SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

JUSTINA JONG, AMINA SALGADO, and ZAINAB BORI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. CGC-24-615363

ORDER ON DEFENDANT APPLE INC.'S DEMURRER TO AND MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Apple Inc.'s Demurrer and Motion to Strike Plaintiff's First Amended Complaint came on for hearing on January 15, 2025. Having considered the pleadings and papers on file in the action, and the arguments of counsel presented at the hearing, the Court hereby sustains the demurrer in part and overrules it in part and denies the motion to strike.

BACKGROUND

On June 13, 2024, Plaintiffs Justina Jong ("Jong") and Amina Salgado ("Salgado") filed the above-referenced action against Defendant Apple Inc. ("Defendant" or "Apple"). On September 3, 2024, Plaintiffs Jong and Salgado filed a First Amended Complaint ("FAC") adding Plaintiff Zainab Bori ("Bori") (collectively with Jong and Salgado, "Plaintiffs"). Plaintiffs are current and former employees of Defendant. (See FAC ¶¶ 10-12.) The operative FAC seeks to state twelve causes of action, including

seven class claims for: (1) violations of the Equal Pay Act, Lab. Code §§ 1197.5, 1194.5; (2) disparate impact based on sex in violation of the Fair Employment and Housing Act ("FEHA"), Gov. Code § 12900 *et seq.*; (3) disparate treatment in violation of FEHA; (4) violations of the Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200 *et seq.*; (5) failure to pay all wages due upon separation; (6) declaratory relief; and (7) civil penalties pursuant to the Private Attorneys General Act, Lab. Code § 2698 *et seq.* ("PAGA"). (*Id.* ¶¶ 28-63.) Plaintiff Jong seeks to state three individual claims for the following FEHA violations: (8) hostile work environment; (9) failure to accommodate a disability; and (10) failure to engage in a timely, good faith, interactive process. (*Id.* ¶¶ 64-91.) Plaintiff Bori seeks to state two individual claims for the following FEHA violations: (11) race discrimination; and (12) retaliation and wrongful termination. (*Id.* ¶¶ 92-102.)

Plaintiffs seek to bring their first through fourth and sixth causes of action on behalf of a class of 12,000 current and former female employees, defined as: "All women employed by Apple in California in its Engineering, AppleCare, and Marketing divisions at any time during the time period between June 13, 2020, through the date of trial in this action." (*Id.* ¶¶ 25, 27(a).) Plaintiffs seek to state their fifth cause of action on behalf of "a subclass of class members who separated from Apple during the time period between June 13, 2020 through the date of trial in this action." (*Id.* ¶ 26.)

Defendant now demurs to the second, third, fifth, and eighth through eleventh causes of action. (See Demurrer, 1-2; Opening Brief, 11-15; Reply, 5-10.) Defendant also moves to strike the class allegations in the first, fourth, and sixth causes of action and the representative PAGA claim in the seventh cause of action. (Motion, 2-3; Opening Brief, 9-13; Reply, 1-5, 8-9.) Plaintiffs oppose both motions.[1]

[1] Plaintiffs' request for judicial notice is denied as to Exhibits A-D and F. Unpublished trial court decisions have no precedential value. (*SHR St. Francis, LLC v. City and County of San Francisco* (2023) 94 Cal.App.5th 622, 642.) Plaintiffs' request for judicial notice is denied as to Exhibit E, an application for approval to file an amicus curiae brief in the Court of Appeal, as the application is irrelevant to the matters presently before the Court. (See RFJN Ex. E; see, e.g., *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["only relevant material may be noticed"], overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer admits "all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) The Court accepts as true, and liberally construes, all properly pleaded allegations of material fact, as well as those facts which may be implied or reasonably inferred from those allegations; its sole consideration is whether the plaintiff's complaint is sufficient to state a cause of action under any legal theory. (*O'Grady v. Merchant Exchange Prods., Inc.* (2019) 41 Cal.App.5th 771, 776-777.)

"The court may, upon a motion made pursuant to [Code of Civil Procedure] Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. § 436.) "The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc. § 437(a).)

DISCUSSION

I. Defendant's Demurrer And Motion To Strike Plaintiffs' Class Allegations Lack Merit.

Defendant demurs to certain class claims and moves to strike the class allegations in the SAC on the ground that there is no reasonable possibility that common issues would predominate. (Demurrer, 2; Motion to Strike, 2-3; Opening Brief, 8-13; Reply, 1-8.) The Court is not persuaded.

A. Class Certification Is Generally Not Decided On The Pleadings.

"Class certification is generally not decided at the pleading stage of a lawsuit. The preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation. However, if the defects in the class action allegations appear on the face of the complaint or by matters subject to judicial notice, the putative class action may be defeated by a demurrer or motion to strike." (*In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298-

1299 (cleaned up).) "The decision whether a case is suitable to proceed as a class action ordinarily is made on a motion for class certification." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 211.) "California's judicial policy [is to allow] potential class action plaintiffs to have their action measured on its merits to determine whether trying their suits as a class action would bestow the requisite benefits upon the litigants and the judicial process to justify class action litigation. In order to effect this judicial policy, the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1510 (cleaned up).)

To be sure, Defendant is correct that in rare cases, a court may properly adjudicate a class issue on demurrer or motion to strike when the invalidity of the class allegations is revealed on the face of the complaint. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440; *see Canon U.S.A. v. Sup. Ct.* (1998) 68 Cal.App.4th 1, 5 [holding that courts may, in an appropriate case, strike nationwide class allegations at the pleading stage].) However, the standard is a very high one: "A trial court may sustain a demurrer to class action allegations where it concludes as ***a matter of law that, assuming the truth of the factual allegations in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied***." (*Schermer v. Tatum* (2016) 245 Cal.App.4th 912, 923 (emphasis added); accord, *Gutierrez v. Cal. Commerce Club* (2010) 187 Cal.App.4th 969, 975.) Indeed, some courts have expressed the view that "it is only in mass tort actions (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage. In other cases, particularly those involving wage and hour claims, class suitability should not be determined by demurrer." (*Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1325 [demurrer to class action wage and hour complaint improper where the plaintiff "alleges institutional practices . . . that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis"]; *compare Tucker,* 208 Cal.App.4th at 213 [acknowledging body of cases concluding that "there is a policy disfavoring the determination of class suitability issues at the pleading stage," but suggesting in dicta that "such statements are perhaps too broad"].)

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) 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." (*Id.*) In determining whether individual questions or questions of common or general interest predominate, "[a] court must examine the allegations of the complaint and supporting declarations and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." (*Id.* at 1021-22 (cleaned up).) "The ultimate question the element of predominance presents 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." (*Id.* at 1021 (cleaned up).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Id.* at 1022 (cleaned up).) "Employment discrimination, by its very nature, is often class discrimination and therefore well suited for a class action." (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 418.)

The determination whether common issues predominate typically must be made on the basis of *evidence*, not based solely on the pleadings on the very threshold of an action. (See, e.g., *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 ["Plaintiffs' burden on moving for class certification, however, is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate"]; *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 647, disapproved on other grounds, *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 985-986 & fn. 15 ["It is the plaintiff's burden to support each of the above factors [of the test for class certification] with a factual showing."].) "[T]he trial court is entitled to consider the totality of the evidence in making [the] determination of whether a plaintiff has presented substantial evidence of the class action requisites." (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154 (cleaned up).)

Defendant's central argument is that "resolution of Plaintiffs' equal pay and discrimination claims turn on individualized evidence of specific employees, teams, work, and managerial decisions," such that the requirement that common issues of fact or law must predominate over individualized issues cannot be met. (Opening Brief, 1.) Defendants point to a number of individualized issues that, they contend, are apparent from the face of Plaintiffs' allegations in the FAC. (*Id.* at 8-9.) However, the fact that each named Plaintiff's claim poses some individualized factual issues is hardly a surprise; to the contrary, it would be surprising if that were not the case. But that does not address the key factor in the balance: whether common issues of fact or law *predominate* over such individual issues. "Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 539 (cleaned up).)

In the Court's view, class certification in this case must be decided on a full evidentiary record on a motion for class certification, not on demurrer or a motion to strike. (*See Gutierrez*, 187 Cal.App.4th at 975 ["If there is a reasonable possibility the plaintiffs can plead a prima facie community of interest among class members, the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation." (cleaned up)]; see also *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 387 ["it would be premature to conclude—. . . before any discovery has been conducted, and in the absence of any record whatsoever—that no class member, at the relief stage of class action proceedings, will be able to prove" entitlement to relief, a determination that is "plainly a matter for another day"].) Defendant's discussion of Plaintiffs' underlying claims fails to persuade the Court that it is "clear" that there is no reasonable possibility that Plaintiffs can establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact as to each of those claims.

B. Plaintiffs Have Properly Stated Classwide Claims.

Defendant demurs to three class claims (the second, third, and fifth causes of action) for failure to state a cause of action, and moves to strike all of Plaintiffs' class allegations. (Demurrer, 2-3; Opening Brief, 8-13; Reply, 1-8.)[2] The Court addresses each of those claims in turn.

[2] Defendant has not demurred to the first cause of action for violation of the EPA.

1. Plaintiffs Sufficiently Allege A Claim For Violation Of The California Equal Pay Act.

Defendant moves to strike class allegations from the first cause of action for violation of the California Equal Pay Act on the ground that individual issues predominate and therefore, "there is no reasonable possibility" that Plaintiff could obtain class certification. (See Motion, 2; Opening Brief, 9-11; Reply, 2-5.)

To state a claim for pay discrimination under the EPA, a plaintiff must allege that "based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions." (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 323; Lab. Code § 1197.5(a).) As of January 1, 2017, the EPA provides that "[p]rior salary shall not justify any disparity in compensation." (Lab. Code § 1197.5(a)(4).) In addition, Labor Code section 432.3(a) provides, "An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant." Likewise, "[a]n employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment." (*Id.* § 432.3(b).)[3] These provisions reflect the Legislature's recognition that "both employers and workers [should be] able to negotiate and set salaries based on the requirements, expectations, and qualifications of the person and the job in question, rather than on an individual's prior earnings, which may reflect widespread, longstanding, gender-based wage disparities in the labor market." (Stats. 2017, c. 856 § 1(h) (AB 1676); see also *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217, 1228 (en banc) [the policy of setting wages based on prior pay "risks perpetuating the history of sex-based wage discrimination."].)

Here, Plaintiffs allege that Defendant "has implemented an unlawful wage rate scheme that is generally applicable to the Class" which results in Defendant paying "its female employees at wage rates less than" those paid "to its male employees for substantially similar work." (FAC ¶¶ 27(e), 29.) Defendant argues that "the viability of [its] defenses will turn on facts and issues unique to individual women" because each plaintiff must show that she was paid lower wages than a male comparator for equal work and that she

[3] Labor Code section 432.3(j) provides, "Nothing in this section shall prohibit an employer from asking an applicant about the applicant's salary expectation for the position being applied for." Although that provision is directly pertinent to Plaintiffs' allegations in the FAC, neither party addresses it.

has selected the proper comparator. (Opening Brief, 10, citing *Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194.) Defendant asserts that its defenses will necessarily be individualized, and that "[t]he reasons particular women are paid what they are—and whether any pay differences between a particular woman and her male comparator(s) are justified—will require consideration of facts and evidence that is not common." (*Id.*)

While Defendant's summary of the standard for an individual plaintiff to prove a prima facie case of wage discrimination under the EDPA is generally accurate, it does not establish that there is no reasonable possibility that a class could be certified. "California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 333.) "Plaintiffs in a class action need not prove each class plaintiff was a victim of discrimination; [rather] they must prove the existence of a discriminatory policy and, if they do so, they are entitled to classwide relief." (*Alch,* 122 Cal.App.4th at 381 [plaintiffs properly pled classwide claims alleging a pattern or practice of discrimination in violation of FEHA].) Defendant's argument, if accepted, seemingly would mean that a class action could never be certified in an EPA action, which is plainly not the law. Plaintiffs' showing could turn on a combination of statistical, sampling, and pattern-and-practice evidence. Thereafter, the extent to which any putative class members are entitled to backpay would be an issue of damages that would not preclude class certification. (See *Brinker*, 53 Cal.4th at 1022 ["a class will be certified even if the members must individually prove their damages"].) Therefore, there is a reasonable possibility that Plaintiffs' EPA claim will satisfy the requirements of class certification, and Defendant's motion to strike class allegations from the first cause of action is denied.

2. Plaintiffs Sufficiently Allege Disparate Impact and Treatment Under FEHA.

Defendant demurs to the second cause of action on the ground that Plaintiffs fail to state a cause of action because: (1) Plaintiffs fail to identify a practice causing disparate impact; and (2) individualized issues predominate the class portion of the claim. (Demurrer, 2; Opening Brief, 11-12; Reply, 5-7.) Defendant demurs to the third cause of action, arguing only that because "there is no reasonable

possibility that" Plaintiffs' disparate impact claim can survive, "there is no reasonable possibility" that the disparate treatment claim can survive. (Demurrer, 2; Opening Brief, 12; Reply, 7.) The Court disagrees.

"To establish a disparate impact claim, a plaintiff need not prove intent to discriminate, but must prove that 'regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class.'" (*Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 112, quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.) "Thus, in a disparate impact case, a plaintiff must allege and prove, usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are in operation functionally equivalent to intentional discrimination." (*Id.* at 113 (cleaned up); see also *Beale v. GTE California* (C.D. Cal. 1996) 999 F.Supp. 1312, 1323.)

Plaintiffs' disparate impact claim is premised upon three alleged policies disparately impacting female employee salaries: relying upon prior pay and pay expectations to set starting salaries; performance evaluations that "reward[]" men and "penalize[]" women "for the same behaviors"; and using "talent" to pay men more than women "with similar levels of talent." (FAC ¶¶ 3-6.) The Court need only consider the first policy, as to which Plaintiffs allege as follows. Prior to the fall of 2017, Defendant "asked job applicants for information about their prior pay and used that information to set starting salaries and salary levels." (*Id.* ¶ 35; see *id.* ¶¶ 3, 14.) "Since at least January 2018, [Defendant] has asked job applicants to provide their pay expectations" and Defendant has a "policy and practice of . . . using that information to set starting salary and salary levels." (*Id.* ¶ 36; see *id.* ¶ 4.) "Pay expectations are highly correlated with prior pay." (*Id.* ¶¶ 4, 36.) Defendant's reliance on prior pay and pay expectations has had a disparate impact on women because "women [are] assigned lower salaries and receiv[e] lower compensation than men in the same job positions and levels performing substantially similar work." (*Id.* ¶¶ 18-19; see *id.* ¶¶ 3-4, 14.) Further, employee raises are granted as a percentage of an employee's salary thereby "perpetuat[ing] and widen[ing] the gender pay gap." (*Id.* ¶ 20.) [4]

[4] Plaintiffs' second theory alleges that Defendant's performance evaluation system, which has "a relationship to bonuses, RSUs, and pay increases," rewards men while penalizing women for the same behaviors. (*Id.* ¶¶ 5, 37.) Plaintiffs allege the performance evaluation system has a disparate impact on

Thus, Defendant's contention that "Plaintiffs do not allege (nor could they) that Apple has an express or implied policy to peg starting pay to prior pay or pay expectations" (Opening Brief, 11) is demonstrably inaccurate. Plaintiffs allege just that. Defendant argues that Plaintiffs do not allege a uniform policy but rather offer only a "generalized allegation that dispersed recruiters and hiring managers" use such information to set salaries. (Reply, 6, quoting FAC ¶¶ 3-4, 35-36.) Defendant misstates Plaintiffs' allegations. Plaintiffs allege a centralized decision-making process: "all compensation decisions concerning Apple's California employees have been and continue to be subject to approval by Apple's central administrative officers based in its headquarters in Cupertino and its corporate offices in San Francisco." (FAC ¶ 15.) Plaintiffs further allege that compensation policies are "centrally determined and applied in the same manner to all of Apple's employees who report to California offices, whether they work in person or remotely." (*Id.* ¶ 16.)[5]

Moreover, Plaintiffs' claim is not foreclosed even if there is some subjectivity in the salary selection process such that prior pay and pay expectations are not uniformly aligned with starting salaries. Indeed, the United States Supreme Court has found that "[i]f an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination," then that practice "may be analyzed under the disparate impact approach in appropriate cases." (*Watson v. Fort Worth Bank and Trust (1988)* 487 U.S. 977, 990-991.)[6] Thus, Plaintiffs sufficiently allege that Defendant's salary decisions are made in a centralized location pursuant to an employment policy which appears facially neutral but "has had the effect of perpetuating past pay disparities and paying women less than men performing substantially similar work." (*Id.* ¶¶ 4, 15-16; see, e.g., *Verceles v. Los Angeles Unified School District* (2021) 63 Cal.App.5th 776, 786 fn. 5 [plaintiff sufficiently alleged uniform policy of placing teachers on paid leave during misconduct investigation];

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women. (See *id.* ¶¶ 5, 21, 37.) Third, Plaintiffs allege that Defendant has a "practice of selecting individuals who have 'talent' and compensating those persons more highly than other employees." (*Id.* ¶¶ 6, 22, 38.) Plaintiffs allege this practice causes women "to be paid less than men with similar skills, experience, responsibility, and performance." (*Id.*)

[5] Defendants' emphasis on Plaintiffs' individual factual allegations (e.g., Opening Brief, 2-3, 8-9) is misplaced. Plaintiffs may properly allege classwide claims of a pattern or practice of discrimination in violation of FEHA and are not required to plead detailed evidentiary facts supporting individual claims as a predicate for such claims. (*Alch*, 122 Cal.App.4th at 351, 380-383.)

[6] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz*, 24 Cal.4th at 354.)

Phillips v. Cohen (6th Cir. 2005) 400 F.3d 388, 398 [allegations that defendant's policies of "manipulation of performance reviews" and "hazy selection criteria" that negatively affected women "were appropriate [employment policies] for the disparate impact analysis"].)

Because Plaintiffs sufficiently allege a claim for disparate impact, Defendants' demurrer to the third cause of action necessarily fails as well. (Opening Brief, 12; Reply, 8.)

Accordingly, Defendant's demurrers to the second and third causes of action are overruled.

3. Plaintiffs Fail To State A Claim For Unpaid Wages.

Plaintiffs allege in the fifth cause of action that Defendant paid women less than men for performing substantially similar or equal work in violation of the EPA, and that Plaintiff Bori and other class members who separated from Defendant during the class period were "entitled to be paid the wages that they would have been paid had they been paid the same wages and compensation as men performing substantially similar work," plus waiting time penalties under Labor Code section 203. (FAC ¶¶ 51-55.) Defendant demurs, arguing that the unpaid wages provisions of the Labor Code "are not a vehicle by which employees may dispute a wage rate," but rather are intended to ensure that employees are timely paid upon separation. (Opening Brief, 12; Reply, 8.) The Court agrees and finds Plaintiffs' claim is foreclosed by the language and structure of the Labor Code.

Labor Code sections 201 and 202 require an employer to timely pay all wages owed on discharge. (Lab. Code §§ 201-202.) An employer that "willfully fails to pay" wages owed upon separation must pay up to 30 days in wages as penalties. (Lab. Code § 203.) Section 203(a) provides in pertinent part,

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

(*Id.* § 203(a).) These statutory penalties are commonly referred to as "waiting time" penalties. (*Naranjo v. Spectrum Services, Inc.* (2022) 13 Cal.5th 93, 106.) Such penalties represent "a remedy for the failure to make prompt payment of unpaid wages when the employee leaves the job." (Id. at 116.) The purpose underlying section 203 is "to incentivize employers to pay end-of-employment compensation when it is due, rather than forcing employees to seek administrative relief or to go to court." (*Id.* at 110.)

The Court concludes that waiting time penalties for a violation of the EPA are not available under Section 203, a ruling consistent with that of the only decision to have reached the issue. (See *Viana v. FedEx Corporate Services, Inc.* (9th Cir. 2018) 728 Fed.Appx. 642, 645 [former employee's allegation that she would have earned more wages if one of her accounts had not been reassigned due to gender discrimination did not state claim for unpaid wages].) That conclusion is further supported by an examination of the statutory scheme.

The EPA provides that an employer who violates the Act "is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages." (Lab. Code § 1197.5(c).) Similarly, it provides that an employee who receives "less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage." (*Id.* § 11975.h).) The requirement that an employer pay an equal amount as liquidated damages amounts to a penalty for such a violation. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 48 fn. 8 [the liquidated damages allowed in a closely similar statute, Labor Code section 1194.2, are "in effect a penalty equal to the amount of unpaid minimum wages"]; *Seviour-Iloff v. LaPaille* (2022) 80 Cal.App.5th 427, 448 [same].) Moreover, another provision of the Labor Code that neither party mentions, section 210, imposes a second penalty for such violations:

> In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 204.11, 205, 205.5, and 1197.5, shall be subject to a penalty as follows:
>
> 1) For any initial violation, one hundred dollars ($100) for each failure to pay each employee.
>
> 2) For each subsequent violation, or any willful or intentional violation, two hundred dollars ($200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

(Lab. Code § 210(a).)

No provision of the EPA or of the Labor Code authorizes employees to seek other penalties in addition to those explicitly authorized by these provisions. To the contrary, the EPA expressly *limits* duplicative recovery, providing that for certain federal actions "which result[] in an additional recovery

under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (c)." (Lab. Code § 1197.5(j).) Recovering waiting time penalties under Labor Code section 203 for a violation of the EPA in addition to liquidated damages and these penalties would be inconsistent with the explicit remedial provisions of the EPA. Had the Legislature intended to subject employers to a third penalty for violations of the EPA, it is reasonable to assume it would have done so explicitly, particularly where section 210 explicitly refers to the EPA.

Plaintiffs contend that the reasoning in *Naranjo* "applies here with equal force." (Opposition, 16-17.) The Court disagrees. *Naranjo* held only that premium pay for violating the Labor Code's meal and rest break provisions constitutes "wages" for purposes of waiting time penalties, reasoning that such pay is "a statutory remedy for a legal violation" that "can equally be viewed as wages." (13 Cal.5th at 102, 106-107.) *Naranjo* thus addressed the relationship among various provisions of the wage and hour provisions found in the Labor Code, but did not address the availability of waiting time penalties for violations of the EPA, which is a distinct statutory scheme containing its own remedial provisions. The same is true of cases authorizing waiting time penalties for minimum wage and overtime violations. (See, e.g., *Naranjo*, 13 Cal.5th at 107 [overtime]; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 325-326 [minimum wages].)[7]

Finally, the Court's conclusion is supported by common sense. An employer who has failed to pay its employees minimum wages or overtime can readily calculate and timely pay such withheld wages within 72 hours of the employee's termination, as required by section 202. In contrast, such immediate payment would be a practical impossibility under the EPA, which requires a factually intensive examination of whether the employer has paid a different wage to employees doing substantially similar work under substantially similar conditions. That it would be infeasible for employers to comply with the prompt payment requirements of section 202 in this context is further evidence that the Legislature did not intend it to apply to EPA violations.

Accordingly, Defendant's demurrer to the fifth cause of action is sustained without leave to amend.

[7] Notably, neither section 1194, the minimum wage statute, nor section 510, the overtime provision, is referred to in section 210.

4. Plaintiffs Sufficiently Allege Derivative Class Claims.

Defendant moves to strike Plaintiffs' class claims from the fourth cause of action for UCL violations, the sixth cause of action for declaratory relief, and all remaining mentions of the putative class because the claims are derivative of Plaintiffs' other claims and necessarily fail. (See Motion, 2-3; Opening Brief, 12-13; Reply, 8-9.) However, having found Plaintiffs sufficiently plead class claims for FEHA and EPA violations, the Court concludes that Plaintiffs' derivative claims similarly survive.

Accordingly, the Court denies Defendant's motion to strike the class claims from the fourth and sixth causes of action, and all remaining mentions of the putative class from the FAC.

3) Defendant's Challenge To Plaintiffs' PAGA Representative Claim Fails.

Defendant argues that Plaintiffs' PAGA representative claim "could not be tried consistent with Apple's due process rights," and therefore must be stricken or, at a minimum, Plaintiffs should be required to replead a PAGA claim "limited in scope to one where Apple's liability to each aggrieved employee could potentially be tried consistent with due process in a single action." (Opening Brief, 13; see Motion, 3.) Defendant's argument is readily rejected. It is irreconcilable with the California Supreme Court's decision in *Estrada v. Royalty Carpet Mills, Inc.* (2024) 15 Cal.5th 582, which squarely held that "trial courts lack inherent authority to strike a PAGA claim on manageability grounds." (*Id.* at 606-614;[8] see also *Woodworth v. Loma Linda University Medical Center* (2023) 93 Cal.App.5th 1038, 1047 ["We agree with the [Court of Appeal] in *Estrada* and hold that trial courts may not strike or dismiss a PAGA claim for lack of manageability. When faced with unwieldy PAGA claims, trial courts may limit the scope of the claims or the evidence to be presented at trial but may not prohibit PAGA plaintiffs from presenting their claims entirely."]). To be sure, that holding "does not preclude trial courts from limiting the types of evidence a plaintiff may present or using other tools to assure that a PAGA claim can be effectively tried." (*Estrada*, 15 Cal.5th. at 619.) However, it is far too early at this stage for the Court to address such issues.

Accordingly, Defendant's motion to strike the representative claims from the seventh cause of

[8] Defendant asserts that *Estrada* "left open the possibility that in some circumstances a defendant's right to process might support striking a PAGA claim," (Opening Brief, 13), but that is not what the Court said. (See 15 Cal.5th at 618 ["we express no opinion as to the hypothetical questions of whether, and under what circumstances, a defendant's right to due process might ever support striking a PAGA claim."].)

action is denied.

4) Plaintiffs' Individual Claims.

Defendant demurs to Plaintiffs' individual claims in the eighth through eleventh causes of action. (Demurrer, 1-3; Opening Brief, 13-15.) The Court addresses each claim in turn.

A. Plaintiff Jong Sufficiently Alleges A Claim For A Hostile Work Environment.

Defendant demurs to the eighth cause of action on two grounds: (1) that the claim is barred by the statute of limitations; and (2) that Plaintiff Jong fails to allege that any "severe or pervasive conduct" occurred. (Demurrer, 2-3; Opening Brief ISO Demurrer, 13-14.)

Plaintiff Jong seeks to state a claim for a hostile work environment in violation of FEHA. (See FAC ¶¶ 64-80.) She alleges as follows. "From 2015 through 2022, Ms. Jong was sexually harassed and subjected to a hostile environment that unreasonably interfered with her work performance." (*Id.* ¶ 64.) Throughout her tenure working alongside Mr. Weilert, he would "stare at Ms. Jong's body and touch her arms and shoulder" and made "sexually charged comments." (*Id.* ¶¶ 66-67, 70.) In March 2019, Plaintiff Jong sought and obtained a transfer to another department but she "continue[d] to work with Blaine Weilert on projects" and was "pressured" to do so. (*Id.* ¶¶ 72-73.) In March 2022, Plaintiff Jong was informed that Defendant would be moving Mr. Weilert to an office adjacent to her own office. (*Id.* ¶ 75.) When Plaintiff requested "not to sit directly next to Mr. Weilert" or transfer her to a different team, Defendant refused her requests. (*Id.* ¶¶ 75-78.) Plaintiff Jong suffered from post-traumatic stress disorder as a result of the conduct. (*Id.* ¶¶ 69, 71, 74, 87.) She filed a complaint with the Civil Rights Department and received a right-to-sue notice. (*Id.* ¶ 40.)

1. Plaintiff Jong's Harassment Claim Is Not Barred By The Statute Of Limitations.

"The statute of limitations is an affirmative defense, and as with any affirmative defense, the burden is on the defendant to prove all facts essential to each element of the defense." (*Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918, 945.) A FEHA claim for harassment and a hostile work environment involves two separate limitations periods. First, a complaint must be filed with the Civil Rights Department no later than "three years from the date upon which the unlawful practice or refusal to cooperate occurred." (Gov. Code § 12960(e)(5); see *Romano v. Rockwell Internat., Inc.* (1996)

14 Cal.4th 479, 492; see also *Pollock*, 11 Cal.5th at 931.) Should the Civil Rights Department issue a right-to-sue notice, a "claimant has one year to file a civil action from the date of the right-to-sue notice." (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 725.) "[W]hen an employer engages in a continuing course of unlawful conduct under the FEHA . . . , and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)

Defendant contends that Plaintiff "Jong's claim is predicated on a single January 2019 incident" and Plaintiff "Jong does not allege any sufficiently similar conduct that could make her claim subject to the continuing violations doctrines." (Opening Brief, 14; see Reply, 9.) This conclusory argument is insufficient to meet Defendant's burden as to the affirmative defense. Plaintiff Jong's allegations involve more than a single event and do not simply "skip[] from 2019 to 2022" as Defendant contends. (Reply, 9.) Rather, Plaintiff Jong alleges that despite transferring to another department in 2019, she "continue[d] to work with Blaine Weilert on different projects" and alleges misconduct "[t]hroughout their time working together." (FAC ¶¶ 17, 66.) Accordingly, Defendant's demurrer cannot succeed on this ground.

2. Plaintiff Jong Sufficiently Alleges Pervasive Conduct.

Defendant argues that "within the statute of limitations, Plaintiff Jong alleges only that seating was rearranged," which is not sufficiently severe or pervasive conduct. (Opening Brief, 14.) The Court disagrees with Defendant's characterization of the allegations.

Harassment claims brought pursuant to FEHA involve "situations in which the social environment of the workplace becomes intolerable because the harassment . . . communicates an offensive message to the harassed employee." (*Pollock*, 11 Cal.5th at 932.) To state a claim, a plaintiff must allege "that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462.) "The working environment must be

evaluated in light of the totality of the circumstances." (*Id.*) "To be pervasive, the sexually harassing conduct must consist of more than a few isolated incidents." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [finding vulgar comments made on a single day were not sufficiently pervasive or severe to state claim for sexual harassment pursuant to Civ. Code § 51.9].)

Here, Plaintiff sufficiently alleges pervasive conduct. Plaintiff Jong's allegations encompass more than her issues with an unsatisfactory seating arrangement. Rather, Plaintiff alleges "Mr. Weilert sexually harassed her many times" "[t]hroughout their time working together," including touching, staring, and making sexually charged comments. (*Id.* ¶¶ 65-66, 69.) Further, Plaintiff alleges that in 2019, "Mr. Weilert touched Ms. Jong's body in a sexually suggestive manner without her consent." (*Id.* ¶ 65.) Plaintiff alleges that in response to a complaint she filed regarding the incident, Defendant conducted an internal investigation and disciplined Mr. Weilert. (*Id.* ¶ 68.) Plaintiff further alleges that she witnessed Mr. Weilert's conduct with other females in the office. (*Id.* ¶ 70; see, e.g., *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 262 ["An employee's work environment is affected not only by conduct directed at the employee but also by the treatment of others."].) Considering the totality of the circumstances, a factfinder could conclude that Plaintiff's allegations, if true, constitute both severe and pervasive conduct. Plaintiff Jong sufficiently alleges a claim for harassment pursuant to FEHA.

Accordingly, Defendant's demurrer to the eighth cause of action is overruled.

B. Plaintiff Jong Sufficiently Alleges A Claim For Failure To Accommodate.

Defendant demurs to the ninth cause of action on the ground that Plaintiff Jong fails to state a claim because Plaintiff Jong's request for "a *carte blanche* transfer (without Jong identifying any particular role she could fill on another team) is not a reasonable accommodation as a matter of law." (Opening Brief ,14; see also Demurrer, 3; Reply, 9.) Defendant additionally argues in its Reply that Plaintiff Jong's request for a seat change was not "ignored" or "denied"; rather, Defendant was "considering" Plaintiff's request. (Opening Brief, 2, 14; Reply, 9-10.) The Court disagrees.

"The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable

accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.) Defendant contests only the third element. (See Demurrer, 3; Opening Brief, 14; Reply, 9.)

"A reasonable accommodation is a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 971 (cleaned up).) Where a qualified employee requests "reassignment as an accommodation, FEHA requires the employer to offer the employee comparable or lower graded vacant positions for which he or she is qualified." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 721 (cleaned up).) "The reasonableness of an accommodation generally is a question of fact." (*Nealy*, 234 Cal.App.4th at 374.)

Plaintiff Jong alleges Defendant denied her repeated requests for accommodations when she learned Defendant would be relocating Mr. Weilert next to her. First, on March 23, 2022, after Defendant assigned Mr. Weilert "to sit next to her, she emailed Mr. Foote, requesting a change in seating assignment" and Defendant "denied this request for a reasonable accommodation." (FAC ¶ 85.) As a result, "[o]n March 28, 2022, Ms. Jong was forced to take a medical leave of absence due to the ongoing hostile work environment." (*Id.* ¶¶ 78, 86.) Second, while on leave, Plaintiff Jong requested a transfer to a different team. (See *id.* ¶ 78.) "[A]fter multiple requests to transfer to a different team" Defendant "assigned Ms. Jong a recruiter and asked her to search, apply, interview, and compete for job openings at the company if she wanted to leave her role." (*Id.* ¶¶ 10, 78, 84, 86.)

Plaintiff Jong sufficiently alleges a claim for failure to accommodate. Defendant argues that the request for a seating change was never denied but was merely under consideration, according to Plaintiff Jong's allegations. (Reply, 10, citing FAC ¶ 77 [alleging Plaintiff Jong's manager responded to her request to move seats by stating "that he would get back to her regarding her request"].) However, Defendant is obligated to do more than consider Plaintiff's request. Defendant "has an affirmative duty to reasonably accommodate a disabled employee, and that duty is a continuing one that is not exhausted by one effort." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 969 (cleaned up).) Moreover, Defendant must "engage in a *timely*, good faith, interactive process with the employee or

applicant to determine effective reasonable accommodations." (Gov. Code § 12940 (emphasis added).) Defendant is permitted to provide an accommodation that differs from that requested. (See, e.g., *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222 [FEHA requires an employer to provide a reasonable accommodation but "does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks"].) However, that Defendant considered Plaintiff Jong's request is not sufficient to rebut the allegation that Defendant failed to provide reasonable accommodations.

Defendant next argues that Plaintiff Jong's request for a transfer was unreasonable as a matter of law because Plaintiff Jong failed to identify any particular role she could fill on another team. (Opening Brief, 14; Reply, 9-10.) Defendant's argument distorts an employer's obligations under FEHA. "Although an employer does not have an obligation to create a new job, reassign another employee, or promote a disabled employee, courts have made it clear that an employer has a *duty* to reassign a disabled employee if an already funded, vacant position at the same level exists." (*Swanson*, 232 Cal.App.4th at 970 (cleaned up) (emphasis in original); see also *Zamora v. Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1, 44-45 [employer has "affirmative duty to engage in the interactive process . . . including advising [plaintiff] of other suitable job opportunities"]; *Atkins*, 8 Cal.App.5th at 721 [where eligible employee requests reassignment as accommodation, defendant is obligated to offer comparable or lower grade vacant positions for which employee is qualified].) "Moreover, a disabled employee seeking reassignment to a vacant position is entitled to preferential consideration." (*Swanson*, 232 Cal.App.4th at 970 (cleaned up).) Defendant's argument places the burden on Plaintiff Jong to identify an available role at the time of her request, which contradicts binding authority. (See *Miller v. Dept. of Corrections & Rehabilitation* (2024) 105 Cal.App.5th 261, 284 [plaintiff need not identify an objectively reasonable accommodation until "after litigation with full discovery"].) Further, Plaintiff Jong alleges that Defendant assigned a recruiter and directed her "to compete for job openings at the company." (FAC ¶ 79.) These allegations contradict Defendant's obligation to *offer* a comparable position and undermine any entitlement Plaintiff Jong may have had to preferential consideration under FEHA. (*Id.*)

Accordingly, Defendant's demurrer to the ninth cause of action is overruled.

C. Plaintiff Jong Sufficiently Alleges A Claim For Failure To Engage In The Interactive Process.

Defendant demurs to the tenth cause of action on the ground that Plaintiff Jong cannot state a claim because her allegations reveal that Defendant engaged in the interactive process, "just not with the results [Plaintiff Jong] wanted." (Demurrer, 3; Opening Brief, 14-15; Reply, 10.) The Court disagrees.

FEHA makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code § 12940(n).) Once an employee initiates the accommodations request process, "the employer has a *continuous obligation* to engage in the interactive process in good faith." (*Kaur v. Foster Poultry Farms LLC* (2022) 83 Cal.App.5th 320, 347 (cleaned up) (emphasis in original).) Both the employer and the employee must "keep communications open" and "participate in good faith." (*Swanson*, 232 Cal.App.4th at 971-972.) "The fact that an employer took some steps to work with an employee to identify reasonable accommodations does not absolve the employer of liability." (*Id.* at 972.) "If the employer is responsible for a later breakdown in the process, it may be held liable." (*Id.*) "Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." (*Id.*)

Plaintiff sufficiently alleges Defendant failed to engage in the interactive process. Plaintiff alleges that Defendant did not timely grant Plaintiff's request for a seating reassignment. (FAC ¶ 90.) Plaintiff further alleges that Defendant did not "engage in a timely interactive process . . . to determine alternative, effective reasonable accommodations." (*Id.*) Further, "[d]uring Ms. Jong's leave, she requested to be transferred to a different team," but Defendant denied the "request without engaging in a good-faith interactive process." (*Id.* ¶ 91.) Rather, Defendant assigned Plaintiff a recruiter and directed her to search and compete for an open position. (*Id.* ¶ 86.)

Defendant again argues that Plaintiff's request for a transfer to a new department was unreasonable as a matter of law. Even if this argument had merit, Plaintiff's request for an unreasonable accommodation would not relieve Defendant of its continuous obligation to engage in the interactive

process in good faith. (See *Kaur*, 83 Cal.App.5th at 347.) Defendant additionally contends that it "cannot be held liable" because "a reasonable accommodation was not available." (Opening Brief, 15.) However, this is a factual dispute that cannot be resolved on demurrer. (See, e.g., *Roe v. Hesperia Unified School District* (2022) 85 Cal.App.5th 13, 30 [courts "do not resolve factual disputes at [the demurrer] stage of the proceeding"].)

Defendant also argues that Plaintiff Jong is at fault because she "rejected its attempt to provide a reasonable accommodation." (*Id.*) However, Defendant fails to identify any reasonable accommodation that Defendant offered to Plaintiff Jong that she could have rejected. Moreover, offering or providing "a reasonable accommodation does not absolve the employer of liability for failure to engage in the interactive process if it is responsible for a later breakdown in the process." (*Zamora*, 71 Cal.App.5th 1, 41.) At present, the Court cannot determine the extent to which Defendant or Plaintiff Jong bore responsibility for any breakdown in the interactive process.

Accordingly, Defendant's demurrer to the tenth cause of action is overruled.

D. Plaintiff Bori Fails To State A Claim For Discrimination.

Defendant demurs to the eleventh cause of action on the ground that Plaintiff Bori fails to allege an adverse action sufficient to state a claim for racial discrimination pursuant to FEHA. (Demurrer, 3; Opening Brief, 15; Reply, 10.) Defendant further argues that "the FAC contains no allegations that Bori's final performance evaluation detrimentally impacted her compensation or that it was related to her termination." (Reply, 10.) The Court agrees.

Pursuant to FEHA, "it is unlawful for an employer, because of a protected classification, to discriminate against an employee 'in compensation or in terms, conditions, or privileges of employment.'" (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 577, quoting Gov. Code § 12940(a).) To state a claim for discrimination in violation of the FEHA, a plaintiff must allege: "(1) she was a member of a protected class, (2) she was performing competently in the position she held, (3) she suffered an adverse employment action, and (4) some other circumstance suggests discriminatory motive." (*Ortiz*, 37 Cal.App.5th at 577.) Defendant contests only the adverse employment action element.

An action constitutes an "adverse employment action" where it "materially affects the terms,

conditions, or privileges of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036; see also *Doe v. Dept. of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 734.)

Plaintiff Bori alleges she "received performance reviews and mid-year assessments of at least 'meeting expectations' during her employment at Apple from June 2021 until early 2024." (FAC ¶ 93.) However, in the spring of 2024, Plaintiff Bori "was assigned to report to a new manager" with "a history of negative interactions with African American employees." (*Id.* ¶ 94.) Plaintiff "Bori is African American." (*Id.*) "At Ms. Bori's mid-year assessment in late March/early April 2024, Ms. Bori's new manager made negative comments about Ms. Bori's work, and claimed that the comments were based on statements made by persons with whom Ms. Bori had worked." (*Id.* ¶ 95.) However, Plaintiff Bori alleges her manager "misconstrued and mischaracterized their statements." (*Id.*) Plaintiff Bori alleges that the negative review from her "new manager adversely affected the terms and conditions of Ms. Bori's employment." (*Id.* ¶ 96.) Plaintiffs generally allege that Defendant's performance reviews "have a relationship to [employee] bonuses, RSUs, and pay increases." (*Id.* ¶¶ 21, 37; see Opposition, 22.)

Plaintiff Bori fails to allege sufficient facts to state a claim for disparate treatment pursuant to FEHA. Plaintiff alleges only that a negative review from her new manager "adversely affected the terms and conditions of [her] employment." (*Id.* ¶ 96.) Plaintiff Bori fails to support this conclusory assertion with any facts. In Plaintiffs' opposition, Plaintiff Bori argues that the "adverse effects included both lower compensation and termination." (Opposition, 22.) However, the FAC is silent as to any decrease in compensation Plaintiff Bori may have suffered as a result of the negative review. Additionally, the FAC does not allege that Plaintiff Bori's employment was terminated because of, or even partly due to, her poor performance review. Rather, Plaintiff Bori alleges that Defendant terminated her employment in retaliation for filing a discrimination complaint. (FAC ¶ 99 ["Apple's termination of Ms. Bori['s employment] was in response to, and in retaliation for, Ms. Bori having complained about suffering race discrimination at the hands of her new manager, and race and gender discrimination from her engineering director and his manager."].) Plaintiff Bori's conclusory allegation is insufficient to support a necessary element of the claim. (*John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2024) 16 Cal.5th 1003, 1021, 1023 [reversing Court of Appeal decision overturning trial court's order sustaining

demurrer where plaintiff's "purely conclusory assertion" regarding an essential element of claim was not supported by sufficient factual allegations].)

Accordingly, Defendant's demurrer to the eleventh cause of action is sustained with leave to amend.

CONCLUSION

For the foregoing, Defendant's demurrer is sustained without leave to amend as to the fifth cause of action and with leave to amend as to the eleventh cause of action, and is otherwise overruled, and its motion to strike is denied. Any amended complaint shall be filed within 30 days of this Order.

IT IS SO ORDERED.

Dated: January 17, 2025

Ethan P. Schulman
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Edward Santos, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On January 17, 2025 , I electronically served:

ORDER ON DEFENDANT APPLE INC.'S DEMURRER TO AND MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT

via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated:

JAN 17 2025

Brandon E. Riley, Court Executive Officer

By: Edward Santos

Edward Santos, Deputy Clerk