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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

R. ROSS, et al.,

Plaintiffs,

vs.

HEWLETT PACKARD ENTERPRISE COMPANY,

Defendant.

Case No.: 18-CV-337830

ORDER AFTER HEARING ON JUNE 28, 2019

(1) **Demurrer by Defendant Hewlett Packard Enterprise Company to the Complaint and**
(2) **Motion by Defendant Hewlett Packard Enterprise Company to Strike Portions of the Complaint**

The above-entitled matter came on for hearing on Friday, June 28, 2019 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued prior to the hearing. The appearances are as stated in the record. Having reviewed and considered the written submissions of all parties and being fully advised, the Court orders as follows:

This is a putative class action alleging gender-based pay discrimination under the Equal Pay Act ("EPA") and related claims. Before the Court are defendant Hewlett Packard Enterprise Company's ("HPE") demurrer to and motion to strike portions of the complaint, which plaintiffs oppose.

I. Allegations of the Operative Complaint

HPE is a multinational corporation headquartered in Palo Alto and is one of the largest information technology companies in the world, selling products and services on an enterprise level. (Complaint, ¶ 1.) Women make up approximately 1/3 of HPE's employees, filling 81 percent of administrative support jobs, but only 17 percent of technician jobs, 22 percent of sales jobs, and 17 percent of executive/senior/official & manager positions. (*Id.* at ¶ 3.)

HPE does not publish the measures it takes to address the gender pay gap among its workers, and instructs employees to keep their compensation to themselves and not to compare their compensation to coworkers' during salary negotiations. (Complaint, ¶ 5.) It also fails to make its pay grades available, leaving employees in the dark about what male counterparts may make. (*Ibid.*) Plaintiffs allege that HPE's policies, "however facially uniform," do not result in equal pay and treatment for similarly situated male and female employees. (*Id.* at ¶¶ 7-8.)

A. General Allegations Regarding HPE's Compensation Practices

HPE's Global Pay Policy applies to all of its employees worldwide (other than "Section 16 Officers"), and provides that "[s]alary ranges are assigned to each position in each country to define a range of pay which is appropriate and market competitive." (Complaint, ¶¶ 18-19.) Plaintiffs allege on information and belief that HPE does not publicly disclose its pay-grade or job-level structure and pays wide ranges of salaries to employees at a particular job level. (*Id.* at ¶¶ 21-22.)

Plaintiffs allege that throughout the class period, HPE has paid and continues to pay its female employees systematically lower compensation than male employees performing substantially equal or similar work, both when they are in the same job position and salary band and when they are in the same job position but in a different salary band. (Complaint, ¶¶ 35-40.) HPE has known or should have known of this pay disparity, but has taken no action to equalize pay, and its failure to pay equal compensation is willful. (*Id.* at ¶ 41.)

Plaintiffs allege on information on belief that HPE considers new hires' prior compensation when determining their compensation and deciding which job level to place

them in, perpetuating historical pay disparities between men and women. (*Id.* at ¶ 43.) They allege on information and belief that long-term employees remain at a job level of 1 or 2, in contrast to new hires who start at or quickly rise to a level 3. (*Id.* at ¶ 42.) Plaintiffs further allege on information and belief that HPE channels women into lower-paying positions, for example, in Operations instead of higher-paying Engineer jobs, due to its stereotypes about their capabilities; it also starts men in the same jobs at higher pay bands. (*Id.* at ¶¶ 45, 52.) HPE's practices governing performance reviews, raises, bonuses, and promotions perpetuate and widen the gender pay gap. (*Id.* at ¶¶ 54-57.)

B. Allegations Regarding the Named Plaintiffs

Plaintiff R. Ross was employed by HPE and its predecessor in sales operations for a total of 17 years. (Complaint, ¶ 67.) She progressed from a business analyst to a Director of Sales Operations, with duties including overseeing sales operations and developing and supporting operational strategic models to support success in worldwide channel sales of HPE products. (*Id.* at ¶¶ 68-72.) In her capacity as Director of Sales Operations, Ross was privy to financial documents and, on at least one occasion, received a file including salary information of her male colleagues. (*Id.* at ¶ 73.) She noted that the base pay of male employees who joined HPE during the class period exceeded the base pay of females who joined around the same time, even where the female employees had more extensive work experience at HPE. (*Ibid.*) Further, Ross was told by a former supervisor who had access to the salaries of her subordinates that her salary was less than her male peers who were performing substantially equal or similar work under similar working conditions. (*Id.* at ¶ 74.) Ross received only a three percent increase in total annual compensation from 2014 to 2017. (*Id.* at ¶ 75.) When she left HPE in January of 2018, a superior told her that she was underpaid compared to male peers. (*Id.* at ¶ 76.)

Plaintiff C. Rogus was hired by HPE's predecessor in April of 2013 to work in its Veterans Affairs Integrated Services 21 project based in Roseville, California as Implementation Project Manager ("IM") for a project called the Real Time Location System. (Complaint, ¶¶ 78-79.) HPE's predecessor asked about and Rogus disclosed her prior

compensation before she joined the organization. (*Id.* at ¶ 86.) IMs reported to Project Managers ("PM"s), who had more supervisory authority and were consequently paid more. (*Id.* at ¶¶ 84-54.) Plaintiffs allege on information and belief that more men than women were in PM positions, and male PMs were paid more than female PMs. (*Id.* at ¶¶ 92-93.) In March of 2014, Rogus obtained information showing that the male PM on her team was paid 14.27 percent more than her. (*Id.* at ¶ 87.) When her PM passed away in September of 2014, she was offered his position, but received only a two percent performance-related pay increase and no role change. (*Id.* at ¶ 90.) Although she excelled in the PM position, Rogus stopped working at HPE in April of 2018. (*Id.* at ¶¶ 91, 94.)

C. Claims Alleged in the Complaint

Based on these allegations, plaintiffs seek to represent a class of all women employed by HPE in California in a Covered Position, defined as positions in one of the following categories: "(1) Engineering, Information Technology, and Design (Software Engineer Positions; Engineer Positions; Software Manager Positions;); (2) Administration, Finance, and Legal; (3) Operations; (Sales Positions; Director of Operations Positions)[;] (4) Public Relations, Marketing, and Sales (Sales Positions; Director of Operations Positions); and (5) Human Relations and Development." (Complaint, ¶ 6.) They assert claims for (1) violations of the EPA, Labor Code sections 1197.5 and 1194.5; (2) failure to pay all wages due to discharged and quitting employees, Labor Code sections 201-202 and 1194.5; (3) violation of the Unfair Competition Law ("UCL"); and (4) declaratory relief.

II. Request for Judicial Notice

HPE requests judicial notice of a Bloomberg.com Company Overview of Hewlett-Packard International Bank PLC, which reflects that this entity is a subsidiary of HPE and therefore a separate entity. Plaintiffs do not oppose HPE's request, but contend that HPE's corporate structure is not determinative of any of the issues before the Court, including those related to HPE's Global Pay Policy.

As an initial matter, while the Court could take judicial notice of official records establishing HPE's corporate structure, it does not find that Bloomberg.com is a "source[] of reasonably indisputable accuracy" for purposes of Evidence Code section 452, subdivision (h), particularly where the Company Overview itself reflects that another entity, "S&P Global Market Intelligence," creates the information displayed in the profile from unspecified sources. Moreover, plaintiffs allege that the Global Pay Policy attached to their complaint "applies to all regular HPE employees worldwide with the exception of Section 16 officers," which is a direct quote from the document itself. HPE would have the Court conclude that, because the Global Pay Policy was provided as an attachment to a filing by its subsidiary, it applies only to the subsidiary and not to all HPE employees. This argument raises a factual issue not appropriately resolved on demurrer, and is not supported by the document itself. At this juncture, the Court must accept plaintiffs' allegations regarding the applicability of the Global Pay Policy as true, notwithstanding HPE's corporate structure.

HPE's request for judicial notice is accordingly DENIED as improper under section 452, subdivision (h) and for lack of relevance.

III. Allegations Made on Information and Belief

In both its demurrer and its motion to strike, HPE argues that plaintiffs' allegations made on information and belief are improper. Plaintiffs make a total of fifteen such allegations, all of which defendant moves to strike as unsupported. Plaintiffs contend that the allegations are appropriate, particularly where the doctrine of less particularity applies.

A pleading must conform to the general rule that a complaint must contain allegations of ultimate facts rather than legal conclusions. (*Doe v. City of Los Angeles*, *supra,* 42 Cal.4th at p. 551, fn. 5.) However, "[a] '[p]laintiff 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.' " (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, quoting *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792.) The court may infer the basis for allegations made on information on belief from the other allegations in the complaint and from

general context. (See *J.W. v. Watchtower Bible and Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1166 ["It can reasonably be inferred from J.W.'s allegations that her belief that Simental was an elder was based upon her participation in the same congregation as Simental."]; *Pridonoff v. Balokovich, supra,* 36 Cal.2d at pp. 792-793 ["Plaintiff would ordinarily learn that he lost employment because of the libel from the declarations of others. It is therefore appropriate for him to allege such matters on information and belief."].)[1] In addition to pleading on information and belief, less particularity in pleading 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. (*Doe v. City of Los Angeles, supra,* 42 Cal.4th at pp. 549-550.) Here, the Court agrees with plaintiffs that the doctrine of less particularity applies because HPE has superior knowledge of its own compensation practices. Plaintiffs can rely on this doctrine where they "plausibly allege" the ultimate facts supporting their claims. (*Id.* at p. 551.)

Here, plaintiffs allege that they were employed by defendant for a total of 17 and 5 years, respectively. They allege that they personally experienced or encountered most of the practices that they believe are employed more widely at HPE, including those alleged in paragraphs 43 (HPE considers new hires' prior compensation), 45 and 65 (HPE channels women into lower-paying positions such as Operations), 52 (HPE has a practice of starting men at higher salary levels), 77 (plaintiff Ross was paid less than men for substantially equal or similar work performed under similar working conditions), and 85, 92, and 93 (PMs had more supervisory authority than IMs, more men than women were in PM positions, and male PMs were paid more than female PMs). This is an appropriate basis for these allegations on information and belief.

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[1] In dicta, *Doe* states that allegations on information and belief "that merely asserted the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true' " would be inadequate, quoting *Pridonoff*. (*Doe v. City of Los Angeles, supra,* 42 Cal.4th at p. 551, fn. 5.) However, *Pridonoff* neither imposes nor suggests such a requirement. To the extent that the *Doe* dicta conflicts with *Pridonoff*, the Court does not apply it. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, also cited by HPE, sheds no light on this issue where plaintiffs do not concede they lack information and belief to support their allegations. (See pp. 1158-1159 [demurrer appropriately sustained without leave to amend where plaintiff "conceded that he has no specific information" leading him to believe a foreclosing trustee had assigned the promissory note associated with his mortgage to support an amendment on that theory].)

Plaintiffs also make allegations regarding information that they have or have not located by researching publicly available documents, including the Global Pay Policy. (See Complaint, ¶¶ 34 [HPE has not published a pay-gap audit regarding California or United States employees] and 42 [citing the Global Pay Policy].) This is entirely permissible. Finally, the general allegations set forth at paragraphs 21-24 and 58 (HPE does not publicly disclose its pay structure, provides wide ranges of salaries at a particular job level, publicly identifies its employees with specific job levels, and internally identifies them by common job codes and pay grades) are plausible, describe widespread corporate practices, and are practices that plaintiffs would be familiar with as long-term HPE employees and from their research. These allegations are appropriate as well.

In sum, plaintiffs' allegations on information and belief are proper, and the Court will consider them accordingly in ruling on HPE's motions.

IV. Demurrer to the Complaint

HPE demurs to each cause of action in the complaint on the grounds that it fails to state a claim. (Code Civ. Proc., § 430.10, subd. (e).) The demurrer is addressed to both the individual and class claims.

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

As explained by the Court of Appeal for the Sixth Appellate District:

> Class certification is generally not decided at the pleading stage of a lawsuit. The preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation. However, if the defects in the class action allegations appear on the face of the complaint or by matters subject to judicial notice, the putative class action may be defeated by a demurrer or motion to strike.

(*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1062, citing *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298-1299, internal citations and quotations omitted.)

A court may decide the propriety of class certification on the pleadings " 'only if it concludes as a matter of law that, assuming the truth of the factual allegations in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied.' " (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 211, citing *Bridgeford v. Pacific Health Corp.* (2012) 202 Cal.App.4th 1034, 1041-1042.) This is most commonly the case in circumstances where it is apparent that individual issues will predominate. (See *ibid.* [no commonality regarding putative fraud claim where reliance and materiality varied among individuals and disclosures were provided that were likely seen by some putative class members]; *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1325 ["It is only in mass tort actions (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage. In other cases, particularly those involving wage and hour claims, class suitability should not be determined by demurrer."]; *Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 976-977 ["A review of the cases in which courts have approved the use of demurrers to determine

the propriety of class actions … reveals that the majority of those actions involved mass torts or other actions in which individual issues predominate."].)

B. Analysis

HPE argues that plaintiffs fail to plead individual claims under the EPA because they do not adequately describe their positions and responsibilities or identify a specific or adequate male "comparator." It demurs to the second cause of action under the Labor Code, which is wholly derivative of plaintiffs' EPA claim, and the third and fourth causes of action under the UCL and for declaratory relief, which are partially derivative of the EPA claim, on the same grounds. Finally, defendant contends that, because and for the same reasons that their individual claims fail, plaintiffs fail to state putative class claims under these statutes. It also urges that there is no reasonably possibility plaintiffs can satisfy commonality and typicality as to their class claims.

1. Demurrer to Plaintiffs' Individual Claims

Labor Code section 1197.5, subdivision (a) provides in relevant part that "[a]n employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates" that the wage differential is based upon one or more of the following factors: "(A) A seniority system[;] (B) A merit system[;] (C) A system that measures earnings by quantity or quality of production[;] (D) A bona fide factor other than sex, such as education, training, or experience. …" As the statute originally mirrored the Federal Equal Pay Act of 1963 (see 29 U.S.C. § 206, subd. (d)(1)), California courts rely on federal authorities construing the federal statute in interpreting the EPA. (See *Green v. Par Tools, Inc.* (2003) 111 Cal.App.4th 620, 623.)[2] Few California cases address the EPA: "The apparent reason is

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[2] The EPA has been amended several times over the past few years, including through changes known as the "Fair Pay Act" that went into effect in 2016. (See Complaint, ¶ 29.) Prior to 2016, the statute more narrowly prohibited lower pay "in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex." (Former Lab. Code, § 1197.5, subd. (a),

that an aggrieved employee generally brings suit under both the California statute and the federal Equal Pay Act …, or under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (a)) or its federal counterpart, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)." (*Ibid.*)

The three-stage burden shifting analysis used to establish sex discrimination under the federal Equal Pay Act is applied to a claim under Labor Code section 1197.5. (See *Green v. Par Tools, Inc., supra,* 111 Cal.App.4th at pp. 623-626 [analogizing to the "*McDonnell Douglas*" burden shifting analysis applied in Title VII and FEHA cases].) Under this standard, once the plaintiff makes a prima facie showing in support of her claim, "the employer then has the burden of showing that one of the exceptions listed in section 1197.5 is applicable." (*Ibid.*) The employee may then show that the employer's stated reasons are pretextual. (*Ibid.*)

The elements of a prima facie case under the EPA are (1) the employer paid a male employee more than a female employee (2) for equal (or, since 2016, substantially similar) work on jobs the performance of which requires equal skill, effort, and responsibility, and (3) which are performed under similar working conditions. (*Green v. Par Pools, Inc., supra,* 111 Cal.App.4th at p. 628, citing *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195; CACI No. 2740 (2019).) To make this prima facie showing, a plaintiff must ultimately demonstrate that she is paid lower wages than an appropriate "male comparator" for equal work. (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324-325.) An EPA plaintiff "need only establish that she was paid less than a single male employee for equal work on the basis of sex to prevail on her claim" and "need not establish a pattern and practice of sex discrimination." (*Dubowsky v. Stern, Lavinthal, Norgaard & Daly* (D.N.J. 1996) 922 F.Supp. 985, 990-991.)

While no California case has addressed this issue, some federal courts have held that a specific, appropriate comparator must be identified and described in some detail even at the

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added by Stats.1949, c. 804, p. 1541, § 1; amended by Stats.1957, c. 2384, p. 4130, § 1, Stats.1965, c. 825, p. 2417, § 1, Stats.1968, c. 325, p. 705, § 1, Stats.1976, c. 1184, p. 5288, § 3, Stats.1982, c. 1116, p. 4034, § 1, Stats.1985, c. 1479, § 4.) The federal Equal Pay Act continues to employ this narrower language. (See 29 U.S.C. § 206, subd. (d)(1).)

pleading stage.[3] In the Court's view, such a requirement would conflict with the principle that "[t]he prima facie case under *McDonnell Douglas* … is an evidentiary standard, not a pleading requirement." (*Swierkiewicz v. Sorema N. A.* (2002) 534 U.S. 506, 510 [applying former federal notice pleading standard in a Title VII employment discrimination case]; see also *Alch v. Superior Court (Time Warner Entertainment)* (2004) 122 Cal.App.4th 339, 381-382 [citing *Swierkiewicz* and noting that "[w]hile the pleading standard is stricter in California" than the former federal standard, "the plaintiff is required only to set forth the essential facts of his case with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action"], internal citations and quotations omitted.)

Here, plaintiff Ross does not identify a specific male comparator in support of her claim, but she does allege that she was told on multiple occasions of male comparators who were performing substantially equal or similar work under similar working conditions. (Complaint, ¶¶ 74, 76.) Plaintiff Rogus alleges that her former male supervisor was paid substantially more than her, even after "she was offered his position" when he passed away. (*Id.* at ¶ 90.) While she acknowledges that she received no formal role change after her supervisor's passing and does not detail precisely how her job duties changed, she alleges clearly enough that she performed the duties of the PM position—in fact, she excelled in that role. (*Id.* at ¶ 91.) These allegations are sufficient to state an EPA claim under California law.

In opposition to defendant's demurrer, plaintiffs do not address whether they are required to identify a comparator at the pleading stage, but take the position that they do not seek to pursue individual claims under the EPA—or as to any of the causes of action set forth

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[3] See *Reardon v. Herring* (E.D. Va. 2016) 191 F.Supp.3d 529, 547 (at the pleading stage, the court must evaluate whether the plaintiff has adequately alleged that her male comparators held jobs requiring equal skill, effort, and responsibility); *Bailey v. SC Department of Corrections* (D.S.C., Feb. 23, 2018, No. CV 3:17-3500-TLW-KDW) 2018 WL 2144548, at *7 ("conclusory allegations of largely unidentified comparators with no detail as to relative salaries, time-frames, or the skill, effort, and responsibilities of the employees is not sufficient to permit a reasonable inference that Defendant is liable for an EPA violation"), *report and recommendation adopted sub nom. Bailey v. South Carolina Department of Corrections* (D.S.C., May 9, 2018, No. 3:17-CV-3500-TLW-KDW) 2018 WL 2135168; *Kairam v. West Side GI, LLC* (S.D.N.Y., Nov. 9, 2018, No. 118CV01005ATSDA) 2018 WL 6717280, at *5, *report and recommendation adopted* (S.D.N.Y., Jan. 31, 2019, No. 18CIV1005ATSDA) 2019 WL 396573 (facts regarding comparator's "common duties or job content" are required to state an EPA claim); but see *Kassman v. KPMG LLP* (S.D.N.Y. 2013) 925 F.Supp.2d 453, 471 (the Second Circuit has reserved judgment on the issue of "[w]hether or not a female plaintiff must identify a specific male comparator" to state a claim under the federal EPA).

in the complaint—at all. Rather, they contend that the complaint sets forth only "pattern and practice" putative class claims. In light of this position, the Court will sustain the demurrer to plaintiffs' individual claims. However, the comparator issue remains relevant to the Court's analysis of the putative class claims.

2. Demurrer to the Class Claims

HPE contends that, because they fail to adequately allege individual claims under the EPA, plaintiffs cannot allege class claims under that statute and are atypical of the putative class.[4] For the reasons discussed above, the Court finds that plaintiffs do state individual claims. As urged by plaintiffs, *Alch v. Superior Court, supra,* 122 Cal.App.4th 339 holds that plaintiffs need not pursue individual claims to state a classwide claim for discrimination. (At pp. 380-388.) Finally, there is no indication that plaintiffs' claims are atypical of those of the putative class—whether plaintiffs can present sufficient evidence to demonstrate that a larger group of employees shared their experiences is an issue for a motion addressed to class certification.

In its reply brief, HPE urges that "pattern and practice" claims differ from EPA claims because they require allegations of intentional discrimination, and "as a substantive matter, a 'pattern and practice' claim does not exist under the EPA/FPA." HPE cites no authority in support of the latter proposition; by the same token, plaintiffs do not cite, and the Court has not located in its own research, any authority expressly approving such a theory. However, defendant does not appear to dispute the basic proposition that it is possible to bring some type of EPA class action in California.[5] (See Reply, pp. 4-5 [stating defendant is not aware of any such class action "that did not include individual claims of unequal pay"]; see also *Hall v.*

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[4] As HPE did not demur to the complaint on the ground that plaintiffs lack standing, the Court will not address this issue, which was raised for the first time in HPE's reply brief. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [points raised for the first time in reply brief will not ordinarily be considered, because such consideration would deprive respondent of an opportunity to counter the argument].)

[5] Under the federal statute, opt-in, collective actions are expressly authorized by the statute and "true" class actions are accordingly not permitted. (See 29 U.S.C.A. § 216(b) ["No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."]; *Bittner v. Combustion Engineering, Inc.* (N.D. Cal., May 11, 1979, No. C 79-0327 SC) 1979 WL 210, at *3 ["the spurious class action under section 216(b) differs markedly from the true class action based on Rule 23"].) Federal authorities may consequently provide less guidance on this particular issue.

County of Los Angeles, *supra*, 148 Cal.App.4th 318 [trial court certified an EPA class, but the issue was not addressed on appeal].)

In *Alch*, the court rejected the defendants' similar argument that FEHA did not authorize a "pattern or practice" claim. It explained that

> 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." (1 Lindemann & Grossman, Employment Discrimination Law (3d ed.1996) p. 44, fn. 168.)

(*Alch v. Superior Court*, *supra*, 122 Cal.App.4th at p. 379.)

Alch noted that courts look to authority from the Title VII context—where pattern or practice claims are well-established—to guide their analysis in FEHA cases. (*Alch v. Superior Court*, *supra*, 122 Cal.App.4th at pp. 379-380.) Courts look to such authority in the EPA context as well. (See *Green v. Par Tools, Inc.*, *supra*, 111 Cal.App.4th at pp. 623-626.) *Alch* explained that the following "well-settled" principles long established in the Title VII context were equally applicable to class actions under FEHA:

> 1. A claim of discrimination against a class requires the plaintiffs to establish by a preponderance of the evidence that discrimination was the company's standard operating procedure—the regular rather than the unusual practice.
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> 2. The class plaintiff is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. The plaintiff's burden is to establish a prima facie case that such a policy existed.
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> 3. Plaintiffs normally seek to establish a pattern or practice of discriminatory intent by combining statistical and nonstatistical evidence, the latter most commonly consisting of anecdotal evidence of individual instances of discriminatory treatment.
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> 4. A finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class. Further proceedings usually are required to determine the scope of individual relief for class members.

(*Alch v. Superior Court*, *supra*, 122 Cal.App.4th at pp. 380-381, internal quotation marks and citations omitted.)

It is not immediately obvious that these principles could not be applied to an EPA claim. "Generally, a Title VII claim of wage discrimination parallels that of an EPA violation." (*Kovacevich v. Kent State University* (6th Cir. 2000) 224 F.3d 806, 828; see also *Lavin-McEleney v. Marist College* (2d Cir. 2001) 239 F.3d 476, 483 ["The Equal Pay Act and Title VII must be construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies."].) While HPE is correct that Title VII disparate treatment pattern and practice claims require a showing of intent and EPA claims do not (*Lavin-McEleney v. Marist College*, *supra,* 239 F.3d at p. 483), intent may still be relevant under the EPA, which extends the statute of limitations in cases arising from willful violations. (Lab. Code, § 1197.5, subd. (i).) In any event, HPE's argument that Title VII claims are *more difficult* to prove in this regard fails to demonstrate that EPA claims should be ineligible for class treatment permitted under Title VII.

EPA claims are subject to the unique requirement that a plaintiff identify an appropriate male comparator or comparators in order to prove a prima facie case. (*Hall v. County of Los Angeles*, *supra,* 148 Cal.App.4th at pp. 324-325; see also *Kovacevich v. Kent State University*, *supra,* 224 F.3d at p. 828 [EPA claims are "more demanding" than Title VII claims in this sense].) Whether appropriate comparators can be identified on a class-wide basis will impact commonality, typicality, and other requirements for class certification. Still, the Court is not prepared to conclude at this juncture that there is "no reasonable possibility" certification can be accomplished as to any portion of the class plaintiffs propose. The cases cited by defendant in support of its argument that plaintiffs cannot identify adequate comparators were virtually all decided on summary judgment; for the reasons already discussed, the Court finds that plaintiffs are not required to identify specific comparators at the pleading stage, with regard to either their individual or their class claims. It will, however, expect this issue to be thoroughly addressed at class certification.

Whether appropriately characterized as "pattern and practice" claims or simply as class claims under the EPA, plaintiffs' class claims survive demurrer.

C. Conclusion and Order

HPE's demurrer is SUSTAINED IN PART as to plaintiffs' individual claims. At the hearing on this matter, plaintiffs confirmed that, as they state in their opposition, they no longer intend to pursue individual claims. The demurrer is accordingly sustained without leave to amend in this regard. The demurrer is OVERRULED as to the putative class claims.

V. Motion to Strike

Defendant moves to strike from the complaint allegations in the following categories: (1) class allegations, (2) allegations made on information and belief, (3) allegations regarding the UCL claim, and (4) allegations regarding the Global Compensation Policy. With regard to items 1, 2, and 4, its motion relies on arguments already rejected by the Court above, and its motion will be denied in these respects for the reasons already stated. The Court will focus its analysis on the allegations regarding the UCL claim.

A. Legal Standard

A motion to strike may be employed to remove "irrelevant, false or improper" matters from a complaint. (See Code Civ. Proc, § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See *id.*, § 431.10, subds. (b), (c).)

As with a demurrer, the policy of the law is to construe the pleadings liberally with a view to substantial justice. (See Code Civ. Proc, § 452.) The allegations in the complaint are considered in context and presumed to be true. (See *Clauson v. Superior Court (Pedus Service, Inc., et al.)* (1998) 67 Cal.App.4th 1253, 1255.)

B. Analysis

Plaintiffs' claim under the UCL is predicated on HPE's alleged violations of the EPA and Labor Code sections 201-203, as well as its alleged violation of FEHA, a theory asserted only in the context of the UCL claim.

HPE urges that the FEHA theory is improper where plaintiffs fail to allege that they have satisfied FEHA's administrative exhaustion requirements. In support of this argument, it cites *In re Vaccine Cases* (2005) 134 Cal.App.4th 438, which held that a plaintiff may not bring a UCL claim predicated on a law containing an exhaustion requirement that has not been satisfied: in that case, the requirement that a Proposition 65 plaintiff provide 60 days' notice to the Attorney General and local prosecutors before filing suit. (At pp. 458-459.) In opposition to HPE's motion, plaintiffs cite an inapposite case, *Hodge v. Superior Court (Aon Insurance Services)* (2006) 145 Cal.App.4th 278, which rejected the argument that there is a right to a jury trial in a UCL action. While *Hodge* was decided after *In re Vaccine*, it in no way contradicts the latter case, which controls on this issue. The motion to strike the FEHA-related allegations will accordingly be granted. (See also *Asencio v. Miller Brewing Co.* (9th Cir. 2008) 283 Fed. App'x. 559, 561-562, *Sarkizi v. Graham Packaging Co.* (E.D. Cal., Nov. 13, 2014, No. 1:13-CV-1435 AWI SKO) 2014 WL 6090417, at *9, and *Vasconcellos v. Sara Lee Bakery* (N.D. Cal., Nov. 21, 2013, No. C 13-2685 SI) 2013 WL 6139781, at *4 [all applying *In re Vaccine* to UCL claims predicated on FEHA and the Labor Code].) While plaintiffs contend that allegations of *conduct* that violates FEHA should not be stricken, HPE does not move to strike any substantive allegations regarding its conduct, only legal conclusions related to FEHA.

Finally, HPE contends that Labor Code section 203 penalties are not available as restitution under the UCL, an argument to which plaintiffs do not respond in their opposition papers. HPE's argument is directly supported by *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1401-1402, and other authorities cited in its briefing. Its motion to strike the Labor Code allegations from the UCL claim will be granted.

C. Conclusion and Order

HPE's motion to strike is GRANTED IN PART. The following portions of the complaint are hereby struck without leave to amend:

-"HPE's Violations of the Fair Employment and Housing Act Support the UCL Claim" (p. 13, ll. 12-13);

-paragraphs 61, 62, 66, and 128 in their entireties;

-"including FEHA" (p. 18, ll. 22-23);

-"the California Fair Employment and Housing Act, ('FEHA')" (p. 23, ll., 17-18);

-"and 203" (p. 23, ll. 18, 26); and

-"HPE's conduct is also immoral, unethical, oppressive, unscrupulous, and offensive to the established public policy of ensuring women are not discriminated against in the workplace, policy reflected in FEHA." (p. 24, ll.18-21).

The motion to strike is otherwise DENIED.

IT IS SO ORDERED.

Dated: July 2, 2019

Honorable Brian C. Walsh
Judge of the Superior Court