H_____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

_____ ♦ _____

HEWLETT PACKARD ENTERPRISE COMPANY,
Petitioner,
vs.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondent;

R. ROSS AND C. ROGUS
Real Parties in Interest.

_____ ♦ _____

Writ Petition From Superior Court of Santa Clara County
Case No. 18-cv-337830
The Honorable Brian C. Walsh, Judge Presiding

_____ ♦ _____

PETITION OF HEWLETT PACKARD ENTERPRISE COMPANY FOR ALTERNATIVE AND PEREMPTORY WRITS OF MANDAMUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

_____ ♦ _____

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court 8.208 and 8.488, the undersigned counsel for Petitioner Hewlett Packard Enterprise Company certifies that Dodge & Cox (and no other entity) has either: (1) an ownership interest of ten percent or more in it; or (2) a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

DATED: August 8, 2019

SEYFARTH SHAW LLP

By: _____

Camille A. Olson
Richard B. Lapp
James M. Harris
Robin E. Devaux
Attorneys for Petitioner/Defendant
Hewlett Packard Enterprise Company

TO THE HONORABLE JUSTICES OF THE SIXTH APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA:

Petitioner Hewlett Packard Enterprise Company ("HPE") respectfully petitions this Court for a Writ of Mandamus vacating the order entered by the Respondent Superior Court insofar as it overruled HPE's demurrer to the class Equal Pay Act/Fair Pay Act claim, and directing Respondent to enter a new and different order sustaining said demurrer.

INTRODUCTION

The California Fair Pay Act prohibits an employer from paying an employee less than a member of the opposite sex for "substantially similar work . . . performed under similar working conditions" except pursuant to a "seniority system," a "merit system," "a system that measures earnings by quantity or quality or production," or any "bona fide factor other than sex." (Its predecessor, the Equal Pay Act, was materially similar).

The key element of the statute, as its plain text makes clear, is the performance of equal work, under equivalent conditions, but for less pay.

Here, in a ruling that is unprecedented under either the California statute or its federal counterpart, the trial court held that Plaintiffs had stated a legally sufficient class claim under the Fair/Equal Pay Act without alleging any facts showing female class members had performed equal and equivalent work to male counterparts for less pay.

Instead, it held that Plaintiffs had stated an adequate class claim simply by alleging that Defendant HPE had supposedly employed discriminatory policies of the type that routinely serve as the basis for pattern-or-practice class intentional sex discrimination claims under FEHA and its federal counterpart, Title VII. That (inadequate) class claim is the only one remaining in the case, as the trial court dismissed Plaintiffs' individual Equal Pay Act claims and separately held Plaintiffs had failed to exhaust their administrative remedies under FEHA. They brought no Title VII claim.

The trial court's ruling was clearly erroneous. No State or federal ruling has authorized an Equal Pay Act claim to proceed as a class action based on an alleged pattern-or-practice of pay discrimination. As contemplated by the plain language of the statute , every reported case has, required specific factual allegations that female workers actually performed "substantially similar work" to male counterparts, for lesser pay.

Immediate appellate review and reversal is essential to forestall massive, expensive and unwieldy litigation, both here and in the copycat cases that would inevitably follow absent reversal.

PETITION FOR WRIT OF MANDAMUS

By this verified Petition, Petitioners allege and will show that:

A. The Parties To This Petition.

1. Petitioner Hewlett Packard Enterprise Company ("HPE") is a corporation that was founded on November 1, 2015 after Hewlett-Packard Company ("H-P") split into HPE and HP Inc. *See* Complaint, PA:006-007, ¶¶13, 16.

2. HPE is a leading provider of information technology (IT) products, solutions, and services with a particular focus on the enterprise market. HPE currently employs roughly 4,000 employees in the State of California, where it is headquartered, in a wide variety of job categories including engineers, sales people, administrators, attorneys, and a multitude of other jobs.

3. Real Parties in Interest R. Ross and C. Rogus (collectively "Plaintiffs") are the named plaintiffs in a putative Equal Pay Act class action pending before Respondent Superior Court entitled *R. Ross and C. Rogus v. Hewlett Packard Enterprise Company, et al.,* Santa Clara County Superior Court Case No. 18-cv-337830 (the "Action"). PA:002.

4. Plaintiff R. Ross alleges she was first employed by H-P and then employed by HPE after its formation. PA:015, ¶67. She was most recently employed by HPE as a Director of Business Operations (a position the Complaint mislabels as "Director of Sales Operations.") PA:015, ¶68. Plaintiff Ross left HPE in January of 2018. PA:015, ¶76.

5. Plaintiff C. Rogus alleges she was hired by H-P in April 2013 and, following H-P's split, worked for HPE as an Implementation Lead (a position the Complaint mislabels as "Project Manager"). PA:016, ¶¶78-79. Plaintiff Rogus alleges that she left HPE in April of 2018. PA:017, ¶¶91, 94.

6. Respondent is the Superior Court of the State of California, in and for the County of Santa Clara (the "Superior Court") in which the Action is pending.

B. Plaintiffs' Complaint.

7. Plaintiffs filed the instant Action on November 8, 2018, alleging multiple individual and class claims. PA:002.

8. As individuals, Plaintiffs attempted to assert claims for violation of the California Equal Pay Act, Labor Code § 1197.5 (renamed the Fair Pay Act when amended in 2016), as well as derivative claims for allegedly unpaid wages, violations of California's Unfair Competition Law, and declaratory relief (jointly the "Individual EPA Claims"). PA:023-025, ¶¶120, 126-127, and 132.

9. Additionally, Plaintiffs sought to pursue the same claims on behalf of virtually every woman employed by HPE in California throughout the putative class period, that is, a class including all such employees in the following categories: "Engineering, Information Technology and Design," "Administration, Finance and Legal," "Operations," "Public Relations, Marketing and Sales," and "Human Relations and Development." PA:004, ¶6. In reality, these sweeping categories encompass hundreds, if not thousands, of different job positions, with numerous variations within, and between, various jobs.

10. Although the Individual EPA claims were dismissed by the trial court (PA:195), their allegations provide crucial context for the class claims that are at issue in this Petition.

1. The Individual EPA Claims.

11. The California Fair Pay Act prohibits an employer from paying an employee less than a member of the opposite sex for "substantially similar work . . . performed under similar working conditions" except pursuant to a "seniority system," a "merit system," "a system that that measures earnings by quantity or quality or

production," or any "bona fide factor other than sex." Labor Code § 1197.5.[1]

12. In support of her individual claims, Plaintiff Ross alleged that a former unidentified "superior . . . told her that she was underpaid compared to [unidentified by name or position] male peers." PA:015, ¶75. She also alleged she had earned three percent more when she worked at H-P in 2014 than she had earned at HPE in 2017. *Id.*, ¶¶74-76.

13. Likewise, Plaintiff Rogus alleged that an unidentified person at H-P (not HPE) had asked about her prior compensation before she joined that company in 2013. PA:017, ¶86. She also alleged her male Project Manager at H-P in 2014 had earned 14.27 percent more than she did then, and that she was given only a two percent increase when she "agreed to take on the duties" of the Project Manager in 2014 after his death. PA:017, ¶¶87, 89, 90.

14. Neither Plaintiff identified their job duties at HPE with any specificity; nor did they identify the skill, effort and responsibility to perform such work or the working conditions under which it was performed, such as the multitude of different departments, supervisors and geographic locations across California. *See* PA:015, ¶¶71-72 (Ross's duties included, *e.g.*, "overseeing sales operations"); and PA:017, ¶89 (Rogus "agreed to take on" duties of Project Manager).

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[1] Before 2016, the Equal Pay Act was not materially different and prohibited lower pay "for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . under similar working conditions." Former Labor Code, Labor Code § 1197.5(a). The differences between these two standards is not germane to the issues raised by this Petition.

15. Nor did Plaintiffs identify any specific male employee whom HPE had allegedly paid at a higher rate for identical or substantially similar work. *See generally* PA:002-71.

16. Rather, Ross alleged "on information and belief" that "at all times" she had been "paid less than men for substantially equal or similar work," PA:015, ¶77, while Rogus alleged "on information and belief" that "during [her] tenure, male PMs [*i.e.* Project Managers] were paid more than female PMs"—her alleged position at HPE. PA:017, ¶93. Indeed, Plaintiffs' Complaint is premised almost entirely on "information and belief" allegations, the basis for which is never articulated. *See e.g.* PA:002-71, ¶¶ 21-24, 34, 42, 43, 45, 52, 58, 65, 77, 85, 92, 93.

2. The Putative Class Claims.

17. Plaintiffs purport to assert their EPA Claims on behalf of a class of all female employees in California, in five broadly defined job categories, which the Complaint refers to as the "Covered Positions." PA:004-5.

18. The jobs in the "Covered Positions" are not standardized, but in fact include significant variation of education, skill, responsibility, and expectations. As defined, the "Covered Positions" encompass virtually every job in California at HPE, or approximately 13,000 employees during the putative class period, of whom approximately one-third are allegedly women. PA:003-5, ¶¶ 3, 6; PA:085. Indeed, within each of the so-called "Covered Positions" there are several hundred different job categories. For example, in Plaintiffs' broad "Administration, Finance and Legal" category alone, there are over 200 different job categories at all different levels and

pay grades. And these jobs vary substantially, even by title. The "Administration" sub-category, for example, includes senior vice presidents in several subject matter areas, different business unit vice presidents, clerks, managers, and executive assistants.

19. The Complaint alleges that each of the female putative class members has suffered a violation of the Equal Pay Act and/or the Fair Pay Act, depending on the timing of her employment. PA:005, ¶7.

20. However, the Complaint contains no allegations specific to any of the five categories of Covered Positions, or to any of the multitude of job titles within those categories. PA:085-86.

21. Thus, the Complaint never describes the work performed by employees in *any* of the many discrete jobs contained in *any* of the jobs within the five broad categories of Covered Positions; the conditions under which such work was performed; the skills, effort and/or responsibility required; or the pay any employees received. PA:083-84.

22. Nor does the Complaint identify any male peers to whom any of the putative female class members assertedly are comparable, and who received more pay for "substantially equal or similar work under similar working conditions." PA:091.

23. In other words, the Complaint alleges no facts that HPE paid any putative class member less than any male employees who performed substantially similar work under similar working conditions.

24. Instead, Plaintiffs allege, solely on "information and belief," that HPE applies the following common companywide

policies and practices to all of its California employees, male and female:

- "HPE also considers or has considered each new hire's prior compensation when determining that employee's compensation, as well as in deciding which job level to place that new hire." PA:011, ¶43;

- "HPE channeled women into lower-paying job positions than men because of HPE's stereotypes about what men and women can or should do." PA:012, ¶45;

- "HPE during the Class period paid female employees less than men performing substantially equal or similar work in the same job. . . ." PA:012, ¶52;

- "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 employee much less." PA:013, ¶58;

- "[W]omen are not proportionally represented at HPE," and HPE "does not publically [*sic*] identify specific measures taken to address the gender pay gap." PA:003-004 , ¶¶ 3-5;

- "[A]t all relevant times, HPE has regularly and routinely channeled and segregated female employees in California into lower-paying salary bands or levels than men with equal or lesser qualifications and/or paid women less than similarly qualified or situated men." PA:015, ¶65.

25. Plaintiffs rest their EPA class claims on the allegation that the foregoing policies, while "facially uniform, do not result in equal pay for women and men, resulting in unequal compensation between the sexes." PA:005, ¶7.

C. HPE's Demurrer And Motion To Strike.

26. On April 2, 2019, HPE filed a demurrer to Plaintiffs' claims, PA:073, accompanied by a separate motion to strike specified allegations. PA:097.

27. In its demurrer, HPE first argued that Plaintiffs' Individual EPA claims were legally insufficient for two separate, but related reasons. PA:083-84.

28. First, Plaintiffs had altogether failed to describe the relevant attributes of their positions at HPE—*e.g.* specific duties, the skill, effort and responsibility required, and pay.

29. Second, and contrary to well-established case law (*see* Part I(B) below), neither Plaintiff identified a specific, actual male comparator for their positions, much less any basis for concluding those comparators had engaged in equal or substantially similar work in terms of skill, effort and responsibility for greater pay.

30. Next, HPE argued that the Class EPA claims likewise failed due to Plaintiffs' total failure to allege facts showing women had performed substantially similar work to men for lesser pay. PA:085-86.

31. As HPE explained, within the Covered Positions (which include virtually every position in the Company) there are significant variations in duties, education, skill, responsibility, expectations, and pay. *Id.*

32. As HPE further argued, Plaintiffs did not allege, as required to establish EPA violations, the factors relevant to *any* (let alone all) covered position: that is, its specific duties, the skill, effort

and responsibility required to perform, or the pay rate for any individual who had performed it. *Id.*

33. Instead, Plaintiffs had simply alleged the existence of a litany of supposed company-wide policies that, while admittedly "facially uniform, do not result in equal pay for women and men, resulting in unequal compensation between the sexes." PA:005, ¶7. But, as HPE argued, Plaintiffs would not establish EPA violations simply by demonstrating the existence of such policies. PA:085-86.

34. Finally, HPE argued in its motion to strike that Plaintiffs could not base their UCL claim on an alleged violation of FEHA, having failed to exhaust their administrative remedies. PA:108-109.

D. Plaintiffs' Oppositions.

35. On May 6, 2019, Plaintiffs filed separate oppositions to HPE's demurrer and motion to strike. PA:112, 135.

36. As relevant here, Plaintiffs asserted that "while they could have alleged claims individually, [they] have alleged class claims only." PA:125.

37. Next, they argued that their class claims, which they characterized as resting on a "pattern-or-practice" theory, were legally sufficient. PA:125, 128-130.

38. In their view, their class claims were legally sufficient because "[t]hese 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." PA:129.

39. Additionally, Plaintiffs argued in opposing HPE's motion to strike that they could pursue a UCL claim based on "FEHA-related

allegations" without having exhausted their administrative remedies. PA:147-149.

E. HPE's Replies.

40. On May 20, 2019, HPE filed separate replies in support of its demurrer and motion to strike. PA:153, 169.

41. Citing the relevant case law, HPE argued that Plaintiffs had not adequately pled class EPA claims simply by alleging the existence of company-wide policies that supposedly had depressed female compensation generally. PA:166-167.

42. In other words, HPE demonstrated that a plaintiff cannot plead an adequate EPA class claim simply by alleging the existence of company-wide policies of the type typically cited to establish conventional sex-discrimination class violations under FEHA and Title VII. *Id.*

F. The Superior Court Denies HPE's Demurrer As To The Equal Pay Act Class Claim.

43. On June 28, 2019, the Superior Court heard oral argument on HPE's demurrer and motion to strike. A genuine copy of the transcript of that hearing and related CMC is contained in the appendix to this Petition. PA:202 *et seq.*

44. On July 2, 2019, the Superior Court issued its order granting in part and denying in part HPE's demurrer and motion to strike. PA:184-201.

45. As relevant here, the Superior Court sustained the demurrer as to the Individual EPA claims, citing Plaintiffs' abandonment of any such claims. PA:194-195.

46. As to the class claims, the Superior Court first noted that no decision—federal or state—has allowed a class-wide EPA claim to proceed on the pattern-or-practice theory which Plaintiffs rely on here. PA:195.

47. However, it then noted that such a pattern-or-practice theory may permissibly be used to allege a class sex discrimination claim under FEHA. PA:196, citing *Alch v. Superior Court*, 122 Cal. App. 4th 339, 379 (2004). In such cases, a class violation may be established by proof the employer's policies suppressed female compensation generally. *Id.*

48. Reasoning it should be "possible to bring some type of EPA class action in California" (PA:195), the Superior Court concluded "[i]t is not immediately clear that the same principles could not be applied" to an EPA claim. PA:196-197.

49. The Superior Court reached that conclusion despite recognizing that "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," and therefore "are 'more demanding than Title VII claims in this sense.'" PA:197.

50. The Superior Court's order never addressed how the policies relied on by Plaintiffs could establish the "more demanding" elements required to establish EPA violations: specifically, that female employees performed substantially similar work under similar conditions for less pay then their male counterparts.

G. Writ Review Is Necessary And Appropriate.

51. Petitioner respectfully submits that writ review is both necessary and appropriate.

52. The Order denying the demurrer as to the class EPA claims is not immediately appealable. Petitioner would suffer irreparable harm if the Order were not immediately reviewed and reversed. Without such review, Petitioner would be forced to defend against a legally insufficient class claim necessarily involving virtually every single individual (female class members and their alleged male comparators) it has employed since the Company's inception in California, where it is headquartered. No order entered on review of a final judgment could possibly undo the resulting prejudice to HPE.

53. The issue raised by the Petition is a pure question of law: namely, may a class EPA claim be based solely on a "pattern-or-practice" theory which alleges that the employer's policies depressed female compensation generally, without competent allegations that individual female employees performed substantially similar work as male counter-parts, though for lesser pay?

54. This legal issue is one of first impression. No decision under the California statute or its federal counterpart has considered whether an EPA class claim may rest on such a pattern-or-practice theory.

55. However, the plain text of the California statute and the federal decisions involving multiple plaintiffs indicate it may not. Rather, a legally sufficient class EPA claim requires competent allegations that women performed substantially similar work to men, not simply that they were discriminated against on pay. By effectively reading the "substantially similar work" element of the EPA out of the statute, the trial court committed a clear error of law.

56. The legal issue raised by this Petition is of widespread importance to litigants and courts throughout the State. The legally inadequate pattern-or-practice theory endorsed by the Superior Court here will, unless reversed by this Court, inevitably spawn burdensome copycat cases throughout the State.

57. Indeed, the ruling here potentially greenlights any female employee, current or former, of any large California employer to bring a class EPA claim on behalf of most, if not all, of the employer's female California employees—with no regard, at least until class certification, as to whether those women performed substantially similar work to men.

58. Manifestly, the burden of having such a low bar to proceeding deep into expensive class certification discovery (including the retention of statistical and other experts) on behalf of a "class" with no discernible limiting principle beyond a common employer will fall heavily on corporate defendants, especially large ones with numerous employees. For HPE, with thousands of employees in California, discovery would entail review and analysis of thousands of compensation decisions throughout the class period—an incredibly burdensome undertaking. For many other companies, such review could cover several years of compensation for tens or even hundreds of thousands of employees.

59. That burden will also fall heavily on California trial judges, who will have to manage complex discovery disputes, often involving sensitive privacy and confidentiality concerns, where the proposed class and their male counterparts include virtually all of an employer's California workforce.

60. Petitioner has a beneficial interest in the issues raised by this Petition because it is adversely affected by the Superior Court's ruling.

61. The Exhibits in Petitioner's Appendix are genuine copies of documents that were filed in the Superior Court in this Action, and are incorporated herein by reference. A genuine copy of the reporter's transcript of the hearing on the demurrer and motion to strike is contained therein. All record citations in this Petition are to the pages of Petitioner's Appendix. *See* Cal. Rules of Court, rule 8.486(b)(1). The order overruling the relevant portions of Petitioner's demurrer is attached to this Petition at PA:184-200.

WHEREFORE, Petitioner respectfully prays:

1. That a peremptory writ of mandate issue forthwith under Seal of this Court mandating Respondent Superior Court of the State of California, County of Santa Clara, to vacate its order insofar as it overruled Petitioner's demurrer to Plaintiffs' class EPA claims, and directing Respondent to enter a new and different order sustaining the demurrer;

2. If a peremptory writ does not issue in the first instance, that an alternative writ of mandate issue with an order to show cause before this Court at a specified time and place why the foregoing relief should not be ordered; and

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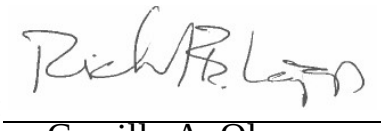
3. That the Court grant such other and further relief as may be just and proper.

Dated: August 8, 2019

Respectfully submitted,

SEYFARTH SHAW LLP

By: 

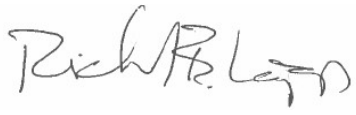
Camille A. Olson
Richard B. Lapp
James M. Harris
Robin E. Devaux
Attorneys for Petitioner/Defendant Hewlett Packard Enterprise Company

VERIFICATION AND DECLARATION

I, Richard B. Lapp, am an attorney with the law firm of Seyfarth Shaw LLP, attorneys for Petitioner Hewlett Packard Enterprise Company. The facts set forth in this Petition primarily relate to and are derived from the documents filed by the parties and the orders of the Superior Court. I am the co-lead attorney who is litigating this case in the trial court, and I am fully familiar with, and can attest to the authenticity of, the subject documents and orders. The facts in the Petition are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 8th day of August, 2019.



Richard B. Lapp

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts and procedural history relevant to this Petition are set forth in Paragraphs 1-61 of the Petition. *See* Cal. Rules of Court, rule 8.486(a)(5).

LEGAL ARGUMENT

The trial court in this case made the unprecedented ruling that Plaintiffs could proceed with putative class claims arising under California's Equal Pay Act and Fair Pay Act where they merely asserted the existence of companywide policies supposedly giving rise to a "pattern-or-practice" of pay discrimination.

The trial court recognized that no courts have ever permitted a "pattern-or-practice" claim under the EPA. Although the Court acknowledged that allegations that female employees performed "substantially similar work" as their male counterparts for less pay are required to state a claim under the EPA, it nevertheless allowed Plaintiffs' class-wide EPA claim to proceed despite the absence of specific allegations satisfying that clear statutory requirement in this case.

The trial court's improper decision to allow an EPA class claim to proceed rests on a series of related legal errors, including: (1) improperly importing procedural devices from FEHA and Title VII (*i.e.*, pattern-or-practice theories) even though those statutes have no "substantially similar work" element comparable to the EPA; (2) reading the words "substantially similar" out of the EPA for purposes of evaluating the sufficiency of the pleadings; and (3) dispensing with

the clear and well-established requirement to identify a male comparator as an essential element of a claim under the EPA.

The trial court's ruling is manifestly incorrect, and, unless reversed, will lead to serious discovery abuse in this case as well as unfettered copycat litigation in other cases throughout the State.

I. An Equal Pay Act Class Claim Requires Competent Allegations That Class Members Performed "Substantially Similar Work" To Male Counterparts For Less Pay.

A. The Equal Pay Act Prohibits Paying A Woman Less Than A Male Counterpart For "Substantially Similar Work."

Before January 2016, California Labor Code section 1197.5 was known as the Equal Pay Act. In order to maintain a claim under the statute at that time, a plaintiff had to establish that: (1) the employer paid the plaintiff less than employees of the opposite sex in the same establishment; (2) the plaintiff performed equal work as the employees of the opposite sex on jobs which required equal skill, effort, and responsibility; and (3) the plaintiff and the employees of the opposite sex worked under similar working conditions. *See, e.g.*, *Green v. Par Pools, Inc.*, 111 Cal. App. 4th 620, 628 (2003). The federal Equal Pay Act employs similar language. *See* 29 U.S.C. § 206(d)(1).

In January 2016, California Labor Code section 1197.5 was amended and became known as the Fair Pay Act, and a plaintiff's required showing shifted slightly. Pursuant to the Fair Pay Act, a plaintiff must show that: (1) the employer paid the plaintiff less than employees of the opposite sex; (2) the plaintiff performed "substantially similar work" as the employees of the opposite sex,

when viewed as a composite of skill, effort, and responsibility; and (3) the plaintiff and the employees of the opposite sex worked under similar working conditions. Cal. Lab. Code § 1197.5(a).

California courts rely on federal authorities when construing the EPA. *Green*, 111 Cal. App. 4th at 623. As the trial court noted, this is necessary because "[f]ew California cases address" the state's EPA, apparently because EPA plaintiffs typically sue under both the California and federal statutes, or include a claim for discrimination under FEHA or Title VII. PA:192-193 (citing *Green*, 111 Cal. App. 4th at 623). Plaintiffs in this case did neither.

As the Superior Court acknowledged, no decision—federal or state—has allowed a plaintiff to maintain a standalone EPA class claim based on the "pattern-or-practice" theory which Plaintiffs would borrow here from FEHA or Title VII. PA:0195.[2] However, both the statutory text and the relevant case law make clear that Plaintiffs' legal theory is legally insufficient.

[2] To be sure, in *Puffer v. Allstate Ins. Co.*, the plaintiff made pattern-or-practice allegations pursuant to both Title VII and the Equal Pay Act. 255 F.R.D. 450, 471 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012). However, the court in that case did not directly address whether pattern or practice allegations were appropriately made in an Equal Pay Act case. Furthermore, it expressly determined that EPA claims demand individualized inquiries into whether the plaintiff can meet his or her prima facie case, and denied the plaintiff's request to proceed as a class in part because of the individualized inquiries required. *Id.* at 455.

B. EPA Claims That Lack Concrete "Substantially Similar" Work Allegations Are Subject To Dismissal.

Mere allegations that an employer's policies generally depressed female employees' compensation are inadequate to state a clause of action under the EPA. Courts have consistently and uniformly held that to state a claim under the EPA, the plaintiff's complaint ***must*** include specific allegations that individual employees performed the same (or "substantially similar") work as male counterparts, though for lesser pay. Courts have routinely dismissed cases in which the plaintiff's allegations are insufficient to meet the EPA's clear statutory requirements with respect to what conduct constitutes a violation of the statute (i.e., unequal pay for "substantially similar work").

For example, in *Emmons v. City Univ. of New York*, 715 F. Supp. 2d 394, 414 (E.D.N.Y. 2010), modified (July 2, 2010), the court granted an employer's motion to dismiss a federal Equal Pay Act claim where the plaintiff had not alleged anything more than her belief that men were paid more. At best, the court concluded, the plaintiff described another employee who allegedly received more compensation, but still failed to allege in the complaint that the other employee's position "was one of comparable skill, effort, and/or responsibility relative to plaintiff's position." *Id.*

Similarly, a federal Equal Pay Act claim was dismissed where the plaintiff's complaint lacked any "specific allegation" that the employer ever "paid her a wage different than it paid a similarly situated male employee." *Burch v. Bellagio Hotel & Casino*, No. 2:14-CV-1141-JAD-PAL, 2014 WL 4472411, at *3 (D. Nev. Sept. 9,

2014); *see also Banawis-Olila v. World Courier Ground, Inc.*, No. 16-CV-00982-PJH, 2016 WL 4070133, at *3 (N.D. Cal. July 29, 2016) (dismissing EPA claim where "[t]he FAC does not contain sufficient specific, factual allegations comparing the 'skill, effort, and responsibility' required for the two positions"); *Eng v. City of New York*, No. 15 CIV. 1282 (DAB), 2016 WL 750251, at *2 (S.D.N.Y. Feb. 19, 2016) (dismissing EPA claims where "[p]laintiff has alleged only that younger male employees with the same title 'perform[ ] the substantially similar or lesser job duties . . .' [which] allegations reveal nothing regarding the content of the work performed by the subject employees. . . .").

As these and other cases make clear, Equal Pay Act cases can survive only where there are adequately pleaded allegations of violations as to each of the employees at issue. Boilerplate recitation of the legal elements of a claim, without factual support, are insufficient to meet the pleading standards. *See, e.g.* PA:022, ¶110.

In *Finefrock v. Five Guys Operations, LLC*, the court found the plaintiff's allegations adequate because she had "alleged in the complaint the existence of at least two particular males that held the same positions she did in Defendant's restaurants and who were paid higher wages than her for the same work." No. 1:16-CV-1221, 2017 WL 1196509, at *3 (M.D. Pa. Mar. 31, 2017) (emphasis added). In reaching this conclusion, the court emphasized that a plaintiff bringing an Equal Pay Act claim "must identify a particular male 'comparator' . . . and may not compare [herself] to a ***hypothetical or 'composite' male***." *Id.* at *2 (emphasis added).

The trial court in this case acknowledged that, "[w]hile no California case has addressed this issue," several federal courts have concluded that Equal Pay Act claims mandate specific allegations as to male comparators. PA:193-194 n.3 (citing cases). This case law, which correctly construes the statutory text and intent, should have compelled the conclusion that Plaintiffs' class EPA allegations were woefully deficient.

C. The Trial Court Erroneously Permitted Plaintiffs To Base Their Class EPA Claim Solely On An Alleged Pattern-Or-Practice Of Generalized Sex Discrimination.

In effect, the trial court in this case determined that Plaintiffs' class claim may proceed based on just the sort of deficient allegations that other courts have found to merit dismissal of Equal Pay Act claims. It concluded the pattern-or-practice theory upon which the EPA class claim rests here must be legally sufficient because Title VII and FEHA class claims may proceed based on similar theories. PA:194. There are multiple reasons why this analysis was incorrect and warrants this Court's intervention.

1. The FEHA Case Cited By The Superior Court Did Not Address The Question Presented Here.

The Superior Court concluded Plaintiffs could rely on a "pattern-or-practice" developed in Title VII and FEHA cases, even though Plaintiffs did not allege a claim under either statute. However, *Alch v. Superior Court, supra*, upon which the Superior Court relied extensively for this conclusion (PA:195-197) provides no guidance here whatsoever.[3]

[3] Furthermore, the Superior Court's assertion that California courts

Alch merely held that a class FEHA intentional discrimination claim may, like a Title VII claim, be established by "pattern-or-practice" evidence of generalized discrimination. 122 Cal. App. 4th at 379. This result is unremarkable for, as *Alch* emphasized, the State and federal claims are "precisely the same." *Id.*

Alch, however, did not involve an Equal Pay Act claim. Thus, the Court of Appeal neither considered nor determined whether the unique elements of an Equal Pay Act claim likewise could be established by pattern-or-practice proof of class-wide discrimination. But as shown in Part 2 below, such proof does not even address the "similar work" component at the heart of the Equal Pay Act, making *Alch* irrelevant.

2. The Pattern-Or-Practice Of Generalized Discrimination Alleged Here Does Not Address The "Substantially Similar Work" Component Of The EPA.

Even more important, the trial court's conclusion is a non sequitur. It is not surprising that a sex discrimination class claim may rest on policies that cause generalized sex discrimination. But it does

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"look to [Title VII] authority in the EPA context as well," relying on *Green v. Par Pools*, (PA:0196) is overstated. In *Green*, the court noted the paucity of California case law interpreting the state EPA and concluded that it was therefore appropriate to look to ***federal EPA*** cases for guidance. 111 Cal. App. 4th 620, 623. The court noted that such federal cases typically also include Title VII allegations. *Id.* Finally, the court in *Green* concluded that it was appropriate to apply the *McDonnell Douglas* burden-shifting test in California EPA cases. *Id.* at 625-26. Nowhere did *Green* say that courts should apply the substance of Title VII case law to California EPA cases, much less that it is appropriate to allege pattern-or-practice violations in a state EPA case.

not follow that an EPA class claim may likewise rest on such policies given that, as the trial court elsewhere recognized, EPA claims are "more demanding" than garden-variety discrimination claims by requiring proof of unequal pay for equal work. PA:197.[4]

Indeed, the federal Seventh Circuit made just this point in affirming a defense summary judgment against a city park manager who complained that several male park managers were paid more than she in a multi-job federal EPA case. *Sims-Finger v. City of Indianapolis*, 493 F.3d 768 (7th Cir 2007). Noting the men in question had greater responsibilities, duties, and experience than plaintiff, the Seventh Circuit explained, "the proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman . . . and there are no skill differences. *Id.* at 772. That was not the case in the "sprawling Indianapolis parks system," where "the parks are so different from one another." *Id.*

Significantly, the Seventh Circuit emphasized that Title VII pattern-and-practice theories are misplaced under the EPA. As it explained, "when jobs are heterogeneous a suit under the Equal Pay Act is in danger of being transmogrified into a suit seeking comparable pay. . . ." *Id.* at 771. But, it went on, "[l]iability on [such a

[4] To be sure, the trial court here noted that Title VII claims were more difficult in different respects. PA:197. To that point, which is not material here, Title VII and the EPA have different and distinct burdens of proof, the former depending on intentional discrimination on which a plaintiff always bears the burden, while the latter creates a type of strict liability if a plaintiff's prima facie case is unrebutted by the employer. *Fallon v. State of Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

claim] is even less tenable under the Equal Pay Act than under Title VII, because the former Act requires equal pay only for equal work, and the whole idea of the comparable-worth movement is that equal pay should sometimes be required for unequal work." *Id*.

Given the clear elements of a claim under the statute, allegations of a generalized policy that might give rise to an inference of generalized sex discrimination are insufficient to state a class-wide claim for relief under the California EPA claim unless the nature of the alleged policies is such that they would naturally and necessarily result in class-wide EPA violations (*i.e.*, women performing equal work to multitudes of individual men for unequal pay).

Plaintiffs' allegations are insufficient to meet the required elements of the EPA because the alleged policies on which they rely do not compel unequal pay for "substantially similar work." Here, Plaintiffs merely alleged, largely on "information and belief," that HPE applies "facially uniform" common companywide policies and practices throughout California, the existence of which supposedly "do not result in equal pay for women and men." *See, e.g.,* PA:005, ¶ 7; 011, ¶43; 012, ¶¶45, 52; 013, ¶58; 015, ¶65.

For example, Plaintiffs allege that "HPE channeled women into lower-paying job positions than men [based on] HPE's stereotypes about what men and women can or should do." PA:012, ¶45. But even if true (and it is not), it does not follow that women were paid less for "substantially similar work." To the contrary, if female employees were really "channeled" into different, lesser job positions, they necessarily were not doing "substantially similar work" to male employees in other positions.

Likewise, Plaintiffs allege that HPE "considers or has considered each new hire's prior compensation when determining that employee's compensation, as well as in deciding which job level to place that new hire." PA:011, ¶43. Again, even if that were true, it would not follow that women thereby performed substantially similar work to men under similar conditions, but for lesser pay. Even assuming that such a practice existed, the alleged "policy" simply does not speak to the equivalence of work performed by men and women at all.

Although a generally-applicable employment policy that expressly or impliedly disfavors women could theoretically, in a proper case, provide fodder for a generalized gender discrimination claim, such a policy cannot provide the foundation for a "pattern-or-practice" claim under the EPA, which is limited to addressing the problem of equal ("substantially similar") work for unequal pay. *See e.g.*, Cal. Lab. Code § 1197.5(a); *Banawis-Olila*, 2016 WL 4070133, at *3; cases cited in part I(B) above; and *Schneider v. Space Sys./Loral, Inc.*, No. C 11-2489 MMC, 2012 WL 476495, at *3 (N.D. Cal. Feb. 14, 2012) (dismissing as "conclusory" class claim containing no allegations how allegedly unlawful policy impacted particular employees).

3. Plaintiffs' Remaining Allegations Do Not Demonstrate Women Performed "Substantially Similar Work" To Men For Less Pay.

Most fundamentally, Plaintiffs make no attempt to allege a theory of class liability that is actually tailored to the specific elements of an EPA claim. They never allege, for example, that HPE utilized

the type of "standardized jobs" that are "the proper domain of the Equal Pay Act." *See Sims-Finger, supra,* 493 F.3d at 772. In a proper case, such an allegation *could* conceivably serve as the foundation for a class claim—that is, where men and women both performed the same standardized job, but men were paid more.[5]

Plaintiffs' Complaint is devoid of allegations describing the work performed by any of the employees in *any* of the "Covered Positions," the conditions under which any work was performed, the skills, effort, and/or responsibility required, or the pay that any employee received. Plaintiffs appear to expect the Court to infer that everyone with the same job title has identical duties, skills and

[5] Simply alleging that men and women had the same job title, however, is not an adequate foundation for a class EPA claim, even if men as a group were higher paid. Titles, classifications and generic descriptions are not enough in any field to do a proper comparison under the EPA. Rather, a court must examine actual job performance and content. *See Fallon v. State of Illinois,* 882 F.2d 1206, 1208-1209 (7th Cir. 1989) (comparison of actual performance rather than descriptions and titles showed employees performed substantially equal work); *see Spencer v. Virginia State University,* 919 F.3d 199 (4th Cir. 2019) (professors are not "interchangeable widget makers"); *E.E.O.C. v. Port Auth. of New York & New Jersey,* 768 F.3d 247, 255, 258 (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 rejecting 'attorney is an attorney is an attorney' theory"); *Carey v. Foley & Lardner LLP*, 577 Fed. App'x 573, 579-80 (6th Cir. 2014) (not all law partners the same); *Becker v. Gannett Satellite Information Network, Inc*., 10 Fed.Appx. 135 (4th Cir. 2001) (not all reporters the same); and *Forsberg v. Pacific Northwest Bell Telephone Co*., 840 F.2d 1409, 1416 (9th Cir. 1988) (not all with same title do the same work).

experience, but such an inference defies logic and common sense, and in any event, is contrary to the decisional law cited in note 3, *infra*.

Plaintiffs' reliance on HPE policies, rather than actual, specific allegations regarding female putative class members performing equivalent work to male comparators for less pay, is even more generalized than the "hypothetical" or "composite" male comparator deemed insufficient in the *Finefrock* case. 2017 WL 1196509, at *2. Plaintiffs simply did not allege any facts showing that female putative class members performed equal and equivalent work to male counterparts for less pay.

Accordingly, there was no basis for the trial court to allow Plaintiffs to pursue a remedy on behalf of others, given that the class claims rest on the sort of generalized, "pattern-or-practice" allegations which have never before been held sufficient under the EPA.

4. The Trial Court Erred In Disregarding Relevant Case Law Merely Because It Arose At The Summary Judgment Phase.

Notably, the trial court in this case did acknowledge that "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," and therefore "are 'more demanding' than Title VII claims in this sense." PA:197. But believing that "virtually all" the relevant cases arose on summary judgment, it reasoned that "plaintiffs are not required to identify specific comparators at the pleading stage, with regard to either their individual or their class claims." *Id.*

However, the California Supreme Court has repeatedly emphasized that, "[w]hen the substantive theories and claims of a

proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved" via demurrer or motion. *E.g. Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 440 (2000). Accordingly, cases examining the viability of EPA cases at summary judgment are instructive even at the pleadings stage because they offer guidance as to the merits of such a claim. The trial court's decision to allow Plaintiffs' class-wide EPA allegations to proceed impermissibly ignored the direction such cases provide.

II. Writ Review Is Necessary To Avoid Irreparable Harm In This Action.

As described above, Plaintiffs' proposed class in this case would encompass virtually every female HPE employee in California (with potential comparators including virtually every male). By permitting Plaintiffs' conclusory, non-specific allegations as to the putative class to proceed, notwithstanding their patent failure to comply with basic EPA pleading requirements, the trial court has invited the discovery floodgates to open. Following the trial court's order, HPE will be obligated to respond to daunting and burdensome discovery requests regarding the thousands of individuals HPE has employed in California during the class period, including the thousands of individual hiring, assignment, pay, and promotion decisions during that time period. Apart from the discovery burdens, HPE will also face the onerous task of investigating each of the individual jobs and associated decisions for thousands of employees—for both men and women—over the course of several years in order to assess and defend against Plaintiffs' EPA allegations.

Furthermore, if the trial court's rationale goes unchecked, it will encourage copycat cases against large employers, pursuant to which plaintiffs will be entitled to simply assert that every single female employee was necessarily paid less than every single male employee based on "pattern-or-practice" allegations that the EPA does not actually countenance. The potential for such grave abuses justifies the Court of Appeals' intervention at this stage to correct the trial court's error and preclude follow-on cases making similar allegations.

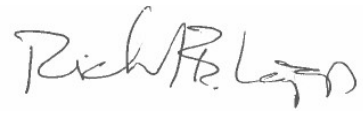
III. Conclusion.

For the reasons expressed above, this Court should grant a peremptory Writ of Mandamus as prayed for in the accompanying Petition.

Dated: August 8, 2019

Respectfully submitted,

SEYFARTH SHAW LLP



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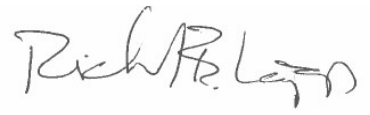
CERTIFICATION OF WORD COUNT

In accordance with California Rules of Court 8.204(c) and 8.486(a)(6), the text of this Petition, exclusive of all portions authorized to be excluded by the Rules, consists of 7,311 words, as counted by the Microsoft Word 2016 Program used to generate this Petition.

Dated: August 8, 2019

SEYFARTH SHAW LLP



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