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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EMMA MAJO, an individual,

Plaintiff,

v.

SONY INTERACTIVE ENTERTAINMENT LLC, a California limited liability Company,

Defendant.

Case No. 3:21-cv-09054-LB

DEFENDANT SONY INTERACTIVE ENTERTAINMENT LLC'S NOTICE OF MOTION AND MOTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND STRIKE

Date: April 14, 2022
Time: 9:30 a.m.
Courtroom: B, 15th Floor
Judge: Hon. Laurel Beeler

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 14, 2022 at 9:30 a.m. in Courtroom B, on the 15th Floor of the above-titled Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Sony Interactive Entertainment LLC ("SIE") will move the Court for an Order dismissing and striking claims alleged against SIE in Plaintiff Emma Majo's ("Plaintiff's") First Amended Complaint ("FAC") on the grounds that Plaintiff failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), or that Plaintiff's claims should be stricken pursuant to Federal Rule of Civil Procedure 12(f) on the grounds Plaintiff failed to allege facts sufficient to demonstrate a class or collective action is appropriate. This Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the complete pleadings and records on file herein, and such other evidence and arguments as may be presented at the hearing on this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In her First Amended Complaint ("FAC"), Plaintiff Emma Majo tries mightily to transform a handful of individualized complaints about her failure to earn a promotion into a massive collective and class action lawsuit on behalf of all women employed by SIE nationwide and within the state of California. Yet despite the sweeping breadth of her lawsuit, the allegations in which SIE categorically denies, she fails to plead facts to support either her individual claims or the claims of the broad-based classes of women she seeks to represent. Plaintiff seeks to bring collective and class actions under the Federal and California Equal Pay Acts ("EPAs"), but alleges ***no facts*** about her own work, let alone the work of the class members she seeks to represent or any alleged male comparators who she claims performed equal or substantially similar work and were paid more. She alleges classwide claims of disparate treatment and disparate impact discrimination, but fails to identify a single policy, practice or procedure at SIE that allegedly formed the basis of any widespread intentional discrimination or had a discriminatory impact on women. Her widespread claims of harassment are based solely on

unactionable allegations of run-of-the-mill personnel activity. And she clams SIE failed to prevent discrimination and harassment, but provides no facts suggesting SIE knew or should have known about the alleged conduct about which she complains. She further brings wage and hour claims and claims under California's Private Attorneys General Act ("PAGA") and Unfair Competition ("UCL") law, but they are entirely derivative of her other claims and therefore fail for all the same reasons.

Not only does Plaintiff fail to allege sufficient facts to support her asserted claims, but she also fails to allege a class, collective or representative action is procedurally proper. To the contrary, Plaintiff's allegations suggest precisely the opposite, as they are highly individualized and based solely on her personal circumstances. She fails to allege any facts supporting the notion that common evidence can prove the asserted claims of the class, or that the purported members of the collective action she seeks to represent are similarly situated. She also fails to articulate how the alleged class, collective and representative actions she seeks to bring are remotely manageable. Moreover, because she seeks to represent the very managers she accuses of discrimination and harassment, she cannot possibly meet the requirements of adequacy and typicality due to irreconcilable conflicts of interest.

Plaintiff's purely individual claims are similarly deficient. Like her class claims, they are based solely on conclusory allegations or recitations of legal elements without any factual support. Her claims for intentional and negligent infliction of emotional distress are preempted by California's Worker's Compensation statute and are otherwise based on unactionable personnel activity or purported duties SIE did not owe to her. And while she claims the termination of her employment due to a reduction in force was retaliatory, she fails to sufficiently plead she was the victim of unlawful retaliation.

Plaintiff cannot bring thirteen separate legal claims on behalf of herself, nor a national collective action or statewide class action lawsuit, without pleading facts to support her allegations. She has failed to plead such facts here (which SIE contends do not exist). For all of these reasons and as explained more fully below, the Court should grant SIE's Motion to Dismiss and Motion to Strike.

II. ISSUES TO BE DECIDED

The issues to be decided are: (1) Whether the Court should dismiss Plaintiff's putative collective Fair Labor Standards Act (FLSA) EPA claim because the FAC fails to allege sufficient facts to sustain the claim, and strike collective class allegations because she cannot meet collective action procedural requirements; (2) Whether the Court should dismiss Plaintiff's putative Rule 23 class claims because the FAC fails to allege sufficient facts to sustain those claims, and strike Rule 23 class allegations because she fails to allege facts showing she can meet the procedural requirements of Rule 23; (4) Whether the Court should dismiss Plaintiff's derivative UCL and PAGA claims because Plaintiff fails to allege sufficient facts to sustain the predicate claims, and strike Plaintiff's PAGA claim because she fails to allege facts sufficient to demonstrate the claim is manageable; and (5) Whether the Court should dismiss Plaintiff's individual claims because the FAC fails to allege sufficient facts to sustain those claims.

III. PROCEDURAL BACKGROUND

Plaintiff filed this action on November 22, 2021 and filed her FAC on February 7, 2022. *See* Complaint; FAC. She seeks to bring, on behalf of all females and those who identify as female at SIE: (1) a putative nationwide collective action alleging violations of the Federal EPA; (2) a putative Rule 23 class action alleging violations of the California EPA, the California FEHA, California Labor Code §§ 201-203 (final wages) and the California UCL; (3) a California PAGA representative action seeking to represent all "aggrieved employees" in California, and (4) individual claims including public policy wrongful termination, intentional and negligent infliction of emotional distress, FEHA discrimination and harassment, and retaliation under California Labor Code §§ 232.5 and 1102.5.[1]

IV. RELEVANT FACTUAL ALLEGATIONS

A. Plaintiff Alleges She Personally Experiences Gender Bias at SIE.

Plaintiff alleges SIE hired her in 2015. *See* FAC, ¶ 1. She does not allege, however, the

[1] Plaintiff also seeks a declaratory judgment under 28 U.S.C. § 2201 which should be dismissed or stricken because she does not allege facts sufficient to sustain the predicate claims and because the request is redundant. *See Achal v. Gate Gourmet, Inc.*, 114 F. Supp. 3d 781, 819 (N.D. Cal. 2015).

job she held, the job responsibilities she held, to whom she reported, how much she was paid, or the department into which she was hired. She further alleges that when she began her employment at SIE, "her department was roughly 60:40 of men: women, but over the years [she] observed a shift towards more and more males" and as "of 2021, Sony is dominated by males." *Id.*, ¶¶ 64-65. She further alleges SIE "has managers" and claims that one of them would not be alone in a room with females with the door closed, but she fails to allege this individual was *her* manager (and he was not). *See Id.*, ¶ 66. She further alleges this individual ignored unspecified requests from her (but does not state when or how many) and alleges that when she routed these unspecified requests through an unnamed male intern, she received a response (but does not describe the response). *See Id.*, ¶ 67.

B. Plaintiff Alleges She Was Not Promoted, Which She Attributes to Gender Bias at SIE.

Plaintiff alleges she worked at SIE for six years but "did not earn a promotion." *Id.*, ¶ 71. She does not allege she applied for a promotion or was qualified for promotion, but instead speculates her failure to be promoted was due to gender bias at SIE based on a single vague, unattributed comment that unnamed managers said an unidentified female worker who had a "personal issue" was "not performing well because she has had a lot going on at home." *Id.*, ¶¶ 68, 72, 78. Plaintiff further describes various inquiries she made about how to get promoted, as well as restructuring decisions and changes to her reporting chain with which she apparently was dissatisfied. *See Id.*, ¶¶ 69-73. She also complains that when she agreed to join a project underneath another unspecified department at the request of the CFO, she was not allowed to transfer back to her prior job despite being told the move to the other department would be temporary. *See Id.*

Plaintiff further alleges she "sought out" a mentor, who she fails to identify but claims told her the only thing she could do to get promoted was to speak to her unnamed manager, who Plaintiff claims would not answer what she could do to get promoted.[2] *Id.*, ¶ 74. Plaintiff alleges

[2] Despite Plaintiff's allegation that SIE "did not have any females in either Staff or Line leadership roles," *id.*, ¶ 14, she does not allege the gender of any of her managers, apparently

SIE "sometimes promotes people 'in cycle' (meaning around the time of annual performance reviews) and sometimes 'out of cycle,'" but every "out of cycle" promotion she personally "knew of was for a male." *Id.*, ¶ 75. She does not allege the number of "out of cycle" promotions of which she was aware, when they took place, who was promoted, or whether the alleged promotions were to the exclusion of qualified female candidates. Plaintiff also vaguely speculates that "HR itself creates resistance when women try to get promoted… by losing track of females seeking promotion," but does not allege how often this happened, or to whom. *Id.*, ¶ 77.

Plaintiff further alleges she was demoted, "because she went from reporting to a VP, to reporting to a manager below that VP." *Id.*, ¶ 70. She alleges the VP told her "they" [not "he"] did not have time to handle subordinates, despite other male co-workers continuing to report to this VP. *See Id*. She does not allege whether these males were peers or held roles more senior to her, nor otherwise explain the reporting relationships. She further alleges she had the same direct subordinate for three years but "Sony never made [her] management role official." *Id.*, ¶ 71. She does not allege that having a subordinate equates to being a manager at SIE.

C. Plaintiff Alleges She Was Terminated For Complaining About Gender Bias.

Plaintiff alleges that in 2021, she "submitted a signed statement to Sony detailing the gender bias she has experienced," and soon after received a letter stating she was being terminated because SIE was eliminating "a certain department." *Id.*, ¶ 77. She does not allege which department was being dissolved or whether her department fell under it, but alleges the dissolution of the unnamed department was a "false basis" to terminate her because she claims she was not a member of it. *Id.* Nor does she allege that her signed statement informed SIE of any particular law or statute she believes SIE violated. She further alleges she was not promoted, was demoted, and was eventually terminated because "of gender bias, because she is a female, and because she spoke up about gender bias." *Id.*, ¶ 78.

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because all of Plaintiff's managers going back to 2017, including the manager she claims would not tell her how to get promoted, were female.

D. Plaintiff Alleges SIE Broadly Discriminates Against Women in Pay and Promotions.

Without identifying any particular policy or practice at SIE, Plaintiff vaguely alleges "Sony's policies and procedures have an ongoing disparate impact on female employees." *Id.*, ¶¶ 15. She further alleges "Sony maintains policies and practices regarding the promotion process that promote gender-based inequities in title and compensation," and that these unidentified "policies and practices regarding advancement" favor males through a "system where women are denied opportunities for advancement at Sony." *Id.* She alleges "Sony's nationwide practices, policies, and procedures result in lower compensation for female employees than similarly situated male employees." *Id.*

Plaintiff further alleges, "in general, the [unidentified] policies, practices, and procedures that govern the pay and promotions of female employees lack the sufficient standards, quality controls, implementation metrics, transparency, and oversight to ensure equal opportunities for males and females at Sony." *Id.*, ¶ 16. She asserts that because "Sony's management does not provide sufficient oversight or safety measures to protect against intentional and overt discrimination or the disparate impact of [unidentified] facially neutral policies and procedures, female employees (including those...identify[ing] as female) suffering from discrimination are without recourse." *Id.*, ¶ 17.

V. LEGAL STANDARDS

A. Motion to Dismiss

A complaint must be dismissed under Rule 12(b)(6) where a plaintiff fails to assert a cognizable legal theory or allege sufficient facts under a cognizable legal theory. *See, e.g., SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 782-83 (9th Cir. 1996). To assert a cognizable legal theory, a plaintiff must provide "the 'grounds' of [her] 'entitlement to relief' [and this] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at

570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Prior to "unlock[ing] the doors of discovery," the complaint must include sufficient facts from which an inference of wrongdoing may be drawn—facts that suggest that the right to relief is more than conceivable, but also plausible on its face. *Id.*

When deciding a motion to dismiss, a court must set aside any "conclusory statements" or "threadbare recitals of the elements." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 555) ("we 'are not bound to accept as true a legal conclusion couched as a factual allegation'"). Pleading standards "are not so liberal as to allow purely conclusory statements to suffice to state a claim that can survive a motion to dismiss." *Miller v. Cont'l Airlines, Inc.*, 260 F. Supp. 2d 931, 935 (N.D. Cal. 2003); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007).

Moreover, a "court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations." *Summit Tech., Inc. v. High-Line Med. Instruments Co.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (citing *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)). "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.''" *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557). A court cannot assume a plaintiff can prove facts she has not alleged. *Twombly*, 550 U.S. at 563 n.8 (*quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983)). If a plaintiff's allegations do not bring her "claims across the line from conceivable to plausible, [her] complaint must be dismissed." *Id*. at 570. Additionally, a "district court may deny a plaintiff leave to amend if it determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (*quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

B. <u>Motion to Strike</u>

The Court may strike from a complaint "any redundant, immaterial or impertinent and scandalous matter." Fed. R. Civ. P. 12(f). This includes unsupported class allegations: "Where the complaint demonstrates…a class action cannot be maintained on the facts alleged, a defendant

may move to strike class allegations prior to discovery." *See Sanders v. Apple Inc*., 672 F. Supp. 2d 978, 989-90 (N.D. Cal. 2009); *see also Collins v. Gamestop Corp*., No. C10-1210-TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6, 2010) (same); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010).

VI. THE COURT SHOULD GRANT SIE'S MOTION TO DISMISS AND STRIKE.

A. Plaintiff Fails to Sufficiently Plead a Federal Equal Pay Act Claim.

1. The Court Should Dismiss Plaintiff's Federal EPA Claim Because She Simply Recites the Elements of the Claim With No Supporting Facts.

Plaintiff seeks to represent a nationwide Federal EPA collective on behalf of all females or individuals who identify as female at SIE, but she utterly fails to include any factual allegations to support her own Federal EPA claim, let alone a collective claim. The EPA requires men and women *in the same workplace establishment* be given "equal pay for equal work." *Gunther v. Washington Cty*., 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981). A plaintiff has the burden of showing the skill, effort, and responsibility required in performing a job between a female and a male comparator is "substantially equal." *Id*.

Following the precise rubric upon which courts dismiss Federal EPA claims at the pleading stage—Plaintiff simply recites the elements of the claim.[3] *See* FAC, ¶¶ 58-59, 73 ("the putative FLSA class members "(a) were not compensated equally to male employees who had substantially similar job classifications, functions, titles, and/or duties, (b) were not compensated equally to male employees who performed substantially similar work, and/or (c) were denied equal compensation to similarly situated male employees…who performed substantially similar work and had substantially similar experience…Plaintiff and the Nationwide Class are similarly situated with respect to their claims that Sony paid and promoted them less than their male counterparts…Plaintiff's claims are similar to the claims of the Nationwide Class members.").

[3] *See e.g., Lehman v. Bergmann Assocs., Inc., 11 F. Supp*. 3d 408, 420 (W.D.N.Y. 2014). Vague and conclusory allegations will not save an Equal Pay Act claim. *Fairchild v. Quinnipiac Univ*., 16 F. Supp. 3d 89, 96 (D. Conn. 2014). *See also Arafat v. Sch. Bd. of Broward Cty*., 549 F. App'x 872, 875 (11th Cir. 2013) (Reciting the elements of an EPA does not state a claim); *Unger v. City of Mentor*, 387 F. App'x 589, 595 (6th Cir. 2010) (same); *Solomon v. Fordham Univ*., 2020 WL 1272617, at *13 (S.D.N.Y. Mar. 17, 2020) (same); *Kairam v. W. Side GI, LLC*, 793 F. App'x 23, 26 (2d Cir. 2019) (same).

Plaintiff does not describe the work she or other class members performed and does not name any specific male comparators. She does not allege how her work, or the work of other class members, was equal to any male allegedly paid more than her, nor does she allege facts describing the required skill, effort, and responsibility of the work she, other class members, or any alleged comparators performed. She also does not allege facts showing the unnamed jobs at issue were performed under similar working conditions *or at the same workplace establishment*. ***Such paucity of facts is fatal to both her individual and collective EPA claim***. It is not enough to simply state males were paid more for the same work. *See Wade v. Morton Bldgs., Inc*., No. 09-1225, 2010 WL 378508, at *6 (C.D. Ill. Jan. 27, 2010).[4] Indeed, Plaintiff's failure to identify a single male comparator who received a higher salary than her or any alleged class member is, on its own, fatal to her claim. *See Rivera v. Children's & Women's Physicians of Westchester, LLP,* No. 16-CIV-714 (PGG) (DCF), 2017 WL 1065490, at *11 (S.D.N.Y. Mar. 18, 2017) (dismissing EPA claim where plaintiff did not identify a comparator).[5]

And while job titles are not determinative in adjudicating an EPA claim, *see E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 255, 258 (2d Cir. 2014),[6] Plaintiff fails to provide even her own job title in support of her flawed theory. Indeed, other than passing references to working in the SGRC department (with no descriptions of what that department does), and having an

[4] *See also Rose v. Goldman, Sachs & Co*., 163 F. Supp. 2d 238, 244 (S.D.N.Y. 2001) (dismissing EPA claim where complaint contains "nothing more than bald assertions that she and male employees ... received disparate wages for substantially equal jobs under similar working conditions"); *Werst v. Sarar USA Inc*., No. 17-CV-2181 (VSB), 2018 WL 1399343, at *8 (S.D.N.Y. Mar. 16, 2018) (dismissing EPA claim where plaintiff did not allege she was in same position or equally skilled or experienced as comparator); *Hernandez v. Premium Merch. Funding One, LLC,* No. 19-CV-1727, 2020 WL 3962108, at *15 (S.D.N.Y. July 13, 2020) (same); *Adams v. Northstar Location Servs., LLC,* No. 09-CV-1063, 2010 WL 3911415, at *6 (W.D.N.Y. Oct. 5, 2010) (same).

[5] *See also Suzuki v. State Univ. of New York Coll. at Old Westbury,* No. 08-CV-4569 (TCP), 2013 WL 2898135, at *4 (E.D.N.Y. June 13, 2013) (dismissing EPA claim where plaintiff identified no comparator); *Wang v. Gov't Employees Ins*. Co., No. 15-CV-1773 (JS) (ARL), 2016 WL 11469653, at *7 (E.D.N.Y. Mar. 31, 2016) (finding Plaintiff did not plausibly allege EPA claim where she alleged only widespread practice of paying women less than men.).

[6] *See also* 29 C.F.R. § 1620.13(e) ("Job titles…provide very little guidance" in EPA context); *Verdone v. Am. Greenfuels, LLC*, No. 3:16-CV-01271 (VAB), 2017 WL 3668596, at *5 (D. Conn. Aug. 24, 2017) (quoting *Port Auth. of N.Y. & N.J.*, 768 F.3d at 256)("The plaintiff must make specific allegations 'about the actual content of the work done' and cannot res[t] on 'broad generalizations drawn from job titles and divisions.'").

unidentified subordinate employee (FAC, ¶¶ 71, 73), Plaintiffs alleges ***no facts*** about the work she or any alleged male comparator performed, which plainly fails to state an EPA claim. *See Kairam v. W. Side GI, LLC*, 793 F. App'x 23, 26 (2d Cir. 2019*; see also Hernandez v. Premium Merch. Funding One, LLC,* No. 19-CV-1727, 2020 WL 3962108, at *15 (S.D.N.Y. July 13, 2020). Instead, Plaintiff alleges only in conclusory fashion that female employees "were not compensated equally to male employees who had substantially similar job classifications, functions, titles, and/or duties," without alleging a single fact describing those classifications, functions, titles and/or duties. FAC, ¶ 58.

Plaintiff does not even allege facts plausibly showing her knowledge of how SIE conducts its business in any locations other than her own. Instead, she simply alleges ***upon information and belief***, that SIE's allegedly discriminatory employment practices, policies, and procedures are "centrally established and implemented at the highest levels of Sony" are "not unique or limited to any location; rather, they apply uniformly and systematically to employees throughout Sony, occurring as a pattern and practice throughout all locations." *Id.*, ¶¶ 19-20 (emphasis added). This textbook conclusory allegation is not plausible on its face. *See Bush v. Vaco Tech. Servs., LLC*, No. 17-CV-05605-BLF, 2019 WL 3290654, at *5 (N.D. Cal. July 22, 2019) ("many of her allegations lack factual support from which the Court could infer their applicability to a broader class"). It also is insufficient for purposes of proving an EPA collective claim, which depend on showing *with common evidence* an employer pays an entire class of women less than men who perform equal work: EPA claims do not depend upon proving a discriminatory pattern or practice. *See Bauer v. Curators of Univ. of Mo.*, 680 F.3d 1043, 1045 (8th Cir. 2012) (noting intent not relevant Federal EPA claim). The Court should dismiss this claim without leave to amend, including because Plaintiff admits she has no knowledge of how SIE conducts its business in locations outside her own, and thus cannot credibly allege she is similarly situated to the class she seeks to represent. *See Steckman v. Hart Brewing*, 143 F.3d 1293, 1298 (9th Cir. 1998) (pleadings may be dismissed without leave to amend where amendment "would be an exercise in futility").

2. <u>Plaintiff Fails to Allege a Collective Action is Procedurally Proper</u>.

Plaintiff asks this Court to designate "this [EPA] action as a collective action on behalf of

the Nationwide Class and promptly issue notice and toll the statute of limitations on the claims of all class members of the Nationwide class" but alleges no facts suggesting collective treatment is appropriate. FAC, ¶ 17. An employee may bring a collective action under the FLSA on behalf of other "similarly situated" employees. 29 U.S.C. § 216(b). Determining whether a collective action is appropriate is within the discretion of the district court. *Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966-LHK, 2017 WL 3267540, at *2 (N.D. Cal. July 31, 2017). Most courts follow a two-step approach to determine whether employees in a proposed collective are "similarly situated" for purposes of FLSA certification. *Johnson v. Q.E.D. Env't. Sys. Inc.*, No. 16-CV-01454-WHO, 2017 WL 1685099, at *3 (N.D. Cal. May 3, 2017).

The first step focuses on whether similarly situated opt-in plaintiffs exist, and thus whether a collective action should be certified for the purpose of sending notice to potential collective action members. *Id*. This showing "cannot be satisfied simply by 'unsupported assertions,'..." *Barrett v. Forest Lab'ys, Inc.*, No. 12 CV. 5224 RA MHD, 2015 WL 5155692, at *2 (S.D.N.Y. Sept. 2, 2015).[7] At the second step, it is Plaintiffs' burden to present substantial allegations that putative collective members were subject to "an illegal policy, plan, or decision, by showing that there is some factual basis beyond the 'mere averments' in the complaint." *Johnson*, 2017 WL 1685099, at *3; *Rivera*, 2017 WL 3267540, at *3.

Plaintiff simply proclaims, without alleging how or why, that the class is similarly situated. Although courts evaluating Federal EPA claims focus on "the congruity and equality of actual job content between the plaintiff and comparator," which requires "micro-level – rather than macro-level" comparisons, the FAC provides ***no facts*** to suggest the Court could avoid such an individualized, arduous exercise here. *See Kassman v. KPMG LLP*, 416 F. Supp 3d 252, 289-90 (S.D.N.Y. 2018) (decertifying EPA collective action because individualized inquiries were necessary to assess class members against 1,100 proposed male comparators, adjudicate 1,100

[7] "Determining whether proposed class members are similarly situated is fact specific," and courts consider: "(1) whether there is evidence…the alleged activity was part of an institution wide practice; (2) the extent of similarities among the [proposed class] in particular whether the[y] all are challenging the same employment practice; and (3) the extent to which the members of the proposed action will rely on common evidence." *Trinh v. JP Morgan Chase & Co.*, No. 07-CV-1666 W(WMC), 2008 WL 1860161 at *3 (S.D. Cal. April 22, 2008).

equal work questions, and address KPMG's affirmative defenses, which was "impractical if not impossible").[8] Because Plaintiff does not sufficiently allege conditional certification is even a remote or realistic possibility, the Court should dismiss or strike her request to conditionally certify an EPA collective action.

B. Plaintiff's Rule 23 California Equal Pay Act Claim Fails Because She Recites Only the Legal Elements and Provides Conclusory Allegations, But Alleges No Facts.

As with Plaintiff's Federal EPA claim, the Court should dismiss Plaintiff's California EPA claim because Plaintiff alleges no facts in support of this claim, but instead simply recites the claim's elements and makes conclusory allegations. *See* FAC, ¶¶ 13, 92 (alleging only that SIE paid her and other proposed class members "less than the wage rates paid to its male employees for substantially equal or similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions"). Yet Plaintiff alleges ***no facts*** demonstrating SIE paid higher wages to an employee (or employees) of a different sex for "substantially similar work when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions"—as required under the California EPA. *See Hall v. Cty. of Los Angeles*, 148 Cal. App. 4th 318, 323 (2007); Cal. Lab. Code § 1197.5. As discussed in section VI(A)(1), *supra*, Plaintiff alleges no facts describing the work she (or any putative class member) performed, or how it was substantially similar to any male comparator's work under the relevant legal standard. Plaintiff's bare legal conclusions cannot substitute for the required factual allegations. *See, e.g., Wade v. Morton Bldgs., Inc.*, 2010 WL 378508, at *6 (dismissing EPA complaint where plaintiff alleged "only that a male employee performed the same work for more pay," an unsupported recitation of the EPA Act elements).[9]

Additionally, as explained above, Plaintiff fails to identify any male comparator paid more

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[8] See also *O'Reilly v. Daugherty Sys., Inc.*, Case No. 4:18-cv-01283 SRC, 2021 WL 4514293, at *10 (E.D. Mo. Sept. 30, 2021) (decertifying EPA collective action because whether defendant "[paid] male employees more than similarly-situated female[s]…would result in 20 mini-trials").

[9] Although the California EPA recently has been amended, including to broaden the comparator standard from "equal work" to "substantially similar" work and change the elements of employer affirmative defenses, it nevertheless is based on the federal EPA, and therefore "in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute." *Green v. Par Pools, Inc.*, 111 Cal. App. 4th 620, 623 (2003); *see also* Cal. Lab. Code § 1197.5.

than her (or any other would-be class member) for performing substantially similar work—which also dooms her California EPA claim. *Hall*, 148 Cal. App. 4th at 323-25. Classwide treatment is especially inappropriate; she alleges no facts anywhere in the FAC about anyone but herself, and certainly fails to identify how any purported class member was paid less than any male for work that is substantially similar.

C. Plaintiff's Rule 23 FEHA Discrimination Claims Fail.[10]

Despite asserting both individual and classwide FEHA discrimination claims based on theories of both disparate treatment and disparate impact discrimination, Plaintiffs fails to allege facts to support either legal theory, on an individual or classwide basis. FAC, ¶¶ 15, 34.

Disparate Treatment. Plaintiff fails to plead facts essential to support her FEHA discrimination claim, either as to herself, or the proposed class, and instead alleges only conclusory statements rather than "circumstance[s] suggest[ing] discriminatory motive" grounded in the conduct of which she complains. *See Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031, 1038 (2002).[11] Plaintiff alleges female employees are "subjected to continuing unlawful disparate treatment in pay and work opportunities" and that SIE "maintains [unidentified] policies and practices" that result in males being favored in promotion and pay. *See* FAC ¶¶, 15, 113. This is not enough. *Iqbal*, 556 U.S. at 678 (a complaint tendering "naked" assertions "devoid" of factual support is defective). She alleges no facts suggesting she was qualified to receive a promotion or higher pay. She fails to identify any other female who was allegedly not promoted or denied "equal payment." She makes no mention that any female (including herself) was denied a promotion for which they were qualified. She identifies no males given promotions to which she or another female was allegedly entitled. Her pay discrimination claim also fails to state a claim for the reasons explained in section VI(A)(1), *supra*. Indeed, the FAC is devoid of

[10] "Because of the similarity between [the FEHA] and federal employment discrimination laws, California courts look to pertinent federal precedent when" analyzing claims of discrimination under FEHA. *Guz v. Bechtel Nat'l Inc*., 24 Cal. 4th 317, 354 (2000). *See also Harris v. Civ. Serv. Comm'n*., 65 Cal. App. 4th 1356, 1366 (1998).

[11] The elements of an intentional FEHA discrimination claim include Plaintiff (1) is a member of a protected class; (2) suffered an adverse employment action; (3) performed her job competently in the position held; and (4) some other circumstance suggesting discriminatory motive based on the protected class. *See Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031, 1038 (2002).

any factual allegations suggesting discriminatory animus motivated any of the employment actions of which Plaintiff complains.

Disparate Impact. Rather than identify a specific policy or practice Plaintiff claims has a disparate impact on female employees, she simply proclaims in conclusory fashion: "Sony's policies and procedures have an ongoing disparate impact on female employees;" "Sony's policies and practices are not valid, job-related, or justified by business necessity;" and "[a]lternative, objective, and more valid procedures are available to Sony that would avoid such a disparate impact on female employees." FAC, ¶¶ 15, 18. These conclusory statements are insufficient to survive a motion to dismiss. Indeed, it is "not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." *See Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). Plaintiff must isolate and identify the specific employment practices allegedly responsible for any disparate impact. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e–2(k) (*quoting Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).[12]

In fact, Plaintiff complains it is precisely the *lack of common procedures* that drive discrimination at SIE. *See* FAC, ¶¶ 16-18 (SIE's "policies, practices, and procedures *lack sufficient standards…and oversight…other objective…*procedures are available."); *id.*, ¶ 76 ("HR loses track of females seeking promotion"); *id.* ¶ 75 (more males promoted through "off-cycle" process—*i.e.*, in one-off promotions). Plaintiff's sweeping proclamations about nationwide, broadly-applicable discriminatory policies are simply not plausible in the face of such allegations.

1. <u>Plaintiff Does Not Sufficiently Allege FEHA Harassment</u>.

Plaintiff does not state an actionable claim for sex-based harassment under FEHA because her claims are grounded in unactionable personnel management actions such as demotions, termination, and promotions, which cannot form the basis of a harassment claim within the meaning of FEHA.[13] *See Reno v. Baird*, 18 Cal. 4th 640, 647 (1998) (*quoting Janken v. GM*

[12] *See also Meacham v. Knolls Atomic Power Lab'y.*, 554 U.S. 84, 101 (2008); *Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO (AFSCME) v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985) (citing cases).

[13] Plaintiff must allege: (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected class; and (4) the

Hughes Elecs., 46 Cal. App. 4th 55, 64-65 (1996)).

A harassment plaintiff must plead facts establishing her workplace was "permeated with discriminatory intimidation, ridicule and insult" which was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 409 (1994). Plaintiff alleges no such facts. Instead, she alleges only that SIE managers engaged in unactionable personnel management activity—failure to promote, job assignments, and termination. Such allegations track nearly verbatim conduct the California Supreme Court has held is insufficient to state a FEHA harassment claim. *Compare* FAC, ¶73-78 (Plaintiff assigned to different department, not promoted, and effectively demoted) and ¶ 113 ("…preventing females from being promoted…and receiving equal payment") *with Reno*, 18 Cal. 4th at 646-47 ("… hiring and firing, job or project assignments…promotion or demotion…the assignment or non-assignment of supervisory functions… do not come within the meaning of harassment.").

Even had Plaintiff alleged actionable harassment as to herself—and she does not—she certainly fails to sufficiently plead classwide harassment. She provides no allegations whatsoever that she or any other female was subjected to a work environment "permeated with discriminatory intimidation, ridicule and insult" which was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Kelly-Zurian*, 22 Cal. App. 4th at 409 (1994). This claim should be dismissed or stricken because it is not actionable as pled.

2. Plaintiff's Failure to Prevent Claim is Not Sufficiently Pled.

Plaintiff's claim for failure to prevent discrimination or harassment should be dismissed because she does not plead sufficient facts to plausibly suggest such discrimination or harassment occurred (let alone that SIE knew or should have known about it and failed to prevent it). Absent actionable discrimination or harassment, California does not recognize a separate cause of action for failure to prevent. *See* 2 Cal. Code Regs. § 11023(a)(2); *Lee v. Eden Med. Ctr.*, 690 F. Supp.

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harassment unreasonably interfered with her work performance by creating an intimidating, hostile or offensive work environment. *See Lyle v. Warner Bros. Television Prods*., 38 Cal. 4th 264, 277-79 (2006).

2d 1011, 1025 (N.D. Cal. 2010) ("[B]ecause Plaintiff has not supported her FEHA claims of discrimination or harassment…her claim [for] failure to prevent fails as well.")

3. Plaintiff's Unpaid Wages Claim Is Not Properly Pled.

Plaintiff does not allege SIE failed to pay her or proposed class members for all hours worked at the rate at which she or they agreed to be paid (*i.e*., all wages earned). Consequently, she fails to plead essential facts to support her unpaid wages claim: that SIE failed to pay all wages earned upon termination and that any failure to immediately pay wages earned upon termination or quit was intentional. *See* Cal. Lab. Code §§ 201-204; *Kao v. Holiday*, 12 Cal. App. 5th 947, 962 (2017). Instead, Plaintiff bases her claim for failure to pay final wages entirely on her assertion of pay discrimination in violation of the California EPA. FAC, ¶ 137. Yet because Plaintiff has failed to plead facts sufficient to sustain her California EPA clam, her claim for unpaid wages similarly fails. *See* section VI(B), *supra.* More fundamentally, the "facts" Plaintiff does plead are untethered to the elements of Sections 201-203, confirming the claim must be dismissed. *See Viana v. FedEx Corp. Servs., Inc.*, 728 F. App'x 642, 645 (9th Cir. 2018) (affirming summary judgment on Section 201-204 claims because the theory employee would have earned more but for discrimination "does not give rise to a claim for unpaid wages").

D. The Court Should Strike the Class Allegations Because Plaintiff Alleges No Facts Suggesting She Can Satisfy the Rule 23 Procedural Requirements.

Plaintiff asks this Court "for an order certifying this action as a class action" (FAC, Prayer for Relief, ¶ 7), but alleges no facts to support that class treatment is appropriate, *i.e*., that she can meet the requirements of Rule 23. The Court's authority to dismiss class claims is written into Rule 23: "the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). *See also Kamm v. Cal. City Dev. Co*., 509 F.2d 205, 213 (9th Cir. 1975).[14]

[14] *See e.g.*, *Sanders v. Apple Inc*., 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (striking class allegations); *Ramirez v. Baxter Credit Union*, No. 16-cv-03765-SI, 2017 WL 1064991, at *8 (N.D. Cal. Mar. 21, 2017) (same); *Shabaz v. Polo Ralph Lauren Corp*., 586 F. Supp. 2d 1205, 1211 (C.D. Cal. 2008); *Kamm v. Cal. City Dev. Co*., 509 F.2d 205, 213 (9th Cir. 1975) (district court properly granted motion to dismiss and strike class allegations); *Palmer v. Combined Ins. Co*., No. 02 C 1764, 2003 WL 466065, *2 (N.D. Ill. Feb. 24, 2003) (proper to strike class

To maintain a class action, Plaintiff must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation and satisfy at least one 23(b) requirement. Where, as here, the complaint is devoid of factual allegations upon which the Court can draw a reasonable inference of liability, a plaintiff does not meet that burden. *See e.g.*, *Flores v. Starwood Hotels & Resorts Worldwide, Inc.*, No. SACV 14-1093 AG (ANX), 2015 WL 12912337, at *4 (C.D. Cal. Mar. 16, 2015) ("Plaintiffs do not demonstrate…knowledge of, or reasonable belief concerning, the employment practices across departments at their own work sites, let alone across other California locations…. Because Plaintiffs have failed to allege such basic facts, the Court cannot draw" a reasonable inference of liability).

1. Plaintiff's Unascertainable Class Should be Stricken.

As defined, the class is hopelessly unascertainable as the Court will have no manageable way to determine who "identifies as female." Courts require the class definition be precise, objective and presently ascertainable. *Whiteway v. FedEx Kinko's Off. & Print Svcs.*, No C 05-2320 SBA, 2006 WL 2642528, at *3 (N.D. Cal. Sept. 14, 2006). Here, Plaintiff's class definition includes, in addition to all females at SIE, all "individuals employed by [SIE] in California …who…identify as female." FAC, ¶ 23. How will the Court determine who falls within this group? Plaintiff declares this can be gleaned from reviewing email signature blocks. *Id.*, ¶ 4, fn.1. But this proposed solution requires the highly-burdensome and individualized exercise of reviewing all employees' email signature blocks and assumes people always include such information therein. Plaintiff alleges no facts to suggest this is true, and it "is not…proper for a court to assume that [a] plaintiff can prove facts…not alleged." *Twombly*, 550 U.S. at 563 n.8 (*quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983)). Plaintiff has simply failed to allege any manageable way to ascertain who belongs in the class.

2. Plaintiff Alleges No Facts Suggesting She Can Establish Adequacy.

Plaintiff's allegations confirm she is not an adequate class representative because the class

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allegations when "possible to determine…[the Rule 23] requirements cannot possibly be met"); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (same).

definition necessarily sweeps in members with whom she has a direct conflict of interest—female managers. The Rule 23 adequacy requirement "requires the Court to make two determinations: (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether the named plaintiffs and their counsel will "prosecute the action vigorously on behalf of the class[.]'" *Benedict v. Hewlett-Packard Co*., 314 F.R.D. 457, 471 (N.D. Cal. 2016) (*citing Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 985 (9th Cir. 2011).[15]

Plaintiff asks this Court for an order certifying a class for her California EPA, FEHA, and derivative claims. But the crux of her claims is that SIE *managers* discriminatorily failed to promote women, thus decision-making by managers is at the heart of this litigation. Plaintiff has a direct conflict of interest with female manager class members; she cannot purport to represent them, while simultaneously accusing them of potential wrongdoing.[16] *See Randall v. Rolls-Royce Corp*., 637 F.3d 818, 824 (7th Cir. 2011); *Wagner v. Taylor,* 836 F.2d 578, 595 (D.C. Cir. 1987); *Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2018 WL 3328418 at * 29 (W.D. Wash. June 25, 2018); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001).

3. **Plaintiff Alleges No Facts Suggesting She Can Satisfy the Commonality Requirement.**

Plaintiff alleges no specific facts to support that her individual experiences at SIE reflected that of any other female, nor does she identify any policy, practice or procedure that

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[15] Plaintiff alleges she has "retained counsel sufficiently qualified, experienced, and able to conduct this litigation and to meet the time and fiscal demands required to litigate an employment discrimination class action of this size and complexity," but the FAC does not allege counsel has ever led a complex discrimination class action such as this. FAC, ¶ 46.

[16] Plaintiff similarly fails to allege she can satisfy the Rule 23 typicality requirement; though the facts she does allege confirm she cannot. To begin, because she has a direct conflict with female managers, her interests are not "sufficiently aligned with those of class members..." *Alvarado v. Wal-Mart Assocs*., Inc., No. 220CV01926ABKKX, 2021 WL 6104234, at *10 (C.D. Cal. Nov. 3, 2021). Additionally, Plaintiff has not pled facts demonstrating her "claims or defenses…are typical of the claims or defenses of the class" either as to her EPA or FEHA claims. *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 468-469 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012) (typicality not met in EPA and Title VII and pay and promotion discrimination case because "defenses would vary between class members. For example, if [defendant] sought to present evidence that a class member's job performance was the legitimate, nondiscriminatory reason for her salary or job position, such evidence would differ for each individual class member..[w]here…a court would have to examine numerous individualized factors to determine the parameters of individual claims, the typicality requirement is not met.")

raises common issues of law or fact. Rule 23 commonality demands a plaintiff to show "there are questions of law or fact common to the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). "What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation..." *Id*. at 350. Plaintiff must allege a "common contention…of such a nature that it is capable of classwide resolution…determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

a. <u>California EPA</u>

Plaintiff alleges no facts to support commonality can be established for her California EPA claim. To the contrary, she asserts the allegedly common facts include "whether Sony has: (a) intentionally held back female employees on its pay scale because Sony does not provide the same opportunities for advancement; (b) used a compensation system that lacks appropriate standards, implementation metrics, quality controls, transparency, and opportunities for redress; (c) relied on compensation criteria that perpetuate discrimination; (d) compensated female employees less than similarly-situated male employees in salary and/or promotions." *Id*., ¶ 35.

None of these allegedly "common" facts address the questions relevant to a California EPA claim: whether men and women are paid equally for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions" and whether any wage differential among individuals performing substantially similar work was due to "a seniority system; merit system; system that measures earnings by quantity or quality of production; or a bona fide factor other than sex." Cal. Lab. Code § 1197.5. Nor does Plaintiff even attempt to explain how common evidence *could* prove the California EPA claim as to the class. Because Plaintiff alleges no facts regarding her own (or any class member's) work, or how it allegedly compares to higher-paid males, Plaintiff renders impossible the discovery of common answers to the questions that matter. Moreover, because answering such inquiries will be highly individualized, any attempt at amendment will be futile. *See Kassman*, 416 F. Supp. 3d at 289-90 (decertifying EPA collective action because individualized inquiries were needed to assess class members against 1,100 proposed male comparators, adjudicate 1,100 equal work

questions, and address KPMG's affirmative defenses, which was "impractical if not impossible.")

b. <u>FEHA</u>

With regard to Plaintiff's FEHA discrimination and harassment claims, she alleges only facts about her own experiences at SIE, but no facts about class members having the same experiences, *i.e.*, that there are issues of law and fact common to the class. *See* FAC, ¶¶ 68-71, 73-76. Other than the conclusory statements littered throughout the FAC that some unidentified "discriminatory policies, practices, and procedures" cause females, and those who identify as female, to be promoted and paid less than unidentified "similarly situated males," she identifies no *specific* practice, policy, or procedure that binds the claims of the class. *See, e.g.,* FAC, ¶¶ 16-18, 68-71, 73-76.

Plaintiff alleges the common issues of *law* are whether SIE's unidentified policies, practices, and procedures are discriminatory, and whether a lack of transparency, and standards governing its policies violate FEHA. *See* FAC, ¶ 34. She alleges the common questions of *fact* are whether SIE discriminated in promotion and pay, and whether a lack of transparency and standards resulted in discrimination in the same. *See Id.*, ¶ 35. Neither address whether there are common ***answers*** as to whether or why any specific class members experienced discrimination or harassment. Plaintiff's overbroad allegations and theories negate that possibility.

What's more, Plaintiff's own allegations imply that discretion and subjectivity in pay and promotion decisions lead to discrimination at SIE. *See* FAC, ¶¶ 16-18 (SIE's "policies, practices, and procedures ***lack*** sufficient ***standards***…and ***oversight***…other ***objective***…procedures are available.") (emphasis added). But this is "the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Dukes*, 564 U.S. at 355. "Without some glue holding the alleged reasons for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352 (emphasis in original).

Similarly, while Plaintiff simply declares, with no supporting facts, that SIE's allegedly discriminatory policies, practices, and procedures have a disparate impact on women in pay and promotion, she identifies no specific policy. But it is "is all the more necessary" to identify a

specific policy or practice that leads to disparate impact "when a class of plaintiffs is sought to be certified." *Id.* at 357 (discussing Title VII disparate impact claim).

4. <u>Plaintiff Alleges No Facts Suggesting She Can Show Predominance</u>.

Plaintiff fails to allege facts demonstrating common evidence can prove the class claims—*i.e.*, that she can satisfy the Rule 23(b)(3) predominance requirement. "The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Benedict*, 314 F.R.D. at 474 (*citing Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member[.]'" *Id.*

a. <u>California EPA</u>

Plaintiff's unbounded class cannot meet the predominance requirement because the evidence necessary to prove the California EPA claim will differ from class member to class member. Establishing who performs substantially similar work will be a highly-individualized inquiry, requiring an examination of whether the skill, efforts, and responsibility required in the performance of the jobs between each class member and male comparator is substantially similar. *Gunther*, 623 F.2d at 1309, *aff'd*, 452 U.S. 161 (1981). Individualized evidence about actual job performance and content—not titles or classifications—is determinative, and there is no way to shortcut such analysis. *Id.*

b. <u>FEHA</u>

Similarly, the evidence necessary to prove Plaintiff's FEHA claims will be highly individualized because, other than conclusory allegations, Plaintiff does not identify a policy, practice or procedure that determines, on a classwide basis, whether and why any women were discriminated against in pay and promotions—one will have to go promotion and pay decision, by promotion and pay decision. *See* section VI(D)(3)(b), *supra*.

5. <u>Plaintiff Fails to Allege Facts Showing a Class Action Will be Manageable</u>.

a. <u>California EPA</u>

Plaintiff pleads no facts to suggest that proving who performs substantially similar work

(and whether those who do are paid differently) can be done in a manageable way that will not result in endless mini-trials. The FAC likewise provides no possibility that SIE's affirmative defenses can be managed on a classwide basis. SIE has a due process right to put on evidence as to the reasons for any wage disparities among males and females performing substantial similar work—including testimony from the individual managers who made any relevant pay decisions at issue. *See Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 28-29 (2014). The FAC is silent on how this can be done in a manageable way that will not tie up this Court and a jury for months on end.

b. FEHA

The FAC provides not even a hint as to how the evidence necessary to prove Plaintiff's FEHA claims will be managed. She alleges no facts showing she is similarly situated to the class, nor does she identify a policy, practice or procedure that establishes women were discriminated against on a classwide basis. Even assuming Plaintiff established her *prima facie* case, the FAC says nothing of how SIE's affirmative defenses (whether any class member's disparity in pay or promotion of was justified by legitimate, nondiscriminatory reason) can be handled in a manageable way. *See, e.g., Guz*, 24 Cal. 4th at 354.

E. Plaintiff Fails to State Derivative UCL and PAGA Claims[17]

Because Plaintiff's UCL claim is entirely derivative of her substantive claims, and because the alleged violations for which she seeks penalties under PAGA are based on her substantive claims [*see* FAC, ¶¶ 114, 128], her UCL and PAGA claims must be dismissed because the predicate claims are not properly pled. *See Reyna v. WestRock Co.*, No. 20-CV-01666-BLF, 2020 WL 5074390, at *12 (N.D. Cal. Aug. 24, 2020); sections VI(A)(1) and VI(B)-(C), *supra*.[18]

Additionally, Plaintiff alleges no facts demonstrating manageability. And for the same

[17] To the extent Plaintiff seeks penalties under the UCL, they are not recoverable. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002). Moreover, to the extent Plaintiff seeks to recover unpaid wages through her PAGA claim (based on, for example, her EPA claim), PAGA does not provide for recovery. *See ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 185-86 (2019).

[18] An UCL action "borrows" violations of other laws and treats them as independently actionable. *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). A PAGA claim is also based on underlying Labor Code statutes. *See* Cal. Lab. Code § 2699.

reasons the predicate claims are not manageable—so too are these derivative claims; they are properly stricken. *Wesson v. Staples the Off. Superstore*, *LLC*, 68 Cal. App. 5th 746, 762, 765–66, 775, *reh'g denied* (Sept. 27, 2021), *review denied* (Dec. 22, 2021) (proper for district court to strike PAGA claims as unmanageable where underlying claims "are highly fact-dependent" and focus "on the work actually performed by the employee," and the defendant's "affirmative defense could not be fairly litigated through common proof.")[19]

F. Plaintiff Alleges Insufficient Facts to Sustain Her Individual Claims.

1. Plaintiff Fails to State a Claim for Wrongful Discharge (Public Policy).

The Court should dismiss Plaintiff's public policy wrongful discharge ("*Tameny*") claim because it relies on the same deficient allegations as her FEHA claims. *See* FAC, ¶ 78; section VI(C), *supra*; *Peterson v. U.S. Bancorp Equip. Fin., Inc.*, No. C 10-0942 SBA, 2010 WL 2794359, at *6 (N.D. Cal. July 15, 2010) (where the underlying FEHA claims fail, so does the *Tameny* claim).

2. Plaintiff Fails to State a Claim for Intentional or Negligent Infliction of Emotional Distress.

Plaintiff's IIED and NIED claims must be dismissed because they are preempted by California's Worker's Compensation statute, which provides the exclusive remedy for emotional injuries caused by an employer's conduct related to the normal course of the employment relationship (e.g., promotions, demotions, termination). *Grotz v. Kaiser Found. Hosps.*, No. C-12-3539 EMC, 2012 WL 5350254, at *10 (N.D. Cal. Oct. 29, 2012). Even if Plaintiff's IIED claim was not preempted, it cannot proceed because "personnel management activity is insufficient to support a claim of [IIED]" *See Janken v. GM Hughes Elect.*, 46 Cal. App. 4th 55, 80 (1996); *Reno*, 18 Cal. 4th at 647; FAC, ¶ 158. Similarly, Plaintiff's claim for NIED fails because Plaintiff alleges no facts suggesting SIE owed her a duty to avoid negligently causing her emotional distress. *See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d 583, 590 (1989).

[19] *See also Lopez v. Liberty Mut. Ins. Co.*, No. 2:14-CV-05576-AB-JCX, 2020 WL 1189841, at *5 (C.D. Cal. Feb. 11, 2020) (striking PAGA claim as unmanageable); *Litty v. Merrill Lynch & Co.*, No. CV 14-0425 PA PJWX, 2014 WL 5904904, at *3 (C.D. Cal. Nov. 10, 2014) (same).

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3. The Court Should Dismiss Plaintiff's Claim for "Discrimination and Harassment—Termination" Under FEHA Because It Confusingly Lumps Discrimination and Retaliation Into One Legal Standard

The Court should dismiss this jumbled claim wherein Plaintiff alleges she was discriminated against, harassed, ***and*** retaliated against because it is utterly unclear what theory Plaintiff is alleging. "Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud." *U.S. ex rel. Garst v. Lockheed-Martin Corp*., 328 F.3d 374, 378 (7th Cir. 2003). An unintelligible claim is properly dismissed. *Id*. Moreover, if this claim is a FEHA retaliation claim, Plaintiff has not pled a critical element, causation, further warranting dismissal of this claim. *See McKenna v. Permanente Med. Grp., Inc*., 894 F. Supp. 2d 1258, 1279 (E.D. Cal. 2012) (dismissing FEHA retaliation claim where plaintiff failed to sufficiently plead causal link).

4. Plaintiff Fails to Plead Facts Sufficient to Support Her Claims for Retaliation Under California Labor Code Sections 1102.5 and 232.5.

Because Plaintiff fails to allege she complained to SIE about a specific statutory or regulatory violation, instead only alleging she sent SIE a letter "detailing the gender bias she experienced" (FAC, ¶77), she fails to plead a § 1102.5 violation. *See Chan v. Canadian Standards Ass'n*, No. SACV192162JVSJDE, 2020 WL 2496174, at *2 (C.D. Cal. Mar. 16, 2020).

Likewise, Plaintiff fails to plead a claim under Labor Code § 232.5 because she does not allege SIE prevented her from disclosing her wages and working conditions. *Suarez v. Bank of Am. Corp*., No. 18-CV-01202-MEJ, 2018 WL 3659302, at *13 (N.D. Cal. Aug. 2, 2018). Disclosure "means to reveal something that was hidden and not known" but does not include internal complaints expressing a belief that an employer's known conduct was unlawful. *Guthmann v. Classic Residence Mgmt. Ltd. P'ship*, No. 16-CV-02680-LHK, 2017 WL 3007076, at *17 (N.D. Cal. July 14, 2017).

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VII. CONCLUSION

For the reasons set forth above, SIE respectfully requests that Plaintiff's Complaint be dismissed in its entirety.

Dated: February 22, 2022

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: */s/ Erin Connell*
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