SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

RONG JEWETT, SOPHY WANG, and XIAN MURRAY, on behalf of themselves, and ELIZABETH SUE PETERSEN, MARILYN CLARK, and MANJARI KANT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ORACLE AMERICA, INC.,

Defendant.

Case No.: 17CIV02669

ORDER GRANTING REPRESENTATIVE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Assigned for all purposes to the Honorable V. Raymond Swope

Complaint Filed: June 16, 2017

Trial Date: No date set

On February 7, 2020, in Department 23, the Court heard argument on the Motion for Class Certification of proposed Representative Plaintiffs Elizabeth Sue Peterson, Marilyn Clark, and Manjari Kant ("Representative Plaintiffs"), with all parties appearing through their counsel of record. Having considered the memoranda and evidence filed by all parties, the complete record, oral argument of counsel, and the relevant law, and for the reasons set forth below, the Court finds this case should be certified to proceed as a class action pursuant to California Code of Civil Procedure section 382 and California Rule of Court 3.765.

INTRODUCTION

The Representative Plaintiffs are three women employed by Defendant Oracle America, Inc. ("Oracle") in California. Oracle is "a global company that offers technology products and services." Oracle Opp. Mem. at 2. Plaintiffs contend that Oracle pays women employees in California less than men performing substantially similar or equal work, and thus violates California law. Plaintiffs allege that Oracle has violated California's Equal Pay Act, Labor Code §1197.5 ("EPA"), as well as California's Unfair Competition Law, Business & Professions Code §17200 ("UCL"). They seek to proceed as a class action, representing over 4,100 women employed by Oracle in California in its Information Technology, Product Development, and Support Job Functions since June 16, 2013. Plaintiffs contend that these women were paid on average over $13,000 less per year than similarly-situated men. Plaintiffs also contend that much of this pay disparity arose from Oracle's use of prior salary at jobs before Oracle to set starting salaries for its workers, a practice the California Legislature has found perpetuates historical pay discrimination. *See* AB 1676 (2016) at §1(b) (which was attached as Exhibit I to Plaintiffs' Request for Judicial Notice ("RJN")).

The California Equal Pay Act prohibits employers from paying women and men unequal amounts for substantially similar work: "[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...." Labor Code §1197.5.[1] This is a strict liability statute: proving a violation of the EPA (like the federal EPA), does not required proving intent, discriminatory animus, or the cause or motive for the identified pay disparity. *Id.*

The California Unfair Competition Law prohibits businesses from engaging in "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. Code §17200. The UCL "borrows violations of other laws" and makes them "independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 180 (quotations omitted). Here, Plaintiffs allege that Oracle violated the UCL both by violating the EPA and also by violating the Fair Employment & Housing Act ("FEHA"), Cal. Gov. Code §12940.

Plaintiffs ask the Court to certify the following class: "all women employed by Oracle in California in its Product Development, Information Technology, and Support job functions, excluding campus hires, at any time during the time period beginning June 16, 2013, through the day of the trial." The proposed class includes employees from three of Oracle's fifteen different job functions. *See* Declaration of James M. Finberg in Support of Plaintiffs' Motion for Class Certification ("Finberg Decl."), Ex. B (Waggoner) at 83:2-84:25, Ex. M at 00000653. Employees in Product Development work to develop the products Oracle sells; Information Technology employees support Oracle employees on Oracle's internal IT systems; and Support employees provide services to Oracles customers. *Id.* at 45:18-46:13.

In support of their motion, Plaintiffs have submitted substantial common evidence regarding all of the elements of their EPA and UCL claims and Oracle's affirmative defenses to those claims.

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[1] Prior to 2016, the EPA prohibited employers from paying men and women unequal amounts for substantially "equal" work. *See* SB 358, §1(b) (amending Labor Code §1197.5 in light of the "gender wage gap in California" and "the persistent disparity in earnings [that] still ha[ve] a significant impact on the economic security and welfare of millions of working women and their families."); Plfs' RJN, Ex. D (Labor Code §1197.5 text through December 31, 2015). The prior substantially equal standard paralleled the standard under the 1963 federal Equal Pay Act, 29 U.S.C. §§206(d)(1)(iv). *See generally Rizo v. Yovino*, __ F.3d __, 2020 WL 946053 (9th Cir. Feb. 27, 2020) (en banc); *see Hall v. City of Los Angeles* (2007) 148 Cal. App. 4th 318, 323-24; *Green v. Par Pools, Inc.* (2003)111 Cal. App. 4th 620, 623; *see also Negley v. Judicial Council of California*, 458 Fed. Appx. 682 (9th Cir. 2011).

With respect to their EPA claim, Plaintiffs submitted evidence regarding the centralized and systematized manner in which Oracle classifies employees and determines employee pay through the use of a detailed company-wide system of job codes, in which Oracle groups employees by job function, job specialty, job family and responsibility level, and assigns each job code a specific salary range. *E.g.,* Oracle's "Global Job Table," Finberg Decl., Ex. Z[2], and "Global Compensation PowerPoint Presentation," Finberg Decl., Ex. M, Ex. B (Waggoner) at 66:1-77:12. Plaintiffs' common evidence includes deposition testimony from Oracle's PMQ designees that individuals within job code share "basic skills, knowledge, and abilities," and "similar" "levels of responsibility and impact." Finberg Decl., Ex. B (Waggoner) at 225:11-19, 229:7-9.

Plaintiffs' common evidence also includes detailed reports and expert analyses and opinions from two experts – Professor David Neumark, Ph.D., a Labor Economist, and Leaetta Hough, Ph.D., an Industrial Organization Psychologist.[3] Industrial Organizational Psychologist Hough analyzed Oracle's job classification system and concluded that "At Oracle women in the same job codes as men perform the same or substantially similar work." Hough Report at ¶48; *see also* ¶18.a. *See also* Neumark January 2019 Report at ¶8.b. Plaintiffs' experts concluded that work within Oracle's specific job codes should be considered substantially equal with respect to skills, effort, and responsibilities.

Professor Neumark analyzed Oracle's pay records and found disparities in pay between men and women within job code. Neumark January 2019 and April 2019 Reports. He found that women working in the same job codes as men receive less base pay, fewer bonuses, and less stock. Neumark January 2019 Report at ¶8.b. He found that the compensation discrepancies are large and statistically significant. *Id.*

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[2] There are approximately 200 specific job codes within the three job functions that comprise the proposed class. Finberg Decl., Ex. Z.

[3] Oracle moved to strike the Neumark and Hough Reports. By separate orders, the Court denied those motions and found that the reports contain admissible evidence.

With respect to their UCL claim, Plaintiffs submitted documents from Oracle and testimony from Oracle's corporate designees demonstrating Oracle's use of prior pay to set salary levels for incoming employees, including both those brought on-board by acquiring other businesses and lateral hires. *E.g.*, Finberg Decl., Ex. B (Waggoner) at 166:25-168:24, 352:5-25, 359:15- 364:8; *id.* Ex. D (Kidder) at 29:25-30:6; *id.* Ex. FF at 6675; *id.* Ex. N at 0000170; *id.* Ex. X; *id.* Ex. GG; Holman-Harries Dec., Ex. A at 8; Subramanian Decl. at ¶¶2-3; Finberg Reply Decl., Ex. D (Subramanian) at 82:8-85:3. Professor Neumark found that "this initial gender gap in starting pay drives the gender gap in base pay that I observed during the Class Period; the magnitude of the gender gap in base pay is similar during the Class Period and in the data on starting pay." Neumark January 2019 Report at ¶8.d.

Oracle opposes class certification. Oracle does not contest ascertainability or numerosity; instead, Oracle primarily focuses on what it contends is a lack of predominance of common issues. Oracle argues that variations in job duties within the job code system it employs preclude comparing the pay of people within those codes for purposes of the EPA. Oracle also contends that its affirmative defense that certain "bona fide" factors justified any pay disparities between women and men performing substantially similar work – which would be Oracle's statutory burden to prove – would require individualized inquiry and proof. Oracle asserts that the Representative Plaintiffs' claims are not typical of the class and that they are not adequate representatives. As to Plaintiffs' UCL claim, Oracle makes the merits argument that Plaintiffs cannot challenge the use of prior pay in setting initial salaries as unlawful on a classwide basis because, Oracle asserts, Plaintiffs have not adequately pled that claim.

In support of its arguments, Oracle submitted common evidence – declarations from managers and employees describing their work, as well as an expert report from an economics litigation consultant, critiquing the statistical analysis performed by Plaintiffs' expert labor economist.

The Court has considered all of the arguments and complete record presented on this motion, and discusses below each of the relevant factors in turn, and explains why class certification is appropriate in this case.

DISCUSSION

I. Standard for Class Certification

California has "a public policy which encourages the use of the class action device." *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326; *see also Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 (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"). Class certification is appropriate when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." Code Civ. Pro. §382. A class should be certified where there is an ascertainable class, and a well-defined "community of interest among class members." *Sav-On*, 34 Cal. 4th at 326. 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* (2003) 29 Cal. 4th 1096, 1104 (citation omitted). This Court must also consider whether "the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." *Sav-On*, 34 Cal. 4th at 332.

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 recovery." *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."). Thus, the Court asks whether "'the issues which may be jointly tried, when compared to 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.'" *Id.* at 326 (*quoting Collins v. Rocha* (1972) 7 Cal.3d 232, 238).

II. Ascertainability of the Proposed Class

Oracle does not contest ascertainability, which the Court concludes is met. Whether a class is ascertainable is determined by examining: "(1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." *Reyes v. San Diego Cty. Bd. of Supervisors* (1987) 196 Cal. App. 3d 1263, 1271; *ABM Indus. Overtime Cases* (2018) 19 Cal. App. 5th 277, 302. The proposed Class, "all women employed by Oracle in California in its Product Development, Information Technology, and Support job functions, excluding campus hires, at any time during the time period beginning June 16, 2013, through the day of the trial," is ascertainable from Oracle's records.

III. Numerosity of the Proposed Class

The Proposed Class has over 4,100 members. *See* Neumark April 2019 Report at ¶11. It would be impracticable to bring all class members before the Court. Oracle does not contest numerosity. The numerosity requirement is satisfied.

IV. Well-Defined Community of Interest

A. Predominance of Common Questions of Law or Fact

As discussed above, the California Supreme Court in *Sav-On* and subsequent cases have instructed that in assessing whether common or individualized issues predominate, this Court's inquiry should focus on the plaintiffs' theory of recovery, and whether plaintiffs' theory is amenable to being tried on a class basis. 34 Cal. 4th at 326-27. As explained in *Linder*, the Court's role is to "scrutiniz[e] a proposed class cause of action to determine whether, *assuming its merit,* it is suitable for resolution on a class-wide basis." 23 Cal. 4th at 443 (emphasis added). 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 Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. For purposes of assessing predominance, common questions are those in which "the issue is susceptible to generalized class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1051 (2016) (Roberts, J., concurring) (quoting 2 W. Rubenstein, *Newberg on Class Actions* §4:50 pp.196-97 (5th ed. 2012).

The Court finds that Plaintiffs' EPA and UCL claims in this case can be resolved through generalized class-wide proof. Plaintiffs' theories of liability raise a number of common issues of fact and law that predominate over any individual issues.

Plaintiffs' theory of recovery for their EPA claim is straightforward: 1) Oracle employees assigned by Oracle to a particular job code perform substantially similar work (and substantially equal work prior to 2016), as such similar work is defined by the EPA, *i.e.,* with respect to skill, effort and responsibility, and 2) women were paid less than their male counterparts within the same job code, and therefore were paid less in violation of the EPA. Plaintiffs have calculated the differential to be on average $13,000 per year. Neumark January 2019 Report at ¶77. Under the EPA, Plaintiffs need not prove the reason for the wage disparities: the fact of gender-based pay disparities violates the statute (absent any valid affirmative defenses, discussed below). Labor Code §1197.5.

Plaintiffs' theory of recovery for their UCL claim is based on Oracle having violated both the EPA and the FEHA. Plaintiffs contend that the gender pay disparities within job code at Oracle resulted in large part from Oracle's policy or practice of using prior pay to set starting pay at Oracle before October 2017. Under Plaintiffs' theory, that policy and practice had a disparate impact on women, *see* Neumark January 2019 Report at ¶8.d., and thus violated the UCL as an unlawful business practice under FEHA.

1. Plaintiffs' EPA Claim

a. The Elements of Plaintiffs' EPA Claim Under Plaintiffs' Theory of Liability

Under Plaintiffs' theory of the case, they can prove the elements of their EPA claim by establishing that (1) persons employed in the same job codes at Oracle were performing substantially similar work after January 1, 2016, and substantially equal work prior to that date; and (2) that women were compensated less than men employed in the same job codes.

Plaintiffs' theory here is *not* that the class members within job codes at Oracle worked in identical jobs, or even jobs with the same duties, because the law does not require them to show that. Labor Code §1197.5 sets the proper comparison as: "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working

conditions...."[4] For work to be substantially similar under this standard, or even substantially equal under the pre-2016 standard (which is comparable to the test under the federal Equal Pay Act), jobs do not need to be identical or require exactly the same duties. For example in *Cooke v. United States*, 85 Fed. Cl. 325, 344-45 (2008), the court found that work performed by the female Director of the Office of Marine Safety for the NTSB was substantially equal to the work performed by male Directors of the Offices of Highway Safety, Railroad Safety, and Pipeline and Hazardous Materials Safety, even though each specialized in investigation of a different type of accident (maritime v. highway, railway, and pipeline) and thus required technical expertise in a different transportation mode. *See also Ewald v. Royal Norwegian Embassy*, 82 F.Supp.3d 871, 941-44 (D. Minn. 2014) ("Innovation and Business Officer" and "Higher Education and Research Officer" substantially equal though one focused on business and the other on education). Similarly, professors in different departments perform substantially equal work under the federal EPA. *Lavin-McEleney v. Marist College*, 239 F.3d 476, 480-81 (2d Cir. 2001) (psychology department and criminal justice department). *See also Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1033 (11th Cir. 1985) (different courses); *Garner v. Motorola,* 95 F.Supp.2d 1069, 1075 (D. Ariz. 2000) ("different software functions"); *EEOC v. Central Kansas Medical Ctr.,* 705 F.2d 1270, 1273 (10th Cir. 1983) ("performed with different equipment or machines").[5]

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[4] Prior to 2016, the statutory comparison was: "jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Plfs' RJN Ex. D (Labor Code §1197.5 prior to December 31, 2015).

[5] California courts can look to decisions regarding the federal EPA, where appropriate, as persuasive authority, given the lack of developed case law under California's EPA, particularly for the time period prior to 2016 when certain statutory language was consistent, but also for the purpose and prohibitions that continue to overlap, even as California has strengthened its law. *E.g., Hall*, 148 Cal. App. 4th at 323 n.4 (as of 2007: "Because Labor Code section 1197.5 is substantively indistinguishable from its federal counterpart, California's courts rely on federal authorities construing the federal statute"); *Green*, 111 Cal. App. 4th at 623 (as of 2003: "The California statute is nearly identical to the federal Equal Pay Act of 1963 [citation]. Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute").

Whether the jobs at issue in this case are substantially equal or similar is a question of fact for a jury. *Beck-Wilson v. Principi;* 441 F.3d 353; *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1311 (2d.Cir. 1995) ("[I]t is for the trier of fact to decide if [there] is a significant enough difference in responsibility to make the jobs unequal").

Plaintiffs have provided this Court with substantial common evidence from which a jury could conclude that Plaintiffs have established the first element of their EPA claim, that women and men at Oracle in the same job code perform substantially similar or equal work. As an initial matter, Oracle documents and testimony of Oracle witnesses demonstrate that the company's hiring and compensation policies and practices are highly centralized:

a) Throughout the United States (and therefore California) and the class period, Oracle's policies and guidelines for making compensation decisions were set forth in one uniform document: the Global Compensation PowerPoint Presentation. Finberg Decl., Ex. B (Waggoner) at 66:1-77:12. Individual offices did not develop compensation training separate and apart from these uniform corporate instructions. *Id.* at 77:14-19.

b) New hire decisions and initial pay setting are approved up through Oracle's corporate hierarchy all the way to Oracle Executive Chairman of the Board and Chief Technology Officer Lawrence Ellison's office for approval and possible modification. Holman-Harries Decl., Ex. A at 6 ("Final approv[al] would be up through the management chain, and finally the approv[al] at the CEO office for a new hire.");[6] Finberg Decl., Ex. B (Waggoner) at 105:1-107:4; 107:19-108:21; 112:2- 17, Ex. O (Pltfs.' Ex. 28) at 114, Ex. N (Pltfs.' Ex. 27) at 174.

c) Pay increases, bonuses, and stock awards are also determined as part of a budget process that begins at the top of the hierarchy, and is "pushed down" to lower-level managers who can make recommendations – but not final decisions –

[6] Oracle objected to the admissibility of this declaration from Oracle's former Director of Compensation, filed in support of Plaintiffs' motion. The Court overrules those objections, *see* Cal. Evid. Code §§ 1220, 1221, 1222, 1280.

regarding the allocation of their budget; the recommendations go back up to the chain of command to the very top for approval at each step. Finberg Decl., Ex. B (Waggoner) 122:22-124:21, 125:4-22, 148:21-149:13, 182:4-200:8; Finberg Decl., Exs. Q, R, S, T, U, V, W (Pltfs.' Exs. 31, 32, 33, 34, 35, 36, 37).

This substantial common evidence supporting a top-down, centralized system makes Plaintiffs' pay claims particularly appropriate for classwide resolution. Plaintiffs can also establish through this common evidence of a centralized system that Oracle's facilities throughout California functioned as one establishment for compensation purposes through the relevant time period.[7]

Next, Plaintiffs have presented substantial common evidence to establish that Oracle categorizes its employees into a granular, uniform, and company-wide system of job codes. Substantial common evidence demonstrates that Oracle's uniform, company-wide job code system already sorts jobs by the skills, responsibilities, and effort that constitute substantially equal or similar work required for comparisons under the EPA. That evidence includes the following:

a) Deposition testimony from Kate Waggoner, Oracle's Person Most Qualified (PMQ) designee about Oracle's compensation and job classification systems, including the following: "People in each of these job codes share certain basic skills, knowledge, and abilities," (Finberg Dec Ex. B (Waggoner) at 225:11-19); Persons in job codes share "similar" "levels of responsibility and impact," (*id.* at 229:7-9);

[7] Prior to January 1, 2016, the EPA prohibited disparate pay by gender for employees working "in the same establishment." Plfs' RJN, Ex. D (Labor Code §1197.5 prior to December 31, 2015). The law was amended as of that date to eliminate that requirement. Labor Code §1197.5. The cases interpreting similar language in the federal EPA make clear that multiple locations constitute a single "establishment" where a company has "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.* Here, Plaintiffs' common evidence would support the conclusion that Oracle's facilities in California functioned as one establishment under this standard.

b) Oracle's Global Job Table, which groups Oracle employees by job functions, job specialty, job family, and responsibility level into job codes, each of which has a specific salary range and identified education and experience requirements. *See* Finberg Decl., Ex. Z;

c) Oracle's Global Compensation Training Power Point. Finberg Decl., Ex. M (explaining uniform use and importance of job codes and salary ranges);

d) Oracle's documents establishing that Oracle has determined that persons with the same job code share the same specific functional competencies, or skills. *See, e.g.* Finberg Reply Decl., Ex. G at 00004918, Ex. P at 00005282 ("Functional competencies are specific to job and represent the most important capabilities or skills needed to perform successfully in each job.");

e) Oracle's documents describing responsibility levels for Oracle employees by career level, which is incorporated into job code. *See, e.g.* Finberg Decl. AA;

f) Oracle's documents establishing that how an employee is compensated within a job code salary range should be determined by Oracle tenure and performance. *See, e.g.* Finberg Decl., Ex. M at 00000392, Ex. BB at 17;

g) Deposition testimony from Anje Dodson, Oracle's PMQ on Training and Performance Evaluations, including testimony that if an employee transfers from one product team to another product team in the same job code, there is no required additional training. Finberg Dec Ex. C (Dodson) at 126:14-128:1;

h) The Report and testimony of Plaintiffs' expert Industrial Organizational (IO) Psychologist Leaetta M. Hough, Ph.D., including her opinion that "At Oracle women in the same job codes as men perform the same or substantially similar work...." Hough Report at ¶48; *see also id.* at ¶18.c; Finberg Reply Decl., Ex. A (Hough) at 132:21-133:21 (Oracle has "specified that within this job code, these are similar jobs in terms of the abilities, the skills, the effort, the responsibility that's required to perform those jobs. The working conditions, they're similar, according to Oracle's work.").

i) The conclusion of Labor Economist Professor David Neumark, who "treat[s] persons in the same job code and grade as performing substantially equal or similar work, which is how Oracle treats such persons; that treatment is consistent with the practice of studying labor market discrimination in labor economics." Neumark January 2019 Report at ¶8.b.

With respect to the second element of their EPA claim, Plaintiffs can prove to the jury that women at Oracle were paid less than men in the same job code through Oracle's own pay and compensation data. Plaintiffs' expert labor economist, Professor Neumark, ran statistical analyses of the data Oracle produced in discovery, and concluded "[t]here are statistically significant gender disparities in compensation. Looking across base pay, Medicare wages, total compensation, bonuses, and stock grants, women received statistically significantly lower compensation than men who were, based on the data available, performing substantially equal work in jobs the performance of which required substantially equal skill, effort, and responsibility, performed under similar working conditions." Neumark January 2019 Report ¶8.b.

The EPA does not require that each and every plaintiff identify one specific individual as a comparator. *Cf. Beck-Wilson,* 441 F.3d at 363. It is sufficient to prove that men and women in the same job code are performing equal or similar work, and some of these men were paid more than women in the same job code. *See Hall,* 148 Cal.App.4th at 325 (appropriate comparison is comparison of persons in same job category). But here Oracle's data would contain the identities of the men who were paid more than the women within each job codes.

Oracle argues, contrary to this common evidence proffered by Plaintiffs, that individualized issues predominate, because, it contends, people within the same job code do not perform substantially equal or similar work. In Oracle's view, the evidence establishes the fact that there are variations within job code with respect to the specific duties of each employee that render comparison at the job code-level improper. Oracle Opp. Mem. at 9-15. Oracle's arguments are not persuasive to the Court for several reasons.

First, Oracle's contentions do not appear to be consistent with Oracle's own documents and PMQ testimony, described above. Plaintiffs have submitted more than sufficient common evidence to demonstrate that they could prove, using this common evidence, that job codes at Oracle already sort jobs by the requisite levels of skill, effort, and responsibility.

Second, to the extent Oracle is relying on what it contends are differences in job *duties* within job code, this is not the law: The EPA does not require equal job duties, but rather that jobs be compared with respect to "a composite of skill, effort, and responsibility, and performed under similar working conditions...." Labor Code §1197.5; *see also* supra n.2 (statutory language prior to 2016). Accordingly, purported differences in job duties do not defeat class certification.

Third, in order to conclude that Oracle is correct that throughout the company, the skills, effort and responsibilities vary within each of Oracle's job codes to such an extent that individualized inquiries are necessary to determine the nature of each person's work, the Court would be required to rule now in Oracle's favor on a merits question that is properly for the jury. That is not appropriate at this stage of the proceedings, which serve to test whether *plaintiffs'* theory is susceptible to common proof (not whether plaintiffs will eventually prevail on the merits). *See, e.g., Sav-On*, 34 Cal. 4th at 338 (class proponent not required to prove merits for all class members to establish predominance); *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1301 (court erred in denying class certification by evaluating the merits of defendants' declarations, "rather than considering whether they rebutted plaintiff's substantial evidence that predominant factual issues" rendered the case amenable to class treatment). The question before the Court now is not whether Oracle's job codes categorize jobs on the basis of substantially similar or equal skills, effort, and responsibility, but whether Plaintiffs have offered substantial common evidence that they do so. Here, Plaintiffs and Oracle have proffered contrary, but common evidence – Oracle documents, Oracle witness testimony, and expert opinion – upon which they base their respective arguments regarding how Oracle actually operates. A jury can resolve this factual dispute to decide whether or not job code is the proper category of

comparison under the EPA. Common questions therefore predominate with respect to Plaintiffs' prima facie case under the EPA.[8]

b. Oracle's Affirmative Defenses to Plaintiffs' EPA Claim

Oracle's asserted affirmative defenses also do not raise individualized issues that predominate over the many common issues of law and fact raised by Plaintiffs' EPA claims. Once a plaintiff establishes a gender pay disparity, the EPA provides an affirmative defense if the employer can prove that disparity is the result of a seniority system, a merit system, a system that measures earning by quantity or quality of production, or a "bona fide factor other than sex, such as education, training, or experience." Labor Code §1197.5(a)(1).[9] Oracle relies here only on section (1)(D), the "bona fide" factor defense, and does not assert any of the other affirmative defenses (for example, a merit system). Oracle Opp. Mem. at 15-18. To establish its affirmative defense, Oracle will have the burden of proving that:

1) the alleged bona fide 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," §1197.5(a)(1)(D)(1);

2) "Each factor relied upon is applied reasonably, §1197.5(a)(1)(D)(2);

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[8] Under Plaintiffs' theory of the case, Oracle's willfulness (which is relevant to the statute of limitations for the EPA Claim) can also be established with common evidence. *See* Hough Report at 2, 18-19, 24 (Oracle's policies for addressing pay inequities fell well short of accepted standards); Finberg Decl., Ex. B (Waggoner) at 186:16-200:8 (At Oracle, all compensation decisions were approved by high level management), Ex. I (Murray) at 58:16-18 (Oracle managers discussed that "women are paid less [at] Oracle.").

[9] With respect to the bona fide factor defense, the statute provides in full:

> (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply 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. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Labor Code §1197.5(a)(1)(D).

3) "The one or more factors relied upon account for the entire wage differential," §1197.5(a)(1)(D)(3); and

4) "Prior salary shall not justify any disparity in compensation." §1197.5(a)(1)(D)(4).[10]

Notably, Oracle makes only vague references to the bona fide factors that it contends it used to set its employees' compensation. Oracle Opp. Mem. at 16 ("Proof of affirmative defenses will vary for each class member and will require looking at any number of considerations"). Oracle does not contend that it can prove its affirmative defenses through company policies that explicitly assign pay based on job-related factors such as education, experience, or performance ("merit" in the parlance of the EPA). *Id.* at 15-18. Such company policies, if they existed, would of course be subject to common proof. Rather, Oracle argues it is "entitled" to present individualized evidence with respect to each and every class member to attempt to establish that some "bona fide" factor is responsible for that woman's lower pay as compared to every man in her same job code who is paid more. *Id.*

Oracle's argument misconstrues the law, for several reasons.

First, proof of Oracle's affirmative defenses are, in large part, susceptible to expert statistical analysis of Oracle's data, which is common evidence. Although it is Oracle's burden to prove its defenses, Plaintiffs' labor economist expert, Professor Neumark, performed standard statistical regression analyses and found that "[j]ob definition, tenure at Oracle, tenure in position, job performance, years of job experience, and location of work site do not explain these statistically significant gender compensation disparities." Neumark January 2019 Report at ¶8.c. Similarly, Professor Neumark found that level of education does not explain the compensation

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[10] The California Legislature amended the EPA in 2017 and 2019 to conform the statutory language to then-existing law, which already prohibited use of prior pay as an affirmative defense. *See* Legislative Digest for AB 2282 (effective January 1, 2019) ("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....") (Ex. C to Plfs' Reply RJN); ("This bill makes clear that prior salary simply cannot be used to justify a wage differential, whether used on its own or in combination with a lawful factor under the Equal Pay Act") (Ex. D. to Plfs' Reply RJN); Legislative Finding for AB 1676 (effective January 1, 2017) ("[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.") (Ex. E to Plfs' Reply RJN). *See Rizo*, __ F.3d __, 2020 WL 946053 at *7-12 (rejecting use of prior pay as bona fide factor for purposes of affirmative defense to violation of federal EPA).

disparity adverse to women. *Id.* at ¶¶9, 73-75. Instead, Professor Neumark found that a "person's prior pay is highly predictive of that person's initial salary at Oracle" and "this initial gender gap in starting pay drives the gender gap in base pay that I observed through the Class Period." *Id.* at ¶8.d. Oracle's expert, Ali Saad, disagreed with and critiqued Professor Neumark's conclusions and the use of particular data to represent certain of these variables (*i.e.*, the use of age and job tenure as proxies for experience and training). These competing analyses are common evidence that a jury can evaluate, along with other evidence of Oracle's actual pay practices, to determine whether bona fide factors account for any gender pay disparities within job code, *and* whether those factors caused the entire pay disparity as required by the EPA (§1197.5(a)(1)(D)(3)), or whether, as Plaintiffs contend, the pay disparity is caused by an impermissible factor, such as prior pay.

The California Supreme Court, in *Duran v. U.S. Bank Nat'l Assn.* (2014) 59 Cal. 4th 1, explained how statistical evidence can help manage the proof of defenses, explaining that: "[i]f trial proceeds with a statistical model of proof, a defendant... must be given a chance to impeach that model...." *Id.* at 38. Oracle will be given such a chance here. As the Court made clear in *Duran*, a defendant does not have "an unfettered right to present individualized evidence in support of a defense." *Id.* at 34. No case holds that a defendant "has a due process right to litigate an affirmative defense as to each individual class member." *Id.* at 38. Instead, the Court has emphasized that trial courts can and should attempt to manage the factual issues raised by affirmative defenses, even where those defenses raise individual issues, through techniques such as "representative testimony, sampling, or other procedures employing statistical methodology." *Id.* at 33. A jury can ultimately decide using common evidence from the opposing experts which expert is more persuasive, and whether Oracle has established that bona fide, job-related factors account for the entire gender pay gap.

Second, as explained above, gender pay disparities are permitted only if they are fully explained by "bona fide" job-related factors that are applied "reasonably." §1197.5(a)(1)(D)(1) and (D)(2). To be "bona fide" and applied "reasonably," any job-related factor that Oracle can point to as actually having been used to set pay, must have been applied by Oracle *consistently*

with respect to employees performing the same work that provides the relevant comparison under the EPA (job code, according to Plaintiffs here). *See* Plfs' Reply RJN Ex. A, "California Pay Equity Task Force" (2018) at 3, 7 ("Such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification"); Plfs' Reply RJN Ex. B, Equal Employment Opportunity Commission Compliance Manual at 10-IV, § F.2 ("the employer must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity"); *Cooke*, 85 Fed. Cl. at 350 (employer must show "that the gender-neutral reason it alleges caused the pay differential was, in fact, actually the factor that created the differential"); *Garner*, 95 F.Supp.2d at 1077 (employer could not prove its affirmative defense as matter of law where there was evidence, inter alia, that the alleged bona fide factors relied upon were not consistently applied); *Lambrecht v. Real Estate Index, Inc.*, 1997 WL 17794 at *3 (N.D. Ill. Jan. 15, 1997) (employer could not rely on differences in education where it did not produce "any evidence that it uniformly pays higher wages to employees with graduate degrees than those without.").

In other words, it is not reasonable or consistent with the purposes of the EPA to permit an employer to pick and choose factors inconsistently and idiosyncratically to justify disparate pay decisions for employees performing substantially similar work. For example, if two women and two men are performing substantially similar work, and both men are paid more, the employer cannot justify a higher wage rate for Man 1 as compared to Woman 1 based on education, while refusing to provide higher wages to Woman 2 with equally impressive educational credentials, but for whom the employer invokes some other factor, such as experience, to justify paying a lower wage. If the factors are not used consistently to determine pay, they are not "bona fide." To be bona fide, a factor must be the actual reason for the observed wage disparities – not a post-hoc, individualized explanation of what might have explained the disparity. *See Cooke*, 85 Fed. Cl. at 350.[11]

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[11] At argument Oracle suggested that the EPA does not require a large company to use the same bona fide factors to set compensation across different jobs, but Plaintiffs are not

This is where Plaintiffs' expert's statistical analysis comes into play once again, because a statistical analysis can control for particular factors and determine whether or not they are being applied consistently across employees performing substantially similar work. If controlling for, for example, experience, education, or performance (or a combination thereof) does not explain the pay disparities between men and women in the same job code, Plaintiffs have presented common statistical evidence that defeats Oracle's contention that bona fide factors, reasonably applied, explain the gender compensation disparity.

This legal requirement—that the job-related factors be bona fide and reasonably and therefore consistently applied, eliminates Oracle's argument that its defenses are necessarily *individualized*: either Oracle applied its bona fide factors consistently within its job codes -- and it can prove the impact on pay of these factors through statistical analyses of average pay differentials without resorting to individualized proof—or it did not apply them consistently and lacks an affirmative defense. Similarly, if Plaintiffs can prove that the actual factor causing the gendered pay differential was prior pay (a prohibited factor under the EPA), after controlling for other factors, that likewise would defeat Oracle's proffered bona fide factors. As discussed below with respect to Plaintiffs' UCL claim, the use of prior pay to set salaries is susceptible to common proof.

2. Plaintiffs' UCL Claim

Plaintiffs also assert a claim under the UCL, for which they have two theories of liability. First, a violation of the EPA would also constitute an "unlawful" act in violation of the UCL. *Cel-Tech,* 20 Cal. 4th at 180. As discussed above, Plaintiffs have identified common evidence that can be used to prove their EPA claim, and therefore their UCL claim. Common issues predominate.

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attempting to impose such a requirement. The Cal. EPA does require, *for substantially similar* jobs (which Plaintiffs contend are cabined by job code at Oracle), that the factor(s) relied upon be applied reasonably, and, thus, consistently. Plaintiffs' statistical analyses all control for job code, meaning that they compare persons within the same job code. *See* Neumark January 2019 Report at ¶8.b.

Plaintiffs' second UCL theory is predicated on Oracle's violation of FEHA, which, among other things, prohibits employers from using policies and practices that have disparate impact on a protected class. Cal. Gov. Code §12940. *See, e.g., Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 325 (N.D. Cal. 1992). Plaintiffs contend that Oracle had a policy or practice of using prior pay to set starting salary at Oracle, and that this policy or practice had a disparate impact on women, in violation of FEHA.[12] Plaintiffs further contend that Oracle knew that women were paid less than men as a result, but failed to correct that gender gap in compensation.

Plaintiffs have presented substantial common evidence that could be used to prove that Oracle had a policy or practice of using prior pay to set starting pay at Oracle, including the following:

a) Oracle documents announcing the decision in October 2017 to stop asking for prior pay information (in compliance with a new California law banning such inquiries) with an FAQ asking *"how will I know what to offer a candidate without the prior salary data?"* Finberg Decl., Ex. FF at 6675.

b) Deposition testimony from Oracle PMQ on compensation and job classification systems Kate Waggoner, that when Oracle acquired new companies and retained their employees, it usually kept the salaries of the retained employees the same. Finberg Decl., Ex. B (Waggoner) at 166:25-168:24, and, that any attempt to change the salary of an employee who came over in an acquisition was "non-standard." *Id.* at 359:15- 364:8.

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[12] Oracle claims that Plaintiffs failed to plead this theory, but Plaintiffs alleged this theory in the Fourth Amended Complaint (Fourth Amended Complaint at ¶¶10, 11, 12, 19, 39). *See, e.g., McKell v. Washington Mutual, Inc.*,142 Cal.App.4th 1457, 1470 (2006) (pleading adequate if it provides "factual basis" for claim). Oracle was also on notice of this claim from Plaintiffs' discovery responses. Finberg Reply Decl., Ex. M, Response to Special Interrogatory no. 4. Oracle also contends that this theory is barred because Representative Plaintiffs failed to exhaust administrative remedies with the DFEH. It is far from clear that is true as a matter of law, *see Rojo v. Kilger,* 52 Cal. 3d 65, 82-88 (1990), but that is a common merits dispute that this Court need not decide now. Moreover, Representative Plaintiff Sue Petersen did exhaust administrative remedies with the DFEH. Finberg Reply Decl., Ex. L. The Court therefore rejects Oracle's argument that Plaintiffs are barred from proceeding on this theory of UCL liability.

c) The statement of then Head of Compensation, Lisa Gordon, that "we try to match what they made at the previous company," Holman-Harries Dec., Ex. A at 8; and that prior pay was "a factor" in setting starting salary for lateral hires. *Id.* .

d) Oracle documents establishing that "a new employee may be hired by Oracle as a result of an acquisition in which case the 'acquisition hire' comes to Oracle usually in their same job and salary," Finberg Decl., Ex. X, and that giving an employee from an acquired company anything other than the same salary was a "non-standard" offer requiring "a strong business justification" and CEO approval, *id.*, Ex. GG at 00004856.

e) Oracle documents showing that, as to lateral hires, prior to October 2017, a question about current salary was part of Oracle's mandatory hiring form. *See Id.*, Ex. N at 0000170 "Candidates' Previous Employer and Compensation Information (Mandatory)."

f) Deposition testimony from Oracle compensation PMQ Waggoner that, prior to October 31, 2017, Oracle Hiring Managers were required to ask applicants about their salary with their current employer. *Id.*, Ex. B (Waggoner) at 352:5-25.

g) Deposition Testimony from Chad Kidder, Oracle recruiting PMQ,, that prior pay information was collected because it is relevant to budget. *Id.*, Ex. D (Kidder) at 29:25-30:6.

i) The Declaration of former Oracle Director and Senior Director Srividya Subramanian, that "[t]he primary factor I used for setting starting pay for new employees was prior salary... I instructed the managers reporting to me to use prior pay when setting initial pay for persons they hired, and, per my instructions, they did so," Subramanian Decl. at ¶¶2-3, and Senior Director Subramanian's testimony that she was instructed to use prior pay to set starting pay up to a cap of 110% of prior pay. Finberg Reply Decl., Ex. D (Subramanian) at 82:18-85:3.

j) Expert statistical analysis finding that "[a] person's prior pay is highly predictive of that person's initial salary at Oracle," Neumark January 2019 Report at ¶8.d,

and that the gender gap in starting salary at Oracle is very similar to the gap in prior pay, and very similar to the gender gap adverse to women in base pay through the class period, even when controlling for education and experience. *Id.* at ¶¶40, 71, Exs. 3, 41. Professor Neumark concludes that "this initial gender gap in starting pay drives the gender gap in base pay that I observed during the Class Period." *Id.* at ¶8.d.

Oracle disputes the conclusions that Plaintiffs contend a jury could reach here, but that does not counter the common questions of law and fact raised by this evidence. For example, Oracle presents common evidence of its own from its expert, Dr. Saad, to dispute that Oracle used prior pay to set starting salaries. A jury can weigh this contrary common evidence and determine whether or not Oracle had a policy of using prior pay to set salaries at Oracle, and whether or not that policy had a disparate impact on women. *See, e.g., Jones v. Farmers Ins. Exch.*, 221 Cal.App.4th 986, 996 (2013) (whether or not company had and followed specific policy was common issue warranting class certification); *accord Jimenez v. Allstate*, 765 F.3d 1161 (9th Cir. 2014). No individualized issues interfere with class treatment of these UCL claims.

The Court finds that Plaintiffs' EPA and UCL claims and Defendant's affirmative defenses to those claims can be resolved through the presentation of common evidence. Because Plaintiffs' claims can be resolved through common evidence, and for the reasons stated above, on the facts and law of this case, the Court concludes, after careful review of the parties' arguments and the complete record, that common issues predominate over any individualized issues with respect to Plaintiffs' claims under the EPA and UCL.[13]

[13] Plaintiffs' other claims are derivative of the EPA and UCL claims, such that common issues predominate with respect to those claims as well.

B. Typicality of Representative Plaintiffs' 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* (2014) 231 Cal.App.4th 362, 375, *as modified on denial of reh'g* (quotation marks and citations omitted). The claims of the Representative Plaintiffs are typical of the class claims here because they allege the same injury – unequal pay relative to men in the same job code – based on the same conduct – Oracle's failure to pay them equally to men in the same job code, with respect to the EPA claim, and Oracle's use of prior pay to set starting salary, with respect to the UCL claim.

Oracle's arguments do not defeat typicality. Oracle argues that the Representative Plaintiffs came from only one acquired company, and worked in one location on only a few products and within "only a few job codes." Oracle Opp. at 23. These are distinctions without a difference for purposes of typicality, because they do not undermine the common injury and nature of the claim.

C. Adequacy of Representation

The Representative Plaintiffs can adequately represent the class if 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. *See Brinker.* 53 Cal.4th at 1021; *Capitol People First v. State Dep't of Dev. Servs.* (2014) 155 Cal.App.4th 676, 696-97. All of these factors are met here.

The Representative Plaintiffs suffered the same injury and have the same interest in pursuing these claims against Oracle as the rest of the class because each was paid less than men in the same job code (which Plaintiffs contend means performing substantially equal or similar work) and because Plaintiffs and Class Members were all injured by Oracle's common policy and practice of using prior pay to set starting pay, both with respect to employees hired laterally and employees coming to Oracle through an acquisition. Neumark January 2019 Report at

¶¶8.b.,8.e. Class Counsel have the necessary experience to adequately represent the proposed Class and there are no conflicts between Class Counsel and the proposed Class (which Oracle does not contest). Finberg Decl. ¶¶4-27, Ex. A; Mullan Decl. ¶¶3-27.

Oracle correctly argues there is a conflict between the Representative Plaintiffs and the class pertaining to those who were or are managers, as the Representative Plaintiffs were not managers. See Saad Rep. ¶ 20. Although intent to discriminate is not an element of Plaintiffs' EPA claims, resolution of these claims necessarily involves determining whether "bona fide factor[s] other than sex" explain pay differences, and whether Oracle applied such factors "reasonably." Cal. Lab. Code §§ 1197.5(a)(1)(D), (a)(2). Putative class members who are managers would be called upon to explain and justify their pay decisions, and thus have an intractable conflict with non-managers (like Plaintiffs) challenging their pay as unlawful. *Moussouris*, 2018 WL 3328418, at *29 (describing conflict as "insurmountable").

IV. Superiority of the Class Action Mechanism

"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.* (2008) 167 Cal.App.4th 966, 974.

> 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. (citations and quotation marks omitted).

Class proceedings are the far superior method of adjudicating the claims of these class members than requiring 4,100 individuals to pursue individual actions. While the potential recovery per class member is not as small as in some cases, the cost of litigating through trial even one of these claims against a well-funded defendant like Oracle would easily dwarf any recovery. Moreover, trying seriatim even a small percentage of the over 4,100 class members claims would waste important judicial resources.

In addition, denying Plaintiffs the ability to proceed on a class basis would in reality likely mean that many class members would not in fact pursue their claims, and assuming Plaintiffs' theory of the case is correct, Oracle would escape liability by virtue of claims never pursued. Class actions are particularly important in cases such as this one, where Class Members are unlikely to learn that they have been paid less than similarly situated men, may not have the means to pursue costly litigation, and thus would likely be unable to vindicate their rights in the absence of a class action lawsuit.

One trial of this case using common evidence would be far superior to 4,100 individual trials, which would be duplicative and waste the time and resources of both the Parties and the Court. Class treatment will permit any remedy to match the full scope of whatever liability is proven, and will best serve the underlying purposes of the EPA, UCL, and FEHA.

CONCLUSION

Accordingly, for all the foregoing reasons, it is hereby ORDERED, that:

1) Plaintiffs' Motion for Class Certification is GRANTED;

2) The following class is hereby CERTIFIED pursuant to Code of Civil Procedure §382:

> All women employed by Oracle in California in its Information Technology, Product Development, or Support job functions, excluding campus hires and managerial positions, at any time during the time period beginning June 16, 2013 through the date of trial in this action;

3) Sue Peterson, Marilyn Clark, and Manjari Kant are appointed as Class Representatives.

4) The law firms of Altshuler Berzon LLP and Rudy, Exelrod, Zieff & Lowe, LLP are appointed as Class Counsel.

5) The parties are ORDERED to meet and confer about the format and procedures for notifying the class. A [Proposed] Order regarding notice procedures, and a [Proposed] Notice shall be submitted to the Court within two weeks of the date of this Order.

IT IS SO ORDERED.

Dated: APR 29 2020

V. RAYMOND SWOPE
JUDGE OF THE SUPERIOR COURT