Operations for purposes of this briefing and synonymity with the Complaint's allegations.

worldwide channel sales of HPE products" (*id.* ¶ 71); "responsible for overseeing sales operations, including providing oversight of and support to sales teams, and conducting sales and performance analytics, financial and otherwise." *Id.* ¶ 73. It is further alleged that "Plaintiff Ross's salary was less than her male peers who were performing substantially equal or similar work under similar working conditions" (*id.* ¶ 74) and that "she was underpaid compared to male peers." *Id.* ¶ 76.

b. Plaintiff Rogus

Plaintiff Rogus alleged that, in her role as Implementation Project Manager, she was tasked with "implementing the RTLS, which involved keeping track of medical equipment in the government-run Veterans Affairs healthcare system." *Id.* ¶ 83. She alleged that each team had a project manager and implementation project manager, that project managers had more supervisory authority than implementation project managers, that more men than women were in project manager positions, and that male project managers were paid more than female project managers. *Id.* ¶¶ 84–85, 92–93. She further alleged that the male project manager she later replaced was paid 14.27 percent more per hour than she. *Id.* ¶¶ 87, 91.

These allegations, along with allegations of HPE's pay policies, job architecture, and salary structure that perpetuate paying women in Covered Positions less than men even when men and women are in the same job level or salary band, more than apprise HPE of the factual basis for Plaintiffs' Labor Code § 1197.5 claims. *See McKell*, 142 Cal. App. 4th at 1469–70. HPE is on notice that Plaintiff Ross, when compared to her male peers (by definition, individuals who perform similar or equal job duties), was paid less, and that Plaintiff Rogus, when she took over the job of a male project manager, was paid less than he was. These allegations are sufficient to survive demurrer because Plaintiffs are not, at this stage, required to prove an actual violation of the Equal Pay Act beyond doubt. Instead, Plaintiffs are required only to allege facts that support that conclusion. *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1152 (2000) ("[T]o constitute a cause of action, the rule is, that if upon a consideration of all the facts stated it appears that the plaintiff is entitled to any relief...the complaint will be held good, although the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged…plaintiff need only plead facts showing that he may be entitled to some relief").

C. HPE's Demurrer Should Be Denied as to the Class Claims Because It Is Premature and the Claims Are Sufficiently Pleaded

HPE's attack on the commonality and typicality of Plaintiffs' allegations by demurrer is premature, and the allegations are sufficiently pleaded.

1. HPE's demurrer to the class claims is premature.

Judicial policy in California has long discouraged trial courts from determining class sufficiency at the pleading stage, instead directing that this issue should be determined on a later motion for class certification. *Gutierrez*, 187 Cal. App. 4th at 976. To effect this policy, "the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." *Id.* (quoting *Tarkington v. California Unemp't Ins. Appeals Bd.*, 172 Cal. App. 4th 1494, 1510 (2009)).

As discussed above, a demurrer to class allegations is generally improper and may be sustained without leave to amend only if it is clear "'there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact.'" *Gutierrez,* 187 Cal. App. 4th at 975 (2010) (citing *Blakemore v. Super. Ct.*, 129 Cal. App. 4th 36, 53 (2005)).[9]

Here, because it would be premature to decide Plaintiffs' class allegations at the demurrer stage, the Court need not and should not reach HPE's specific arguments regarding commonality and typicality. *See, e.g.*, *Tarkington*, 172 Cal. App. 4th at 1512 (declining to reach defendant's arguments regarding class suitability, because trial court acted prematurely in sustaining demurrer). Even if the Court reaches HPE's arguments, none warrant dismissal at this stage.

2. The Class Claims are sufficiently pleaded.

a. There is a reasonable probability that plaintiffs will establish commonality.

"[A]ll that is normally required for a complaint to survive demurrers to the propriety of class litigation is that the complaint allege facts that tend to show: (1) an ascertainable class of plaintiffs, and

[9] *See also, e.g.*, *Beckstead v. Super. Ct.*, 21 Cal. App. 3d 780, 782 (1971) ("Such a drastic step [as demurrer] is unwarranted, and ordinarily constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment."); *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 813 (1971) ("For the purpose of determining if the demurrers should have been overruled, it is sufficient that there is a reasonable possibility plaintiffs can establish a prima facie community of interest among the class members . . . . Plaintiffs' inability to do so, if that be the ultimate result, can be determined at a later stage of the proceeding."). "It would be improper to allow Defendants to slip through the backdoor what is essentially an opposition to a motion for class certification before Plaintiffs have made such a motion and when discovery on the issue is still on-going." *In re BCBG Overtime Cases*, 163 Cal. App. 4th 1293, 1300 (2008).

(2) questions of law and fact which are common to the class." *Prince v. CLS Transp., Inc.*, 118 Cal. App. 4th 1320, 1326 (2004); *see also Blakemore*, 129 Cal. App. 4th at 52–53.

Here, the Complaint meets these requirements. First, it alleges facts showing an ascertainable class of plaintiffs and questions of law and fact that are common to the class. As to ascertainability, the Complaint pleads and alleges facts supporting a class consisting of all women employed by HPE in California during the proposed class period who have held or currently hold a position falling within one of five categories. Compl. ¶¶ 6, 96, 100. Absent class members will know that they are class members based on the objective criteria contained in the class definition.

Plaintiffs have also pleaded questions of law and fact common to the class. Plaintiffs Ross and Rogus have both raised common questions of fact as to whether, because they are women, they were paid less than male colleagues performing the same or substantially similar work. Compl. ¶¶ 67–94. Plaintiffs' Complaint further raises questions of fact regarding whether HPE is systematically paying female employees less than male colleagues performing the same or substantially similar work. *Id.* ¶¶ 2, 6–9, 35–66. These claims will turn on common proof: Either HPE is systematically underpaying women for the same work as men, or it is not; either HPE has policies that cause women to be underpaid in this matter, or it does not. And as noted above, Plaintiffs' pleaded facts must be taken as true. *See Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981) (stating traditional rule that "in testing a pleading against a demurrer the facts alleged … are deemed to be true, *however improbable they may be*.") (emphasis added). Plaintiffs' factual allegations, meanwhile, give rise in turn to common questions of law regarding whether HPE is violating the California Equal Pay Act, the California Labor Code, and the Unfair Competition Law, and whether they are entitled to declaratory relief. *Id.* ¶¶ 95–138.

HPE argues that concerns about commonality justify demurrer on Plaintiffs' class claims, but its arguments are premature and its cited authorities inapposite. Def.'s Br. at 10–13. Several of HPE's cited cases were decided on motions for class certification or similar motions, not demurrers.[10]

[10] *See Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-0715SC, 2007 WL 707475 (N.D. Cal. Mar. 6, 2007) (granting in part, denying in part plaintiffs' motion for conditional certification of Fair Labor Standards Act collective action); *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 273 P.3d 513 (2012) (affirming in part, reversing in part orders on motion for class certification); *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341 (2012) (affirming denial of motion for class certification); *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524 (2008) (reversing order denying motion for class

To Plaintiffs' knowledge, there is no precedential case law interpreting the EPA since its recent amendments. *Schneider* and *Ovieda*, meanwhile, are unpublished decisions on motions to dismiss in federal court under the *Twombly-Iqbal* "plausibility" standard, which does not apply here. *See Ovieda v. Sodexo Operations, LLC*, No. CV 12-1750-GHK SSX, 2012 WL 1627237, *1 (C.D. Cal. May 7, 2012); *Schneider v. Space Sys./Loral, Inc.*, No. C 11-2489 MMC, 2012 WL 476495, *1 (N.D. Cal. Feb. 14, 2012). Additionally, in both cases the plaintiffs had pleaded insufficient or *no* factual allegations supporting their claims. *Ovieda*, 2012 WL 1627237, *2; *Schneider*, 2012 WL 476495, *2. Here, Plaintiffs have specifically pleaded that they were each paid less than men for substantially equal or similar work. Compl. ¶¶ 73–76, 87–93. This is sufficient at this stage. *See Alch*, 122 Cal. App. 4th at 378 (confirming that class-action complaints are not required to allege individual violations but may instead allege a "pattern or practice" of violations).

The question for the Court is simply whether Plaintiffs have alleged facts that would tend to show an ascertainable class and common questions of law and fact. Plaintiffs have done so. Any perceived shortcomings can be addressed in discovery and in Plaintiffs' eventual motion for class certification. Thus, HPE's demurrer should be overruled as to the commonality question.

b. There is a reasonable probability that plaintiffs will establish typicality.

Plaintiffs have also sufficiently pleaded typicality. As with commonality, Plaintiffs need not *prove* typicality at the pleading stage—they need only allege facts that tend to show an ascertainable class and common questions of law and fact. *See, e.g.*, *Blakemore*, 129 Cal. App. 4th at 54; *Prince*, 118 Cal. App. 4th at 1326. Here, Plaintiffs have alleged facts showing common questions of law and facts, including typicality. For instance, they have asserted that they are women who worked at HPE in jobs within one of five categories during the proposed class period and were paid less than male employees "for substantially similar work (through December 31, 2015) or similar work (January 1, 2016 to present)." Compl. ¶¶ 101b; *see also id.* ¶¶ 6, 8, 10, 11. Especially where the information about other employees is peculiarly within HPE's control, no more than this is needed. *See, e.g.*, *Lewis*, 88 Cal. App. 2d at 521.

certification); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal. App. 4th 528 (2008) (reversing order denying motion for class certification).

In contrast, HPE's argument fails to address the no-reasonable-probability standard. Instead, as it does throughout its brief, HPE merely nitpicks whether Plaintiffs have pleaded enough facts, a question that is inappropriate at this stage. *See, e.g.*, *C.A.*, 53 Cal. 4th at 872.

Nor does HPE's lone cited case on typicality support dismissal of the class claims. As with most of HPE's cited authority regarding commonality, *Seastrom v. Neways, Inc.* was decided on appeal from denial of a motion for class certification. 149 Cal. App. 4th 1496, 1501 (2007). Even if it were appropriate for the Court to apply the class-certification typicality standard now, *Seastrom* is inapposite here. In *Seastrom*, the court affirmed denial of certification because plaintiffs had conflicts with the putative class. 149 Cal. App. 4th at 1502–03.

Therefore, for the reasons described above, Plaintiffs' pleading regarding typicality is sufficient and HPE's demurrer should be overruled as to this question.

c. Plaintiffs' class claims are not overbroad.

HPE's argument that Plaintiffs' claims fail on a class-wide basis is similarly flawed. Again, HPE relies on decisions involving individual plaintiffs, not class claims. *Spencer v. Virginia State Univ.*, 919 F.3d 199, 203 (4th Cir. 2019), *as amended* (Mar. 26, 2019), *Becker v. Gannett Satellite Info. Network, Inc.*, 10 F. App'x 135, 137 (4th Cir. 2001), and *Foco v. Freudenberg-NOK Gen. P'ship*, 892 F. Supp. 2d 871, 873 (E.D. Mich. 2012), *aff'd,* 549 F. App'x 340 (6th Cir. 2013) each contain only individual claims (and alleged violation of the federal Equal Pay Act, and were decided at the summary judgment stage). *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247 (2d Cir. 2014), also brought on a non-class basis, was decided based on the more demanding federal pleading standard. *See E.E.O.C.*, 768 F.3d at 254 ("while a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss [ ] it must at a minimum assert nonconclusory factual matter sufficient to 'nudge[ ] [its] claims'... 'across the line from conceivable to plausible' to proceed") (quoting *Iqbal,* 556 U.S. at 680 and *Twombly,* 550 U.S. at 570).) The only class decision cited by HPE, *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1411 (9th Cir. 1988), is an appeal of the district court's orders denying class certification and granting summary judgment in favor of the defendant on the plaintiff's federal Equal Pay Act claims.

None of HPE's cases stand for the proposition that Plaintiffs must include specific allegations

as to individual class members, or groups of putative class members, to assert claims on behalf of a putative class. Again, in a class action complaint, plaintiffs are not required to allege individual violations, but may instead allege a "pattern or practice" of violations. *See Alch*, 122 Cal. App. 4th at 378. Plaintiffs have done as much.

Moreover, as discussed *infra*, HPE's argument that Plaintiffs represent only a small portion of individuals in Covered Positions is irrelevant. The Complaint alleges that Plaintiffs Ross and Rogus' claims are typical of the claims of the women in the Covered Positions, since they all were harmed in the same way by HPE's common policies and practices of (1) using prior pay to set salaries; (2) paying women less than men in the same job positions and levels; and (3) using prior pay to assign women to lower salary levels, and pay them less than men in the same job positions, even though they performed equal or substantially the same work as men. Compl. ¶¶ 8,9, 43, 109–111. Whether Plaintiffs' claims are in fact typical is appropriately raised on a motion for class certification, not at the pleading stage.

In short, a proposed class alleging employment discrimination may consist of members whose specific factual situations differ. It is enough that Plaintiffs and other members of the putative class seek a common remedy for a legal wrong. While Plaintiffs expect they will be required to use statistical evidence, sampling evidence, expert testimony and "other indicators of [HPE's] centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate[,]" this is not that time. *Sav-on Drug Stores, Inc. v. Super. Ct. (Rocher)*, 34 Cal. 4th 319, 333 (2004).[11]

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule HPE's Demurrer in its entirety. To the extent the Court sustains the Demurrer in part or in whole, Plaintiffs request leave to amend their Complaint.

[11] Because Plaintiffs' Labor Code § 1197.5 claim is adequately pled, the derivative claims for violation of the UCL, Labor Code §§ 201-203, and declaratory relief, are not subject to demurrer.

Respectfully submitted,

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