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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KELLY ELLIS, HOLLY PEASE, KELLI WISURI, and HEIDI LAMAR individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE, LLC (formerly GOOGLE, INC.),

Defendant.

Case No. CGC-17-561299

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Judge: Hon. Andrew Y.S. Cheng,
Dept. 613
Date: December 2, 2020
Time: 9:00 A.M.
Complaint Filed: September 14, 2017
Trial Date: None Set

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I. INTRODUCTION

This action, brought on behalf of a Proposed Class of over 10,800 women employed by Google, LLC ("Google") in California at any time since September 14, 2013, in certain Covered Positions,[1] seeks to remediate Google's systemic practices of (1) paying women in those positions less than men in the same positions performing substantially equal or similar work, in violation of California's Equal Pay Act, Cal. Labor Code §1197.5 ("EPA"), and California's Unfair Competition Law, Cal. Bus. and Prof. Code §17200 ("UCL"), and (2) of assigning women to lower levels of responsibility and salary range than men with comparable experience and education, in violation of the UCL by virtue of violation of California's Fair Employment and Housing Act, Cal. Gov. Code §12900 *et seq.* ("FEHA").[2] As Plaintiffs will prove at a trial on the merits using common evidence, Google paid women in the same positions (called job codes) as men, on average, approximately $1,894 less per year in base salary, bonus, and stock than those similarly-situated men, in violation of the EPA. The compensation disparity adverse to women is highly statistically significant. Common evidence also establishes that, in violation of the UCL, Google had a policy and practice of assigning women to lower levels of responsibility and salary range than similarly-situated men because of their lower pay at their prior employment.

The Proposed Class should be certified because the Proposed Class satisfies California Code of Civil Procedure §382's requirements that a class be numerous, ascertainable, and have a community of interest (which in turn requires predominance, typicality, and adequacy). The Proposed Class is numerous; it has over 10,800 women as potential members. The Proposed Class is ascertainable; it is clearly defined as women who worked at Google in Covered Positions in California for any period on or after September 14, 2013—a group identifiable from Google's records. Since Plaintiffs can prove their claims through common evidence—Google's company

[1] The Covered Positions are identified in Deposition Exhibit 503, which is attached as Exhibit M to the Declaration of James M. Finberg in Support of Plaintiffs' Motion for Class Certification ("Finberg Decl."), and is also attached as an Exhibit to Plaintiffs' Notice of Motion and Motion for Class Certification.

[2] Plaintiffs also bring derivative claims for failure to pay all wages due to former employees under California Labor Code §§201-203, and for declaratory relief pursuant to California Code of Civil Procedure §1060, *et seq.*

documents, the testimony of persons Google designated as Persons Most Qualified ("PMQ") to testify on Google's behalf, payroll and human resources data, and expert testimony—the requirement of predominance of common issues is satisfied. The claims of the four named Plaintiffs—Kelly Ellis, Holly Pease, Kelli Wisuri, and Heidi Lamar ("Plaintiffs")—are typical of those of other Class Members. The Plaintiffs have no conflicts and are represented by experienced counsel, so the adequacy requirement is satisfied. Because all of the requirements for class certification are satisfied, and because one trial is more efficient than thousands of separate trials, class certification is appropriate in this case.

As to the ***first*** claim, under the EPA, Plaintiffs and Class Members must establish that they were paid less than men who performed substantially equal or similar work when viewed as a composite of skill, effort, and responsibility, performed under similar working conditions.[3] Plaintiffs can prove all of those elements through common evidence: company documents, PMQ testimony, human resources and payroll data, and expert testimony.

Company documents and PMQ testimony establish that Google classifies its employees by job code—which is the intersection of job family (*e.g.* software engineer or "SWE") and responsibility level (*e.g.* SWE 3 or SWE 4), Finberg Decl., Ex. F (Wagner OFCCP) at 174:2-24; Ex. H (Williams) at 99:16-100:13—for the purpose of setting compensation. Google documents, PMQ testimony, and expert testimony establish that persons in the same job code share a similar level of responsibility, as well as skills, abilities, and basic job tasks. *See, e.g.*, Finberg Decl., Ex. DDD (Goog-Ellis-00010725 at -26); Finberg Decl., Ex. F (Wagner OFCCP) at 174:2-9, 19-24; Expert Report of Leaetta Hough ("Hough") at 1-2. Common evidence, accordingly, establishes that persons in the same job code are performing substantially similar or equal work.

[3] Prior to January 1, 2016, the statutory language was "equal" work, although case law had described it as "substantially equal" work. *Negley v. Judicial Council of California* 458 Fed.App'x 682, 684 (9th Cir. 2011) (citing *Stanley v. Univ. of S. California*, 178 F.3d 1069, 1074 (9th Cir. 1999) and *Green v. Par Pools, Inc.* 111 Cal.App.4th 620, 623 (2003)); *see also Hall v. Cty. of Los Angeles*, 148 Cal.App.4th 318, 323-24 (2007) (describing standard as substantially similar). On January 1, 2016, the statutory language was changed to "similar" work. *See* S.B 358 (2015), attached as Ex. I to Request for Judicial Notice ("RJN"); *see also* RJN, Ex. A (Cal. Labor Code §1197.5 as it existed until December 31, 2015) and RJN Ex. B (Cal. Labor Code §1197.5 as it existed between January 1, 2016 and December 31, 2016). Since Plaintiffs can meet the higher standard of "substantially equal," the change in standard has no practical effect.

Expert analyses of Google's data establish that, throughout the Class Period and throughout California, Google paid women in Covered Positions thousands of dollars per year less than men in the same job code. Google paid women less base pay, smaller bonuses, and smaller shares of stock than it paid men in the same job codes. Those large and statistically significant disparities remain even if one compares women and men with equivalent education and prior experience, and the same tenure at Google, same job location, and same performance review score. There are no valid job-related reasons for the gender pay gap at Google. Expert Report of David Neumark ("Neumark") at ¶¶8b, 18-20, Sum. Tbl. 1., Anal. Tbl. 2.

The EPA's requirement of equal pay is not dependent on proof of intent or cause of the disparity. The fact that Google pays women less than men for equal or similar work constitutes a violation of the EPA regardless of intent or the cause of the differences. Liability under the UCL necessarily follows a finding that Google violated the EPA. Accordingly, Google's classwide liability under both the EPA and UCL can be determined solely on the common evidence described above and does not depend on why or how Google created these disparities in pay.

As to the ***second*** claim, Plaintiffs can establish through common evidence that Google also violated the UCL by violating the FEHA. From before the start of the limitation period at least through August 2017, Google asked candidates for employment about prior pay, and then used that prior pay to inform its starting salary offers and the level to which Google assigned the person upon hire. PMQ testimony and data analyses establish that Google regularly assigned women to lower levels than similarly situated men because of their prior pay.[4] The data confirm that this underlevelling of women is not attributable to differences in education or prior experience. Women with comparable prior experience and education were disproportionately assigned to lower levels than men based on prior pay. Neumark at ¶¶8.d., 27-57, Sum. Tbls. 2, 3, Anal. Tbls. 1-16. As a result of that underlevelling, Google paid women, on average,

[4] Google's Vice President of Compensation, Frank Wagner, testified at a hearing in an Office of Federal Contract Compliance Programs ("OFCCP") proceeding involving an audit of Google's Mountain View headquarters that "a job level can be thought of as a salary grade." Finberg Decl., Ex. F (Wagner OFCCP) at 174:19-24. Higher levels have higher salary ranges and greater responsibility. For example, [redacted] Finberg Decl., Ex. T (Pltfs.' Ex. 555).

approximately $16,794 less per year than similarly situated men, in base pay, bonus, and stock. *Id.* at ¶¶8.c., Sum. Tbl. 2, ¶¶18-20, Anal. Tbl. 1.

Although Google ceased its policy of asking candidates about prior pay in August 2017, Google continued to ask applicants about "salary expectations," and failed to take steps to correct the salary and level disparities at Google. As a result, inequities from Google's illegal use of prior pay to set level persist. Plaintiffs will prove through common evidence that Google's policy of tying salary levels to prior pay, and failing to rectify the imbalances this created, violated FEHA and the UCL. Plaintiffs will prove this illegal policy and practice through company documents, testimony of Google's PMQ designees, and expert analysis of company data.

Since the Proposed Class is numerous and ascertainable, the Plaintiffs are typical and adequate, and since this action can be tried collectively through the use of common evidence, Plaintiffs' Motion for Class Certification should be granted.[5]

II. BACKGROUND

A. Class Members are Women Who Worked for Google in California Since September 14, 2013; Over Half Are Software Engineers.

Google is a corporation that develops and sells technology-related services and products. Google's headquarters is in Mountain View, California, and Google has several other smaller offices in California, including in San Francisco. Neumark at Tbl. A.3.

From September 14, 2013 through December 31, 2018, Google employed over 42,700 persons in the Covered Positions involved in this case. Neumark at ¶8.a. Over 10,800 of those persons are women. *Id.* A little over half of these Class Members (about 54%) have been employed as Software Engineers (SWE2-SWE9). *Id.* at Anal. Tbl. 6.

B. Google Has Centralized Compensation Policies and Practices, Including Salary Ranges for Each Job Code.

Throughout California and through the Class Period, Google has had centralized

[5] The claims, issues, and evidence presented in this case are very similar to those in *Jewett et al. v. Oracle*, No. 17-CIV-02669 (San Mateo County Superior Court), where on April 29, 2020, Judge Swope certified a class of over 3,300 women employees of Oracle in its Product Development, Information Technology, and Support job functions asserting claims under the EPA and UCL. A copy of this Order is attached as Exhibit J to the RJN.

compensation policies and practices. Finberg Decl., Ex. F (Wagner OFCCP) at 174:19-24; Finberg Decl., Ex. H (Williams) at 62:10-64:14; 99:16-105:21; 158:23-159:3; 164:19-169:2; 189:3-192:25; 194:15-196:12; 202:16-205:7. Google posted these polices company-wide. Finberg Decl., Ex. H (Williams) at 164:19-169:2; *see also* Finberg Decl., Ex. N (Pltfs.' Ex. 510); Finberg Decl., Ex. O (Pltfs.' Ex. 511); Finberg Decl., Ex. P (Pltfs.' Ex. 512); Finberg Decl., Ex. Q (Pltfs.' Ex. 513). Among other common policies, Google established salary ranges for each job code. Finberg Decl., Ex. F (Wagner OFCCP) at 172:5-173:2; Finberg Decl., Ex. H (Williams) at 99:16-103:5; 122:4-9. That salary range was based on a "Market Reference Point" ("MRP"), derived from industrywide salary surveys for similar jobs. Ex. F (Wagner OFCCP) at 169:20-170:6; Finberg Decl., Ex. H (Williams) at 99:16-101:11. Google slotted new hires into a salary range close to (but never below) 80% of MRP, with some new hires closer to 100% and a few above 100% if their pay at their prior employer was higher than the MRP. Ex. F (Wagner OFCCP) at 172:5-173:2; Finberg Decl., Ex. H (Williams) at 190:15-193:14; Finberg Decl., Ex. N (Pltfs.' Ex. 510); Finberg Decl., Ex. G (Wagner) at 75:4-23.

C. Google Groups Employees with Similar Skills and Responsibilities, Who Are Performing Substantially Similar Work, into Job Codes.

Google also has a centralized job classification system, which is described in job ladders that identify the duties, job requirements, and expectations for the jobs in a job family, sorted by level of responsibility. *See, e.g.*, Finberg Decl., Ex. T (Pltfs.' Ex. 555) (SWE job ladders L3-L7).[6] A "job family" is a "professional category of job at Google," sorted by "those that are doing similar job duties and responsibilities, but stratified at different levels of capabilities or skill sets."

[6] *See also* Goog-Ellis-00001681 (Tech Mngr.); Goog-Ellis-00001691 (SWE); Goog-Ellis-00004286 (Corporate Operations Eng.); Goog-Ellis-00004293 (Network Eng.); Goog-Ellis-00004301 (SWE 9); Goog-Ellis-00004303 (SWE 9); Goog-Ellis-00004305 (Site Reliability Eng.); Goog-Ellis-00004311 (Project Mngr.); Goog-Ellis-00004329 (Technical Program and Program Mngr.); Goog-Ellis-00004337 (Program Mngr.); Goog-Ellis-00004349 (Technical Program Mngr.); Goog-Ellis-00004363 (User Experience Researcher); Goog-Ellis-00004379 (User Experience Eng.); Goog-Ellis-00004389 (Technical Writer); Goog-Ellis-00004440 (GCC Educators); Goog-Ellis-00004442 (User Experience); Goog-Ellis-00004974 (Business Systems Analyst); Goog-Ellis-00004977 (Product Manager); Goog-Ellis-00004980 (Operations Assembler/Operations Eng.); Goog-Ellis-00008310 (Systems Administrator); Goog-Ellis-00008315 (Operations Eng.), attached to Finberg Decl. as Exs. BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, RR, SS, TT, UU, VV, WW, and XX.

Finberg Decl., Ex. F (Wagner OFCCP) at 174:2-9. Software Engineer, for example, is a job family at Google. There are different levels within each job family; a level "can be thought of as a salary grade." *Id.* at 174:19-24. Employees at the same level in a job family are "performing [a] like level of duties and responsibilities within that job family." *Id.* A job code is a numeric code that includes job family and responsibility level. *Id.* at 174:10-15. As VP of Compensation, Frank Wagner, testified, "[redacted]." Finberg Decl., Ex. G (Wagner) at 93:11-94:7. Google's annual pay equity analyses [redacted]. Finberg Decl., Ex. DDD (Goog-Ellis-00010725), Ex. EEE (Goog-Ellis-00010857), Ex. LLL (Goog-Ellis-00025792), Ex. GGG (Goog-Ellis-00016919). Industrial Organizational ("IO") Psychologist Leaetta Hough concurs that Google's job codes group employees performing substantially the same work. Hough at 1-2. *See also* Neumark at ¶8.b.ii.

D. Google Paid Women Less than Men in the Same Job Codes.

Although men and women in the same job codes had very similar responsibilities and skills, throughout the class period and throughout California, Google paid women substantially less than it paid men in the same job codes. Google paid women less base salary, smaller bonuses, and less stock than men in the same job code and location. Taking into account base pay, bonus, and stock disparities, Google paid the average woman approximately $1,894 less than the similarly-situated man in the same job code each year. Neumark at ¶8.b. Professor Neumark's regression analyses of Plaintiffs' EPA claim found highly statistically significant results adverse to women: approximately 3.0 standard deviations.[7] *Id.* at ¶¶8.b, 21-24, Sum. Tbl. 1, Anal. Tbls. 1-2. The likelihood of such a large disparity occurring by chance is less than 1 in 100. Professor Neumark obtained that powerful result even after controlling for (*e.g.*, comparing only those people with the same) job code, tenure at Google, time in job code, experience, education, location, and performance review score. *Id.* at ¶8.b.iii.[8]

[7] A standard deviation measures the likelihood of the observed disparity occurring by random chance in the absence of discrimination. Neumark at ¶¶15-17. Statistical disparities of two or more standard deviations give rise to an inference of discrimination. *See, e.g., Hazelwood School District v. U.S.*, 433 U.S. 299, 311 n.17 (1977).

[8] A regression analysis "controls" for a variable by comparing persons who are similarly situated with respect to that variable. Neumark at ¶8.b.iii.

E. Google Had a Policy and Practice of Tying Starting Salary and Levels to Applicants' Prior Pay.

Google hired women into lower salary levels than men with comparable experience and education. Neumark at ¶8.c., 18-20, 24-57, Sum. Tbls. 2-3, Anal. Tbls. 7-16. Based on his analyses of Google's data, Professor Neumark concluded that "prior pay largely drives the sex gap in starting pay, and it does this through determining the job levels at which men and women are hired at Google." That starting pay gap created by the level at which people are hired drives the gender wage gap throughout women's tenure at Google. *Id.* at ¶¶8.d., 27-62, Anal. Tbls. 3-17.

Prior to August 2017, Google uniformly asked job candidates about their prior pay. Finberg Decl., Ex. P (Pltfs.' Ex. 512); Finberg Decl., Ex. H (Williams) at 62:10-64:23; 163:3-25; 164:19-165:11; 190:15-193:14; Finberg Decl., Ex. C (Rowe) at 17:4-17. Google used that information "to inform" its offer to those candidates. Finberg Decl., Ex. P (Pltfs.' Ex. 512). Google's VP of Compensation, Frank Wagner, conceded that Google used prior pay to set initial salary at Google whenever an applicant's prior pay was above Google's MRP target (a figure derived from market data from other tech companies about similar jobs). Finberg Decl., Ex. F (Wagner OFCCP) at 172:5-173:2.

The Google PMQ designee for compensation at hire, Alex Williams, testified that Google's practice was [redacted]. Finberg Decl., Ex. H (Williams) at 99:16-103:5. The Google document [redacted]" Finberg Decl., Ex. N (Pltfs.' Ex. 510), and PMQ Williams confirmed that this "[redacted]" was Google's policy [redacted]. Finberg Decl., Ex. H (Williams) at 192:16-193:14. PMQ Wagner explained that, under these policies and practices, if a person had been making less than 80% of Google's MRP for a particular job code before coming to Google, that person would receive 80% of Google's MRP for that job code as their starting pay at Google. If the person made more than 80% of Google's MRP for that job code, that person would receive that person's prior pay as their starting pay at Google, [redacted]. Finberg Decl., Ex. F (Wagner OFCCP) at 172:5-173:19; Finberg Decl., Ex.

N (Pltfs.' Ex. 510); Finberg Decl., Ex. H (Williams) at 192:16-193:14.[9] Wagner emphasized that "[t]he principle is we try to bring them in as low as possible so that they can earn future increases based on performance." Finberg Decl., Ex. F (Wagner OFCCP) at 172:5-173:19.

The decision about which salary level to assign a new hire [redacted] based largely on the candidate's prior pay. [redacted]. Google's pay policies [redacted][10] Although hiring committees formally designated a new hire's level, in most cases the level the Hiring Committee chose was "the same as the rubric level used by the interviewers," [redacted]. Finberg Decl., Ex. V (Pltfs.' Ex. 567).

When making the decision about which salary level to assign to a candidate, [redacted], Finberg Decl., Ex. H (Williams) at 99:16-103:5, [redacted], Finberg Decl., Ex. N (Pltfs.' Ex. 510), using two critical pieces of information: (1) the candidate's prior pay (through August 2017), Finberg Decl., Ex. P (Pltfs.' Ex. 512); Finberg Decl., Ex. C (Rowe) at 14:18-25; 17:4-18:4, or the candidate's "salary expectations" (after August 2017), Finberg Decl., Ex. P (Pltfs.' Ex. 512); Finberg Decl., Ex. C (Rowe) at 14:18-25; and (2) the salary range for each job code, Finberg Decl., Ex. C (Rowe) at 21:3-22. An empirical analysis of

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[9] Because Google brought incoming employees up to 80% of MRP if their prior salaries were below 80% of MRP, but gave them prior pay if they were above, the graph of starting pay at Google for each job code looks like a hockey stick. *See* Neumark at Fig. 2.

[10] Finberg Decl., Ex. B (Ong) at 145:16-19 ("[redacted]"); 146:4-8 (answering that "[redacted]" about "[redacted]"); 117:8-10 (confirming that [redacted]); 163:21-164:3 ([redacted]); 170:9-171:20 ([redacted]); 174:4-18 [redacted]); Finberg Decl., Ex. W (Pltfs.' Ex. 568) at Goog-Ellis-00002377 ("At least 1 interviewer should be at least one level above the candidate's targeted level.").

Google's data confirms that the prior pay of the candidates drove Google's levelling decisions. Neumark at ¶¶26-57.

Professor Neumark's analyses establish that Google in fact followed its stated policies, and in doing so assigned candidates to the level for which 80% of MRP is closest to, but at or below [redacted] of prior pay. *Id.* at 35-48. Because women, on average, had lower prior pay than men, this policy and practice had disparate impact on women and resulted in women being assigned to lower levels than men with comparable prior experience and education. *Id.* at ¶¶8.c., 20, Anal. Tbl. 1. Professor Neumark's analyses of Google's levelling at hire yields statistically significant results adverse to women. Women are disproportionately assigned to lower pay levels than men. For example, approximately 49% of employees hired into the job position Software Engineer Level 2 during the class period were females, but that figure dropped to 22% for Software Engineer Level 3, to 14.2% for Software Engineer Level 4, to 7.2% for Software Engineer Level 5, to 4.2% for Software Engineer Level 6, and to 1.1% for Software Engineer Level 7. Neumark at ¶41, Fig. 1. The results of Professor Neumark's regression analysis of leveling disparities are highly statistically significant: 11.95 standard deviations. *Id.* at ¶8.c., Sum. Tbl. 2. The likelihood of such a disparity occurring by chance is less than one in one billion. *Id.* Professor Neumark obtained these powerful results even after controlling for education and prior experience. Class-wide, these levelling differences yield compensation differences of approximately $16,794 per woman per year in base salary, bonus, and stock. *Id.*

F. The Plaintiffs Were Subject to and Suffered from Google's Common Policies.

Plaintiffs are four women who worked at Google during the Class Period and, like the other women in the Proposed Class, were paid less than similarly situated men. Plaintiff Kelly Ellis worked as a Software Engineer at Google's Mountain View office from May 2010 to July 2014. Finberg Decl., Ex. I (Ellis) at 60:3-5, 70:16-24, 165:22-24, 190:18-20. Plaintiff Holly Pease was a Manager at Google's Mountain View and Sunnyvale offices from August 2005 to February 2016. Finberg Decl., Ex. K (Pease) at 18:2-10, 40:20-25, 45:25-46:2, 78:23-35. Plaintiff Kelli Wisuri was employed at Google as an Enterprise Sales Operations Coordinator and Associate at Google's Mountain View office from August 2012 to January 2015. Finberg Decl., Ex. L

(Wisuri) at 77:19-23, 143:15-18. Plaintiff Heidi Lamar was a Teacher at Google's Children Center in Palo Alto from July 2013 to August 2017. Finberg Decl., Ex. J (Lamar) at 15:6-10, 57:1-3, 69:15-17.

Plaintiffs Lamar, Ellis, and Pease were asked their prior salaries before being hired. Finberg Decl., Ex. QQQ (Goog-Ellis-00001591); Finberg Decl., Ex. I (Ellis) at 39:5-8, 46:19-25, 48:5-6; Ex. K (Pease) at 44:18-23. Plaintiff Wisuri came to Google through an acquisition, so Google knew her prior salary, Finberg Decl., Ex. L (Wisuri) at 86:4-12. Plaintiffs Ellis, Wisuri, and Lamar were paid their prior salary, and Plaintiff Pease was paid slightly less than her prior salary. Neumark at ¶8.e.; Finberg Decl., Ex. L (Wisuri) at 84:13-15.

All four Plaintiffs "were compensated less than men in the same job code with similar education, experience, performance scores . . . ." Neumark at ¶8.e., Anal. Tbl. 18. Plaintiffs Ellis, Lamar, and Wisuri were assigned to lower levels than men with no greater experience and education. Finberg Decl., Ex. I (Ellis) at 42:3-16; Finberg Decl., Ex. J (Lamar) at 20:3-14; 83:2-11; Finberg Decl., Ex. L (Wisuri) at 16:9-19, 25:14-15, 27:24-29:19.

III. DISCUSSION

A. Class Actions Serve an Important Role in Employment Cases.

The California Supreme Court has "long . . . acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system." *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434 (2000); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340 (2004) ("[T]his state has a public policy which encourages the use of the class action device.") (quoting *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 473 (1981)). Public policy supports using class actions to enforce the Labor Code for the benefit of workers. *Bradley v. Networkers Int'l, LLC*, 211 Cal.App.4th 1129, 1141 (2012). *See also Bufil v. Dollar Fin. Group, Inc.*, 162 Cal.App.4th 1193, 1208 (2008) (noting that courts regularly certify class actions to resolve Labor Code violations).

Class certification is appropriate when "the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." C.C.P. §382. Code of Civil Procedure §382 requires an "ascertainable" and

"numerous class," with a "community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1021 (2012). "The community of interest requirement [] embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096, 1104 (2003) (quoting *Richmond*, 29 Cal. 3d at 470). With respect to the predominance element, the "ultimate question" is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Brinker*, 53 Cal.4th at 1021.

A ruling on class certification "is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" *Sav-on*, 34 Cal.4th at 326 (quoting *Linder*, 23 Cal.4th at 439-40). The relevant focus is on the plaintiffs' theory of liability. *See Sav-on*, 34 Cal.4th at 327 ("[I]n determining whether there is substantial evidence to support [certification], we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.").

B. The Proposed Class is Ascertainable.

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." *ABM Indus. Overtime Cases*, 19 Cal.App.5th 277, 302 (2017), *as modified* (Jan. 10, 2018) (quotation marks and citation omitted). Plaintiffs have defined the proposed class as: "All women employed by Google in a Covered Position in California at any time from September 14, 2013 through the date of trial in this action." *See* Notice of Motion and Motion, filed concurrently. This Proposed Class, defined by particular groups of employees during a specified time period, is readily ascertainable. Google's payroll records provide all of the information necessary to identify putative class members. *See* Mar. 27, 2018 Order Overruling Google's Demurrer at 6 ("The class is ascertainable in that class members can be easily identified based on whether they held a "Covered Position.").

C. The Proposed Class Is Sufficiently Numerous.

Numerosity is satisfied where "the class is too large to make joinder practicable . . . . [I]mpracticality does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Hendershot v. Ready to Roll Transp., Inc.*, 228 Cal.App.4th 1213, 1222 (2014) (internal quotation marks and citation omitted). The proposed class includes over 10,800 women. Neumark Report at ¶8.a. The numerosity requirement is easily satisfied.

D. Predominance Is Satisfied Because Plaintiffs Can Prove the Elements of Their Claims with Common Evidence.

In *Tyson Foods, Inc. v. Bouaphakeo*, Chief Justice Roberts wrote in concurrence that a common question is one in which "the issue is susceptible to generalized, class-wide proof." 136 S.Ct. 1036, 1051 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* §4:50, pp. 196-197 (5th ed. 2012.)). Here, Plaintiffs can prove their claims using generalized, class-wide proof. Accordingly, the standard of the California Supreme Court in *Brinker*—that predominance is satisfied when "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous," 53 Cal.4th at 1021—is easily met.

The statistical evidence in this case is clear and powerful. Professor David Neumark of the University of California, Irvine has analyzed Google's human resources and payroll data, and found both (1) that Google paid women less than men in the same job code performing substantially equal or similar work, Neumark at ¶8.b; and (2) that Google systematically assigned women to lower responsibility levels and salary ranges than men with comparable prior experience and education, because it made levelling decisions based on prior pay, *id.* at ¶¶8.c, 8.d. With that statistical evidence, together with PMQ testimony, and company documents establishing Google's policies and practices, Plaintiffs will be able to prove their claims with common evidence.

1. Plaintiffs' EPA Claims Can Be Resolved on a Classwide Basis.

a. Plaintiffs' *Prima Facie* Case under the EPA Can Be Established with Common Evidence.

California's EPA provides 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." Cal. Labor Code §1197.5.[11] Prior to January 1, 2016, the EPA prohibited differential pay for "equal work," which has been interpreted to mean "substantially equal work." *See Negley*, 458 Fed.App'x 682, at 684. With the enactment of California's Fair Pay Act, S.B. 358 (2015), the law was broadened to the current standard of "substantially similar work," to make it easier to bring claims. *See* S.B. 358, Sec. 1(c), RJN, Ex. I.[12] Plaintiffs satisfy either standard and can do so with common evidence.[13]

Plaintiffs can prove their EPA claims with common evidence establishing that (1) persons in the same job code perform substantially equal or similar work; and (2) women are paid less than men in the same job codes. Cal. Labor Code §1197.5. The cause of the disparity is legally immaterial. *Green*, 111 Cal.App.4th at 626; *Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020).

[11] Prior to January 1, 2016, the statute provided: "No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex 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 . . . ." Labor Code §1197.5(a), RJN, Ex. A (eff. until Dec. 31, 2015). "Effort," within the meaning of either version of the statute, means "physical or mental exertion" based on the "total requirements of a job." 29 C.F.R. §1620.16(a); *see also Green*, 111 Cal.App.4th at 623 ("[I]n the absence of California authority, it is appropriate to rely on federal authorities construing the federal [EPA].").

[12] The federal Equal Pay Act uses the narrower "equal work" standard. 29 U.S.C. §206(d)(1).

[13] Prior to January 1, 2016, the EPA prohibited discriminatory pay practices between men and women in "in the same establishment." The cases construing the same term in the federal EPA make clear that multiple locations constitute a single "establishment" where, as here, the company has a "central control and administration of disparate job sites." *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994). "The hallmarks of this standard are centralized control of job descriptions, salary administration, and job assignments or functions." *Id.* Google satisfies this test. Google maintains strict central control of its job classification system and compensation policies and practices from its headquarters. Google had a single set of compensation policies and guidelines. *See* §II.b, *supra*. Accordingly, Google employees throughout California were employed in the same "establishment" for purposes of plaintiffs' EPA claim prior to the elimination of this requirement on January 1, 2016. A statewide class is therefore appropriate for the entire time period.

Common evidence that persons in the same job code perform substantially similar work includes the following: (a) PMQ testimony, *see, e.g.*, Finberg Decl., Ex. F (Wagner OFCCP) at 174:2-24 ("A job family is a professional category of job . . . doing similar job duties and responsibilities, but stratified at different levels of capability or skill sets . . . . A job code is the numeric identifier . . . for a job family at specific level . . . . [I]t is a level at which people at that job are performing like level of duties and responsibilities within that job family"); Ex. G (Wagner) at 93:11-94:7 ("[redacted]"; Finberg Decl., Ex. B (Ong) at 71:17-76:12 (job ladders "set forth the skills, knowledge, and abilities that one needs to do a job," "set expectations of what's expected for the job," provide "the requirements of the job," and provide "what's expected of the job,"); Finberg Decl., Ex. K (Pease) at 199:21-200:11 (when evaluating employees Google "wanted to compare employees who were doing similar work" and "everyone who was compared was within the same job code"); (b) company documents, *see, e.g.*, Finberg Decl., Ex. T (Pltfs.' Ex. 555) ([redacted]);[14] and (c) expert testimony, *see, e.g.*, Hough Report at 1-2 ("[A]t Google persons within a job code are performing substantially the same work."); Neumark at ¶¶8.b.i, 8.b.ii.

Google's highly regimented job classification system provides a ready mechanism for identifying men and women performing equal or substantially similar work. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 203 (1974) (how a company groups its employees in job categories is significant); *Tomka v. Seiler Corp.*, 66 F.3d. 1295, 1311 (2d.Cir. 1995) (how a company groups its employees in salary ranges is significant).

As to the second element of the EPA claim, Professor Neumark's analyses establish that women in the same job codes as men are paid less. Neumark at ¶8.b. Women receive, on average, $1,894 per year less than men in the same job code, even when controlling for prior experience, education, tenure, and performance score. *Id.*

With these two common elements—company-wide policies and practices ensuring that employees in the same job code perform the same work, plus classwide evidence showing that Google pays women less than men in the same job code—Plaintiffs can make out their *prima*

[14] Additional job ladders are listed in footnote 6.

facie case under the EPA. *See, e.g., Green*, 111 Cal.App.4th at 626 (plaintiffs need only show that the employer pays workers of one sex more than workers of the opposite sex on an EPA claim); *Tyson*, 136 S.Ct. at 1045-49 (expert statistical analysis, and attacks on that analysis, present common issues); *Sav-On*, 34 Cal.4th at 333 (statistical and expert testimony can make class certification appropriate); *Alberts v. Aurora Behavioral Health Care*, 241 Cal.App.4th 388, 418 (2015) (expert analysis was common proof). Because this can be done efficiently on a classwide basis, class certification of the EPA claim is appropriate.

b. Google's EPA Defense Will Fail and Can, in Any Case, Be Litigated with Common Evidence.

The EPA provides an affirmative defense if the employer can meet the burden of proving that the wage disparity is the result of the reasonable application of a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a "bona fide factor other than sex, such as education, training, or experience." Cal. Labor Code §1197.5(a)(1)(D).[15] Since January 1, 2016, the employer has borne the burden of establishing that one or more of the defenses relied upon "account for the entire wage differential."

Google lacks a seniority system and does not pay employees based on quantity or quality of production. To the extent that Google contends that it has a merit system, Professor Neumark's analyses demonstrate that performance scores do not explain the gender pay disparity. Neumark at ¶8.b., 8.c. A factor is bona fide "only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity." Cal. Labor Code §1197.5(a)(1)(D).[16] As of January 1, 2017, the Legislature codified the prohibition against employers basing any wage differential on an employee's prior salary. RJN, Ex. C (Labor Code §1197.5(a)(4)). *See also* RJN, Ex. F (A.B. 1676 (2016)). The Legislature recognized that "[t]he problematic practices of seeking salary history from job applicants and relying on prior salary to

[15] The 2016 amendments to the EPA added the exemplars "such as education, training, or experience" to the "bona fide" factor defense. *See* RJN, Ex B.

[16] This clarification was added in 2016. *See* RJN, Ex B.

set employees' pay rates contribute to the gender wage gap by perpetuating wage inequalities across the occupational spectrum." *Id*. Sec. 1(b). "When employers make salary decisions during the hiring process based on prospective employees' prior salaries . . . women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts." *Id.* Sec. 1(c). The express prohibition of this practice was not a change in the law. As the legislative findings acknowledge, the amendment merely "codif[ied] existing law with respect to the provision stating that prior salary cannot, by itself, justify a wage differential." *Id.* Sec. 1(g); *see also id.* Sec. 1(f) ("Courts . . . have warned against relying on salary history and have stated that prior salary cannot, by itself, justify a wage disparity.").[17] Accordingly, Google cannot rely on prior pay as a justification for the pay gap between men and women under the EPA.

Professor Neumark's analyses show a statistically significant pay gap exists even controlling for education, experience, tenure, location, and performance score. Neumark at ¶8.b. Therefore, common evidence establishes that Google's affirmative defense will fail. Cal. Labor Code §1197.5(a)(3). At the very least, Professor Neumark's analyses show that Google's affirmative defense to Plaintiffs' EPA claim can be litigated with common evidence, and without individual trials. *Jewett v. Oracle*, April 29, 2020 Order at 15-19, attached to RJN as Ex. J.

2. Plaintiffs' UCL Claims Can Be Resolved on a Classwide Basis.

Plaintiffs allege violations of the EPA as a predicate unlawful act giving rise to liability under the UCL.[18] This unlawful conduct alone is sufficient to establish a basis for UCL liability.

[17] When the California Legislature amended the EPA, first to say that "prior salary shall not, by itself, justify any disparity in compensation" and later to state that "prior salary shall not justify any disparity in compensation," it explicitly stated in both instances that it was merely codifying and clarifying existing law. The Legislative Digest for AB 2282, which removed the clause "by itself" as of January 1, 2019, states: "This bill makes clarifying changes to the existing provisions regarding the use of a job applicant's prior salary to prohibit use of prior salary to justify any disparity in compensation." RJN, Ex. H. Similarly, the Legislative Finding for AB 1676 (effective January 1, 2017) states that "[t]his act will codify existing law with respect to the provision stating that prior salary cannot, by itself, justify a wage differential under Section 1197.5 of the Labor Code." RJN, Ex. G (1)(g).

[18] The UCL imposes liability on a party that has engaged in "any unlawful, unfair or fraudulent business act." Cal. Bus. & Prof. Code §17200. The "unlawful" prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th

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Because Plaintiffs will be able to establish Google's EPA violations through common evidence, certification of the UCL claim is appropriate.

Plaintiffs' UCL claim is also predicated on Google's violations of FEHA. FEHA prohibits employment discrimination based upon an employee's sex, among other things. Cal. Gov. Code §12940. An employer violates FEHA if, as here, it implements a facially neutral policy that has a disparate impact on employees of one gender. *Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 325 (N.D. Cal. 1992). Plaintiffs will be able to demonstrate, based on common evidence, that Google's pattern and practice of assigning women to lower salary levels resulted from its policy and practice of using prior pay to assign level. That policy and practice had a disparate impact, because women had lower prior pay. Neumark at ¶8.c.

In this case, Plaintiffs can establish a *prima facie* case under a disparate impact theory through company documents and PMQ testimony establishing Google's policies and practices and through Professor Neumark's analyses. This common evidence establishes that Google used prior pay to assign salary levels to new hires. Neumark at ¶8.d. Professor Neumark's report demonstrates that Google's policy and practice of assigning women to lower levels based on their prior pay has had a disparate, discriminatory impact on women, who have historically been paid less than men. *Id.* Google will be unable to make out its affirmative defense under FEHA that the practice "is a business necessity, which is valid and job-related." *Stender*, 803 F.Supp. at 325. Indeed, the California Legislature has declared this very practice of using prior pay to set starting pay, as *unlawful*. RJN, Ex. E (Labor Code §1197.5(a)(4)); RJN, Ex F (AB 1676 Secs. 1(b), (c));

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163, 180 (1999) (quotation marks and citations omitted). The UCL focuses "on the defendant's conduct, rather than the plaintiff's damages," *In re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009), and imposes strict liability when a defendant has engaged in an unlawful business practice, *Cortez v. Percolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 181 (2000). For purposes of the UCL, class treatment is appropriate so long as plaintiffs can identify uniform conduct by the defendant that gave rise to the unfair or unlawful behavior. *Safeway, Inc. v. Superior Court*, 238 Cal.App.4th 1138 (2015). The UCL vests the courts with "broad equitable powers to remedy violations" in the form of injunctive and restitutionary relief. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 320 (2011); *see also* Cal. Bus. & Prof. Code §17203. Further, the UCL has a four-year limitations period, Cal. Bus. & Prof. Code §17208, which is why the Proposed Class is defined to include women employed by Google as early as four years prior to the filing of the initial Complaint.

Rizo, 950 F.3d 1217 (prior pay cannot explain a wage disparity because it is not job related).[19]

3. Plaintiffs' Other Claims Can Be Proven Through Common Evidence.

Plaintiffs' claim for declaratory relief is derivative of other claims and will be proven by the same common evidence discussed above. Plaintiffs' claim for waiting time penalties is largely derivative of their EPA claim, and willfulness will be shown through common evidence, since [redacted]. *See, e.g.*, Finberg Decl., Exs. HHH, III, KKK (Goog-Ellis-00018822, Goog-Ellis-00018925, Goog-Ellis-00025478). Accordingly, certification of those claims is also appropriate.

E. The Representative Plaintiffs Have Typical Claims.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. . . . The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Martinez v. Joe's Crab Shack Holdings*, 231 Cal.App.4th 362, 375, *as modified on denial of reh'g* (2014) (quotation marks and citations omitted).

The test for typicality is satisfied here because, as with the Class, the four Plaintiffs were compensated less than men doing substantially equal or similar work, Neumark at ¶8.e., and were harmed by Google's policy and practice of using prior pay to set starting pay and responsibility and salary level, *see* Judge Wiss's March 27, 2018 Order Denying Google's Demurrer at 6 ("Plaintiffs' Claims are typical of the entire Class . . . because the entire Class was subject to the

[19] Plaintiffs have also alleged that Google violated the UCL through violations of the FEHA under a disparate treatment theory. The disparate treatment theory is based on the combination of (1) the gross statistically significant disparities arising from Google's policy and practice of using prior pay to set level *see, e.g., Alch v. Sup. Court*, 122 Cal.App.4th 339, 381 n.35 (2004) ("Statistics alone may be used to establish a . . . pattern-or-practice case where a gross, statistically significant, disparity exists"); *Hazelwood*, 433 U.S. at 312 n.17 (statistical disparities of three or more standard deviations give rise to an inference of intentional discrimination); *Stender*, 803 F.Supp. at 323; *Butler v. Home Depot*, 1997 WL 605754, at *6-7 (N.D. Cal. Aug. 29, 1997); Neumark at ¶8.b., 8.c., 8.d.; and (2) [redacted], Finberg Decl., Exs. HHH, III, KKK, (Goog-Ellis-00018822, Goog-Ellis-00018925, Goog-Ellis-00025478).

same compensation policies and practices.").

F. The Representative Plaintiffs Will Adequately Represent the Class.

Plaintiffs can adequately represent the Class because they have the same interests as other putative Class Members, have no conflicts with the Proposed Class, and are represented by well-qualified Class Counsel. *Brinker*, 53 Cal.4th at 1021; *Capitol People First v. Dep't of Dev. Servs.*, 155 Cal.App.4th 676, 696-97 (2007). Like all other women in the Class, the Plaintiffs have the same interest in receiving compensation equal to that paid to men. Class Counsel has extensive experience litigating class actions to enforce federal and state wage and anti-discrimination laws and have pursued this case diligently. Finberg Decl., ¶¶4-30; Declaration of Kelly M. Dermody in Support of Class Certification, ¶¶4-10.

G. Class Treatment Presents a Superior Method of Adjudicating Google's Liability.

"A class action also must be the superior means of resolving the litigation, for both the parties and the court." *Harper v. 24 Hour Fitness, Inc.*, 167 Cal.App.4th 966, 974 (2008).

> Generally, a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer. . . . [R]elevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress the alleged wrongdoing.

Id. (quotation marks and citations omitted).

Because this case can be adjudicated efficiently using common evidence, proceeding as a class action is superior to requiring the thousands of Class Members to pursue individual claims. Trial will consist of PMQ testimony and Google's corporate documents, detailing the commonalities among class members in the same job codes in California and Google's top-down compensation structure, together with Professor Neumark's analyses of Google's payroll data demonstrating systemic pay disparities between men and women in the same job codes. *See* Finberg Decl., ¶¶ 31-38 (describing trial plan). Common PMQ testimony, Google's documents, and expert testimony will also establish that women were assigned to lower levels because of

Google's policy and practice of using prior pay to set levels. This testimony will establish liability, refute any affirmative defense Google may attempt to present, and provide the basis for calculating the damages due to Class Members by demonstrating the pay differentials between women and similarly situated men. It would be more efficient for the judicial system to adjudicate these claims only once using common evidence, rather than in separate trials for every class member who wants to pursue an identical claim. A class action is particularly superior here because most women at Google will otherwise be unable to marshal the evidence to file their claims, since most women at Google lack access to their male co-workers' pay.

Although the losses suffered by Class Members are significant, very few women will have sufficiently large individual losses to justify the extraordinary expense of a single plaintiff lawsuit through trial. As a result, absent a class action, many or most claims would go unvindicated, and Google would not be required to remedy the systemic pay inequities that have significantly disadvantaged its female employees. Therefore, the superiority factor weighs in favor of class certification.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the class be certified.

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Respectfully submitted,

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